

## Opinion No. 43-4408

November 15, 1943

**BY:** EDWARD P. CHASE, Attorney General

**TO:** Mr. Floyd Santistevan, Assistant Superintendent of Public Instruction, State Department of Education, Santa Fe, New Mexico

We are in receipt of your letter of November 10, 1943, and the inclosed copies of letters from Superintendent Irvin P. Murphy, in which he asks the following three questions:

1. If bleachers collapse under a crowd at a football game may the Board of Education be sued by anyone who may be injured?
2. Must a teacher serve one or two years on probation before being eligible to the protection provided by the recent tenure law which gives teachers a right to a hearing before the Board of Education in the event of discharge?
3. Are principals and superintendents eligible to the provisions of the new law (new contract) with reference to tenure after two years service?

In answer to your first question your attention is directed to 56 C. J. 777, wherein the author says:

"School organizations, like townships and counties, are subdivisions of the state and are not subject to an action unless it is permitted by statute."

Section 55-902 of the 1941 Compilation provides that the Boards of Education of the various municipalities shall have like powers over the schools and districts within its jurisdiction as those possessed by county Boards of Education over their respective schools and districts. By Section 55-801, 1941 Compilation, county Boards of Education are given the power to sue and be sued, so that municipal Boards of Education would have like power. However, I do not believe that this bare right to be sued would authorize an action against a municipal Board of Education for a tort arising through its negligence. In any event, a municipal Board of Education could not be liable for the collapse of bleachers unless it was in some way negligent.

In answer to your second question, Chapter 60 of the Laws of 1943, which is compiled as Section 50-1111 of the 1943 Compilation, provides, first, that on or before the closing day of school the governing board shall serve written notice upon each teacher or other employee qualified to teach, stating whether it desires to continue or discontinue the services of such teacher or employee. It then goes on as follows:

"Notice to discontinue the service of a teacher properly certified and who has served a probationary period of two years in a particular district shall specify a place and date \* \*  
\* for a hearing."

Thus, any teacher properly certified becomes entitled to a notice of hearing if he has served two years in a particular district and not otherwise. However, the other provision of the statute as to written notice of discontinuance of service appears to apply to any teacher or other employee certified as qualified to teach, whether or not such teacher has taught two years.

In answer to your third question I have inserted the word "law" in place of "contract" in the question, since that appears to be the intention of the writer. So worded, the answer to this question is found in Chapter 60, supra. As pointed out above, there are two things provided by this statute; first, the notice of discontinuance of service, under which only teachers and other employees certified as qualified to teach are given this protection. Our Supreme Court, in the case of Bourne v. Board of Education, 46 N.M. 310, has held that only persons certified as qualified to teach come within this protection. Turning now to the second phase of this statute as to the notice of hearing, it would seem that only teachers properly certified and who have served a probationary period of two years are given this relief. Thus, as to the right to notice of discontinuance, a principal or superintendent would be covered if he is certified by the State Board of Education as qualified to teach. As to the right to a hearing, a superintendent or principal would only be entitled to such relief if he is teaching and so could bring himself within the term "teacher" used in that statute.

Trusting the foregoing sufficiently answers your questions, I remain,

By ROBERT W. WARD,

Assistant Attorney General