SCHOOLS:
CONSTITUTIONAL LAW:
COOPERATIVE AGREEMENTS:
PREKINDERGARTEN:
ECONOMIC OPPORTUNITY ACT:
ELEMENTARY AND SECONDARY EDUCATION ACT:

(1) School boards have the power to provide for the education of residents under five years of age. (2) Except as to those entitled to admittance as a matter of right, school boards have the power to regulate admittance ages. (3) As prescribed by Section 177.031, RSMo. Supp. 1965, school boards have the power to permit the free use of school buildings and facilities for prekindergarten programs. (4) School districts have the power to contract and cooperate with the Federal Government or its agencies or with a community action organization for the purpose of conducting prekindergarten programs under the Economic Opportunity Act and/or the Elementary and Secondary Education Act. (5) Article III, Section 38(a), Missouri Constitution 1945, authorizes school boards to receive Federal monies and to conduct prekindergarten programs as designated by the Federal Economic Opportunity Act and the Elementary and Secondary Education Act.

OPINION NO. 477 (1965)

No. 100 (1966)

January 18, 1966

FILED
100

Honorable Warren E. Hearnes
Governor of Missouri
Capitol Building
Jefferson City, Missouri

Dear Governor Hearnes:

This official opinion is issued in response to your request dated December 13, 1965.

Since your letter sets forth in detail facts relevant to your inquiry we quote it in full:

> "For eight weeks last summer, a pre-school program designated 'Project Head Start' operated in the school districts of 75 of Missouri's counties. This federally sponsored program is an effort to prepare children, whose development has been slowed by poverty, to enter kindergarten or first grade able to compete with their more fortunate classmates.
>
> "Last summer this program served 16,364 children, utilizing 1,184 professionals and 2,072 volunteers. There were 451 stations throughout the State. The total cost of this program was $2,434,056. Of this total amount, $2,141,016 was supplied in the form of federal grants. $293,040 represented the local contributions, which is

not required to be in cash. It may be an in-kind contribution and, therefore, provision of space, equipment, utilities, or personal services is acceptable.

"School Administrators have indicated near unanimous approval and overwhelming enthusiasm for continuation of the program. Present plans of the various school districts in the State call for a continuation of this program on a permanent basis. There is, however, a possibility that this worthwhile program may be in jeopardy.

"It is the opinion of the Commissioner of Education that school boards do not have the power to provide for education of children under five years of age. Since this program is designed to extend educational advantages of early childhood development to three, four, and five year olds, this would seem to indicate that the program would be significantly handicapped in the State of Missouri.

"I have been advised by the General Counsel of the Economic Opportunity Administration that in absence of a clear expression of Missouri law, they must, no later than January 15, examine their position relative to the implementation of Section A Title II of the Economic Opportunity Act of 1964 in the State of Missouri. I, therefore, request your official opinion whether the school districts of Missouri have the authority to provide this pre-kindergarten service, under the Economic Opportunity Act of 1964 and the amendments thereto. (P.L. 88-452, P.L. 89-253)

"The Elementary and Secondary Education Act of 1965 also provides federal grants for pre-kindergarten education. Under this Act, the federal government provides 100% of the cost. The Board of Education is the State authority empowered to approve or reject all applications from the various school districts for funding under this Act. They have indicated that the opinion that the school boards do not have the power to provide for the education of children under five years of age restricts the use of monies available under this Act to those children who are five and above.

> "The funds available under the Elementary and Secondary Education Act of 1965 are significantly greater than the funds available under the Economic Opportunity Act of 1964.
>
> "Therefore, I also request your official opinion on whether or not school districts have the power to provide pre-kindergarten education under the Elementary and Secondary Education Act of 1965." (P.L. 89-10.)

Before considering the specific questions you ask, the primary principles generally applicable here must be noted.

School districts are public corporations. School boards possess only such powers as are expressly conferred or necessarily implied from the Constitution and statutes. 75 C.J.S., School and School District, Section 119.

The courts of this, and other States, have long followed the policy of construing school laws liberally in favor of promoting rather than limiting the extension of education to our citizens.

> " * * * It is . . . the duty of the courts to liberally construe our statutes relating to schools, and in such a manner as to open, and not to close, the doors of the schools against the children of the state. * * * " State ex rel v. Clymer, 164 Mo.App. 671, 676.

> " * * * Our courts have frequently announced and heartily approved the salutary and time-honored principle that school laws will be construed liberally to aid in effectuating their beneficent purpose, * * *" State v. Robinson, 276 S.W.2d 235, 240.

Indeed a contrary policy would not be expected where government is by the people. The strength of a democratic society is dependent upon the enlightened reason of its members. Without education, economic and political freedom are empty shells, mere ornaments devoid of substance.

Turning to the present questions, we are informed that certain state administrators have expressed the opinion that school boards do not have the power to provide education for

children under five. Their opinion is based on the provisions of Section 171.091, RSMo. Supp. 1965. This section provides:

> "The school board of any school district in this state may provide for the gratuitous education of persons between five and six and over twenty years of age, resident in the school district. The gratuitous education, however, shall be provided only out of revenues derived by the school district from sources other than those described in section 3, article IX, of the constitution of this state, and only with revenues which are not required for the establishing and maintaining of free public schools in the school district for the gratuitous instruction of persons between the ages of six and twenty years."

It is our understanding that it is the reasoning of these administrators that Section 171.091 is the source of school boards' power to educate persons between five and six and over twenty years of age; that since persons under age five are not mentioned in the statute by implication, there is no legal authority for a school board to educate such persons.

The hazard of such a course of reasoning is succinctly demonstrated by the fact that there is no express provision in Section 171.091 that school boards shall have the power to educate persons between six and twenty (although the existence of such power is implicitly recognized in the last sentence of Section 171.091). We are not aware of any statute which specifically empowers school boards to educate persons between six and twenty. If we follow the course of reasoning of these administrators, then school boards do not have the power to educate persons between six and twenty.

Section 160.051, RSMo. Supp. 1965, provides:

> "A system of free public schools is established throughout the state for the gratuitous instruction of persons between the ages of six and twenty years. * * *"

This statute would appear to imply the power to educate those between six and twenty. However, since this statute was enacted July 1, 1965, and no similar statute existed previously, we do not consider this statute to be the source of a school board's power to educate persons between six and twenty. This power has patently existed for decades prior to July 1, 1965. Therefore, Section 160.051, cannot be the source of this power.

We are of the opinion that the source of a school board's power to provide for the education of the residents of the district is the statutes by which the legislature created and gave corporate existence to school districts.

They have one obvious purpose for their existence and that is to provide for the education of persons resident within the district. The power to achieve this purpose is so fundamentally inherent in the existence of school districts that although public schools have existed in this State from its origin, the legislature has never deemed it necessary to state expressly that such a power exists. The education of its residents is the very raison d'etre of a school district.

> " * * * a school district is but the arm and instrumentality of the State for one single and noble purpose, viz., to educate the children of the district -- a purpose dignified by solemn recognition in our Constitution * * *." State ex rel v. Gordon, 231 Mo. 547, 133 S.W. 44, 51.

> " * * * They are public corporations, form an integral part of the state, and constitute that arm or instrumentality thereof discharging the constitutionally intrusted governmental function of imparting knowledge and intelligence to the youth of the state that the rights and liberties of the people be preserved. * * *" School Dist. of Oakland v. School Dist. of Joplin, 102 S.W.2d, 909, 910.

Therefore, we are of the opinion that the power of a school district to provide for the education of all residents, without regard to ages, is necessarily implied from the statutes creating school districts.

Article XI, Section 1, Constitution 1875, provided:

> "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this State between the ages of six and twenty years."

The present Constitution provides, Article IX, Section 1(a):

> "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law. * * *"

The extension of the age range by the present Constitution manifests a public policy of this State to provide free public education to those under six years. From this provision of the Constitution it is clear that, except as prohibited by law, a school district has the power to provide for the free education of all persons under twenty-one. This also supports the conclusion reached supra, viz., that school districts have the power to educate those age five and under.

The power to educate residents age five and under is further recognized by the provisions of Section 167.151(1):

> "The school board of any district, in its discretion, may admit to the school pupils not entitled to free instruction and prescribe the tuition fee to be paid by them, except as provided in sections 167.121 and 167.131."

There are two groups who are not entitled to free education as a matter of right: nonresidents, and those outside the ages of six and twenty. Section 167.151(1), clearly expresses the power of school boards to admit at their discretion, resident children under age six.

The legislature, having granted the basic power to educate all residents, may from time to time limit and modify this power. However, except as limited by statute, the legislature has placed with school boards the authority to govern the schools and to determine such matters as admission ages. This authority is expressed by Section 171.011, RSMo. Supp. 1965:

> "The school board of each school district in the state may make all needful rules and regulations for the organization, grading and government in the school district."

As expressed by the Missouri Supreme Court in Roach v. The Board of President and Directors of the St. Louis Public Schools, 77 Mo. 484, 487-488:

> " * * * So far as the kind of school or the character and nature of the studies therein is concerned, the charter, like the grants, is unaccompanied with any conditions, express or implied. That whole subject is confided to the care and discretion of the defendant [school board], subject only to the laws of the land . . . ."

This office has previously ruled that, in absence of constitutional or statutory provision, the age at which a child may be admitted to school may be determined by the school board under authority of Section 171.011. Opinion No. 60, Medley, 5-4-56 (copy enclosed).

Subsequent to Opinion No. 60, the legislature has by statute prescribed the age a child may attend school as a matter of right. Section 160.051, RSMo. Supp. 1965. However, this statute does not affect the power of school boards to determine the admittance age of resident pupils who are not within the ages between which admittance is as a matter of right; namely, residents below age six or over age twenty. This power remains in the school boards.

Placing the regulation of such matters in the discretion of local school officials permits flexibility in adapting educational services to the needs and desires peculiar to the community. For example, prekindergarten would probably be unnecessary in an affluent suburban community, however, last summer's experience demonstrates that such a program is necessary and desired in poverty burdened communities.

Therefore, we are of the opinion that school districts have the power to provide for the education of residents age five and under and, except as to those entitled to admittance as a matter of right, the school board has the power to regulate admittance ages.

Public schools provide education both on a gratuitous and on a nongratuitous basis. Thus, one must distinguish between the power to provide education and the power to provide it gratuitously. The legislature and constitution place certain limitations on the providing of gratuitous education.

Under the provisions of the 1875 Constitution, supra, the Supreme Court held in Roach, supra, that the State Public School Fund could not be used to provide gratuitous education to persons not within the ages of six and twenty.

Apparently as a result of the Roach case, the legislature enacted (Laws 1913, p. 717) what is not Section 171.091 (quoted supra), expressly authorizing school boards to provide, from certain local revenues, gratuitous education to residents between five and six and over twenty.

By application of the maxim of statutory construction, expressio unius est exclusio alterius (the expression of one thing is the exclusion of its alternative) one might conclude that the legislature, by expressly providing authority for using local revenue to educate those between five and six and over twenty, impliedly intended to prohibit the use of local revenue to provide gratuitous education to those under five.

However, such an implied restriction, if it exists, is one only on the use of funds. It does not take away the power to educate those under five. At most, Section 171.091 requires that if education is provided to those under five it may not be financed from local or State public revenue.

As all rules of statutory construction, the expressio unius rule is merely a guideline for finding meaning. It is subservient and must yield to the paramount key to the meaning of statutes, namely: the intention of the legislature.

When weighed against the public policy to educate beyond the ages of six and twenty as manifested in our present Constitution, restrictions implied by construction guides are not readily acceptable. We do not believe that the express policy of the Constitution should be derogated unless the intent to restrict is clearly expressed. There is no statute expressly prohibiting school districts from using local revenue to educate resident children under age five.

We do not rule upon this question since it is not necessary to this opinion, for the reason that no local or State revenue is used to finance the prekindergarten programs of which you inquire. The programs under the Elementary and Secondary Education Act of 1965 are financed one hundred percent by the Federal Government.

Although the Economic Opportunity programs are financed by ninety percent Federal funds, it is our understanding that the ten percent local contribution is an "in-kind contribution", i.e., the school districts furnish the buildings and facilities. This, the school boards are clearly empowered to do by Section 177.031(2):

> "The school board having charge of the schoolhouses, buildings and grounds appurtenant thereto may allow the free use of the houses, buildings and grounds for the free discussion of public questions or subjects of general public interest, for the meeting of organizations of citizens, and for any other civic, social and educational purpose that will not interfere with the prime purpose to which the houses, buildings and grounds are devoted. If an application is granted and the use of the houses, buildings or grounds is permitted for the purposes aforesaid, the school board may provide, free of charge, heat, light and janitor service therein when necessary, and may make any other provisions, free of charge, needed for the convenient and comfortable use of the houses, buildings and grounds for such purposes, or the school boards may require the expenses to be paid by the organizations or persons who are allowed the use of the houses, buildings and grounds. * * *"

The foregoing discusses the powers of school boards, generally, to provide prekindergarten programs under the Economic Opportunity Act and the Elementary and Secondary Education Act 1965.

In addition there are some statutes applicable to specific situations which are relevant to your inquiry so far as these specific situations coincide with the Federal programs. We note these special statutes:

Under the general statutes, those between six and twenty are entitled as a matter of right to a free public education. Section 160.051; Article IX, Section 1(a), Missouri Constitution 1945. However, as to handicapped children resident within St. Louis County, all under twenty-one are entitled to free instruction from the special school district. The laws applicable to the special school district provide, Section 178.640(4), RSMo. Supp. 1965:

> "The special school district shall provide free instruction, classes, school or schools, for children under the age of twenty-one years, resident within the county, who are physically or mentally handicapped, including the blind or partially seeing, the deaf or hard of hearing, the crippled, and the mentally retarded or mentally deficient, who are capable of instruction or training, and for all other categories of physically or mentally handicapped children which are hereafter approved for special instruction by the state commissioner of education, including hyperkinetic children; those of the type having a malfunction in the area of behavior and learning where the brain does not function correctly because of immaturity on a genetic or metabolic basis and children having word-blindness, seizures and aphasia." (Emphasis added.)

Also as to vocational instruction, the statutes of the special district provide, Section 178.765(5), RSMo. Supp. 1965:

> "The special school district shall provide free vocational instruction, classes or schools for children under the age of twenty-one years, resident within the county, in addition to its program of training for the handicapped. Entrance requirements shall be established by the board of education of the special school district subject to the approval of the state department of education. The vocational program of instruction shall be approved by the state department of education, and shall be so designed as to provide sufficient vocational and academic training for the student to receive a high school diploma at the completion of the twelfth grade." (Emphasis added.)

Thus, as to the special district, not only does it have the express power to educate those under five, but further it has the duty to instruct such residents gratuitously.

You inform us that prekindergarten programs were conducted during the Summer of 1965. Section 178.280, RSMo. Supp. 1965,

provides that six-director districts may establish summer schools and may pay all costs for residents under age twenty.

Section 178.280 states:

> "The school board of any six-director district, in its discretion, may establish and maintain summer schools, making all necessary rules and regulations therefor and fixing the rates of tuition of resident pupils above the age of twenty years and of others who are not entitled to receive free public school privileges in the district. At its discretion, the board may require tuition of all pupils resident in the district attending the summer school, or may provide for the payment of all or part of the cost thereof for those resident in the district under the age of twenty years from tax money of the district; but no funds from the state of Missouri shall be provided or used for the summer schools." (Emphasis added.)

Thus, as to summer schools, not only do six-director school boards have the authority to educate residents under age five, but they also have express authority to provide, at their discretion, such education gratuitously.

The prekindergarten programs discussed herein are not conducted as programs solely of a local school board but as cooperative programs with the Federal Government or community action organizations. The legislature has expressly authorized school districts to enter such cooperative programs.

Section 70.220, RSMo 1959, provides:

> "Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions, or with any private person, firm, association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality

> or political subdivision shall be within the scope of the powers of such municipality or political subdivision. * * *"

This statute was enacted pursuant to similar provisions of Article VI, Section 16, Missouri Constitution 1945.

School districts are political subdivisions within Section 70.220, supra. Section 70.210, RSMo. Supp. 1965. Therefore, school boards have the power to cooperate with the Federal Government or community action organizations in prekindergarten programs under the Economic Opportunity Act and Elementary and Secondary Education Act to the extent consistent with the powers of school districts as set forth earlier.

The foregoing adequately supports our conclusion that school boards have the authority to conduct prekindergarten programs under the Elementary and Secondary Education Act or the Economic Opportunity Act. However, there is another source of this authority which we shall also discuss as a concurrent premise for our conclusion.

Participation by our State in Federal welfare programs such as the education programs here was foreseen by the delegates who drafted our present Constitution. Article III, Section 38(a), Missouri Constitution 1945, provides:

> " * * * Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States."

We are of the opinion that the Constitution empowers school districts to receive United States money accepted by the State and to carry out the public purposes for which the Federal Government has designated that the money be used.

Both Federal laws discussed here authorize the use of United States money for the purpose of providing education to those under five years. Thus, by virtue of Article III, Section 38(a), supra, the school districts of this State are authorized to use these Federal monies for prekindergarten programs.

During the Constitutional Convention an amendment was proposed to strike the above quoted provision of Article III, Section 38(a). The late Governor Park succinctly expressed his opposition to the amendment in these words, "If this amendment should be adopted . . . it would be the first time since 1865

that a state has attempted to secede from the union." Transcript of Constitutional Debates(1945), Part 6, p. 2502. The amendment was overwhelmingly defeated.

These programs are financed from our Federal tax dollars. They were enacted by our Representatives in the National Congress. The benefits are available to every State. As reflected in Governor Park's statement, Article III, Section 38(a), was adopted so that Missouri could receive, equally with all other States of the Union, the full benefit of national welfare programs such as the Elementary and Secondary Education Act and the Economic Opportunity Act.

CONCLUSION

Therefore, it is the opinion of this office that:

1. School boards have the power to provide for the education of residents under five years of age;

2. Except as to those entitled to admittance as a matter of right, school boards have the power to regulate admittance ages;

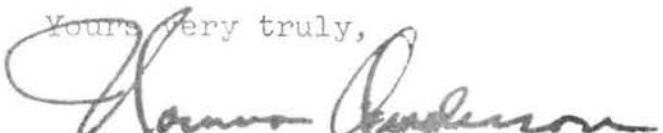
3. As prescribed by Section 177.031, RSMo. Supp. 1965, school boards have the power to permit the free use of school buildings and facilities for prekindergarten programs;

4. School districts have the power to contract and cooperate with the Federal Government or its agencies or with a community action organization for the purpose of conducting prekindergarten programs under the Economic Opportunity Act and/or the Elementary and Secondary Education Act;

5. Article III, Section 38(a), Missouri Constitution 1945, authorizes school boards to receive Federal monies and to conduct prekindergarten programs as designated by the Federal Economic Opportunity Act and the Elementary and Secondary Education Act.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Louis C. DeFeo, Jr.

Yours very truly,



NORMAN H. ANDERSON
Attorney General

Enclosure: Opinion No. 60,
Medley, 5-4-56.