

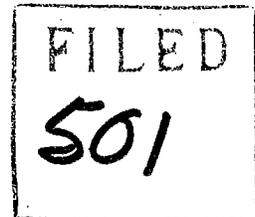
SCHOOLS:

(1) Some or all of the teachers of the St. Charles School District may be placed on a leave of absence pursuant to the provisions of Section 168.124, RSMo 1969, of the Teacher Tenure Act, if the school board of the St. Charles School District reasonably concludes that such action is necessary due to the financial condition of the school district. (2) In determining whether the schools of a district must close due to lack of funds, a school board must take into consideration all available income, including any school money received from the State of Missouri. However, a school board may consider any fixed expenses it will have after school is closed in determining when the available funds of the district have been exhausted. (3) Section 163.091, RSMo 1969, provides the sole remedy available to the state to recover from a school district the excess amount of state school money paid to the district in the current year. Therefore, if the district's application for state school money, report pursuant to Section 163.081, RSMo 1969, and calendar pursuant to Section 171.031, RSMo 1969, as filed with the State Board of Education all indicate that the district is qualified for state aid in the current year, the district will receive its share of state school money in the current year. In the following school year, the district's share of state school money will be reduced by the amount it received in the current year to which it was not entitled. However, should a school district amend any of these documents or otherwise officially notify the State Board of Education in the current year that the district is not qualified under Section 163.021, RSMo 1969, to receive state school money, the State Board of Education would then be obligated to adjust immediately the district's apportionment of school money.

OPINION NO. 501

September 29, 1970

Honorable Arlie H. Meyer
State Representative
District No. 105
234 Thomas Street
St. Charles, Missouri 63301



Dear Representative Meyer:

This official opinion is issued in response to your request for the ruling of this office on the following questions:

"1. Can teachers collect a full year's salary if the Board is forced to close school because of lack of available funds

.

Honorable Arlie H. Meyer

"2. In the Attorney General's Opinion No. 446 stating that school must open and expend all financial resources, does this include State aid if it is known that the district cannot maintain 174 classroom days even with State funds, and therefore would be required to pay back the state's money."

Although no factual information was furnished this office with the opinion request, we have subsequently determined from you that the request pertains to the St. Charles School District. With your assistance, we have obtained from this district copies of the contracts entered into with the teachers of that district. We have been advised that the teachers signed the contracts prior to May 1, 1970, and that the president of the school board executed the contracts on May 1, 1970, which is prior to the effective date of the Teacher Tenure Act (July 1, 1970).

In answering your first question, it is necessary to analyze these contracts to determine if the parties contemplated what would happen if a financial crisis in the district forced the closing of school. Although these contracts were entered into prior to the effective date of the Teacher Tenure Act, it is apparent that the parties thought they were entering into agreements which would be governed by it. For instance, one contract form is entitled "Permanent Teacher's Contract" and the other is designated "Probationary Teacher's Contract." Prior to July 1, 1970, there was no statutory provision for, or definition of, "permanent teacher" and "probationary teacher." However, the terms "permanent teacher" and "probationary teacher" are carefully defined in Section 168.104, RSMo 1969, of the Teacher Tenure Act and these terms are used throughout the Teacher Tenure Act. In addition, the contract offered to permanent teachers purports to employ the teacher for an "indefinite period." Under the law governing teachers' contracts in effect on May 1, 1970, a school board of a six-director district was not authorized to grant indefinite contracts to teachers. See Sections 168.101 and 168.111, RSMo Supp. 1967.

Furthermore, in the contracts offered to both permanent and probationary teachers, the provisions of the Teacher Tenure Act are incorporated by reference. In the form of contract offered to permanent teachers, the following language appears:

"It is agreed by the parties that this contract shall continue in force from year to year, until modified or terminated in accordance with the provisions of The Missouri Teacher Tenure Act, Sections 168.101 to Sections 168.116, both inclusive, V.A.M.S. and any amendments thereto,

Honorable Arlie H. Meyer

which provisions, together with the published Rules and Regulations of the Board of Education, are, by reference, made part of this agreement."

The form of contract offered to probationary teachers contains this provision:

"The provisions of the Missouri Teacher Tenure Act, Sections 168.101 to Sections 168.116, both inclusive, V.A.M.S., and any amendments thereto, together with the published Rules and Regulations of the Board of Education, are, by reference, made part of this agreement."

In both contracts, the reference is to the "Missouri Teacher Tenure Act, Section 168.101 to Section 168.116, both inclusive, V.A.M.S." This language is potentially misleading and ambiguous. If taken literally, only those provisions numbered 168.101 through 168.116 in Vernon's Annotated Missouri Statutes, including the 1969-70 Cumulative Annual Pocket Part, would be incorporated into the contract. The Teacher Tenure Act in its entirety begins at Section 168.102 and concludes with Section 168.130. See Section 168.102, RSMo 1969. In both contracts this would mean that crucial provisions of the Teacher Tenure Act were omitted. For example, in the permanent teachers' contracts, the procedure for a termination hearing contained in Section 168.118, and the provision for appeal from the board's decision in a termination hearing provided in Section 168.120 would not be included. For probationary teachers, a literal reading of the contract would mean that the only provision of the Teacher Tenure Act pertaining exclusively to them, Section 168.126, would be omitted from their contracts. We believe the parties intended to incorporate all provisions of the Teacher Tenure Act into their agreement and that the confusion arose because the Revisor of Statutes renumbered the original sections of the Teacher Tenure Act. House Bill No. 120, Laws 1969, the Teacher Tenure Act, contained Sections 168.101 through 168.116. See Vernon's Legislative Service, supplementing V.A.M.S., pp. 454-459 (No. 3, 1969). However, the Revisor of Statutes altered the numbering of these sections so that the Teacher Tenure Act, as it appeared in the 1969-70 Cumulative Annual Pocket Part to V.A.M.S., and in Missouri Revised Statutes, 1969, begins with Section 168.102 and ends with Section 168.130. Therefore, we conclude that the parties to both the permanent and probationary teachers' contracts intended to make all of the provisions of the Teacher Tenure Act a part of the agreements. To conclude that the parties intended to incorporate only irrationally selected sections of the Teacher Tenure Act would not be a reasonable interpretation of the agreements.

Honorable Arlie H. Meyer

Having concluded that the parties intended to incorporate into their agreement all the provisions of the Missouri Teacher Tenure Act, we must now determine whether, under the Missouri Teacher Tenure Act, a school district must pay teachers a full year's salary if the board is forced to close school due to the financial condition of the district. Section 168.124, RSMo 1969, part of the Missouri Teacher Tenure Act, provides as follows:

"Board to place on leave, provisions governing.--
The board of education of a school district may place on leave of absence as many teachers as may be necessary because of a decrease in pupil enrollment, school district reorganization or the financial condition of the school district.
In placing teachers on leave, the board of education shall be governed by the following provisions:

"(1) No permanent teacher shall be placed on leave of absence while probationary teachers are retained in positions for which a permanent teacher is qualified;

"(2) Permanent teachers shall be retained on the basis of merit within the field of specialization;

"(3) Permanent teachers shall be reinstated to the positions from which they have been given leaves of absence, or if not available, to positions requiring like training and experience, or to other positions in the school system for which they are qualified by training and experience;

"(4) No appointment of new teachers shall be made while there are available permanent teachers on unrequested leave of absence who are properly qualified to fill such vacancies;

"(5) A teacher placed on leave of absence may engage in teaching or another occupation during the period of such leave;

"(6) The leave of absence shall not impair the tenure of a teacher;

"(7) The leave of absence shall continue for a period of not more than three years unless extended by the board." (Emphasis supplied)

Honorable Arlie H. Meyer

By this section, the Missouri legislature has granted to the board of education of a school district the authority to place teachers on leaves of absence when the board reasonably believes that the financial condition of the district requires such action. Consistent with other provisions of the Teacher Tenure Act, the subparagraphs of Section 168.124 are designed to assure permanent teachers that a leave of absence under this section will not impair their tenure. A leave of absence granted pursuant to this section would be without pay. It would not be a reasonable interpretation of the statute to say that a district which is authorized to give teachers leaves of absence due to the financial condition of the district would then have to continue to pay the teachers. This would in no way alleviate the strained financial condition of a district which is a prerequisite to granting teachers leaves of absence under Section 168.124. In State ex rel. McGaughey v. Grayston, 349 Mo. 700, 163 S.W.2d 335 (En Banc 1942), the Missouri Supreme Court had occasion to explain the meaning of "leave of absence" in the following way:

" . . . The common meaning of the term signifies temporary absence from duty with an intention to return, during which time remuneration is suspended. . . ." Id. at 341.

Therefore, we conclude that (1) the St. Charles School District and both the permanent and probationary teachers of the district intended to include all the provisions of the Teacher Tenure Act in the contracts executed by the board on May 1, 1970, and (2) the St. Charles School Board, pursuant to the authority granted it by Section 168.124 of the Teacher Tenure Act, may place on leave of absence as many teachers as it reasonably believes necessary because of the financial condition of the school district. Should, as your question assumed, it become necessary that the school board close school because of lack of available funds, the school board may grant any or all teachers a leave of absence pursuant to Section 168.124.

In the event the parties to these contracts intended to incorporate certain provisions of the Teacher Tenure Act but not Sections 168.118 through 168.130, would the board be responsible for paying teachers the full amount of their contract even if the board was forced to close school because of lack of funds?

Article VI, Section 26(a), Missouri Constitution, 1945, provides:

"No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted

Honorable Arlie H. Meyer

in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this Constitution."

This provision of the Missouri Constitution is self-enforcing and limits the power of a school district to become indebted in an amount exceeding its revenue for the calendar year. Hawkins v. Cox, 334 Mo. 640, 66 S.W.2d 539 (1933); Clarence Special School Dist. v. School Dist. No. 67, 341 Mo. 178, 107 S.W.2d 5, 7 (1937). If a school district incurs a debt as the result of a voluntary contract, the obligation is void if beyond the revenue actually provided for that year. Linn Consol. High School Dist. v. Pointer's Creek Public School Dist., 356 Mo. 798, 203 S.W.2d 721, 724 (1947).

Whether Section 26(a) has been violated is determined by the financial situation of the school district at the time a debt is contracted or created. Pullum v. Consol. School Dist. No. 5, 357 Mo. 858, 211 S.W.2d 30, 34 (1948). The execution of a teacher's contract does not create a debt for the purposes of Section 26(a) because such a contract is wholly executory until the teacher performs his services. The Supreme Court of Missouri discussed when a teacher's contract creates a debt for the purposes of Article X, Section 12, Missouri Constitution, 1875 (Article VI, Section 26(a), Missouri Constitution, 1945) in Tate v. School Dist. No. 11 of Gentry County, 324 Mo. 477, 23 S.W.2d 1013, 1023 (1930):

". . . It is clear to our minds that such contract is wholly executory, and that the pecuniary liability of the defendant school district thereunder is contingent upon the rendition of such personal services by plaintiff. If, and as, such personal services are properly rendered by plaintiff from month to month, during the term of the contract, the school district becomes indebted to plaintiff for the personal services actually rendered by plaintiff. In the event of the death or disability of plaintiff, either before or during the term of the employment, the contract is terminated and discharged. 'Contracts to perform personal acts are considered as made on the implied condition that the party shall be alive and shall be capable of performing the contract, so that death or disability will operate as a discharge.' 13 C. J. 644, and cases there cited. Thus the contract here in controversy might never be performed by plaintiff [teacher]; in which event, of course, there is no pecuniary liability of

Honorable Arlie H. Meyer

the school district, and consequently no debt on its part. That such contract of employment is wholly executory and contingent is clearly recognized by the school statute (section 11138, R. S. 1919), which provides that, 'should the schoolhouse [which the teacher is employed to teach] be destroyed, the contract becomes void.' We are constrained to the view that the mere execution of the contract of employment did not create a debt of the defendant school district on December 18, 1924, within the meaning or intent of section 12, art. 10, of the Constitution, and that the defendant school district did not become indebted to plaintiff, under the terms of the contract of employment, until the time for the performance of such contract had expired."

Furthermore, in Pullum v. Consol. School Dist. No. 5, supra, the court concluded:

". . . In examining a question whether a debt for a teacher's services is in violation of constitutional limitations on a school district's indebtedness, the debt is considered as contracted or created when the teacher's services are performed. Tate v. School Dist. No. 11 of Gentry County, supra."

With reference to your inquiry, the St. Charles School District would become indebted to its teachers only when the teachers perform their services under the contracts. However, the district is prohibited by Article VI, Section 26(a) from incurring any debt in excess of the revenue provided for that calendar year. Therefore, the school board would not be authorized to permit teachers to perform services under their contracts and thereby become indebted to them when the available funds of the district have been exhausted. [This conclusion is based on the assumption that the school board has fully performed its duties under the contracts and applicable statutes except that it is unable to keep school open due to a lack of available funds. See Dye v. School Dist. No. 32, 355 Mo. 231, 195 S.W.2d 874 (En Banc 1946)].

Your second inquiry involves two questions:

1. Must a school district expend any financial aid it receives from the state before it is authorized to close school because all financial resources have been exhausted?

Honorable Arlie H. Meyer

2. If the district expends all of its financial resources in the 1970-71 school year and does not operate its schools for 180 days including legal school holidays, must the school district pay back all state moneys received in the 1970-71 school year?

In Opinion No. 446, dated September 4, 1970, to the Honorable Harold J. Esser, we concluded in part as follows:

"(3) If all available funds are insufficient to provide for a full nine month term, the school board may refuse to open the schools within its district if it has arranged for all pupils within the district to be educated in another district. If such arrangements are not or cannot be made, then the school board must open and operate its schools until all financial resources are exhausted. When all financial resources have been exhausted, the school board is authorized to close its schools."

Pursuant to the foregoing, the school board of any six-director district in the state may close school when it reasonably determines that all of its available financial resources have been exhausted. The available financial resources may be exhausted prior to the expenditure of the last penny in the account of the district. Whether school must be closed due to lack of funds is a decision which has been entrusted by the Missouri Constitution and statutes to the reasonable discretion of the school board of a district. In reaching this decision a board might take into consideration the amount of money required to provide for certain fixed expenses of the district such as maintenance and security of the district's buildings and other property, insurance premiums, debt service, etc. However, in reaching this decision we believe a school board is obligated to consider as available income all financial resources available to it including any amounts received from the State of Missouri. See Section 163.031(9), RSMo 1969.

To qualify for state financial aid, a school district must comply with Section 163.021, RSMo 1969:

"Eligibility for state aid--requirements.--
A school district shall receive state aid for its educational program only if it:

"(1) Operates its schools for a minimum of one hundred eighty days including legal school holidays as defined in section 171.051, RSMo, and days when the school is dismissed by order of the board to permit teachers to attend teachers' meetings;

Honorable Arlie H. Meyer

"(2) Maintains adequate and accurate records of attendance, personnel and finances, as required by the state board of education, which shall include the preparation of a financial statement which shall be submitted to the state board of education the same as required by the provisions of section 165.111, RSMo, for six-director elementary and high school districts;

"(3) Levies a property tax of not less than one dollar for current school purposes on each one hundred dollars assessed valuation of the district;

"(4) Computes average daily attendance as defined in subdivision (1) of section 163.011. Whenever there has existed within the state an infectious disease, contagion, epidemic, plague or similar condition whereby the school attendance is substantially reduced for an extended period in any school year, the apportionment of school funds and all other distribution of school moneys shall be made on the basis of the school year next preceding the year in which such condition existed."

Also, the school board of each district must prepare each year a calendar for the school term providing for a minimum of 174 days of actual pupil attendance. Section 171.031, RSMo 1969, states:

"Each school board shall prepare annually a calendar for the school term, specifying the opening date and providing a minimum term of at least nine months or one hundred seventy-four days of actual pupil attendance. The term may be extended to ten months when the resources of the school funds justify the extension."

The regulations of the State Board of Education require each district in the state to file its annual school calendar prior to October 15 of each year as part of the district's Application for Classification. See Section 161.092, RSMo 1969.

The amount of state aid each district receives is based on an Application for State School Money, Pupil and Personnel Data and on a Report of Secretary of Board to County Superintendent and State

Honorable Arlie H. Meyer

Board of Education filed with the State Board of Education pursuant to Section 163.081 which provides as follows:

"Distribution of state aid--clerk's reports--penalty--duties of county superintendents, state board and county treasurers.--1. Between June fifteenth and June thirtieth each year the clerk of each school district shall make a report to the county superintendent of schools which shall contain all necessary data for calculating the amounts of state support which each district is to receive for the following school year. The report shall be sworn to before a notary public or the county clerk. After the reports are properly made, the county superintendent shall verify, summarize and forward them to the state board of education with comments on or before July fifteenth. Any district clerk, superintendent or teacher who knowingly furnishes any false information in the reports, or neglects or refuses to make the reports is guilty of a misdemeanor and shall be punished by a fine of not more than five hundred dollars or imprisonment in the county jail for not more than six months or by both such fine and imprisonment.

"2. The state board of education upon receipt of the county superintendent's report shall calculate the amount which each school district is to receive and on or before September fifteenth of each year shall distribute all moneys available August thirty-first to the several districts. Additional distribution of all moneys available November thirtieth and February twenty-eighth shall be made on or before December fifteenth and March fifteenth of each school year. The state board of education shall certify the amounts so apportioned to the comptroller for his approval and warrants shall be issued payable to the several counties and forwarded to them. The county treasurer immediately upon receiving the money shall distribute and credit to the various school districts in the county the amounts due each district as apportioned and reported to the county treasurer and county clerk by the state board of education."

If the application, report and calendar filed by a district pursuant to Sections 163.081 and 171.031 indicate that the district

Honorable Arlie H. Meyer

qualifies for state aid, we believe that the State Board of Education is required to distribute to this district its share of state school money for that school year. In State ex rel. Randolph County v. Evans, 240 Mo. 95, 145 S.W. 40 (Mo. 1912), the county sought a court order compelling the State Superintendent of Schools to apportion to the county the full sum of state aid due it. The State Superintendent contended that the school district in question had filed fraudulent pupil enumerations for the current and past years and that it was his duty to withhold from the current year sufficient moneys to rectify these frauds. The Court pointed out that school enumerations are the responsibility of school boards and that there is a presumption that the acts of a body entrusted by law with the performance of a duty which, on their face, are regularly taken are not subject to collateral attack. Id. at 42.

"If these enumerations are fraudulent, no doubt they could be attacked and corrected in a proper action; but, so long as they exist, the State Superintendent cannot reach them in this collateral proceeding. Until they are corrected in a proper proceeding, he must take them as a basis for a proper distribution of the school money. This view, of course, disposes of the enumerations for all the years, and in effect disposes of the case; but there are other matters urged by the motion to strike out which we prefer to discuss, and these we take next.

"2. But, to my mind, there is another reason why the contention of respondent, Evans, cannot be sustained. His duties as to the distribution of school funds are purely ministerial. No statute authorizes the State Superintendent to revise and correct enumerations on the ground of fraud. Such officer has been furnished with no legal machinery by which he can hold or have a hearing and adjudge the fact of fraud or no fraud in enumeration returns. He is not empowered to bring the interested parties before him. In fact, the law makes no provision for him to make an investigation of the question of fraud. As indicated in the previous paragraph, I have no doubt that in a proper proceeding before a proper tribunal, with the proper parties before such tribunal, fraudulent enumeration lists may be purged of fraud;

Honorable Arlie H. Meyer

but the State Superintendent has not been constituted such a tribunal by law. Nor can this court try the issue of such fraud in this collateral proceeding. It may be that the Legislature could invest the State Superintendent with powers in this regard; but up to this time it has not seen fit so to do. The Legislature, no doubt, thought that it had sufficiently hedged these enumerations from fraud by the criminal proceedings which it authorized and mentioned above." (Id. at 44)

However, the State Board of Education is obligated to reduce a district's apportionment in the next school year by the amount of any state aid it improperly received in the current year. Section 163.091 provides as follows:

"Correction of errors in apportionment of state aid.--The state board of education may correct any error made in the apportionment of the state school moneys fund among the various counties of this state out of the state school moneys fund of the year next following the date when the mistake was made. The state board of education shall certify the amount set apart to any county for the purpose of correcting any error to the comptroller and to the county treasurer, and the comptroller shall certify the amount so apportioned for proper payment, and the county treasurer shall distribute and credit the funds to the various districts in the county as the funds of the year in which the error occurred. If any district has received funds in excess of the amount to which it was entitled, its apportionment for the next succeeding year shall be reduced accordingly." (Emphasis supplied)

This statute provides the sole remedy available to the state to recover from a school district an excess amount of state school money paid to the district in the current year. Therefore, if the district's application for state school money, report pursuant to Section 163.081 and calendar pursuant to Section 171.031 all indicate that the district is qualified for state aid in the current year, the district will receive its share of the state school money in the current year. In the following school year, the district's share of state school money will be reduced by the amount it received in the current year to which it was not entitled. However, should a school district amend any of these documents or otherwise

Honorable Arlie H. Meyer

officially notify the State Board of Education that the district is not qualified under Section 163.021 to receive state school money, the State Board of Education would then be obligated to adjust immediately the district's apportionment of school money. See Section 163.031.

CONCLUSION

Therefore, it is the opinion of this office that under the factual circumstances set forth in this opinion:

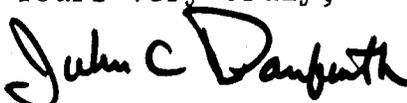
(1) Some or all of the teachers of the St. Charles School District may be placed on a leave of absence pursuant to the provisions of Section 168.124, RSMo 1969, of the Teacher Tenure Act, if the school board of the St. Charles School District reasonably concludes that such action is necessary due to the financial condition of the school district.

(2) In determining whether the schools of a district must close due to lack of funds, a school board must take into consideration all available income, including any school money received from the State of Missouri. However, a school board may consider any fixed expenses it will have after school is closed in determining when the available funds of the district have been exhausted.

(3) Section 163.091, RSMo 1969, provides the sole remedy available to the state to recover from a school district the excess amount of state school money paid to the district in the current year. Therefore, if the district's application for state school money, report pursuant to Section 163.081, RSMo 1969, and calendar pursuant to Section 171.031, RSMo 1969, as filed with the State Board of Education all indicate that the district is qualified for state aid in the current year, the district will receive its share of state school money in the current year. In the following school year, the district's share of state school money will be reduced by the amount it received in the current year to which it was not entitled. However, should a school district amend any of these documents or otherwise officially notify the State Board of Education in the current year that the district is not qualified under Section 163.021, RSMo 1969, to receive state school money, the State Board of Education would then be obligated to adjust immediately the district's apportionment of school money.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, D. Brook Bartlett.

Yours very truly,



JOHN C. DANFORTH
Attorney General