used to meet the interest on the bonds and other expenses payable *prior to the completion* of the works. Based upon my reasoning in answer to your first question, these funds cannot be used for the payment of additional compensation, and therefore my answer to your second question is in the negative.

Your third question concerns the payment of additional compensation to the city attorney from the proceeds of the revenue bonds during the construction of the sewage works. For the same reasons given in my answer to question one, it is my opinion that the answer is again in the negative. However, the Acts of 1932, *supra,* Sec. 3, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-4303 provides:

> "* * * The board [board of public works of the city, or the committee or body authorized to perform the duties of the board of public works in cities where there is no such board, or the board of trustees of the town, as the case may be] may employ engineers, architects, inspectors, superintendent, manager, collectors, *attorneys,* and such other employees as in its judgment may be necessary in the execution of its powers and duties, and may fix their compensation, all of whom shall do such work as the board shall direct. * * *" (Our emphasis and insertion)

Thus, the board has specific authority to employ attorneys to assist the regular city attorney when necessary to perform additional legal work.

OFFICIAL OPINION NO. 24

June 1, 1956

Mr. Wilbur Young
State Superintendent of Public Instruction
227 State House
Indianapolis, Indiana

Dear Mr. Young:

Your letter of May 17, 1956, has been received and reads as follows:

"In 1948, your office issued Official Opinion No. 41,

which concerned the teaching of religion as provided by Chapter 225 of the 1943 Acts and by Chapter 91 of the 1923 Acts. This Opinion concerned the validity of the aforementioned statutes in view of the decision of the U. S. Supreme Court in McCollum v. Board of Education. In 1952 the Supreme Court again considered the religious education issue in Zorach v. Clauson, 343 U. S. 306.

"May I have your Official Opinion on the following questions:

"1. Is all or are any parts of Chapter 225 of the Acts of 1943 unconstitutional or invalid? If so, which parts and why?

"2. Is all or are any parts of Chapter 91 of the Acts of 1923 unconstitutional or invalid? If so, which parts and why?"

In answer to your first question, I wish to advise that Official Opinion No. 41 of 1948, as found in 1948 O. A. G., page 233, was primarily premised upon the decision of the Supreme Court of the United States in the case of McCollum v. Board of Education (1948), 333 U. S. 203, 68 S. Ct. 461, 92 L. Ed. 649. Since that decision, the Supreme Court of the United States has ruled on the constitutionality on the Plan for Released Time for Religious Education adopted by the State of New York, which decision is Zorach *et al.* v. Clauson *et al.* (1952), 343 U. S. 306, 72 S. Ct. 679, 96 L. Ed. 954, in which said Court affirmed the decision of the Court of Appeals of New York holding such New York Plan constitutional.

The Acts of 1943, Ch. 225, Sec. 1, as found in Burns' Indiana Statutes (1948 Repl.), Section 28-505a, referred to in your letter, is as follows:

"If it is the wish of the parent, guardian or other person having control or legal custody of any child, that such child attend, for a period or periods to be determined by the local principal or superintendent of schools and not exceeding in the aggregate one hundred and twenty [120] minutes in any week, a school for religious instruction, conducted and maintained by

some church or association of churches, or by some association organized for religious instruction, and incorporated under the laws of this state, and which school shall not be conducted or maintained, either in whole or in part, by the use of any public funds raised by taxation; such child upon written request of the parent, guardian or other person having legal custody may be permitted to attend such school for religious instruction and such permission shall be valid for not longer than the school year during which it is issued. Such school for religious instruction shall maintain records of attendance which shall at all times be open to the inspection of the public school attendance officers. Attendance at such school for religious instruction shall be given the same attendance credit as at the public school."

The New York Plan is set out in the footnotes to the last-referred to United States Supreme Court decision, on page 308, and is as follows:

"The New York City released time program is embodied in the following provisions:

"(a) N. Y. Education Law, § 3210, subdiv. 1 (b), which provides that 'Absence for religious observance and education shall be permitted under rules that the commissioner shall establish.'

"(b) Regulations of the Commissioner of Education of the State of New York, Art. 17, § 154 (1 N. Y. Official Code Comp. 683), which provide for absence during school hours for religious observance and education outside the school grounds [par. 1], where conducted by or under the control of a duly constituted religious body [par. 2]. Students must obtain written requests from their parents or guardians to be excused for such training [par. 1], and must register for the training and have a copy of their registration filed with the public school authorities [par. 3]. Weekly reports of their attendance at such religious schools must be filed with their principal or teacher [par. 4]. Only one hour a week is to be allowed for such training, at the

end of a class session [par. 5], and where more than one religious school is conducted, the hour of release shall be the same for all religious schools [par. 6].

"(c) Regulations of the Board of Education of the City of New York, which provide similar rules supplementing the State Commissioner's regulations, with the following significant amplifications: No announcement of any kind will be made in the public schools relative to the program [rule 1]. The religious organizations and parents will assume full responsibility for attendance at the religious schools and will explain any failures to attend on the weekly attendance reports [rule 3]. Students who are released will be dismissed from school in the usual way [rule 5]. There shall be no comment by any principal or teacher on attendance or nonattendance of any pupil upon religious instruction [rule 6]."

Since the majority opinion of the United States Supreme Court, as written by Mr. Justice Douglas, in its entirety, has a material bearing on the first question presented, it is set out herein and reads as follows:

"New York City has a program which permits its public schools to release students during the school day so that they may leave the school buildings and school grounds and go to religious centers for religious instruction or devotional exercises. A student is released on written request of his parents. Those not released stay in the classrooms. The churches make weekly reports to the schools, sending a list of children who have been released from public school but who have not reported for religious instruction.

"This 'released time' program involves neither religious instruction in public school classrooms nor the expenditure of public funds. All costs, including the application blanks, are paid by the religious organizations. The case is therefore unlike McCollum v. Board of Education, 333 U. S. 203, which involved a 'released time' program from Illinois. In that case the classrooms were turned over to religious instructors. We

accordingly held that the program violated the First Amendment which (by reason of the Fourteenth Amendment) prohibits the states from establishing religion or prohibiting its free exercise.

"Appellants, who are taxpayers and residents of New York City and whose children attend its public schools, challenge the present law, contending it is in essence not different from the one involved in the McCollum case. Their argument, stated elaborately in various ways, reduces itself to this: the weight and influence of the school is put behind a program for religious instruction; public school teachers police it, keeping tab on students who are released; the classroom activities come to a halt while the students who are released for religious instruction are on leave; the school is a crutch on which the churches are leaning for support in their religious training; without the cooperation of the schools this 'released time' program, like the one in the McCollum case, would be futile and ineffective. The New York Court of Appeals sustained the law against this claim of unconstitutionality. 303 N. Y. 161, 100 N. E. (2d) 463. The case is here on appeal. 28 U. S. C. § 1257 (2).

"The briefs and arguments are replete with data bearing on the merits of this type of 'released time' program. Views *pro* and *con* are expressed, based on practical experience with these programs and with their implications. We do not stop to summarize these materials nor to burden the opinion with an analysis of them. For they involve considerations not germane to the narrow constitutional issue presented. They largely concern the wisdom of the system, its efficiency from an educational point of view, and the political considerations which have motivated its adoption or rejection in some communities. Those matters are of no concern here, since our problem reduces itself to whether New York by this system has either prohibited the 'free exercise' of religion or has made a law 'respecting an establishment of religion' within the meaning of the First Amendment.

"It takes obtuse reasoning to inject any issue of the 'free exercise' of religion into the present case. No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools. A student need not take religious instruction. He is left to his own desires as to the manner or time of his religious devotions, if any.

"There is a suggestion that the system involves the use of coercion to get public school students into religious classrooms. There is no evidence in the record before us that supports that conclusion. The present record indeed tells us that the school authorities are neutral in this regard and do no more than release students whose parents so request. If in fact coercion were used, if it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction, a wholly different case would be presented. Hence we put aside that claim of coercion both as respects the 'free exercise' of religion and 'an establishment of religion' within the meaning of the First Amendment.

"Moreover, apart from that claim of coercion, we do not see how New York by this type of 'released time' program has made a law respecting an establishment of religion within the meaning of the First Amendment. There is much talk of the separation of Church and State in the history of the Bill of Rights and in the decisions clustering around the First Amendment. See Everson v. Board of Education, 330 U. S. 1; McCollum v. Board of Education, *supra*. There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. 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.'

"We would have to press the concept of separation of Church and State to these extremes to condemn the present law on constitutional grounds. The nullification of this law would have wide and profound effects. A Catholic student applies to his teacher for permission to leave the school during hours on a Holy Day of Obligation to attend a mass. A Jewish student asks his teacher for permission to be excused for Yom Kippur. A Protestant wants the afternoon off for a family baptismal ceremony. In each case the teacher requires parental consent in writing. In each case the teacher, in order to make sure the student is not a truant, goes further and requires a report from the priest, the rabbi, or the minister. The teacher in other words cooperates in a religious program to the extent of making it possible for her students to participate in it. Whether she does it occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students does not alter the character of the act.

"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 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. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here.

"This program may be unwise and improvident from an educational or a community viewpoint. That appeal is made to us on a theory, previously advanced, that each case must be decided on the basis of 'our own prepossessions.' See McCollum v. Board of Education, *supra,* p. 238. Our individual preferences, however, are not the constitutional standard. The constitutional standard is the separation of Church and State. The problem, like many problems in constitutional law, is

one of degree. See McCollum v. Board of Education, *supra,* p. 231.

"In the McCollum case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction. We follow the McCollum case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion."

1. In answer to your first question, I am of the opinion the Acts of 1943, Ch. 225, Sec. 1, *supra,* is constitutional in its entirety. This is true for the reason there is no material difference between the provisions of the Indiana Released Time Statute and the New York Plan, and language of the United States Supreme Court, above quoted, is equally applicable to the Indiana statute.

2. In answer to your second question, I do not find that the case of Zorach *et al.* v. Clauson *et al., supra,* affects the opinion given by this office in said Official Opinion No. 41 of 1948 on the validity of the Acts of 1907, Ch. 191, Sec. 2, as last amended by the Acts of 1923, Ch. 91, Sec. 1, as found in Burns' Indiana Statutes (1948 Repl.), Section 28-3418. Therefore, the opinion given in said Opinion No. 41 of 1948 applicable to your second question is hereby affirmed, the pertinent parts of which appear on pages 251 and 252 of said Official Opinion, and read as follows:

"You further present the question, does the same decision invalidate the teaching of Bible as one semester course, as permitted by the 1923 Acts, Chapter 91, same being Section 28-3418 of Burns' 1933. This is an amendment of Section 2, Chapter 191, Acts 1907 and as amended reads as follows:

" 'The following enumerated studies shall be taught in all commissioned high schools through-

out the state, together with such additional studies as any local board of education may elect to have taught in the high school: Provided, That such additions shall be subject to revision of the state board of education. Mathematics: commercial arithmetic, algebra, geometry. History: United States, ancient, medieval or modern. Geography: commercial or physical. English: composition, rhetoric. Literature: English, American. Language (foreign): Latin or any modern foreign language. Science: biology, physics or chemistry. Civil government: general and state. Drawing. Music.'

* * *

"In my opinion, Chapter 91 of the Acts of 1923, same being Section 28-3418 of Burns', is not affected by either the opinion rendered in the McCollum or the Everson case, provided, however, that the teaching is secular and not sectarian in nature."

OFFICIAL OPINION NO. 25

June 5, 1956

Mr. Wilbur Young
State Superintendent of Public Instruction
227 State House
Indianapolis, Indiana

Dear Mr. Young:

Your letter of May 17, 1956, has been received and reads as follows:

"The Beech Creek-Center Joint School District of Greene County, Indiana, has been operating a joint school in Solsberry in Beech Creek Township. This joint school organization soon will be entitled to receive its final portion of state tuition support for the current school year, 1955-1956.

"On May 12, 1956, the trustee of Center Township served a written notice on the trustee of Beech Creek