

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

March 23, 2015

Opinion No. 15-26

State Textbook and Instructional Materials Quality Commission

Question 1

Whether textbooks currently being used by Local Education Agencies (LEAs) that contain substantive factual errors or omissions, or grammatical errors, or that do not comply with Tenn. Code Ann. § 49-6-1028(b), are in violation of, or fail to comply with, state law as set out in Public Chapter 981?

Opinion 1

No. The recently enacted statutory amendments in Public Chapter 981 took effect on January 1, 2015. They have no retroactive applicability and may only be applied prospectively. Therefore, the amendments do not apply to textbooks in use before the January 1, 2015, effective date of Public Chapter 981.

Question 2

Whether the Tennessee Textbook Commission is in violation of these same statutory amendments if it recommends for inclusion on the approved textbook list books that contain substantive errors or omissions, grammar or spelling mistakes, or that fail to comply with Tenn. Code Ann. § 49-6-1028(b)?

Opinion 2

Yes. Technically, the Commission would be in violation of Public Chapter 981 if it recommends textbooks for inclusion on the approved textbook list that contain material substantive or editing errors or that materially fail to comply with Tenn. Code Ann. § 49-6-1028(b). Assuming that the Commission had acted in good faith in making the recommendation, the remedy for the violation would be correction of the error at the expense of the publisher of the textbook. If a commissioner were found to have violated his or her oath of office, the violation could result in removal or even in criminal penalties.

ANALYSIS

The state textbook adoption process is administered in accordance with the statutory requirements in Tennessee Code Annotated, Title 49, Chapter 6, Part 22 and the rules and policies of the state textbook and instructional materials quality commission (the “Textbook

Commission”). Public Chapter 981 amended Tenn. Code Ann. §§ 49-6-2201 through -2211, effective January 1, 2015. *See* 2014 Tenn. Pub. Acts 981.

In general, the Textbook Commission is responsible for recommending an official list of textbooks to the Tennessee State Board of Education for approval. Tenn. Code Ann. § 49-6-2202(a). Once the State Board of Education has approved a list of textbooks, local boards of education, also known as Local Education Agencies (“LEAs”), decide which textbooks to adopt for use in their respective districts. Tenn. Code Ann. § 49-6-2202(d). The Textbook Commission has implemented a staggered adoption of textbooks, and textbooks for each subject area are reviewed and approved on a six-year cycle. Tenn. R. & Reg. § 0520-05-01-.02.

Your questions concern the application and construction of Tenn. Code Ann. §§ 49-6-2201 and -2202, as amended by Public Chapter 981, relating to the Textbook Commission’s review and recommendation process. These amendments became effective on January 1, 2015. They add new requirements for the factual and editing accuracy of textbooks and incorporate the Tenn. Code Ann. § 49-6-1028(b) content standards for civics-related textbooks.¹

Under this amended statutory scheme, the Commission is given the authority to recommend to the State Board of Education which textbooks may be added to the list of those textbooks and instructional materials that are approved for adoption by the LEAs. Tenn. Code Ann. § 49-6-2202(b)(1). The amendments detail the “assigned tasks” and obligations of the Commission and require the commissioners to be trained in the textbook review process. Tenn.

¹ Tennessee Code Annotated § 49-6-1028(b) provides:

- (1) The state board of education shall include in the social studies curriculum standards, at the appropriate grade level or levels in high school, as determined by the state board of education through curriculum standards and the local board of education through curriculum, courses and content designed to educate children about the United States and Tennessee governments. The curriculum standards shall include the three (3) branches of government, the fundamental documents identified in § 49-6-1011(a) that underpin our form of government, an understanding of how laws are enacted, and ways citizens shape and influence government and governmental actions.
- (2) Students shall be taught about the formation of the governments of the United States and Tennessee using federal and state foundational documents. They shall also be taught the significance and relevance of those federal and state foundational documents today. This instruction shall include:
 - (A) The historical and present-day significance of the Declaration of Independence;
 - (B) How the United States Constitution establishes the federal government and the characteristics of the republic created by it;
 - (C) How the United States Constitution with the Bill of Rights and the Tennessee Constitution with the Declaration of Rights are applicable in today's society;
 - (D) How the United States Constitution is changed and the changes that have been made to it since 1787;
 - (E) Why Tennessee has had three (3) constitutions, the Constitutions of 1796, 1834, and 1870, and how changes have been made to the Tennessee Constitution of 1870; and
 - (F) How other foundational documents of the United States and Tennessee aided in the formation of the federal and state governments.

Code Ann. § 49-6-2201(j). In making its recommendations, the Commission “shall only recommend textbooks and instructional materials that comply with and reflect the values expressed in § 49-6-1028(b) . . .” Tenn. Code Ann. § 49-6-2202(b)(2) (emphasis added). In addition, no textbook shall be approved by the Commission unless it is free of clear, substantive, factual and grammatical errors and conforms to the standards for its subject area or grade level. Tenn. Code Ann. § 49-6-2201(j)(9).²

The Commission may appoint an advisory panel of experts to advise it on textbook selection. Tenn. Code Ann. § 49-6-2201(n). Any such experts must also be trained in the “requirements for performing a thorough review of all textbooks,” and their review must, like the review of the commissioners, include an examination for errors and for compliance with Tenn. Code § 49-6-1028. Tenn. Code Ann. § 49-6-2201(n)(2).

The amendments make the textbook publishers accountable for factual and editing errors:

A publisher submitting a textbook or instructional materials for possible approval shall execute an agreement:

- (1) Ensuring the book’s or the materials’ accuracy;
- (2) Certifying that the textbook or the instructional materials have been thoroughly examined and reviewed by qualified content experts for factual accuracy. The publisher shall also list the professional credentials for at least three (3) content review experts who have thoroughly examined the textbook or instructional materials for content accuracy;
- (3) Certifying that the textbook or instructional materials have been thoroughly examined and reviewed by qualified editors for typographical errors and errors in grammar, written expression, spelling, formatting and other substantive elements that may affect student learning; and

² Tennessee Code Annotated § 49-6-2201(j)(9) (emphasis added) provides, in relevant part, as follows:

No textbook or any instructional materials shall be approved by the commission for adoption by LEAs unless the textbook or instructional materials:

- (A) Conform to the standards for its subject area or grade level;
- (B) *Are free of any clear, substantive, factual or grammatical error;*
- (C) *Comply with and reflect the values expressed in § 49-6-1028(b), if the textbook or instructional materials are being considered for adoption as a textbook or instructional materials for education of students in general studies and specifically in United States history and this nation’s republican form of government; and*
- (D) Nothing in this part shall prohibit the use of or apply to supplemental instructional materials.

- (4) *Agreeing to correct all factual and editing errors found in a textbook or instructional materials, at the publisher's expense.* The publisher shall submit a corrective action plan to the department, for review and approval by the state board, within thirty (30) days of the department's notification of the existence of errors in the textbook or instructional materials.

Tenn. Code Ann. § 49-6-2202(c) (emphasis added).

The Legislature has made it clear that the amendments are not to be construed as cancelling or in any manner modifying any existing contract with a publisher or changing the period covered by an existing contract. Tenn. Code Ann. § 49-6-2209.

1. Your first question is whether the new requirements apply to textbooks that were already in use by LEAs before passage of Public Chapter 981. It is well-established that a statute or statutory amendment will be construed to have prospective application only, unless there is a clear legislative intent that it have retroactive operation. *Electric Power Bd. v. Woods*, 558 S.W.2d 821, 825 (Tenn. 1977) (a statute will not be given retroactive effect in the absence of legislative intent or necessary inference that it is to have retroactive force); *Henderson v. Ford*, 488 S.W.2d 720, 721 (Tenn. 1972); *Shannon v. Board of Educ.*, 286 S.W.2d 571, 576 (Tenn. 1955). Therefore, a statute should not be given retroactive operation, unless its words make that result imperative. *Shultz v. Demster Systems*, 561 F. Supp. 1230, 1232 (E.D.Tenn.1983). See also Tenn. Const. Art. 1, § 20 (providing “[t]hat no retrospective law, or law impairing the obligations of contracts, shall be made”).

In enacting the amendments to Tenn. Code Ann. §§ 49-6-2201 and -2202, the Legislature did not indicate any intent that the amendments are to apply retroactively. “Had the legislature intended to depart from the long-established rule that statutes are presumed to apply prospectively, it could have so indicated.” *State v. Odom*, 137 S.W.3d 572, 582 (Tenn. 2004). Nor can a legislative intent of retroactive operation be necessarily inferred from the amendments. The Legislature is presumed to be aware that textbooks are on a six-year adoption cycle,³ yet it made no provision for incorporating into the new requirements textbooks already on the lists adopted by the Board of Education. On the contrary, the statute expressly provides that nothing in Part 22, which includes the amendments, is to be construed as cancelling or modifying any existing contract with a publisher. Tenn. Code Ann. § 49-6-2209. This would appear to apply even if textbooks currently in use under an existing contract do not conform to the new requirements imposed by the amendments.

In sum, since there is no express intent that the amendments be given retroactive application and since retroactive application cannot be necessarily implied, the amendments to Tenn. Code Ann. §§ 49-6-2201 and -2202, which became effective January 1, 2015, only apply prospectively. Consequently, textbooks already in use before January 1, 2015, are not subject to the recent amendments to Tenn. Code Ann. §§ 49-6-2201 and -2202.

³ The Legislature is presumed to have knowledge of the status of state law on the subject under consideration at the time it enacts legislation. *Neff v. Cherokee Ins. Co.*, 704 S.W.2d 1 (Tenn. 1986); *State, Department of Revenue v. Moore*, 722 S.W.2d 367, 374 (Tenn. 1986).

2. Your next question is whether the Textbook Commission will be in violation of the amended statutes if the Commission recommends for addition to the approved list textbooks that contain factual or editing errors or that fail to comply with Tenn. Code Ann. § 49-6-1028(b). This question is one of statutory construction.

The most basic principle of statutory construction is to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope. Legislative intent or purpose is to be ascertained primarily from the natural and ordinary meaning of the language used when read in the context of the entire statute, and without any forced or subtle construction to limit or extend the import of the language. Inconsistent or repugnant provisions of a statute must be reconciled, and a statute must be construed so that no part of it will be inoperative, superfluous, void, or insignificant. Every word, phrase, clause, and sentence must be given effect. *Austin v. State*, 831 S.W.2d 789, 791 (Tenn. Ct. App. 1991) (internal citations omitted). In short, the text of the statute is of primary importance; it should be read naturally and reasonably with the presumption that the Legislature says what it means and means what it says. *In re Kaliyah S.*, No. E2013-01352-SC-R11-PT, 2015 Tenn. LEXIS 14 at *47 (Tenn. S. Ct. Jan. 22, 2015).

The statute as amended by Public Chapter 981 expressly and plainly says that the Commission “shall only recommend textbooks and instructional materials that comply with and reflect the values expressed in § 49-6-1028(b)” Tenn. Code Ann. § 49-6-2202(b)(2) (emphasis added). It also requires the Commission to approve only textbooks that conform to the standards for the given subject area or grade level and that are free of any clear, substantive, factual, or grammatical error. Tenn. Code Ann. § 49-6-2201(j)(9).

The statute as amended is unambiguous. A commissioner has a duty thoroughly to review proposed textbooks and to recommend only textbooks that comply with the specified standards. It would be a violation of that statutory duty for a commissioner to recommend a textbook that does not comply with the specified standards.

Of course, even the most thorough review may not catch every inaccuracy, grammatical error, or other defect. Indeed, in characterizing these conditions as “goals of the textbook review process,” Tenn. Code Ann. § 49-6-2201(j)(9) (emphasis added), the Legislature seems to recognize that it is difficult for the Commission to be absolutely certain that any given textbook is completely error-free.

Nothing in the statute indicates a legislative intent to hold the Textbook Commission or any individual commissioner legally liable for recommending a textbook that contains errors or that might not comply in every respect with Tenn. Code Ann. § 49-6-1028(b).⁴ Rather, at least with respect to the goal that textbooks be error-free, liability is placed upon the publishers who submit textbooks for possible approval. Tennessee Code Annotated § 49-6-2202(c) requires every

⁴ Further, nothing in the statute creates a private right of action to enforce the textbook-recommendation requirements of Tenn. Code Ann. §§ 49-6-2201 and -2202. See Tenn. Code Ann. § 1-3-119 (“legislation must contain express language creating or conferring a private right of action”).

publisher to provide certifications of accuracy, and in particular, subsection (c)(4) requires the publisher to agree to correct all factual and editing errors found in an approved textbook at the publisher's expense.

This approach is consistent with the limited role of the Commission in the textbook selection process. The legislation creates a multi-tiered, review-approval-selection process, in which the Textbook Commission is only one part; others also bear responsibility for textbook review and selection. The Textbook Commission may rely on reviews conducted by advisory panels. The public has the right to comment. The Textbook Commission is required to conduct a public hearing, if the advisory panel reviews do not lead to a clear recommendation to approve or reject a textbook or if the public comments indicate that further review is warranted. *See* Tenn. Code Ann. § 49-6-2201(n)(7). Although the Textbook Commission compiles the recommended textbook list, the Board of Education makes the final determination of textbooks actually approved for adoption by LEAs. And then each LEA makes its own determination about which textbooks to adopt.

Even though the statute does not impose legal liability on the Commission if it recommends a non-compliant textbook, failure of a commissioner to fulfill his or her statutory obligations in the review and recommendation process is not necessarily without consequence. Pursuant to Tenn. Code Ann. § 49-6-2201(i)(1), the commissioners must take an oath not to engage in self-dealing and not to have any financial interest in, or derive any financial benefit from, their actions as commissioners. Included in the required oath is the following: "I do hereby promise that I will act honestly, faithfully and conscientiously, and in all respects will discharge my duty as a member of this commission to the best of my skill and ability." A violation of this oath, as determined by the State Board of Education, "shall be grounds for the removal of a member [of the Commission] by the respective appointing authority," and may subject the commissioner to criminal prosecution pursuant to applicable criminal statutes. Tenn. Code Ann. § 49-6-2201(i)(2) (emphasis added).

Thus, a commissioner who acts in bad faith or in material disregard of his statutory obligations not only violates the statute, but also violates his oath. Violation of the oath—whether because of self-dealing, conflict of interest, or failure to perform his duties as commissioner conscientiously and faithfully—can result in removal and, in an appropriate case such as dishonesty, in criminal prosecution.

In sum, the Textbook Commission could, technically, be in violation of the law if it recommended textbooks that contain material factual or editing errors, or that materially fail to comply with Tenn. Code Ann. § 49-6-1028(b). The remedy for such “violations” would be correction of the factual and editing errors by and at the expense of the publishers. If it were determined in a particular case that a commissioner had violated his oath to perform his duties honestly, conscientiously, and to the best of his skill and ability, the violation could result in removal or even in criminal sanctions.

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

EUGENIE B. WHITESELL
Senior Counsel

Requested by:

The Honorable Glen Casada
State Representative
25 Legislative Plaza
Nashville, TN 37243

The Honorable Timothy Hill
State Representative
23 Legislative Plaza
Nashville, TN 37243

The Honorable Mike Sparks
State Representative
113 War Memorial Building
Nashville, TN 37243