STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

February 16, 1976

ATTORNEY GENERAL OPINION NO. 76- 60

John L. Vratil
LYTLE, WETZLER, WINN & MARTIN
Attorneys at Law
Second Floor - Johnson County
National Bank & Trust Company
5100 West 95th Street
P. O. Box 8030
Prairie Village, Kansas 66208

Re: Schools--Boards of Education; Organization--Powers--Finances--School Closings

Synopsis: U.S.D. #512 does not constitute a "city unified school district" for purposes of K.S.A. 72-8213(b). The board of education of U.S.D. #512 may not order the closing of three elementary schools located in the Osage, Hickory Grove, and Corinth areas of that district without first submitting the proposition at an election or through a petition to the appropriate electors of each school pursuant to either K.S.A. 72-8213(a) or K.S.A. 1975 Supp. 72-8213a.

* * *

Dear Mr. Vratil:

K.S.A. 72-8213(a) provides:

> "The board shall not close any attendance facility that was being operated at the time the unified district was organized if at

least three-fourths (3/4) of the territory and at least three-fourths (3/4) of the taxable tangible valuation of the district which formerly owned such building is included in such unified district unless and until a majority of the resident electors within the attendance center of such attendance facility shall give their consent thereto. Such consent may be given in writing in the form of a petition, or the board may submit the question to a vote of such resident electors in the attendance center at an election which shall be conducted in the same manner as for approval of bonds of the unified district. If a majority of those voting on the question vote in favor thereof, the same shall constitute consent for the porpose of this section. The board may close any attendance facility at any time except as is otherwise provided in thiw act. For the purpose of this section, the following terms shall have the following meanings: The term 'attendance facility' means a school building which has been property of a school district disorganized pursuant to this act, but which, at the time under consideration, is owned by the unified district of the disorganized district which formerly owned such attendance facility.

Notwithstanding the other provisions of this act, the board of education of any unified school district may close any attendance facility which has failed to receive accreditation by the state superintendent of public instruction until that office is abolished or the state board of education thereafter, and in any such case no petition, election or other procedures shall be necessary as a condition to such closing."

The authority of the boards of education of city unified school districts to proceed in closing district attendance facilities without the benefit of an election by the residents of the attendance center is governed by K.S.A. 72-8213(b) which specifies:

> "The board of any city unified school district such city has a population in excess of 20,000 may close any of its attendance facilities at any time such board finds the same should be closed to improve the school system of such school district. The limitations of subsection (a) of this section shall not apply to any closing under this subsection (b)."

A controversy has arisen relative to the authority of the board of education of Unified School District #512, Johnson County, Kansas, to utilize the authority granted in the above subsection (b) to justify the proposal to close three district attendance facilities. Subsection (a) clearly provides the board of education of U.S.D. #512 with one alternative method to close these attendance facilities since it is a matter of public record that at the time, U.S.D. #512 was first organized at least three-fourths (3/4) of the territory and at least three-fourths (3/4) of the tangible taxable valuation of the districts which formerly operated these three schools were included in the unified districts. The board of U.S.D. #512 has not thus far scheduled an election on the proposition. Thus, you have directed your inquiry to whether these three attendance facilities may be closed pursuant to the above subsection (b) in light of both the legislative history surrounding the school closing statutes and the factual background peculiar to each of the three schools in question. The attendance facilities involved are all elementary schools and the closings would be effective with the 1976-77 school year. The proposal to close these schools stems primarily from reduced attendance and the alleged excessive costs involved in maintaining these schools. We have the benefit of opposing views on this question through correspondence furnished by both the proponents and opponents of these school closings.

At present, boards of education are authorized to close district attendance facilities pursuant to the provisions of either K.S.A. 72-8213 or K.S.A. 1975 Supp. 72-8213a. The latter statute, described therein " . . . as separate from procedures for closing or changing the use of attendance facilities prescribed by K.S.A. 72-8213 and K.S.A. 31-144 . . . " may be summarily excluded from consideration here since there has neither been a prior election disapproving the proposed closings nor a plan submitted to the State Board of Education prior to October 1, 1975, both mandatory prerequisites for the board's utilization of this statute.

In this instance, the question of school closings turns primarily upon the applicability of the provisions contained in K.S.A. 72-8213. This statute was first adopted as Section 23 of Chapter 393 of the 1963 Session Laws and subsequently amended by Section 1 of Chapter 399 of the 1967 Session Laws and again at Chapter 380 of the 1972 Session Laws. Prior to the adoption of these latter amendments, K.S.A. 72-8213 then consisted in its entirety of the identical text presently found only in subsection (a). In light of both the historical sequence of enactment and the specific or limited application of the provisions contained in subsections (b) through (h), their inclusion must reasonably be considered or viewed as exceptions to the general rule found in subsection (a). If these subsections are scrutinized in their entirety, it is altogether clear that subsections (c), (e), (f), (g) and (h) can have no applicability to this situation in view of the following undisputed facts:

1) The attendance facilities in question are all accredited by the State Board of Education;

2) No election has been held to authorize the issuance of general obligation bonds to construct and equip a new school building;

3) The State Fire Marshall has made no orders or recommendation regarding the closing or remodeling of any of the school facilities;

A question has developed concerning whether the transfer or exchange in 1969 of the property and attendance facilities here in question from each of their respective disorganized school districts to U.S.D. #512 constituted a transfer or attachment of property under K.S.A. 72-8213(d). U.S.D. #512 was organized

pursuant to K.S.A. 72-8121 et seq., in 1969 and the three attendance facilities were transferred during the original unification procedure. Subsection (d) provides:

> "In the event any territory has been or is hereafter attached or transferred to any unified school district by attachment or transfer proceedings other than a signed agreement under K.S.A. 1971 Supp. 72-6758 or upon petition therefor of such a unified school district under said statute, any attendance facility in the territory so attached or transferred may be closed by the board and no limitations of subsection (b) shall apply to any such closing."

The phrase ". . . has been or is hereafter attached or transferred to any unified school district . . ." invisions a transfer or attachment occurring subsequent to the original organization or unification and not that which is a component of the unification process itself. The language employed assumes the existence of an organized school district prior to the transfer or attachment. To conclude otherwise would mean that upon organization of every unified school district, the respective board of education could potentially utilize subsection (d) to close any attendance facility in each of those disorganized districts which combined to become the unified school district. The probable consequence of that interpretation would be the complete emasculation of the general rule contained in subsection (a). With this interpretation, I cannot concur. Subsection (d) is limited to those transfers and attachments of property occurring subsequent to the original organization or unification of the school district.

The elimination of subsection (d) leaves only subsection (b) to justify the board's proposal to close the three attendance facilities. Subsection (b) was first enacted as part of the 1967 amendments to the then existing K.S.A. 72-6756 or what is now subsection (a) of K.S.A. 72-8213. As will be seen, the interpretation given the language employed in this subsection is of crucial importance to resolution of the issue. This portion of the statute states:

> "The board of any city unified school district which such city has a population in excess of 20,000 may close its attendance facilities at any time such board finds the same should be closed to improve the school system of such school district. The limitation of subsection (a) of this section shall not apply to any closing under this subsection (b)."

The statute does not endeavor to define the term "city unified school district" beyond the requisite that the "city" of the "city unified school district" have a population in excess of 20,000. The only statutory definition which potentially illuminates the intended meaning of "city unified school district" is found at K.S.A. 72-8113. Therein, "city unified district" is defined as:

> "A unified district having a territory which includes a city of first or second class having a population of more than ten thousand (10,000) . . . "

The definition of "city unified district" as found above was first adopted by the legislature at Section 3 of Chapter 420 and Section 39 of Chapter 410 of the 1965 Session Laws, two years prior to the adoption of the 1967 enactment of K.S.A. 72-8213(b). The reasonable inference to derive is that the Legislature had the definition of "city unified district" in mind when the term "city unified school district" was employed in K.S.A. 72-8213(b). There exists some persuasiveness to this inference since both terms are used only in the two Acts under which each was originally promulgated. On the other hand, Section 1 of Chapter 410 of the 1965 Session Laws states that the definitions listed in the introductory language of K.S.A. 72-8113, including the definition of "city unified district", are applicable solely to the "Third Unification Act" adopted in 1965. There is no indication that those definitions were to be applicable to any other legislation such as Chapter 337 of the 1969 Session Laws, K.S.A. 72-8121, the Act under which U.S.D. #512 was organized. Thus, the marked similarity in the terms alone appears inconclusive justification to authorize U.S.D. #512 to exercise a perogative of such magnitude. Proponents of the position which

assert that the board of U.S.D #512 is without authority to utilize subsection (b) in school closings offer a different interpretation as to the Legislature's intended meaning relative to U.S.D. #512. Historically, boards of education in cities of the first and second class had the following power under K.S.A. 72-1623:

> "School buildings and other school properties not needed by the city school district may be sold by the board at private or public sale upon the affirmative recorded vote of at least 2/3's of all the members of the board at a regular meeting."

The districts and territory comprising present-day U.S.D. #512 were never classified as a city school district. Early in its history, Shawnee Mission Rural School District #6 operated a high school in this area. All of the legislation relating to that school district treated it as a rural district. See, G.S. 72-3524 and G.S. 72-3524(b), repealed at Section 5, Chapter 312 of the 1969 Session Laws. There has been no other legislation that I have been able to discover which provided that that school district could exercise the authority of a city district. The district was operating during this period under former G.S. 72-3524 et seq., the authority granted rural school districts. Common school districts were also located in the Shawnee Mission Rural High School District. Under the provision of G.S. 72-406, also repealed at Section 6, Chapter 312 of the 1969 Session Laws, the qualified voters at any annual meeting of a common school district by a majority vote of those voting could " . . . authorize and direct the school board to lease, donate or sell and convey any school building, real or other property belonging to the school district where such property shall be deemed no longer necessary for the use of the district." However, G.S. 72-501 tempered this power by providing that the site of any common school district could not be changed until the question had been submitted by the school board to the qualified voters of the district at an election called for that purpose and a majority of all the qualified voters voting on the proposition had declared by their ballots in favor of changing the same. Thus, historically, the power to change sites and close schools was vested in the voters in the area which now constitutes U.S.D. #512.

In 1957, the boards of common school districts in the Shawnee Mission area were granted additional powers by Chapter 415, 1967 Session Laws. The Legislature provided that boards of common school districts located wholly or partly in Shawnee Mission Rural High School District #6 in Johnson County, Kansas, should have the authority conferred by then G.S. 72-1623 and G.S. 72-406. See, also G.S. 72-1055 through G.S. 72-1059. The provisions of G.S. 72-406, G.S. 72-501 and G.S. 72-1055 through 1058 were repealed by Section 6 of Senate Bill 286, found at Chapter 312 of the 1969 Session Laws.

Upon enacement, Senate Bill 286 provided that as of July 1, 1969, the State Department of Education was to issue orders disorganizing all nonunified school districts, including the common school districts and rural high school districts in the Shawnee Mission area. Notwithstanding the disorganization order, the Legislature, in an apparent attempt to preserve local control, provided at Section 3 of this Bill that:

> "On July 1, 1969, the property, records, and all funds on hand and to be collected of each school district disorganized under authority of this act shall be turned over and paid to the unified school district to which the main school building of the disorganized school district is attached. Such unified school district shall thereupon become liable for and pay all lawful debts of such disorganized school districts, except as otherwise provided in section 2 and except bonded indebtedness. Each unified school district shall on July 1, 1969, become the owner of all the property of such disorganized school districts and shall be entitled to possession thereof from and after July 1.
>
> Notwithstanding the provisions of subsection (d) of K.S.A. 1968 Supp. 72-8213, the provisions of subsection (a) of K.S.A. 1968 Supp. 72-8213 shall apply to territory, and attendance facilities therein, attached under authority of this act, and the limitations of subsection (e) of K.S.A. 1968 Supp. 72-8213 shall apply to attendance facilities not used for high school purposes in the school year 1968-1969."

The final paragraph precludes the unified school district to which territory from the disorganized rural and common high school districts are attached from utilizing K.S.A. 72-8213(d) to remove the question of school closings from the former district's electorate. This comprises persuasive evidence that the Legislature, as late as 1969, did not view the Shawnee Mission area as comparable to a city unified school district. This is implied from the fact that in protecting the historical right of the electorate in this area in deciding questions of school closings, present-day subsection (b) was not mentioned in the above emphasized text. An inference arises that subsection (b) was not considered legally available authority to close schools in this region since the districts did not comport with the traditional meaning attached to "city unified school district." Thus, one may correctly conclude that in enacting Section 3 of Senate Bill 286, the Legislature did not consider this term applicable to the school districts then operating in this region.

The term "city unified district" as used in 72-8113(a) also comes from the "Third Unification Act". See, Section 3 of Chapter 420 and Section 39 of Chapter 410, Session Laws of 1969. As mentioned earlier, Section 3 of Chapter 420 and Section 39 of Chapter 410 both provide:

> "In addition thereto, as used in this act, unless the context otherwise requires:
> (a) The term 'city unified district' means a unified district having territory which includes a city of first or second class having a population of more than ten thousand (10,000) and also every unified district, then organization order for which provides for election at large."

However, as cited earlier, U.S.D. #512 was not organized under this or the prior two unification acts.

Contemporaneous with the enactment of Chapter 312 of the 1969 Session Laws, requiring disorganization of all non-unified school districts, the Legislature promulgated Senate Bill No. 58 at Section 1 of Chapter 337 which in pertinent part provides:

> "The state board of education shall issue its order providing for the establishment of one unified school district to include all of the territory of any rural high school district in which there are located at least two cities of the first class. The order issued under the authority of this section shall disorganize all of the non-unified school districts within the territory to which this act applies. The effective date of such order shall be July 1, 1969, except for the purpose of election of members of the board of education and such other purposes as are herein specifically provided."

I am informed that at and since the time this measure first passed, its application in this has been solely to the territory formerly comprising Shawnee Mission Rural High School District No. 6 and the associated common school districts. Furthermore, U.S.D. #512 is the only unified district that utilizes advisory boards. See, K.S.A. 72-8134. In addition, all members of the board of education of this district are all elected by member districts except for two who are elected at large. Thus, the terminology in subsection (a) of K.S.A. 72-8113(a) providing that it includes every unified district, the organization order for which provides for election at large, has no application to U.S.D. #512.

The importance of these considerations to the issue here is embodied in Section 2 of Chapter 337 which provides:

> "The provisions of all statutes of general application to unified school districts shall apply to any school district organized under the provisions of this act to the extent that such statutory provisions are not in conflict with the provisions of this act."

See, K.S.A. 72-8122. The import of this section is, in my view, that it removes the authority granted in subsection (b) of K.S.A. 72-8213 from the board of U.S.D. #512. There can be no real dispute that K.S.A. 72-8213(a), which provides for elections on the proposition of school closings, applies to all unified school districts in this state, except as otherwise provided in

subsections (b) through (h). On the other hand, subsection (b) is specifically limited to "city unified school districts" and thus is not generally applicable to all districts in this state. Accordingly, it is reasonable to conclude that the Legislature intended that those districts organized pursuant to K.S.A. 72-8121, including U.S.D. #512, were not to utilize subsection (b) authority to justify any attempt to close the district's attendance facilities.

In my view, dispositive of this last question has been the Court's pronouncements in the cases of Hand v. Board of Education, 198 Kan. 460, 426 P.2d 124 (1967), and Welch v. Board of Education, 212 Kan. 697, 512 P.2d 358 (1953). The Hand case involved an appeal from an order of a district court denying injunctive relief against the Board of Education of Unified School District #247, Crawford County, Kansas. Patrons of McCune Joint Rural High School No. 2, a disorganized high school district, brought the action to prevent the unified district board from closing the high school at McCune without an election or consent as provided by K.S.A. 72-6756, now, subsection (a) of K.S.A. 72-8213. In that case, the Court stated:

> "This tradition of local community administration became an accepted and deeply rooted right of self-determination to be jealously guarded. Parental control and participation in the educational process was wisely delegated by the legislature to meet the needs of a scattered rural population under the circumstances then existing.
>
> * * *
>
> It must be assumed that the traditional element of local control of the schools was within the thinking of the legislature at the time the new act (Unified School District Act of 1963) was passed. We believe this historical background sheds light on what the legislature intended by the provisions of K.S.A. 72-6756 (now 72-8213[a]) requiring consent of affirmative vote by majority of the resident electors or a disorganized district. . . . . This particular section of unification law appears to have been inserted by the legislature to permit a vestige of self-determination, which might smooth the troubled waters resulting

> from disorganization of small school districts and the attendant threat of closing their schools." 198 Kan. at 464, 465.

The Welch case involved an appeal from a district court order enjoining appellants, the board of education of U.S.D. #495 and its individual members, from discontinuing grades nine through twelve of the school at Pawnee Rock and directing them to continue operating those grades until the electors of Pawnee Rock Disorganized School District No. Joint A consented to such discontinuance. Appellees were resident electors of the disorganized district.

Prior to school unifications, Pawnee Rock District No. Joint A, a rural high school district, and Pawnee Rock District No. 2, a common school district, joined in constructing one school building at Pawnee Rock to be used by both districts. Each district took legal title to the site upon which this building is located, which they were permitted to do under the provisions of K.S.A. 72-507 (now repealed). Before unification, the common school district operated grades one through eight in one wing of the building and the high school district operated grades nine through twelve in another wing. Parts of the building and equipment were used by both the grade school and high school; other parts were used by only one of the districts. Upon unification, more than three-fourths of the tangible property valuation of each district were merged into U.S.D. #495.

Based upon these closely analogous facts, the Supreme Court has stated, amplifying upon the Hand decision, that:

> "Examination of that part of K.S.A. 72-8213 with which we are presently concerned reveals it hinges upon ownership of an attendance facility, that is, its restrictions on closure are applicable only when a major portion (at least three-fourths of the territory and taxable tangible valuation) of the district which formerly owned such building is included in a unified district. When such major portion of the disorganized district is so included, an attendance

> facility cannot be closed without consent of a majority of the resident electors within the attendance center served thereby. The definition of the latter bears repeating:
>
> > 'The term "attendance center" means the area around an attendance facility consisting of the territory in such unified district of the disorganized district which formerly owned such attendance facility.' [Emphasis added by court.]
>
> The restrictions placed in that which is now K.S.A. 72-8213 against closing an attendance facility were for the purpose of retaining some vestige of local control in connection with school reorganization and unification (Hand v. Board of Education, supra). This local control is reserved in that major portion of the disorganized district which formerly owned the building sought to be closed, namely, those electors resident within the attendance center of such building or facility. It is these persons who assent is necessary to closure of an attendance facility. Thus it is rights of former ownership which are the focal point of protection by the statute."

Although the real issue decided in Welch focused upon the board's power to change the use of district attendance facilities, the above quotation emphasizes the prevailing attitude of the Court towards K.S.A. 72-8213 --- the rights of former ownership are to be protected.

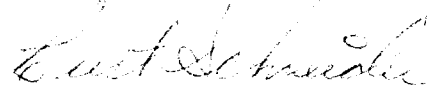
Undoubtedly, opponents of this interpretation to Welch will argue the facts are distinguishable. The former common and rural school districts in the Shawnee Mission area did not merge into a single building prior to unification and, the school district in Welch did not contain the population nor requisite size cited for consideration as a "city unified school district". Neither the case law nor statutory authority relevant to this issue offer a concrete explanation, not heretofore duly considered, to justify the manner in which these different facts alter the conclusion.

In summation, the issue to be resolved is whether U.S.D. #512 constitutes a "city unified school district" for purposes of whether the board may close certain district attendance facilities without an election pursuant to K.S.A. 72-8213(b). The only real support for this grant of authority rests entirely upon the inference that although the Legislature neglected to define "city unified school district" in subsection (b) of K.S.A. 72-8213, the definition of "city unified district" in K.S.A. 72-8113(a) should be applied. If construed in this manner, U.S.D. #512 would be able to exercise subsection (b) powers. I cannot draw that inference.

A foremost consideration is the Court's pronouncements establishing that the focal point in implementing school closing statutes is protection of the rights of former ownership. In this case, the electors of the three attendance facilities' former districts all qualify under the provisions of subsection (a) as appropriate for an election prior to closure of their schools. Secondly, the historical analysis of the law in this regard illustrates that the legal traditions in this region have required prior voter approval before closure. The analysis has further shown that the term "city unified school district" in K.S.A. 72-8213(b) has a meaning apart from that ascribed to a similar term in an entirely different legislative enactment. Finally, the authority under which U.S.D. #512 was first unified affirmatively states that only those provisions of general application are to be applied to those unified school districts under its authority. Thus, subsection (b) closure power is not available to the board of U.S.D. #512. On balance, I am unpersuaded that the one potential and very arguable inference is of sufficient magnitude to overcome these latter considerations.

Thus, it is my opinion that U.S.D. #512 does not constitute a "city unified school district" for purposes of K.S.A. 72-8213(b). Accordingly, the board of education of U.S.D. #512 may not order the closing of three elementary schools located in the Osage, Hickory Grove, and Corinth areas of that district without first submitting the proposition at an election or through a petition to the appropriate electors of each school pursuant to either K.S.A. 72-8213(a) or K.S.A. 1975 Supp. 72-8213a.

Sincerely yours,



CURT T. SCHNEIDER
Attorney General

CTS:HTW:bv