STATE OF TENNESSEE
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Opinion No. 11-59

Establishment and Maintenance of a Senior High School

QUESTION

Is Greenback Public School, which currently provides classes from kindergarten through the twelfth grade, prohibited by Tenn. Code Ann. § 49-6-403(b)(2)(A) from building a new facility for its high school students because the current average daily attendance of students attending high school at the school is less than three hundred (300) students?

OPINION

No. According to publicly available sources, Greenback Public School was opened in 1921, and from that date going forward established and maintained a high school. Tenn. Code Ann. § 49-6-403(b)(2)(A), the current version of which was enacted in 1961 and which provides that no senior high school shall be established and maintained with fewer than three hundred (300) pupils in average daily attendance, would not apply to Greenback Public School because Tenn. Code Ann. § 49-6-403(b)(2)(D), the current version of which also was enacted in 1961, excludes from the average-daily-attendance requirement "any high school now established." The building of a new facility for Greenback Public School's high school students would not constitute "establish[ing]" an additional high school within the meaning of the statute. Therefore, based on these facts, while the current average daily attendance of students attending high school at the school is less than three hundred (300) students, Greenback Public School is not prohibited by Tenn. Code Ann. § 49-6-403(b)(2)(A) from building a new facility for its high school students.

ANALYSIS

Tenn. Code Ann. § 49-6-403(b) sets forth the requirements for maintaining a senior high school, stating as follows:

> (2)(A) No senior high school shall be established and maintained with fewer than three hundred (300) pupils in average daily attendance.
>
> (B) Any senior high school in a state of transition may be initially established with fewer than three hundred (300) pupils in average daily attendance; provided,

> that as soon as the transition period has been completed, the senior high school shall not have fewer than three hundred (300) pupils in average daily attendance.
>
> (C) Nothing in this part shall prohibit the consolidation of any two (2) or more high schools now established into one (1) high school, even though the combined average daily attendance of the pupils in the consolidated high school is less than that required in this part.
>
> *(D) Nothing is this part shall be construed as abolishing any high school now established.*
>
> (E) Local boards of education may, in unusual circumstances, establish and maintain high schools with fewer pupils in average daily attendance than is prescribed in this section; provided that prior approval is granted by the commissioner of education and the state board of education upon request of the respective local board of education.

(emphasis added). *See State ex rel. Weaver v. Ayers*, 756 S.W.2d 217, 223-24 (Tenn. 1988).

"Senior high schools" are "schools in which are taught any combination of grades corresponding to grade nine through grade twelve (9-12); however, the school must include grade twelve (12)." Tenn. Code Ann. § 49-6-401.

The relevant provisions of Tenn. Code Ann. § 49-6-403 under review were originally enacted by 1925 Tenn. Pub. Acts, ch. 115, §14. This Act provided that no two-year high school could be established and maintained with fewer than ten (10) high school pupils, and no four-year high school could be established and maintained with fewer than thirty (30) high school pupils. That Act contained the same "grandfather" provision that exists under current law, stating that nothing in the act was to be construed as abolishing "any high school now established." *Id*.

In 1957, the statute was amended to increase the number of students required in order to establish and maintain a senior high school, providing that no senior high school shall be established and maintained with fewer than seventy-five (75) pupils in average daily attendance. 1957 Tenn. Pub. Acts, ch. 145, §1. This Act also contained the "grandfather" clause stating that its provisions were not to be construed as abolishing any high schools "now established." *Id*.

Finally, apparently in response to the continued growth of high school student populations in Tennessee, the General Assembly in 1961 increased the number of pupils required for the establishment and maintenance of a senior high school to the number now specified in Tenn. Code Ann. § 49-6-403(b)(2)(A), providing that no senior high school shall be established and maintained with fewer than three hundred (300) pupils in average daily attendance. 1961 Tenn. Pub. Acts, ch. 137, §1. However, significantly, Chapter 137 retained the "grandfather" clause, stating that "nothing in this chapter shall be construed as abolishing any high school now established," the language which is currently set forth Tenn. Code Ann. §

49-6-403(b)(2)(D). Section 2 of the Act provided that the Act would take effect from and after July 1, 1961. 1961 Tenn. Pub. Acts, ch. 137, §2. This law remains in effect today.

The public website for the Greenback Public School reflects that it opened on its present site in the fall of 1921 and has operated a high school continuously since that date. http://gbs.loudoncounty.org. Greenback Public School was the first and only public school on the eastern side of the Tennessee River in Loudon County, thus giving students on that side of the river the opportunity to attend a public high school near their homes instead of choosing between a private school at nearby Morganton and public schools in surrounding counties. *Id.* Greenback Public School currently has a school population of approximately 660 students and serves the students from kindergarten through the twelfth grade. *Id.* S*ee also* http://www.loudoncounty.org.

Assuming that Greenback Public School was founded in 1921 and has operated a high school continuously since that date, which was well before the requirements contained in the pertinent provisions of § 49-6-403(b)(2) were enacted in 1961, Greenback Public School's senior high school would be exempt from the average daily attendance requirement of Tenn. Code Ann. § 49-6-403(b)(2)(A) by Tenn. Code Ann. § 49-6-403(b)(2)(D). Under such circumstances, the building of a new facility for Greenback Public School's high school students would not constitute "establish[ing]" an additional high school within the meaning of the statute. Therefore, based on these facts, it is the opinion of this Office that, while the current average daily attendance of students attending high school at the school is less than three hundred (300) students, Greenback Public School is not prohibited by Tenn. Code Ann. § 49-6-403(b)(2)(A) from building a new facility for its high school students.

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