

SCHOOLS: School Board can call repeated
ELECTIONS: elections to increase school
TAXATION (SCHOOLS): tax levy. Board can issue state-
ments giving information as to
necessity of tax increase. Board must open and operate schools
even though it has insufficient funds to operate for nine month
period.

OPINION NO. 446

September 4, 1970



Honorable Harold J. Esser
State Representative
District No. 18
3 West Glen Arbor Road
Kansas City, Missouri 64114

Dear Representative Esser:

This official opinion is issued in response to your request concerning the following questions:

- "1. Is it legal for a School Board to state publicly that the schools will not open until the prescribed levy is passed, and that there will be a levy election every 17 days until it passes?
- "2. Can the School Board repeatedly submit a levy which requires two-thirds majority without reducing it, stating that they will submit the same levy every 17 days until it is passed?"

Article X, Section 11(b) of the Missouri Constitution limits the tax rate which school districts may impose without voter approval. Such section reads as follows:

"For school districts formed of cities and towns, including the school district of the city of St. Louis--one dollar and twenty-five cents on the hundred dollars assessed valuation;

"For all other school districts--sixty-five cents on the hundred dollars assessed valuation."

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In order for a school district to increase the tax above the limited rate, reference must be made to Article X, Section 11(c) of the Missouri Constitution which provides as follows:

"In all municipalities, counties and school districts the rates of taxation as herein limited may be increased for their respective purposes for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor; provided in school districts the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed three times the limit herein specified and not to exceed one year, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor; provided in school districts in cities of seventy-five thousand inhabitants are over the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed three times the limit herein specified and not to exceed two years, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor, provided, that the rates herein fixed, and the amounts by which they may be increased, may be further limited by law; and provided further, that any county or other political subdivision, when authorized by law and within the limits fixed by law, may levy a rate of taxation on all property subject to its taxing powers in excess of the rates herein limited, for library, hospital, public health, recreation grounds and museum purposes."

Section 164.021, RSMo 1969, implements the provisions of Section 11(c) and provides, in part, as follows:

"1. Whenever it becomes necessary, in the judgment of the school board of any school district in the state, to increase the annual rate of taxation beyond the rate authorized by the constitution for district purposes without

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voter approval, or when the voters of the district equal in number to ten percent or more of the number of votes cast for the member of the school board receiving the greater number of votes cast at the last school election in the district petition the board, in writing, for such an increase of the rate, the board shall determine the rate of taxation necessary to be levied in excess of the authorized rate, and the purpose or purposes for which the increase is required, specifying separately the rate of increase required for each purpose, and the number of years, not in excess of four, for which each proposed excess rate is to be effective. The proposal may provide for a greater rate of increase in one or more years than in others and acceptance of a proposal to increase the tax levy for any year or years shall not prevent the board from subsequently proposing a further increase in the tax levy for the same year or years.

"2. The board shall submit the proposition as to whether the rate of taxation shall be increased as proposed by the board to the voters of the district at the annual school meeting or the annual or biennial election for members of the board, or at a special meeting or election called and held for that purpose at the usual place or places of holding elections for members of the board, except that in metropolitan districts the proposal may be submitted only at a special election ordered by the board."
(Emphasis added)

It is apparent that Section 164.021 leaves to the discretion of the school board of any school district in this state the decision to submit a proposition to increase the rate of taxation above the limited rate to popular vote. Said section specifically authorizes the school board to call a special election at which it may submit a proposition to increase the rate of taxation.

Section 162.061, RSMo 1969, prescribes the manner in which a school board shall call such a special election, and provides as follows:

"Unless otherwise prescribed by this law notice of any special election or meeting in

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any school district or of any proposal to be voted on at an annual election or meeting, when required by law, shall be in writing and shall be given either by posting written notices in at least five public places within the district at least fifteen days before the meeting or election, or by publishing the notice in a newspaper within the county in which all or part of the district is located which has general circulation within the district, once a week for two consecutive weeks, the first publication to be at least fifteen days before and the last publication to be at least seven days before the date of the election or meeting. The method of giving notice shall be determined by the school board of the district by an order entered on the records of the district. Each notice shall contain a brief statement of the questions or proposals to be voted on at the election or meeting."

Subject to the restriction of fifteen days notice, there is no limitation as to the number of times a school board may hold a special election concerning an increase in taxation above the limited rate, or to the resubmission of a proposition to increase taxes above the limited rate after defeat of the same proposition at a former election.

In this respect Section 164.021, supra, differs from Section 162.441, RSMo 1969, which provides that after holding a special election for annexation, a school board shall not call a subsequent special election for a period of two years. In a former opinion of this office issued to Honorable Eugene S. Heitman, dated March 21, 1958, we concluded that because the only restriction regarding elections to change the boundary lines between six-director school districts pursuant to Section 165.294 RSMo 1969, was that the election be had at the time of the annual school election, there was no limitation upon the number of times an election to change boundary lines could be called and voted upon. A copy of that opinion is enclosed.

Although Missouri courts have not had an occasion to consider the precise issue in question, the Supreme Court of New Jersey, construing a statutory provision similar to Section 164.021, has held that in the absence of specific prohibition a school board may call a special election for the reconsideration of a tax increase proposal previously rejected. State v. Board of Education, 53 A. 236 (N.J. 1902). Courts in other jurisdictions have held

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that in the absence of specific statutory prohibition, successive elections may be called and held at the discretion of the district officer on a school bond proposition after defeat of the same proposition at an earlier election. Luzader v. Sargeant, 4 Wash. 299, 30 P. 142 (1892); Taylor v. Brownfield, 4 Iowa 264 (1875); Molette v. Board of Education of Van Lear Graded Dist., 260 Ky. 737, 86 S.W.2d 990 (1935).

Therefore, we conclude that special elections may be called and held every seventeen days in the discretion of a school board concerning a proposal to increase the rate of taxation above the limited rate after defeat of the same proposition at an early election, without reducing the amount of the proposed increase.

You also inquire whether a school board may state that its schools will not open until the proposed tax levy is passed. The inquiry presents two questions: First, whether the board may issue statements with respect to a proposed tax levy; and, second, whether it may refuse to open its schools if such tax levy is not approved, which would result in insufficient funds to operate the schools for a nine month term.

With respect to the first issue, this office has previously determined that a school board has authority to expend public funds to provide voters with relevant facts concerning school bond elections. Opinion of the Attorney General, No. 186, dated July 1, 1969, issued to the Honorable John J. Johnson. Also considered in that opinion was a publication of the school board, the propriety of which was tested by whether it went ". . . beyond the discretion of the school authorities in promoting a bond issue which they consider essential in the discharge of the duty of 'establishing and maintaining free public schools.'" Those principles are applicable to the instant inquiry and compel the conclusion that the school authorities did not exceed their discretion in the issuance of the questioned statement, subject to the limitations necessarily implied in our consideration of the second issue.

The second issue necessarily included in your inquiry is whether a school board may close its schools for lack of operating funds. For reasons hereafter set forth, we conclude that a school board has authority to close its schools because of lack of operating funds. This conclusion necessitates a further inquiry, if the school board is authorized to close its schools due to insufficient operating funds, may it refuse to open its schools if the operating funds are inadequate to provide for a nine month term. In such a situation, there are two alternative actions which may be taken by the school board. First, it may refuse to open the schools within its district only if it has arranged for all pupils

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within the district to be educated in another district. If such arrangements are not or cannot be made, then it must open and operate its schools until all financial resources are exhausted.

Advancement of reasons supporting the stated conclusions begins by reference to the strong commitment made by this State to the concept of free public schools as succinctly stated in the Constitution:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law. . . ." Constitution of Missouri, 1945, Article IX, Section 1(a).

In furtherance of this stated commitment, the Constitution provided for funding of free public schools. Article IX, Section 3(b), Constitution of Missouri, 1945, provides:

"In event the public school fund provided and set apart by law for the support of free public schools, shall be insufficient to sustain free schools at least eight months in every year in each school district of the state, the general assembly may provide for such deficiency; but in no case shall there be set apart less than twenty-five per cent of the state revenue, exclusive of interest and sinking fund, to be applied annually to the support of the free public schools."

The Constitution further made provision for local taxes to supplement state funds. Article X, Section 11(b), Constitution of Missouri, 1945, provides:

"Any tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates:

* * *

"For school districts formed of cities and towns, including the school district of the city of St. Louis--one dollar and twenty-five cents on the hundred dollars assessed valuation;

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"For all other school districts--sixty-five cents on the hundred dollars assessed valuation."

The Constitution provides for certain tax rate increases only upon approval by popular vote. Article X, Section 11(c), provides:

"In all municipalities, counties and school districts the rates of taxation as herein limited may be increased for their respective purposes for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor; provided in school districts the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed three times the limit herein specified and not to exceed one year, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor; provided in school districts in cities of seventy-five thousand inhabitants or over the rate of taxation as herein limited may be increased for school purposes so that the total levy shall not exceed three times the limit herein specified and not to exceed two years, when the rate period of levy and the purpose of the increase are submitted to a vote and a majority of the qualified electors voting thereon shall vote therefor; provided, that the rates herein fixed, and the amounts by which they may be increased, may be further limited by law; and provided further, that any county or other political subdivision, when authorized by law and within the limits fixed by law, may levy a rate of taxation on all property subject to its taxing powers in excess of the rates herein limited, for library, hospital, public health, recreation grounds and museum purposes."

These provisions are relevant to our analysis in that it is apparent that a school district receives substantial funds (without voter approval) even though the funds may be increased when certain levies are submitted for voter approval.

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Section 160.021, RSMo 1969, provides that school districts shall be divided into four classes; namely, common, six-director, urban and metropolitan school districts. Consolidated School District No. 1, Hickman Mills, Missouri, is organized as a six-director school district under the provisions of Section 162.101 through 162.451, RSMo 1969. Section 162.261, RSMo 1969, invests the government and control of Consolidated School District No. 1 in its school director board. Section 162.331, RSMo 1969, delineates the duties and liabilities of the board of a six-director school district. Said section prescribes that the duties of a board of a six-director school district shall be the same as the duties of the board of a common school district. Section 162.811, RSMo 1969, sets forth the duties of the board of a common school district, and provides as follows:

"The board shall visit the schools under their care, examine into their condition and the progress of the pupils, advise and consult with the teachers, and exercise such supervision as will best promote the interests of the schools."

The directors are sworn to faithfully discharge their duties according to law. Section 162.781, RSMo 1969.

The discharge of their duties, according to law, may, upon occasion, confront them with duties which are in conflict. A duty imposed by Section 171.031, RSMo 1969, is that:

"Each school board shall prepare annually a calendar for the school term, specifying the opening date and providing a minimum term of at least nine months or one hundred seventy-four days of actual pupil attendance. The term may be extended to ten months when the resources of the school funds justify the extension."

Assuming that the school district is without sufficient funds to provide for a minimum term of nine months, the school board is then confronted with the duty of providing for such a term and at the same time complying with Article VI, Section 26(a), Constitution of Missouri, 1945, which provides:

"No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered

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balances from previous years, except as otherwise provided in this Constitution."

This prohibition regarding deficit spending is reenforced by the provisions of Section 165.021, RSMo 1969, which provides, in part, as follows:

"4. No warrant shall be drawn from the payment of any school district indebtedness unless there is sufficient money in the treasury and in the proper fund for the payment of the indebtedness.

* * *

"6. No county, township or school district treasurer shall honor any warrant against any school district that is in excess of the income and revenue of the school district for the school year beginning on the first day of July and ending on the thirtieth day of June following."

The authorization granted to certain school districts to issue tax anticipation notes does not authorize deficit spending. Section 165.131, RSMo 1969, provides, in part, as follows:

"The school board of any urban school district in this state, upon a vote of a majority of the members of the board, may borrow funds for the use of the various funds of the district, including the debt service fund, and may issue negotiable notes in evidence thereof, payable out of the revenues derived from school taxes, for the purposes of the funds of any year in which the notes shall be placed to the credit of the respective funds for the use and benefit of which the borrowing was made, as evidenced by the notes, and subject to the right to make transfers from and to funds as otherwise permitted by law, the proceeds of the notes shall be used and expended only in payment of the expenses and obligations properly payable from the funds respectively, and incurred or to be incurred against the funds during the year for the expenses of the year, or in payment of principal and interest on the notes. . . ."

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The school board is limited in its expenditures to those in which there is sufficient money in the treasury and in the proper fund for payment of the indebtedness and which is not in excess of the income and revenue of the school district for the school year. Therefore, if the school board lacks sufficient operating funds to provide for a nine month term, it is authorized to close the schools, when the funds are exhausted.

Our conclusion is supported by cases decided in other jurisdictions. In City of Louisville v. Greer, 166 Miss. 554, 148 So. 356 (1933), the court stated that schools should be closed whenever the revenues are insufficient for further maintenance.

In Morley v. Power, 10 Lea 219, 78 Tenn. 219 (1882), the court stated:

" . . . The terms of the school are necessarily dependent upon the amount of these funds. It was certainly never contemplated that the schools should be run beyond the amount of funds provided for their support. . . . It would be plainly their duty to keep the schools open as long as the funds would justify, but no longer. . . ." 78 Tenn. at 224.

The Constitution and statutes of this State implicitly recognize that situations may arise in which the school district lacks funds to provide for the minimum term of nine months. Such recognition is found in those provisions which attach certain penalties to the failure to provide a minimum term of nine months. For example, Article XI, Section 2, Constitution of Missouri, 1875, provided:

"The income of all the funds provided by the state for the support of free public schools shall be paid annually to the several county treasurers, to be disbursed according to law; but no school district, in which a free public school has not been maintained at least three months during the year for which the distribution is made, shall be entitled to receive any portion of such funds."

That section was incorporated, in part, in Article IX, Section 3(a), Constitution of Missouri, 1945, which provides:

"All appropriations by the state for the support of free public schools and the income from the public school fund shall be

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paid at least annually and distributed according to law."

Omitted from the present Constitution is the prohibition with respect to distribution of funds to a school district which failed to maintain a free public school for the specified time period. The reason for this is stated in the Constitutional Debates:

"MR. LINDSAY: . . . We have left out the penalty in this Section which provides that a school district must maintain a school for three months during the year in order to share in the state's distribution of funds. The General Assembly, many years ago, provided by law that school districts must maintain a school for eight months of the year, so this language has been obsolete for many years and serves no useful purpose any longer. . . ." Constitutional Debates, 1945, page 2605.

The penalty is now contained in Section 163.021(1), RSMo 1969, which provides:

"A school district shall receive state aid for its educational program only if it:

(1) Operates its schools for a minimum of one hundred eighty days including legal school holidays as defined in section 171.051, RSMo, and days when the school is dismissed by order of the board to permit teachers to attend teachers' meetings;"

Statutory recognition that a school term may be shortened by necessity is found in Section 163.051, RSMo 1969, which provides:

"The state board of education, in the apportionment of the state school moneys fund, may use the number of days' attendance for the next full year preceding, in apportioning money to districts which have been forced to close their schools before the expiration of the full term, because of nonpayment of taxes as a result of flood and drouth condition, or because of a loss of surplus funds occasioned by failures of banks in any county of this state."

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Another instance of statutory recognition that a school term may be shortened by necessity or otherwise is found in Section 162.081, RSMo 1969, which provides:

"Whenever any school district in this state fails or refuses in any school year to provide for a nine months' school term if a levy of sixty-five cents on the one hundred dollars' valuation, together with the public funds and cash on hand, will enable it to have so long a term, its corporate organization shall lapse and the territory theretofore embraced within the lapsed district shall be unorganized territory, and the same, or any portion thereof, may be attached to any adjoining district for school purposes, in the manner provided by section 162.071; but no school district shall lapse where provision is lawfully made for the attendance of the pupils of the district at another school or where the failure to make the needed provision for the nine months of school results from irregular or void proceedings had for that purpose."

Therefore, we conclude that a school board may shorten the school term when the funds provided for are inadequate to sustain a nine month term. However, a school board may not refuse to open its schools unless it makes appropriate arrangements for the education of its pupils in some other district. If such arrangements are not or cannot be made, then the school board must open and operate its schools for a term which will end when the funds are exhausted.

The stated position is supported by State ex inf. McAllister v. Consolidated School Dist. No. 2 of Platte County, 204 S.W. 1098 (Mo. banc 1918). Section 162.081, RSMo 1969, provides that the remedy which attaches to the failure of a school board to provide for a school term of a specified duration is the forfeiture of the district's authority and its subsequent consolidation with another district. Such was the relief sought in State ex inf. McAllister v. Consolidated School Dist. No. 2 of Platte County, supra. That case was a proceeding in the nature of quo warranto by the State on the relation of Frank W. McAllister, Attorney General, against Consolidated School District No. 2 of Platte County, Missouri. In the Spring of 1914, Consolidated School District No. 2 of Platte County was organized over a territory theretofore embracing several school districts. The incorporated

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school districts challenged the validity of the consolidation but were unsuccessful as the organization of the consolidated district was upheld in State ex inf. Barker v. Smith, 271 Mo. 168, 196 S.W. 17 (1917).

Thereafter, an action was instituted to forfeit the franchise of the consolidated school district because of its failure to provide for an eight months' school.

The action was based upon Section 10776, RSMo 1909, which provided:

"Whenever any school district in this state, now organized or that may be hereafter organized under the laws of this state, shall fail or refuse, for the period of one year, to provide for an eight months' school in such year, provided a levy of forty cents on the one hundred dollars' valuation, together with the public funds and cash on hand, will enable them to have so long a term, the same shall be deemed to have lapsed as a corporate body, and the territory theretofore embraced within such lapsed district shall be deemed and taken as unorganized territory, . . ."

The evidence demonstrated that until the court's determination in State ex inf. Barker v. Smith, supra, the county clerk uniformly extended the taxes for the benefit of the original school districts and that such proceeds were not turned over to the consolidated district. However, the evidence also demonstrated that the consolidated district maintained a high school in one of the old districts where a school was maintained prior to the organization of the consolidated school district. Thereafter, the present action was instituted. The court refused to forfeit the corporate rights of the consolidated school district and stated thusly:

"It will be seen at a glance that the above provision for forfeiture is wholly inapplicable unless it shall be shown by the evidence that the funds in the hands of the school district, together with the levy of 40 cents on the \$100 valuation, are sufficient for the maintenance of an eight months' school in one year. There is no substantial evidence in the present record to that effect; for, until the final decision of this court validating the organization of respondent, it did not receive the public funds and cash on hand belonging to the former school district

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to which it was entitled. . . . This fact, in connection with the evidence showing an appropriation of such funds, and also intervening revenues from taxation belonging to respondent, by the officers and directors of the old school districts, thereby preventing respondent from the direct handling of such funds for the payment of teachers employed by it and compelling it, in order to maintain schools, in many instances, to employ the teachers selected by the old districts and to acquiese in the payment of their salaries by the directors of the former school districts, are sufficient to exclude respondent from the purview of the statute in question, which shows on its face and by its terms that it was only intended to affix a forfeiture for failure to provide an eight months' school in one year, when such omission did not result from inability 'to have so long a term,' or where the failure was purposeful or intentional on the part of the school district.

"A thorough review of the testimony in this case satisfies us of the entire good faith of respondent in the exercise, as far as possible, of all its corporate franchises. It did maintain a high school in one of the districts, and seems to have maintained also, as far as possible, schools in other localities where they had been theretofore maintained, through the medium of a payment of the salaries of teachers out of the revenues that were improperly in the hands of the directors of the former school districts. In these circumstances, the statute relied upon by relator is wholly inapplicable, for giving that statute its full scope and effect, as was done in the case of State ex rel. v. Claxton, 263 Mo. 701, 173 S.W. 1049, it does not appear in the present case, as it did appear in that case, that the 40-cent levy and the public funds and cash on hand provided a fund sufficient to maintain a school for eight months in one year. In that case, the sufficiency of the revenues of the school district was shown by an express agreement. In the present case, the record does not show that the 'public funds and cash

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on hand' belonging to the former school district has ever been turned over to respondent, nor its ability, without such funds, to have independently paid all of the teachers employed by it. Under the authority of that case and the facts of the present one, therefore, the statute invoked by relator has no application whatever to the present record." (Emphasis added.)

Morley v. Power, supra, was an action by a school teacher to recover under the terms of his contract. The contract had been entered into with the teacher for one year beginning on August 16, 1880, in which he was to be compensated the sum of \$60 per month for his services. On March 18, 1881, the board of directors voted to close all schools because of a lack of funds and all schools were closed except for the one taught by Morley. The board refused to pay for his services past the date of closing of the schools. One of the defenses raised was the school board's authority to discontinue school. Although there was no positive provision as to the length of the term of a school year, in that case, the directors did have the duty to use school funds in a manner as would promote the interests of the public schools. The court, commenting upon the authority and duties of the directors, stated:

" . . . It would be plainly their duty to keep the school's open as long as the funds would justify, but no longer. . . ."

Nor was a school board authorized to close its schools for a year in order to comply with the requirements of a statute which provided that schools operating on the calendar year basis shall so adjust their finances as to operate on a fiscal year basis and to be out of debt for current expenses by a certain date. The court's view was that the action of the school board was premature and unauthorized in that the necessity for such action was not yet at hand. State v. Rapides Parish School Board, 158 La. 249, 103 So. 757 (1925).

CONCLUSION

Therefore, it is the opinion of this office that:

(1) A school board of a six-director school district has the discretionary power to call and hold a special election every 17 days concerning a proposition to increase taxes above the rate which can be levied without voter approval even though the same proposition has been defeated at a previous election.

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(2) A school board has authority to issue statements with respect to a proposed tax levy increase which they consider essential in the discharge of their duty to establish and maintain free public schools.

(3) If all available funds are insufficient to provide for a full nine month term, the school board may refuse to open the schools within its district if it has arranged for all pupils within the district to be educated in another district. If such arrangements are not or cannot be made, then the school board must open and operate its schools until all financial resources are exhausted. When all financial resources have been exhausted, the school board is authorized to close its schools.

Yours very truly,

A handwritten signature in cursive script, reading "John C. Danforth". The signature is written in dark ink and is positioned below the typed name.

JOHN C. DANFORTH
Attorney General

Enclosures:

Opinion No. 38, 3/21/58, Heitman
Opinion No. 186, 7/1/69, Johnson