

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
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Opinion No. 06-051

Public Access to Schools by Professional Teachers' Associations

QUESTIONS

1. Does Title 49, Chapter 5, Part 6, the Education Professional Negotiations Act, apply to organizations which are not legally authorized to participate in collective bargaining?
2. Under Tenn. Code Ann. § 49-5-609(a)(4), may a board of education deny access to a professional teachers' association which is prohibited by federal law from engaging in collective bargaining?
3. Does Tenn. Code Ann. § 49-5-609(a)(5) empower a board of education to deny a teacher the right to select a legal representative of his or her choice?

OPINIONS

1. To determine whether the Education Professional Negotiations Act (Act) covers a particular professional association or organization requires an analysis of whether the association fits the definition of "professional employee organization" under Tenn. Code Ann. § 49-5-602(12). Such an analysis requires a factual determination, which this Office cannot undertake.
2. When teachers have elected a professional employee organization to represent them, then, under Tenn. Code Ann. § 49-5-609, the school board may exclude any similar organization. Under separate statutory authority, a board of education is authorized to promulgate regulations to control access to school property and facilities. The regulation must be content neutral and be applied consistently. Under such a regulation, the school board may deny access to individuals, professional associations or any community or noncurriculum related organizations.
3. Tenn. Code Ann. § 49-5-609(a)(5) has no bearing on a teacher's right to select a legal representative (a personal lawyer) of his or her choice.

ANALYSIS

Introduction — Facts

The opinion request did not refer to a specific professional association. For the purposes of this opinion, we assume that professional teachers' associations exist that offer access to insurance products and legal advice and lobby the Legislature on education issues, but cannot legally bargain with school boards over matters such as wages and work conditions. We assume also that a school board or school official has denied such an association access to its school(s) on the ground that the association meets the criteria of Tenn. Code Ann. § 49-5-602(12) and therefore may be denied access as a rival collective bargaining entity.

1. Professional Organization or Professional Association

The Education Professional Negotiations Act, Tenn. Code Ann. §§ 49-5-601, *et seq.*, defines a professional employees' organization as follows:

“Professional employees' organization” means any organization with membership open to professional employees, as defined in subdivision (11),¹ in which such employees participate and which exists for the purpose, in whole or in part, of dealing with boards of education concerning, but not limited to, grievances, wages, hours of employment or conditions of work²

Tenn. Code Ann. § 49-6-102(12).

Tenn. Code Ann. § 49-5-609(a)(4) provides that, when a professional employees' organization has been selected as exclusive bargaining representative pursuant to law, the local board of education may deny access to any other professional employees' organization. This statutory provision is, in essence, a restatement of what access a designated³ professional employees' organization has as the exclusive representative of the teachers. Under this provision, the school board may deny access to representative collective bargaining organizations other than the accredited teachers' professional organization.

¹A “professional employee” is any person employed by any local board of education in a position which requires a license issued by the department of education for service in public elementary and secondary schools of Tennessee supported, in whole or in part, by local, state or federal funds, but shall not include a retired teacher who is employed as a teacher in accordance with the provisions of title 8, chapter 36, part 8. Tenn. Code Ann. § 49-5-602(11).

²The Act does not use nor define the term “collective bargaining.” Generally speaking, collective bargaining is a procedure used by an employer and an accredited representative of union employees to reach a collective agreement regarding wages, hours and other conditions of employment. *Black's Law Dictionary* 263 (6th ed. 1990).

³Tenn. Code Ann. § 49-5-605(b)(4) requires a majority vote of those voting to secure representation by a professional employees' organization.

Whether a professional teachers' association (the Association) that provides services to its members, but legally cannot engage in collective bargaining, is covered by the Act will depend on the factual context (*e.g.*, how the association is structured, whether it is tax exempt and what its activities are). If such an association cannot legally bargain with the school boards to reach agreement on matters such as grievances, wages, hours of employment or conditions, then the association is not likely to be covered by the Act. A final determination, however, would require an investigation of the facts.

When an Association does fit the definition in Tenn. Code Ann. § 49-5-602(12) and has not been certified as the teachers' exclusive bargaining representative, the Association does not have access rights under the Act. When an organization has been elected as the exclusive bargaining agent, the selected organization has rights of access, and the local school board may deny access to any other "professional employees' organization." Tenn. Code Ann. § 49-5-609(a)(4).⁴ If the Association does not fit the definition and the Act does not apply, the question of access still remains.

2. Local School Board's Authority Regarding Public Access to Schools

A professional association does not have any general statutory or constitutional right to be on school premises or to use school facilities. The United States Supreme Court has stated, "Nowhere [have we] suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for . . . unlimited expressive purposes." *Perry Education Ass'n v. Perry Local Educators' Assn*, 460 U.S. 37, 44 (1983).

Local school boards have the authority and responsibility to control access to school premises. In Tenn. Code Ann. § 49-2-203, two statutory provisions are pertinent. They read as follows:

(a) It is the duty of the local board of education to:

(2) Manage and control all public schools established or that may be established under its jurisdiction.

(b) The local board of education has the power to:

(4) Permit school buildings and school property to be used for public, community or recreational purposes under such rules,

⁴A certified professional organization must be given access at reasonable times to areas in which professional employees work, use institutional bulletin boards, mail boxes, or other communication media, or use institutional facilities at reasonable times for the purpose of holding a meeting concerned with the exercise of the rights guaranteed by this part. Tenn. Code Ann. § 49-5-609(a)(4).

regulations and conditions as may be prescribed from time to time by the board of education.

Tenn. Code Ann. § 49-2-203(a)(2) and (b)(4).

In their discretion, then, local school boards may promulgate regulations to allow or deny public access to school buildings and school property. The regulation must be content neutral and applied consistently. *See Rusk v. Crestview Local Sch. Dist.*, 379 F.3d 418, 423 (6th Circuit 2004); *Daughtery v. Vanguard Charter School Academy*, 116 F.Supp.2d 897, 911-12 (W.D.Mich. 2000). By properly adopting such a regulation, the local school board could choose not to allow any professional associations, or like entities, to come onto school premises. If the school board chooses to deny access, it must take into account possible First Amendment concerns raised by denying access.⁵

3. Teacher's Legal Representative

The term "legal representative," found in question four, could have several meanings, including the designated collective bargaining entity's representative. We are informed that, in the context of your questions, the term refers to a teacher's personal attorney. The question then is whether a teacher may have her personal attorney attend discussions between the teacher and school officials before written charges for suspension or dismissal are filed against the teacher under Tenn. Code Ann. § 49-5-511.

Tenn. Code Ann. § 49-5-609(a)(4) applies to teachers' duly elected collective bargaining organization and does not prohibit or require a school board to give access to school premises to a teacher's personal lawyer. In fact, we have found no statute granting or denying anybody a right to have a lawyer present in disciplinary discussions with school authorities.⁶

⁵As a general rule, a school is not a public forum, and the State may impose reasonable regulations as to the time, place and manner of speech on school property so long as the regulations are not based on the content of the speech. *See* 68 Am.Jur.2d, *Schools*, § 94. A professional association's proposed activities at a school could, however, include expressive speech protected by the First Amendment to the United States Constitution. If this is the case, denial of access could raise constitutional questions. In *Perry Educ. Ass'n v. Perry Local Educators' Assn*, 460 U.S. 37 (1983), the Supreme Court emphasized that any First Amendment analysis dealing with access to government property must begin with a determination of the nature of the property to be used for expressive purposes. "The existence of a right of access to public property and the standard by which limitations upon such a right may be evaluated differ depending on the character of the property at issue." *Perry*, 460 U.S. at 44. The Court explained that three categories have been recognized into which all government property must fall: public forum, limited public forum, and non-public forum. *Perry*, 460 U.S. at 45-46. For an extensive discussion of these issues, please see Op. Tenn. Att'y Gen. 90-105 (December 19,1990).

⁶The teacher's right to have a lawyer present, however, could be a part of a collective bargaining agreement.

Under normal circumstances,⁷ all tenured teachers receive a written notice of the charges filed against them. Tenn. Code Ann. § 49-5-511(a)(4). They have the right to have counsel of their choice at a dismissal or suspension hearing. Tenn. Code Ann. § 49-5-512(a)(3). Right to counsel is not otherwise addressed by the statutes. When properly conducted, the hearings required by Tenn. Code Ann. §§ 49-5-511 and -512 provide adequate constitutional procedural due process. *See, e.g., Pritchard v. Lafferty*, 974 F.2d 1338 (Table), 1992 WL 205659, *3 (6th Cir. 1992).

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⁷In some instances, a school official may or must suspend the teacher. A director of schools has the authority to suspend a teacher pending investigation or final disposition of charges. Tenn. Code Ann. § 49-5-511(a)(3). When a teacher is convicted of a felony listed in Tenn. Code Ann. §40-35-501(i)(2), or a criminal offense listed in Tenn. Code Ann. § 39-17-417, however, the teacher must be suspended immediately and dismissed subject to the provisions of Tenn. Code Ann. § 49-5-511(c); Administrative Rules and Regulations, *Board of Education*, 0520-2-4-.01(9); *see also, e.g., Kendall v. Bd. of Educ. of the Memphis City Schools*, 627 F.2d 1, 4 fn.5 (“The Board may suspend a teacher immediately upon learning of very serious misconduct, such as conduct which threatens the safety of students, and then later provide the teacher with adequate procedural safeguards.”), *impliedly overruled in part on grounds not relevant to this discussion, Pritchard v. Lafferty*, 974 F.2d. 1338 (Table), 1992 WL 205659, *3 fn 6 (6th Cir. 1980).