

Opinion No. 69.

Schools and School Districts—Sufficiency of Petition for Annexation — County Superintendent — School Elections.

HELD: 1. It is the duty of the county superintendent to make every reasonable effort to ascertain the number of qualified electors in a school district in computing the requisite per cent of signers on a petition for annexation of a school district.

2. Under the facts submitted the petition requesting annexation of a school district had the requisite signatures and an election should have been called and the question submitted to the qualified electors.

March 31, 1954.

Miss Mary M. Condon
 Superintendent of Public Instruction
 State Capitol Building
 Helena, Montana

Dear Miss Condon:

You have requested my opinion concerning the sufficiency of a petition requesting the county superintendent of Flathead County to annex School District No. 1, a third class district, to District No. 6, a second class district. The petition was signed by 23 qualified electors and attached to the petition is the certificate of the county superintendent which recites the method followed by the superintendent in ascertaining whether or not the petition was signed by 20 per cent of the qualified electors. The pertinent part of the certificate is as follows:

“Basis of Calculation

“Number of voters in a ‘contested’ school trustee election as shown by official tally in 1952 election	78
“Number of voters in a ‘contested’ school trustee election as shown by official tally in 1953 election	67
“Number of parents listed on 1953 census list.....	68

"Number of registered voters voting in last general election....109

"Number of registered voters as of now.....112

"A number of people in the district were contacted as to probable number of eligible voters—highest estimate was.....110"

On these facts the superintendent concluded that the petition had a sufficient number of signatures and called an election. The total vote cast at the election was 115; 61 of whom voted for annexation and an appeal was taken to your office. The appellants, in support of their appeal, submitted twelve affidavits of persons who stated they were qualified electors and did not vote at the election. These affidavits raise the question as to the sufficiency of the petition. Emphasis must be placed on the dates of the various steps taken in regard to the proceedings. The petition was filed with the county superintendent on January 2, and on January 5, the superintendent acted on the petition by notifying the school boards of the petition. The election was held on February 4. The affidavits of electors submitted executed more than ten days after the election by the appellants recited that each affiant was qualified to vote at the election.

This opinion is confined to the sufficiency of the petition, as the appeal on the whole record submitted must be decided by you.

In answering your question as to the sufficiency of the petition it is important to consider several statutes. The authority and procedure for the annexation of a third class district to a first or second class district is found in sub-section 5 of Section 75-1813, R. C. M., 1947, as last amended by Chapter 23, Laws of 1953, which reads in part as follows:

"(5) When, in the interest of reducing cost of operation or improving the school service for pupils, a board of trustees, of a third class district, shall by majority vote of its members or at the request of twenty per cent (20%) of the qualified electors of the districts indicated by a petition, ask the county superintendent

of schools to annex the territory and property of such third class district to any second or first class district in its entirety, or proportionately to any number of first or second class districts as the board resolution or petition requests, the county superintendent shall, upon an approving vote of the trustees of the district with which the annexation is sought, authorize an election on such annexation within not less than twenty (20) nor more than thirty (30) days . . ."

This code section permits two alternatives. Either a resolution of the board of trustees or a petition of 20 per cent of the qualified electors of the district may request that the county superintendent annex the third class district to a first or second class district. A petition directed to the county superintendent initiated the proceedings with which we are concerned.

Only qualified electors of the third class district were eligible to sign the petition and qualifications of electors are defined in Section 75-1618, R. C. M., 1947:

"Qualifications of Electors. Every citizen of the United States of the age of twenty-one years or over who has resided in the State of Montana for one year, and thirty days in the school district next preceding the election, may vote thereat."

It is important to observe that registration is not a condition precedent to casting a vote at a school district election in a district of the third class. That registration is not a qualification to vote in a general school election was the conclusion reached in 22 Opinions of the Attorney General 158, No. 94. The Montana Supreme Court in *State ex rel. Lang v. Furnish*, 48 Mont. 28, 134 Pac. 297, expressed the rule in this language:

". . . It is a principle long established that registration is no part of the qualifications of an elector and adds nothing to them; it is merely a method of ascertaining who the qualified electors are, in order that abuses of the elective franchise may be guarded against . . ."

My reason for emphasizing that registration is not an essential element to vote at a school election is apparent when it is remembered that the county superintendent must determine whether a petition is signed by 20 per cent of the electors and no registration list is available as a standard in ascertaining the sufficiency of the number of signers. This perplexing problem was considered in the case of *Swaim v. Redeem*, 101 Mont. 521, 55 Pac. (2d) 1, although there was a marked difference in the statute there considered, as the petition had to be "signed and acknowledged by a majority of the resident freeholders." The court held that the county superintendent was justified in relying on the county records as "the freeholders of the district are the freeholders shown to be such by the county records." The opinion also stated:

" . . . We do not think it may be reasonably assumed that the superintendent shall personally contact each of the residents of the district and by direct inquiry determine whether such resident is a freeholder or not . . ."

The *Swaim* case was followed in *State ex rel. Wilson v. Musburger*, 114 Mont. 175, 133 Pac. (2d) 586, and the court specifically stated the petition for consolidation of school districts is jurisdictional and it is the duty of the county superintendent to search all the county records including those of the clerk of the court in determining the freeholders. However, both of these cases must be distinguished from the facts which you presented, as there has been a change in the statute by amendment. No longer must the signers be freeholders, but qualified electors for school elections are proper petitioners. As was previously pointed out, school electors need not be registered and as a consequence the county superintendent does not have the benefit of a fixed mathematical basis for her computation.

As the petition was filed January 2 and the election held February 4, more than thirty days elapsed between the two dates. The county superintendent acted on the petition January 5, and the sufficiency of the petition must be

tested as of such date. This conclusion is in accord with the opinion in *Swaim v. Redeem*, supra, where the court said:

"The petition was filed in the action at bar July 16, 1934. The order calling the election or directing that notices of election be posted was made between 1:30 and 2:30 P. M. July 25th. Some two hours thereafter, or at 3 o'clock P. M., the same day, the deeds heretofore mentioned were filed for record so that the number of resident freeholders was increased to the extent that the petition did not contain a majority of such freeholders at that time. The deeds were filed after the election had been ordered and came too late to alter the required number of signatures on the petition . . ."

No showing is made by appellants as to the exact number of electors on January 5, and it is conjectural whether there were more or less than 115 electors at the time the superintendent acted on the petition. Six different inquiries were made by the county superintendent as set out in the "Basis of Calculation" recited in full above, and in my opinion each of these was a real probative force in reaching the conclusion that twenty-three signers were sufficient. It is not reasonable to require the county superintendent to conduct a door to door census and this was recognized in the *Swaim* case.

The petition is questioned after the election and this makes the recent case of *State ex rel. Graham v. Board of Examiners*, 125 Mont. 419, 239 Pac. (2d) 283, particularly applicable as the court in the case discussed attacks on an initiative petition. The opinion stated the rule:

" . . . But after the people have voted on the measure and a great majority of the voters throughout the state have expressed their approval, the courts presume that the public interest was there and technical objections to the petition or its sufficiency are disregarded."

The delay in challenging the petition until after the election also mitigates against the appellants' position as it was held in *Reid v. Lincoln County*, 46 Mont. 31, 125 Pac. 429:

“ . . . But the election should be held valid unless it appears that a sufficient number of legal voters to have changed the result were prevented from casting their ballots . . . ”

No showing was made nor was the claim made that any elector was deprived of a chance to vote.

It is, therefore, my opinion that it is the duty of the county superintendent to make every reasonable effort to ascertain the number of qualified electors in a school district in computing the requisite per cent of signers on a petition for annexation of a school district.

It is also my opinion that under the facts submitted the petition requesting annexation of a school district had the requisite signatures and an election should have been called and the question submitted to the qualified electors.