SCHOOLS: School district has no authority to transport children to private schools even though the pro rata cost of transportation might be paid by the private school child so transported.
SCHOOL DISTRICTS:

August 27, 1953

FILED
43

Honorable William L. Hungate
Prosecuting Attorney
Lincoln County
Troy, Missouri

Dear Mr. Hungate:

This is in response to your request for an opinion dated August 6, 1953, which reads, in part, as follows:

> "The County Superintendent of Schools has asked me to obtain an opinion of the Attorney General as to whether or not it would be lawful for a bus owned by the free public schools to haul parochial children for hire on the basis of actual per pupil cost for transportation.
>
> "Two of Lincoln County's four reorganized districts are faced with this problem so it is a live issue. When we speak of hauling parochial children, we mean hauling them to a parochial school. The actual per pupil cost would be determined by the school board in each district on a district wide basis."

Free transportation of pupils is authorized by Sections 165.140 and 165.143, RSMo 1949, which sections read as follows:

> Sec. 165.140. "Whenever the board of directors of any school district or board of education of a consolidated district shall deem it advisable, or when they shall be requested by a petition of ten taxpayers of such district, to provide for the free transportation to and from school, at the expense of the district,

of pupils living more than one-half mile from the schoolhouse, for the whole or for part of the school year, said board of directors or board of education shall submit to the qualified voters of such school district, who are taxpayers in such district, at an annual meeting or a special meeting, called and held for that purpose, the question of providing such transportation for the pupils of such school district; provided, that when a special meeting is called for this purpose, a due notice of such meeting shall be given as provided for in section 165.037. If two-thirds of the voters, who are taxpayers, voting at such election, shall vote in favor of such transportation of pupils of said school district, the board of directors or board of education shall arrange for and provide such transportation. The board of directors or board of education shall have authority and are empowered to make all needful rules and regulations for the free transportation of pupils herein provided for, and are authorized to and shall require from every person, employed for that purpose, a reasonable bond for the faithful discharge of his duties, as prescribed by the board. Said board of directors or board of education shall pay by warrant the expenses of such transportation out of the incidental fund of the district; provided, that this section shall include pupils attending private schools of elementary and high school grade except such schools as are operated for profit."

Sec. 165.143. "When any school district makes provision for transporting any or all of the pupils of such district to a central school or schools within the district, and the method of transporting is approved by the state board of education the amount paid for transportation, not to exceed three dollars per month for each pupil transported a distance of two miles or more, shall be a part of the minimum guarantee of such district for the ensuing year. When the board of directors of any school district

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

In the case of McVey et al. v. Hawkins et al., 258 S.W. (2d) 927, the court considered the constitutionality of the added

provisos of these sections which purport to authorize the transportation of children to private schools at public expense. Although the court intimated that appellants (plaintiffs) therein may not have presented the constitutional question in such a manner as to preserve it for review by the court, since respondents (defendants) relied on those sections as a defense to the action the constitutionality of the provisos of those sections was in issue. Having discussed the applicable constitutional and statutory provisions, the court said, l.c. 933:

> " * * * If the parts of what are now Section 165.140 and Section 165.143, as added in 1939, see Laws 1939, pp 718-720, are in direct conflict with controlling provisions of the Constitution of Missouri 1945, to wit, Section 5 of Article IX, they do not and can not constitute any defense to the present action and must be disregarded. Since the added portions of these sections do conflict with the mentioned constitutional provisions they constitute no defense to the present action. We may not in this proceeding determine the effect of such holding upon the remaining portions of said sections, however, see Missouri Ins. Co. v. Morris, Mo. Sup., 255 S.W. (2d) 781, 782."

Therefore, the court has held the provisos of Sections 165.140 and 165.143, supra, purporting to authorize transportation of children to private schools at public expense, unconstitutional, hence, null and void (12 C. J., Constitutional Law, page 800, Section 228; Gilkeson v. Missouri Pac. R. Co., 222 Mo. 173, 121 S.W. 138, 24 L.R.A., N.S., 844, 17 Ann. Cas. 888).

In Berghorn et al v. Reorganized School Dist. No. 8, Franklin County, Missouri, et al., recently decided by the Supreme Court and not yet reported, the court in affirming the judgment therein also condemned the practice of intermingling the funds of a school district with those of a church. The court said:

> "The court further found that the arrangement with the Roman Catholic Church for the joint operation of motor buses for transporting pupils to the Gildehaus school and to the Gildehaus church constituted an unlawful intermingling of the funds of the said school district and of the St. John's Catholic Church,

> and the use of public monies for joint operation of two motor buses was in aid of a religious creed and church for a sectarian purpose, and that said arrangement constituted a donation of personal property for a religious creed and church and for sectarian purposes and was therefore unlawful."

Some question might be raised here as to whether the factual situation outlined in your request would constitute an unlawful intermingling of funds, but in view of the decision reached in this opinion that question need not be decided.

Section 432.070, RSMo 1949, provides that no school district shall make any contract unless the same be within the scope of the powers of the district or be expressly authorized by law. That section reads as follows:

> "No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

The courts of this state have on numerous occasions construed the powers of a board of education of a school district. In State v. Kessler, 136 Mo. App. 236, 240, ~~96 S.W. 494~~, 117 SW, 85, 86, the Kansas City Court of Appeals said:

> " * * * The board of directors of the school district is a body clothed with authority to discharge such functions of a public nature as are expressly prescribed by statute. It can exercise no power not expressly conferred or fairly arising by necessary implication from those conferred. * * *"

And again, in Consolidated School Dist. No. 6 of Jackson County v. Shawhan et al., Mo. App., 273 S.W. 182, 184, the Kansas City Court of Appeals said:

> "Plaintiff district is a corporation created by statute; its board of directors is what the statute makes it, having only such powers and functions as are expressly delegated to it. Armstrong v. School District, 28 Mo. App. 169. * * *"

In Wright v. Board of Education of St. Louis, 295 Mo. 466, 476, 246 S.W. 43, the Supreme Court said:

> "The power of the board to make the rule in this case is to be considered prior to a determination of its reasonableness. The power delegated by the Legislature is purely derivative. Under a well-recognized canon of construction, such powers, however remedial in their purpose, can only be exercised as are clearly comprehended within the words of the statute or that may be derived therefrom by necessary implication, regard always being had for the object to be attained. Any doubt or ambiguity arising out of the terms of the grant must be resolved in favor of the people. (Watson Seminary v. County Ct. Pike Co., 149 Mo. l.c. 70, and cases, 45 L.R.A. 675; Armstrong v. School Dist., 28 Mo. App. 180; 25 R.C.L, p. 1091, sec. 306 and notes."

This rule also seems to be the law generally. 56 C. J., Schools and School Districts, page 193, Section 46, provides:

> "A school district, or a district board of education or of school trustees, or other local school organization, is a subordinate agency, subdivision, or instrumentality of the state, performing the duties of the state in the conduct and maintenance of the public schools. All its functions are a public nature, and its only powers are those expressly granted by, or necessarily implied from, the statutes, by which it is governed and restrained in the exercise of such powers and the performance of its

> duties. The legislature may modify or abrogate the powers of school districts as it may see fit. Only such school districts exist as are created or provided for by statute."

56 C. J., Schools and School Districts, page 294, Section 152, provides:

> "A county board of education or of school trustees, although a creature of the law, may exercise any powers authorized by law, it however has in general only such powers as are expressly conferred upon it by constitutional or statutory provision or powers which are incidental to those expressly conferred. * * *"

56 C. J., Schools and School Districts, page 331, Section 202, provides:

> "The powers and authority of the officers and directors, trustees, or the like, of school districts and other local school organizations, like those of other public officers, are ordinarily purely statutory and derivative, and are under the control of the legislature, which may enlarge or abridge them as it sees fit. So such officers or boards possess such powers, and such only, as have been expressly conferred upon them by statute or are necessarily implied from those so conferred or from the duties imposed upon them; and a fortiori, such an officer or board can have no authority which the state in its sovereign capacity could not delegate or confer. All persons who deal with school boards and officers are presumed to have knowledge of the extent of their powers, and the manner in which such powers may or must be exercised."

On the factual situation presented there are no Missouri cases directly in point. The only case we are able to find dealing with this issue is that of Silver Lake Consolidated School Dist. v. Parker et al., 238 Ia. 984, 29 N.W. (2d) 214 (1947). This was a suit for declaratory judgment, count 2 of

which asked that children attending parochial schools might be carried in the public school bus upon the condition that the parents of said children pay the pro rata cost of transportation. In discussing count 1 of the petition the court said, N.W. (2d) l.c. 217:

> "The only powers of the school district are those expressly granted it or necessarily implied from the statutes by which it is governed and restrained in the exercise of such powers in performance of its duties. Courtright v. Consolidated Independent School Dist., 203 Iowa 26, 212 N.W. 368; Bellmeyer v. Independent Dist. of Marshalltown, 44 Iowa 564."

Plaintiff relied on Section 282.13 of the Iowa Code, which reads:

> "The board may permit pupils enrolled in the secondary grades or any other pupils that are not entitled to free transportation to avail themselves of the transportation facilities provided their parents pay the pro rata cost of such transportation."

However, the court held that this section read with other sections was applicable only when a contract had been entered into between districts and was not operative otherwise.

The court then said (N.W. (2d) l.c. 221):

> " * * * We hold that this statute can have no application other than on the condition stated therein. This limitation, together with the restriction upon the powers and duties of the local boards heretofore mentioned, prevent any such transportation if paid for by the parents of the pupils. * * *"

Now that the Missouri Supreme Court has held the provisos at the end of Sections 165.140 and 165.143, supra, unconstitutional, hence, null and void, we find no statutory authority for a school district to enter into any type of contract for the transportation of children to private schools.

It is true that the portions of Sections 165.140 and 165.143 now remaining refer to "school" and "schoolhouse," etc., without specifying that they must be public schools, but as was said in the Parker case, supra (N.W. (2d) l.c. 217):

> "The affairs of the public schools are administered by a school board, and such schools are organized into districts for the purpose of management, control, and government. The powers of the board of education or directors, as laid down in the Code, apply only to the public schools, except as otherwise stated. School district has been variously defined. It is a quasi corporation, a creature of the legislature, and is endowed only with powers bestowed upon it by statute. Bruggeman v. Independent School Dist. No. 4, 227 Iowa 661, 289 N.W. 5. It is defined as a political or civil subdivision of the state for the purpose of aiding in the exercise of that governmental function which relates to the education of children. Landis v. Ashworth, 57 N.J.L. 509, 31 A. 1017. Is a district of and for the public schools - Smith v. Donahue, 202 App. Div. 656, 195 N.Y.S. 715. The term 'school district' clearly has reference to the public school system with which alone school districts have to do. Charles Scribner's Sons v. Board of Education of Dist. No. 102, 7 Cir., 278 F. 366."

And again, l.c. 221:

> "The public schools are those which the state undertakes, through the various boards and officers, to direct, manage, and control, and the statutes relating to transportation of pupils, read in the light of such duty and obligation, must necessarily apply only to such public schools. To place private schools upon the same basis as the public schools would open up a system of control of such private schools such as would tend to authorize the management and government of those schools by the state - a result in no way sought either by those in control of the state public schools, or of the private schools."

Honorable William L. Hungate

Therefore, we must and do conclude that, since school districts have only such powers as are conferred by statute or such as may be reasonably implied as necessarily incident to a power expressly conferred, under our statutes a school district has no authority to transport children to a private school even though the pro rata cost of transportation might be paid by the private school child so transported.

We express no opinion as to the constitutionality of a statutory provision authorizing such a contract as that contemplated in your request, should the Legislature at some future date pass such a law, because such an issue is not presented herein.

CONCLUSION

It is the opinion of this office that school districts have no authority to transport children to private schools even though the pro rata cost of transportation might be paid by the private school child so transported.

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

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml