

Opinion No. 14-1308

September 1, 1914

BY: FRANK W. CLANCY, Attorney General

TO: Mr. Edwin Mechem, Alamogordo, New Mexico.

SCHOOL.

Upon the subject of the creation of new school districts.

OPINION

{*164} I have your letter of the 30th ultimo in which you say that there will probably be a suit brought to mandamus the county school superintendent {*165} to create a new school district under Section 22 of Chapter 97 of the Laws of 1907, and you say that you would like to have my views on the subject of whether the law is mandatory or not, or is a matter of discretion with the superintendent.

That section of the statute, after some preliminary provisions, in its fourth paragraph, as printed, declares that upon the receipt of the petition and statement the county superintendent shall create the new district. Even if we give this language its ordinary mandatory significance, yet the superintendent, before acting, must decide whether the petition and statement conform to the requirements of the first paragraph of the section, and whether there are at least twenty-five children of school age in the proposed new district as required by the third paragraph of the section. It seems unnecessary to consider from this point of view whether he might not have some further discretion, and that the word "shall" should be considered as "may," because it seems clear that the provision about an appeal in the last paragraph of the section to which you refer in your letter leaves the whole subject to his discretion. If this is not so there would be no reason for an appeal, and there being a provision for an appeal I believe that the petitioners must exhaust that statutory remedy before resorting to the courts. The statute says that the decision of the board of county commissioners upon the appeal shall be final, but in view of Section 13 of Article VI of the Constitution, the action of the county commissioners cannot be considered as final. That section of the constitution provides that the district court shall have "appellate jurisdiction of all cases originating in inferior courts and tribunals in their respective districts, and supervisory control over the same."