

SCHOOLS:  
CONSTITUTIONAL LAW:

1. The parent, guardian or other person having charge, control or custody of a child under the age

of seven or over sixteen does not come within the provisions of Section 167.031, RSMo 1969, relating to compulsory school attendance on a full-time basis. However, a person standing in the parental relation to a child between sixteen and eighteen years of age who has not completed the elementary school course in the public schools of Missouri, or its equivalent, does come within the provisions of Section 167.051(2), RSMo 1969, relating to compulsory attendance at a part-time school. 2. All children in the State of Missouri between the ages of six and twenty years have a constitutional right to a public school education. All children who are entitled to a public school education as a matter of right but who do not fall within the age group of the Compulsory School Attendance Law may attend a public school on a part-time basis subject to a school district's reasonable rules and regulations. 3. Subject to reasonable rules and regulations applicable to all students, public school authorities operating an area vocational school must enroll a private school student who desires to participate in the vocational instruction offered at the school outside of the regular school day if the student is within the age group of children entitled to a public education as a matter of right. Shared time instruction in area vocational schools whereby students between the ages of sixteen and twenty attend the public vocational school for part of the regular school day and take the remainder of their courses at a church related school does not violate either the statutes or Constitution of Missouri or the United States Constitution.

OPINION NO. 133

October 28, 1971

Honorable Norbert J. Jasper  
Representative, District 108  
819 West Second Street  
Washington, Missouri 63090



Dear Representative Jasper:

This official opinion is issued in response to your request for a ruling on the following questions:

"I request your official opinion on the law applicable to the following situation: There is an area of vocational school in my district operated by the public school Board of Education. Administrators of the public school district and local nonpublic schools would like to work out an arrangement whereby

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pupils enrolled in the local nonpublic schools could attend vocational education courses in the area vocational school operated by the public school district. Most of the children involved in this program would be sixteen, seventeen or eighteen years of age.

"I would appreciate your ruling on the following questions:

1. Is a child who has not reached his seventh birthday or has reached his sixteenth birthday required to comply with the Compulsory Attendance Law, Section 167.031 RSMo., 1969? Also, is a child seventeen, eighteen or older required to comply?
2. Does a child not covered by the Compulsory Attendance Law have a right to attend the public schools? May such children exercise their right by part-time attendance?
3. If a child is not within the ages covered by the Compulsory Attendance Law, may he attend the public school part-time and attend some school other than a public school for the remainder of the regular school time?
4. Does a public school Board of Education have authority to enroll a pupil on a part-time basis if he is not within the ages covered by the Compulsory Attendance Law? Assuming that such a pupil meets other reasonable requirements, academic, health, discipline, etc., does the public school Board of Education have any authority to deny that pupil part-time enrollment even though he may spend part of his school time in some school other than a public school?"

QUESTION NO. 1

The Missouri Compulsory School Attendance Law, Section 167.031, RSMo 1969, provides as follows:

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"Every parent, guardian or other person in this state having charge, control or custody of a child between the ages of seven and sixteen years shall cause the child to attend regularly some day school, public, private, parochial or parish, not less than the entire school term of the school which the child attends or shall provide the child at home with regular daily instructions during the usual school hours which shall, in the judgment of a court of competent jurisdiction, be at least substantially equivalent to the instruction given children of like age in the day schools in the locality in which the child resides; except that

(1) A child who, to the satisfaction of the superintendent of schools of the district in which he resides, or if there is no superintendent then the chief school officer, is determined to be mentally or physically incapacitated may be excused from attendance at school for the full time required, or any part thereof; or

(2) A child between fourteen and sixteen years of age may be excused from attendance at school for the full time required, or any part thereof, by the superintendent of schools of the district, or if there is none then by the county superintendent of the county in which the child resides, or by a court of competent jurisdiction, when legal employment has been obtained by the child and found to be desirable, and after the parents or guardian of the child have been advised of the pending action."

Your first question implies that the Compulsory School Attendance Law applies directly to the child within the specified age group. It should be noted, therefore, that Section 167.031 applies to "every parent, guardian or other person in this state having charge, control or custody of a child between the ages of seven and sixteen years. . . ." Thus, a person standing in the parental relationship to a child becomes subject to Section 167.031 when the child reaches the age of seven years. The parent remains subject to Section 167.031 up to, but not including, the day the child celebrates the sixteenth anniversary of his birth. The child's sixteenth birthday is not counted for the purpose of determining the period of time the parent is subject to Section 167.031 because

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on the day of his sixteenth birthday the child is no longer "be-  
tween" the ages of seven and sixteen years. In other words, a  
child is "between the ages of seven and sixteen years" from the  
date of his seventh birthday through the day preceding his six-  
teenth birthday.

Although the person standing in the parental relationship to  
a child who has reached the age of sixteen is no longer subject to  
Section 167.031, he may, nevertheless, be required to send his child  
to part-time school under subsection 2 of Section 167.051, RSMo 1969,  
which provides as follows:

"2. All children who are under eighteen years  
of age, who have not completed the elementary  
school course in the public schools of Missouri,  
or its equivalent, and who are not attending  
regularly any day school shall be required to  
attend regularly the part-time classes not less  
than four hours a week between the hours of  
eight o'clock in the morning and five o'clock  
in the afternoon during the entire year of the  
part-time classes."

This subsection requires the person standing in the parental  
relationship to a child under the age of eighteen, who has not com-  
pleted the elementary school course, to send such child to the part-  
time classes referred to in subsection 1 of Section 167.051, if any  
are established. The elementary school course referred to is through  
eighth grade. Section 160.011(4), RSMo 1969. Thus, although the  
person standing in the parental relationship to a child who has  
reached the age of sixteen is no longer required to cause his child  
to regularly attend school on a full-time basis under Section 167.  
031, the parent of a child between sixteen and eighteen years of  
age who has not completed the eighth grade must cause such child  
to regularly attend a part-time school, if one is provided, under  
Section 167.051(2).

#### QUESTION NO. 2

Article IX, Section 1(a), Missouri Constitution, requires the  
legislature to establish and maintain a free public school system  
for all persons in the state not in excess of twenty-one years of  
age, but leaves it to the legislature to prescribe a more limited  
age group which shall be entitled to a free education. Article IX,  
Section 1(a) reads as follows:

"A general diffusion of knowledge and intelli-  
gence being essential to the preservation of  
the rights and liberties of the people, the

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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 duty to establish and maintain a free public school system is mandatory. Roach v. The Board of President and Directors of the St. Louis Public Schools, 77 Mo. 484, 488 (1883).

Pursuant to this constitutional mandate, the legislature has provided in Section 160.051, RSMo 1969, for the establishment of free public schools for persons between six and twenty years of age. Section 160.051 reads as follows:

"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. Any child whose sixth birthday occurs before the first day of October after the first day of a school term shall be deemed to have attained the age of six years at the commencement of the term for the purpose of apportioning state school funds and for all other purposes. Gratuitous instruction for persons between the ages of five and six years may be provided by the board of education."

Referring to the predecessor of Section 1(a), the Supreme Court of Missouri in Lehew v. Brummell, 103 Mo. 546, 15 S.W. 765 (1891) stated:

". . . The common-school system of this state is a creature of the state constitution and the laws passed pursuant to its command. The right of children to attend the public schools, and of parents to send their children to them, is not a privilege or immunity belonging to a citizen of the United States as such. It is a right created by the state, and a right belonging to citizens of this state as such. . . ."  
(Emphasis ours) 15 S.W. at 766

In State ex rel. Roberts v. Wilson, 221 Mo.App. 9, 297 S.W. 419 (Spr.Ct.App. 1927), the court noted:

". . . The right of children, of and within the prescribed school age, to attend the public school established in their district for

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them is not a privilege dependent upon the discretion of any one, but is a fundamental right, which cannot be denied, except for the general welfare. . . ." (Emphasis ours) 297 S.W. at 420

Thus, children between the ages of six and twenty have a constitutional right to a free public education. This right is not dependent upon the child being within the age group of the Compulsory School Attendance Law, Section 167.031, et seq., RSMo 1969. A child between six and twenty derives his right to a public education from the Missouri Constitution. The Compulsory School Attendance Law merely enforces that right. The title of Missouri's first Compulsory School Attendance Law supports this conclusion:

"An Act to enforce the constitutional right of every child in the state to an education, to provide for truant or parental schools and attendance officers in cities of ten thousand population or more and to prohibit the employment of children during school hours." Laws 1905, page 146

May a child who is entitled as a matter of right to a free public school education, but who is not covered by the Compulsory School Attendance Law, attend a public school on a part-time basis? You have not explained what you mean by "part-time attendance." We can envision this phrase as encompassing several different situations. For instance, a child might desire to attend a public school for only part of the regularly scheduled school year, or he might desire to attend a limited number of classes in a public school for either part of or the entire school year.

As stated above, Section 1(a), Article IX, imposes the duty on the legislature to establish and maintain a free public school system. By Section 160.051 the legislature has provided that all persons in the state between the ages of six and twenty are entitled to receive free public education. To carry out the constitutional mandate, the legislature established a public school system comprised of a number of separate school districts, and except as limited by statute, placed the general administration of public schools in the hands of the school boards of these school districts. School Dist. of Oakland v. School Dist. of Joplin, 102 S.W.2d 909, 910 (Mo. 1937). This authority is expressed in Section 171.011, RSMo 1969, as follows:

"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. . . ."

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There are no statutory provisions, other than the Compulsory School Attendance Law, respecting the regularity of attendance at public schools by pupils between the ages of six and twenty years. Thus, we believe that the regularity of attendance by pupils who do not come within the provisions of the Compulsory School Attendance Law, but who are entitled to receive a free public school education as a matter of right is a subject relating to the government of the individual school district.

In discussing the power of a school board to make reasonable regulations for the government of its district, the Supreme Court of Missouri in State ex rel. Ranney v. School Dist. of City of Cape Girardeau, 237 Mo. 670, 141 S.W. 640 (1911) stated:

"The power of the board of education 'to make all needful rules and regulations for the organization, grading and government in their schools district' is expressly given by the statute (Rev. St. 1899, § 9764), by which its nature and extent must be judged; with the qualification, however, that neither the Legislature nor the board by its authority can make or enforce any rule inconsistent with the constitutional requirement that these schools shall be maintained for the gratuitous instruction of all persons in the state between the ages of 6 and 20 years. From this constitutional mandate it necessarily results that the Legislature has power to authorize, and that the school authorities have power, to the extent of such authorization, to make such rules as shall be needful for the orderly conduct of the schools, and to guard the moral and physical health of the pupils so as to make them available to all alike who may be entitled to their advantages. These rules may, and some of them necessarily will, deprive some pupils temporarily of the right to avail themselves of the facilities for instruction which they afford, but all must be adapted to the promotion and accomplishment of the paramount object contemplated by the Constitution. They cannot arbitrarily and unnecessarily deprive any beneficiary of the Constitution of any part of the right guaranteed to him. For example, a rule that no person should be enrolled in the public schools who had not attained the age of six years and one month would be evidently void, because tending only to defeat

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that object. On the contrary, a rule forbidding the attendance of persons afflicted with smallpox would be evidently valid because it would tend to promote that object. Between these extremes lies a vast field for the exercise of this rule-making power, which depends, in some instances, upon local or temporary conditions of which the courts cannot take judicial notice, and to which their attention must therefore be directed by pleading and evidence. . . ." 141 S.W. at 642

A school board, then, may make and enforce reasonable rules and regulations to insure the orderly conduct of the school. However, such rules and regulations cannot arbitrarily deprive a student of his constitutional right to receive a free public education. Thus, we conclude that a child between the ages of six and twenty, but not within the age limitation of the Compulsory School Attendance Law, may attend a public school on a part-time basis subject to the reasonable rules and regulations of the school district.

Inasmuch as your question concerning part-time attendance at a public school does not relate to any particular factual situation or school district regulation, we are asked to hypothesize all the instances in which a school district could validly exercise its power to regulate the attendance of pupils who are entitled to a free education as a matter of right but who do not come within the Compulsory School Attendance Law. We do not believe that this is appropriate for a legal opinion, and, therefore, reserve a determination for a future occasion when more specific factual circumstances are presented.

#### QUESTIONS NO. 3 AND 4

Your third and fourth questions relate to whether a child who is not within the age limitation of the Compulsory School Attendance Law but who is nevertheless entitled to a public school education as a matter of right may attend a public school for a part of the regular school day and a private school for the remainder of a school day. Although these questions do not relate to any specific factual situation, we notice that you have prefaced these questions by reference to part-time attendance of private school students at an area vocational school operated by a public school district. Thus, for purposes of this opinion we assume that questions No. 3 and 4 relate to whether private school students who are within the age group of children entitled to a public education as a matter of right but who are not within the age group of the Compulsory School Attendance Law may attend classes offered at an area

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vocational school while pursuing the rest of their education at a private school.

The practice whereby private school pupils attend a course offered in a public school for part of the school day and pursue the rest of their education at a private school for the remainder of the school day is generally known as "shared time" or "dual enrollment." See generally 65 Mich.L.Rev. 1224.

Under the Vocational Education Act of 1963 and the Vocational Education Amendments of 1968, 20 U.S.C.A. Sections 1241-1391, Congress has appropriated funds to the various states to assist with the establishment and maintenance of vocational education programs. The funds appropriated under these acts have been accepted by the State of Missouri, Section 178.430, RSMo 1969, and over the years "State Plans" for the administration of vocational education under the federal acts have been submitted by the state to the federal government. An "area vocational school" is defined in the federal regulations as either a separate, specialized high school or a department of a high school, junior college or university which is devoted exclusively or principally to vocational training. 45 C.F.R. Section 102.3(b)(1), 35 Federal Register No. 91, page 7335. An "area vocational school" is part of the overall educational program offered by those public school districts which have established such schools.

We believe that a public school district which operates an area vocational school has not only the authority but the duty to enroll private school students between the ages of sixteen and twenty in vocational education programs even though such students do not otherwise attend a public school. We understand that some state officials have reached a contrary conclusion on the basis that there is no express provision in the Vocational Education Act, Sections 178.420-178.580, RSMo 1969, or in any other part of the school laws authorizing a public school district to operate a dual enrollment program in an area vocational school. The shortcoming of such reasoning is adequately demonstrated by the fact that neither is there express statutory provision authorizing school boards to enroll and educate children between the ages of six and twenty years. It is clear, however, that a public school district has the inherent power, and the duty, to educate its resident children. See Opinion No. 100 dated January 18, 1966 (copy enclosed). As previously demonstrated, children between the ages of six and twenty years have a constitutional right to a public education, and the various school districts of the state are organized for the sole purpose of discharging the constitutional mandate to educate school age children. State ex rel. Carrollton School Dist. No. 1 v. Gordon, 231 Mo. 547, 133 S.W. 44, 51 (1910); School Dist. of Oakland v. School Dist. of Joplin, supra; Kansas

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City v. School Dist. of Kansas City, 201 S.W.2d 930 (Mo. 1947).  
Article IX, Section 1(a) does not exclude those children attending non-public schools from receiving any benefit from the public school system.

In fact, we believe that to exclude private school children between the ages of sixteen and twenty from receiving shared time instruction in an area vocational school for the sole reason that such children choose to attend a private school for the basic school curriculum amounts to a denial of equal protection in violation of Article I, Section 2, Missouri Constitution and the Fourteenth Amendment to the United States Constitution. The right of the pupil to attend a public school in Missouri is one founded upon our state Constitution. Having offered a public education to all children, the state must make it available on non-discriminatory terms. In State of Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938), the Supreme Court of the United States considered the lawfulness of the denial of a student's admission to the School of Law of the University of Missouri on the basis that he was a Negro. The court stated:

" . . . The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove that discrimination." 305 U.S. at 349-350

In overturning the separate but equal doctrine in Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the Supreme Court of the United States stated:

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate

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our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." (Emphasis ours) 347 U.S. at 493

In our opinion, for the same reason that race would not be an acceptable basis for determining who is entitled to the benefits of a public vocational education program, the fact that a student attends a private school for part of the day is not a lawful reason for denying him access to a vocational education program provided by a public school district.

The Supreme Court of Michigan recently reached a similar conclusion upon analogous reasoning. In re Proposal C, 185 N.W.2d 9 (Mich. 1971). The court concluded that the exclusion of private school students from shared time instruction on public school premises on the basis of their status as private school students denied equal protection to the parent of the private school child:

"Proposal C [the constitutional initiative amendment] involves the fundamental right, protected by the Fourteenth Amendment of a parent to send his child to the school of his choice if it meets the state quality and curriculum standards. *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). Proposal C's restriction of this right under the Attorney General's Opinion by prohibiting nonpublic school children from receiving shared time . . . services at a public school can be justified only by a compelling state interest and by means necessary to achieve the objective. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); *Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583

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(1969); and *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) . . .

\* \* \*

"The Attorney General's interpretation of Proposal C severely curtails the constitutional right of school selection while the state interests advanced by Proposal C do not require this intrusion upon the exercise of a fundamental constitutional right. Consequently, excluding private school children from receiving shared time instruction . . . at the public school is a denial of equal protection. This does not mean that a public school district must offer shared time instruction . . . it means that if it does offer them to public school children at the public school, nonpublic school students also have a right to receive them at the public school." 185 N.W.2d at 27-28

Furthermore, we believe that excluding a student who attends a non-public school out of religious conviction from participation in shared time instruction in an area vocational school constitutes an unconstitutional infringement upon the free exercise of religion in violation of Article I, Section 5, Missouri Constitution and the First Amendment to the United States Constitution. The right to the free exercise of religion is one of the most fundamental freedoms of our society. A state imposed classification which conditions the practice of religious beliefs upon the surrender of other rights or other privileges without the justification of a compelling state interest constitutes a denial of religious freedom. *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). In that case the Supreme Court of the United States held that South Carolina's denial of unemployment compensation benefits to a Seventh Day Adventist because she refused for religious reasons to accept employment on Saturday infringed the Free Exercise Clause. The court stated:

". . . Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work,

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on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." 374 U.S. at 404

Whereas Sherbert concerned unemployment compensation benefits or privileges, the present case concerns the right of a school age child to a public school education, including vocational instruction. If the state were to condition the exercise of this right upon full-time attendance at a public school, the coercion upon the student who attends a non-public school out of religious conviction to forsake that religiously motivated practice in order to receive vocational instruction would be unmistakable. We can conceive of no legitimate state interest which would justify the conditioning of area vocational school instruction upon the surrender of one's constitutional right to attend a non-public school as an expression of religious motivation and conviction.

The same conclusion was reached by the Supreme Court of Michigan in In re Proposal C, supra:

"When a private school student is denied participation in publicly funded shared time courses . . . offered at the public school because of his status as a nonpublic school student and he attends a private school out of religious conviction, he has also a burden imposed upon his right to freely exercise his religion. The constitutionally protected right of free exercise of religion is violated when a legal classification has a coercive effect upon the practice of religion without being justified by a compelling state interest. Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962); Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) . . . As pointed out above, there are no compelling state interests advanced by Proposal C which justify the burden placed on the choice of attending a private school out of a religious conviction." 185 N.W.2d at 28-29

Thus, we conclude that a public school district operating an area vocational school has the authority and the duty to admit to its vocational education courses private school students who are entitled to a free public education as a matter of right but who do not come within the Compulsory School Attendance Law.

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Inasmuch as the private school students to which this opinion refers do not come within the terms of the Compulsory School Attendance Law, their attendance at an area vocational school on a shared time basis does not conflict with Special District for the Education and Training of Handicapped Children of St. Louis County v. Wheeler, 408 S.W.2d 60 (Mo. banc 1966), wherein the Supreme Court of Missouri stated that it was a violation of the Compulsory School Attendance Law for a student to attend more than one school during the six hour school day.

There are also several constitutional provisions, state and federal, which must be considered in relation to shared time instruction in an area vocational school.

The First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment to the United States Constitution, prohibits any state action respecting an establishment of religion. As most recently stated in Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), the Establishment Clause requires compliance with the following criteria:

" . . . First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion [citation omitted]; finally, the statute must not foster 'an excessive government entanglement with religion.' . . ."  
29 L.Ed.2d at 755

For the following reasons, we believe that shared time in area vocational schools does not involve the establishment of religion. First, shared time in an area vocational school involves a legitimate secular legislative purpose--education. Secondly, shared time vocational instruction accommodates the student's decision to exercise his constitutional right to the education provided on public school premises and his desire to pursue religiously motivated activities elsewhere, and, therefore, it neither advances nor inhibits religion. Thirdly, shared time in area vocational schools does not foster excessive governmental entanglement with religion because the program is administered by public school authorities, the vocational instruction is provided on public school premises, secular teachers are employed to instruct the students, and vocational studies have no inherent ethical, spiritual or religious content or value nor may they be adapted to instilling the same.

Article IX, Section 5, Missouri Constitution, relating to the expenditure of public school funds provides as follows:

"The proceeds of all certificates of indebtedness due the state school fund, and all moneys,

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bonds, lands, and other property belonging to or donated to any state fund for public school purposes, and the net proceeds of all sales of lands and other property and effects that may accrue to the state by escheat, shall be paid into the state treasury, and securely invested under the supervision of the state board of education, and sacredly preserved as a public school fund the annual income of which shall be faithfully appropriated for establishing and maintaining free public schools, and for no other uses or purposes whatsoever."

An area vocational school, whether operated as a separate specialized school or as a department of a public high school, junior college or university, is a public school. Funds expended in connection with an area vocational school are therefore for the purpose of maintaining free public schools. In The Special District for the Education and Training of Handicapped Children of St. Louis County v. Wheeler, *supra*, the Supreme Court of Missouri held that the use of public school funds for the education of pupils at parochial schools was not for the purpose of maintaining free public schools. Contrary to the situation in Wheeler, vocational education takes place on public school premises under the exclusive control of the public school district. That students who attend a private school for their basic education may attend an area vocational school for its specialized instruction pursuant to their constitutional right to a public education does not change the public character of the area vocational school.

In McVey v. Hawkins, 258 S.W.2d 927 (Mo. banc 1953), the Supreme Court of Missouri held that the use of public school funds to transport parochial school students on public school buses was not for the purpose of maintaining free public schools. The significant element of that case, which is not involved in a consideration of shared time instruction at area vocational schools, is that public school funds were spent to help private school students attend a school other than a public school. In the instant case, public funds are spent exclusively for the support and maintenance of a public vocational school. Therefore, we conclude that Section 5 of Article IX does not prohibit shared time instruction in an area vocational school.

Secondly, because some private school students enrolled in an area vocational school may attend a church related school for the remainder of the day, the Missouri constitutional provisions respecting the prohibition against aid to religion should be considered. Article I, Section 7, and Article IX, Section 8, Missouri Constitution, provide respectively as follows:

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"That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

"Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever."

In Berghorn v. Reorganized School Dist. No. 8, 260 S.W.2d 573 (Mo. 1953) and Harfst v. Hoegen, 163 S.W.2d 609 (Mo. banc 1941), the Supreme Court of Missouri held that the payment of public school funds to parochial schools which had been incorporated into the public school system amounted to unconstitutional aid to a school controlled by a sectarian denomination. Although the court did not undertake discussion of the Missouri constitutional provisions prohibiting aid to religious schools, the payment of public monies to these schools to sustain their operations obviously involved a prohibited aid both in purpose and effect. The distinction between the situation in Berghorn and Harfst and shared time in area vocational schools is clear. In the latter case the payment of funds to sustain the operations of an area vocational school, which is a public school, is neither for the purpose of aiding a church related school nor do such payments have the primary effect of aiding a church related school.

Some commentators state that, because of the prohibition against "indirect" as well as "direct" aid, the Missouri constitutional provisions prohibiting aid to religion are broader than the prohibitions contained in the First Amendment to the United States Constitution.

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Section 7, Article I, Missouri Constitution. We agree that the language of the Missouri Constitution relating to aid to religion is more explicit than the Establishment Clause of the First Amendment to the United States Constitution. However, we do not believe that the people of the State of Missouri intended to prohibit every form of legislation or appropriation of public money for a secular purpose, the benefit of which might in some remote way incidentally accrue to religiously affiliated schools.

There are many examples of legislation designed to satisfy a secular purpose in which there is no intention to aid religion or church related schools as such and the benefit accruing to religion or religious schools is only a collateral effect of the legislation. For example, when the state provides such services as sanitation, police and fire protection to the entire community, churches in the community benefit from such services. The construction of a street next to a religiously affiliated school indirectly benefits such school by providing easy access for its students. Public transportation also incidentally benefits churches and religiously affiliated schools by furnishing the means of attendance. State and local governments have long provided public libraries with books for use by all persons. Are the doors of a public library to be closed to students attending church related schools because the use of its facilities in connection with assignments for courses in their schools amounts to an unconstitutional "indirect" aid to the religious school? We think not. These are just some of the many examples of legislation which satisfy a secular interest and which have neither the purpose nor the primary effect of supporting or inhibiting religion. We are not prepared to make the facile assumption that the Missouri Constitution prohibits all legislation which might in some remote way incidentally benefit religion. Such a conclusion would express a hostility to religion which might result in direct conflict with Sections 5 and 7, Article I, Missouri Constitution, which prohibit discrimination on account of religion.

Because the experience and reasons behind the promulgation of the Free Exercise and Establishment Clauses of the First Amendment to the United States Constitution are common to the similar provisions in the Missouri Constitution, it is appropriate to consider the United States Supreme Court's discussion of the interplay between the two clauses. In Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952), the Court upheld a released time program pursuant to which public schools released their pupils during the school day for religious instruction on premises away from the public school. Speaking for the court, Mr. Justice Douglas stated:

". . . There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated.

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And so far as interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise, the state and religion would be aliens to each other--hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths--these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.'

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"We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the

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religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. . . ." 343 U.S. at 312-314

This concept of accommodated neutrality runs throughout the Supreme Court's decisions concerning the First Amendment. See Everson v. Board of Education of the Township of Ewing, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947); Abington School District v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); Board of Education of Central School District No. 1 v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968).

Thus, we conclude that the Missouri Constitution does not prohibit all forms of legislation which might remotely or incidentally benefit religion when neither the purpose nor primary effect is to support religion as such but is, instead, to satisfy a legitimate, secular, state interest. We are not alone in this conclusion. At least two other states with constitutional provisions prohibiting "direct" and "indirect" aid to religion have concluded that it is not every benefit which might accrue to religion or religiously affiliated schools that is prohibited. See In re Proposal C, supra; Board of Education of Central School District No. 1 v. Allen, 228 N.E.2d 791 (N.Y. 1967), aff'd 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968). In Allen the Court of Appeals of New York held that a statute providing for the loan of free textbooks to school age children, including parochial school students, did not offend Section 3 of Article XI of the New York Constitution which is remarkably similar to Article I, Section 7 of the Missouri Constitution. The court's reasoning is instructive:

". . . The New York State Constitution prohibits the use of public funds for a particular purpose; that is, aiding religiously affiliated schools. Certainly, not every State action which might entail some ultimate benefit to

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parochial schools is proscribed. Examples of co-operation between State and church are too familiar to require cataloguing here. As we said, although in a different context: 'It is thus clear beyond cavil that the Constitution does not demand that every friendly gesture between church and State shall be dis-  
countenanced. The so-called "wall of separation" may be built so high and so broad as to impair both State and church, as we have come to know them.' (Matter of Zorach v. Clauson, 303 N.Y. 161, 172, 100 N.E.2d 463, 467, affd. 343 U.S. 306, 72 S.Ct. 679, 97 L.Ed. 954.)  
The architecture reflected in Judd would impede every form of legislation, the benefit of which, in some remote way, might inure to parochial schools. It is our view that the words 'direct' and 'indirect' relate solely to the means of attaining the prohibited end of aiding religion as such." (Emphasis ours) 228 N.Ed.2d at 794

Therefore, we conclude that shared time programs in area vocational schools would not involve prohibited aid to church related schools in violation of Article I, Section 7 and Article IX, Section 8 of the Missouri Constitution.

#### CONCLUSION

It is the opinion of this office that:

1. The parent, guardian or other person having charge, control or custody of a child under the age of seven or over sixteen does not come within the provisions of Section 167.031, RSMo 1969, relating to compulsory school attendance on a full-time basis. However, a person standing in the parental relation to a child between sixteen and eighteen years of age who has not completed the elementary school course in the public schools of Missouri, or its equivalent, does come within the provisions of Section 167.051(2), RSMo 1969, relating to compulsory attendance at a part-time school.

2. All children in the State of Missouri between the ages of six and twenty years have a constitutional right to a public school education. All children who are entitled to a public school education as a matter of right but who do not fall within the age group of the Compulsory School Attendance Law may attend a public school on a part-time basis subject to a school district's reasonable rules and regulations.

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3. Subject to reasonable rules and regulations applicable to all students, public school authorities operating an area vocational school must enroll a private school student who desires to participate in the vocational instruction offered at the school outside of the regular school day if the student is within the age group of children entitled to a public education as a matter of right. Shared time instruction in area vocational schools whereby students between the ages of sixteen and twenty attend the public vocational school for part of the regular school day and take the remainder of their courses at a church related school does not violate either the statutes or Constitution of Missouri or the United States Constitution.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett and John B. Mitchell, Jr. -

Yours very truly,



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Attorney General

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