S T A T E O F T E N N E S S E E
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Opinion No. 08-194

Constitutionality of Amendments to BEP's "Maintenance of Effort" Provisions

QUESTION

The BEP formula currently generates the State funding amounts per school system, and also generates the local match funding requirements per school system. All school systems have met and are currently meeting their local match funding requirements. In addition to providing funds sufficient to meet their local match requirement, there is also "Maintenance of Effort (MOE)" language contained in Tenn. Code Ann. § 49-3-314(c)(1) and Tenn. Code Ann. § 49-2-203(a)(10)(A)(ii) that requires local legislative bodies to provide funding each year that is at least equal to the funding level they provided in the prior year. Senate Joint Resolution 1180 of 2008 requested that the BEP Review committee review, study and make recommendations for this MOE language to prevent a reduction and/or redistribution of education funding from the local legislative bodies after an increase in State Education funding, such as occurred in 2007 with the implementation of BEP 2.0. The BEP Review Committee recommended the following language:

> Amending Tennessee Code Annotated § 49-3-314(c)(1), by deleting the first sentence and replace it with the following
>
> > Excluding capital outlay and debt service, no LEA shall use state funds to supplant total local current operating funds nor shall such LEA receive less funding from a local legislative body than it received in the previous fiscal year with such amount adjusted for inflation based on the local government price deflator used to adjust the Basic Education Program; however, a reduction in funding based on a decline in student enrollment shall not be considered a reduction in funding for the purpose of this subdivision.
>
> Amending Tennessee Code Annotated § 49-2-203(a)(10)(A)(ii), by deleting the current language and replacing it with the following:
>
> > Excluding capital outlay and debt service, no LEA shall submit a budget to the local legislative body that directly or indirectly supplants or proposes to use state funds to supplant any local operating funds nor shall such budget include a funding amount

> from the local legislative body, adjusted for inflation based on the local government price deflator used to adjust the Basic Education Program, that is less than the amount budgeted in the previous fiscal year; however, a proposed reduction in funding based on a decline in student enrollment shall not be considered a proposed reduction for the purposes of this subdivision.

In anticipation of legislation on this issue in the 106th General Assembly, you have requested our opinion as to the constitutionality of the language proposed by the BEP Review Committee.

OPINION

It is the opinion of this Office that the proposed language is constitutional.

ANALYSIS

Tenn. Code Ann. § 49-3-314(c)(1) currently reads as follows:

> No LEA shall use state funds to supplant total local current operating funds, excluding capital outlay and debt service. The provisions of the preceding sentence shall not apply to a newly created LEA in any county where the county and city schools are being combined for a period of three (3) years after the creation of such LEA.

Tenn. Code Ann. § 49-2-203(a)(10)(A)(ii) currently reads as follows:

> No LEA shall submit a budget to the local legislative body that directly or indirectly supplants or proposes to use state funds to supplant any local current operation funds, excluding capital outlay and debt service;

In comparing the existing language of these two statutes with the proposed amendments to those same statutes, it appears that the new language proposed by the BEP Review Committee is essentially a refinement of the existing language. That is, the proposed language chiefly clarifies issues such as the Department of Education's use of the "local government price deflator" to adjust for inflation when comparing local education funding on a year-to-year basis. The proposed language therefore does not adopt a new definition of "maintenance of effort" or depart significantly from the original maintenance of effort concept.

Since the passage of the Educational Improvement Act (EIA) of 1992, this Office has issued a number of opinion letters discussing various aspects of the maintenance of effort requirement.[1] During that time the maintenance of effort requirement has never been interpreted as presenting constitutional issues that might render it vulnerable to constitutional challenge.

[1] *See, e.g.,* Op. Tenn. Atty. Gen. 07-95 (June 25, 2007); Op. Tenn. Atty. Gen. 05-021 (March 10, 2005); Op. Tenn. Atty. Gen. 02-068 (May 22, 2002); Op. Tenn. Atty. Gen. 99-130 (June 30, 1999); Op. Tenn. Atty. Gen. 95-102 (October 2, 1995); and Op. Tenn. Atty. Gen. 93-47 (June 17, 1993).

Similarly, since the original "Small Schools" case[2] the Tennessee Supreme Court has had two opportunities to examine the 1992 EIA enacted by the General Assembly in response to its decision in "Small Schools I." [3] While the "maintenance of effort" requirement represents a significant part of the Basic Education Program (BEP) enacted in response to Small Schools I, the Supreme Court has not suggested the existence of any constitutional infirmities associated with the maintenance of effort provisions of the BEP. Nor can it be argued that the Court was unaware of this aspect of the BEP, as evidenced by the Court's specific reference in "Small Schools II" to the maintenance of effort requirements imposed upon local school systems:

> The significant provisions of the BEP other than funding are characterized as governance and accountability measures. These reforms are designed to address "the relative indifference" to education demonstrated by some local systems, which this Court found to be a contributing factor to the inequities in educational opportunities. . . ..
>
> The BEP requires state and local funding, but the amount of funds collected or appropriated by a local government does not affect the funding provided to that local school system under the BEP. . . . A proportionate share of the total cost of the BEP is assigned to each local system based on its county's relative ability to pay, its "fiscal capacity." Fiscal capacity is calculated by using a methodology developed by the Tennessee Advisory Commission on Intergovernmental Relations. Each county's fiscal capacity is calculated as a percentage of the total capacity of all counties in the State. The capacity calculations are based on sales tax base, property tax base and income. **Each local government is required by statute to appropriate the funds determined to be its share.**[4]

(Emphasis added).

Indeed, the Supreme Court, in Small Schools I,[5] emphasized the General Assembly's own mandate, imposed by the Tennessee Constitution, to provide a statewide educational system that provides substantially equal educational opportunities to all Tennessee children.

> The power of the General Assembly is extensive. The constitution contemplates that the power granted to the General Assembly will be exercised to accomplish the mandated result, a public school system that provides substantially equal educational opportunities to the school children of Tennessee. The means whereby the result is accomplished is, within constitutional limits, a legislative prerogative.

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[2] *Tennessee Small School Systems v. McWherter, et al*., 851 S.W.2d 139 (Tenn. 1993) ("Small Schools I").

[3] *Tennessee Small School Systems v. McWherter, et al.,* 894 S.W.2d 734 (Tenn. 1995)("Small Schools II") and *Tennessee Small School Systems v. McWherter, et al*., 91 S.W.3d 232 (Tenn. 2002)("Small Schools III").

[4] 894 S.W.2d at 736-737.

[5] 851 S.W.2d at 156.

Subsequently, in Small Schools II, the Court found that each of the performance and governance factors that comprise the BEP, including the "local management" requirements (which include the local "maintenance of effort" requirements), were not only constitutional, but integral to the overall plan and indispensable to it.[6]

Finally, upon our subsequent review in response to your opinion request, we do not find that the maintenance of effort requirements of the BEP are vulnerable to constitutional challenge. The essence of the maintenance of effort requirement is the General Assembly's mandate that (1) local governments shall appropriate educational funding in an amount determined by State officials, and that (2) local governments may not reduce funding for local education, as compared to their previous year's funding, absent certain specific events such as loss of student population.

A local government, either county or municipal, is a creature of the legislature and as such, has only the powers expressly given or necessarily implied by state law.[7] Consequently, the General Assembly may place restrictions or requirements upon local government actions in matters such as local education funding without running afoul of the Tennessee Constitution, provided that no constitutional provision restrains the Legislature from doing so. And in the matter of the BEP's maintenance of effort requirements, we find no such provision. This is, of course, particularly true when the goal that the Legislature is trying to achieve is itself the result of a constitutional mandate to provide a substantially equal education to Tennessee citizens.

Accordingly, it is the opinion of this Office that the language proposed by the BEP Committee for inclusion in the "maintenance of effort" provisions of Tenn. Code Ann. §§ 49-3-314(c)(1) and 49-2-203(a)(10)(A)(ii) is constitutional.

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[6] *Small Schools II*, 894 S.W.2d at 739. *See also City of Humboldt v. McKnight*, 2005 WL 2051284, at 13.

[7] *See, e.g., Manning v. City of Lebanon, 124 S.W.3d 562, 564-565 (Tenn. Ct. App. 2003); Nichols v. Tullahoma Open Door, Inc.*, 640 S.W.2d 13, 18 (Tenn. Ct. App. 1982); *State ex rel. Witcher v. Bilbrey*, 878 S.W.2d 567, 571 (Tenn. Ct. App. 1994).

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Requested by:

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