



## Legislative Fiscal Bureau

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March 11, 2024

TO: Members  
Joint Committee on Finance

FROM: Bob Lang, Director

SUBJECT: Public Instruction: Early Literacy Curricula Recommendations As Required Under  
2023 Act 20

On February 19, 2024, the Department of Public Instruction (DPI) submitted a recommendation to the Committee for early literacy curricula under a 14-day passive review process. On March 8, 2024, the Co-Chairs notified the Department of an objection to the plan and indicated that the Committee intended to meet on the plan.

### **BACKGROUND**

Under 2023 Act 19 (the 2023-25 budget act), \$50 million GPR was reserved in the Joint Finance Committee's supplemental appropriation [s. 20.865(4)(a)] for a literacy program under DPI. Subsequent legislation (2023 Act 20) was passed in July, 2023, to implement the literacy program.

Act 20 created a Council on Early Literacy Curricula. The Council consists of nine members, appointed for staggered three-year terms: three appointed by the Speaker of the Assembly, three appointed by the Senate Majority Leader, and three appointed by the State Superintendent. Council members must demonstrate knowledge of, or experience with, science-based early literacy instruction and literacy curricula for pupils in grades K-3, and must not have a financial interest in any entity that develop, sells, or markets products to assess reading ability, teach reading, or treat reading difficulties.

The Council is required to annually recommend to DPI a science-based literacy curriculum and instructional materials for use in the following school year in grades kindergarten through three, beginning in the 2024-25 school year. School districts and schools can choose to use a recommended curriculum, but are not required to do so. Act 20 created a grant program to reimburse school districts, independent charter schools, and private choice schools that adopt a literacy curriculum from the recommendations of the Council after January 1, 2024. Grants will equal 50% of the costs of purchasing the curriculum and instructional materials, and will be prorated if funding is insufficient to pay the full amount to all recipients. A portion of the \$50 million set aside in the Committee's supplemental appropriation will be used for this purpose.

The curricula recommended by the Council must meet certain requirements under Act 20. The curricula must include all of the components of science-based early reading instruction, defined as instruction that is systematic and explicit and consists of at least all of the following: (a) phonological awareness, including word awareness, rhyme recognition, repetition and creation of alliteration, syllable counting or identification, onset, and rime manipulation; (b) phonemic awareness, including phoneme identification, isolation, blending, segmentation, addition, substitution, and deletion; (c) phonics; (d) building background knowledge; (e) oral language development; (f) vocabulary building to develop lexical and morphological knowledge; (g) instruction in writing; (h) instruction in comprehension; and (i) reading fluency. The curricula approved by the Council cannot include three-cueing, which is defined as any model, including the model referred to as meaning, structure, and visual cues, or MSV, of teaching a pupil to read based on meaning, structure and syntax, and visual cues or memory.

On September 28, 2023, DPI announced the nine members of the Council. The initial meeting of the Council took place on October 10, 2023. The Council met an additional 15 times before the submission of the curricula recommendation on February 19.

In its early meetings, the Council developed a Wisconsin Rubric for scoring curricula, which included the requirements under Act 20 and additional criteria, including the inclusion of leveled readers, design of the curriculum, quality of the teacher-facing materials, quality of associated professional learning, quality of assessments, quality of assignments, the quality of words included for vocabulary study, and other criteria. In total, Council members rated curricula in nearly 100 areas on a scale from 1 (not present) to 4 (exemplary), plus additional yes/no questions and sub-criteria.

The Council established a January 15, 2024, deadline for vendors to submit curricula for review. Vendors were required to submit a self-assessment rubric and instructional materials to review, and 30 curricula were submitted by the deadline.

In its report submitted to the Committee, DPI identified a number of concerns with the Council's process. In particular, due to the number of curricula submitted for review and the amount of time required to score each on the established rubric, the Council did not have sufficient time for a thorough review of each submitted curriculum; by the time the recommendations were finalized in February, 2024, the Council had reviewed approximately half of the submitted curricula. At the same time, the list needed to be finalized so that school districts could select and purchase a curriculum for the 2024-25 school year, as required under Act 20. Council members reviewed materials in order of the date of submission and in some cases only a subset of Council members reviewed certain curricula, which differs from the process that was communicated to vendors at the time of submission. In addition, the report indicates that questions about definitions of rubric terms and norming to ensure consistency in ratings were not sufficiently addressed. The report states, "DPI determined statements and actions by the Council's selection process had exposed the state of Wisconsin to an unacceptable level of risk that the process and ultimate recommendations could be successfully challenged." A vendor that was not included on the Council's list could make an argument that their materials were not given full consideration, and therefore the recommendations from the Council may be subject to an Equal Protection Clause claim. A memorandum from Legislative Council related to this issue is included as Attachment 1.

Because of these concerns, DPI conducted an independent review of the curricula, with materials reviewed by staff with knowledge of and experience in science-based early literacy instruction, based on their work in schools prior to their DPI employment and their participation in either a reading training from the Center for Effective Reading Instruction's list of accredited teacher trainings or an administrator training that meets Act 20 criteria. This group reviewed all submissions together, using the rubric provided to vendors for evaluation of the curricula, with additional considerations noted for information purposes only but not used to determine if a submission would be included on the recommendation list.

## **REQUEST**

In the letter submitted to the Committee, DPI provided a list of 11 curricula that were reviewed by DPI and determined to meet the Act 20 criteria. The table below shows the recommendations made by DPI, which were subject to the passive review.

### **Literacy Curriculum on DPI Recommended List for 2024-25 School Year**

American Reading Company K-3 (ARC Core, 2017)  
Being a Reader (K-2nd, 2021; 3rd, 2023) & Being a Writer (K-3rd., 2014) with Systemic Instruction in Phonological Awareness, Phonics, & Sight Words (2020) (Center for the Collaborative Classroom)  
Benchmark Education Advance (Benchmark Education Company, 2022)  
Core Knowledge Language Arts K-3 (CKLA, Amplify Education, 2022)  
Our EL Education Language Arts (Open up Resources, 2017)  
EL Education Language Arts (Imagine Learning LLC, 2019)  
Into Reading, National V2 (Houghton Mifflin Harcourt, 2020)  
myView Literacy Elem. Reading Curriculum (Savvas Learning Company, 2025)  
Open Court (McGraw-Hill, 2023)  
Wit and Wisdom (Great Minds, 2020) with Pk3 Reading Curriculum (Really Great Reading)  
Wonders (McGraw Hill, 2023)

The Literacy Council recommended four titles. Of the four recommended by the Council, three were also included on DPI's list: Core Knowledge Language Arts K-3, Our EL Education Language Arts, and Wit and Wisdom with Pk-3 Reading Curriculum. An additional curriculum, Bookworms Reading and Writing K-3, was approved by the Council but was determined by DPI not to meet the requirements of Act 20; in its evaluation of the curriculum, DPI indicated that it did not include instruction in some of the components included in the Act 20 definition of science-based early reading instruction. Attachment 2 provides a list of all of the curricula that were submitted for review, and identifies whether they were reviewed or approved by DPI or by the Literacy Council.

## **ALTERNATIVES**

Four alternatives are presented. Alternative 1 is to approve the request as submitted by DPI. Because DPI reviewed all of the submissions, the issue of risk of litigation does not arise. Potential risks of litigation may arise under Alternative 2 (approve the four criteria recommended by the Council) and Alternative 3 (approve the three criteria recommended by both the Council and DPI). Alternative 4 would deny the request. Under this, it is likely that the Council would again need to meet and the Department would need to submit another request.

1. Approve DPI's list of 11 early literacy curricula recommended for use based on the criteria established under Act 20.
2. Approve the four curricula that were recommended for use by the Council on Early Literacy Curricula (Core Knowledge Language Arts K-3, Our EL Education Language Arts, Wit and Wisdom with Pk-3 Reading Curriculum, and Bookworms Reading and Writing K-3).
3. Approve the three curricula that were included on the recommendations of both DPI and the Council on Early Literacy Curricula (Core Knowledge Language Arts K-3, Our EL Education Language Arts, and Wit and Wisdom with Pk-3 Reading Curriculum).
4. Deny the request.

Prepared by: Christa Pugh  
Attachments

## ATTACHMENT 1

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# Wisconsin Legislative Council



Anne Sappenfield  
Director

TO: MEMBERS OF THE JOINT COMMITTEE ON FINANCE

FROM: Emily Hicks, Staff Attorney

RE: Curriculum Recommendations From the Council on Early Literacy Curricula and the Department of Public Instruction

DATE: March 7, 2024

This memorandum explains that, if adopted, the Council on Early Literacy's list of curricula recommendations may be subject to an Equal Protection Clause claim that could be brought by any of the vendors whose materials have not been recommended by the council because the council did not give those materials full consideration. The likelihood of success of such a claim may depend on whether the council acted in bad faith or with intentional disregard for uniformity.

## **COUNCIL ON EARLY LITERACY AND THE DEPARTMENT OF PUBLIC INSTRUCTION'S CURRICULA RECOMMENDATIONS**

2023 Wisconsin Act 20 created a Council on Early Literacy Curricula within the Department of Public Instruction's (DPI) Office of Literacy. The council is required to annually recommend to DPI science-based literacy curricula and instructional materials for use in grades K-3, beginning in the 2023-24 school year. DPI must then submit curricula and materials recommendations to the Joint Committee on Finance (JCF) for approval under a 14-day passive review process. The act does not require DPI to recommend to JCF the same curricula and instructional materials recommended to DPI by the council. Under Act 20, schools that purchase curricula and instructional materials included on an approved list are eligible for grants to cover a portion of those costs.

DPI submitted a request to JCF for approval of recommendations for early literacy instructional materials on February 19, 2024. According to background information provided by DPI as part of its request, before review of materials began, vendors were invited to submit early literacy instructional materials for review by the council. The council had a limited amount of time to perform its review, but attempted to review and rate all submitted materials. According to DPI, throughout the process, council members openly discussed not rating all submitted materials. Additionally, in its request to JCF, DPI identified several inconsistencies in the council's review process. Ultimately, the council did not rate 13 of the submitted materials and recommended a list of four early literacy instructional materials to DPI.

DPI performed its own independent review of the submitted early literacy instructional materials, because "DPI determined statements and actions by the Council's selection process had exposed the state of Wisconsin to an unacceptable level of risk that the process and ultimate recommendations could be successfully challenged." After its independent review, DPI ultimately recommended a list of 11 early literacy instructional materials, which included three of the four recommendations by the council.

## POTENTIAL FOR LEGAL CHALLENGE TO THE COUNCIL'S CURRICULA RECOMMENDATIONS

As mentioned, DPI indicated in its request to JCF that it had determined that “statements and actions by the Council’s selection process had exposed the state of Wisconsin to an unacceptable level of risk that the process and ultimate recommendations could be successfully challenged.” A legal challenge could be initiated by a vendor whose materials were not rated by the council and subsequently were not selected for the council’s list of recommended curricula. Such a challenge could claim that the council’s action violated the Equal Protection Clause of the U.S. Constitution.

The Equal Protection Clause provides that, “[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws.”<sup>1</sup> [U.S. Const. amend. XIV.] Different standards of review apply depending on the discrimination alleged. When the government discriminates based on a protected classification, such as race, religion, or national origin, then the government’s action must be justified by a compelling interest and must be narrowly tailored to accomplish that interest. In contrast, when the government creates a classification that does not involve a protected class or a fundamental right, the courts apply a rational basis review. As the classification created by the list of curricula approved for early literacy grants implicates neither a protected class nor a fundamental right, rational basis review is likely to apply.

Rational basis review generally requires that the complaining party demonstrate that the government’s classification is clearly irrational or that there is no possible legitimate state interest being served by the classification. A governmental classification fails rational basis review “when it rests on grounds wholly irrelevant to the achievement of the State’s objective.” [*Heller v. Doe*, 509 U.S. 312, 324 (1993).] When a court is analyzing a government classification under rational basis review, it is deferential to the government. “[M]ere errors of judgment by officials will not support a claim of discrimination. There must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity.” [*Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 353 (1918).]

Whether the list of curricula would withstand rational basis review would likely depend on whether a complainant could prove that the council’s failure to review and rate all of the submitted materials in the same manner amounts to bad faith or “an intentional violation of the essential principle of practical uniformity.” As is detailed in DPI’s request to JCF, the council did not fully review and rate all of the materials submitted to it. Thus, if the council’s recommendations were adopted, a vendor whose materials were not fully reviewed could potentially bring an equal protection claim, perhaps arguing that a lack of time to consider all materials does not constitute a rational basis for treating some instructional materials differently from others. A claim on these grounds is more likely to succeed if the complainant can demonstrate an intentional or bad faith-based purpose for the council’s decision, but far less likely to succeed if the facts indicate the council’s sole reason for treating instructional materials differently was a lack of time.

Please let me know if I can provide any further assistance.

EH:kp:jal

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<sup>1</sup> Article I, Section 1 of the Wisconsin Constitution similarly provides that “[a]ll people are born equally free and independent...” Wisconsin courts have used the same analysis to review challenges under state and federal Equal Protection Clauses. [See *Reginald D. v. State*, 193 Wis. 2d 299, 306 (1995).]

## ATTACHMENT 2

### Literacy Curriculum Rated and Approved by DPI and the Literacy Council for the 2024-25 School Year

	<u>DPI</u>		<u>Literacy Council</u>	
	<u>Rated</u>	<u>Approved</u>	<u>Rated</u>	<u>Approved</u>
American Reading Company K-3 (ARC Core, 2017)	X	X	X	
Being a Reader (K-2nd, 2021; 3rd, 2023) & Being a Writer (K-3rd., 2014) with SIPPS (2020) (Center for the Collaborative Classroom)	X	X	X	
Benchmark Education Advance (Benchmark Education Company, 2022)	X	X	X	
Bookworms Reading & Writing K-3 (Open up Resources, 2022)	X		X	X
Bridge to Reading Foundational Skills (Heggerty, 2023); 3rd grade (Heggerty, 2024)	X			
Connections: OGIN3D (The Apple Group, 2007)	X			
Core Knowledge Language Arts K-3 (CKLA, Amplify Education, 2022)	X	X	X	X
Our EL Education Language Arts (Open up Resources, 2017)	X	X	X	X
EL Education Language Arts (Imagine Learning LLC, 2019)	X	X		
Exact Path (Edmentum, 2023)	X			
Foundations A-Z (Learning A-Z, 2022)	X			
From Phonics to Reading (Sadlier, 2020)	X			
Foundations (Wilson Language Training, 2020)	X			
Into Reading, National V2 (Houghton Mifflin Harcourt, 2020)	X	X	X	
Just Right Reader Decodables(Just Right Reader, 2021-2023)	X			
Kindercorner (2nd ed., 2016.); & Reading Roots (5th ed., 2021); Reading Wings (4th ed., 2016) (Success for All Foundation Inc.)	X		X	
Lindamood Bell Learning Processes (Gander Publishing, 2001-2022)	X			
Magnetic Reading (Curriculum Associates, 2023)	X			
myView Literacy Elem. Reading Curriculum (Savvas Learning Company, 2025)	X	X	X	
OnTrack Reading Phonics Program Workbook(OnTrack Reading, 2001- 2023); Instructional Manual (OnTrack Reading, 2004- 2023)	X			
Open Court (McGraw-Hill, 2023)	X	X	X	
Orton-Gillingham Plus (IMSE, 2022) Supplemental	X			
Raz-Plus (Learning A-Z, 2017)	X		X	
Ready 4 Reading (Scholastic, 2023)	X			
Superkids Reading Program (2017); Superkids Foundational Skills (2020); Superkids Phonemic Awareness Kindergarten (2022) (Zaner-Bloser Inc., 2017; 2020; 2022)	X		X	
Voyager Passport Intervention (Voyager Sopris Learning, 2022)	X			
Wit and Wisdom (Great Minds, 2020)	X			
Wit and Wisdom (Great Minds, 2020) with Pk3 Reading Curriculum (Really Great Reading)	X	X	X	X
Wonders (McGraw Hill, 2023)	X	X	X	
Writing A-Z (Learning A-Z, 2023)	X		X	