S T A T E O F T E N N E S S E E
OFFICE OF THE
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Opinion No. 01-099

Local School Board Contract with Outside Provider to Operate School

QUESTIONS

1. Whether the Memphis City School Board's contract with an outside provider to operate a nontraditional school is within the School Board's authority under Tenn. Code Ann. § 49-3-365.

2. Whether the School Board, in contracting with an outside provider to provide services at a nontraditional school, has improperly delegated its duties and responsibilities.

OPINIONS

1. The Memphis City School Board derives its power to contract from its corporate charter. The School Board's contract with the KIPP Foundation does not refer to Tenn. Code Ann. § 49-3-365, and because this Office has no information indicating that the School Board has or is going to apply to the Commissioner of Education for "break the mold" status, the Office does not address this issue.

2. The Board's charter gives the Board no express authority to delegate. Because the Board retains some control over the proposed school and because it is unclear from the contract how much of the Board's duties would actually be delegated to KIPP in practice, this Office cannot state conclusively that the Board has impermissibly delegated duties assigned to it by statute.

ANALYSIS

Your questions concern a contract between Memphis City Schools (Board) and the KIPP Foundation (KIPP), approved by the Board on June 6.[1] The contract describes KIPP as a California public benefit corporation. Under the contract, the Board and KIPP agree that KIPP will operate a nontraditional[2] school at a Memphis City School location to be selected. The contract does not refer to

[1] Copy attached.

[2] The term "nontraditional school" is not defined in the contract.

Tenn. Code Ann. § 49-3-365 or other statutory authority. The contract also does not refer to the proposed school as a "break the mold" school. The contract covers services to be rendered, compensation, minimum performance requirements, assignment of students, and the status and treatment of faculty and staff. The contract's primary purpose is to serve at-risk students.[3]

1. Authority to Contract

Local school boards are creatures of statute and have the authority and duties provided by law, neither more nor less. *See Op. Tenn. Atty. Gen.* No. 96-036 (March 11, 1996). Tenn. Code Ann. § 49-2-203 assigns all local school boards the duty to manage and control the public schools under their jurisdiction. The Memphis City School System operates under a charter granted by the General Assembly to the Memphis Board of Education by Chapter 30 of the 1869-70 Private Acts of Tennessee, as amended. *See Board of Education of Memphis City Schools v. Shelby County*, 339 S.W.2d 569, 583 (Tenn. 1960).

By its charter, the Memphis School Board has power "generally to do and execute all acts, matters and things which a corporation or body politic in law may and can lawfully do and execute."[4] 1868-69 Priv. Acts, Ch. 30 § 6. This language is not an express authority to enter contracts, but it is broad enough to encompass the authority to contract. In addition, the courts have found that local boards of education have a general power to contract, although the power is not unlimited. *See Tipton County Department of Public Instruction v. Delashmit Electric Co.*, 1998 W.L. 158774, 2 (Tenn. App. 1998); *see also Benson v. Hardin County*, 173 Tenn. 246, 116 S.W.2d 1025, 1026 (1938).

Even with its status as a corporation, the Board's power to contract is not inherent but must be granted expressly by statute or be necessarily implied from the statutory authority. *See Edmondson v. Board of Education of City of Memphis*, 108 Tenn, 557, 69 S.W. 274, 275(1902).[5]

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[3] The contract states that "[t]he KIPP program is primarily intended to serve at-risk students and to significantly improve achievement levels in schools that are Title I eligible and which serve significant concentrations of at-risk students." Contract § 3.

[4] Section 6 states as follows:

> [S]aid Board are hereby created and constituted a body politic and corporate, by the name and style the Board of Education of the Memphis City Schools, . . . and by the name and style aforesaid, may purchase, receive, hold and possess property of any kind for the use of said City Schools; may sue and be sued, plead and be impleaded, answer and be answered unto in all Courts of Record and Courts of inferior jurisdiction. And . . . shall have power to make, have and use a common seal, the same to break, alter and renew at pleasure, and generally to do and execute all acts, matters and things which a corporation or body politic in law may and can lawfully do and execute.

[5] Inherent power is authority possessed without its being derived from any source. In *Edmondson v. Bd. of Education of Memphis*, the Supreme Court held that "It is well-settled that such a corporation is under the control of the legislature, so that it may be abolished, its power enlarged or its responsibilities increased, at any time, by that body, without the danger of encountering constitutional difficulties." Because the Board's power is entirely derived from the legislature and from its Charter, it can have no inherent power. 108 Tenn. at 561.

As mentioned above, the Board's contract does not reference statutory authority. Tenn. Code Ann. § 49-3-365 allows local boards of education to apply with the Commissioner of Education to be designated a "break the mold" school or school system. Tenn. Code Ann. § 49-1-207 allows local boards of education to apply with the Commissioner of Education for permission to establish a nontraditional, innovative program not tied to the usual curriculum requirements. Both statutes require submission of a plan to the Commissioner and the Commissioner's approval. Neither statute grants a local board of education express authority to contract.

The Board has implied authority under its charter to contract. This Office has insufficient information to determine whether the Board should or has complied with Tenn. Code Ann. § 49-1-207.

2. Authority to Delegate

A local school board does not have any inherent power to delegate its duties and responsibilities. The power to delegate must be expressly conferred, or implied as necessarily incidental to the powers expressly conferred. *See Op. Tenn. Atty. Gen.* No. 96-036 (March 11, 1996). The Board's contract is not clear on how much control, in practice, that the Board is delegating and how much it is retaining.

In several ways, the Board retains control over the proposed KIPP school or program.[6] Significantly, the Board sets the minimum performance standard that KIPP must meet. Contract § 3. The faculty and staff of the KIPP program will be Memphis School Board employees. Contract § 6. The KIPP school leader will report to the Memphis director of schools. Contract § 6, The Board will continue to be responsible for school maintenance, textbooks, cafeteria services and debt service. Contract § 2. The contract requires financial and testing reports by KIPP to the Board. Contract § 7. KIPP must establish and manage records subject to the Public Records Act and other applicable state and federal laws. Contract § 9.

On the other hand, the contract places considerable authority in KIPP to execute Board functions. KIPP will operate the school and will receive applicable federal funds and assume responsibilities that come with the funds. Contract §§ 1 and 2. The KIPP Foundation will select the school leader and determine the salary, terms and conditions of his or her employment. Contract, § 6. The contract grants the KIPP program school leader the discretion to remove a student from the program, with notice to the parents or guardians and an opportunity to meet with the school leader. Contract § 4.

The KIPP school leader will have authority to remove any teacher or staff from the program, with written notice of the reasons and an opportunity to be heard by KIPP. If the reasons do not amount to ones which would warrant suspension or termination, the teacher cannot teach in the KIPP program but can resume his normal duties within the Memphis City School System. If the reasons warrant suspension or termination, the employee is then entitled to any rights to a hearing granted under state law, a grievance

[6] The contract uses the terms "program" and "school" interchangeably in the contract.

procedure or a collective bargaining contract. Contract § 6.

The Board agrees that the Board and the Memphis City Director of Schools will give deference to KIPP personnel decisions, including the selection of personnel and the evaluation of the school leader. Contract §6.[7]

Our research has uncovered no express authority for the Board's delegation of its statutory duties to manage and control its schools. The Board might have implied power to delegate some functions, but not its ultimate control and responsibility for its duties. *See Op. Tenn. Atty. Gen.* No. 99-151 (August 16, 1999).

The Memphis City School System has a general authority to contract, but not to delegate its duties. By the terms of its contract with KIPP, the Board retains control but gives KIPP considerable latitude in decision-making that normally would be exercised by the Board and its director of schools. Questions of fact involving the intent of the parties and how the contract will work in practice could bear on the question of delegation. Depending on how KIPP exercises its discretion in decision-making, the Board's control might be diminished to the extent that a court might determine that the Board has impermissibly delegated its statutory duties to KIPP. This Office, however, is not a fact-finder and, based upon the contract, cannot state conclusively that the Board has impermissibly delegated its duties.

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[7] The contract states that "[t]he Schools Superintendent will give KIPP's evaluation [of the school leader] substantial deference" and "[i]t is the expectation of the parties that the KIPP choices of personnel for the KIPP program would be upheld by the [Memphis School Boards's] Personnel Services Division in the absence of some concrete reason for rejection detected by the Personnel Services Division during its pre-employment process." Contract § 6.