



# Shelby County Government

Joe Ford  
*Interim Mayor*

Brian L. Kuhn  
*County Attorney*

December 16, 2009

Julie H. Ellis, Chairperson  
Memphis and Shelby County  
Metropolitan Government Charter Commission  
c/o Butler, Snow, O'Mara, Stevens & Cannada, PLLC  
6075 Poplar Avenue – Suite 500  
Memphis, Tennessee 38119

**Re: Opinion**

Dear Chairperson Ellis:

I am writing you in response to a request that you sent to Ms. Christy Kinard on December 7, 2009 wherein you asked for a legal opinion guiding the Commission on school consolidation which is an item to be taken up on your Agenda on December 17<sup>th</sup>. In that email you also asked that this legal opinion be concurred in by the City Attorney and two School Board attorneys. I am writing you my opinion and will be copying them but there is not enough time to get their concurrence before the December 17<sup>th</sup> meeting.

Your specific question as set forth in the aforementioned email is as follows:

**ISSUE**

Is consolidation of the Memphis City School System and the Shelby County School System as controlled by the State statute which was amended last year permissive or mandatory. If permissive, what are the circumstances, conditions, etc.

**OPINION**

The consolidation of the school systems in Memphis and Shelby County is not mandated but permissive pursuant to Tennessee Code Annotated 7-2-108(a)(18) as amended in 2009. If they are not consolidated, the charter needs to address local funding for the two systems.

### ANALYSIS

The Tennessee Code Annotated Section that deals with provisions that are required in a Metropolitan Government Charter is T.C.A. 7-2-108. Subparagraph 18 has provided since the inception of that law in 1957 until 2009 that it was mandatory for the consolidation of the existing City and County School Systems. Specifically, the language set forth the following:

(a) The proposed metropolitan charter shall provide: . . .“(18) For the consolidation of the existing school systems with the county and city or cities, including the creation of a metropolitan board of education, which board may be vested with power to appoint a director of schools.”

In 2009 this section was amended by deleting in its entirety and substituting instead the following language:

“18. For the consolidation of the existing school systems with the county and city or cities, including the creation of a metropolitan board of education, which board may be vested with power to appoint a director of schools, *if there are no special districts operating in the county. If one (1) or more special school districts operate within the county, then the metropolitan charter need not provide for the consolidation of the existing school systems. If the school districts are not consolidated, then any special school district shall continue to exist as a separate entity.*”

This new language which is shown above as the italicized language recognized the fact that in Memphis and Shelby County there existed a special school district being the Memphis City Schools and if there was a special school district then the metropolitan charter “need not provide for the consolidation of existing school systems.” This language “need not provide” seems to be language that is permissive although it does not contain the traditional permissive statutory word of “may”. However, since it said it need not provide for the consolidation of existing school systems.”, this office interprets the language as permissive so the charter can either provide for a consolidated school system or not. If they do not, then the last sentence of this new section comes into play and the special school district continues to exist as a separate entity.

There is a significant legal issue as to with or without this new language a consolidated government charter that is in a jurisdiction where a special school district exists by separate Private Act Charter, such as the City of Memphis, whether or not the metropolitan government charter could in fact consolidate that school system into a metropolitan school system. There have been opinions written that if the City of Memphis lost its Charter that the City of Memphis School System would still continue in existence pursuant to the Charter they received from the state government by a Private Act in the 1800's. This question is further complicated by the several opinions issued by the Attorney General several years ago in response to questioning whether or not the City of Memphis School System Charter had in fact lapsed by its own terms after one hundred (100) years. The question, therefore, presents itself as to whether or not the language in the Metropolitan Government Act, even as it existed prior to the amendment, would be controlling. This is the case because in normal instances the city school system exists pursuant to the chartered government of that city and in a metropolitan government consolidation effort the charter of that city is abolished and replaced by a new charter. In that case, naturally the school system would also be abolished. This is not the case for a special school district that receives its own charter from the State of Tennessee. These issues have not been litigated so it is difficult to predict any definitive outcome of any such litigation. It is believed that the language offered in the amendment of 2009 simply recognizes this fact and eliminates the legal question if, in fact, the school systems are not consolidated pursuant to a charter.

Of course, this raises other issues such as local education funding. The Charter Commission needs to be aware of the fact that the State Attorney General has issued an Opinion, AG Opinion No. 09-108 on June 8, 2009 as to what it feels would be the result of a metropolitan charter being created without consolidating the school systems in Memphis and Shelby County. I have attached a copy of that Opinion to this Opinion for your information and files. It concludes that under State Education Funding statutes the metropolitan government legislative body would be responsible for providing local funding for both school systems if they were not consolidated.

I am asking Mr. Craig Willis of my office to give us an opinion regarding the issues: (1) if the schools are consolidated in a metropolitan government how does the funding of local education takes place and (2) whether or not state law directs such funding , or is there some provision in the charter that has to address it.

I am copying the attorney for the City of Memphis and the attorney for the two School Boards on this Opinion so they can have their input, but, again, this will not be the December 17<sup>th</sup> meeting. If you would like to take this off the Agenda and await their

Julie H. Ellis, Chairperson  
Memphis and Shelby County  
Metropolitan Government Charter Commission  
December 16, 2009  
Page 2

opportunity to review this and add to it or concur let me know and we can delay this to a future agenda so this can be done.

Regards,



Brian L. Kuhn  
Shelby County Attorney

BLK/mbw  
Enclosure

Cc: Honorable Herman Morris, City Attorney  
Honorable Dorsey Hopson, General Counsel for Memphis City Schools  
Honorable Valarie Speakman, General Counsel for Shelby County Schools  
Ms. Christy Kinard, Assistant County Attorney  
Mr. Craig Willis, Assistant County Attorney  
Ms. Kelly Rayne, Legislative Advisor and Senior Counsel  
All Members of the Memphis and Shelby County Metropolitan Government  
Charter Commission