SCHOOLS:
STATE BOARD OF EDUCATION:
SCHOOL DISTRICTS:

The statutory provisions found within Section 165.677, RSMo Cum. Supp. 1957, which give the State Board of Education sixty days in which to consider county reorganization plans for school districts and return to the county board approved or disapproved, are directory. These provisions are designed to expedite reorganization of school districts and tardy compliance does not invalidate the proceedings taken thereunder. However, it is incumbent upon the State Board to adhere to this schedule as nearly as practicable. Even though the provisions are directory, they are meant to be followed as closely as possible.

October 28, 1960

FILED
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Honorable Hubert Wheeler
Commissioner of Education
Jefferson Building
Jefferson City, Missouri

Dear Mr. Wheeler:

This is in response to your request for opinion dated February 2, 1960. You conclude your letter with the following request:

> "I shall be glad to have your advice and official opinion in answering the following questions:
>
> 1. Does the law which establishes a time schedule for the State Board of Education to examine, approve or disapprove proposed school district reorganization plans submitted by the county board of education apply in the same manner as the courts have ruled in relation to the time schedule for county boards?
>
> 2. Is the statute which regulates the time in which the State Board exercises its power in the examination, approval or disapproval of county board of education plans for reorganization of school districts to be considered directory and not mandatory? If directory, would the State Board's consideration and disposal of a county plan which went beyond the 60 days scheduled time be a valid act?"

Your first question and the first part of your second question will be handled together. Following this discussion I will answer the latter portion of question number 2.

Those statutes necessary for an understanding of the problem at hand are as follows:

Section 165.673, RSMo 1949:

"The county board of education, as provided for in sections 165.657 to 165.670 shall:

(1) Within six months after its organization, make or cause to be made and completed a comprehensive study of each school district of the county and prepare a plan of reorganization. Such study shall include:

(a) The assessed tax valuation of each existing district and the differences in such valuation under the proposed reorganization plan;

(b) The size, geographical features and the boundaries of the proposed enlarged districts;

(c) The number of pupils attending school, average daily attendance, and the population of the proposed enlarged districts;

(d) The location and conditions of school buildings and their accessibility to the pupils;

(e) The location and condition of roads, highways and natural barriers within the county;

(f) The high school facilities of the county and recommendations for improvement of same;

(g) The conditions affecting the welfare of the teachers and pupils;

(h) Any other factors concerning adequate facilities for the pupils.

(2) Upon completion of the comprehensive study, but not later than May 1, 1949, submit to the state board of education, a specific plan for the reorganization of the school districts of the county. Such plan shall be in writing and shall include such charts, maps and statistical information as are necessary to properly document the plan for the proposed reorganized districts.

(3) Continue to study the school system of

the county and propose subsequent reorganization plans as conditions warrant.

(4) Cooperate with boards of adjoining counties in the solution of common organization problems, and submit to the state board of education for final decision any and all organization questions on which the cooperating boards fail to agree.

(5) Approve the budget prepared by the county superintendent of schools in cooperation with the clerks of the boards of several districts and approve the audit, made by the county superintendent, of the expenditures report prepared by the district clerk and submitted for the approval of the state board of education.

(6) Continue to advise with the county superintendent of schools, school patrons, and school officials on all matters pertaining to the improvement of the schools in the county." (Emphasis supplied.)

Section 165.677, RSMo Cum. Supp. 1957:

"Upon receipt of such reorganization plan, the state board of education shall examine such plan. The state board shall approve or disapprove such plan either in whole or in part. If the plan includes any proposed district with territory in more than one county, the board shall designate the county containing the greater portion of such proposed district based upon assessed valuation as the county to which such district shall belong. The secretary of the county board shall be notified of the state board's action within sixty days following receipt of the plan by the state board. If the state board finds that the reorganization plan is inadequate in whole or in part, it shall return the plan to the secretary of the county with a full statement indicating the parts thereof it has approved and its reasons for finding the plan or any part inadequate. The county board shall have sixty days to review the rejected plan or parts thereof, make alterations, amendments and revisions as may be deemed advisable and return the revised plan or part to the state

> board for its action. If the revised plan or part is disapproved by the state board, the county board shall propose and submit its own plan or part to the voters within sixty days following receipt of disapproval of the revised plan or part. No enlarged district may be proposed or submitted without the approval of the state board unless such proposed district shall have a minimum of two hundred pupils in average daily attendance for the preceding year or is comprised of at least one hundred square miles of area. Such plan or part shall be submitted to the qualified voters in the same manner as if the plan or part had been approved by the state board. Nothing in sections 165.657 to 165.707 shall be construed as preventing the establishment and operation of more than one school in any enlarged district."

Thus we see that the State Board has sixty days to examine, approve or disapprove, in whole or in part, the county's plan. If the plan is disapproved the county board has sixty days in which to submit a revised plan. If this plan is also rejected, then the county board shall submit its own plan to the voters within sixty days. If the State Board should approve any reorganization plan, then Section 165.680, RSMo Cum. Supp. 1957, gives the county board sixty days to call an election. In the event that any plan of reorganization should fail at the polls, then the county board can resubmit a subsequent plan pursuant to certain time limitations found in Section 165.693, RSMo 1949.

State ex rel. Rogersville Reorganized School District No. R-4 of Webster County v. Holmes, 363 Mo. 760, 253 SW2d 402, interpreted certain portions of the above time schedule. The court held that the requirements of (1) submitting reorganized plans to the State Board not later than May 1, 1949 [Section 165.673(2)] and (2) submission of subsequent plans to the voters after a rejection at the polls should not be later than two years [Section 165.693], were only directory provisions and not mandatory. The failure to fully comply with these time limitations did not invalidate the organization and existence of the school districts involved.

The use of such slippery words as "mandatory" or "directory" by themselves is subject to severe limitations. It could even be said that these words describe the position a court has reached after interpreting a statute under a given set of facts. So the true meaning of these words is the analysis used to test the statutory language involved. In the Holmes case, the court said at 253 SW2d, l.c. 404:

> "In determining whether either of the provisions of the schedule with which each relator failed to comply is mandatory or directory, the 'prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished. Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory.' 25 R.C.L. §14, pp. 766, 767."

The court also cited authorities for a general proposition of the law such as is found in 67 C.J.S., Officers, Sec. 114 (b), pp. 404-406:

> "As a rule a statute prescribing the time within which public officers are required to perform an official act regarding the rights and duties of others, and enacted with a view to the proper, orderly and prompt conduct of business, is directory unless it denies the exercise of the power after such time, or the phraseology of the statute, or the nature of the act to be performed, and the consequences of doing or failing to do it at such time are such that the designation of time must be considered a limitation on the power of the officer. When the legislature prescribes the time when an official act is to be performed, the broad legislative purpose is to be considered in deciding whether the time prescribed is directory or mandatory. If the statute is mandatory there must be strict conformity, but if directory the legislative intention is to be complied with as nearly as practicable. So a statute requiring a public body, merely for the orderly transaction of business, to fix the time of performance of certain acts which may as effectually be done at any other time is usually regarded as directory." (Emphasis supplied).

The above quotation is cited with approval in part in Taney

County v. Empire District Electric Company, Mo. Sup., 309 SW2d 610. The Taney County case, the Holmes case, and many other Missouri decisions which have delved into the dichotomous discussion at hand, cite a leading authority on statutory interpretation. Sutherland, Statutory Construction, 3rd Ed. In Vol. 3, l.c. 101-102, Sutherland says:

> §5816. " * * * It is difficult to conceive of anything more absolute than a time limitation. And yet, for obvious reasons founded in fairness and justice, time provisions are often found to be directory merely, where a mandatory construction might do great injury to persons not at fault, as in a case where slight delay on the part of a public officer might prejudice private rights or the public interest.* * *
>
> "For the reason that individuals or the public should not be made to suffer for the dereliction of public officers, provisions regulating the duties of public officers and specifying the time for their performance are in that regard generally directory. A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered a limitation of the power of the officer." (Emphasis supplied.)

These lengthy quotations have been included in this opinion to give meaning to the court's decision in the Holmes case when it said that certain portions of the time schedule for school district reorganization were "directory" rather than "mandatory."

This time schedule, the court said, was placed in the statutes because "the Legislature deemed a general reorganization of the school districts of this State to be of urgent need. But it was the need that prompted the urgency." And it was further stated that the Legislature never intended that a tardy compliance with those provisions of the schedule before the court "would be construed to defeat the end to be accomplished when both are so clearly intended to expedite rather than to abort the fulfillment of the need."

The Holmes case and State ex inf. Smoot, ex rel. Kugler v. Boyer, et al., Mo. Sup., 259 SW2d 375, explicitly state that the Legislature intended that schools were to be reorganized, under the provisions set out above in years to come, regardless of the fact that the calendar schedule in the statute had expired (first Tuesday in November, 1949). Thus, the logic of these cases can be used today. To reach a solution to the question raised in your opinion request we must equate the time schedule for State Board action to the same plane and parallel to that schedule set up for the county board. It is certainly difficult to explain why the two should be treated differently. The "need" of school district reorganization would apply equally to one board as to the other. Tardy compliance by the State Board could not reasonably be permitted to defeat the over-all objective of reorganization. Surely the State Board's inability to meet and act upon a reorganizational plan within the prescribed sixty-day period could not defeat that plan and cause injury to the public. It is my view, therefore, that the time schedule prescribing the time within which the State Board shall examine and approve or disapprove a reorganizational plan is directory and "intended to expedite rather than to abort the fulfillment of the need" for reorganization.

In answering your second question it might be accurate to state that the true distinction between a directory or mandatory provision is that late compliance is valid in one situation while invalid in another. Thus, if we say that the time schedule under discussion is directory, we are inferentially stating that tardy compliance is effective. However, it cannot be too strongly emphasized that regardless of the conclusion that the time schedule at hand is directory, the State Board is still required to adhere to this schedule as nearly as practicable.

In 82 C.J.S., Statutes, §374, p. 869, it is stated that " * * *While noncompliance with a directory provision of a statute does not invalidate a proceeding, there is nevertheless a duty to comply even with purely directory provisions, as nearly as practicable, * * *" This same theory was mentioned in School District No. 40 v. Board of County Commissioners of Clark County, 155 Kan. 636, 127 P2d 418, 420 [1], when the court said that if a statute is directory "the legislative intention is to be complied with as nearly as practicable." This same court said in an earlier case, " * * *While a directory provision should be obeyed, an act done in disobedience of it may still be valid.* * * " Hooper v. McNaughton, 113 Kan. 405, 214 P 613, 614 [1]. The basic premise that directory provisions are not intended by the Legislature to be wholly disregarded appears in 25 R.C.L., §14, p. 767 and has been adopted as a proper expression of the law in Baltimore Paint & C. Works vs. Automotive Electric & Parts Co., 173 Md. 210, 195

A 558, 560 [5]; State vs. Consolidated School District No. 4C, 358 Mo. 839, 217 SW2d 500, 502 [4]; and State vs. Brown, 326 Mo. 627, 33 SW2d 104, 106 [2-6]. This basic statement is further elaborated in 50 Am. Jur., Statutes, §20, p. 43. It says there that " * * * while the consequences of the violation of a directory statute may be a judicial question to be decided in accordance with the excusatory or explanatory facts and circumstances attending the violation, in the absence of any such fact, the direction of the statute will ordinarily be followed where it is plain and explicit and is consistent with the established practice and policy of the court dealing with the question." The consequences of determining whether a statute is mandatory or directory was recognized in Borough of Pleasant Hills vs. Carroll, 182 Pa. Super. 102, 125 A2d 466, 469 [3]. The court said that, "To hold that a provision is directory rather than mandatory does not mean that it is optional--to be ignored at will. Both mandatory and directory provisions of the legislature are meant to be followed."

CONCLUSION

It is therefore the official opinion of this office that the statutory provisions found within Section 165.677, RSMo Cum. Supp. 1957, which give the State Board of Education sixty days in which to consider county reorganization plans for school districts and return to the county board approved or disapproved, are directory. These provisions are designed to expedite reorganization of school districts and tardy compliance does not invalidate the proceedings taken thereunder.

However, it is incumbent upon the State Board to adhere to this schedule as nearly as practicable. Even though the provisions are directory, they are meant to be followed as closely as possible.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Eugene G. Bushmann.

Yours very truly,

JOHN M. DALTON
Attorney General

EGB/mlw