

2843.

APPROVAL, NOTES OF WEATHERSFIELD TOWNSHIP RURAL SCHOOL DISTRICT, TRUMBULL COUNTY, OHIO—\$4,000.00.

COLUMBUS, OHIO, June 21, 1934

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2844.

SCHOOL—PROPOSED CONTRACT BETWEEN ST. MICHAEL'S PARISH AND KELLY'S ISLAND RURAL SCHOOL DISTRICT BOARD OF EDUCATION DISCUSSED.

SYLLABUS:

Proposed contract between St. Michael's Parish and the Kelleys Island Rural School District Board of Education discussed.

COLUMBUS, OHIO, June 21, 1934.

HON. ALVIN F. WEICHEL, *Prosecuting Attorney, Sandusky, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication wherein you submit for my opinion, a matter which was referred to you by the County Superintendent of Schools for the Erie County School District. The letter of the Superintendent of Schools is as follows:

"The Kelleys Island Board of Education has been requested by Father Pessefall of St. Michael's Parish at Kelleys Island, to adopt and enter into the following agreement:

AGREEMENT
between
St. Michael's Parish
and
Kelleys Island School Board

'We, the undersigned, members of the Board of Kelleys Island Township, wishing to enter into a contract with St. Michael's Parish, Kelleys Island, propose to do so with the following understanding:

1. That St. Michael's Parish shall allow said school board to use for school purposes the two classrooms of St. Michael's Parish school.
2. That St. Michael's Parish shall maintain the furnishing and equipment of these classrooms.
3. That St. Michael's Parish shall accept any non-Catholic children placed in this school by the Kelleys Island School Board; St. Michael's Parish agrees to respect the religious conviction of such children and to

allow them to attend religious instruction in their respective churches, in accordance with the plan adopted by the Kelleys Island School Board.

4. That the Kelleys Island School Board agrees to pay an annual rental fee of One Dollar (\$1.00) for the use of these two classrooms.

5. That the Kelleys Island School Board agrees to pay the one teacher of St. Michael's School the legal minimum salary each month, per school year.

6. That the Kelleys Island School Board agrees to employ, as at present, in the school, a sister who shall hold an Ohio Teaching Certificate.

7. That the Kelleys Island School Board shall allow St. Michael's School to use the prescribed textbooks of the Toledo Diocese and to follow the Toledo Diocesan Course of Study.

8. That the Kelleys Island School Board shall allow all Catholic children of St. Michael's Parish to attend St. Michael's School.

9. That the Kelleys Island School Board shall pay, if possible, for the fuel used in heating the two class-rooms.

10. That the Kelleys Island School Board shall allow the two classrooms of St. Michael's School to be used for religious instruction, outside of the prescribed six hours of class.

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Signed this day of, 193.....'

Prior to 1926, all of the elementary children on Kelleys Island attended the public school. Since 1926, a Catholic elementary school has been maintained on Kelleys Island and the Catholic elementary children have attended this school. Due to the difficulty of financing this school, the request is now made for the Board of Education to enter into the above agreement. Since the proposal has been referred to me by the Kelleys Island Board of Education, I would like to have answers to the following questions:

1. Can the Kelleys Island Board of Education legally enter into the above agreement?

2. If such agreement is entered into by the Kelleys Island Board of Education, can funds be distributed to the Kelleys Island Board of Education by the Erie County Board of Education, under Section 7600, General Code, based upon the salaries of teachers in the St. Michael's School and the aggregate days of attendance of pupils in this school?"

As no term is mentioned in the proposal of St. Michael's Parish it is fair to assume that it was intended to be for one year only and that the question of the power of the Kelleys Island School Board to contract for a term extending beyond the life of the board is not involved. Unless we proceed on this assumption, it is unnecessary to extend this discussion further. It is too well settled to admit of argument, that a board of education can not bind future boards by a contract to do any of the things mentioned in the proposed agreement except perhaps the unconditional leasing of school rooms.

The substantial legal question presented by your inquiry is whether or not the Board of Education of the Kelleys Island Rural School District possesses the power under the law, to enter into the proposed agreement with St. Michael's Parish for one year or during the life of the present board. The powers of a

board of education are limited by statutory and constitutional provision, and any contract made by a board which exceeds those limitations is unauthorized and void.

By the terms of Sections 2 and 3 of Article VI, of the Constitution of Ohio, the General Assembly is directed to make such provision by taxation or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state and to provide by law for the organization, administration and control of the public school system of the state supported by public funds.

In pursuance of this constitutional mandate, provision has been made by the General Assembly for the local administration and control of the public schools by boards of education elected by the people of the several school districts in the state. It has been held by the courts of this state as well as those of other states where similar provisions prevail, that boards of education have such powers and such only as are expressly granted to them by statute, together with such powers as are incidental to the express powers granted and which are necessary to carry out those express powers, and in the exercise of these powers boards of education are strictly limited by the terms of the grant of power. This rule, which is supported by the great weight of authority, is stated in *Corpus Juris*, Vol. 56, pages 331 and 332, as follows:

“Such officers and boards possess such powers, and such only, as have been expressly conferred upon them by statute or are necessarily implied from those so conferred or from the duties imposed upon them, and a fortiori, such an officer or board can have no authority which the state in its sovereign capacity could not delegate or confer. All persons who deal with school boards and officers are presumed to have knowledge of the extent of their powers and the manner in which such powers may or must be exercised. It has been held that statutes conferring powers or imposing duties of regulation and administration of schools must be strictly construed and must be treated not merely as grants of power but also as limitations thereon * * * Any doubt as to the existence or possession of a particular power or any ambiguity in the terms of the grant should ordinarily be resolved against the power and in favor of the people.”

See also *Schwing vs. McClure*, 120 O. S., 335.

By the enactment of Section 7690, General Code, the General Assembly committed to local boards of education the control and management of the public schools in their respective districts, subject, of course, to limitations of law.

Section 7644, General Code, commands each board of education to establish a sufficient number of elementary schools to provide for the free education of the youth of school age within the district at such places as will be most convenient for the attendance of the largest numbers thereof. To carry out this power to provide elementary schools at such places within the district as will be most convenient for the largest number of school pupils, a board of education is authorized by Section 7620, General Code, to construct and furnish necessary school buildings and to rent suitable school rooms when necessary. The determination of the need of establishing schools at various places in a school district so that the largest number of pupils attending school may be accommo-

dated, is a matter within the discretion of the board of education, and that discretion will not be controlled by the courts unless it is abused. The leasing of school rooms which are owned by church organizations is not forbidden. See Opinions of the Attorney General for 1928, page 392 and for 1933, page 1712, and the authorities there cited.

Section 7705, General Code, directs boards of education in rural and village school districts to employ the teachers for the public schools under their control. Our statutes do not provide any religious belief as a qualification for a teacher in a public school. The only limitation placed by statute with respect to the personnel of the teaching force that may be employed in the elementary schools is that no teacher shall be employed who does not have a proper certificate to teach. (Section 7830, General Code.) It has been held in this state that a board of education may, in its discretion, lawfully employ nuns or Ursuline Sisters as teachers in the public schools. See Opinions of the Attorney General for 1928, page 392 and for 1933, page 712. Of course, any school maintained by a public board of education and for the maintenance of which public funds are expended, is a public school or "common school" as the term is used in the Constitution and is entirely and in all respects under the control of the board of education. It would seem from the proposal made by St. Michael's Parish to the Kelleys Island School Board for the renting of school rooms, which is the subject of your inquiry, that it is the intent of the parish authorities to retain some measure of control over the school to be conducted on these premises, inasmuch as Item 3 of the Proposal provides:

"That St. Michael's Parish shall accept any non-Catholic children placed in this school by the Kelleys Island School Board; St. Michael's Parish agrees to respect the religious conviction of such children and to allow them to attend religious instruction in their respective churches,
* * *"

Should the school rooms in question be leased for public school purposes, the parish authorities nor anyone else but the public school authorities, will have anything whatever to say about which pupils may attend the school conducted in these rooms. The school will, of course, be open to any and all children of school age possessing the requisite residential qualifications and who have been properly assigned to the school by the county superintendent of schools, regardless of their religious convictions and whether they are Catholics, Protestants or Jews or whether they have any religious convictions at all.

In Item 7 of the Proposal it is made a condition of the proposed rental contract that the prescribed textbooks of the Toledo Diocese shall be used in the school and that the Toledo Diocesan course of study shall be followed.

Boards of Education are authorized by statute to determine the studies to be pursued in the schools under their control and the textbooks to be used therein. With reference to this matter, Sections 7709, 7711 and 7713 are pertinent. These statutes read as follows:

"Sec. 7709. Any publisher or publishers of schoolbooks in the United States desiring to offer school-books for use by pupils in the common schools of Ohio as hereinafter provided, before such books may be lawfully adopted and purchased by any school board, must file in the office of the superintendent of public instruction, a copy of each book

proposed to be so offered, together with the published list who'se'a'e price thereof. No revised edition of any such book shall be used in common schools until a copy of such edition has been filed in the office of the superintendent together with the published list wholesale price thereof. The superintendent must carefully preserve in his office all such copies of books and the price thereof."

"Sec. 7711. Such superintendent, during the first half of the month of June, in each year, must furnish to each board of education the names and addresses of all publishers who during the year ending on the first day of the month of June in each year, agreed in writing to furnish their publications upon the terms above provided. A board of education shall not adopt or cause to be used in the common schools any book, whose publisher has not complied, as to such book, with the provisions of law relating thereto."

"Sec. 7713. At a regular meeting, held between the first Monday in February and the first Monday in August, each board of education shall determine by a majority-vote of all members elected the studies to be pursued and which of such text-books so filed shall be used in the schools under its control. But no text-books now in use or hereafter adopted shall be changed, nor any part thereof altered or revised, nor any other text-book be substituted therefor for five years after the date of the selection and adoption thereof, as shown by the official records of such boards, except by the consent at a regular meeting, of five-sixths of all members elected thereto. Books so substituted shall be adopted for the full term of five years."

I have no knowledge as to whether or not the terms of Sections 7709 and 7711, General Code, supra, with respect to the textbooks mentioned in Item 7 of the proposal of St. Michael's Parish have been complied with. Unless the law in this regard has been complied with, the Board of Education of the Kelleys Island School District can not lawfully adopt these textbooks and could not therefore agree to adopt the textbooks.

Neither am I advised as to when this board of education last adopted the textbooks to be used in the schools of the district. Under the terms of Section 7713, General Code, supra, a board of education may adopt for a five year period the textbooks to be used in its schools. No change can be made in the books so adopted nor may other textbooks be substituted therefor for five years after such selection and adoption except at a regular meeting of the board of education and with the approval of five-sixths of all the members thereof.

Even if the requirements of the law with respect to the filing of copies and list prices of textbooks as provided by Section 7709, General Code, have been complied with, and the board of education adopts the same for the five year period or substitutes them during the five year period by a five-sixths vote of the members of the board of education, there still remains the question as to whether or not the books so adopted or substituted are such as may legally be used as textbooks in the public schools.

I do not have before me the textbooks in question or the Toledo Diocesan Course of Study, but if the books or the course of study involve the teaching of sectarian religion it is clearly beyond the power of the board of education to bind itself by contract to use the books or to permit this course of study to prevail in the schools under its control or to which it contributes public school

funds. Sectarianism has no place in the public school system of this state. This matter is so well settled as to not need the citation of authority.

A former Attorney General in an opinion which will be found in the published Opinions of the Attorney General for 1928, at page 392, after quoting the provisions of Article I, Section 7 and of Article VI, Section 2 of the Constitution of Ohio, said:

"To my mind the 'doctrine' of a church organization, or what may be termed the creed, or the theological tenets, peculiar to any so-called church denomination, or its form of worship, whether it be Catholic, Protestant or what-not is not a proper subject for promulgation in the public schools, and is violative of the constitutional provisions above set forth. Attendance in public schools is compulsory and such a practice would necessarily result in compelling the pupils to participate in a form of worship against their consent."

I do not assume to hold in this opinion that the use of the textbooks in question and the pursuing of the Toledo Diocesan Course of Study would result in the giving of sectarian instruction in the schools in which they were used and followed, as I have not examined them, but if, as a matter of fact, such a result would follow the adoption of the textbooks and course of study mentioned, Kelleys Island Board of Education is without authority to enter into the proposed contract. The Board of Education of the Kelleys Island School District and the church authorities in St. Michael's Parish will know whether or not sectarian teaching would result from the use of the books and course of study mentioned, and will therefore know whether or not a contract such as the one proposed would be lawful.

In Item No. 8 of the Proposed Agreement the Kelleys Island School Board is asked to bind itself to allow all Catholic children in St. Michael's Parish to attend the school to be conducted in the leased rooms. Section 7764, General Code, provides that a child in his attendance at school shall be subject to assignment by the principal of the public schools or superintendent of schools as the case may be, to the class in elementary school, high school or other school suited to his age and state of advancement and vocational interest within the school district. Section 7763-3, General Code, provides that the term "superintendent of schools, as used in this statute means the county superintendent of schools."

It follows from the provisions of Section 7764, General Code, with respect to the assignment of pupils, that the law reposes in the county superintendent of schools of the Erie County School District the assignment of the pupils in the Kelleys Island School District to whatever school in the district he may see fit to assign them. The board of education is entirely without power to make such assignment or to contract that any certain pupils may attend any certain school. For this reason if for no other, I am of the opinion that the Board of Education of the Kelleys Island School District is without power to enter into the agreement in question.

Inasmuch as the board can not legally enter into this contract, an answer to your second question is unnecessary.

Respectfully,
JOHN W. BRICKER,
Attorney General.