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Opinion No. 03-107

The Authority of the Commissioner of Education and of a Local Education Agency To Grant Waivers Under the Tennessee Public Charter Schools Act

QUESTIONS

1. Does Tenn. Code Ann. § 49-13-105(b) authorize or permit the commissioner of education or a local education agency (LEA)[1] to grant or approve a request by a charter school to waive Tenn. Code Ann. § 49-13-106(a)(1), such that any student residing in a school district is eligible to attend the charter school?

2. Does any other Tennessee statute, rule or regulation authorize or permit the commissioner of education or an LEA to grant or approve a request by a charter school to waive Tenn. Code Ann. § 49-13-106(a)(1), such that any student residing in a school district is eligible to attend the charter school?

3. Are any provisions of the Public Charter School Act of 2002, codified as Tenn. Code Ann. §§ 49-13-102, *et seq.*, subject to waiver under Tenn. Code Ann. § 49-13-105(b) or under any other Tennessee statute or regulations?

OPINIONS

1. Under certain criteria, yes. The Commissioner may not grant waivers in the areas listed in Tenn. Code Ann. § 49-13-106(b). The Commissioner's authority is otherwise discretionary, calling for the exercise of sound judgment. Before granting a waiver, the Commissioner must determine that without the waiver, the statute or rule being waived would inhibit or hinder the charter school's ability to meet its goal or comply with its mission statement.

2. We have found no other such statute or rule.

3. This question is answered by the opinions given to the first two questions.

[1] Due to the need to expedite this opinion, we are confining our discussion to the Commissioner's authority. It is she who granted the waiver in question.

ANALYSIS

This Office has recently issued three opinions on the new Tennessee Public Charter Schools Act of 2002 (Act).

In Op. Tenn. Atty. Gen. 03-46 (April 17, 2003), we stated, "The statute does not specifically restrict the composition of the twenty-five percent (25%) enrollment portion of the charter school formed under Tenn. Code Ann. § 49-13-106(a)(2)."

In Op. Tenn. Atty. Gen. 03-083 (July 2, 2003), we stated, "Students eligible to enroll in a charter school formed under Tenn. Code Ann. § 49-13-106(a)(1) [*i.e.*, Type 1] are students who come from failing schools. A student from a school that is not failing may not enroll at this type of charter school."

In Op. Tenn. Atty. Gen. 03-090 (July 24, 2003), we stated, "The general law, and not the local education agency, determines charter school enrollment eligibility."

On August 11, 2003, the Commissioner of Education granted a limited one-year, student-specific waiver to three Type 1 charter schools in Memphis to enroll students who were not previously enrolled or assigned to a school failing to make average yearly progress. Absent the waiver, these children would be ineligible to enroll. The Memphis charter schools recruited and enrolled these ineligible students despite the Commissioner's comments to the contrary. The charter schools' counsel has stated that the charter schools first enrolled all eligible students who had applied and then accepted the additional, ineligible students.

The waiver covers sixty-four (64) specific students. It permits these children, and no others, to enroll in one of the three Memphis charter schools and to attend the school for one year only, the School Year 2003-2004. The waiver expires July 31, 2004. You stated in your letter that you think this waiver is in violation of our recent opinions.

When we issued the three previous opinions, we did not address the waiver authority under Tenn. Code Ann. § 49-13-105, which reads as follows:

> (a) Public charter schools shall be part of the state program of public education.
> (b) Except where waivers are otherwise prohibited in this chapter, the sponsor of a proposed public charter school may apply to either the LEA or to the commissioner of education for a waiver of any state board rule or statute that inhibits or hinders the proposed charter school's ability to meets its goals or comply with its mission statement. Neither the LEA nor the commissioner shall waive regulatory or statutory requirements related to:
> (1) Federal and state civil rights;

(2) Federal, state, and local health and safety;
(3) Federal and state public records;
(4) Immunizations;
(5) Possession of weapons on school grounds;
(6) Background checks and fingerprinting of personnel;
(7) Federal and state special education services;
(8) Student due process;
(9) Parental rights;
(10) Federal and state student assessment and accountability;
(11) Open meetings; and
(12) At least the same equivalent time of instruction as required in regular public schools.

The question is whether the statute gives the commissioner the discretion to waive a statute or a rule. Canons of statutory construction guide an inquiry into a statute's purpose and effect. The primary rule in interpreting a statute is to ascertain and to give the fullest possible effect to the General Assembly's intention and purpose as reflected in the statute's language. The courts avoid construing a statute in a way that goes beyond, or that unduly restricts, the statute's intended purpose. *See State v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 754-55 (Tenn. App. 2001).

The courts assume that when the General Assembly passed the statute, it chose its words deliberately, and that it meant what it said. Thus, the search for a statute's purpose and effect begins with the statute's words. The courts give these words their natural and ordinary meaning unless their context requires otherwise. They also look at the words in context, within the same provision and as a part of the whole. *Id.* The courts know that the interpretation must make sense and fit with the entire statute and the statute's general purpose. *Id.*

Tenn. Code Ann. § 49-13-105 does two things. It prohibits the Commissioner from waiving the specifically stated twelve exceptions in subsection (b). It also permits a charter school sponsor to apply to the Commissioner for a waiver. Because a charter school may request a waiver, we infer that the Commissioner's authority to grant a waiver is discretionary, except as to the prohibited areas. *See, e.g., Tusant v. City of Memphis*, 56 S.W.3d 10, 18 (Tenn. App. 2001). The courts often discuss discretionary authority and mandatory duty in writs of mandamus cases. *Id.* When a statute gives public officials the power to use their judgment in deciding how to administer a statute, the statute is conferring discretionary authority, to be exercised within the boundaries of the applicable law. *Id.*; *see also* 2 Am.Jur.2nd, *Administrative Law*, § 63. In this instance, the statute guides the discretionary authority. Before granting the waiver, the Commissioner must find that without the waiver, the rule or statute would inhibit or hinder the proposed charter school's ability to meets its goals or comply with its mission statement. Tenn. Code Ann. § 49-13-105(b).

Other statutes in Title 49, Tennessee Code Annotated, contain waiver authority. One statute requires LEAs to waive school fees under criteria outlined in the provision. Tenn. Code Ann. § 49-2-114. Another gave the Commissioner authority to waive the maximum class sizes found in the

statutory provision, until four years from the date the basic education program was fully funded. This waiver authority has expired.[2] Tenn. Code Ann. § 49-1-104. Tenn. Code Ann. § 49-1-203 permits the Commissioner to waive State Board of Education rules under limits set by the statute. Finally, Tenn. Code Ann. § 49-6-3110 also permits the Commissioner to waive class sizes.

The Public Charter School Act plainly includes the word "statute" in granting the discretionary waiver authority. No ambiguity exists in the statutory language. Thus, under this Act, the Commissioner may waive both rules and statutes when she receives a waiver application and has made the required finding. Other than the exceptions and the finding the Commissioner must make, the statutory provision does not indicate a limit on what the Commissioner may waive.

The Act sets out enrollment eligibility criteria. Because the statutory enrollment criteria are specific, we have inferred a legislative intent to restrict enrollment to certain students. *See* Op. Tenn. Atty. Gen. 03-083. Because the Commissioner may waive a statute and because the enrollment eligibility requirements are found in a statutory provision, the statute itself supports the conclusion that the Commissioner may suspend the eligibility requirements under the guidance of Tenn. Code Ann. § 49-13-105. It appears then that Tenn. Code Ann. § 49-13-105 and § 49-13-106 clash. One provision restricts; another allows modification, presumably including expansion.

When a conflict between statutes arises, courts use the well-established rule of statutory construction that the courts must seek an interpretation that harmonizes the conflicting statutory provisions. In doing this, the court adopts an interpretation that gives effect to legislative intent but does not unduly restrict or expand the statute's coverage beyond its intended scope. *See Memphis Publishing Co. v. Cherokee Children & Family Services, Inc.*, 87 S.W.3d 67, 75 (Tenn. 2002).

To aid our analysis and meet the requirement of finding a harmonizing interpretation, we turn to another part of the Act. Tenn. Code Ann. § 49-13-102 lists the purposes of the Act, the first of which says, "[T]o [i]mprove learning for all students and close the achievement gap between high and low [performing] students." Tenn. Code Ann. § 49-13-106 is completely congruent with this purpose. Another purpose stresses flexibility to achieve goals. Subsection (b) states as follows:

> It is the intention of this chapter to provide an alternative means within the public school system for ensuring accomplishment of the necessary outcomes of education by allowing the establishment and maintenance of public charter schools that operate within a school district structure but are allowed maximum flexibility to achieve their goals.

Thus the Act's purposes could support either a restrictive or a broad interpretation of the waiver authority. With these purposes in mind, we believe a court could fairly interpret the Act to allow the

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[2] Full BEP funding occurred in 1997. Thus, the Commissioner's waiver authority under this statute has expired.

Commissioner's very limited waiver. The waiver the Commissioner granted does not eliminate enrollment eligibility criteria and thus does not open enrollment to all students, but it does put the educational needs of children first. Thus a court could find that the Commissioner's waiver adheres to expressed legislative purposes and that the waiver is within her statutory discretion.

With this opinion, we reaffirm the statutory interpretation in our prior opinions. We also recognize, however, that the Commissioner has discretionary waiver authority that she may exercise to help enable a charter school to reach its goals and comply with its mission statement.

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