STATE OF MISSISSIPPI

JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

June 21, 2019

John H. Henley, Esquire
Attorney, Copiah-Lincoln Community College District
Post Office Box 389
Jackson, Mississippi 39205-0389

Re: Interpretation of House Bill Number 1247

Dear Mr. Henley:

OFFICIAL OPINION

Attorney General Jim Hood is in receipt of your opinion request and has assigned it to me for research and reply. In your letter, you ask several questions regarding House Bill 1247 of the Regular Session of 2019 ("H.B. 1247") and how if affects the composition of the Copiah-Lincoln Community College Board of Trustees. In response, please see the attached opinion to the Honorable John Lamar dated June 11, 2019, in which our office opined that we are unable to provide an opinion as to the definitive meaning of H.B. 1247. "As a general matter, H.B. 1247 is confusing, internally inconsistent and defies consistent application as a whole. In our opinion, the self-contradictory and confused language of H.B. 1247 is ineffective to cause any change in current law. Consequently, in the absence of any clear guidance from the Legislature (which is not provided in H.B. 1247), it is the opinion of this office that the amendatory provisions of H.B. 1247 are ineffective to change either the current version of Section 37-29-65 of the Mississippi Code Annotated or Section 37-29-457 of the Mississippi Code Annotated. Accordingly, it is our opinion that the provisions of these sections as now written and codified remain in effect." Therefore, the Copiah-Lincoln Community College Board of Trustees should retain its present board and follow the existing provisions of these sections.

If this office may be of any further assistance to you, please let us know.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By: Avery Mounger Lee

Avery Mounger Lee
Special Assistant Attorney General

Attachment

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STATE OF MISSISSIPPI

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ATTORNEY GENERAL

OPINIONS
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June 11, 2019

John T. Lamar, Jr., Esq.
Attorney, Board of Trustees of
Northwest Mississippi Community College
214 South Ward Street
Senatobia, Mississippi 38668

Re: House Bill No. 1247 and the Northwest Mississippi Community College Board

Dear Mr. Lamar:

OFFICIAL OPINION

Attorney General Jim Hood is in receipt of your opinion request and has assigned it to me for research and response. In your letter, you inquire as to the interpretation of House Bill 1247 of the Regular Session 2019 ("H.B. 1247" or the "Bill"), which amends Section 37-29-65 of the Mississippi Code Annotated effective July 1, 2019. Your request letter asks four questions as follows:

> 1. The language of House Bill 1247 does not appear to allow the Board to authorize, in its discretion, a number of board members between two (2) and six (6) from each county (i.e., three, four or five members) nor does it appear to allow the Board to authorize, in its discretion, a different number of members from each county (i.e., five from Desoto County, four from Lafayette County and three from Panola County, etc.). Do you agree?
>
> 2. If the NWCC Board of Trustees, as it exists prior to July 1, 2019, adopts a resolution setting the number and makeup of the Board on July 1, 2019, would it control and provide authority for the number and makeup of the Board after House Bill 1247 becomes law on July 1, 2019?
>
> 3. Please explain how Section 1, subsection (9) of House Bill 1247 juxtaposes with subsections (1) and (2) of Section 1?
>
> 4. Do you see any other scenarios or options for the NWCC Board of Trustees that I have not mentioned?

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This office is unable to provide an opinion as to the definitive meaning of H.B. 1247. As a general matter, H.B. 1247 is confusing, internally inconsistent and defies consistent application as a whole. In our opinion, the self-contradictory and confused language of H.B. 1247, as more fully described below, is ineffective to cause any change in current law.

To the extent the Bill can be understood, it appears to require inconsistent and potentially untoward results. From the title of H.B. 1247 and anecdotal evidence from people aware of the timing and manner in which H.B. 1247 was drafted, it appears the Bill may have been an attempt to modify the provisions of prior law that made the county superintendent of education an automatic appointee member of the board of trustees. Also, it appears that the Bill may have attempted to remove currently serving superintendents. Although suggesting these results, H.B. 1247 provides no meaningful guidance as to how or when these ends might be achieved. For example, the Bill gives no guidance as to when a serving superintendent's term should end or when the subject boards' of trustees numbers should be reduced to the new statutory numbers. Additionally, the underlying code section (Section 37-29-65) allowed boards in the past to either increase or decrease board membership to six (6) members or two (2) members respectively. H.B. 1247 apparently makes no provisions for what its effect would be on such previously reconstituted boards.[1] Assuming boards of trustees have expanded their size to the authorized six (6) (or some other number of) members from each represented county, H.B. 1247 does not address what would happen to such boards or how representation on the boards should be reduced from six (6) members to one (1) member for the non-founding counties.

H.B. 1247 has an effective date of July 1, 2019, and states:[2]

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[1]We have not been able to determine if such changes have, in fact, been made to boards. While information is generally available about the number of trustees on a given board, we have been unable to determine if such numbers reflect a change under these provisions. As discussed herein, we are aware that the Northwest Community College board was statutorily changed from an initial membership of six (6) trustees for two (2) founding counties and two (2) trustees for the remaining nine (9) counties. As discussed in this regard, we are unsure what effect was intended for Northwest Community College. These same issues would be present if boards had been reconstituted under the prior version of the statute.

[2]For reference and comparison, the text of paragraph 1 of Section 1 of H.B. 1247 is below:

Section 37-29-65, Mississippi Code of 1972, is amended as follows:

37-29-65. (1) Except as provided in this section and in Sections 37-29-409, 37-29-457 and 37-29-505, there shall be * * * five (5) trustees from each county of the junior college district which originally entered into and gave financial aid in establishing the junior college. On June 30, 1992, the offices of the six (6) trustees from each of the original counties in the Northwest Community College District shall stand vacated. The board of supervisors of those respective counties shall appoint two (2) members on July 1, 1992, to serve full terms of office as provided in this section. * * * The board of supervisors of those respective counties shall appoint * * * one (1) member who is a qualified elector from each supervisors district to serve as a member, either of which may be the county superintendent of education if he or she resides in a respective supervisors district.

> [e]xcept as provided in this section . . . there shall be * * * five (5) trustees from each county . . . which originally entered into and gave financial aid in establishing the junior college.

As noted by the text, this provision was amended in the 2019 legislative session. Section 1 of H.B. 1247 continues in the same paragraph that:

> [T]he board of supervisors of those respective counties shall appoint * * * one (1) member who is a qualified elector from each supervisors district to serve as a member, either of which may be the county superintendent of education if he or she resides in a respective supervisors district.

(Emphasis original). This language appears to suggest how the members of the newly-legislated five (5) trustees[3] would be selected. Use of this language suggests that the statute envisions a reset of all community college boards as of the effective date (July 1, 2019) of the Bill. H.B. 1247 does not provide that trustees serving as of July 1, 2019 shall continue to serve in accordance with their prior appointments and for existing terms.[4] Instead, it states[5] that the "board[s] of supervisors . . . shall appoint . . . one (1) member . . . from each supervisor district." To give effect to these appointment provisions, each board covered by the Bill would have to be vacated and subsequent appointments made. Given the effective date of July 1 in the Bill, the boards would be re-constituted as of that date.[6]

The next provision of H.B. 1247 deals with counties that joined a community college district

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> Counties which subsequent to the establishment of the junior college joined the district shall have only * * * one (1) trustee. However, the board of trustees so constituted, by appropriate resolution, may enlarge its number to six (6) trustees from each county * * *. The board of trustees shall also be authorized within its discretion to reduce its number to two (2) trustees at large from each county * * *. In any case in which there is an equal number of trustees the board of trustees may appoint another person to membership.

[3]The next two sentences of the Bill (which will be discussed below) apparently have nothing to do with community college boards in general but apparently were part of a 1990 amendment that applied only to one college for the purpose to "Provide for the Reorganization of the Board of Trustees of Northwest Community College." *See* Laws 1990, Chapter 471, Senate Bill 2520 (Reg. Session 1990).

[4]The Bill is apparently inconsistent on this issue. Section 1 which amended Section 37-29-65 suggests board member terms should end on July 1, 2019. Section 2 of the Bill treats board member terms differently and suggests that some counties' members should serve until expiration of their terms while suggesting that members from Adams County could be subject to termination immediately upon effectiveness.

[5]Notably, much of the appointing language was amended in H.B. 1247.

[6]H.B. 1247 can be compared to Chapter 50, House Bill 30 Laws 1990 wherein the Legislature actually reconstituted the East Mississippi Comunity College District through specific language and directions with regard to both how and when the new board was to be reconstituted.

after its original formation. These provisions state that "[c]ounties which subsequent to the establishment of the junior college joined the district shall have only * * * one (1) trustee." This provision of the Bill provides no guidance on how or when the second trustee from such counties is removed from office. Likewise, the statute is silent on whether the remaining trustee simply continues in office or as the prior language tends to suggest, a new appointment must be made by July 1, 2019. Notably, the Bill retains immediately following language which states that "the board of trustees so constituted . . . may enlarge its number to six (6) from each county . . . [or] to reduce its number to two (2) trustees at large from each county . . ." Read in conjunction with the preceding language, this seems to suggest a legislative reset of all boards on July 1, 2019 with the "post July 1, 2019 boards" then having the authority to change any future makeup of the various boards. In the event boards have previously expanded their numbers to six (6) members from subsequently-joining counties, the Bill does not address which members, in addition to county superintendents, would have their positions terminated in order to reach the new number of one (1) member per county.

Paragraph (2) of Section (1) of H.B 1247 adds no clarity to the legislative intent or practical application of the statute. This section appears to apply to situations wherein a county superintendent has been appointed to serve by the board (as opposed to any automatic membership on the board) but then declines to serve or subsequently resigns. In the case of a declination or resignation, paragraph (2) then dictates that the replacement must be appointed as an at-large appointment. Thus, in the case where a supervisor/board appoints a member from a particular supervisor district who happens to be a school superintendent and the superintendent later resigns as a trustee, the position would change from being a district position appointment to an at-large appointment. This result, although illogical and inconsistent with the notion of one member per supervisor district, is what the statute mandates. This provision, which (by virtue of the amendments) is new to the statute, seems to apply only to the counties with five (5) trustees. This is true because in counties with one (1) trustee, all future appointments would by definition be at-large. Although there is little logic to this approach, it does appear to be what the statute mandates as a result.

Paragraph (9) is the next major change to Section 37-29-65. The first sentence of this paragraph clarifies that no superintendent shall be automatically placed on the board. The second sentence states "[t]he number of trustees from each county **shall be reduced by one (1) member** if **such member** is superintendent of education." This sentence apparently intends to state that all boards will be reduced by one member as part of the removal of superintendents from boards of trustees. However, the language, if followed, removes one member "if such member" is a superintendent. Thus, this language causes confusion and ambiguities if a superintendent is appointed (or has been appointed) as the appointment from a supervisor's district. The last sentence adds further confusion by seeming to suggest that the supervisors can only appoint a superintendent if it is after the expiration of an at-large trustee. This language seems to have applicability only to at-large counties, but the preceding two sentences would appear to apply to all counties. The language in the last sentence is pertinent, because it appears to suggest that at-large members of counties will serve to the "expiration of [his/her] term." In this sense,

paragraph (9) appears to conflict with paragraph (1) since paragraph (9) suggests a natural expiration of terms while paragraph (1) suggests a complete reset of boards of trustees is required as of July 1, 2019. Also, while paragraph (9) clearly seems to contemplate the removal of certain superintendents from boards, it provides no guidance on when or how such removals should occur.

As noted above, there are two sentences at the beginning of paragraph (1) which state:

> On June 30, 1992, the offices of the six (6) trustees from each of the original counties in the Northwest Community College District shall stand vacated. The board of supervisors of those respective counties shall appoint two (2) members on July 1, 1992, to serve full terms of office as provided in this section.

These two sentences appear to relate only to Northwest Community College. These sentences were inserted in a 1990 amendment to the statute which at the time prospectively reconstituted the Northwest Community College Board and changed the representation of the two founding counties from six (6) trustees to two (2). By virtue of this 1990 amendment, Northwest Community College ended up with eleven (11) counties all of which had two (2) (or equal) representation. Although paragraph (1) commences by stating except as provided herein all boards shall have "five (5) trustees," H.B. 1247 provides no real guidance on whether the new mandate of five (5) trustees applies to the founding counties or if the remaining nine (9) counties maintain their equal representation of two (2) trustees. In other words, the Bill simply does not clearly delineate how Northwest Community College should be treated.

Section 2 of H.B. 1247 amends Section 37-29-457 with regard to how trustees for the Copiah Lincoln Junior College District will be chosen. This statute clearly reduces the number of board members from the various counties. This section also notes that these trustees "shall be elected and serve according to Section 37-29-65." Section 37-29-457 presumably incorporates the provision of Section 37-29-65 regarding removal of superintendents. However, the amended Section 37-29-457 (unlike the amended Section 37-29-65) is not silent about expiration of terms. In this vein, it states:

> Except as provided in * * * paragraph (g) of this subsection (1), persons who are currently serving as members of the board of trustees of the Copiah-Lincoln Junior College District shall complete their terms without interruption.

Thus, the amendments to Section 37-29-457 which call for natural expiration of terms (presumably even for superintendents) seem to at least, in part, be in conflict with Section 37-29-65 which appears to require a reset. However, this bit of clarity is not without injection of a further lack of clarity. The exception of paragraph (g) could suggest that the Adams County trustees do not have the benefit of serving until normal expiration of their terms. There appears to be no logical reason for Adams County trustees to be treated differently other than drafting issues caused

by the amendments to existing and somewhat already confusing language. Likewise, there seems to be no reason why some (less than adequately identified) boards under Section 37-29-65 would be reset as of July 1, 2019.

At its essence, H.B. 1247 is not understandable. The language could, depending on how applied, cause sweeping and, perhaps, harmful changes to the community college systems. Given the potential for harm and lack of clarity, this office cannot advise community college boards to attempt to apply what may be inapplicable language from the statute. At best, H.B. 1247 might be understood to provide that superintendents should no longer be on such boards automatically. However, H.B. 1247 provides no clear directions as to how or when this result should be achieved. Moreover, while H.B. 1247 would appear to allow superintendents to continue to serve in certain circumstances, the provisions relating to such service are so confused as to provide no complete or articulated guidance on the subject.

Courts have realized that at some point statutes can be so unclear as to prevent their application. The Ohio Supreme Court held a statute was "so confused, vague, [and] unworkable . . . that it amount[ed] to no effective legislation." *State ex rel. Miller v. Brown*, 167 Ohio St. 452, 454–56, 150 N.E.2d 46, 48 (1958). In that case, the court held that "[u]nder such circumstances it follows that [the] former [statutory] [s]ection . . . is in effect." *Id.* The Wyoming court stated that if "after exhausting every rule of construction . . . no sensible meaning can be given to a statute or if it is so incomplete that it cannot be carried into effect, it must be pronounced inoperative and void." *Yeik v. Dep't of Revenue & Taxation*, 595 P.2d 965, 968–69 (Wyo. 1979). *See also, State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 610–11, 399 P.3d 663, 685–86 (2017), as amended (Aug. 17, 2017)("An indefinite and incomplete statute may be held invalid . . . [where] the language used may not have sufficient legal significance to be capable of intelligent execution . . .")(citations omitted).

The basis for courts to decline to enforce incomplete and confusing statutes was further discussed by the Arizona Court as follows:

> The unintelligibility doctrine is perhaps the quintessential example of how a court, acting with restraint, observes its constitutional role under the separation of powers. *See Board of Trustees*, 132 S.W.3d at 781 (stating "the unintelligibility rule has its foundation in the constitutional requirement of separation of powers"); *see also* U.S. Const. art. I–III; Ariz. Const. art. 3. **When faced with an incomplete, unintelligible statute, a court may either attempt to re-write the statute, or declare it unenforceable. Id. The first option is a clear violation of the separation of powers. Courts lack the constitutional authority to legislate,** and this limitation is perhaps most acute when a court attempts to enforce a statute that, by virtue of its incompleteness, is really no law at all. See *Ballesteros v. Am. Standard Ins. Co. of Wis.*, 226 Ariz. 345, 349 para. 17, 248 P.3d 193,

> 197 (2011) (stating "[i]f the legislature desires to add [ ] a requirement [to A.R.S. Section 20–259.01], it may do so ... but it is not our place to rewrite the statute"). In contrast, when a court declares an incomplete, unfinished statute unenforceable on the grounds of unintelligibility, it refrains from stepping outside its judicial authority, and provides the legislature with an opportunity to address the infirmities in the statute.

State ex rel. Brnovich v. City of Tucson, 242 Ariz. 588, 611, 399 P.3d 663, 686 (2017), as amended (Aug. 17, 2017)(emphasis added).

In the absence of any clear guidance from the Legislature (which is not provided in H.B. 1247), it is the opinion of this office that the amendatory provisions of H.B. 1247 are ineffective to change either the current version of Section 37-29-65 or Section 37-29-457. Accordingly, it is our opinion that the provisions of these sections as now written and codified remain in effect.

If this office may be of any further assistance to you, please let us know.

OFFICIAL OPINION

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By: Avery Mounger Lee w/permission
Avery Mounger Lee
Special Assistant Attorney General