RE; Schools, Section 9217, R.S. 1929, requiring districts to maintain separate schools for negro children resident therein, or in lieu thereof transportation to and tuition in such a school in the county, on penalty for failure of being deprived of public schools funds, is mandatory and State Superintendent of Public Schools should ascertain facts and act thereon in apportioning such funds.

January 13, 1933

FILED
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Hon. Charles A. Lee,
State Superintendent, Public Schools,
Jefferson City, Missouri.

Att: Mr. George B. John.

Dear Sir:-

Your letter of January 5, 1933 to us is as follows:

"Complaint has reached this department upon a number of occasions from parents of colored pupils saying the school board has neglected or refused to provide school facilities for colored pupils according to the provisions of Section 9217.

"Section 9217 provides that should any board neglect or refuse to comply with the provisions of this act they shall be deprived of any part of the public funds so long as the law is not complied with.

"Each year during the month of August the State Superintendent makes the apportionment of the state school moneys. Also the county clerk at different times during the year apportions to each school district public funds derived from the Foreign Insurance, County Interest, Township Interest, and Railroad taxes.

"Questions:

"1. Can the State Superintendent or county clerk legally apportion money to school districts when valid information is available showing that the board has neglected or refused to provide school facilities for colored pupils?

"2. What would be valid information sufficient to deny the ap ortionment of public funds to such districts?

"3. Is it necessary that a writ of prohibition be served upon the state

superintendent or county clerk before the apportionment of public funds can be denied according to Section 9217?

"4. Does the word "shall" in the last provision of Section 9217 make it mandatory that the state superintendent or county clerk deny the apportionment to a district without a "writ of prohibition" when valid information is available that this law has not been complied with?"

This Section 9217, R.S. 1929, follows the mandate of Section 3, Article XI of the Missouri Constitution:

"Separate free public schools shall be established for the education of children of African descent."

Although the Supreme Court has said that "shall" in the Constitution does not compel the legislature to act (Fahey vs Hackmann, 231 Mo. 351, 379), because there is no way to compel a legislative body to act, yet, when it does act and itself uses mandatory words and provisos to enforce the legislation enacted by it in pursuance of its constitutional powers and duties, the administrative officers are bound thereby, as they do not have the prerogative of declining to act with no one to call them to account for non-action other than the voters at the next election, as is the case with legislators, as the court says.

In fact, the Kansas City Court of Appeals held Section 9217, R.S. Mo. 1929 to be mandatory upon the school boards in the case State ex rel. vs Cartwright, 122 App. 257, 99 S.W. 48, holding that mandamus should issue to the board to establish and maintain a school for colored children in the district as the statute required, and this case has been cited with approval in State ex rel. Whitehead vs Wenom, 326 Mo. 352, 359, 361, 32 S.W. (2d) 159. So it would seem that parties injured by non-action of the board have a remedy by mandamus against the board.

However, the legislature has"imposed a penalty on the district by the last proviso of Sec. 9217, as you say, by depriving it of public funds in case of its board of directors' failing or refusing to comply with this Section. Though this statute's enforcement may bear hard upon the negligent district and its schools, the statute like all others is presumptively valid, and in our opinion should be complied with by the State

Superintendent of Schools, when he comes to make his apportionment and is satisfied by proper inquiry that a district is failing or refusing to provide school facilities for negro children resident therein as required by Sec. 9217, that is, either to maintain a separate school for them, or in lieu thereof provide transportation to and tuition in such a school in the county. Of course, the enforcement of this penalty depends first upon the ascertainment of the fact of the failure or refusal of the district to comply with the law, and as no method of its determination is set out in the statute, the fact should be ascertained as any other, that is, by finding competent witnesses who are familiar with the facts and could testify thereto in court, if the fact is disputed therein. If the board is notified of the proposed action on the ground of its failure or refusal to obey this law, there ought to be no great trouble about determining the facts, which must be well known in any district which is actually so failing or refusing. We do not think it necessary to wait for some injured party to sue out a writ of prohibition against the Superintendent, as the burden ought not to be primarily upon injured persons to enforce a law of this kind, and if the State Superintendent should act upon an error of fact, then the district would have its remedy by mandamus against him, or if the district disputed the validity of this proviso, it could raise that question also for the courts to determine.

We have not attempted to consider the duty of the county clerks in this matter, because their legal adviser is primarily the local prosecuting attorney, who can then ask the opinion of this department, if he is not himself satisfied in regard thereto.

Trusting we have fully answered your inquiries, we are

Respectfully yours,

DENTON DUNN
Asst. Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

DD/mh