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. 02-085

Use of School Building and School Property By Private Entities

QUESTIONS

1. Whether present law would allow private entities to use a school building or school property for the following activities:

a. Use of a school facility for a basketball camp as described in Op. Tenn. Atty. Gen. 77-260;

b. Use of space and a piano, in an elementary school, by a piano teacher who gives students private lessons for a fee during an activity period or after school;

c. Use of a school facility for a recital by a private dance school when no admission is required for the recital although the dance school charges a fee for its students to attend the school;

d. Use of a school facility for a recital by a private dance school when admission is charged for the recital although the dance school charges a fee for its students to attend the school;

e. Use of a school facility by a non-profit organization dedicated to educating children in modern dance when the non-profit organization pays a fee to its teachers;

f. Use of a school facility by a teacher to provide tutoring, for a fee, to a child with a learning disability;

g. Use of a school facility to provide training for students in taking the SAT and ACT tests when a training is provided by a consultant not employed by the school system and the consultant charges a fee for the training;

h. Use of a school facility when the school board engages the consultant to provide SAT and ACT training; the school system charges a fee to the students for attending the training, which is held after school; and, the school system pays a portion of the student's fee to the consultant;

i. Use of a school facility when a future farmers' organization of a school utilizes a school gymnasium to sponsor a donkey basketball game as a fundraiser and charges a fee for admission, a portion of which is used to pay the entertainers that put on the donkey basketball game.

2. If a school board or school official (a) inadvertently, or (b) intentionally, allows a school building or school property to be used for "private benefit," is the school board or school official liable in damages for injury to persons or properties resulting from such use?

OPINIONS

1. Tenn. Code Ann. § 49-2-203(b)(4)(a) authorizes the school board to permit use of school property for public, community, or recreational purposes, regardless of whether a benefit may accrue to the prospective user, so long as the board follows its rules adopted under this statute and makes findings that the proposed use is for a public, community or recreational purpose.

2. Assuming the school board members and officials make their decision under the rules they have adopted for use of school property, the individual school board members and school officials would be immune from a personal injury lawsuit in state court. The board is generally immune but there are exceptions and an answer will depend on the facts and circumstances.

ANALYSIS

1. Use of School Buildings and Property

School boards may permit the use of school buildings and property (school property) by members of the public for non-school activities that the board determines are for "public, community or recreational" purposes. Tenn. Code Ann. § 49-2-203(b)(4)(A).[1] Subpart (B) allows the board to authorize one

[1] Tenn. Code Ann. § 49-2-203(b)(4) reads in pertinent part as follows:
[The school board may]
(4) Permit school buildings and school property to be used for public, community or recreational purposes under such rules, regulations and conditions as may be prescribed from time to time by the board of education;
(A) No member of such board or other school official shall be held liable in damages for any injury to person or property resulting from such use of school buildings or property;
(B) The local board of education may lease buildings and property or the portions of buildings and property it determines are not being used or are not needed at present by the public school system to the owners and/or operators of private child care centers and kindergartens for the purpose of providing educational and child care services to the community. Such leases may not be entered for a term exceeding five (5) years and must be on such reasonable terms as are worked out between the school board and the owner and/or operator. No such leasing arrangement entered into in accordance

specific for-profit use of school property: leasing school property to private child care centers and kindergartens to provide services to the community. In addition, subpart (B) prohibits three counties from allowing any other private profit use. Williamson County is not one of the three counties. Another part of the same statute, Tenn. Code Ann. § 49-2-203(b)(10), sets the conditions under which a school board may lease or sell school property. The situations you have presented do not involve selling school property and do not appear to involve leasing school property. Thus, the latter statutory provision would not be applicable.

This Office previously interpreted Tenn. Code Ann. § 49-2-202(b)(4) to permit use of school property for public purposes only. Op. Tenn. Atty. Gen. 83-420, 83 WL 167052. At the time the Office issued the opinion, Tenn. Code Ann. § 49-2-203(b)(4) contained this statement: "The authority hereby conferred shall not extend to the use of such buildings and property for private profit." The General Assembly has deleted that sentence, and thus, because Op. Tenn. Atty. Gen. 83-420 was grounded in this sentence, the opinion no longer has any force.

Your ask for guidance on what constitutes a "private benefit." This term is not found in Tenn. Code Ann. § 49-2-203(b)(4). This statute does allow the board to lease school property to owners and operators of private child care centers and kindergarten, under certain conditions. It also prohibits any other use of school property for private profit in three counties. Williamson is not one of the three counties. Tenn. Code Ann. § 49-2-203(b)(4) does not prohibit the school board from approving a use with a "public, community or recreational" purpose, knowing that there may be, as a result, a private benefit to an entity or individual, *e.g.*, the director of a dance school or a piano teacher.

The statute does require that the board have rules guiding its decisions on use of school property for these purposes. These rules could, but are not required to, address the question of "private benefit." They would certainly address the question of how the school board determines what use would fall within the requirement that the use be for a "public, community or recreational" purpose. Because circumstances could be different from county to county, this determination would require knowledge of the community, which is the province of the school board and not the Attorney General.

We cannot opine on each situation you presented because a determination would require a review of the school board's rules and a factual inquiry which this Office cannot undertake. The following are general comments only.

Items (h) and (i) would probably be permissible because the use is not by a private entity, but by the school itself. In one instance, the school board institutes the program and is obligated to pay for it. In

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with the preceding sentence shall be intended or used to avoid any school integration requirement pursuant to the fourteenth amendment of the United States Constitution. Otherwise, public school buildings and property may not be used for private profit in counties of [Blount, Sumner and Knox Counties].

the other instance, the school board would be allowing a school organization to use school property. These situations do not fall within Tenn. Code Ann. § 49-2-203(b)(4). As to the other items, including Item (a), the school board must examine each request to determine whether the proposed use is for a public, community or recreational purpose. If the school board follows its applicable rules and finds that the use is for a public, community or recreational purpose, then the school board may approve the use.

2. School Board or Official Liability for Personal Injuries

Tenn. Code Ann. § 49-2-203(b)(4) gives school board members and school officials absolute immunity from suit in state court for damages arising out of a personal injury resulting from the use of school property. The statute does not give immunity to the school board, as an entity.

The Government Tort Liability Act, Tenn. Code Ann. §§ 29-20-201, *et seq.*, governs the board's immunity. This Act establishes a general rule of immunity from suit in state court for school boards, with exceptions. The exceptions remove the immunity for certain situations, such as injury caused by the dangerous or defective condition of a public building. Tenn. Code Ann. § 29-20-204(a). The board's immunity depends on factors not known to this Office, *e.g.*, the condition of the building, the possibility of an employee's negligence and the nature of the decision making process (in granting use of the school property). *See* Tenn. Code Ann. §§ 29-20-201, -204, -205; *Bowers v. Chattanooga*, 826 S.W.2d 427 (Tenn. 1992). For this reason, we cannot opine on the board's potential liability. In either case, however, the board members must follow their rules governing use of school property for "public, community or recreational" purposes.

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