SCHOOLS:
SCHOOL FUNDS:
CONSTITUTIONAL LAW:

Effect of decision in McVey v. Hawkins, 258 S.W.2d 927, on state aid for transportation to private schools.

August 25, 1953

FILED
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Honorable Hubert Wheeler
Commissioner of Education
Jefferson Building
Jefferson City, Missouri

Dear Mr. Wheeler:

This is in response to your request for an opinion, dated July 2, 1953, which reads, in part, as follows:

> "I shall be glad to have your advice and official opinion in regard to the following questions:
>
> "1. In view of the court's judgment that public school funds used to transport pupils to and from a private parochial school are not used for the purpose of maintaining free public schools and that such use of funds is unlawful, does it render unconstitutional and void the provisions of Section 165.140 and 165.143 in reference to private school transportation?
>
> "2. If the statutory provisions for private school transportation are null and void, do boards of education have any legal basis for aiding private school transportation, for either elementary or high school pupils?
>
> "3. Does the court's decision become effective from the date it was rendered, June 8, 1953, or is the court's opinion in the form of a declaratory judgment indicating what the law has always been since its enactment and thereby prohibit any further claim for transportation aid?

"4. If the court's decision became effective from the date the opinion was rendered would it be legal and proper for school boards in districts where private school transportation was provided last school year to file application for the state transportation aid?

"5. Applications for state aid for transportation of pupils which includes transportation to parochial schools are now being filed with the State Department of Education. Shall the State Board accept the certification of these applications as a valid basis for the distribution of transportation aid in the August 31 apportionment of state school moneys?

"6. If the court's decision became effective from the date the opinion was rendered, would it be legal for the State Board of Education to apportion transportation aid for the transportation completed and approved prior to such date for pupils transported to private schools?"

Question No. 1

In your request you refer to the case of McVey et al. v. Hawkins et al., 258 S.W. (2d) 927, and question whether it has the effect of rendering unconstitutional and void the provisions of Section 165.140 and Section 165.143, RSMo 1949. In order better to understand the law as it now stands, following the decision of the McVey case, it might be well to give a short summary of that case.

Briefly, the facts involved therein were these:

Commerce Consolidated School District No. 9 lies in the northeastern part of Scott County. Benton Consolidated School District No. 19 lies west of the Commerce District in Scott County. A public elementary or grade school is maintained in the village of Commerce in the Commerce District, and a public secondary or high school is maintained in the village of Benton in the Benton District. The Roman Catholic Church maintains and operates the St. Dennis Catholic School, a private parochial school in Benton, the school offering courses up to and including the eighth grade.

On school days a school bus owned and operated by the Commerce District, the whole expense of which was paid out of the incidental fund of the district, moved over designated roads in the Commerce district transporting the grade school children of the district to the Commerce School. During and after this movement, children attending the St. Dennis Catholic School at Benton boarded the bus and were transported to a point near the line between the Commerce and Benton districts. There the children were received and transported by the Benton District school bus to Benton and discharged at the Benton High School or at the St. Dennis Catholic School.

This was a suit by resident taxpayers to enjoin the transportation of the grade school children by a public school bus for that portion of the way above mentioned to and from the private parochial school at Benton. It further appeared that the entire cost of such transportation had been and was being paid for out of public school funds by warrants drawn on the incidental fund of the district.

In the lower court, judgment was rendered for the defendants, the board of education of the district and the driver of the school bus, a motion to dismiss having been sustained as to the county superintendent of schools. This latter action was not complained of on appeal, and hence was not considered. The upper court reversed and remanded the judgment for judgment consistent with the opinion.

Appellants, plaintiffs below, contended that the conduct of respondents, defendants below, in causing the parochial school children to be hauled in a public school bus to and from a private religious school at public expense and with the public school funds of the district was in violation of specific provisions of the Constitution of Missouri, 1945, to wit: Sections 5 and 8 of Article IX, and Sections 6 and 7 of Article I. For sake of convenience, we now set said sections out in full:

> Sec. 5, Art. IX. "The proceeds of all certificates of indebtedness due the state school fund, and all moneys, 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."

Sec. 8, Art. IX. "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."

Sec. 6, Art. I. "That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same."

Sec. 7, Art. I. "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."

They also insisted that Section 165.143, RSMo 1949, was violative of these same constitutional provisions. Respondents contended that the constitutionality of Section 165.143 was not in issue because the records showed that the Commerce District received no state aid under Section 165.143 for transporting within the district the students attending the St. Dennis Catholic School at Benton.

The court pointed out that Section 165.140 was not mentioned in plaintiffs' petition or in appellants' brief, and although appellants insisted that Section 165.143 was violative of the constitutional provisions mentioned, in what respects or why did not appear from appellants' brief. However, since respondents relied on Sections 165.140 and 165.143 as a defense to this action, the court considered the constitutionality of these sections. Said sections read as follows:

> Sec. 165.140. "Whenever the board of directors of any school district or board of education of a consolidated district shall deem it advisable, or when they shall be requested by a petition of ten taxpayers of such district, to provide for the free transportation to and from school, at the expense of the district, of pupils living more than one-half mile from the schoolhouse, for the whole or for part of the school year, said board of directors or board of education shall submit to the qualified voters of such school district, who are taxpayers in such district, at an annual meeting or a special meeting, called and held for that purpose, the question of providing such transportation for the pupils of such school district; provided, that when a special meeting is called for this purpose, a due notice of such meeting shall be given as provided for in section 165.037. If two-thirds of the voters, who are taxpayers, voting at such election, shall vote in favor of such transportation of pupils of said school district, the board of directors or board of education shall arrange for and provide such transportation. The board of directors or board of education shall have authority

and are empowered to make all needful rules and regulations for the free transportation of pupils herein provided for, and are authorized to and shall require from every person, employed for that purpose, a reasonable bond for the faithful discharge of his duties, as prescribed by the board. Said board of directors or board of education shall pay by warrant the expenses of such transportation out of the incidental fund of the district; provided, that this section shall include pupils attending private schools of elementary and high school grade except such schools as are operated for profit."

Sec. 165.143. "When any school district makes provision for transporting any or all of the pupils of such district to a central school or schools within the district, and the method of transporting is approved by the state board of education the amount paid for transportation, not to exceed three dollars per month for each pupil transported a distance of two miles or more, shall be a part of the minimum guarantee of such district for the ensuing year. When the board of directors of any school district makes provision for transporting the high school pupils whose tuition it is obligated to pay, to the school or schools they are attending, and the method of transporting is approved by the state board of education, the amount paid for transporting such pupils, not to exceed three dollars per month for each pupil transported shall be a part of the state apportionment to such district for the ensuing year, if no part of the minimum guarantee of such district has been used to pay any part of the cost of transporting such pupils. When the board of directors of a district that admits nonresident pupils to its high school makes provision for transporting such pupils to such high school, and the method of transporting and the transportation routes are approved by the state board of education before the transportation is

> begun, the amount spent for transporting such pupils, not to exceed three dollars per month for each pupil transported shall be a part of the state apportionment to such district for the ensuing year, if no money apportioned to such district from any public fund or funds has been used to pay any part of the cost of transporting such pupils, except money apportioned to such district to pay the cost of transporting such pupils; provided, any cost incurred for transporting such pupils in excess of three dollars per month for each pupil transported may be collected from the district of the pupil's residence, if said cost has been determined in the manner prescribed by the state board of education; and provided further, that for the transportation of pupils attending private schools, between the ages of six and twenty years, where no tuition shall be payable, the costs of transporting said pupils attending private school shall be paid as herein provided for the transportation of pupils to public schools."

Other contentions were made and other questions determined which are of no particular moment at this time.

In addition to the constitutional and statutory provisions above mentioned, the court also quoted Section 3, Article IX, Constitution of Missouri, 1945, Section 161.225, Laws of Missouri, 1951, p. 495, Sections 2.120 and 2.121, Laws of Missouri, 1949, p. 27 (appropriation bills), and Section 161.180, RSMo 1949, Amended, Laws of Missouri, 1951, p. 493, all of which refer to the use of public school moneys for the establishment and maintenance of free public schools.

At page 929 the court said:

> " * * * We shall consider only the constitutional questions raised by the pleadings and urged herein upon this appeal."

Then, in defining the question, the court said, page 932:

> "In view of the issues presented on this appeal, we think the essential question is whether the use of the public school moneys, to wit, the incidental funds of the district, for defraying the expenses of transporting the parochial school children to, or part way to and from, a private school is a use for the purpose of 'establishing and maintaining free public schools, and for no other uses or purposes whatsoever', as provided by Sec. 5, Art. IX of the Constitution. And see Sec. 161.180, RSMo 1949, as amended Laws 1951, p. 493, V.A.M.S. Also involved is the question of whether the income from the State Public School Fund is applied to 'the support of free public schools', as provided by Sec. 3, Art. IX and whether such income and the other moneys appropriated are properly used within the meaning of the act of the Legislature setting the fund aside 'to be used for the support of the free public schools' and 'to be apportioned and distributed for the support of the free public schools.' Laws 1949, p. 27, Secs. 2.120 and 2.121. And see Sec. 28, Art. IV, supra. If the use of the fund mentioned for the purpose of transportation of parochial school children to a private school or part of the way to the private school and return is not a use 'for establishing and maintaining free public schools,' and if the use of the fund or any part thereof is not within the purpose for which it was dedicated and appropriated, the use must be enjoined and the transportation discontinued."

Then again, at page 933, the court said:

> " * * * If the parts of what are now Section 165.140 and Section 165.143, as added in 1939, see Laws 1939, pp. 718-720, are in direct conflict with controlling provisions of the Constitution of Missouri 1945, to wit, Section 5 of Article IX, they do not and can not constitute any defense to the present action and must be disregarded. Since the added portions of these sections do conflict with the mentioned constitutional provisions they constitute no

> defense to the present action. We may not in this proceeding determine the effect of such holding upon the remaining portions of said sections, however, see Missouri Ins. Co. v. Morris, Mo. Sup., 255 S.W. 2d 781, 782."

The added portions referred to are the provisos at the end of each of Section 165.140 and Section 165.143, i.e:

> (Sec. 165.140) "provided, that this section shall include pupils attending private schools of elementary and high school grade except such schools as are operated for profit."

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> (Sec. 165.143) "and provided further, that for the transportation of pupils attending private schools, between the ages of six and twenty years, where no tuition shall be payable, the costs of transporting said pupils attending private school shall be paid as herein provided for the transportation of pupils to public schools."

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The court concluded by saying, l.c. 933:

> " * * * We must and do hold that the public school funds used to transport the pupils part way to and from the St. Dennis Catholic School at Benton are not used for the purpose of maintaining free public schools and that such use of said funds is unlawful. It necessarily follows that such transportation of said students at the expense of the district is unlawful and must be enjoined. We express no opinion on any issues not directly decided herein."

Although the court did not at any time use the term "unconstitutional," it did, by the phraseology above quoted, directly hold that the above-quoted provisos of Sections 165.140 and 165.143 are in conflict with the constitutional provisions above mentioned. Therefore, it did as effectively hold such provisos "unconstitutional" as if the word itself had been used.

However, it is to be noted that the court expressly refrained from ruling on any other portion of those statutes so

that the remainder of such sections stands with the validity that they did before the rendition of this decision. (State ex inf. Hadley v. Washburn, 167 Mo. 680, 697, 67 S.W. 592.)

Question No. 2

Your next inquiry is whether boards of education have any legal basis for aiding private school transportation for either elementary or high school pupils if the statutory provisions for private school transportation are null and void.

We have concluded in answer to Question No. 1 that the court has held the provisos of Sections 165.140 and 165.143 with regard to private school transportation unconstitutional. The effect of such a holding is to render such portions of the statutes null and void.

It is stated in 12 C.J., Constitutional Law, page 800, Section 228:

> "The interpretation given to a statute or constitutional provision by a court of last resort is binding on all departments of the government, including the legislature; and a decision by such a court that a statute is unconstitutional has the effect of rendering such statute absolutely null and void, * * *"
>
> (Gilkeson v. Mo. Pac. R. Co., 222 Mo. 173, 121 S.W. 138, 24 L.R.A., NS, 844, 17 Ann. Cas. 888.)

It is further said in 56 C.J., Schools and School Districts, page 186, Section 41:

> " * * * where the constitution requires the revenues from the school fund to be applied exclusively to the public or common schools, a statute providing for the payment of any part thereof to a private school or a sectarian or denominational school is void. Subject to any such constitutional provisions or restrictions, however, the school moneys may be distributed and disposed of as the legislature may direct, provided the division is according to some reasonable and uniform

> rule, and not arbitrary; and the distribution and apportionment or disposition thereof must be in accordance with the provision of the constitution with respect thereto, and statutes enacted within its terms or under its authority. * * *"

Therefore, in order to justify the expenditure of public funds for aiding private school transportation, boards of education must be able to point to some legislative enactment consonant with the provisions of the Constitution which authorize such expenditure. Since the only statutory provisions purporting to authorize the payment of public funds for this purpose have been held in violation of the Constitution, and consequently null and void, there is no legal basis for boards of education to provide assistance from public funds for transportation of pupils to private schools whether they be elementary or high schools.

Question No. 3

Your third question is whether the court's decision became effective from the date the decision of McVey v. Hawkins, supra, was rendered or whether the opinion was in the form of a declaratory judgment indicating what the law has always been since the enactment and thereby prohibits any further claim for transportation aid.

The effect of holding a statute unconstitutional was discussed in Lieber v. Heil (Mo. App.), 32 S.W. (2d) 792. There the Supreme Court had held a statute for legitimation of an illegitimate child unconstitutional while a similar case was pending transfer to the St. Louis Court of Appeals. The Court of Appeals, in ruling on this case, said, l.c. 792, 793:

> "Meanwhile, pending the submission of the case in the Supreme Court, the case of Southard v. Short, 320 Mo. 932, 8 S.W. (2d) 903, presenting the identical question in proper manner, was argued and submitted to that court, and the court in its decision held that the statute was unconstitutional and void, as pertaining to a different subject than was indicated by and expressed in the title.

> "Obviously, the effect of the decision of the Supreme Court in Southard v. Short, supra, was to render the statute null and void, not only from and after the date of such judicial pronouncement, but even from the date of its enactment. Ex parte Smith, 135 Mo. 223, 36 S.W. 628, 33 L.R.A. 606, 58 Am. St. Rep. 576; State v. Hayes, 14 Mo. App. 173; 12 C.J. 800. In other words, the statute is now to be regarded as void ab initio, and as though it had never been in existence; and it is our constitutional duty, following the ruling of the Supreme Court, so to treat it in all matters affecting its constitutionality. State v. Finley, 259 Mo. 414, 168 S.W. 921; State v. Finley, 187 Mo. App. 72, 172 S.W. 1162."

The law generally is declared in 12 C.J., Constitutional Law, page 800, Section 228:

> " * * * a decision by such a court that a statute is unconstitutional has the effect of rendering such statute absolutely null and void, from the date of its enactment, and not only from the date on which it is judicially declared unconstitutional. * * *"

This principle is asserted in many other cases, among which is Norton v. Shelby County, 118 U.S. 425, 442, 6 S. Ct. 1121, 30 L. Ed. 178, where it was said:

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

Therefore, it is apparent that the provisos of Sections 165.140 and 165.143, supra, with regard to private school transportation, found by the court to be violative of provisions of the Constitution, were void from their very enactment, and it follows that no claim for transportation aid from public moneys or the public school fund can be made for transportation to private schools.

Question No. 4

Your fourth question is premised upon the condition that the answer to Question No. 3 would be that the court's decision became effective from the date that the opinion was rendered. Whereas, in answer to Question No. 3, we have stated that the decision had the effect of holding the portion of the statutes in question null and void from the date of their enactment. However, as stated above in answer to Question No. 1, the remaining portions of those statutes are now as effective as they were before the rendition of the decision in the McVey case.

The amount of state aid for transportation, which is a part of the minimum guarantee of the district for the ensuing year, is based upon the number of eligible students transported in the preceding year. The fact that a school district may have provided transportation for some children to private schools in the preceding year would not necessarily deprive the district of the right to state aid for the ensuing year based upon the number of children transported to the public schools in the previous year. The district would not be entitled to state aid for those children transported to private schools, but as long as the application is based upon the number of children transported to public schools, there would seem to be no reason to deny that application regardless of the fact that the transportation of children to private schools in the preceding year, the cost of which was paid from funds illegally apportioned in the preceding year, may have been unlawful.

Therefore, it would be proper for a school district to make application for state aid for transportation for the school year 1953-54 based upon the number of children transported to free public schools in the school year 1952-53, excluding therefrom any children that may have been transported to private schools.

Question No. 5

The method of applying for state aid for transportation, authorized by Section 165.143, supra, as we understand it, is the same as the method used in applying for other state aid, the procedure for which is set out in Section 161.030(2), RSMo 1949. Under that section the district clerk is required to make and forward to the county superintendent of schools a report showing the number of teachers employed, the total number of days' attendance of all pupils, the length of the school term, the average

attendance, the number of days taught by each teacher, the salary of each teacher, and any other information that the State Board of Education may require.

Section 161.040, RSMo 1949, in providing for the apportionment of the public school fund, says, inter alia: "provided, further, that the state board of education shall at the time of making the annual apportionment, apportion to the various districts their allotments of building, transportation and tuition aid as provided by law."

On this same certification required by Section 161.030 is included an item for transportation as a basis for the annual apportionment from the public school fund.

After the report is properly made, the county superintendent of schools approves it and turns it over to the county clerk who summarizes all of these reports and forwards to the State Board of Education a report showing for the county substantially the same information above required from each district. It is made a misdemeanor, punishable by fine and imprisonment, for any district clerk, teacher or county clerk knowingly to furnish any false information in such reports.

Then Subsection 3 of Section 161.030 says: "The state board of education shall certify the amount so apportioned to the comptroller for his approval, and warrants shall be issued payable to the treasurers of the several counties and the same shall be forwarded to them." Thereafter, the county treasurer immediately distributes and credits the money to the various school districts in accordance with the statute.

It appears also that, in addition to the information contained on the above certified application, the State Department of Education requires a further report on transportation on which is shown the name of each pupil transported and to what school he or she was transported.

Your fifth question states that applications for state aid for transportation are now being filed in which some pupils being transported to private schools are included. The question then is whether the State Board of Education must accept the certification of these applications as a valid basis for the distribution of transportation aid in the August 31 apportionment of state school moneys.

In answering this question we are not unmindful of the case of State ex rel. Randolph County v. Evans, 240 Mo. 95, 145 S.W. 40. In that case an enumeration list was certified to Evans, the state superintendent of schools, who refused to apportion state aid on the basis thereof on the ground that the list was fraudulent in that it contained names of persons not between the ages of six and twenty years and who did not reside in the district, and the names of many persons who were dead, and further contained many false and fictitious names and the names of many persons who were not entitled to be enumerated as residents of the school district.

The county brought mandamus to compel the issuance of state aid based on the enumeration list as certified to the state superintendent of schools.

In a four to three decision, the majority opinion written by Graves, J., the court held that the act of the school directors in making the enumeration list was a judicial act which was not subject to collateral attack and although the list might be attacked and corrected in a direct proceeding by the state superintendent as long as the list existed, the state superintendent must accept it as a proper basis for the distribution of the school money.

As a further reason for its holding, the court said that the duties of the state superintendent were purely ministerial and that no statute authorized him to revise and correct enumeration lists on the ground of fraud; that no machinery had been set up whereby he could hold hearings, etc., and determine the question of fraud. The court said that, as to the frauds alleged for prior years, the state superintendent was in legal effect rendering judgment against the district, issuing execution and then satisfying the execution and judgment, which he could not do.

A dissent, in part, was filed by Brown, J., and concurred in by Kennish, J.

Section 10823, R.S. Mo. 1909, substantially the same as Section 161.080, RSMo 1949, was also discussed by the court in this case. That section authorizes the State Board of Education (then the state superintendent of schools) to correct any errors made in the apportionment. It was held not to grant such powers as were contended for by the state superintendent. That section and the Evans case were discussed in a later case, that of State ex rel. Consolidated School Dist. No. 9, Bates County, v. Lee, 303 Mo. 641, 262 S.W. 344. We do not believe, however, that either of these cases in this connection, or Section 161,080, supra, are applicable to the case at hand.

It may be conceded that the State Board of Education has no such equity powers that it could hold hearings, etc., for the purpose of determining the issue of fraud, and it need not be contended that being a ministerial body it could refuse to honor or could question a properly certified application for state aid valid on its face. Nor is there here any question of correcting any error made in an apportionment. Here we have an entirely different situation from that presented in the Evans case or the Lee case.

The Supreme Court has held in the McVey case that public funds may not be used for the purpose of providing transportation of children to private schools. The State Department of Education may be presumed to know the public schools of the state and that those schools which are not public schools shown on the additional report concerning transportation must of necessity be private schools.

The law specifies those things which may properly be the basis of an apportionment of state aid. Section 161.030, supra, states, in part, that: "The state board of education shall, annually, before August thirty-first, apportion the public school fund applied for the benefit of the public schools in the manner provided by law." (Emphasis ours.) From this we see that the State Department of Education has the power and the duty to see that only those items specified by the Legislature are used as a basis for its apportionment. If a district should submit an application for state aid on which was shown an item of one pair of boots for each child in the district, for which there is clearly no authorization in law, could it by any logic be said that the Department of Education must nevertheless make the apportionment?

So here it has been declared by the highest court in our state that public funds may not be used for providing transportation of children to private schools and has held the portions of the statutes purporting to authorize such aid unconstitutional, hence null and void. By reports in the Department of Education filed with the application for state aid, the Department has official knowledge what portion of the application for transportation aid is based on transportation to private schools and what part on transportation to public schools. Since the part based on transportation to private schools is not authorized by law, it is not a proper item to be included in an application for state aid of which the State Department must take cognizance and deny that part of the application.

This ruling is applicable only to a situation where, as here, the fact that the application for state aid is based, in part at least, on items not eligible for state aid appears on the face of the application or on other required reports accompanying the application. This ruling is not meant to apply to a case where the application and all other reports in the office of the Department of Education are regular on their face.

Question No. 6

Your sixth question is again premised on the condition that the decision in the McVey case became effective law from the date of its rendition, and you then inquire as to whether, based upon that premise, it would be legal for the State Board of Education to apportion transportation aid for the transportation completed and approved prior to such date for pupils transported to private schools.

In view of our answer to Question No. 3, the above specific question need not be answered. Combining our answers to questions numbers 3 and 5, it follows that since those portions of the law purporting to authorize state aid for transportation to private schools have been held unconstitutional, hence null and void, since their enactment, and since the State Board of Education must take cognizance of undisputed facts which appear on the face of an application for state aid or on other required reports filed in the office of the State Department of Education, if it appears thereby that an application is based in whole or in part on transportation to private schools, the application as to that part must be denied although the transportation was completed and approved prior to the date of the decision in the McVey case.

CONCLUSION

It is the opinion of this office that the case of McVey v. Hawkins, 258 S.W. (2d) 927, held unconstitutional the provisos of Sections 165.140 and 165.143, RSMo 1949, purporting to authorize the expenditure of public funds for transportation of children to private schools, and that the holding of such portions of the above statutes unconstitutional renders such portions null and void from their very enactment.

It is the further opinion of this office that, under the present state of the law, boards of education have no legal basis for aiding private school transportation for either elementary

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or high school pupils, but that it would be legal and proper for school boards in districts where private school transportation was provided last school year to make application for state transportation aid based upon the number of children transported to public schools and excluding therefrom those children transported to private schools.

This office is of the further opinion that the State Board of Education may deny an application for state transportation aid for transportation to private schools where the fact that the application is based on transportation to private schools appears on the face of the application or on other reports required to be filed in the office of the State Department of Education, and this is true although the transportation may have been completed and approved prior to the date of the rendition of the decision in the McVey case.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. Inglish.

Yours very truly,

JOHN M. DALTON
Attorney General

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