



## Shelby County Attorney's Office

### Memorandum

### Via Email

To: All County Commissioners  
Shelby County Board of Commissioners

From: Kelly Rayne *KR*  
Shelby County Attorney

Date: January 9, 2011

Subject: Question and Answer Summary of Legal Opinions Related to the Pending Dissolution of the Memphis City School District and Possible Conversion of the Shelby County School District to a Special School District [A5074-11]

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Please find attached a question and answer document that addresses issues raised by members of the Shelby County Board of Commissioners relating to action of the Memphis City School Board to surrender its Charter; the resulting transfer of the Memphis City School System to the Shelby County School System; and the possible creation of a new special school district in the area of the county which is currently the Shelby County School District. While there are a number of state laws that provide a roadmap to guide the orderly transfer or merger of school systems, very few of those provisions contemplate or address the issues that arise in a scenario such as that presently under consideration in Shelby County.

In lieu of answering the questions presented in the usual legal opinion format, it has been determined that the most concise method of providing this analysis is to use a question and answer format. If a question was asked more than once by Commissioners, there is a combined response; if two different questions were asked that require the same analysis, the reader is referred to a single analysis.

Due to the extensive research required to arrive at the answers and analysis presented, further research of some questions may be necessary. An addendum to this memorandum will be provided to Commissioners on several questions as indicated in the attachment.

After you have had an opportunity to review this memorandum and the attachment, please let me know if you have any questions.

cc: Shelby County Mayor, Mark H. Luttrell, Jr.

**QUESTION AND ANSWER SUMMARY OF LEGAL OPINIONS  
RELATED TO THE PENDING DISSOLUTION OF THE MEMPHIS CITY SCHOOL  
DISTRICT AND POSSIBLE CONVERSION OF THE SHELBY COUNTY  
SCHOOL DISTRICT TO A SPECIAL SCHOOL DISTRICT<sup>1</sup>**

1. **Does the creation of a special school district (“SSD”) in Shelby County require passage of a private act?**

ANSWER: The Tennessee General Assembly must first amend state law, and then approve a private act creating a SSD in Shelby County.

ANALYSIS: Creation of a SSD is a two-step process. First, the Tennessee General Assembly must remove the prohibition against the establishment of SSDs, which requires an amendment to T.C.A. § 49-2-501(a)(1) and (b)(3). Second, the Tennessee General Assembly must pass a private act pursuant to that amended statute that specifically creates a SSD in Shelby County. Op. Atty. Gen. No. 10-59 (Apr. 29, 2010). The private act creating the SSD will serve as the governing document for the structure and operations of the SSD.

2. **Do private acts require the support of the affected members of the Shelby County Delegation for passage by the Tennessee General Assembly?**

ANSWER: Complete support of the local delegation is not required.

ANALYSIS: Senate Rule 26 governs Local Bills. The Rule provides as follows:

No general bill with local application, or private act, shall be introduced unless personally signed by a Senator representing a local unit of the government. **No general bill with local application or private act shall be passed on third consideration unless three-fourths (3/4) of the Senators who represent the local unit of government to which the bill is applicable are present or have agreed in writing and have filed the agreement with the Clerk.** In the case of Davidson, Knox and Hamilton counties, the signature or presence of all Senators representing the local unit of government shall be required for passage. The Clerk shall prepare a calendar for third and final consideration of private bills and give notice of such bills by posting the written calendar in designated places and delivering the same to each Senator's legislative office before 2:00 p.m. at least on calendar day prior to such consideration. (Emphasis added.)

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<sup>1</sup> This question and answer document was submitted to the Shelby County Board of Commissioners by the Shelby County Attorney's Office on January 9, 2011 for purposes of answering questions raised by of the Board's members and should not be interpreted as legal advice for the Shelby County School Board or the Memphis City School Board.

Thus, pursuant to Senate Rule 26, only three-fourths of the Senators from the Shelby County Delegation must support a private act to ensure passage. There appears to be no corresponding House rule.<sup>2</sup>

**3. Can state legislation be passed to impose SSD status on the Shelby County School District (“SCS District”) without local action?**

ANSWER: Yes.

ANALYSIS: If Tenn. Code Ann. § 49-2-501 is amended to allow the establishment of a SSD only in Shelby County based on a population parameter, for example, or to remove the prohibition against the establishment of SSDs, the Tennessee General Assembly could potentially pass a private act designating a SSD in Shelby County without requiring a voter referendum. The Tennessee Supreme Court has concluded that a SSD is not entitled to the protections of the Tennessee Constitution, Article XI, § 9.<sup>3</sup> See *Perritt v. Carter*, 325 S.W.2d 233 (1959). More importantly, the Tennessee Supreme Court has held that conditioning whether a law becomes effective on a popular vote of those who will be subject to the law results in an unconstitutional delegation of legislative authority. See *Gibson County Special School Dist. v. Palmer*, 691 S.W.2d 544, 548 (Tenn. 1985) (holding that the Bradford Special School District Act, which conditioned the effectiveness of the Act upon the approval of a majority of the voters in that special school district, was an unconstitutional delegation of legislative authority).

**4. Can state legislation be passed to prevent the SCS District from obtaining SSD status?**

ANSWER: New legislation is not necessary, because current state law prohibits the creating of SSDs.

ANALYSIS: Section § 49-2-501(b)(3) of the Tennessee Code states that no additional SSDs may be created, except for municipal school districts, in certain cases as set out in the parameters of the statute. Therefore, current law prohibits the SCS District from becoming a SSD. It is not possible to enact legislation that would prohibit the Tennessee General Assembly, in perpetuity, from lifting the current ban on the creation of SSDs.<sup>4</sup>

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<sup>2</sup> The Tennessee General Assembly’s website contains a reference resource entitled “How a Bill Becomes a Law” at <http://www.capitol.tn.gov/about/billtolaw.html> and, although not incorporated into the House or Senate rules, indicates that the signatures of all members of the local delegation affected by the private act are needed for a local bill to be placed on the consent calendar.

<sup>3</sup> Article XI, § 9 of the Tennessee Constitution requires local approval by way of a two-thirds vote of the local legislative body or, in the alternative, a local referendum, on legislative acts that are “...private or local in form or effect, and applicable to a particular county or municipality, either in its governmental or its proprietary capacity.”

<sup>4</sup> “While the Legislature may bind itself to statutory provisions, it may not bind a subsequent General Assembly.” *Mayhew v. Wilder*, 46 S.W.3d 760, 770 (Tenn. Ct. App. 2001).

**5. Can state legislation be passed to prevent the Memphis City School Board (“MCS Board”) from surrendering its Charter?**

ANSWER: It is unlikely.

ANALYSIS: It is unlikely that the Tennessee General Assembly could pass legislation to prevent the MCS Board from surrendering its Charter. The Memphis City School District (“MCS District”) is a “special school district” established by private act.<sup>5</sup> *Board of Educ. of Memphis City Schools v. City of Memphis*, 2010 WL 104602 at \*4 (Tenn. Ct. App. 2010); Op. Tenn. Atty. Gen. No. 03-038 (Apr. 2, 2003). There is no state law requirement that a SSD must exist in perpetuity. Instead, the law presumes that schools will be maintained and operated by the counties of the State of Tennessee. See Tenn. Code Ann. § 49-2-101. It is possible, however, that state legislation could be pursued so as to create procedural obstacles to the dissolution of a SSD (e.g., amending the private act creating the SSD to require that charter surrender be approved by the Tennessee General Assembly; amending Tenn. Code Ann. § 49-2-502 to impose additional restrictions prior to transfer of the MCS District to the county school system).

**6. Is a voter referendum required for approval of a SSD? If so, do all voters in Shelby County vote or just the voters in the area of the proposed SSD?**

ANSWER: No. Local approval is not required to create a SSD.

ANALYSIS: The Tennessee Supreme Court has concluded that a SSD is not entitled to the protections of Tennessee Constitution, Article XI, § 9, which requires local approval of legislative acts of a local nature. See Question 3 for further analysis of the applicable constitutional provision.

**7. Can the MCS Board surrender its Charter by only a vote of its members or is a voter referendum required? How quickly can the MCS Board’s Charter be surrendered?**

ANSWER: There are two methods to surrender the MCS Board’s Charter. The MCS Board is authorized by a private act to surrender its Charter without a voter referendum upon approval of the Memphis City Council. The second method, authorized by Tenn. Code Ann. § 49-2-502, allows the MCS Board to transfer the MCS system to the SCS Board, upon approval of the voters in a referendum.

ANALYSIS: The MCS Board is authorized by Chapter 375 of the 1961 Private Acts to surrender its Charter without a voter referendum, which would have the effect of transferring the responsibility to operate the MCS system to the SCS Board, since the county is responsible for operating a county school system. See Tenn. Code Ann. § 49-2-101; Tenn. Op. Atty. Gen. No.

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<sup>5</sup> As established in Questions 3 and used throughout this memorandum, “SSD” refers to a special school district that would comprise the area of the Shelby County School District and should not be interpreted as referring to the Memphis City School District.

03-102 (Aug. 19, 2003). The 1961 Private Act, however, may be subject to a legal challenge on grounds that it conflicts with general state law since it accomplishes the same end without a voter referendum. See *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 60 S.W.3d 65, 74 (Tenn. Ct. App. 2001) (a private act is superseded as far as is necessary to give effect to a general statutory scheme of statewide application). However, this determination would have to be made by a court of law since it involves a close question of statutory interpretation.

Tenn. Code Ann. § 49-2-502 authorizes the MCS Board to transfer the MCS system to the SCS Board. This transfer requires a referendum and has the effect of abolishing the MCS District. The Tennessee Attorney General has opined that this is the appropriate method for the MCS Board to surrender its Charter. Ops. Tenn. Atty. Gen. No. 03-037 (Apr. 2, 2003) and No. 05-021 (Mar. 10, 2005).

If the MCS Board relies on the 1961 Private Act, the surrender of its Charter would most likely be effective upon the Memphis City Council's approval of the MCS Board's resolution or a future date specified in the MCS Board's resolution. If the MCS Board relies on § 49-2-502 of the Tennessee Code, the surrender would most likely be effective upon certification of the voter referendum results, unless a later effective date can be provided for by the MCS Board's resolution.<sup>6</sup>

**8. If SSD legislation is passed prior to the voter referendum to transfer the administration of the MCS District to the SCS Board, would such SSD legislation prevent the surrender of the MCS Board's Charter?**

ANSWER: No.

ANALYSIS: If legislation is passed that converts the SCS District to a SSD, the process to surrender the MCS Board's Charter would not be precluded by such legislation. The Tennessee Attorney General has opined that even if such a SSD is created in Shelby County, the MCS Board could still surrender its Charter in accordance with Tenn. Code Ann. § 49-2-502, which would make the SCS Board "responsible for the schools in the former Memphis City Schools System." Op. Tenn. Atty. Gen. No. 03-102 (Aug. 19, 2003).

**9. What happens to the boundaries of the MCS District when the City of Memphis annexes a reserve area after a SSD is established, taking into consideration that a SSD freezes the boundaries, the MCS Board's Charter is unique and may predate state legislation relating to SSDs, and the MCS District's boundaries are coterminous with the City of Memphis boundaries and follow same upon annexation of reserve areas?**

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<sup>6</sup> The resolution passed by the MCS Board on December 21, 2010 to surrender its Charter did not set an effective date. The resolution states that it is surrendering its charter pursuant to the private act, and that it is requesting a referendum to transfer the Memphis City Schools to the Shelby County Board of Education as required by T.C.A. § 49-2-502.

ANSWER: The boundaries of the SSD would be determined by the private act creating the SSD. If included in the SSD, areas within the annexation reserve areas of the City of Memphis could remain in the SSD even after annexation occurs. The private act should address whether subsequently annexed reserve areas remain in the boundaries of the SSD or are transferred to the MCS District.

ANALYSIS: If a SSD is created in Shelby County, there conceivably could be areas currently within the annexation reserve areas of the City of Memphis that will continue to be part of the SSD boundaries. This remains true, even if such areas are annexed by the City of Memphis after the establishment of the SSD. There is no legal authority to suggest that this situation is prohibited, although this result could be subject to legal challenge as discussed in Question 10 below. It is likely, however, that the private act would address whether the reserve areas that are subsequently annexed by the City of Memphis, are transferred from the SSD boundaries to the MCS District.

**10. Can Shelby County challenge a SSD law that applies only to Shelby County?**

ANSWER: Yes. A SSD law that only applies to Shelby County may be challenged on grounds that it is “special” legislation or that it is an unconstitutional violation of the Education Clause of the Tennessee Constitution. Whether these challenges would be successful must be decided by a court of law.

ANALYSIS:

(a) Unconstitutional Special Legislation – Tenn. Const., Article XI, § 8. If Tenn. Code Ann. § 49-2-501 is amended to allow for the creation of a SSD only in Shelby County, a court could find such measure to be unconstitutional special legislation. The Tennessee Supreme Court has interpreted Article XI, § 8 of the Tennessee Constitution to place limitations on the ability of the legislature to enact laws that benefit a particular county or individual. *See Finister v. Humboldt Gen. Hosp., Inc.*, 970 S.W.2d 435, 440, n. 3 (Tenn. 1998). However, courts often uphold the use of population classifications in legislation which render general statutes applicable in only one county, where a rational basis exists for the classification. *See e.g., Shelby County Civil Service Merit Bd. v. Lively*, 692 S.W.2d 15 (Tenn. 1985) (upholding an act eliminating authority of county officials to terminate deputies, applicable solely in Shelby County); *Harwell v. Leach*, 672 S.W.2d 761 (Tenn.1984) (upholding a statute prohibiting the sale of fireworks, applicable only in Knox County); *Peterson v. Grissom*, 250 S.W.2d 3 (Tenn. 1952) (upholding a “road law,” applicable to only one county by virtue of population classification); *Elliott v. Fuqua*, 204 S.W.2d 1016 (Tenn. 1947) (upholding a statute prohibiting the sale of pyrotechnics, applicable only in Davidson County); *Knox County v. State ex rel. Nighbert*, 147 S.W.2d 100 (1940) (upholding the Teacher Tenure Act, applicable to Knox County alone); *cf. Canale v. Stevenson*, 458 S.W.2d 797 (Tenn. 1970) (invalidating a statute forbidding “fortune telling,” applicable only in Shelby County for absence of rational basis). Based on this authority, a court would have to determine whether an enactment creating a SSD only in Shelby County is supported by a rational basis to decide the constitutionality of such enactment.

(b) Unconstitutional Legislation that Violates the Education Clause -- Tenn. Const., Art. XI, § 12. If Tenn. Code Ann. § 49-2-501 is amended to allow for the creation of a SSD only in

Shelby County, a court could find that such a measure violates the Education Clause. The Tennessee General Assembly has constitutional power to make laws governing both local government affairs and public education. *See* Tenn. Const., Art. XI, §§ 9 and 12. However, in fashioning laws related to education, the Tennessee Constitution will not permit legislation that allows a local government “to defeat the constitutional mandate of substantial equality of opportunity.” *Tennessee Small Sch. Systems v. McWherter*, 91 S.W.3d 232, 235 (Tenn. 2002). Accordingly, if proof could be mustered that the creation of a SSD in Shelby County somehow defeats the equality of opportunity available to all children in Shelby County, such legislation could be challenged under the Education Clause of the Tennessee Constitution.

**11. Are there any constitutional or legal pitfalls to freezing SSD boundaries, if the City of Memphis annexes any of its reserve areas?**

ANSWER: See Questions 9, 10, and 13 above.

ANALYSIS: Question 9 addresses the effect of SSD boundaries established by a private act on the annexation reserve areas of the City of Memphis. Question 10 addresses possible legal challenges to SSD legislation that only applies in Shelby County. Question 13 addresses the voter eligibility of the residents in a reserve area of a SSD that is annexed by the City of Memphis.

**12. Would a SSD in Shelby County be limited to the area outside of the City of Memphis or the area outside of the annexation reserve areas of the City of Memphis?**

ANSWER: The Tennessee General Assembly has the discretion to set the boundaries of a SSD.

ANALYSIS: Whether the boundary of a SSD is limited to the entire area of Shelby County outside the limits of the City of Memphis or the area outside of the annexation reserve areas of the City of Memphis is a matter solely within the discretion of the Tennessee General Assembly. If the Tennessee General Assembly passes a private act that creates a SSD for the entire area of Shelby County outside the limits of the City of Memphis, the City of Memphis could still annex its reserve areas, but portions of the area annexed could be made permanent within the jurisdiction of the SSD rather than the MCS District.

**13. Would residents in a reserve area annexed by the City of Memphis be able to vote for the SSD board members, county school board members representing the current MCS District, or both?**

ANSWER: Residents in the annexation reserve areas of the City of Memphis would likely vote only for members of the SSD board.

ANALYSIS: The Memphis City Charter and MCS Board Charter provide that all eligible voters residing in a district of the MCS Board may vote for its members. Memphis City Charter, §§ 6 and 937. Currently, annexation reserve areas are part of the SCS District and its

residents vote for members of the SCS Board. The boundaries of the SSD would be determined by the private act creating the SSD. If the boundaries of a SSD include annexation reserve areas, the residents in such areas would vote for members of the SSD board, but not for members of the county school board representing the current MCS District, even if such areas are annexed at a later date. *See, e.g., Board of County Comm'rs of Shelby County, Tenn. v. Burson*, 121 F.3d 244, 249 (6<sup>th</sup> Cir. 1997) (the relevant geopolitical entity for purposes of the one person, one vote analysis in cases such as this is the school district, not the entire county); Tenn. Code Ann. § 49-2-201. The Tennessee General Assembly, however, could enact legislation that would allow such annexed areas to become part of the county school system (current MCS District). In that case, the residents in such annexed areas would vote for members of the county school board, but not the board of the SSD.

The two MCS District's at-large positions pose an issue, because SSD voters in a reserve area would become eligible to vote in a citywide election of those two positions after being annexed based on their city residency. The SSD legislation should, therefore, address whether a voter annexed into the City of Memphis is eligible to vote both in the SSD elections and in the two MCS District at-large elections. *See generally* Op. Shelby Co. Atty. No. 96-176 (Aug. 30, 1996).

**14. Would residents in an annexation reserve area have the option to send their children to city schools or schools in the SSD?**

ANSWER: Students in the annexation reserve areas would attend the SSD, unless transferred upon approval of the school districts in accordance with Tenn. Code Ann. § 49-6-3104.

ANALYSIS: If a SSD is established in Shelby County that includes the annexation reserve areas, students residing in such areas will attend the SSD. Transfer of students between school systems is permissible, however, in accordance with state law. Subsection (a) of Tenn. Code Ann. § 49-6-3104 reads as follows:

Local boards of education may admit pupils from outside their respective local school systems without the approval of the LEA that the pupil previously attended up to two (2) weeks before the beginning of the school year in the LEA the pupil wishes to attend. Within the (2) weeks of the beginning of the school year and during the school year, the approval of both the sending and the receiving LEAs is required. Local boards of education may also arrange for the transfer of pupils residing within their systems to schools located outside their districts, and enter into agreements with other local boards of education for the admission or transfer of pupils from one school system to another.

It appears to be the current practice of the MCS District to permit inter-district transfers at designated optional schools if the transferring student pays tuition. The website for the MCS District provides that (1) all applications must be processed through the MCS Division of Optional Schools, although optional transfer applications from city residents are processed



before non-city residents, and (2) optional schools are tuition-free for city residents, but non-city residents are required to pay tuition.<sup>7</sup>

**15. If the MCS Board surrenders its charter, what will happen concerning state law maintenance of effort requirements?**

ANSWER: By statute, the SCS Board would be required to “maintain” its effort and support for school funding. However, neither the SCS Board nor Shelby County Government would be required to replace funding currently provided by the City of Memphis to MCS Board.

ANALYSIS: The “maintenance of effort” or “maintenance of support” obligation is imposed by state law on the school districts, or Local Education Agencies (LEA’s). Tenn. Code Ann. §§ 49-3-314(c), 49-2-203(a)(10), 49-3-356, and 49-3-306(b)(4). State law requires that the school districts maintain their effort and support for school funding from one year to the next, excluding funds for capital outlay and debt.

The County Commission has statutory funding obligations for public schools in Shelby County, including the City of Memphis. The Memphis City Council has a current funding obligation to the MCS Board. If the MCS Board surrenders its Charter, the SCS Board is not obligated to increase its education funding to make up the amount that the City of Memphis supplies to the MCS Board, because the MCS District LEA will no longer exist. Op. Tenn. Atty. Gen. No. 05-021 (Mar. 12, 2005); Op. Shelby Co. Atty. No. 03-057 (Apr. 17, 2003). If the MCS District LEA ceases to exist, the maintenance of effort requirement will likewise cease to exist.

State law also provides that maintenance of effort “shall not apply to a newly created LEA in any county where the county and city schools are being combined for a period of three (3) years after the creation of such LEA.” Tenn. Code Ann. §§ 49-3-314(c)(1) and 49-2-203(a)(10)(C). Therefore, city schools that were formerly part of a SSD or a municipal school district become part of the county schools, it could be argued that a new LEA has been created and the provisions prohibiting the supplanting of state funds (maintenance of effort) would not apply.

In 2005, the Tennessee Attorney General analyzed the possible elimination of City of Memphis funding for the MCS Board and the potential closing of the MCS District and stated the following:

Shelby County government would not be required to provide the [Memphis] School System with enough funding to close the gap created by the City’s actions. *See* Op. Tenn. Atty. Gen. No. 91-101 (Dec. 20, 1991). Shelby County’s obligation is to provide public schools for the students in its areas and to distribute

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<sup>7</sup> Source: <http://www.mcsk12.net/flash2/insider/vol-109/optionalschoolsback.asp>.

<sup>8</sup> “‘LEA’ refers to any local education agency, defined as, any county, city, or special school district, unified school district, school district of any metropolitan form of government or any other school system established by law.” Op. Tenn. Atty. Gen. No. 95-015 (March 13, 1995), citing Tenn. Code Ann. § 49-3-302(11).

the school tax to the school systems in the county based upon average daily membership (ADM). See Tenn. Code Ann. § 49-2-101. Depending upon the circumstances, Shelby County could end up funding education for former city school students because the students would be attending county schools, but it would not fund the [Memphis] School System itself.

Whether Shelby County would have to increase its funding to account for the influx of new students, we cannot say. Although it seems likely that it would, too many factors have to be considered, for which we do not have the facts.

Op. Tenn. Atty. Gen. No. 05-021 (Mar. 10, 2005), citing *Hardaway v. Bd. of Educ. of the Hamilton County Sch.*, 2004 WL 533941 at \*2 (Tenn. App. 2004) (case involving the City of Chattanooga's abolishment of its school system, which was integrated into the Hamilton County school system).

In Hamilton County, the City of Chattanooga voluntarily continued to contribute, to the newly consolidated school system, the amount of its former funding of Chattanooga city schools.<sup>9</sup> When Chattanooga stopped contributing that amount, the Tennessee Attorney General concluded that it fell to the Hamilton County school district to maintain that level of funding. Op. Tenn. Atty. Gen. 02-068 (May 22, 2002).

There is no statutory requirement mandating that the City of Memphis continue a contribution once the MCS District is dissolved and merges into the county school district.<sup>10</sup> If the City of Memphis never begins making a contribution to Shelby County Government to fund the merged school district following dissolution of the MCS District, then no obligation to maintain that higher level of funding ever attaches to the County. Based on the reasoning in the 2002 Tennessee Attorney General opinion cited above, maintenance of effort would only be required in the event that the City of Memphis were to contribute funds to Shelby County Government for education purposes for a number of years, and then eliminate the funding. In such an instance, the County may be required to continue this funding under the maintenance of effort provisions.

**16. If additional funding is sought by a SSD, does the board for the SSD establish a tax rate in the geographic area of the SSD for such additional funds?**

ANSWER: Only the legislature may impose the tax for the SSD with taxing authority. The SSD with taxing authority may propose the level of the tax rate to the legislature which levies the tax by passage of a Private Act.

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<sup>9</sup> Like Chattanooga, Memphis could voluntarily choose to continue to provide that extra funding amount to the merged county LEA. See Tenn. Code Ann. § 49-2-1002(b) and (d). *Distinguish* Op. Tenn. Atty. Gen. No. 03-037 (Apr. 2, 2003) (opining that subsection (a) of Tenn. Code Ann. § 49-2-1002 does not apply to transfer of the MCS District to the SCS District). It is the opinion of this office that subsections (b), (c), and (d) of § 49-2-1002 do apply to the MCS District.

<sup>10</sup> This opinion does not address issues related to the provisions in the Memphis City Charter that provide for a property tax for education.

**ANALYSIS:** The Tennessee General Assembly has given both counties and municipalities the authority to levy and collect school taxes. Op. Tenn. Atty. Gen. No. 95-055 (May 23, 1995).

The power to tax belongs to the Tennessee Legislature and cannot be delegated unless the Tennessee Constitution expressly allows such delegation. *B.O. Keese v. Civil Dist. Bd. of Educ.*, 46 Tenn 128 (1868). Article 2, § 29 of the Constitution allows the Legislature to delegate its taxing powers to counties and towns. The Tennessee Supreme Court has held that this delegation of taxing power does not extend to special school districts. Op. Tenn. Atty. Gen. No. 01-034 (Mar. 12, 2001), citing *Gibson Co. Special School District v. Palmer*, 691 S.W.2d 544, 549 (Tenn. 1985) and *Williamson v. McClain*, 249 S.W. 811 (Tenn. 1923).

Although SSDs that do not rely on appropriations from the county legislative body are referred to as having “taxing authority,” the state legislature actually levies the school tax on behalf of such SSDs. SSDs with taxing authority propose or recommend a tax rate to the state legislature for school operational and maintenance purposes. Approval of the SSD tax rate is governed by the private act creating the SSD. Tenn. Code Ann. § 49-2-107(a)(1). *See also Gibson County Special School District v. Bradford Special School District*, 691 S.W.2d 544, 547 (Tenn. 1985) (stating that “the legislature determines and levies the taxes in a special school district”).

If additional funding is sought, the SSD board would be responsible for recommending to the state legislature any necessary changes to the tax rate, and the state legislature would levy such tax on the residents of the SSD. The Shelby County Commission would not be involved in setting or changing the SSD’s tax rate.

**17. If a SSD is established, is Shelby County Government required to continue funding the education operating budget and to apportion such funds in accordance with the ADA?**

**ANSWER:** Shelby County Government is required to continue funding schools, but may not be required to apportion such funds to the SSD in accordance with the ADA, if the SSD has taxing authority.

**ANALYSIS:** If a SSD is established, Shelby County Government is still required to levy a school tax and to appropriate funds for the education operating budget to pay the local share required by the BEP<sup>11</sup> for schools. The County retains this funding obligation, regardless of whether the MCS District remains in operation, or the MCS Board votes to surrender its Charter either pursuant to Chapter 375 of the 1961 Private Acts only or Tenn. Code Ann. § 49-2-502, which requires the voters in the City of Memphis to approve the transfer of the MCS system to the SCS system.

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<sup>11</sup> Basic Education Program. *See* Tenn. Code Ann. § 49-3-302(3) for definition of BEP.

State law requires that school funds be apportioned. Section § 49-3-315 of the Tennessee Code requires that school fund revenues received “from the state, county and other political subdivisions, if any” for current school operations be apportioned by the County Trustee to all school systems in the county on what is commonly known as an “ADA”<sup>12</sup> basis. A recent opinion issued by the Tennessee Attorney General, however, indicates that SSDs with taxing authority are not entitled to a proportionate share of proceeds from a countywide school tax levy.

In a county in which there is both a county school system and a separate SSD which is funded by property taxes levied by the General Assembly, the county commission has no responsibility to provide funding to the SSD. Op. Tenn. Atty. Gen., No. 10-58 (Apr. 28, 2010).<sup>13</sup>

According to that opinion, if a SSD is established in Shelby County with taxing authority, Shelby County Government may not be required to apportion school funds to the SSD. The Tennessee Attorney General’s opinion, however, is based on the Tennessee Court of Appeals holding that the Gibson County Commission was not required to fund a SSD with its own taxing authority. *City of Humboldt v. McKnight*, 2005 WL 2051284 (Tenn. Ct. App. Aug. 25, 2005). In Humboldt County, there are municipal and special school districts, each with their own taxing authority, but no general county school district. Therefore, the Humboldt situation is not directly analogous to Shelby County. Because of the complex nature of this particular issue, this office will continue researching this question and will provide a supplemental response.

**18. If the SCS District is granted SSD status with taxing authority, may the County Commission continue to levy an education tax (i.e., the portion of the property tax dedicated to education funding) on all property owners in Shelby County for purposes of funding the operations of the MCS District?**

**ANSWER:** Yes. Shelby County would still be obligated to levy a school tax countywide.

**ANALYSIS:** Tenn. Code Ann. § 49-3-315(a) imposes an obligation on counties to levy not more than one school tax for current operation and maintenance of schools within the county. Article II, § 28 of the Tennessee Constitution requires that each respective taxing authority shall apply the same tax rate to all property within its jurisdiction. There does not appear to be any express statutory authority that enables counties to levy a tax that is limited to a certain geographic area or municipality within the county and that is not levied uniformly within the entire jurisdiction of the county for school operating expenses.

It is presumed that a tax, as opposed to a special assessment, will be assessed and collected on a countywide basis. See *Williamson County v. Franklin Special Sch. Dist.*, 1994

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<sup>12</sup> Average Daily Attendance. The language used in the statute is actually WFTEADA, or Weighted Full Time Equivalent Average Daily Attendance. See Tenn. Code Ann. § 49-3-302(18) for definition of WFTEADA.

<sup>13</sup> Note that opinions of the state attorney general are merely advisory and do not constitute legal authority binding on a court. See *Washington County Bd. of Educ. v. Market America, Inc.*, 693 S.W.2d 244, 288 (Tenn. 1985).

WL 700850, 5 (Tenn. App. 1994) (taxation is simply a mode of raising revenue for public purposes and, unlike a special assessment, taxation is not tied to the benefit the property or owner will receive from the tax). The exceptions to this are taxes levied for the repayment of debt issued to finance the construction of a public school,<sup>14</sup> and where taxes are levied in connection with the issuance of payment of school bonds, a county may tax only the taxable property lying outside a municipal or special school district. Tenn. Code Ann. § 49-3-1005(b)(1) and (b)(2). The Tennessee Attorney General has opined that “if the county’s property tax levy for school purposes is not connected to a bond issue, the ‘taxing authority’ of the county is coextensive with the territorial limits of the county, including any independent municipal or special school districts lying within the county.” Op. Tenn. Atty. Gen. No. 95-055 (May 23, 1995).

**19. If the answer to Question 18 is “yes”, must those funds be allocated to both the MCS District and SCS District according to the ADA?**

ANSWER: See Question 17.

ANALYSIS: As indicated in the analysis to Question 17, this office will continue researching the issue of apportioning county school funds with a SSD and provide a supplemental response.

**20. Can SSD legislation require, or give discretionary authority to, Shelby County Government to levy a school property tax only on City of Memphis taxpayers for the funds the County needs to fund the schools in the City of Memphis?**

ANSWER: No.

ANALYSIS: See Question 18 for related analysis.

**21. If the City of Memphis annexes a reserve area after a SSD is created, would residents currently living in such area be obligated to pay taxes levied by Shelby County, Memphis, and/or the SSD?**

ANSWER: It is possible.

ANALYSIS: Upon the establishment of a SSD in Shelby County, residents in the annexation reserve areas of the City of Memphis would be liable for the payment of school taxes levied by Shelby County on a countywide basis and taxes levied within the SSD. See Tenn. Code Ann. §§ 49-2-107 and 49-3-315. After annexation of such reserve areas, and in the event the MCS District exists, residents in such areas would be liable for the payment of taxes levied by the City of Memphis. If the SSD legislation and/or other necessary state law transfers such

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<sup>14</sup> The Tennessee General Assembly has granted counties authority to levy such taxes only upon taxable property within that portion of the county lying outside the territorial limits of any SSD or incorporated city or town in the county. See Tenn. Code Ann. § 9-21-107(5).

areas from the boundaries of the SSD to the boundaries of the MCS District, *these residents* would pay the countywide tax and the Memphis tax, but not the SSD tax.

**22. If a SSD is established in Shelby County with taxing authority, what happens to the remaining debt service related to the construction of schools in the SCS District and in the annexation reserve areas of the City of Memphis, if any?**

ANSWER: Shelby County Government has issued general obligation debt, so repayment of that debt would remain the responsibility of the County in the absence of any legislative authority to transfer this responsibility to the SSD.

ANALYSIS: Shelby County Government has issued general obligation debt for City and County schools pursuant to §§ 9-21-101, *et seq.* and 49-3-1001, *et seq.* and apportioned the proceeds from the bonds as required by §§ 9-21-129 and 49-3-1005, of the Tennessee Code. Since the bonds<sup>15</sup> issued by the County for schools are general obligations issued for all schools in the County, including the MCS District, the County is required to levy a tax for repayment of the bonds on all taxable property within the County as required by Tenn. Code Ann. §9-21-215.

There is no explicit statutory authority that relieves Shelby County from its obligation to repay these bonds upon creation of a SSD, and Tenn. Code Ann. § 9-21-121 specifically affirms the prohibition against a local government impairing the rights of its creditors, which includes bondholders. This is in addition to the provisions of Article I, § 20 of the Tennessee Constitution prohibiting the enactment of retrospective laws or laws impairing the obligations of contract, and the provisions of the U.S. Constitution prohibiting state and local governments from impairing contracts, including bondholder rights. See *United States Trust Co. of New York v. New Jersey, et. al.*, 431 U.S. 1 (1977). If the private act creating the SSD provides for the assumption by the SSD of the County's school debt allocable to the SSD, the private act must also provide a comparable security or source for repaying the debt in order to avoid impairment of contract.

State law refers to a method for handling outstanding debt when a school system is abolished and merged with another system. The following statute is applicable to the outstanding debt of the City of Memphis issued for the MCS District, but not the County school bonds:<sup>16</sup>

Where there is any school indebtedness owned by the town, city, or special school district at the time the transfer of administration is effectuated, the indebtedness

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<sup>15</sup> Note that the County's Special General Obligation School Bonds, 2003 Series A were issued for schools located outside of the City of Memphis and, pursuant to § 49-3-1005(b) of the Tennessee Code, such bonds are payable solely from taxes levied on taxable property located outside the boundaries of the MCS District, which constitutes the area of the County outside of the boundaries of the City of Memphis.

<sup>16</sup> The Tennessee Attorney General has stated, and this office concurs, that the provisions of Tenn. Code Ann. § 49-2-1002(a)(1) do not authorize the MCS Board to surrender its Charter pursuant to this statute, because the MCS District is not a school system "maintained" by a municipality. See Op. Tenn. Atty. Gen. No. 03-037 (Apr. 2, 2003). While the Attorney General in this opinion stated that § 49-2-1002 does not apply to the MCS District, it is the opinion of this office that several subsections of this statute do apply, as they specifically reference SSDs transferring authority to the county pursuant to Tenn. Code Ann. § 49-2-502, which is the authority upon which the current MCS Board Charter surrender has been initiated. These subsections, Tenn. Code Ann. § 49-2-1002 (b), (c), and (d), respectively, deal with the ability of the abolished district to devote funds for operation and maintenance of the county school system, the requirement that the county school board perform the same duties with respect to the transferred SSD as they do with respect to county schools, and the transfer and use of funds and indebtedness.

shall remain the obligation of the town, city or special school district, and existing arrangements for the retirement of the indebtedness shall be continued until the indebtedness is retired and paid in full, unless the county legislative body, by resolution adopted by a majority of the members, agrees to assume the school indebtedness owed by the town, city, or special school district. T.C.A. § 49-2-1002 (d).

Accordingly, indebtedness issued by the City of Memphis for the MCS District remains the obligation of the City after any such school merger, unless the County Commission adopts a resolution assuming such debt.

**23. In the event the SCS District is granted SSD status, what happens to the funds collected from the local option sales tax and the wheel tax generated within the boundaries of the SSD?**

ANSWER: Half of the proceeds from the local option sales tax collected in Shelby County would continue to be used for education purposes pursuant to Tenn. Code Ann. § 67-6-712. State law requires that these funds be apportioned among the school districts within a county, including any special school districts. In regard to the wheel tax, the County Commission has discretion as to the use of such funds. While there are no state law requirements that mandate that wheel tax funds be used for school purposes, if such funds are used for education purposes, they must be apportioned.

ANALYSIS: Tenn. Code Ann. §67-6-712(a)(1) requires that half of the proceeds from the local option sales tax collected in Shelby County be used for school purposes and distributed among the school systems based on the number of students served in each system. The other half of such funds is distributed to the cities, towns, and unincorporated areas of the county based on where the taxes are collected. Tenn. Code Ann. §67-6-712 (a)(2). Currently, Shelby County Government uses its non-education portion of the local option sales tax to fund general government operations.

The education portion of the local option sales tax collected in Shelby County is apportioned between the MCS and SCS Districts in accordance with Tenn. Code Ann. § 67-6-712(a)(1):

*One-half (½) of the proceeds shall be expended and distributed in the same manner as the county property tax for school purposes is expended and distributed. (Emphasis added.)*

Distribution of county property taxes for school purposes is guided by § 49-3-315 of the Tennessee Code, which requires “that the County Trustee apportion these funds to all school systems in the county on an ADA basis.”<sup>17</sup> See also Op. Tenn. Atty. Gen. No. 93-17 (Feb. 26, 1993).

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<sup>17</sup> Average Daily Attendance. The language used in the statute is actually WFTEADA, or Weighted Full Time Equivalent Average Daily Attendance. See Tenn. Code Ann. § 49-3-302 for definition of WFTEADA.

If the SCS District is granted SSD status, apportionment of local option sales tax funds would be required. The subsequent provisions of § 67-6-712 clearly contemplate that SSDs are entitled to a share of the funds, as the statute includes SSDs within the description of the entities that may pledge their portion of local option sales tax proceeds for the payment of debt: “[a]ny county, city, town, incorporated area or *special school district* entitled to receive the proceeds described [in this section]...” Tenn. Code Ann. § 67-6-712 (a)(3)<sup>18</sup>

Shelby County Government has levied a countywide motor vehicle tax, or “wheel tax,” pursuant to the authority granted by Tenn. Code Ann. § 5-8-102. There is no state law requirement that mandates that the wheel tax funds be used for school purposes. Once such funds are used for school purposes, however, they must be apportioned to all LEA’s in the county, which include SSDs, as they would constitute school fund revenues under T.C.A. § 49-3-315. Currently, Shelby County Government has allocated a portion of the wheel tax funds for school purposes, apportioning the allocation for school operations between the SCS and MCS Districts. If a SSD is created in Shelby County, any portion of the wheel tax that is used to fund education must be apportioned with the SSD.

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<sup>18</sup> Consistent with this reading of the statute, the Tennessee Attorney General noted that in Gibson County, the Trenton SSD receives its proportionate share of funds from this “education portion” of the local option sales tax. Op. Tenn. Atty. Gen. No. 01-076 (May 8, 2001).