SCHOOLS:
SCHOOL DISTRICTS:
COUNTY COURT:

County court may not attach unorganized territory to school district not contiguous thereto.

December 16, 1959

FILED
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Honorable Francis Toohey, Jr.
Prosecuting Attorney
Perry County
Perryville, Missouri

Dear Mr. Toohey:

This is in response to your request for opinion dated November 16, 1959, which reads as follows:

> "This is to seek an opinion from your office as to the construction of Section 165.167 of the Revised Statutes of Missouri for the year 1949. We have in our county an area of approximately six sections of land which is unorganized territory. For the past several years the Perryville School District has been accepting these pupils for the sixty-five cents a hundred that the county levied in such district. The Perryville School District accepted these pupils at the beginning of the present school term. Within the past few weeks the School Board of the Perryville District has advised the parents living in such territory that it will collect the tuition from the parents and if the parents refuse to pay will not permit their children to attend the Perryville Schools.
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> "The parents are willing to file a petition to be assigned to a district as is provided by Section 165.167. The adjacent common districts are overcrowded and have not budgeted for these children. In addition these districts, although bordering on the territory, are not very accessible for these

children. In some cases the children would have to travel through Perryville to reach the adjacent school house.

"The Perryville District has indicated that it would accept the territory. Thus the following questions arise:

1. May the county court, upon the filing of a petition as provided in Section 165.167, if it finds that the Perryville School District is the most available and nearest district, although not contiguous to the territory, assign such pupils to such district?

2. Should the terms nearest and most available be construed together and if so may the Perryville District be construed as the nearest and most available district where the Court is advised that the nearer districts are not directly accessible to such children and that from a mileage and transportation standpoint the Perryville District is the more accessible? May the fact that an adjacent school district is overcrowded with its present enrollment be taken to mean that said district is not the most available?

3. If the court should find that the Perryville District was the nearest and most available, may such area be attached to the Perryville District although no part of the district touches the unorganized territory?"

The statute applicable to this problem is Section 165.167, RSMo 1949, which reads as follows:

"Whenever there shall be in this state any territory not organized into a common, town or city school district, and not containing within its limits twenty or more pupils of school age, any three or more taxpayers in such unorganized territory, or in any adjacent common, town or city school district, may file a written petition in the office of the clerk of the county court praying that such unorganized territory shall be

> attached to the nearest and most available common, town or city school district, and at the next meeting of the county court the said petition shall be taken up and heard by the court, which shall, after being duly informed and advised, make an order annexing such territory to the nearest and most available common, town or city school district, and thereupon such territory shall become a part of such district, which fact shall be duly entered by the proper officers upon the tax books and other records of the county."

At the outset, we are faced with the proposition that neither this statute nor any other general statute expressly requires contiguity in the formation of school districts. The special statutes relating to annexation (§165.300 to 165.307, RSMo, C.S. 1957) and consolidation (§165.273, RSMo 1949), etc., do require that the land being annexed or consolidated must be "adjacent" or "adjoining," but the language used here is "nearest and most available" district.

As you have pointed out in your opinion request, the nearest school district, which of necessity would be one adjacent to the unorganized territory, is not necessarily the most available from the standpoint of transportation, etc. This language then being somewhat ambiguous is subject to construction, and we must arrive at its meaning through application of general principles of law and judicial decisions relative thereto.

In 78 C.J.S., School and School Districts, Section 31(b), page 686, we find the following:

> "It has been held that, unless otherwise expressly provided by statute, a school district must consist of contiguous bodies of land or territory, and that it cannot include two or more detached tracts or territories, separated from each other by intervening territory not a part of the district. In other instances, constitutional or statutory provisions require contiguity, or compactness and contiguity, of the territory of which a school district

> is composed, or require territory sought to be attached to a district to be adjacent thereto. On the other hand, under some statutes, it is expressly provided that a school district or other local school organization need not consist of connected, contiguous territory, and there is authority for the view that it is not necessary, in the absence of a statute providing otherwise. * * *"

From this we see that the courts have taken two opposite stands, the vast majority holding that, in the absence of a statute expressly so providing, a school district cannot be formed of noncontiguous areas. On the other hand, at least one court has taken the opposite view. See Weeks v. Batchelder, 41 Vt. 317, wherein it was held that, in the absence of a statute requiring contiguity, a school district could be formed of two areas detached from each other and completely separated by intervening lands. This is the only case we have found, however, adopting this view.

There are no Missouri cases squarely on the point. However, the St. Louis Court of Appeals, in State at Inf. of Taylor ex rel. Schwerdt, et al., v. Reorganized School Dist. R-3, Warren County, et al., Mo. App., 257 SW2d 262, clearly indicated which line of decisions it would follow on this question. In that case a petition had been presented for release of one part of the R-1 District to R-3 and another part of R-1 to the Hermann District. The two were submitted as one proposition and the question was whether this was proper or whether they should have been submitted as separate and independent propositions. In discussing this phase of the case the court said, l.c. 267:

> " * * * If the two propositions had been submitted on separate ballots and the proposition to release the middle section of the district had carried and that territory had been accepted by the board of directors of District R-3, while the proposition had failed as to the release of the western end of the district, an anomalous and irreconcilable situation would have resulted, for in that event the district would have been divided into two separate and noncontiguous areas. In proceedings to release

> parts of school districts for annexation to other districts, the law does not contemplate that two portions of a district should be left entirely segregated from each other. See Howell v. Kinney, 99 Ga. 544, 27 S.E. 204, and Chicago & N.W. Ry. Co. v. Town of Oconto, 50 Wis. 189, 6 N.W. 607. Paraphrasing, the dissenting opinion in State ex inf. Barrett ex rel. Callaghan v. Maitland, 296 Mo. 338, 246 S.W. 267, loc. cit. 275, (which dissent was declared to be the law in the later case of State ex rel. City of St. Louis v. Hall, supra, 75 S.W. 2d loc. cit. 581), sound public policy required that the proposition to release the two areas be linked inseparately, and the very reasons which argue against doubleness in submitting proposals argue for the submission of these two questions in one proposition and one ballot. To submit them separately would surely invite an administrative and procedural impasse."

It should be borne in mind that there is no statute expressly requiring that the district, as it remains after the release of territory to another district, must consist of a contiguous area.

The court cited Howell v. Kinney, 99 Ga. 544, 27 SE 204, and Chicago and N.W. Ry. Co. v. Town of Oconto, 50 Wisc. 189, 6 NW 607.

The Georgia case involved annexation of certain areas to a militia district. On this question the court said, SE l.c. 207:

> "If the proceedings above referred to were to be treated as having the effect, as contended by plaintiffs, of transferring to the Ridge Valley district the numerous tracts of land embraced in the several petitions presented to the board of county commissioners, two anomalous results would follow. The first of these is that in some instances an isolated portion of the territory of a district other than the Ridge Valley district would be added to the latter, although, in point of fact, such territory nowhere touched or was contiguous to any portion of the Ridge Valley district. The second is that it would

> in one instance have happened that two portions of a district other than the Ridge Valley district would be left entirely segregated from each other. We feel certain that the law authorizing changes to be made in militia district lines never contemplated such gerrymandering as this. As demonstrating the correctness of this proposition, we content ourselves with presenting a diagram which illustrates the situation, and is of itself sufficiently convincing to need no argument in its support.
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> [Diagram omitted.]
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> "The shaded space marked R, constituting a part of the Rome district, represents territory sought to be transferred to the Ridge Valley district, leaving the two remaining portions of the Rome district entirely segregated."

The Wisconsin case involved the validity of taxes levied upon certain areas by the town of Oconto, the contention being that previous actions of the town board of supervisors attaching these areas to the town were void because they were not contiguous to the main body of the town. The court, after a lengthy discussion, sustained this contention and said, NW l.c. 609:

> "Supported by these authorities, as well as most obvious and numerous reasons of public policy, practical convenience, and respecting the public welfare, we decide that a town must consist of contiguous territory."

To the same effect, see Cole v. City of Watertown, S. Dak., 147 NW 91, 93; State ex rel. Bibb et al. v. City of Reno et al., Nev., 178 P2nd 366, 370; Hillman v. City of Pocatello, Idaho, 256 P2nd 1072, 1073.

See also City of Denver v. Coulehan, Colo., 39 P. 425, 428, where the court said:

> "Legislative acts in the matter of extending the boundaries of municipal corporations are to be interpreted and applied according to

> the essential nature as well as the subject-matter of such legislation. In the nature of things, there must be some limit to legislative power. For example, the legislature cannot extend the municipal boundaries of a city into another state. Legislative acts upon such a subject would have no extra-territorial force. There are some things that in their very nature cannot be accomplished by any human power. A thing cannot be made to exist as a whole and in broken disjointed fragments at one and the same time. A thing essentially single in its nature cannot have a plural existence. Every municipality must have its territorial corpus, in which to exercise its corporate functions and powers. Such corpus may be enlarged or diminished by the action of the legislature. So the human body may grow or diminish by the action or nonaction of its vital forces; but neither the human body nor the municipal corpus loses its identity, its individuality, or its unity by such growth or enlargement. It is a misnomer - a solecism - to speak of a growth of the human body not connected with the body itself. Such a growth is, in fact, not of the body. So, territory not in fact connected with or adjacent to a city cannot be regarded as a part of the municipal corpus, or as an addition thereto, in any true sense of the term. * * *"

In the case of Petitioners of School Dist. No. 9, Caddo County, v. Jones, Okla., 140 P2d 922, 924, the Oklahoma Supreme Court said:

> "It is common knowledge that school districts, judicial districts, legislative districts, incorporated towns, cities and counties are composed of one body of land. In the face of all the indications to the contrary we cannot attribute to the Legislature any intention on its part that a school district should ever be composed of nonadjacent units or integral parts where it made no specific provision therefor. Likewise it never intended that an existing school district

> should be divided into separate and distinct noncontiguous parts by the annexation of a portion, or portions, thereof to another district. You cannot accomplish indirectly that which cannot be effected directly."

See also Independent School Dist. No. 66, Pottawatomie County, v. Dependent School Dist. No. 62, Pottawatomie County, Okla., 259 P2d 826.

Although it is well recognized that school districts, cities and other municipal corporations are creatures of the Legislature and their boundaries may be established as the Legislature directs, at least one court has questioned the power of the Legislature to create such entities of divided and unconnected parts (City of Denver v. Coulehan, supra). On the other hand, it was pointed out in the case of Petitioners of School Dist. No. 9, Caddo County, v. Jones, supra, that in Oklahoma for unusual situations some statutes do expressly authorize such procedure. The authority to do so was not questioned by the court.

We are not prepared to say that the Legislature could not authorize the creation of public corporations consisting of non-contiguous areas, but we need not decide that issue here.

In view of the fact that the only Missouri case on the subject (State at Inf. of Taylor ex rel. Schwerdt v. Reorganized School Dist. R-3, Warren County, supra) cites and follows the line of cases which at least presumes that a school district or other public corporation will consist of contiguous territory unless the Legislature has expressly directed otherwise, we are of the opinion that the words "nearest and most available" are not sufficient to indicate a legislative intent to authorize the creation of a school district consisting of detached areas and that the word "nearest" must be held to mean an adjacent school district. Inasmuch as several districts are equally near in this instance, the only factor which the county court could consider would be availability.

We find it difficult to answer any of your three questions precisely because they seem to be based upon the assumption that the county court could find the Perryville District to be the "nearest" district. On the contrary, we do not think the court would have this authority because it is, in fact, not the "nearest" district. Therefore, because of the basic concept of a school

district as consisting of a contiguous area and the use of the word "nearest" in the statute, we must conclude that the county court could not attach the unorganized territory to the Perryville District.

In determining the availability of a school district, the county court should be guided by the same principles that govern the action of a county superintendent of schools in assigning pupils under Section 165.253, RSMo, C.S. 1957. There, the word used is "accessible," but we believe that for this purpose the two words "available" and "accessible" are roughly synonymous. For the guidance of the court, we are enclosing copy of an opinion written for Honorable Phil Hauck, dated April 16, 1959.

CONCLUSION

It is the opinion of this office that a county court acting under Section 165.167, RSMo 1949, may not attach unorganized territory to a school district which is not contiguous thereto.

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

Yours very truly,

JOHN M. DALTON
Attorney General

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Enc.