

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
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April 2, 2003

Opinion No. 03-038

Memphis City School Board

QUESTIONS

1. Did the passage of Tenn. Code Ann. § 49-2-501(a)(1) abolish the Memphis City School Board?
2. Is 1959 Priv. Acts Ch. 24 unconstitutional because of an improper delegation of legislative authority to both the Memphis School Board and the Memphis Board of Commissioners?
3. Is the Memphis City School System a municipal school system and, if not, is it a separate school system maintained by a municipality within the contemplation of Tenn. Code Ann. § 49-2-1002(a)(1)?
4. If a court declared 1970 Priv. Acts Ch. 340 unconstitutional and ineffective, would that mean that the nine-member Memphis School Board is improperly constituted?

OPINIONS

1. While the legal basis for the Memphis City School Board's existence is unclear, a court of competent jurisdiction would have to decide whether the Board legally exists. Even if a court declared that the Board is not legally constituted, the court could find that the Board members were *de facto* officials whose actions were valid.
2. 1959 Priv. Acts Ch. 24 is constitutional unless a court declares otherwise.
3. The Memphis City School System is a special school district.
4. If a court decided that 1970 Priv. Acts Ch. 340 was unconstitutional and of no effect, the court would then look to the prior valid act, which set the number of board members at five.

ANALYSIS

1. The Legal Existence of the Memphis City School Board (Board)

The General Assembly created the Memphis City School System (School District) when it enacted 1869 Priv. Act. Ch. 30, and it has passed several private acts amending the School District's charter since 1869.¹ The School District is a special school district with its boundaries coterminous with the boundaries of the City of Memphis. *See, e.g., Halbert v. Shelby County Election Commission*, 31 S.W.3d 246, 247 (Tenn. 2000); Op. Tenn. Atty. Gen. 96-055 (March 27, 1996). It does not have the power to tax. Op. Tenn. Atty. Gen. 00-142 n.3 (September 11, 2000). Clearly, the School District does exist in fact. It has an elected school board and currently operates dozens of elementary and secondary schools. The question is its legal existence.

Tenn. Code Ann. § 49-2-501(a)(1) states as follows: "All special school districts that are not taxing districts are abolished." This statutory provision became law in 1925. Based upon this statutory provision alone, a court might conclude that the nontaxing School District was abolished by operation of the 1925 act. In fact, the School District continued in existence after 1925. Subsequent private acts and the courts have recognized the fact of its continuing existence. *E.g., Halbert*, 31 S.W.3d at 247, *Board of Education of the Memphis City Schools v. Shelby County Tennessee*, 207 Tenn. 330, 339 S.W.2d 569 (1960); *see also, for example*, 1959 Priv. Acts Ch. 24, § 2 (in which the General Assembly changed the School District's existence to "perpetual.")

In addition, Tenn. Code Ann. § 49-2-501(b)(2)(A) states as follows: "As of April 30, 1982, all special school districts in the counties affected by this section which are not currently operating schools or which do not have outstanding bonded indebtedness are abolished." The Commissioner of Education would have the authority in the first instance to determine whether a school district had been abolished by operation of this statutory section. Op. Tenn. Atty. Gen. 98-161 (August 24, 1988).

Some would argue that the sheer existence of the School District for so many years validates it. The lapse of a long length of time alone is not, however, sufficient to validate an otherwise invalid law nor to prevent a court from declaring the law invalid when it plainly appears to be so. *Wilson v. Wilson*, 137 Tenn. 590, 195 S.W. 173, 174 (Tenn. 1917). But, the court will only address and decide upon an act's validity when it is raised and fully presented to the court. *Gribble v. Wilson*, 101 Tenn. 612, 49 S.W. 736, 737 (Tenn. 1899). While this statement about an act's validity is not directly applicable to the present situation, it does suggest that a court might have to make the determination about the continued operation of the School District. *See* Op. Tenn. Atty. Gen. U97-

¹ 1883 Priv. Acts Ch. 17; 1941 Priv. Acts Ch. 42; 1951 Priv. Acts Ch. 378; 1955 Priv. Acts Ch. 350; 1955 Priv. Acts Ch. 351; 1959 Priv. Acts Ch. 24; 1959 Priv. Acts Ch. 179; 1959 Priv. Acts Ch. 226; 1961 Priv. Acts Ch. 375; 1967 Priv. Acts Ch. 260; 1970 Priv. Acts Ch. 340; 1995 Priv. Acts Ch. 67; 2000 Priv. Acts Ch. 141.

023 (April 29, 1997), quoting *Brimer v. Jefferson City*, 187 Tenn. 467, 216 S.W.2d 1 (1948).² The School District has a *de facto* existence; it is an operating school district. Because applying the 1925 and 1982 acts to the School District, in these unusual circumstances,³ to say that the School District has been abolished, at a minimum, twenty years ago, would have such grave consequences, we think that a court of competent jurisdiction would have to determine the legal existence of the School District.

We conclude that while someone might question the legal existence of the School District, until someone challenges it and a court decides the issue, the School District continues to exist legally. Should a court decide that the School District has no legal existence, it might also find that the School Board members are *de facto* public officials and their actions valid. *See Country Clubs, Inc. v. City of Knoxville*, 217 Tenn. 104, 113, 395 S.W.2d 789 (Tenn. 1965).⁴

For the remainder of this discussion, we assume that the School District still legally exists.

2. Constitutionality of 1959 Priv. Acts Ch. 24

Some have questioned the constitutionality of 1959 Priv. Acts Ch. 24 because Section 3 of the act requires the act to be approved by a two-thirds vote of the School Board and of the Memphis Board of Commissioners. Among other things, 1959 Priv. Acts Ch. 24 amended 1869 Priv. Acts Ch. 30 to change the duration of the School District, and thus its School Board, from ninety-nine

² Opinion U97-023, an attachment to Op. Tenn. Atty. Gen. 99-075 (April 5, 1999), stated as follows:

In *Brimer v. Jefferson City*, cited above, the Tennessee Supreme Court concluded that an alderman who had moved out of his ward in violation of the City Charter was still a *de facto* officer until a competent tribunal had judged his office to be vacated. Cases in other jurisdictions have found that, even where the controlling statute provided that a city official's office became vacant upon the official's change of residence, where the municipal governing body did not declare the office vacant and appoint a successor, but continued to recognize the original official's right to the office, the official remained a *de facto* official whose acts were valid against challenges by third persons. *Ajax Contractors, Inc. v. Myatt*, 424 P.2d 30 (Okla. 1967); *Oak St. Kansas City v. McTernan*, 308 Mo. 494, 273 S.W. 105, 109 (Mo. 1925).

³ Contrast the School District's situation with that of another school district to which Tenn.Code Ann. § 49-2-501 may have been applied. For example, consider Kenton Special School District which owns no buildings, does not operate any schools, owns no real estate and does not otherwise have the indicia of an extant school district. *See* Op. Tenn. Atty. Gen. 98-161 (August 24, 1998).

⁴ The law validates the acts of *de facto* officers as to the public and third persons on the ground that, though not officers *de jure*, they are in fact officers whose acts, public policy requires, should be considered valid. The term *de facto* officer has been defined as one whose acts were exercised under color of a known election or appointment which is void because the officer was not eligible for the office, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in the exercise of the appointing power. *Evers v. Hollman*, 196 Tenn. 364, 369, 268 S.W.2d 97 (1954) (acts of a beer board appointed by the wrong appointing authority held valid); *see also State ex rel. Smith v. Bomar*, 212 Tenn. 149, 368 S.W.2d 748 (1963) (acts of the legislature which had not been constitutionally reapportioned since 1901 held valid).

years to permanent and perpetual. In Op. Tenn. Atty. Gen. 03-037 (April 2, 2003), this Office concluded that a court could determine that the approval provision may be elided from the act and that the remaining portions of the 1959 Act would be valid.

3. Memphis City School System — a Special School District to which Tenn. Code Ann. § 49-2-1002(a)(1) does not apply

Op. Tenn. Atty. Gen. 03-037 (April 2, 2003) also tackled this issue. The School District is a special school district, and its dissolution or transfer is governed by Tenn. Code Ann. § 49-2-502. Tenn. Code Ann. § 49-2-1002 is not applicable.

4. The Composition of the Memphis City School Board

In Op. Tenn. Atty. Gen. 00-149 (October 4, 2000), this Office stated not that 1970 Priv. Acts Ch. 340 is unconstitutional but that

This Office finds a strong argument in favor of the correctness of the Secretary of State's certification of the invalidity of 1970 Private Acts, Chapter 340. Whether the certification should be declared correct, however, is for a court of competent jurisdiction to decide.

Nothing in our recent research suggests another conclusion. 1970 Priv. Acts Ch. 340 expanded the School Board from five⁵ to nine members. If a court were to find that 1970 Priv. Acts Ch. 340 never came into effect, it would look to the previous valid act setting the number of board members, and in this instance, might determine that the board should have five members, not nine. *See, e.g., McMinn County Board of Education v. Anderson*, 200 Tenn. 333, 336, 292 S.W.2d 198 (1956) (Court held that an education act was unconstitutional and that, therefore, the next previous valid act was the governing law.).

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⁵ 1883 Priv. Acts Ch. 17 amended 1869 Priv. Acts Ch. 30 and set the number of school board members at five. Subsequent private acts refer to a five-member board. *E.g.*, 1941 Priv. Acts Ch. 42, 1951 Priv. Acts Ch. 378, 1967 Priv. Acts Ch. 260.

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