Schools—School Districts—Junior College Courses—High Schools—Common School Fund.

A district high school is merely a part of the district school activities. It is not a legal entity.

The income derived from the State permanent common school fund cannot be used for the purpose of maintaining junior college courses. Other funds which are provided by taxation to augment the income received by the district from the permanent common school fund are impressed with a trust for the benefit of the common school fund to the extent that sufficient thereof, in conjunction with the amount received from the State common permanent school fund, will be used to maintain a free public common school in the district for a

period of at least three months. To this extent these funds could not be used for junior college work. Only the surplus that remains after providing for a free common school for nine months in each year and excluding altogether the moneys derived from the State common permanent school fund may be used for general college work and then only when authorized by the voters to be used for that purpose.

Sections 1302-1309, R.C.M., 1921, relating to junior college courses held indefinite and not capable of being put into operation without further legislation.

Julius J. Wuerthner, Esq., February 19, 1930.
Attorney at Law,
Great Falls, Montana.

My dear Senator Wuerthner:

You have requested an opinion relative to the procedure to be adopted in submitting to the electors the question of using the common school funds of your school district for the establishment and maintenance of junior college courses in your school. I understand that your school district is a district of the first class.

Section 1302, R.C.M. 1921, provides:

> "Any accredited high school in the state, approved as hereinafter provided, may establish normal training courses for rural school teachers, or junior college courses, or both."

Section 1307 provides that junior college courses established in any high school shall conform to such requirements and regulations as may be prescribed by the chancellor of the University of Montana.

Section 1309 is as follows:

> "None of the common school funds shall be used in any county to carry out the purpose of this act, without first submitting such proposed expenditure to a vote of the qualified electors affected thereby."

An accredited high school is simply one that meets the standards of study required by the state board of education. (See Section 836, R.C.M. 1921). Whether accredited or not, a district high school is merely a part of the district school activities, consisting of the ninth, tenth, eleventh, and twelfth grades. It is not a legal entity and has no means of acting as such. The entity is the school district which maintains high school classes as a part of its educational work. Section 1302 is not directed either to the school board or to the school district. When it says a district high school may establish junior college courses this is merely saying that the ninth, tenth, eleventh and twelfth grades of a district school may do so. Of course, these grades can do nothing of the sort.

In my opinion, what was intended by the legislature was that any school district maintaining accredited high school grades could establish junior college courses as distinguished from districts not maintaining accredited high school grades. It was no doubt the purpose to permit such districts to still further expand their teaching activities.

As a school district acts through its board of trustees, it follows that it is that board which must determine in the first instance whether the district will establish junior college courses as a part of the teaching activities of the district. No provision is made by law requiring such establishment to be made upon a petition, and therefore it is my opinion that the board may do so without any petition being filed, just as it may do when it establishes high school grades.

It will be observed that there are no provisions made for the district obtaining any funds with which to carry on this work, and if carried on at all, it must be by the use of those funds provided for the maintenance and operation of the common and high school grades.

The common school fund is prohibited from being used for this purpose unless authority for such expenditure is obtained from the qualified voters affected thereby.

Part of this common school fund is made up of distributions from the income of the state permanent common school fund. No part of these moneys may be expended for junior college work by the district even though the voters of the district authorized it. This fund is held in trust by the State of Montana for the benefit of the common schools, and the Constitution directs that the income thereof shall be used only for common school purposes. If this fund were to be used for higher educational work then the purpose of the Constitution and the condition of the grants made to the state establishing the fund would be defeated, and the fund would be made to carry the burden of providing higher educational facilities to the detriment of the common schools for which it was especially established.

It is therefore apparent that no part of the moneys received from this fund can in any event be used for the establishment and maintenance of junior college courses in a district high school.

The Constitution further provides that in addition to the funds received from the state permanent common school fund the legislature must provide funds by taxation or otherwise, sufficient to maintain a free public common school in each district for at least three months. The legislature has provided various sources of revenue for the school districts by taxation and otherwise, and, in my opinion, all of these additional funds are impressed with a trust to the extent that sufficient thereof will be used for the purpose of carrying on a free public common school for a period of at least three months in each district. To this extent these funds could not be used for junior college work.

These additional funds are also raised for the purpose of not only maintaining school for the constitutional minimum of a three months period, but also under the statute to maintain such school for at least

nine months in first and second class districts. Some of these funds which are raised by special levies may only be raised in an amount which is sufficient when taken together with the other funds of the district to maintain school for the nine months period.

It is my opinion that the legislature, by the enactment of Section 1309, did not intend that any of the common school funds which are required to maintain a common school in the district for nine months should be used to establish and maintain junior college courses. It is only the surplus that would remain, if any, after providing for nine months' common school and excluding altogether the moneys that are derived from the state common permanent school fund, that could be authorized by the voters to be used for junior college work.

The legislature has not provided any method or means for determining whether any surplus will exist in any given year. In my opinion, it would be necessary to ascertain whether in fact any surplus existed before the district would be justified in holding an election to determine whether such surplus might be spent for junior college work, and to state the amount in the question submitted to the voters.

In my opinion, such an election would have to be held every year, even though in each year there is a surplus and that a blanket question could not be submitted to the voters at one election to expend any surplus that might exist at that time, or at any future time, for the reason that no provision is made by the law for discontinuing the right to use such surplus when once granted, and a grant once given would be in perpetuity.

No provision whatever is made in the act for the legal machinery that is necessary to hold such an election. It merely provides that an election is first required before the funds can be expended. No one is given authority to call the election, nor is the manner of calling it specified. Such an election would be a special election even though it were held on the date that a general school election is held. Notice thereof would be required to be given, yet the statute does not provide for a notice to be given nor does it say who shall give the notice, when it shall be given, the manner in which it shall be given, or for what period of time it must be given.

There is no general law relating to elections upon matters of this kind which could be brought to the aid of this section. The provisions for holding elections and giving notice relating to the election of trustees, the voting of bonds, the creation of indebtedness and the levying of extra taxes by school districts are all special and refer to those matters only, and they cannot be invoked in this case.

The rule seems to be that even where an election is authorized to be held by statute but no provision is made for the mode and manner of holding it no such election may be held. Our Supreme Court, in the case of State ex rel. Rowe vs. Kehoe, 49 Mont. 582, has announced the doctrine that even where the people are entitled under the Constitution to elect officers they cannot exercise the right in the absence of statutory provisions regulating the mode and manner of holding the elec-

tions, and this rule would a fortiori apply in the case in question. Neither this office nor the courts can supply the necessary legislation which must be had before Section 1309 can be put in operation.

> "It is always competent for the legislature to speak clearly and without equivocation, and it is safer for the judicial department to follow the plain and obvious meaning of an act, rather than to speculate upon what might have been the views of the legislature in the emergency which may have arisen. It is wiser and safer to leave to the legislative department to supply a supposed or actual casus omissus than to attempt to do so by judicial construction." (People vs. Woodruff, 32 N.Y. 364.)

> "Courts cannot supply omissions in legislation, nor afford relief, because they are supposed to exist. To adopt the language of Mr. Justice Woods in Hobbs vs. McLean, 117 U. S. 579, 6 Sup. Ct. Rep. 870: 'When a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe'." (People vs. Woodruff, 32 N.Y. 364.)

It is therefore my opinion that the legislation upon the subject is entirely deficient, and that no valid election can be held for the purpose of expending any of the common school funds of a district for the purpose of establishing and maintaining junior college courses.

Very truly yours,
L. A. FOOT,
Attorney General.