S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

July 12, 2001

Opinion No. 01-112

Delayed BEP Funding

QUESTIONS

1. If the General Assembly appropriates funding for the Basic Education Program (BEP) and, in the appropriations bill, prohibits disbursement of the funding, has the General Assembly violated applicable constitutional or statutory law?

2. Does Tenn. Code Ann. § 49-3-351 give the Commissioner of Education the authority to delay BEP funding disbursement indefinitely?

OPINIONS

1. The State has a constitutional duty to provide for a system of free public education for all K-12 school children, and the Tennessee Supreme Court has found that the BEP meets this constitutional duty. If the failure to disburse BEP funding adversely affects the delivery of the BEP program to K - 12 students, then the failure to distribute could lead to a violation of the Tennessee Constitution Art. XI § 12. In addition, to the extent that Senate Bill 1914/House Bill 1943, Section 54, Item 1 (the appropriations bill) attempts to amend statutory substantive law, the provision could violate Tenn. Const. Art. II, § 17 and Tenn. Code Ann. § 9-4-5108(c).

2. Under Tenn. Code Ann. § 49-3-354, if state BEP funds are insufficient, the Commissioner may reduce each school system's funding by applying a pro rata reduction based on average daily membership. This statute does not authorize the Commissioner to delay BEP funding.

ANALYSIS

The FY2001-02 appropriations bill (SB 1914/HB 1943), Section 54, Item 1, states in relevant part:

> Notwithstanding any provision of this act to the contrary, no funds appropriated by the provisions of this act for the Basic Education Program shall be disbursed.

The State has several obligations regarding K-12 public education. Article XI, § 12 of the Tennessee Constitution requires the State to provide for a system of free public education.[1] The Basic Education Program, fully funded, meets this constitutional obligation. *See Tennessee Small School Systems v. McWherter,* 894 S.W.2d 735, 738 (Tenn. 1995).

The BEP is the only procedure for funding public school education. Tenn. Code Ann. § 49-3-351(b). Under Tenn. Code Ann. § 49-3-354, the Commissioner of Education distributes the BEP funds appropriated by the General Assembly. This statute also gives the Commissioner authority to reduce BEP funding to each school system, on a pro rata basis, if state funds are not sufficient to fund the BEP fully. Tenn. Code Ann. § 49-3-354(e). The State's overall funding obligation is seventy-five per cent (75%) of the BEP classroom costs and fifty per cent (50%) of nonclassroom costs. Tenn. Code Ann. § 49-3-356. Under none of these statutes is the Commissioner authorized to delay or prohibit distribution of BEP funding.

It has been suggested that the phrase "subject to all restrictions prescribed by law," found in Tenn. Code Ann. § 49-3-354(a), is a basis for the Commissioner's authority not to distribute BEP funds. The implication is that this statutory provision, combined with the appropriations bill section quoted above, which directs that BEP funds not be distributed, is legal authority for the Commissioner not to supply BEP funding to local school systems. The appropriations bill cannot amend or establish general law, without running afoul of Tenn. Const. Art. II, § 17. *See Op. Tenn. Atty. Gen.* No. 83-251 (May 12, 1983); *see also* Tenn. Code Ann. § 9-4-5108(c) ("The appropriation bill shall not contain any provisions of general legislation.").

By prohibiting distribution of BEP funding under SB 1914/HB 1943, Section 54, Item 1, the General Assembly has attempted to amend the statutes discussed above, to direct the Commissioner of Education to act contrary to statutory requirements that he disburse BEP funding. This the General Assembly cannot do without violating the constitution. Furthermore, if the General Assembly chose not to fund the BEP sufficiently, it would eliminate a factor the Tennessee Supreme Court considered essential to the BEP's constitutionality. About the BEP, the Supreme Court said, "Adequate funding is essential . . . . [Each factor] relating to funding . . . is an integral part of the plan and . . . indispensable to its

---

[1] The provision reads: "The State of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools. The General Assembly may establish and support such postsecondary educational institutions, including public institutions of higher learning, as it determines."

success. [No factor] can be compromised without destroying the integrity and effectiveness of the plan." *Small Schools II*, 894 S.W.2d at 738.

Failing to fully fund the BEP would likely subject the State to added litigation.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

KATE EYLER
Deputy Attorney General

Requested by:

The Honorable Randy McNally
State Senator
Legislative Plaza
Nashville, TN 37243