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Opinion No. 01-111

School Board Contract with Outside Provider to Operate School

QUESTIONS

1. Under the proposed contract with the KIPP Foundation, has the Memphis City Board of Education contracted away its duty to "manage and control all public schools established or that may be established under its jurisdiction" (Tenn. Code Ann. § 49-2-203(a)(2)? This question includes the directive under Tenn. Code Ann. § 49-1-102(c) that a local public school system is to be administered by a local board of education and a superintendent or director.

2. As Tenn. Code Ann. § 49-2-301(f)(1) makes it a duty of the Board to "assign to its superintendent" specific enumerated duties, including general supervision of the schools, the power to employ personnel, and the power of nonrenewal and assignment of staff, to name a few, does the contract with the KIPP foundation obstruct the superintendent from performing duties given to her by the Legislature under the Education Reform Act?

3. As Tenn. Code Ann. § 49-2-203(b)(12) is the only provision in state law to allow a board of education to "[c]ontract for the management and operation of the alternative schools provided for at Tenn. Code Ann. § 49-6-3405 with any other agency of local government," can the Memphis City Board of Education contract out the operation and control of one or more regular school sites without specific statutory authorization?

4. Are the director of schools' duties and responsibilities in Tenn. Code Ann. § 49-2-303(a) capable of being modified or transferred to another person or a public benefit corporation in the state of California by the Board?

5. As the Board bargains with a professional employees' organization, can the Board vest in the KIPP Foundation and its KIPP Network School the right to determine salaries and other conditions of employment?

6. As student discipline codes are to be uniform (Tenn. Code Ann. § 49-6-4016) and directors of schools have the responsibility for implementation and supervision of such codes (Tenn. Code Ann. § 49-6-4012), can the Board contract out an exception to its behavior and discipline codes?

7. If such contracting out of essential education services occurs, does the Commissioner of Education have the authority and responsibility to withhold and retain funds (Tenn. Code Ann. §§ 49-1-102(c)(5) and 49-3-316(c)(2))?

8. If such contract is possible, is the Board required to pursue any contract through competitive bidding procedures?

OPINIONS

1. No. The School Board may not contract out its duty to manage and control schools, but it has not conclusively done so under its contract with KIPP.

2. No. The contract with KIPP does limit the director of schools' discretionary powers, but it does not obstruct his ability to perform any of the duties enumerated in § 49-2-301.

3. Yes. The School Board's charter gives the Board broad powers to contract. In addition, courts have found that school boards have general authority to contract, although the power is not unlimited.

4. No. The School Board cannot change or transfer the statutory duties given to the director of schools. If the contract changes or transfers statutory duties, then it would be invalid.

5. The Board has not vested in KIPP the right to determine salaries and conditions of employment in bargaining with a professional employees association. This Office declines to answer the hypothetical question of whether the Board could do so under some set of circumstances, insofar as a meaningful answer would depend upon the specific facts.

6. Yes. School discipline codes are not required by statute to be exactly alike. As long as the code complies with Tenn. Code Ann. § 49-6-4012(b) and § 49-6-4015, the Board can allow KIPP to have a different disciplinary code. The director of schools retains general supervisory and implementation power under the contract with KIPP.

7. Tenn. Code Ann. § 49-3-316(c)(2) does gives the Commissioner discretionary authority to withhold funds under special circumstances. It does not compel the Commissioner to withhold funds. This Office does not find Tenn. Code Ann. § 49-1-102(c)(5).

8. The Board is not required to competitively bid the contract with KIPP, and may be forbidden to do so by Tenn. Code Ann. § 12-4-106.

ANALYSIS

1. This question has been analyzed in a previously issued opinion. *See Op. Tenn. Atty. Gen.* 01-099 (June 18, 2001)(copy attached).

2. Under the contract with the KIPP Foundation (KIPP), the director of schools (director) can still perform the duties enumerated in Tenn. Code Ann. § 49-2-301. The director still maintains general supervision over the schools because the school leader assigned by KIPP to oversee the school must report to the director. Contract § 6. Further, KIPP must periodically evaluate the school leader and report to the director of schools. The contract states that the director must give substantial deference to KIPP's evaluation, but it does not require the director to follow it. Contract § 6. If the director chooses not to follow KIPP's recommendation, then KIPP may cancel the contract.

The director also retains the power to employ faculty and staff. The contract provides that KIPP will select employees either from current employees of the Board, or from potential new applicants. Contract § 6. If KIPP chooses an employee already in the current system, the director retains the same power he originally held in the selection process of that employee. If KIPP chooses from the pool of potential new applicants, the prospective employee will be screened by the Personnel Services Division of the Board of Education. The Personnel Services Division can choose to reject an applicant. The contract does not state, however, whose decision will prevail in the event that a KIPP selected employee is rejected by the Personnel Services Division.[1]

The contract also does not contain any terms that obstruct the director's power to assign and renew employees, except that KIPP's selection of employees be interfered with as little as possible. Contract § 6. If the director chose to renew an employee that KIPP did not want in its program, that employee could return to the regular employment with the Memphis City School System without "loss of tenure, seniority, retirement, or other applicable rights." Contract § 6.

Because the contract requires substantial deference to KIPP decisions, it limits the director's ability to use his discretion in performing the duties given by Tenn. Code Ann. § 49-2-301. The director must now include KIPP's opinions and recommendations in his decision-making process. This does not amount to an obstruction of his duties, however, because he still retains power to make final decisions. Whether the discretion called for by the contract will amount to obstruction of the director's duties in practice will depend on how KIPP exercises its advisory power.

This Office, however, finds nothing in the language of the contract that obstructs the director's ability to perform his statutory duties.

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[1]The contract states:

> It is the expectation of the parties that KIPP's choice of personnel for the KIPP program would be upheld by the Personnel Services Division in the absence of some concrete reason for rejection detected by the Personnel Services Division during its pre-employment process. In the event that such reasons should occur, they will be discussed with the KIPP school leader.

3. The contract with the KIPP foundation will create an alternative school, but it is not the kind of alternative school that the Board may contract out for under Tenn. Code Ann. § 49-2-203(b)(12). That Code section is thus inapplicable to this contract. The Memphis City School System, however, operates under 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." 1868-69 Priv. Acts, Ch. 30 § 6.[2] This language is not an express authority to enter contracts, but it is broad enough to encompass a general 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).

Thus, the School Board has implied authority from its charter to enter contracts that are not specifically authorized by statute. The Board cannot, however, contract out, or delegate the operation and control of its schools. *See Op. Tenn. Atty. Gen.* 01-099 (June 18, 2001).

4. The School Board cannot modify or transfer the statutory duties of the director of schools. Tenn. Code Ann. § 49-2-303 requires that "each local superintendent shall employ principals for the public schools." In its contract with the Board, KIPP retains in the contract the right to select and employ a school leader "for the program." Contract § 6. This does not prevent the director of schools from employing principals to serve the public schools in which KIPP programs operate, although the contract is silent as to how a principal would work alongside the school leader. Further, nothing in the contract prevents the school principal from performing his statutory duties as to the students, faculty, staff and resources outside the KIPP program.

The contract's language does not modify or transfer to KIPP the responsibility for selecting a principal. It provides for an additional official, the KIPP school leader, to administer the KIPP program. The contract could, however, operate in practice to modify the director of schools' responsibility for employing a principal if the KIPP program leaves no room for a principal to operate, or if the KIPP program practically affects the principal's ability to perform his statutory duties. This Office, however,

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[2]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.

cannot determine either the intent of the parties concerning Tenn. Code Ann. § 49-2-303, or the facts that may develop in the implementation of the contract.

5. The Board's contract with the KIPP foundation makes very clear that the Board will retain both the responsibility for bargaining with professional employees' organizations, and the responsibility for determining salaries and conditions of employment. The Board retains responsibility for the salaries of employees assigned to the KIPP program, all of whom remain employees of the Memphis City school system. The contract states, "Their [employees assigned to KIPP] wages, benefits, retirement, social security, withholding, and all other aspects of salary shall be handled through the routine payment procedures of the Memphis City school system. . . Those employees volunteering for service in the KIPP program shall retain all routine rights, benefits and obligations which they have under existing Board policy, Tennessee law, and applicable union contracts." Contract § 6. Thus, the Board will determine the salaries and other conditions of employment, and it is clear that the Board is required to abide by existing union contracts.

Further, the Board also retains full responsibility for bargaining with professional employees' organizations. "It is the intention of the Board of Education to enter into an addendum to the Memphis Education Association Agreement that sets forth the terms and conditions of employment for bargaining unit employees who are assigned to the KIPP program to the extent that any such terms and conditions diverge from the existing contract." Contract § 6. Thus, the Board and KIPP will abide by existing contracts, and to the extent that the KIPP program's terms and conditions diverge with the professional employees' organization, the Board itself will work with the organization to harmonize any existing agreements with the new KIPP program.

The contract also states that if the Board and the Association fail to reach an agreement, the Board may withdraw from its contract with KIPP. Thus, if the employee organizations cannot reach an agreement with the Board about KIPP, the contract with KIPP can be terminated without liability to the Board. Since the Board will continue to deal with the Association, and KIPP is not at all involved in the bargaining process, the Board has not vested any powers relating to union employees in KIPP foundation or its Network school.

Our examination of the KIPP contract indicates that the Board has not delegated the authority to bargain with or determine the salaries of union employees. This Office does not reach the hypothetical question of whether the Board could delegate this authority, insofar as a legal analysis of that question will depend on specific facts.

6. The Code sections that concern school disciplinary codes are Tenn. Code Ann. §§ 49-6-4015 and 49-6-4012(b). Section 49-6-4012(b) requires that the director of schools be responsible for overall implementation and supervision of the behavior code, and that each school principal shall be responsible for administration and implementation. The contract does not detail KIPP's disciplinary code, but it does provide for cases where a child must be removed from the KIPP program. If a student is

removed from the KIPP program for disciplinary reasons, the student may remain in the regular school system unless the student's offense warrants a Board suspension. Contract § 4. If that is the case, the student is subject to the general rules of the Memphis Board of Education. Contract § 4. Further, it has already been noted that the KIPP school leader reports directly to the director of schools.

This Office does not have a copy of KIPP's disciplinary code and cannot discuss whether it contains terms that specifically take away the director of schools' responsibility to supervise and implement a disciplinary code. It is clear, however, that the director and Memphis City School Board generally control serious disciplinary actions taken against a student. Further, any disciplinary actions taken by the KIPP school leader are subject to review by the director of schools when he evaluates the school leader. For these reasons, the contract with KIPP does not appear to violate Tenn. Code Ann. § 49-6-4012(b).

Tenn. Code Ann. § 49-6-4015 states that different codes of behavior among grade levels must be uniform "to the extent of maximum consideration for the safety and well-being of students and employees." This Office does not read the statute to require uniform discipline codes. Rather, it contemplates that different codes will be adopted for "different classes of schools." The codes must only be uniform in that they must include maximum consideration for the safety and well-being of students. The statute does not require that all codes be exactly alike.

Tenn. Code Ann. §§ 49-6-4013 and 49-6-4014 do bear on the KIPP disciplinary code. Section 49-6-4013 lists the basic subjects each behavior code adopted by the school systems must address. KIPP's disciplinary code should address these same issues in order to be in compliance with state law. This Office, however, does not have any information as to whether KIPP's code is in compliance with this statute. Section 49-6-4014 requires that the principal of each school must uniformly and fairly apply any behavior codes. To the extent that the KIPP code could prevent the principal from complying with this statute, it would be in violation of the law.

In sum, the Board can adopt different behavior codes for different classes of schools under Tenn. Code Ann. § 49-6-4015. All codes adopted by the Board, or by KIPP under contract with the Board, must comply with state law, but are not required to be uniform, only uniformly applied.

7. Our research indicates that Tenn. Code Ann. § 49-1-102(c)(5) does not exist. Section 49-3-316(c)(2) does give the Commissioner discretionary authority to withhold funds "[i]f any school funds are misappropriated or illegally expended by an LEA. . .".[3] As the word "may" suggests, this statute calls for the Commissioner to use his discretion. If the Commissioner determines that the special circumstances

[3]The applicable section states:

If any school funds are misappropriated or illegally expended by an LEA an amount equivalent thereto shall be returned to the proper school fund; and upon a failure to do so, the commissioner may retain and withhold the amount thereof from any funds available for distribution to such LEA in the current or any subsequent school year.

named in the statute exist, he may then withhold funds. This Office does not supplant the decisions to be made by the Commissioner, and therefore does not speculate as to whether such special circumstances do exist.

The Commissioner is not required by this statute to withhold funds from any LEA. Thus, he may not be compelled to do so.

8. The Board is not required to pursue this type of contract through competitive bidding procedures. The Board's charter does not require it to pursue competitive bidding for any type of contract. 1868-69 Priv. Acts, Ch. 30 § 6. Tenn. Code Ann. § 49-2-203 (4)(A) does require competitive bidding for purchases of "all supplies, furniture, fixtures and materials of every kind through the executive committee" which are estimated to exceed five thousand (5,000) dollars. Further, 49-2-203(4)(C)(1) requires competitive bidding for construction contracts. None of these types of expenditures are included in the Board's contract with the KIPP Foundation.

The Board is also bound by Tenn. Code Ann. § 12-4-106, which may forbid contracts such as the one with KIPP from being granted by competitive bid. The statute requires that any contract for "legal services, fiscal agent, financial advisor or advisory services, educational consultant services, and similar services by professional persons or groups of high ethical standards shall not be based upon competitive bids." The Board's contract with KIPP could be interpreted to fall within this category, which would then forbid the contract to be pursued through competitive bidding procedures.

The Board is thus bound by all applicable laws, but none require competitive bidding procedures for a contract of this type. Further, Tenn. Code Ann. 12-4-106 could be construed to forbid competitive bidding for services of this type.

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