

## Opinion No. 24-3781

August 28, 1924

**BY:** MILTON J. HELMICK, Attorney General

**TO:** Requested by: State Board of Education, Santa Fe, New Mexico.

**It Was the Intent of the Former State Board of Education to Prescribe One Set of Required Readers for the Schools Which Can Not be Changed for Six Years Beginning June 16, 1921.**

**The State Board of Education Has no Authority to Create Any Preference Between Various Readers Which May Be Used to Supplement the Required Readers.**

### OPINION

{\*164} This inquiry arises upon the following facts:

The State Board of Education which was in office on December 11, 1920 at a meeting on that date, as appears from its minutes, "adopted" the text books to be used in the state for a period of six years beginning June 16, 1921. Readers of twelve different publishers were "adopted" as official readers to be used in the schools. The minutes of this meeting recite that "It is understood that one set of the readers shall be selected as basal after which any other readers, either in the basal list or the supplemental list, may be used." Following this recital is a note that four sets of readers were adopted as basal as indicated by stars after the list of readers in the minutes. However, only three sets are starred and these three make one complete act from the first to the eighth grades inclusive. The Beacon Readers published by Ginn & Company comprise the basal readers from the first to fifth grades, inclusive; the Bolenius Readers published by Houghton, Mifflin & Company comprise the basal readers for fourth to the sixth grades, inclusive, while the Rand, McNally Readers published by the Rand McNally Company comprise the basal readers for seventh and eighth grades. Following this designation in the minutes is a notation as follows: "It is understood that after one basal set of readers has been used, others in the supplemental list may be used in any order, or others in the basal list."

The following terms are used in the minutes: "Basal"; "Basal Optional"; "Supplemental." The meaning of these terms is not clear, and indeed, the minutes are wholly ambiguous. However, it seems to be agreed that the proper construction to be given to the resolution passed by the board is that the set of readers from the first to the eighth grade put out by the three publishing houses above mentioned is the required set for all schools of the state which cannot be changed for six years following June 15, 1921 and that all the other readers listed in the minutes may be used in addition to the required set if the school authorities so elect.

After the passage of the resolution just described, contracts were entered into with twelve publishing companies. These contracts are all similar in form and all of them contain a clause whereby the State Board of Education agrees to see that the said books mentioned therein are used throughout the schools of the state. All of the contracts specify readers although several of them refer to the list of readers as "basal optional," whatever that may mean. In other words, we are confronted with this situation. -- There are twelve outstanding contracts, all of them pledging the State Board of Education to use the readers of these twelve publishers, which contracts are manifestly impossible of performance.

{\*165} The contracts are not made in the name of the state as required by law, but according to the first paragraph, are made by the State Board of Education. However, none of them are executed by the State Board of Education but all of them are signed by Jonathan H. Wagner as Superintendent of Public Instruction and not as a member of the Board or on behalf of the Board.

After the "adoption" of the readers of all twelve publishers and after making twelve contracts, the Board at a later meeting on June 28, 1921, passed a resolution which says:

This board hereby adopts the following order for the readers as text books in this state for the following grades, to-wit: First three grades, 1st basal Searson & Martin; 2nd basal Elson; 3rd basal Merrill; 4th, 5th, 6th, 7th and 8th grades, first basal, Elson; 2nd basal Searson & Martin, 3rd basal Merrill; Provided, however, that any schools wishing to use the Phonetic System, may use the Beacon as first basal. The foregoing resolution is to be construed as meaning where only one reader is used, first basal must be used first; where two readers are to be used; first basal must be used first, second basal second and where three readers are to be used, first basal must be used first, second basal second and third basal must be used last."

I am utterly unable to interpret this resolution and do not know what was intended to be accomplished thereby unless it was to make a preference between various readers to be used in addition to the required readers.

The present board desires to know what course it can legally adopt with reference to the use of readers in the public schools and whether there is any liability on account of any of the twelve outstanding contracts with publishing houses.

In answer to the first inquiry, it is my opinion that there is but one course the board can follow. The board must insist on the use of the set of readers made up of readers of the three publishing houses above mentioned as the only required readers in this state. It was evidently the intention of the former board to designate this set as the required set and I am told that the various school authorities so understand the action of the former board. There can be no change in the required text books for a period of six years beginning June 15, 1921 and the present board does not desire to make any change. I think the board can legally rescind the resolution passed at the later meeting of the

board on June 28, 1921 which will result in placing all the readers of the various publishing houses on an equal footing as additional text books in case any of the school authorities desire to adopt additional readers.

In answer to the second inquiry, it is my opinion that there is no liability against any member of the present board on account of the non-performance of any of the twelve contracts mentioned. It is quite likely that the contracts are invalid because they are not made in the name of the state as required by the statute and because they are not executed by the State Board of Education on behalf of the state. It seems to me that the publishing companies were charged with notice of the laws of the state and cannot enforce a contract made in violation of such laws. Even if the contract should be held to be valid as to form and execution, I do not believe that any liability attaches to any member of the present board because of non-performance. It seems to me that all of the publishing houses had ample notice of the action and record of the {\*166} board and were charged with notice that the State Board of Education could not possibly agree to see that the readers of twelve different publishing companies were used in the public schools of this state. Furthermore, these contracts are in fact state contracts and should have been state contracts in form as well if the statute had been followed and consequently I think that no suit can be maintained for breach of any of these contracts because such suit would necessarily be against the state which cannot be sued without its consent. At any rate, the present board is not responsible for the situation and cannot be held liable.

In my opinion the present board should insist upon the use of the set of readers above mentioned as the only required set of readers in this state and should give all the other publishing companies an equal opportunity to sell their readers as additional text books to such schools as desire to use them.