STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

March 31, 2014

Opinion No. 14-38

Expanding County Board of Education

QUESTIONS

1. If a private act increasing the number of members of a county board of education becomes effective upon approval by the county voters at the 2014 regular August election, will vacancies arise such that the county legislative body may appoint persons to fill the newly created positions until an election to fill them can be held?

2. If the county legislative body may not fill the new positions, may new members of the county board of education be elected in a special election to fill the positions until the 2016 regular August election?

3. In order to effectuate the requirement of Tenn. Code Ann. § 49-2-201 that members of a local board of education be elected to staggered four-year terms, may some of the new members be elected to four-year terms and some of the new members be elected to two-year terms at the 2016 regular August election?

4. Should the county legislative body's resolution requesting the increase in membership of the county board of education include reapportionment of the county so that the voters in the 2014 regular August election will be apprised of the districts from which the members of the county board of education will be elected following the increase in membership?

OPINIONS

1. Yes. The creation of new positions on the county board of education pursuant to Tenn. Code Ann. § 49-2-201(a)(1) would create vacancies in the newly created positions that the county legislative body may fill by appointment.

2. See above.

3. Yes. An August 2016 election of members to newly created positions on the county board of education should be construed as a "first election" held pursuant to Tenn. Code Ann. § 49-2-201(a)(1), requiring staggered terms of office by electing members from even-numbered districts for an initial term of two years and by electing members from odd-numbered districts for a term of four years.

4. Tenn. Code Ann. § 49-2-201(a)(1) requires that county school-board members be "elected from districts of substantially equal population established by resolution of the local legislative body." The creation of new positions on the board of education would necessitate the creation of new "districts of substantially equal population" from which those board members are to be elected. There is no requirement for the county legislative body to reapportion districts unless and until the voters elect to increase the school-board membership in the August 2014 election.

ANALYSIS

1. and 2. In Title 49, Chapter 2, of the Tennessee Code, the General Assembly has prescribed the manner in which county boards of education are to be elected, the makeup and qualifications for membership, and the manner in which vacancies are to be filled.

> Notwithstanding any other law to the contrary, there shall be a board of education elected by the people. . . . In addition to the membership existing on boards as of January 1, 1992, or January 1, 1993, the general assembly may authorize by private act any number of school board members that is no less than three (3) nor more than eleven (11). The members of the board shall be elected for a term of four (4) years, and may succeed themselves. For the first election held pursuant to this section, in order to establish staggered terms of office, the members from even-numbered districts shall be elected for a term of two (2) years, and the members of odd-numbered districts shall be elected for four (4) years. Members of county boards of education shall be residents of and elected from districts of substantially equal population established by resolution of the local legislative body. . . . Vacancies occurring on the board shall be filled by the local legislative body. . . . Any person so appointed shall serve until a successor is elected and qualifies according to law. The successor shall be elected at the next general election for which candidates have a sufficient time to qualify under the law.

Tenn. Code Ann. § 49-2-201(a)(1).

The statute thus authorizes the creation by private act of any number of school-board positions between three and eleven; school-board members shall be "elected by the people," and vacancies shall be filled by the local legislative body. *Id.* "When a vacancy occurs, the unexpired term shall be filled at the next regular meeting of the county legislative body or at a special meeting of the county legislative body," and [v]acancies shall be declared to exist, on account of death, resignation or removal from the county." Tenn. Code Ann. § 49-2-202(e)(1)-(2).

The statute does not directly address whether a new school-board position created pursuant to Tenn. Code Ann. § 49-2-201(a)(1) constitutes a "vacancy," but the Tennessee Supreme Court has said that a new office is vacant upon its creation.

> [The language regarding vacancies in Article VII, § 5, of the Tennessee Constitution] applies equally where the appointment or election may be made to fill an office for the first time, and where it may be made to fill one whose previous incumbent has died, resigned, or been removed. The word "vacancy" covers both cases. . . . *There is a vacancy in every instance in which there is an office without an incumbent.* Every office without an officer is vacant. *Therefore every new office created must, of necessity, be vacant from the time of its creation until it is filled by appointment or election.*

State ex rel. Rambo v. Maloney, 20 S.W. 419, 421-22 (Tenn. 1892) (emphasis added).

There is "no distinction with respect to a vacancy in a new and an old office." *Williams v. Mabry*, 141 S.W.2d 481, 484 (Tenn. 1940). *See also id.* (restating proposition that a "newly created office which is not filled by the legislative act creating it, and for which no provision is made by the act for filling it, becomes vacant on the instant of its creation") (internal quotation marks omitted). Vacancies in office thus exist automatically upon the creation of a new office. The creation of new positions on a county board of education pursuant to Tenn. Code Ann. § 49-2-201(a)(1), therefore, would create vacancies, and "[v]acancies occurring on the board shall be filled by the local legislative body." *Id.*

Tenn. Code Ann. § 49-2-202(e)(2) is not to the contrary. That statute provides that vacancies on a county school board "shall be declared to exist, on account of death, resignation or removal from the county," but it does not limit vacancies to such circumstances. *Maloney* makes clear that a "vacancy" exists where there is a need to fill an office for the first time *and* where there is a need to fill an office whose incumbent has died, resigned, or been removed. 20 S.W. at 421.

3. The intent of Tenn. Code Ann. § 49-2-201 is for the members of local boards of education to be elected on a staggered basis, whether a county school district, a special school district, an LEA or a municipal board of education. *See* Tenn. Code Ann. § 49-2-201(a)(1), (5), (6). And it is clear that the statute contemplates future changes to the number of school-board members, as it provides that the General Assembly "may authorize by private act any number of school board members that is no less than three (3) nor more than eleven (11)." *Id.* § 49-2-201(a)(1). Any election following the creation by private act of new board-member positions should therefore be considered a "first election held pursuant to this section." *Id.* Accordingly, if new school-board members are elected to newly created positions at the 2016 regular August election, "the members from even-numbered

districts shall be elected for a term of two (2) years, and the members of odd-numbered districts shall be elected for four (4) years." *Id.*

4. The Tennessee Code provides for the reapportionment of county districts at least every 10 years in counties that have not adopted a charter form of government under Article VII, § 1, of the Tennessee Constitution. *See* Tenn. Code Ann. § 5-1-111(a). In addition to this mandated reapportionment, "[a] county legislative body may reapportion at any time if [it] deems such action necessary to maintain substantially equal representation based on population." Tenn. Code Ann. § 5-1-111(c). Furthermore,

> whenever an election is held to fill a vacancy in a county office that is elected from districts, including, but not limited to, county school board members, the county legislative body may provide by resolution duly certified to the county election commission that persons qualifying as candidates shall be elected from the most recently adopted reapportionment plan in the county. If the county legislative body requires the election to be held using districts as adopted in the most recently adopted reapportionment plan in the county, the county legislative body shall specify to the county election commission which district shall be used to fill the vacancy by election. In the absence of a resolution requiring the latest reapportionment plan be used and specifying which district shall be used for the election, the election shall be held using the district as constituted for the election of the vacated incumbent.

Tenn. Code Ann. § 5-1-104(c).

Tenn. Code Ann. § 49-2-201(a)(1) requires that county school-board members be "elected from districts of substantially equal population established by resolution of the local legislative body." If a private act creating new school-board positions were approved by voters, the creation of these new positions would then necessitate the creation of new "districts of substantially equal population" from which those board members are to be elected. The county legislative body is responsible for the reapportionment of districts and is responsible for specifying to the county election commission which districts shall be used to fill vacancies of office by election. *See* Tenn. Code Ann. §§ 5-1-104(c), -111. The question before the voters in the August 2014 election will be whether to increase the school-board membership. There is no requirement for the county legislative body to reapportion districts unless and until the voters answer that question in the affirmative. There is thus no requirement that the proposed reapportionment be included in the county legislative body's resolution.

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