

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

September 21, 2017

Opinion No. 17-42

Legality of County School Board Vote on a Non-binding Memorandum of Understanding with Regard to Partnering with a Private Company to Assist Low-performing Schools

Question 1

May a county board of education vote on a non-binding memorandum of understanding regarding the potential formation of a “partnership district” that would allow the Tennessee Department of Education, the county school board, and a private company to collaborate to improve education for students in certain “priority schools” (i.e., low-performing schools) even though current law does not provide for such a partnership?

Opinion 1

Yes.

ANALYSIS

The request for this opinion was based on the following premises: The Commissioner of Education has proposed that the Hamilton County School Board vote on a memorandum of understanding that would reflect the School Board’s interest or lack of interest in potentially pursuing an agreement among the Tennessee Department of Education, the School Board, and a private company to form a “partnership district” to improve education for students in certain “priority schools” (i.e., low-performing schools) in Hamilton County. Current law does not provide for such a partnership. The Commissioner plans to seek legislation that would allow for the proposed partnership, but the vote on the memorandum of understanding would take place before any such change in the law.

The analysis is, accordingly, based on those premises and on the additional assumption that the memorandum of understanding will be drafted to be explicitly non-binding.

A memorandum of understanding—a term used interchangeably with “letter of intent”—generally is not an enforceable contract.¹ Indeed, it is by definition “a noncommittal writing preliminary to a contract.” Black’s Law Dictionary 924 (8th ed. 2004). Since a memorandum of understanding is not meant to be binding, it does not commit the parties to any particular course

¹ Courts will sometimes enforce a memorandum of understanding as a binding contract if there is clear evidence that the parties intended to be bound by it. *See, e.g., APCO Amusement Co. v. Wilkins Family Restaurants, Inc.*, 673 S.W.2d 523 (Tenn. Ct. App. 1984).

of action or hinder the parties from pursuing other courses of action or other arrangements with third parties. *Id.*

In particular, courts will not view as binding a memorandum of understanding that explicitly states that it is not binding. *See, e.g., Barnes & Robinson Co. v. Onesource Facility Servs.*, 195 S.W.3d 637, 645 (Tenn. Ct. App. 2006) (citing with approval cases holding that, as a matter of law, parties cannot rely on the existence of a contract if a letter of intent contains “unequivocal non-binding language,” and that if the letter of intent is conditioned on the execution of a subsequent contract the letter of intent is not binding.)

Thus, if a school board were to approve a non-binding memorandum of understanding regarding the proposed partnership it would not be entering into a contract or committing itself to enter into a contract that is currently not permitted under the law. It would merely be expressing its interest in a potential partnership—contingent on a change in the law and on the successful negotiation of a suitable contract should the contingency materialize. Moreover, an affirmative vote on such a non-binding memorandum of understanding would not prevent the school board from pursuing other courses of action or other arrangements at any time.

Nothing prohibits a school board from expressing potential interest in a method of improving education that may differ from methods currently available under existing law. Because an affirmative vote on a non-binding memorandum of understanding would be nothing more than an expression of a potential interest and would not hinder a school board from complying with current law, a school board may vote on such a non-binding memorandum of understanding.

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