STATE OF TENNESSEE

OFFICE OF THE ATTORNEY GENERAL

January 9, 2014

Opinion No. 14-06

State Authorization of Public Charter Schools

QUESTIONS

1. If enacted, would House Bill 702/Senate Bill 830 of the 108th General Assembly, as amended, (hereinafter "HB702") impose undue financial burdens on school districts in violation of Article II, Section 24, of the Tennessee Constitution?

2. If enacted, would HB702 be otherwise constitutionally suspect because it permits the Tennessee Board of Education ("the State Board") to approve, on appeal, new charter schools that were denied approval by a local education agency ("LEA") within local school districts with priority schools?

OPINIONS

1. No. HB 702 would not impose financial burdens on local school districts in violation of Article II, Section 24, of the Tennessee Constitution.

2. If enacted, HB702 would likely withstand any facial constitutional challenge with respect to allowing the State Board to approve new charter schools on appeal within local school districts with priority schools.[1]

ANALYSIS

HB702 is a comprehensive bill concerning charter schools in Tennessee. If enacted, it would amend eleven existing statutes within Title 49, Chapter 13, of the Tennessee Code and create one new provision, Tenn. Code Ann. § 39-14-142, within the same title and chapter. The bill as amended was passed by the Tennessee House of Representatives during the 108th General Assembly on April 18, 2013,

[1]This opinion is based upon the text of HB702 and addresses only facial constitutional challenges. This Office cannot anticipate all possible factual situations in which HB702 might be applied and from which an "as applied" challenge might arise. Accordingly, such "as applied" challenges are outside of the scope of this opinion. *See generally Waters v. Farr*, 291 S.W.3d 873, 922-23 (Tenn. 2009) (Koch, J., concurring in part and dissenting in part) (discussing in depth distinctions between "as applied" and "facial" constitutional challenges).

and is currently under review by the Senate.[2] HB702 provides a new mechanism by which the State Board can serve as the "chartering authority" for new charter schools within any LEA that contains at least one "priority school."[3] *See* H.B. 702, §§ 2, 7. Specifically, HB702 permits the State Board to authorize a charter school when the LEA has denied the charter school's initial application and the charter school sponsor appeals that denial to the State Board. *Id.* If the State Board finds, on appeal, that the LEA's denial of the charter school application was "contrary to the best interests of the pupils, school district or community," the State Board may approve the charter school application and serve as its chartering authority. *Id.* § 7(E).

With respect to LEAs in which there are no priority schools, HB702 provides that the State Board may reverse the LEA's decision to deny a charter school application and remand the decision to the LEA with instructions for approval of the charter. In such instances, the LEA, rather than the State Board, would be the "chartering authority." *See id.* § 7(D). Under current law, this procedure applies to all charter appeals, regardless of whether the LEA in question contains a priority school. *See* Tenn. Code Ann. § 49-13-108(a)(4).

1. Article II, Section 24, of the Tennessee Constitution provides, in pertinent part, 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." This Office recently opined that the Tennessee Public Charter Schools Act, codified at Tenn. Code Ann. §§ 49-13-101 *et seq*., does not violate this constitutional provision. *See* Tenn. Att'y Gen. Op. 13-72 (Sept. 9, 2013). That opinion was based on three factors: (1) the Tennessee Public Charter Schools Act does not "directly or expressly" require the expenditure of additional funds by any LEA; (2) the State provides the majority of total education spending by LEAs through the Basic Education Program ("BEP"), thus meeting the participation requirements imposed by Article II, Section 24; and (3) the General Assembly is afforded broad discretion in funding education. Each of these factors applies equally to HB702.

HB702 does not, on its face, "directly or expressly" require the expenditure of additional funds by any LEA. Any indirect expenditure required of LEAs by HB702 would be consistent with Article II, Section 24, because the State funds a large portion of LEA education spending through the BEP. This substantial participation in funding education expenses satisfies the State's obligation to share in any

[2]*See* http://wapp.capitol.tn.gov/apps/billinfo/default.aspx?billnumber=hb0702. A copy of the bill as passed by the House is attached to this opinion.

[3]A "priority school" is a school that is in the bottom 5% of schools statewide in overall achievement as determined by the performance standards and other criteria set by the State Board. Tenn. Code Ann. § 49-1-602(b)(2).

indirect costs of HB702. Finally, the General Assembly's broad discretion in education funding gives it the authority to make policy changes, even if those changes may indirectly result in increased LEA expenditures. HB702 appears to be a reasonable exercise of this discretion. In fact, HB702 prohibits the State Board from approving any charter school denied by an LEA based on "substantial negative fiscal impact" where the State Board determines on appeal that operation of the school would have a substantial negative fiscal impact on the LEA such that authorization would be contrary to the best interests of the pupils, school district, or community. *See* H.B. 702, § 8(e). For all of these reasons, HB702 does not violate Article II, Section 24, of the Tennessee Constitution.

2. HB702 is also likely to withstand other constitutional challenges, including claims that its provisions violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; Article I, Section 8, of the Tennessee Constitution; and Article XI, Section 8, of the Tennessee Constitution with respect to allowing the State Board to approve new charter schools on appeal within local school districts with priority schools.

The Equal Protection Clause of the Fourteenth Amendment provides: "nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Statutes that infringe fundamental rights or make distinctions based on suspect classifications such as race or national origin are subject to strict scrutiny, which requires that the statute be narrowly tailored to achieve a compelling government interest. *Reno v. Flores*, 507 U.S. 292, 301-02 (1993); *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995). On the other hand, if a law neither burdens a fundamental right nor targets a suspect class, the law will be upheld so long as it bears a rational relation to some legitimate end. *Romer v. Evans*, 517 U.S. 620, 631 (1996). "A statute is constitutional under rational basis scrutiny so long as there is any reasonably conceivable state of facts that could provide a rational basis for the statute." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

A claim that HB702 violates the Equal Protection Clause by discriminating on the basis of race is unlikely to succeed. First, the law contains no racially discriminatory language and, in fact, never mentions race. Because the law is facially race-neutral, an Equal Protection challenge would require a showing of both discriminatory impact *and* discriminatory intent. "A law, neutral on its face and serving ends otherwise within the power of government to pursue," is not invalid under the Equal Protection Clause simply because it may disproportionately affect a suspect class. *Washington v. Davis,* 426 U.S. 229, 242 (1976). "An unwavering line of cases from [the Supreme Court] holds that a violation of the Equal Protection Clause requires state action motivated by discriminatory intent; the disproportionate effects of state action are not sufficient to establish such a violation." *Hernandez v. New York,* 500 U.S. 352, 372-73 (1991).

There is no indication of discriminatory intent in HB702. The bill targets no suspect class and, on its face, applies equally to every LEA and every student in Tennessee. The State Board continues to have the authority to overrule local denials of charter schools in all LEAs, as does it under current law. If an LEA contains at least one priority school, and the State Board overrules the LEA's denial of a charter school application, HB702 provides that the State Board will become the chartering authority instead of the LEA. But this is so regardless of the race, national origin, religion, or nationality of any student in the LEA. This Office is unaware of any evidence in the legislative history or background of HB702 that would lead a reviewing court to conclude that HB702 is motivated by racial discrimination.

Because there is no discriminatory intent, it matters not for equal protection purposes whether HB702 would have a racially disparate impact. Nevertheless, there is no reason to conclude that HB702 on its face would have such an impact, notwithstanding the fact that, currently, four of the five LEAs with priority schools have a higher proportion of minority students than the state average.[4] The change that HB702 works pertains only to *the designation of the chartering authority* in LEAs with a priority school, when such an LEA denies a charter school application and the State Board overrules that denial. Under current law, the chartering authority would be the LEA; under HB702, the chartering authority would be the State Board. Thus, the "disparate impact," if any, falls not on the students within the LEA but on the LEA itself as an administrative entity. HB702 treats differently only the administrative control of charter schools in a limited class of LEAs—not students.

HB702 does not interfere with any fundamental right. Rather, it effects an administrative change to the way charter schools are approved and governed in Tennessee. An LEA has no fundamental right to deny a charter application or to have that denial undisturbed by the State. *See generally Southern Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001) (explaining that "municipal governments in Tennessee derive the whole of their authority solely from the General Assembly."). Likewise, students have no fundamental right to attend a public school system without charter schools. *See City of Humboldt v. McKnight*, No. M2002-02639-COA-R3-CV, 2005 WL 2051284, at *15 (Tenn. Ct. App. Aug. 25, 2005), *perm. app. denied* (Tenn. Feb. 21, 2006) ("[T]he General Assembly has the broadest discretion to create or allow various entities to provide educational services to children in the state.").

---

[4] *See* http://www.tn.gov/education/accountability/doc/2012-13_priority_schls.pdf (listing LEAs with priority schools); http://www.tn.gov/education/reportcard/2013.shtml (TDOE 2013 Report Card, showing student ethnic composition of state and LEAs). The priority-school list is revised at least every three years. Therefore, the location, number, and minority-student composition of LEAs with at least one priority school will almost certainly vary over time. *See* Tenn. Code Ann. § 49-1-602(b)(1).

Because HB702 is based on no suspect classification and does not interfere with any fundamental right, it will be upheld if supported by a rational basis.[5] The rational basis standard is highly deferential to the State. In *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313-14 (1993), the United States Supreme Court explained the scope of rational-basis judicial review as follows:

> Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. . . . Where there are "plausible reasons" for Congress' action, "our inquiry is at an end." . . . This standard of review is a paradigm of judicial restraint. [citations omitted]

HB702 is rationally related to at least one "reasonably conceivable" legitimate state interest—the education of the State's young people—and it is reasonably conceivable that the General Assembly could rationally conclude that HB702 would advance that interest. *See Crites v. Smith*, 826 S.W.2d 459, 466 (Tenn. Ct. App. 1991) ("The State has a compelling interest in the proper schooling of all children."). Both current law and HB702 empower the State Board to authorize new charter schools in any LEA, regardless of whether the LEA contains a "priority school," provided that an appeal is filed with the State Board by a charter school whose application has been rejected by the LEA in which it seeks to operate. The General Assembly could rationally conclude that in LEAs where priority schools do exist, there is greater need for educational innovation, state governance, and added choice such that the State Board should serve as the "chartering authority" of charter schools that it approves on appeal. There is thus nothing arbitrary or capricious about the provisions of HB702 related to charter schools. Accordingly, a reviewing court would likely find a rational basis for HB702.

Article I, Section 8, of the Tennessee Constitution provides: "That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land."

Article XI, Section 8, of the Tennessee Constitution provides:

> The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the

[5] As discussed above, HB702 treats only LEAs differently, not persons. Arguably, therefore, it is not subject even to rational basis review.

> benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunities, or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law. No corporation shall be created or its powers increased or diminished by special laws but the General Assembly shall provide by general laws for the organization of all corporations, hereafter created, which laws may, at any time, be altered or repealed and no such alteration or repeal shall interfere with or divest rights which have become vested.

Tennessee courts interpret Article I, Section 8, together with Article XI, Section 8, to "guarantee equal privileges and immunities for all those similarly situated." *Tenn. Small School Systems v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993). "Article XI, Section 8 is implicated when a statute contravenes some general law which has mandatory application." *McCarver v. Ins. Co. of State of Penn.*, 208 S.W.3d 380, 384 (Tenn. 2006) (quoting *Riggs v. Burson*, 941 S.W.2d 44, 53 (Tenn. 1997)). Such a statute will, nevertheless, be upheld unless it creates classifications that are "capricious, unreasonable, or arbitrary." *McCarver*, 208 S.W. 3d at 384. If the questioned statute does not interfere with an established fundamental right or disadvantage a suspect class, it will be upheld against an Article XI, Section 8 challenge as long as the classification it creates is "rationally related" to any conceivable legitimate legislative purpose. *See City of Chattanooga v. Davis*, 54 S.W.3d 248, 276 (Tenn. 2001); *Riggs*, 941 S.W. 2d at 53. Thus, even where a statute does contravene general law or suspends the application of general law in specific circumstances, it does not violate Article XI, Section 8, if there is a rational basis for the distinctions made. *Id.*

As discussed above, HB702 does not infringe upon any fundamental right nor target any suspect class of people. HB702 has a reasonably conceivable rational basis. Therefore, HB702 is defensible under Article I, Section 8, and Article XI, Section 8.

ROBERT E. COOPER, JR.
Attorney General and Reporter

JENNIFER L. SMITH
Deputy Attorney General

KEVIN STEILING
Deputy Attorney General

Requested by:

The Honorable Beth Harwell
Speaker of the House of Representatives
Suite 19, Legislative Plaza
Nashville, TN 37243

The Honorable Mike Stewart
State Representative
23 Legislative Plaza
Nashville, TN 37243-0152