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June 5, 1954
Letter Opinion
No. 54-158-L

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ARIZONA ATTORNEY GENERAL

The Honorable Ruskin Lines
Graham County Attorney
Courthouse
Safford, Arizona

Re: Apportionment of school funds.

Dear Sir:

You ask if the duty imposed on county school superintendents by Section 54-604, A.C.A. 1939, as amended, 1952 Cumulative Supplement, is mandatory or discretionary.

The section provides for the creation of a "special county reserve fund". Section 54-608 (c), A.C.A. 1939, as amended, 1952 Cumulative Supplement, provides for this fund as follows:

"54-608. Apportionment of county school fund.--

* * * * *

(c) * * * shall be used for: 1. necessary expenses in newly formed school districts; 2. transportation of children to and from one and two-room rural schools; 3. transportation of children in unorganized territory to organized districts; 4. necessary expenses in excess of the per capita apportionment from the county school fund for the establishment of schools in unorganized territory, and, 5. costs of maintaining one and two-room rural schools in any school district in excess of the amount available for such schools from the county school fund, but not to exceed the additional amount required and estimated for such purpose by the county school superintendent in fixing the amount of the special county school reserve fund under the provisions of Section 54-604. * * *

The section in question (54-604) contains the directions for the creation of the fund. This is accomplished in two principal steps. The establishment of the fund by following the necessary fiscal procedure is made the duty of the county treasurer. Such duty is the ultimate mandate of the statute and the other step, which requires the county school superintendent to estimate the amount needed for such fund, is a natural condition precedent.

The treasurer's duty under the statute is couched in positive terms, i.e., that he "shall transfer * * * an amount estimated by the county school superintendent". From the nature of the act, a ministerial duty, as well as the grammatical sense of the language used, it appears that there is no discretion in the treasurer.

The language delineating the function of the county school superintendent is likewise in positive terms, i.e., "Such estimate shall be submitted * * * and shall include the amounts needed".

Is this obligation to determine the "amounts needed" for the several purposes any less a ministerial duty than that imposed on the treasurer? We are of the opinion that it is not.

Article II, Section I, Constitution of Arizona provides for the "establishment and maintenance of a general and uniform public school system," by mandating (Board of Regents v. Sullivan, 45 Ariz. 245, 42 P. 2d. 619) the legislature to enact laws to accomplish this purpose. The language used in this section and the remainder of the Article, as well as the laws adopted pursuant thereto by the legislature, is generally in the same positive form, i.e., shall.

The problem is treated in part in 50 Am. Jur. Statutes:

"§ 30. Convertibility of Permissive and Mandatory Terminology.--In determining whether a statute is directory or mandatory, its form is not always decisive. In this respect, as in others, the terminology of the statute is to be given that effect which is necessary to carry out the intention of the legislature as determined by the ordinary rules of construction. The words, "may" "shall" and "must" are frequently used interchangeably in statutes, and without regard to their literal meaning. However, it should be helpful to keep in mind the fundamental rule that ordinarily the words "may" and "shall" or "must" are not used interchangeably or synonymously, but are given their ORDINARY MEANING. When the use of

the words in other than their ordinary meaning is intended, the intention to do so must clearly appear."

"§ 32. Mandatory Terminology Interpreted as Permissive.-- There are cases in which words of a statute, which are generally regarded as mandatory, are nevertheless given a directory or permissive meaning, in order to give effect to the legislative intent. This is true of the word "shall". A legislative intention that the word "shall" is to be construed as permissive, may appear from the spirit or purpose of the act, or from the connection in which it is used or the relation into which it is put with other parts of the same statute. The rule applies where no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or the individual by giving it such construction. It is particularly true that the word "shall" in a statute may be held to be not mandatory, where such a construction is necessary to uphold the constitutionality of the statute. The courts are, however, reluctant to contravene or construe away terms of a statute which in themselves are mandatory, except where the intent and purpose of the legislature are plain and unambiguous and clearly signify a contrary construction. Moreover, if any right to anyone depends on giving the word an imperative construction, the presumption is that the word was used in reference to such right or benefit."

The present language of Section 54-604, which follows the general pattern of the statutes in pari materia, is not the original form. Prior to the amendment of 1941, the duty in connection with the special county school reserve fund was laid upon the county board of supervisors as follows:

"54-604. Special county school reserve fund.--The board may add to the estimate of the county school superintendent an amount not to exceed six (6) per cent thereof, which amount shall constitute a special county school reserve fund, which shall be deposited in the county treasury and used as hereinafter provided."

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Nothing appearing to indicate the legislature intended the word "shall" as used in the section in its present form to convey other than its usual meaning, and as rights to the benefit of the fund would be placed in question by an interpretation that construed such language to be permissive, it is the opinion of this office that no discretion exists in the county school superintendent and the section is mandatory in all its features.

Very truly yours,

ERC:jlb

ELDON R. CLAWSON
Assistant to the
Attorney General