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January 7, 2011

The Honorable Sidney Chism, Chairman  
Shelby County Commission  
160 N. Main St., Suite 450  
Memphis, Tennessee 38103

**Re: Responses to Questions Relating to the Creation of a New Shelby County School Board**

Dear Chairman Chism:

At the request of Kelly Rayne, Shelby County Attorney, this law firm has opined on the following questions:

1. Is the Shelby County Commission empowered to redistrict the county in order to create a new school board upon a voter referendum approving the surrender of the Charter of the Memphis City School District as provided by Tenn. Code Ann. § 49-2-502?
2. Assuming that the County Commission redistricts the county in order to create new Shelby County School Board districts can a special election be called to fill the new positions?

In reaching the preliminary opinions contained herein we have assumed that the surrender of the Charter of the Memphis City Schools would be approved by a majority of registered voters within the City of Memphis at the special election to be called on this question. We have reviewed the relevant statutes enacted by the Tennessee General Assembly, case law from Tennessee and Federal Courts and Attorney General Opinions from the Tennessee Attorney General that we think are applicable, but we have by no means performed the great amount of legal research that needs to be done to answers these questions with any certainty. Further research in necessary to reach definite conclusions.

Additionally, in answering these questions we have focused on legal considerations only and intend no opinion about the political ramifications or implications that may arise from our conclusions.

**1. *Is the Shelby County Commission empowered to redistrict the county in order to create a new school board upon a voter referendum approving the surrender of the Charter of the Memphis City School District as provided by Tenn. Code Ann. § 49-2-502?***

Tennessee Code Annotated § 49-2-201 requires that a county board of education be elected "by the people" from "districts of substantially equal population established by resolution of the local legislative body." Upon surrender of the Charter of the Memphis City Schools, the entirety of Shelby County will be included in the Shelby County School District. The current Shelby County School Board will no longer have been elected from districts that represent an equal apportionment of the District's population. Reapportionment and redistricting will thus be required.

The reapportionment of school districts is discussed generally under Tenn. Code Ann. § 49-2-111, but this statute contemplates that the "scheme of apportionment of the membership of such school commission school board, board of education or other agency" has "been declared to be in violation of any provision of the United States Constitution or the Constitution of Tennessee." We do not believe that the Shelby County School District is under such judicial declaration.<sup>1</sup> Therefore, it would appear that Tenn. Code Ann. § 5-1-111 would provide the applicable authority on redistricting. Under that provision, the Shelby County Commission is obligated to change the boundaries of districts or redistrict a county entirely if necessary to apportion the county legislative body so that the members represent substantially equal populations. We understand that this process is currently underway.

Furthermore, the Shelby County School Board would be governed by the decisions of the United States Supreme Court requiring that all election districts be configured so as not to violate the "one person, one vote" requirement of the United States Constitution. *See Avery v. Midland County*, 390 U.S. 474 (1968); *Baker v. Carr*, 369 U.S. 186, (1962); *Rader v. Cliburn*, 476 F.2d 182 (6<sup>th</sup> Cir. 1973) (holding that the "one man, one vote" principle which requires reapportionment is applicable to local school boards). The Tennessee Attorney General has opined similarly. *See* Tennessee Attorney General Opinion Nos. 80-127; 82-34; 91-98; and 06-168. In Attorney General Opinion No. 06-168, the Attorney General specifically opined that when one voting district has experienced growth resulting in that area having an inordinate population, as compared with the other voting districts within the school district, reapportionment is required under the United States Constitution.

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<sup>1</sup> The Memphis City School Board is, however, subject to the jurisdiction of such a court order. *Muhammad v. City of Memphis*, No. 88-2899, No. 90-2093, No. 91-2139 (W.D. Tenn. 1991). Since the territory of the former Memphis City School District will be subsumed within the Shelby County School District it is unclear whether these court orders will have continuing application to the Shelby County School District, thus making the redistricting requirements of Tenn. Code Ann. § 49-2-111 applicable to the Shelby County School District.

Thus even without express statutory authority from the Tennessee General Assembly allowing reapportionment and redistricting, we believe that such reapportionment would be constitutionally required such that the districts of the school board represents substantially equal populations.

**2. Assuming that the County Commission redistricts the county in order to create new Shelby County School Board districts can a special election be called to fill the new positions?**

The Tennessee Supreme Court has held that the right to hold a special election does not exist absent an express grant of power by the Legislature. *McPherson v. Everett*, 594 S.W.2d 677, 680 (Tenn. 1980). Tennessee Code Annotated § 2-14-101 provides for such special elections "(w)hen a vacancy in any office is required to be filled by election at other times than those fixed for general elections." We have thus far found no authority in the Tennessee statutes, in the Shelby County Charter or in any Private Act requiring that any vacancy on the Shelby County School Board must be filled by special election.<sup>2</sup>

Instead, it appears that the Shelby County Commission is authorized to fill vacancies in all county offices by appointment, and that any person so appointed shall serve until a successor can be elected at the next general election. See Tennessee Constitution Article VII, Section 2 ("Vacancies in county offices shall be filled by the County legislative body, and any person so appointed shall serve until a successor is elected at the next election occurring after the vacancy and is qualified"); see also Tenn. Code Ann. § 49-2-201(a)(1); *Southern v. Beeler*, 183 Tenn. 272, 195 S.W.2d 857 (1946)(recognizing that a member of a county school board is a county officer). Importantly, the Tennessee Supreme Court has also recognized that "vacancies" can arise upon the creation of new offices and that such vacancies can be filled by appointment. See *Marion County Bd. of Com'rs v. Marion County Election Commission*, 594 S.W.2d 681, 683 (Tenn. 1980).<sup>3</sup>

Alternatively, we believe that it may be possible to petition a court for a declaratory judgment that a special election is necessary to prevent potential violations of the Equal Protection Clause of the United States Constitution or the Voting Rights Act. See, e.g. *Connor v. Finch* 431 U.S. 407, 426 (U.S. 1977)(recognizing the power of a district court to order such special elections as the circumstances may require or permit when Mississippi's election scheme failed to meet the most elemental requirement of the Equal Protection Clause that legislative districts be "as nearly of equal population as is practicable."). At this time we can offer no

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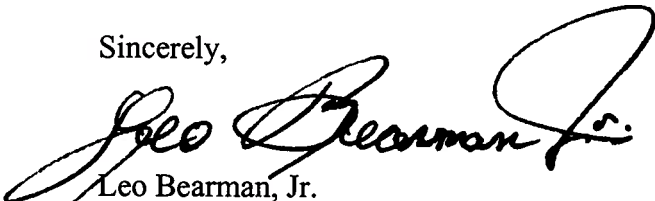
<sup>2</sup> Given the time constraints in providing this opinion, we have not been able to perform an exhaustive search of all such sources.

<sup>3</sup> T.C.A. §49-2-202 states that "When a vacancy occurs, the unexpired term shall be filled in the next regular meeting of the county legislative body or at a special meeting of the county legislative body. Vacancies shall be declared to exist on account of death, resignation or removal from the county." The listed definitions of "vacancies" would appear to be suggestive, but not exclusive. If not, if a member of the Shelby County School Board became totally incapacitated, but did not die, no vacancy would exist.


opinion as to the success of any such declaratory judgment action. Nor can we offer any opinion as to whether any future circumstances related to the creation of new school board districts or the filling of any vacancies arising from their creation might create a constitutional need for any special election. We offer this opinion only to let you know that courts have the inherent and equitable power to order special elections when the United States Constitution of the Voting Rights Act requires it.

We hope you understand that the questions asked present complex legal issues that will require much additional legal research and consideration. Today, we have merely attempted to provide you opinions that might provide you preliminary guidance on some of the issues that the County Commission will have to consider. We look forward to expanding these opinions and providing you with more tangible conclusions.

Sincerely,



Leo Bearman, Jr.



Lori H. Patterson

LHP:phr