S T A T E O F T E N N E S S E E
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Opinion No. 02-093

Approval of KIPP nontraditional schools under authority of Tenn. Code Ann. § 49-1-207

QUESTION

Does the statute providing for the establishment of alternative education programs, Tenn. Code Ann. § 49-1-207, authorize the Commissioner of Education to grant approval for the operation of KIPP supported nontraditional schools in Tennessee?

OPINION

Yes, provided that the proposal for operation of the nontraditional school, in the judgment of the Commissioner of the Department of Education, meets the conditions and goals set forth in Tenn. Code Ann. § 49-1-207.

ANALYSIS

Your opinion request indicates that the Memphis City School System has submitted a proposal to the Department of Education to establish and operate a nontraditional school. The proposal seeks approval of a nontraditional school to be operated under a contract with the KIPP Foundation.[1] We are now asked whether Tenn. Code Ann. § 49-1-207 authorizes the Commissioner of the Department of Education ("the Commissioner") to grant approval for such a proposal.

Tenn. Code Ann. § 49-1-207 provides as follows:

> **49-1-207. Alternative education programs.**
>
> (a) The commissioner of education may authorize up to eight (8) school systems or any part thereof to operate as alternative education programs which emphasize school-based decision making. Upon authorization of the local board of education, the superintendent on behalf of the school system or the principal on behalf of an individual public school may apply to the commissioner

[1]We have previously issued two opinions addressing questions regarding the KIPP program, Op. Tenn. Atty Gen. 01-099 (June 18, 2001) and Op Tenn. Atty. Gen. 01-111 (July 11, 2001). For ease of reference, copies of these opinions are attached.

to operate the system or school in accordance with an alternative plan approved under this section by the commissioner. The commissioner, subject to approval by the state board of education, may award grants to individual school systems of up to fifty thousand dollars ($50,000), for local education agencies for planning and implementation purposes. The principal may be authorized by such principal's performance contract to develop such a plan. Prior to application, the principal shall consult with such principal's faculty. Subject to the implementation and funding of the relevant federal program, additional individual schools which emphasize school-based decision making may be approved.

(b) Such schools and systems shall be distributed throughout the state and not concentrated in any grand division. The commissioner has the discretion to approve the entire alternative plan or any part of it.

(c) (1) The commissioner, in the commissioner's discretion, is authorized to waive any rules and regulations necessary to accommodate the implementation of a local plan. In exercising such discretion, the commissioner shall consider whether the proposed waiver will improve the educational opportunities and performance of the subject students by the application of nonconventional curriculum and operational methods in innovative school programs developed by the use of local initiative and decision making.

(2) In these alternative programs, the commissioner may waive certain rules and regulations including, but not limited to, regulations relative to reporting requirements and premium pay for educators, without giving rise to any contractual right to such pay.

(3) The commissioner of education shall only be authorized to waive regulations relative to health and safety after consultation with either the commissioner of health or the state fire marshal, or both, as appropriate. The commissioner of health or the state fire marshal, as appropriate, must determine that the proposed waiver does not constitute a threat to the health and safety of students and staff and must notify the commissioner of education in writing of such determination.

(d) No local plan approved by the commissioner of education shall reduce the level of state funding to a local education agency under this title.

> (e) At any time before the end of an approved alternative plan, the school principal on behalf of such principal's school or the local board of education acting through the superintendent may elect to terminate the alternative program and to return to operation under all applicable rules and regulations. The principal or the superintendent shall provide thirty (30) days' notice to the commissioner of such intent to withdraw from the alternative program.
>
> (f) A local school board shall comply with provisions of title 8, chapter 44, when it considers any alternative plan under this section.

This statute confers broad discretion upon the Commissioner in deciding whether to approve a local education system's proposal for the establishment and operation of "alternative education programs which emphasize school-based decision making."[2] For example, Tenn. Code Ann. § 49-1-207(b) provides that, upon a local school system's submission of a proposal for an alternative educational program, "[t]he commissioner has the discretion to approve the entire alternative plan or any part of it."

Tenn. Code Ann. § 49-1-207(c)(1) authorizes the Commissioner, in her discretion, to "waive any rules and regulations necessary to accommodate the implementation of a local plan." In exercising such discretion, the Commissioner is only required to consider "whether the proposed waiver will improve the educational opportunities and performance of the subject students by the application of nonconventional curriculum and operational methods in innovative school programs developed by the use of local initiative and decision making." *Id.*

Paragraph (c)(2) of Tenn. Code Ann. § 49-1-207 further authorizes the Commissioner to "waive certain rules and regulations including, but not limited to, regulations relative to reporting requirements and premium pay for educators, without giving rise to any contractual right to such pay." Finally, paragraph (c)(3) of the statute permits the Commissioner to waive regulations relative to health and safety, although she may do so only after (1) consultation with either the commissioner of health or the state fire marshal, or both, as appropriate, and (2) a determination by either the Commissioner of Health or the State Fire Marshal (or both, as appropriate) that the proposed waiver does not constitute a threat to the health and safety of students and staff, and (3) written notification from either the Commissioner of Health or the State Fire Marshal (or both, as appropriate) to the Commissioner of Education of such determination.

When a statute confers discretionary powers upon a public official such as the Commissioner of the Department of Education, the statute is typically interpreted as intended to rely upon the good

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[2]Tenn. Code Ann. § 49-1-207(a).

judgment of the official. Provided that the decisions made under the aegis of that statute are not arbitrary or capricious, courts will rarely find an abuse of that discretion.[3]

Accordingly, with regard to the Memphis City School System's proposal to create and operate a nontraditional school under contract with the KIPP Foundation, Tenn. Code Ann. § 49-1-207 authorizes the Commissioner to exercise her discretion by either approving the proposal, rejecting the proposal, or granting the proposal only in part, as she considers appropriate. The language of Tenn. Code Ann. § 49-1-207 appears to require only that the Commissioner find that, in her judgment, the proposal will establish an "alternative education program which emphasizes school-based decision making,"[4] before approving the proposal, or some portion thereof.

In deciding whether to reject, approve, or to approve in part, the proposal, the Commissioner is authorized to exercise her discretion to waive any rules or regulations necessary to accommodate the implementation of the KIPP program. In considering whether to waive such rules or regulations, she must consider "whether the proposed waiver will improve the educational opportunities and performance of the subject students by the application of nonconventional curriculum and operational methods in innovative school programs developed by the use of local initiative and decision making."[5] In the event the KIPP proposal proposes waiver of any rules or regulations relating to health or safety, the Commissioner may again exercise her discretion in approving or rejecting these proposals, provided that, before approving such waivers, the Commissioner obtains written determinations from the appropriate State officials as discussed above.

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[3] *See, e.g., State ex rel. Association for the Preservation of Tennessee Antiquities v. City of Jackson*, 573 S.W.2d 750, 755 (Tenn. 1978); *Mitchell v. Garrett*, 510 S.W.2d 894, 898 (Tenn. 1974); *State ex rel. Park v. Beasley*, 182 Tenn. 523, 528, 188 S.W.2d 333, 335 (Tenn. 1945).

[4] Tenn. Code Ann. § 49-1-207(a).

[5] Tenn. Code Ann. § 49-1-207(c)(1) and (2).

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