Whether that amounts to a proper filing, i.e., is excessive or discriminatory, I believe is within your discretion based upon all available information.

OFFICIAL OPINION NO. 41

May 10, 1948.

Hon. Ben H. Watt, Superintendent,
State Board of Education,
227 State House,
Indianapolis, Indiana.

Dear Mr. Watt:

Your letter of March 22, 1948, has been received in which you request an official opinion on the following questions:


"2. Does the same decision delivered by Justice Black invalidate rule 79 of the General Commission of the Indiana State Board of Education?

"3. Does the same decision invalidate the teaching of Bible as a one semester course as permitted by the 1923 Acts, Chapter 91?"

Chapter 225 of the Acts of 1943 is Section 28-505a, Burns' 1947 Pocket Supplement, and amends Chapter 132 of the Acts of 1921 by adding a new section to the law. The original law is the compulsory school attendance law of this State, being Section 28-501, et seq., Burns' 1947 Pocket Supplement. It is, therefore, clear this is an amendment to our Compulsory Education law and is in the nature of an exception to such law, available for all classes of persons desiring to take advantage of it. The 1943 amendment reads 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."

Your first question is the most difficult. The simple answer to it would be that the decision in Vashti v. McCollum does not, in and of itself, affect the Indiana statute quoted above, because it involved a different set of facts—a somewhat different system than that authorized by the Indiana statute. But, I take it, you would like to know whether the rationale or reasoning of the decision discloses fatal defects in the Indiana law.

For your guidance and because many of those intensely interested in a program of religious instruction do not have ready access to the McCollum decision, I feel it advisable to discuss the opinion more at length than is usual to determine what guidance may be obtained.

In the decision, the Supreme Court of the United States decided, eight to one, that the release time religious instruction program operated in the public schools of Champaign, Illinois is in violation of the First and Fourteenth Amendments to the Federal Constitution. The First Amendment reads:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise
thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Fourteenth Amendment reads:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The appellant, Vashti McCollum began her action for mandamus against the Champaign Board of Education in the Circuit Court of Champaign County, Illinois. Her asserted interest was that of a resident and taxpayer of Champaign and of a parent whose child was then enrolled in the Champaign public schools. Illinois has a public compulsory education law which, with exceptions, requires parents to send their children, age seven to sixteen, to its tax-supported public schools where the children are to remain in attendance during the hours when the schools are regularly in session. Parents who violate this law commit a misdemeanor punishable by fine unless the children attend private or parochial schools which meet educational standards fixed by the state. District Boards of Education are given general supervisory powers over the use of the public school building within the school district. See Rev. Stat. Ch. 122, Sec. 123, 301, 1943.

The appellant's petition for mandamus alleged that religious teachers, employed by private religious groups, were permitted to come weekly into the school buildings during the regular hours set apart for secular teaching, and then and there for a period of thirty minutes substitute their religious teaching for the secular education provided under the compulsory education law.

The petition charged that this joint public school religious group program violated the First and Fourteenth Amend-
ments to the United States Constitution. The prayer of her petition was that the Board of Education be ordered to "adopt and enforce rules and regulations prohibiting all instruction in and teaching of all religious education in all public school houses and buildings in said district when occupied by public schools."

The Supreme Court of Illinois refused to sustain the contentions of the petitioner; the Supreme Court of the United States did sustain her.

As pointed out by the Court's opinion, the following facts are shown by the record without dispute.

"In 1940 interested members of the Jewish, Roman Catholic and a few Protestant faiths formed a voluntary association called the Champaign Council on Religious Education. They obtained permission from the Board of Education to offer classes in religious instruction to public school pupils in grades 4 to 9, inclusive. Classes were made up of pupils whose parents signed printed cards requesting that their children be permitted to attend; they were held weekly, thirty minutes for the lower grades, forty-five minutes for the higher. The council employed the religious teachers at no expense to the school authorities, but the instructors were subject to the approval and supervision of the superintendent of schools. The classes were taught in three separate religious groups by Protestant teachers, Catholic priests, and a Jewish rabbi. Although for the past several years there have apparently been no classes instructed in the Jewish religion. Classes were conducted in the regular classrooms of the school building. Students who did not choose to take the religious instruction were not released from public school duties. They were required to leave their classrooms and go to some other place in the school building for pursuit of their secular studies. On the other hand, students who were released from secular studies for the religious instruction were required to be present at the religious classes. Reports of the presence or absence were to be made to the secular teachers.
After stating the facts, Mr. Justice Black, delivering the majority opinion, said:

"The foregoing facts, without reference to others that appear in the record, show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in Everson v. Board of Education, 330 U. S. 1. * * *"

"To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodies in the First Amendment's guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the Everson case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable.

"Here not only are the state's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for
their religious classes through use of the state’s compulsory public school machinery. This is not separation of Church and State.”

It thus appears, in the majority opinion (and as will later appear also in the concurring opinion of Mr. Justice Frankfurter) the chief objections to the Champaign program were two:

(1). The use of tax-supported property for sectarian religious instruction.
(2). The element of compulsion which required either attendance in school or classes for religious instruction.

Would either one, alone, invalidate a program?

At this point a comparison of the Champaign program and the Indiana law might be of some assistance. The following are the salient points, as I see them:

<table>
<thead>
<tr>
<th>Champaign</th>
<th>Indiana</th>
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<tbody>
<tr>
<td>1. Parental request is required.</td>
<td>x</td>
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<tr>
<td>2. Teachers are employed by churches or church groups.</td>
<td>x</td>
</tr>
<tr>
<td>3. Teachers are subject to approval and supervision of Superintendent of Schools.</td>
<td>x</td>
</tr>
<tr>
<td>4. Cards are furnished and passed out in school.</td>
<td>x</td>
</tr>
<tr>
<td>5. Attendance records are kept.</td>
<td>x</td>
</tr>
<tr>
<td>6. Classes are held on school property.</td>
<td>x</td>
</tr>
<tr>
<td>7. Students not taking religious instruction are required to continue regular school studies.</td>
<td>x</td>
</tr>
<tr>
<td>8. Maximum time per week.</td>
<td>30-40 min.</td>
</tr>
</tbody>
</table>

Quoting Justice Black again, because this statement seems to be the crux of the decision:

“Here not only are the state’s tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state’s compulsory public school machinery. * * *”
It is well to note, however, that it was the "Champaign program" that was before the Court and not a statute. The Supreme Court of Illinois sustained the validity of the program on the grounds that the State's statute granted the board authority to establish such a program. This holding was held to be sufficient by the Supreme Court of the United States to give it jurisdiction. The Illinois statute in question was drawn within the meaning of 28 U. S. C. Sec. 344 (a).

The case of Everson v. Board of Education (1946), 330 U. S. 1, referred to by the Court, dealt with a New Jersey statute authorizing its local districts to make rules and contracts for the transportation of children to and from school. A township board of education, acting pursuant to this statute, authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system. Part of this money was the payment of transportation of some children in the community to Catholic parochial schools. These church schools gave their students, in addition to secular education, regular religious instruction conforming to the religious tenets and modes of worship of the Catholic faith.

Suit was filed by taxpayers in the state court challenging the right of the board to reimburse parents of parochial school students, the contention being that the statute and the resolution passed pursuant to it violated both the State and Federal Constitution. The trial court held that the Legislature was without power to authorize such payment under the State Constitution. The ruling was reversed by the New Jersey Court of Errors and Appeals. Neither the statute nor the resolution, they said, was in conflict with the State Constitution. The ruling was reversed by the New Jersey Court of Errors and Appeals. Neither the statute nor the resolution, they said, was in conflict with the State Constitution or the provisions of the Federal Constitution in issue. On appeal to the Supreme Court of the United States of the federal questions in issue, the court by a divided opinion affirmed the decision of the New Jersey Court of Errors and Appeals. The majority opinion holding that the payments, as herein related, were for a public purpose and inured to the benefit of the child rather than to the church and, therefore, did not violate the provisions of the First and Fourteenth Amendments to the Constitution. Here the Court said: "That the legislation as applied does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and
from accredited schools.” Here, majority and minority of the Court, though divided in arriving at opposite conclusions both held that the First Amendment’s language properly interpreted had erected a wall of separation between Church and State; that the amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises; that Legislatures are free to make, and courts to sustain, appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teachings or observances, be the amount large or small.


A matter that should not be overlooked in the consideration of the problem is that the dissenting opinion rendered in the Everson case, was written by Mr. Justice Rutledge, with whom Mr. Justice Frankfurter, Mr. Justice Jackson and Mr. Justice Burton concurred. Likewise, the fact that in the McCollum case these same gentlemen joined in and agreed in a separate but concurring opinion written by Mr. Justice Frankfurter, in which he said:

“* * * We find that the basic Constitutional principle of absolute separation was violated when the State of Illinois, speaking through its Supreme Court, sustained the school authorities of Champaign in sponsoring and effectively furthering religious beliefs by its educational arrangement.”

Here it is well to note that Mr. Justice Rutledge and Mr. Justice Burton, although concurring with Mr. Justice Frankfurter, likewise joined, agreed and concurred in the Court’s opinion rendered by Mr. Justice Black.

In attempting to analyze the various opinions rendered in this case, I must confess “considerable confusion.” It is comforting to see, however, that the lone dissenter, Mr. Justice Reed, is also puzzled. In his dissent opinion, he states:

“* * * I find it difficult to extract from the opinions any conclusion as to what it is in the Champaign plan that is unconstitutional. Is it the use of school buildings for religious instruction; the release of pupils
by the schools for religious instruction during school hours; the so-called assistance by teachers in handing out the request cards to pupils, in keeping lists of them for release and records of their attendance; or the action of the principals in arranging an opportunity for the classes and the appearance of the Council's instructors? None of the reversing opinions say whether the purpose of the Champaign plan for religious instruction during school hours is unconstitutional or whether it is some ingredient used in or omitted from the formula that makes the plan unconstitutional."

Nor is the cloud of confusion lifted when we read from Mr. Justice Jackson's opinion:

"* * * So far as I can see this Court does not tell the State court where it may stop, nor does it set up any standards by which the State court may determine that question for itself."

Perhaps a few excerpts from Mr. Justice Frankfurter's opinion may throw light on the subject.

"This case (the Champaign program) in the light of the Everson decision, demonstrates anew that the mere formulation of a relevant Constitutional principle is the beginning of the solution of a problem, not its answer. This is so because the meaning of a spacious conception like that of the separation of Church from State is unfolded as appeal is made to the principle from case to case. We are all agreed that the First and the Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an 'established church.' But agreement, in the abstract, that the First Amendment was designed to erect a 'wall of separation between Church and State,' does not preclude a clash of views as to what the wall separates. Involved is not only the Constitutional principle but the implications of judicial review in its enforcement. Accommodation of legislative freedom and Constitutional limitations upon that freedom cannot be achieved by a mere
phrase. We cannot illuminatingly apply the 'wall-of-separation' metaphor until we have considered the relevant history of religious education in America, the place of the 'released time' movement in that history, and its precise manifestation in the case before us.

"* * * Traditionally, organized education in the Western world was Church education. * * *

"* * * The emigrants who came to these shores brought this view of education with them. * * *

Here the opinion goes into the evolution of colonial education. It points out that the modern public school derived from the philosophy of freedom reflected in the First Amendment.

"* * * New York and Massachusetts provide famous chapters in the history that established dissociation of religious teaching from State-maintained schools. In New York, the rise of the common schools led, despite fierce sectarian opposition, to the barring of tax funds to church schools, and later to any school in which sectarian doctrine was taught. In Massachusetts, largely through the efforts of Horace Mann, all sectarian teachings were barred from the common school to save it from being rent by denominational conflict. The upshot of these controversies, often long and fierce, is fairly summarized by saying that long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people. * * *

"Separation in the field of education, then, was not imposed upon unwilling States by force of superior law. In this respect the Fourteenth Amendment merely reflected a principle then dominant in our national life. To the extent that the Constitution thus made it binding upon the States, the basis of the restriction is the whole experience of our people. Zealous watchfulness against fusion of secular and religious activities by Government itself, through any of its instruments but especially through its educa-
tional agencies, was the democratic response of the American community to the particular needs of a young and growing nation, unique in the composition of its people. * * *

"* * * The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom. The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.

"* * *

"Prohibition of the commingling of religious and secular instruction in the public school is of course only half the story. A religious people was naturally concerned about the part of the child's education entrusted 'to the family altar, the church, and the private school.' * * * Abortive attempts were therefore frequently made to obtain public funds for religious schools. But the major efforts of religious inculcation were a recognition of the principle of Separation by the establishment of church schools privately supported. * * *

"* * * Church leaders decided that if the week-day church school was to succeed, a way had to be found to give the child his religious education during what the child conceived to be his 'business hours.'
"**the Federation (at the Interfaith Conference on Federation held in New York City in 1904) urged that upon the request of their parents children be excused from public school on Wednesday afternoon, so that the churches could provide 'Sunday school on Wednesday.' This was to be carried out on church premises under church authority. Those not desiring to attend church schools would continue their normal classes. Lest these public school classes unfairly compete with the church education, it was requested that the school authorities refrain from scheduling courses or activities of compelling interest or importance.

"The proposal aroused considerable opposition and it took another decade for a 'released time' scheme to become part of a public school system. Gary, Indiana, inaugurated the movement. ** The religious teaching was held on church premises and the public schools had no hand in the conduct of these church schools. They did not supervise the choice of instructors or the subject matter taught. Nor did they assume responsibility for the attendance, conduct or achievement of the child in a church school; and he received no credit for it. The period of attendance in the religious schools would otherwise have been a play period for the child, with the result that the arrangement did not cut into public school instruction or truly affect the activities or feelings of the children who did not attend the church schools.

"From such a beginning 'released time' has attained substantial proportions. In 1914-15, under the Gary program, 619 pupils left the public schools for the church schools during one period a week. According to responsible figures almost 2,000,000 in some 2,200 communities participated in 'released time' programs during 1947. A movement of such scope indicates the importance of the problem to which the 'released time' programs are directed. But to the extent that aspects of these programs are open to Constitutional objection, the more extensively the movement operates, the more ominous the breaches in the wall of separation.
“* * * It is only when challenge is made to the share that the public schools have in the execution of a particular ‘released time’ program that close judicial scrutiny is demanded of the exact relation between the religious instruction and the public educational system in the specific situation before the Court.”

Here the opinion goes into the “undisputed facts.” Then the Court says:

“Religious education so conducted on school time and property is patently woven into the working scheme of the school. The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects. * * * Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally. That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend. * * * The children belonging to these non-participating sects will thus have inculcated in them a feeling of separatism when the school should be the training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents. As a result, the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care. These are consequences not amenable to statistics. But they are precisely the consequences against which the Constitution was directed when it prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages.” (Our emphasis.)

“* * * Nor can the intrusion of religious instruction into the public school system of Champaign be mini-
mized by saying that it absorbs less than an hour a week; in fact, that affords evidence of a design constitutionally objectionable. If it were merely a question of enabling a child to obtain religious instruction with a receptive mind the thirty or forty-five minutes could readily be found on Saturday or Sunday. If that were all, Champaign might have drawn upon the French system, known in its American manifestation as 'dismissed time,' whereby one school day is shortened to allow all children to go where they please, leaving those who so desire to go to a religious school. The momentum of the whole school atmosphere and school planning is presumably put behind religious instruction, as given in Champaign, precisely in order to secure for the religious instruction such momentum and planning. * * *

"* * * Different forms which 'released time' has taken during more than thirty years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found unexceptionable. * * * We find that the basic Constitutional principle of absolute separation was violated when the State of Illinois, speaking through its Supreme Court, sustained the school authorities of Champaign in sponsoring and effectively furthering religious beliefs by its educational arrangement.

"Separation means separation, not something less. * * * The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep strictly apart. 'The great American principle of eternal separation'—Elihu Root's phrase bears repetition—is one of the vital reliances of our Constitutional system for assuring unity among our people stronger than our diversities. It is the Court's duty to enforce this principle in its full integrity.

"We renew our conviction that 'we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.' Everson v. Board
of Education, 330 U. S. at 59. If nowhere else, in the relation between Church and State, 'good fences make good neighbors.'

Referring to the Indiana law, it is apparent that it does not permit or authorize the heretofore enumerated "undisputed facts" of the Champaign plan. Here we have "released time" and attendance at the school for religious instruction given the same attendance credit as at the public school. Missing and not authorized are: the use of public schools for religious instruction; assistance by teachers in handing out the request cards to pupils, in keeping lists of them for release and records of their attendance; action of the principals in arranging an opportunity for the classes and in the appearance of the council's instructors; the approval and supervision of the instructors of religion by the superintendent of schools.

In the many conferences held in preparing this opinion, it was shown that in many cases the Indiana law has been administered almost identically with the Champaign program, but the Indiana statute does not so require and faulty administration would not invalidate the statute.

To me, therefore, we have presented before us simply the question of "released time" and the fact that attendance at such school for religious instruction shall be given the same attendance credit as at the public school. Can it be said that this violates the basic constitutional principle of absolute separation?

Mr. Justice Reed in his dissenting opinion, after stating that he found it difficult to extricate from the opinion any conclusion as to what is in the Champaign plan that is unconstitutional, stated:

"From the tenor of the opinions I conclude that their teachings are that any use of a pupil's school time whether that use is on or off the school grounds, with the necessary school regulations to facilitate attendance, falls under the ban. * * * The use of the words 'cooperation,' 'fusion,' 'complete hands-off,' 'integrate' and 'integrated' to describe the relations between the school and the Council in the plan evidences this. So does the interpretation of the word 'aid.' The criticized 'momentum of the whole school atmosphere,' 'feeling
of separatism' engendered in the non-participating sects, 'obvious pressure * * * to attend,' and 'divisiveness' lead to the stated conclusion. From the holding and the language of the opinions, I can only deduce that religious instruction of public school children during school hours is prohibited. * * *"

And again:

"The opinions do not say in words that the condemned practice of religious education is a law respecting an establishment of religion contrary to the First Amendment. The practice is accepted as a state law by all. I take it that when the opinion of the Court says that 'The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects' and concludes 'This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith,' the intention of its author is to rule that this practice is a law 'respecting an establishment of religion.' That was the basis of Everson v. Board of Education, 330 U. S. 1. * * *"

Quoting again from Mr. Justice Reed:

"* * * I agree that pupils cannot 'be released in part from their legal duty' of school attendance upon condition that they attend religious classes. But as Illinois has held that it is within the discretion of the School Board to permit absence from school for religious instruction no legal duty of school attendance is violated. * * * If the sentence in the Court's opinion, concerning the pupils' release from legal duty, is intended to mean that the Constitution forbids a school to excuse a pupil from secular control during school hours to attend voluntarily a class in religious education, whether in or out of school buildings, I disagree. * * *" (Our emphasis.)

(In Indiana it can hardly be said that students are "excused" since attendance records are required and attendance credit is given.)
Thus, we have the interpretations of the various opinions by a member of that Court. It must carry considerable weight. It is only, states Mr. Justice Frankfurter, when challenge is made to the share that the public schools have in the execution of a particular released time program that close judicial scrutiny is demanded of the exact relation between the religious instruction and the public educational system in the particular situation before the Court.

The element of compulsion is undeniably present in the Indiana law. The Act in effect says, "You may perform a legal duty of attending school by taking religious instruction."

As Mr. Justice Frankfurter said, "That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain."

No Act would be necessary to permit a child to take religious instruction outside of the schoolhouse and after school hours. I do not believe an Act would be necessary to permit "dismissed time" at any time of the day if the students are dismissed with complete freedom to do as they please—to study, to take religious instruction, to take music lessons, etc., or to play.

Is not the very purpose of our Act to "provide pupils for the religious classes through use of the State's compulsory public school machinery?"

Is that the "absolute separation" required?

Recognizing the hazard of the determination of such a complicated problem as this upon the basis of one opinion, I nevertheless am of the opinion that our Act will have difficulty, to use the words of Mr. Justice Reed, in running the gantlet, of the judgment rendered in the McCollum case.

The most questionable part of the Indiana law is the last two sentences. They read:

"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 purpose of the Act may be executed without those two sentences. I would therefore recommend that for the present, no attendance records be kept.

The general rule with respect to the severability of constitutional and unconstitutional provisions of an Act is that unconstitutional provisions may be deleted if it appears that such deletion does not do violence to the legislative intent in passing the Act. The rule is discussed at length in Ettinger, et al. v. Studevent (1941), 219 Ind. 406. As stated at page 423.

"Where the Legislature attempts to do several things one of which is invalid it may be discarded if the remainder of the act is workable and in no way dependent upon the invalid portion. * * *"

Here the Legislature apparently wanted to provide affirmative authority for the release of children for religious instruction. It added an element of compulsion which is objectionable. By the deletion of the objectionable part, the major intent, in my opinion, may yet be preserved.

By that, though, I do not mean to imply that the remainder of the Act can, in any event, be sustained but the part which, at present writing, appears to be in violation of the First and Fourteenth Amendments to the Constitution ought not to be enforced.

By the time of the next General Assembly, we may have sufficient information to enact a program (whether this or a modified one) free of all doubt.

We now come to Rule 79 of the general commission of the Indiana State Board of Education, same reads:

"Credit for Bible Study (as prescribed by Chapter 225 of the 1943 Acts) may be granted when achievement or competence on the part of the student has been measured by some recognized test. A maximum of five-tenths units of credit in Bible Study may be allowed toward graduation."

The rule was promulgated to implement the statute discussed above. In the light of the statements of the members of the United States Supreme Court in the McCollum case, it is my opinion that this rule is unconstitutional. There is
definitely herein that element of aid, inducement and encour-
gagement, as well as many other facts that the high court
criticized.

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 throughout 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:
Language (foreign): Latin or any modern
foreign language. Science: biology, physics or
chemistry. Civil government: general and state.
Drawing. Music."

Here I believe it is well to quote from Mr. Justice Jackson's
opinion in the McCollum case:

"** Perhaps subjects such as mathematics, physics
or chemistry are, or can be, completely secularized.
But it would not seem practical to teach either prac-
tice or appreciation of the arts if we are to forbid
exposure of youth to any religious influences. Music
without sacred music, architecture minus the cathe-
dral, or painting without the scriptural themes would
be eccentric and incomplete, even from a secular point
of view. Yet the inspirational appeal of religion in
these guises is often stronger than in forthright ser-
mon. Even such a 'science' as biology raises the issue
between evolution and creation as an explanation of
our presence on this planet. Certainly a course in
English literature that omitted the Bible and other
powerful uses of our mother tongue for religious ends
would be pretty barren. And I should suppose it is
a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world’s peoples. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared."

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.

Note: I have not discussed pertinent provisions of the Indiana Constitution. They are:

"Sec. 2. RIGHT TO WORSHIP.—All men shall be secured in their natural right to worship Almighty God, according to the dictates of their own consciences.

"Section. 3. FREEDOM OF THOUGHT.—No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience.

"Sec. 4. NO PREFERENCE TO ANY CREED.—No preference shall be given, by law, to any creed, religious society, or mode of worship; and no man shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent.

"Sec. 5. NO RELIGIOUS TEST FOR OFFICE.—No religious test shall be required, as a qualification for any office of trust or profit.

"Sec. 6. NO MONEY FOR RELIGIOUS INSTITUTIONS.—No money shall be drawn from the treasury, for the benefit of any religious or theological institution."
"Sec. 7. COMPETENCY OF WITNESS.—No person shall be rendered incompetent as a witness, in consequence of his opinions on matters of religion."

OFFICIAL OPINION NO. 42

May 11, 1948.

Mr. Forrest V. Carmichael,
Executive Secretary,
Indiana State Teachers' Retirement Fund,
Indianapolis, Indiana.

Dear Mr. Carmichael:

I have received your request for an opinion, as follows:

"May disability retirement benefits be paid and leave of absence service credit granted concurrently prior to 30 years of service credit?"

Sub-section (k) of Section 2 of Chapter 353 of the Acts of 1947, provides as follows:

"Any teacher, while actually teaching in the public schools of the state, may be temporarily or permanently retired for disability on a benefit in accordance with this act after he shall have served as such teacher according to the provisions of this act for a period of ten (10) years or more; and, provided, further, That when a teacher is retired for any disability, such retirement shall continue only until such disability is relieved or removed, and no disability benefit shall be paid to such teacher after medical examination made on demand of the board of trustees of the Indiana state teachers' retirement fund and by a physician approved by the said board and made at the expense of said teacher shall establish to the satisfaction of the board that such disability is removed. No benefit for disability continuing for less than one-half (1/2) of a school year shall be paid. The disability benefits paid shall be at the rate of six hundred dollars ($600) per annum: Provided, however, That no disability benefit will be paid at a greater rate than five-eights (5/8)