S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
425 Fifth Avenue North
NASHVILLE, TENNESSEE 37243-0497

August 15, 2006

Opinion 06-130

Validity of Tennessee State Board of Education Rule 0520-1-604, requiring schools that serve grades 6, 7, or 8 and higher grade levels to meet certain nutritional standards.

QUESTION

Does Tennessee State Board of Education Rule 0520-1-604 exceed legislative authority and legislative intent by the insertion of the following language: "Schools that serve grades 6, 7, or 8 and also serve higher grade levels must meet the standards."

OPINION

No. Tennessee State Board of Education Rule 0520-1-604 does not exceed legislative authority or legislative intent.

ANALYSIS

Tennessee State Board of Education Rule 0520-1-604(4)(b) requires schools that serve grades 6, 7, or 8 to implement specified nutritional standards in a two-phased process. It also requires schools that serve grades 6, 7, or 8 *and* higher grades to meet the same nutritional standards. The Tennessee School Nutrition Standards Act, Tenn. Code Ann. § 49-6-2307, *et seq.*, which is the legislative authority for Rule 0520-1-604(4)(b), mandates that the State Board of Education, in consultation and cooperation with the Department of Education and the Department of Health, promulgate rules creating minimum nutritional standards for individual food items that are being offered to students in grades pre-kindergarten through eight (pre-K-8). This includes items offered for sale via vending machines, school nutrition programs, or other sources. There are a number of schools in Tennessee, however, in which the facilities for pre-K through the 8th grade are shared with those used by students in higher grades. The effect of the questioned rule, therefore, is to give smaller schools that serve students in grades 6, 7, or 8 *and* higher grades in the same facility the latitude to implement Tenn. Code Ann. § 49-6-2307 in an efficient manner.

In addition to Tenn. Code Ann. § 49-6-2307, Tenn. Code Ann. § 49-1-201(a) states "[t]he commissioner is responsible for the implementation of law or policies established by the general assembly or the state board of education." Tenn. Code Ann. § 49-1-201(c)(20)(A) states that the commissioner is to "[p]repare and present to the state board of education . . . such rules and regulations as are necessary to implement the policies, standards or guidelines of the state board or the education laws of the state." The test for determining the legality of the promulation of a rule that applies to grades pre-K through 8 and above is whether it has a tendency to carry into effect the

purpose of the enabling legislation, and is not arbitrary or capricious. *See Tasco Developing and Building Corp. v. Long*, 212 Tenn 96, 102, 368 S.W.2d 65, 67-68 (Tenn. 1963). *See also Comptron v. Tenn Dept of Public Welfare*, 532 F.2d 561, 564 (6th Cir. 1976); *Stallings v. Harris*, 493 F. Supp. 956, 958 (W.D. Tenn. 1980).

Many schools provide food services to students in grades 6, 7, or 8 through 12 all within the same building. It would be difficult and inefficient for these schools to have to meet specific nutritional standards for students in grades 6, 7, or 8 that are different from the standards for students in higher grades, when all eat in the same area. Tennessee State Board of Education Rule 0520-1-604(4)(b) is, therefore, consistent with the commissioner's responsibility for the implementation of law or policies established by the general assembly in a manner that is reasonable in light of the circumstances.

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

KEVIN STEILING
Deputy Attorney General

Requested by:

Representative Joe Fowlkes
Tennessee House of Representatives
32 Legislative Plaza
Nashville, TN 37243-0165