STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

January 31, 2014

Opinion No. 14-14

Authority to Waive Charter School Requirements

QUESTION

Does Tenn. Code Ann. § 49-13-105 constitute an unconstitutional delegation of legislative authority relative to charter schools?

OPINION

No. The waiver authority related to charter schools in Tenn. Code Ann. § 49-13-105 is consistent with the General Assembly's power to delegate authority to implement legislative policy and is defensible from attack as an unconstitutional delegation of legislative authority in violation of Tenn. Const. art. II, § 3.[1]

ANALYSIS

Tenn. Code Ann. § 49-13-105, part of the Tennessee Public Charter Schools Act of 2002 (the Act), allows the sponsor of a proposed public charter school to apply to either the local education agency ("LEA") or the Commissioner of Education ("Commissioner") for waivers from statutes or rules that inhibit or hinder a school's ability to meet its goals or comply with its proposed mission. Specifically, Tenn. Code Ann. § 49-13-105 provides:

> (a) Public charter schools shall be part of the state program of public education.
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> (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**

[1] This Office cannot anticipate all possible factual situations in which Tenn. Code Ann. § 49-13-105 might be applied or "as applied" constitutional challenges that might develop. *See generally Waters v. Farr,* 291 S.W.3d 873, 922-23 (Tenn. 2009) (Koch, J., concurring in part and dissenting in part) (discussing in depth distinctions between "as applied" and "facial" constitutional challenges). Accordingly, such "as applied" challenges are outside the scope of this opinion.

> **statement.** Neither the LEA nor the commissioner shall waive regulatory or statutory requirements related to:
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> (1) Federal and state civil rights;
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> (2) Federal, state, and local health and safety;
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> (3) Federal and state public records;
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> (4) Immunizations;
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> (5) Possession of weapons on school grounds;
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> (6) Background checks and fingerprinting of personnel;
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> (7) Federal and state special education services;
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> (8) Student due process;
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> (9) Parental rights;
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> (10) Federal and state student assessment and accountability;
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> (11) Open meetings; and
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> (12) At least the same equivalent time of instruction as required in regular public schools.

Tenn. Code Ann. § 49-13-105 (emphasis added).

As provided in the statute, charter schools may seek waiver only of a state board rule or statute that inhibits or hinders the school's ability "to meet its goals or comply with its proposed mission." A charter school's "mission" and "goals" are a required part of the school's application for charter status. The Act requires a proposed charter school to file an application with the chartering authority that includes, among other information and documents, a "statement defining the mission and goals of the proposed charter school, including the proposed charter school's academic focus." *Id*. § 49-13-107(b)(1). "Academic focus" is further defined as a "distinctive, thematic program," and "academic plan" is defined as "a platform that supports the academic focus of the charter school," including "instructional goals and methods" as well as "materials and curriculum." *Id*. § 49-13-104(1), (2).

The Tennessee Department of Education has published a charter school application form that requires a proposed school to provide detailed information

about its mission, goals, academic focus and academic plan.[2] The chartering authority has the statutory power to review and approve charter school applications, including by necessity approving the school's mission and goals. *Id.* § 49-13-108(a)(2). Approval by the chartering authority takes the form of a written agreement signed by the sponsor and the chartering authority and which contains all components of the application, including the mission and goals. *Id.* § 49-13-110(a). Accordingly, a charter school's mission and goals must be clearly stated in the school's application, are subject to review and approval by the chartering authority, and are incorporated into a binding contract between the school and the authority.

With respect to charter school waiver requests, Chapter 0520-14-2 of the Rules of the State Board of Education set forth procedures for requesting and reviewing such requests. Waiver requests must include "detailed documentation of the grounds for requesting the waiver" as well as "specific evidence showing how the state board rule or statute currently inhibits or hinders the proposed charter school's ability to meet its goals or comply with its mission statement." Tenn. Comp. R. & Regs. 0520-14-2-.02(4). All waivers are granted for one academic year and may be renewed by filing a new request. Tenn. Comp. R. & Regs. 0520-14-2-.04(1).

The waiver authority delegated to the Commissioner and LEAs is limited in significant ways by the Act. First, the Commissioner or LEA must determine that the rule or statute in question inhibits or hinders the school's goals or mission, which have been previously described and approved by a clearly defined statutory

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[2] The charter school application form published by the Tennessee Department of Education contains a section for describing "Mission and Goals" as part of the "Academic Plan Design and Capacity." In particular, the application requires the following:

> Describe the mission and goals of the proposed school. Include a rationale for the grades served, grades upon opening and an enrollment growth plan. If you choose to, explain how the mission and vision of this school addresses any priorities set by the chartering authority. In the narrative,
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> - Identify the targeted student population and the demographics of the community to be served.
> - Articulate clear guiding purposes and priorities and how the school will know it is achieving them.
> - Identify specific barriers and/or school needs that may impact student achievement. Explain how your school will help students overcome those specific barriers.

Tennessee Department of Education, Application for a Public Charter School From New Operators For a School Opening in the 2014-15 School Year at 12, *found at* http://www.tn.gov/education/fedprog/Charter_Sch_App.shtml. The application also requires that the proposed school describe the school's "academic focus" and "academic plan" as those terms are defined in Tenn. Code Ann. § 49-13-104(1), (2). Application at 13.

procedure. Furthermore, the section of the Act that grants waiver authority also contains a long list of regulatory and statutory requirements that cannot be waived. *See* Tenn. Code Ann. § 49-13-105(b)(1)-(12). In addition, that same section notes that waivers may be "otherwise prohibited in this chapter." In that regard, Tenn. Code Ann. § 49-13-111 contains a significant number of compliance requirements applicable to charter schools that the Commissioner or LEA would be unlikely, if not unable, to waive.

The question posed is whether the waiver language in Tenn. Code Ann. § 49-13-105 is an unconstitutional delegation of legislative authority. In evaluating the constitutionality of a statute, courts begin with the presumption that an act of the General Assembly is constitutional, and every doubt is resolved in favor of the statute's constitutionality. *Gallaher v. Elam,* 104 S.W.3d 455, 459 (Tenn. 2003).

The legislative power of the State of Tennessee is vested exclusively in the General Assembly. Tenn. Const. art. II, § 3. Under Article II, Section 3, the General Assembly may not delegate powers that are "purely legislative." *Elam*, 104 S.W.3d at 464 (explaining that the General Assembly cannot delegate "the exercise of the legislature's discretion as to what the law shall be"). The General Assembly may, consistent with Article II, Section 3, delegate discretion to administrative agencies or local governments to promulgate rules and enforce laws. *Bean v. McWherter*, 953 S.W.2d 197, 199 (Tenn. 1997); *see also Family Golf v. Metropolitan Gov't of Nashville*, 964 S.W.2d 254, 257 (Tenn. Ct. App. 1997) (stating that local governments "lack inherent power to control the use of land within their boundaries. . . however, the General Assembly may delegate it to local governments."). Thus, the General Assembly may delegate the authority to implement the expressed policy of particular statutes, including the power to promulgate rules and regulations that have the effect of law in an agency's area of operations. *Elam,* 104 S.W.3d at 464.

The Supreme Court has held that the test for determining whether a legislative delegation of power is constitutional is "whether the statute contains sufficient standards or guidelines to enable both the agency and the courts to determine if the agency is carrying out the legislature's intent." *Bean*, 953 S.W.2d at 199. The legislature is not required to set out "explicit guidance standards" for the delegated authority; rather, "[g]overning standards need not be express provided such standards can be reasonably ascertained from the statutory scheme as a whole." *Id*. at 198-99. The Court further recognizes that detailed or specific legislation may not be required or feasible "when the subject matter requires an agency's expertise and flexibility to deal with complex and changing conditions." *Id*. at 199; *see also Boyce v. Tennessee Peace Officer Standards and Training Commission*, 354 S.W.3d 737, 742-43 (Tenn. Ct. App. 2010) (legislative delegation to POST Commission upheld where statute directs Commission to establish "minimum standards and curriculum requirements" for police officer training in

accordance with general policy to provide "training consistent with current professional standards").

It is likely that a court would hold that Tenn. Code Ann. § 49-13-105 provides "sufficient standards and guidelines" to allow the agency to carry out the General Assembly's intent relative to charter schools. First, the waiver authority is consistent with the legislative purposes of the Act. Tenn. Code Ann. § 49-13-102(b) provides:

> 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.**

Tenn. Code Ann. § 49-13-102(b) (emphasis added).

Second, the waiver statute contains "a 'sufficient basic standard' accompanied by a definite and certain policy and rule of action." *Bean,* 953 S.W.2d at 199 (*citing Lobelville Special School Dist. v. McCanless,* 381 S.W.2d 273, 274 (Tenn. 1964)). The statutory language unambiguously allows the Commissioner to waive both rules and statutes through the exercise of sound judgment. Prior to granting a waiver, the Commissioner must determine that, without the waiver, the statute or rule being waived would inhibit or hinder the charter schools ability to meet its goals or comply with its mission statement. The school's goals and mission in turn will have been clearly articulated, reviewed, approved and reduced to writing through the statutorily-mandated application approval process. Furthermore, Tenn. Code Ann. § 49-13-105 prohibits the Commissioner from waiving specifically enumerated regulatory and statutory requirements in subsection (b) and other parts of the Act that the legislature has deemed essential to the operation of all charter schools. These restrictions on the waiver authority supplement the legislative guidance on granting waivers and reinforce the conclusion that the Act provides a "sufficient basic standard" under *Bean*. *See also* Op. Tenn. Atty. Gen. 03-107 (Aug. 27, 2003) (reviewing Commissioner's authority to grant a waiver under Tenn. Code Ann. § 49-13-105).

Finally, the Supreme Court in *Bean* held that "[d]etailed or specific legislation may neither be required nor feasible when the subject matter requires an agency's expertise and flexibility to deal with complex or changing conditions." *Bean,* 953 S.W.2d at 199. The state program of public education in Tennessee covers an entire title of the Tennessee Code consisting of over 1,100 pages of text

and notes. Public education is clearly a complex area that requires just such expertise and flexibility. *Cf. Boyce,* 354 S.W.3d at 743.

In conclusion, the limited waiver authority provided under Tenn. Code Ann. § 49-13-105 facilitates the Act's purpose, as set forth in Tenn. Code Ann. § 49-13-102(b), and is consistent with the constitutional test enumerated in *Bean.* Accordingly, the waiver authority is consistent with the General Assembly's constitutional power to provide discretion to agencies in implementing legislative policy.

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