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Opinion No. 05-070

Voluntary Pre-K for Tennessee Act of 2005 (HB 2333, SB 2317)

QUESTIONS

1. Is the proposed Voluntary Pre-K for Tennessee Act of 2005 vulnerable to legal challenge because some counties may be approved to participate in the program while others are not?
2. If the funding became unavailable, could the program be discontinued?

OPINIONS

1. It is the opinion of this office that the program is defensible against legal challenge in the courts.
2. Yes, the program may be discontinued if funding becomes unavailable. Every pre-kindergarten program established under the Act will be subject to annual appropriations.

ANALYSIS

The Voluntary Pre-K for Tennessee Act of 2005 (HB 2333/SB 2317) (the Act)¹ allows local education agencies (LEAs), on a voluntary basis, to establish and seek funding for pre-kindergarten (pre-K) programs and to apply for funding for existing pre-K programs. The LEA may apply to the Department of Education for funding and approval of one or more pre-K programs, including those programs which may be in existence that previously have been funded entirely from local revenues. To receive state funding for a program the Commissioner approves under this Act, the LEA has to provide local matching funds based upon the state and local Basic Education Program (BEP) classroom component ratio in effect for the LEA in which the program is located. The LEA may use

¹ We have examined the bill as it was originally filed.

grants, federal funds and private funds to meet the required match. The LEA may also meet its matching requirement by the use of “in-kind” contributions, such as use of non-LEA owned physical facilities.

Whether some counties have pre-K programs and others do not will depend on certain factors. The first factor is that the program is voluntary. Parents, communities and school districts will decide locally whether they want and need pre-K classrooms. Some may decide that they want to institute a pre-K program, and some may not.

The second factor will be state and local funding. State funding will be available from the Department of Education based upon an application and approval process and on state appropriations. The Commissioner of Education will establish the system for submitting applications and gaining approval for proposed pre-K programs. Thus, under the Act, all LEAs will have an opportunity to seek pre-K program approval and funding under the same system.

The second portion of funding will be at the local level. The Act’s local matching requirement will be calculated using the BEP classroom component ratio in effect for the LEA in which the program is located.² The LEA’s match amount would be based on the statutory seventy-five/twenty-five (75%/25%) percent statewide split, adjusted by the county’s fiscal capacity.³ *See* Tenn. Code Ann. § 49-3-356; *Tennessee Small School Systems v. McWherter*, 91 S.W.3d 232, 235 (Tenn. 2002) (“The proportionate local share [is] determined by each county’s relative ability to pay, or its ‘fiscal capacity.’”)

The third factor will be whether the LEA is able to obtain the Commissioner of Education’s approval. The Act calls for the Commissioner to approve program proposals on a competitive basis.

Ultimately, not every LEA may have a pre-K program because of the considerations just discussed. Because, however, all LEAs will have the same voluntary opportunity to establish a pre-K program, will have to apply and be approved under the same system and will have a matching requirement set by an equalizing formula, we think that the program is entirely defensible against legal challenge.

Pre-K programs established under the Act will be subject to annual appropriations. It follows that if the General Assembly does not appropriate funds for the Act’s pre-K programs, then the local education agency may discontinue the program for lack of funding. In addition, the Act is very clear

²The Act refers to the ratio in effect for the local education agency, but at this time, the BEP local matching amount is calculated under a formula that takes into account the county’s fiscal capacity. Once that amount is calculated, the county receives funds on that basis and then allocates funds to each LEA. *See* Tenn. Code Ann. §§ 49-3-351(d) and 49-3-356; *see also* *Tenn. Small School Sys. v. McWherter*, 91 S.W.3d at 236.

³ “A county’s fiscal capacity is calculated using a formula developed by the Tennessee Advisory Commission on Intergovernmental Relations. Each county’s fiscal capacity is expressed as a percentage of the total capacity of all counties in the State and is based on its sales tax base, property tax base, and income.” *Tenn. Small Schools Sys. v. McWherter*, 894 S.W.2d 734, 737 (Tenn. 1995).

that passage of the Act will not create an entitlement to any service or program authorized by the Act.

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