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Opinion No. 13-72

Public Charter Schools Act and Article II, Section 24 of the Tennessee Constitution

QUESTION

Does the Tennessee Public Charter Schools Act of 2002 ("the Charter Schools Act") impose financial burdens on local school districts in violation of Article II, Section 24 of the Tennessee Constitution?

OPINION

The Charter Schools Act does not impose financial burdens on local school districts in violation of Article II, Section 24 of the Tennessee Constitution.

ANALYSIS

The Tennessee Public Charter Schools Act, codified at Tenn. Code Ann. §§ 49-13-101 to -143, provides the legal authority for the creation and operation of public charter schools in the State of Tennessee. *See* Tenn. Att'y Gen. Op. 08-32, at 1 (Feb. 21, 2008). The funding provisions of the Charter Schools Act are set forth at Tenn. Code Ann. § 49-13-112.[1] Charter schools are generally allocated federal, state and local funds on a "per student" basis, with Tenn. Code Ann. § 49-13-112(a) specifically stating:

> A local board of education shall allocate to the charter school an amount equal to the per student state and local funds received by the LEA and all appropriate allocations under federal law or regulation, including, but limited to, Title I and ESEA funds. The allocation shall be in accordance with rules and regulations promulgated by the department of education. Each LEA shall include as part of its budget submitted pursuant to § 49-2-203, the per pupil amount of local money it will pass through to charter schools during the upcoming school year. Allocations to the charter schools during that year shall be based on that figure. The LEA shall distribute the portion of local funds it expects to receive in no fewer than nine (9) equal installments to the charter schools in the same manner as state funds are distributed pursuant to chapter 3 of this title. If the amount of local funds received

[1] Since its enactment in 2002, Tenn. Code Ann. § 49-13-112 has been amended a number of times *See* 2013 Tenn. Pub. Acts, ch. 326, §§ 4 and 9; 2012 Tenn. Pub. Acts, ch. 1097. § 8; 2012 Tenn. Pub. Acts, ch. 1021, § 9; 2011 Tenn. Pub. Acts, ch. 507, §§ 7 and 8; 2009 Tenn. Pub. Acts, ch. 555. § 8.

> increases or decreases from the budgeted figure, the LEA may adjust payments to the charter schools in October, February, and June. Before adjusting payments to the charter schools, the LEA shall receive approval from the commissioner. All funds received by a charter school shall be spent according to the budget submitted or as otherwise revised by the public charter school governing body, subject to the requirements of state and federal law. At the request of the charter school governing body, a local board of education may act as fiscal agent for a public charter school in accordance with the charter agreement and applicable state and federal law.

The Tennessee Supreme Court has affirmed that in funding public schools (including public charter schools) the Tennessee Constitution grants the General Assembly flexibility in determining how the obligation to provide a free public education to Tennessee's school children is accomplished, stating:

> The constitution, therefore, imposes upon the General Assembly the obligation to maintain and support a system of free public schools that affords substantially equal educational opportunities to all students. *The means whereby this obligation is accomplished is a legislative prerogative.*
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> The defendants would use the flexibility of means granted by the constitution to avoid the certainty of responsibility. The record of the 1977 convention shows clearly that the delegates recognized that the responsibility for designing and maintaining a free public school system rested on the General Assembly and that the General Assembly needed flexibility in meeting that responsibility.
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> The essential issues in this case are quality and equality of education. The issue is not, as insisted by the defendants and intervenors, equality of funding. Some factors that bear upon the quality and availability of educational opportunity may not be subject to precise quantification in dollars. Other obviously significant factors include geographical features, organizational structures, management principles and utilization of facilities. Nor is the issue sameness. The defendants contend that the requirement that the system provide substantially equal educational opportunities would "squelch innovation." Given the very nature of education, an adequate system, by all reasonable standards, would include innovative and progressive features and programs.
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> The power of the General Assembly is extensive. *The constitution contemplates that the power granted to the General Assembly will be exercised to*

> *accomplish the mandated result, a public school system that provides substantially equal educational opportunities to the school children of Tennessee. The means whereby the result is accomplished is, within constitutional limits, a legislative prerogative.*

Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 140-41, 151, 156 (emphasis added). *See also State ex rel. Board of Educ. of Memphis City Schools v City of Memphis*, 329 S.W.3d 465, 472 (Tenn. Ct. App. 2010) (quoting *City of Humboldt v. McKnight*, No. M2002-02639-COA-R3-CV, 2005 WL 2051284, at *14-15 (Tenn. Ct. App. Aug 25, 2005) (recognizing that "the General Assembly has the broadest discretion to create or allow various entities to provide educational services to children in the state.")

The General Assembly has appropriately exercised this constitutional discretion in developing the funding mechanism for public charter schools under the Charter Schools Act and that funding mechanism specifically does not traverse Article II, Section 24 of the Tennessee Constitution. The fourth paragraph of Article II, Section 24 of the Tennessee Constitution provides that "[n]o law of general application shall impose increased expenditure requirements on cities or counties unless the General Assembly shall provide that the state share in the cost." According to the Tennessee Court of Appeals, "the Legislature is constitutionally empowered to elect what the share of the State shall be in the subject expenses, and courts lack the authority to determine what share of expenses the State must bear." *Morris v. Snodgrass*, 886 S.W.2d 761, 763 (Tenn. Ct. App. 1994). So long as the State share enacted by the General Assembly is substantial and not miniscule, compliance with the terms of Article II, Section 24 will be met. *Id.* As the Tennessee Supreme Court has recognized, "Article II, Section 24, the State Spending Clause, gives the General Assembly the widest discretion in assigning the relative shares of responsibility of the state and local governments for funding state mandated services." *Tennessee Small School Systems v. McWherter*, 851 S.W.2d at 156.

Article II, Section 24, also has been construed to apply only to laws of general application which *directly or expressly* require counties and cities to make expenditures. *See Swafford v. City of Chattanooga*, 743 S.W.2d 174, 178 (Tenn. Ct. App. 1987). In *Swafford*, the Court discussed a challenge under Article II, Section 24, to the General Assembly's amendment of the Governmental Tort Liability Act, raising the cap on damages:

> The City also raises the issue of the constitutionality of the General Assembly's having increased the limits of liability under the Governmental Tort Liability Act by Chapter 950 of the Public Acts of 1982. Article 2, Section 24, of the Constitution of Tennessee directs that "no law of general application shall impose increased expenditure requirements on cities or counties unless the General Assembly shall provide that the State share in the cost." The City argues that the General Assembly's having raised the liability limits from $20,000 to $40,000 imposes increased expenditure requirements on Chattanooga without the General Assembly's providing that the State share in the cost. We do not agree. The General Assembly's having raised the liability limits indicates a legislative intent to provide a greater remedy to the citizens of this State and others who are injured at the hands of negligent local governments. This, however, is not an "increased

> expenditure requirement" imposed on the cities or counties of this State. The only "expenditure requirements" would be those that result solely from the negligent acts or omissions of a city or county itself; the Act does not require cities and counties to commit those negligent acts or omissions. The increased limits of liability of T.C.A. § 29-20-403(a), (c) do not conflict with Article 2, Section 24, of the State Constitution.

Id.

Similarly, in *Knox County v. City of Knoxville*, C.A. No. 736 & 737, 1987 WL 31640, at *6 (Tenn. Ct. App. Mar. 12, 1990) the Court of Appeals addressed a challenge under Article II, Section 24, to an education statute, Tenn. Code Ann. § 49-5-203. This statute requires that the rights and privileges of existing teachers "shall continue without impairment, interruption or diminution" when a school system undergoes "annexation, unification, consolidation, abolition, reorganization, or transfer of the control and operation" of the system to a different type structure. *See* Tenn. Code Ann. § 49-5-203(a). Section (c) of the statute provides that "rights and privileges" include "salary, pension or retirement benefits, sick leave accumulation, tenure status and contract rights." As in *Swafford*, the Court held Article II, Section 24 to apply only to legislation that directly or expressly requires expenditures:

> The County asserts that the statute violates Article II, Section 24, of the Tennessee Constitution, which in pertinent part dictates that "[n]o law of general application shall impose increased expenditure requirements on cities or counties unless the General Assembly shall provide that the state share in the cost." The statute clearly is a law of general application, but we are not convinced that the statute imposes increased expenditure requirements on the County. The statute is a remedial one, enacted in order to ensure that no rights of the former teachers of one school system would be diminished by the transfer of that system to another. *See, Wagner v. Elizabethton City Board of Education*, 496 S.W.2d 468, 471 (Tenn.1973). Any increased expenditures incurred by a city or county as a result of the operation of the statute are too indirect and speculative to trigger the state-share mechanism of Article II, Section 24. The statute does not require that cities and counties abolish, transfer, or reorganize their school systems, and absent a local system's taking such a step, the statute imposes *no* expenditure requirements, direct or indirect, on a city or county.

Id. (Emphasis in original).

The Court then went further, emphasizing that, in any event, the substantial funding provided to local school boards by the State government satisfied any concerns under Article II, Section 24:

> Even if we were to hold that Article II, Section 24, applied to the indirect consequences of the General Assembly's having adopted the statute, we believe that the state cost share requirement would be adequately met by the additional ADA funds provided because of the County School System's increased

> enrollment. *The constitution mandates only that there be a state share; it does not mandate the size or proportion of that share.*

Id. (Emphasis added).[2]

On its face, the Charter Schools Act does not directly or expressly require the expenditure of extra funds beyond what an LEA is already spending on education. Rather, it simply requires that all education funds follow the student for whom they were appropriated. Thus, the Charter Schools Act does not implicate Article II, Section 24. *See Swafford*, 743 S.W.2d at 178.

Furthermore, even if the Charter Schools Act were to increase spending by local school districts, the State share of these shared expenditures would remain significant and thus Article II, Section 24 would not be violated. *See Tennessee Small School Systems v. McWherter*, 851 S.W.2d at 156; *Morris v Snodgrass*, 886 S.W.2d at 763. The primary source of state education funding is the Basic Education Program ("BEP"). The BEP formula is calculated by the Commissioner of Education with the approval of the State Board of Education in accordance with statutory guidelines. Tenn. Code Ann. §§ 49-1-302, -306 & -307. Funds appropriated to the BEP are distributed to local education agencies under a formula set forth in Tenn. Code Ann. § 49-3-351. Tenn. Code Ann. § 49-3-356 provides as follows:

> The state shall provide seventy-five percent (75%) of the funds generated by the Tennessee BEP formula in the classroom components and fifty percent (50%) in the nonclassroom components as defined by the state board. Every local government shall appropriate funds sufficient to fund the local share of the BEP. No LEA shall commence the fall term until its share of the BEP has been included in the budget approved by the local legislative body. From the local portion of such revenues, there shall be a distribution of funds for equalization purposes pursuant to a formula adopted by the state board, as approved by the commissioners of education and finance and administration. It is the intent of the general assembly to provide funding on a fair and equitable basis by recognizing the differences in the ability of local jurisdictions to raise local revenues.

Through the BEP, the State provides the majority of funds expended on education by LEAs. Consequently, in the event there are increased financial burdens to local school districts in connection with the creation and the funding of charter schools under the Charter Schools Act, the State share of educational funding of the BEP pursuant to Tenn. Code Ann. § 49-3-356 is clearly more than sufficient to meet the level required by Article II, Section 24, as interpreted by Tennessee courts.

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[2] This Office has previously opined that the state share in increased costs under Article II, Section 24, must be "reasonable and not nominal," Tenn. Att'y Gen. Op. 79-204, at 2 (Apr. 30, 1979), or "more than a nominal or a token portion." Tenn. Att'y Gen. Op. 80-148, at 2 (Mar. 11, 1980). This Office has also concluded that a bill setting the State's share at three percent was "constitutionally suspect" because the State's share might be found to be a nominal or token portion of the fiscal impact on the counties. Tenn. Att'y Gen. Op. 81-364, at 1-2 (June 9, 1981).

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