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IN THE CHANCERY COURT FOR DAVIDSON COUNTY
TWENTIETH JUDICIAL DISTRICT
THE STATE OF TENNESSEE

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al., Plaintiffs, vs. TENNESSEE DEPARTMENT OF EDUCATION, et al., Defendants, – and – NATU BAH, et al., Intervenor-Defendants.	Case No. 20-0143-II Chancellor Anne C. Martin, Chief Judge Judge Tammy M. Harrington Judge Valerie L. Smith **CONSOLIDATED**
ROXANNE McEWEN, et al., Plaintiffs, vs. BILL LEE, in His Official Capacity as Governor of the State of Tennessee, et al., Defendants, – and – NATU BAH, et al., Intervenor-Defendants.	Case No. 20-0242-II Chancellor Anne C. Martin, Chief Judge Judge Tammy M. Harrington Judge Valerie L. Smith

DECLARATION OF CHRISTOPHER M. WOOD IN SUPPORT OF McEWEN PLAINTIFFS' CONSOLIDATED OPPOSITION TO (I) STATE DEFENDANTS' MOTION TO DISMISS; (II) GREATER PRAISE INTERVENOR-DEFENDANTS' MOTION TO DISMISS; AND (III) PARENT INTERVENOR-DEFENDANTS' RENEWED MOTION FOR JUDGMENT ON THE PLEADINGS

I, CHRISTOPHER M. WOOD, declare as follows:

1. I am an attorney duly licensed to practice before all of the courts of the State of Tennessee. I am one of the counsel for Plaintiffs Roxanne McEwen, David P. Bichell, Terry Jo Bichell, Lisa Mingrone, Claudia Russell, Inez Williams, Heather Kenny, Elise McIntosh, and Apryle Young. This declaration is made in support of McEwen Plaintiffs' Consolidated Opposition to (i) State Defendants' Motion to Dismiss; (ii) Greater Praise Intervenor-Defendants' Motion to Dismiss; and (iii) Parent Intervenor-Defendants' Renewed Motion for Judgment on the Pleadings. I have personal knowledge of the matters stated herein and, if called upon, could and would competently testify thereto.

2. Attached are true and correct copies of the following exhibits:

Exhibit A: *City of Humboldt v. McKnight*, 2005 WL 2051284 (Tenn. Ct. App. Aug. 25, 2005);

Exhibit B: Excerpts from the Journal and Proceedings of the 1977 Limited Constitutional Convention, State of Tennessee;

Exhibit C: *Beaver v. Moore*, No. 22-P-24, Final Order Granting Pltfs.' Mot. for Prelim. & Permanent Injunctive Relief & Declaratory Judgment & Ruling on Various Other Mtns. (W. Va. Cir. Ct. July 22, 2022);

Exhibit D: *State of West Virginia v. Beaver*, No. 22-ICA-1, Order (W. Va. Ct. App. Aug. 2, 2022);

Exhibit E: *State of West Virginia v. Beaver*, No. 22-616, Order (W. Va. Aug. 18, 2022);

Exhibit F: *City of New Johnsonville v. Handley*, 2005 WL 1981810 (Tenn. Ct. App. Aug. 16, 2005); and

Exhibit G: *Town of Erwin v. Unicoi Cnty.*, 1992 WL 74569 (Tenn. Ct. App. 1992).

I declare under penalty of perjury that the foregoing is true and correct. Executed this 2nd day of September, 2022, at Nashville, Tennessee.

s/ Christopher M. Wood
CHRISTOPHER M. WOOD

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been forwarded via electronic filing service and electronic mail to the following on this 2nd day of September, 2022:

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EXHIBIT A

2005 WL 2051284
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

The CITY OF HUMBOLDT, et al.

v.

J.R. McKNIGHT, et al.

No. M2002–02639–COA–R3–CV.
|
April 13, 2004 Session.
|
Aug. 25, 2005.
|
Application for Permission to Appeal
Denied by Supreme Court
Feb. 21, 2006.

Appeal from the Chancery Court for Davidson County, No. 99–466–III; Ellen Hobbs Lyle, Chancellor.

Attorneys and Law Firms

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; Kate Eyler, Deputy Attorney General; Kevin Steiling, Deputy Attorney General, for the State Defendant–Appellant.

Jerry D. Kizer, Jr., Patrick W. Rogers, Jackson, Tennessee, for the Defendants–Appellants, Gibson County, Gibson County Commission and its Members and Gibson County Board of Education and its Members.

Valerie B. Speakman, Memphis, Tennessee, for the Defendants–Appellants Gibson County Special School District and Its Members.

L.L. Harrell, Jr., Trenton, Tennessee, for the Defendants–Appellants, Trenton Special Schools District and Bradford Special School District.

Randall G. Bennett, Tennessee School Boards Association, Nashville, Tennessee, for the Defendants/Appellants J.R. McKnight, et al.

Lewis R. Donelson, Angie C. Davis, Memphis, Tennessee, for the Plaintiffs–Appellees, The City of Humboldt and Mayor and Aldermen of the City of Humboldt.

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

OPINION

PATRICIA J. COTTRELL, J.

***1** This lawsuit is about the operation and funding of public schools educating the children in Gibson County. Since 1981 the county has not operated a county school system, and all K–12 students have been in schools operated by the municipal and special school systems. The county ceased operating schools when a 1981 Private Act created the Gibson County Special School District. This arrangement was ratified by a 2002 Public Act stating that where all K–12 students are eligible to be served by city and special school systems, the county is not required to operate a separate county school system or have a county board of education. The trial court held that the 2002 Act was unconstitutional as special legislation and that the 1981 Act, though constitutional, was illegal. It ordered the dissolution of the Gibson County Special School District and that the county undertake operation of the schools not included in the other municipal or special school systems within the county. The court further found that the county was required to levy a countywide property tax to fund the local share of education costs and divide the proceeds among all school systems in the county. We hold that the 2002 Act does not violate Article XI, Section 8 of the Tennessee Constitution and, consequently, there is no obligation for the county to operate a county school system. We also conclude that the facts do not establish any disparity of educational opportunity among the school systems in the county and, consequently, the principles and holdings in the *Small Schools* cases do not apply to require a specific organizational structure and do not preclude the method used in Gibson County. Finally, we conclude the county is not required to levy a countywide property tax for schools. Accordingly, we reverse the trial court's judgment.

This suit challenges the unique method of operating and funding education in Gibson County whereby the county operates no schools, has no elected school board, and levies no countywide property tax to fund education. All students

in Gibson County are served by either a special or municipal school district.

The plaintiffs, City of Humboldt and its officials, brought this suit alleging that Gibson County officials are acting in dereliction of their constitutional and statutory duties by failing to perform any educational role. The Gibson County Special School District, which serves the rural Gibson County students, is alleged to be the device whereby Gibson County avoids its responsibilities. The city also contends that a statute passed after the lawsuit was filed intending to address Gibson County's situation has no effect since it is special legislation in violation of Article XI, Section 8 of the Tennessee Constitution.

The Gibson County Special School District, serving the rural county students, opposes plaintiffs' request that it be dissolved and asserts that its existence and operation are not prohibited by law, but, instead, are specifically authorized. Gibson County argues that no law or constitutional provision places upon it the affirmative burden of operating a school system since all students in Gibson County are served by municipal or special school districts, and that the statute passed during this litigation specifically authorizing this arrangement is constitutional. Furthermore, the county claims that since each of the districts that serve the students collects a property tax assessed by either the city or the General Assembly that is more than sufficient to meet local funding requirements, it is not required to levy a countywide property tax for educational purposes.

I. Material Facts Not In Dispute

***2** The trial court decided the merits of this controversy on cross motions for summary judgment. The trial court found, and the record reflects, that the following facts are not in dispute among the parties.

Since the creation of the Gibson County Special School District ("GCSSD") by Private Act in 1981, all students residing in Gibson County have been included in one of five (5) school districts. Since all students were served by either the GCSSD, the Trenton Special School District ("TSSD"), the Bradford Special School District ("BSSD"), the Milan Special School District ("MSSD") or the Humboldt City School System ("HCSS"), a municipal school district, the county itself operates no schools. All of Gibson County is included within the geographical boundaries of these systems. Each of these local school systems is separate and autonomous.

Prior to the creation of the GCSSD in 1981, Gibson County operated the Gibson County School System, and the Gibson County Commission levied a countywide property tax for education. According to the affidavit of Bill Carey, who served as Superintendent of Gibson County School System from 1978–81 and as Superintendent of the GCSSD from 1981–97, the impetus for formation of the GCSSD was the difficulty in obtaining adequate funding for the rural schools from the Gibson County Commission. Prior to 1981, according to Mr. Carey, there had been a constant struggle between the Gibson County Commission and the Gibson County Board of Education concerning adequate funding. Since 17 of the 25 commissioners sitting on the commission were from Trenton, Bradford, Milan, or Humboldt, it was perceived they were reluctant to levy a countywide property tax sufficient to fund the rural county schools at the expense of their urban districts. For this reason, the GCSSD was created by Chapter 62 of the Private Acts of the General Assembly of the State of Tennessee for 1981, as amended, and encompasses all of Gibson County not otherwise included within one of the four preexisting school districts. In the private act creating GCSSD, the legislature assessed a property tax on property within GCSSD to operate and maintain the school district.

Upon the creation of the GCSSD, Gibson County, in effect, went out of the education business since no students were left to serve. After 1981, Gibson County has not operated or administered a school system. The Gibson County Board of Education continued to exist but, after creation of the GCSSD, its members were no longer elected but appointed. In addition to disbanding the operational components of education, the county ceased funding education in Gibson County through property taxes and changed its property tax rate to reflect the elimination of funding for education. It continues to levy and collect a local option sales tax for education, which is apportioned among the school systems operating in the county.

All five (5) school districts in Gibson County are in compliance with the state's education standards and requirements under the state's Basic Education Program ("BEP"). Under the funding aspect of the BEP, the state must provide seventy-five (75%) percent of the state mandated education funds for classroom components and fifty (50%) percent of the state mandated education funds for non-

classroom components. The local school systems collectively are required to fund the remaining twenty-five (25%) percent and fifty (50%) percent respectively. Each system must contribute a minimum share based upon fiscal ability. Each of the five local school systems in Gibson County contributes more than its state mandated local share under the BEP. In other words, students in both Humboldt and the GCSSD receive more funds per pupil than is required under the BEP. The City of Humboldt spends more per pupil than any of the other systems in Gibson County.

***3** Local governments generally fund their share of the BEP match through property taxes and the local option sales tax. Gibson County does not levy a countywide property tax to fund education since property within each of the school districts is already taxed for education purposes. The private acts creating the GCSSD, the MSSD, the TSSD and the BSSD levy a property tax on the property located within their respective districts and specify the rate to be assessed. HCSS levies a property tax for education as authorized by the legislature. On the other hand, the local option sales tax is collected by Gibson County and then distributed among the five school systems on a weighted full-time equivalent average daily attendance ("WFEADA") basis. The creation of the GCSSD had no effect on Gibson County's collection of sales tax and its distribution of a portion of that sales tax to the five public school systems operating in Gibson County. There is no dispute that education is being funded in Gibson County in excess of that required by the state's BEP.

A comparison of key education components shows that in many respects the schools in Humboldt are outperforming the schools in the GCSSD. Quoting from the trial court's memorandum, relying largely on the 1997–98 Tennessee Report Card, the undisputed facts show:

(1) During the 1997–1997 school year, the City of Humboldt maintained five (5) K through 12 schools, whereas GCSSD maintained six (6) K through 12 schools.

(2) According to the Tennessee Report Card, "Accreditation by the Southern Association of Colleges and Schools (SACS) is something to which all public schools in Tennessee should aspire, and in fact, more are successful in achieving accreditation each year. Accreditation means not only that minimum standards are met, but also that the school community is committed to raising the quality of its program. For the 1997–1998 school year, 100% of Humboldt Elementary Schools were SACS accredited, and 50% of its secondary schools were SACS accredited, whereas 0% of GCSSD elementary or secondary schools were SACS accredited.

(3) The Tennessee Report Card further states that, "The Tennessee General Assembly, believing that smaller classes increased students' chances of academic success, included class size standards in the Educational Improvement Act (EIA) of 1992 that will require lower class sizes for all grades by the school year 2001–2002. As of 1997–1998, 99.7% of City of Humboldt classes met the EIA class size standard and 100% of the Humboldt schools met the EIA standard, whereas only 99.1% of the GCSSD classes met the EIA class size standard, and 100% of the GCSSD schools met the EIA class standard.

(4) The Tennessee Report Card states that, "A wide range of instructional and support personnel is required to effectively operate a school system". Recalling that during the 1997–1998 school year, the City of Humboldt operated one less school than GCSSD, the City of Humboldt employed 13 administrators, 131 teachers, 14 student support personnel, and 158 total professional personnel, whereas, GCSSD employed only 7 administrators, 135 teachers, 9 student support personnel, and 151 total professional personnel.

***4** (5) According to the Tennessee Report Card, "The calculation of expenditures per student is intended to provide a basis for comparison among school systems of different sizes." ... In the 1997–1998 school year, the per pupil expenditure in the City of Humboldt, was $4,313.00 per student, whereas, in the GCSSD the per pupil expenditure totaled only $3,327.00.

(6) For the 1997–1998 school year, the City of Humboldt's average salary for teachers was $31,234.00, whereas, the average salary for teachers in the GCSSD was only $29,706.00.

(7) For the 1997–1998 school year, state and local revenue per student in the City of Humboldt was $4,133.00 per student, whereas, in the GCSSD state and local revenue totaled only $3,846.00 per student.

(Citations to the 1997–98 Tennessee Report Card omitted).

Additionally, the record shows that the per pupil expenditure from property tax revenue for 1998–99 in Humboldt was $927.36 and for GCSSD was $776.21. In other words, Humboldt spends substantially more per student than GCSSD

out of local property tax revenues as well as more per pupil from all sources.

Humboldt alleges that Gibson County is the only county in Tennessee that does not actually operate any schools.[1] It appears that this arrangement was not seriously examined or questioned until officials with the City of Humboldt apparently sought to relinquish the separate municipal school system in Humboldt. In August of 1994, and in November of 1998, the voters of Humboldt rejected referenda to transfer administration of the Humboldt City School System to the Gibson County Board of Education.

In February of 1999, the City of Humboldt, its Mayor, and Board of Aldermen (collectively "Humboldt") filed suit to challenge the way education is administered and funded in Gibson County.[2] The defendants ultimately named in the Amended Complaint can be classified in four (4) groups. First, the suit names those entities in Gibson County that plaintiffs believe are avoiding their constitutional and statutory duty: the Gibson County Commission, the Gibson County Board of Education, their respective members, and the Gibson County Executive (collectively "Gibson County"). Second, Humboldt names the district it seeks to abolish, the Gibson County Special School District, and its associated members (collectively "GCSSD"). Third, the lawsuit includes state officials as defendants: the Governor, Attorney General and Reporter, Commissioner of Education, State Board of Education, and Commissioner of Finance and Administration (collectively "State"). Finally, the suit names the other special school districts in the county, their members and superintendents (MSSD, BSSD, and TSSD).

According to Humboldt's Amended Complaint, since the GCSSD was created in 1981, Gibson County has avoided its constitutional and statutory duties to oversee education in Gibson County, operate a school system, and levy a countywide property tax in Gibson County. According to Humboldt, the failure to levy a countywide property tax to fund education results in a system of financing education that does not ensure a substantially equal educational opportunity to the students residing in Gibson County.

***5** The Amended Complaint for Declaratory Judgment and Injunctive Relief asked the court to find that: 1) Gibson County is required to levy a countywide property tax to fund education to the minimum contribution requirements specified under the state's BEP; 2) Gibson County is required to oversee all school districts within Gibson County; 3) the Private Act of 1981, Chapter 62 creating the GCSSD violates the Tennessee Constitution Article XI, § 12, Article XI, § 8, and Article I, § 8 and state law since the GCSSD enables Gibson County to abdicate its countywide educational responsibilities. The Complaint asked that GCSSD be abolished.

II. Motions for Summary Judgment

In September of 1999, Gibson County filed the first in a series of Motions for Summary Judgment. Gibson County argued that its configuration of school systems is constitutionally sound and that state law does not require it to maintain and operate a school system or levy a countywide education property tax. Gibson County maintained that Humboldt's lawsuit is not about education but, rather, is an effort to adjust the tax burden to the advantage of the residents of Humboldt.[3] The Trenton, Bradford, and Milan Special School Districts joined in Gibson County's motion.

On December 4, 2000, Humboldt filed a cross Motion for Summary Judgment asking the court to abolish GCSSD, order Gibson County to administer and fund schools in Gibson County, and order that the Gibson County Board of Education be elected.

Thereafter, the GCSSD filed its Motion for Summary Judgment on December 11, 2000. While the GCSSD argued the same positions as Gibson County, the motion filed by GCSSD primarily addressed the legality of the private act creating it. The trial court held a hearing on the parties' motions for summary judgment.

III. The Trial Court's Orders, Subsequent Legislation, And Appeal

A) Order on Motions for Summary Judgement

On February 12, 2001, the trial court issued a Memorandum and Order on the cross motions for summary judgment granting Humboldt's Motion for Summary Judgment in part (hereinafter referred to as "Order"). The trial court found that Gibson County is violating Tennessee statutes governing education in three respects: (1) its failure to levy a countywide property tax for education; (2) its failure to maintain a "first rate" county high school; and (3) its failure to maintain a county administrative structure responsible and accountable to the State of Tennessee for public education in Gibson

County. The trial court found the statutory scheme governing education in Tennessee "assumes and requires performance at a countywide level of [these] core responsibilities." In other words, the trial court found Tennessee statutory law requires the county to be the agency through which the state fulfills its education responsibilities. The county is then required to perform basic functions and is accountable to the state for the standard of education provided countywide.

***6** The trial court reached this conclusion based upon several grounds. First, the court relied upon the codified organization of the education statutes. Due to the organization scheme, the trial court found that "Part 1, General Provisions, sets out general duties and obligations of local administration of schools." Based on this reasoning, the court found that Gibson County must perform all of the education tasks described in Tenn.Code Ann. § 49–2–101 even though Gibson County operates no schools. The trial court also relied on Tenn.Code Ann. § 49–2–101, which provides for duties of the county legislative body, including duties to levy taxes for county schools, oversee county boards of education and county directors of schools, adopt a budget for the operation of county schools, and provide sufficient funds to erect a suitable building and maintain at least one (1) first-class four-year high school.

Based on this statute, the trial court found Gibson County is required to adopt budgets for the operation of county schools, examine the accounts of the county schools, levy taxes to fund the budgets, and maintain one first class high school. The trial court, however, did not address why these obligations apply if the county operates no schools or, stated in the language of the statute, if there are no "county schools."

The second basis for the trial court's decision is the county's statutory duty under Tenn.Code Ann. § 49–2–102(a)(1) to provide education should a special or municipal school district terminate. This provision, according to the trial court "assumes the existence of a county system to fall back on." Therefore, the court reasoned the county must maintain a system for this purpose.

Third, the statute authorizing counties to contract with other entities to perform their educational duties is also cited by the trial court for support. Pursuant to Tenn.Code Ann. § 49–2–109, counties may contract with private schools or other school districts to provide education to county students. This option would be available although the private school or other school district has no pre-existing obligation to serve the county students. If a county elects to enter into such a contractual relationship, however, the statute also provides that the county retains its authority as though the students were in a county school. Tenn.Code Ann. § 49–2–109(a)(2). Therefore, since the county may not relinquish its authority in this contractual setting, the court reasoned by analogy that the county may not relinquish its authority over any student even if the legislature has created a special school district to serve the student.

Finally, the court found that Tenn.Code Ann. § 49–1–102 places the duty on the county to operate a school system. The language of Tenn.Code Ann. § 49–1–102(c) relied upon by the court is as follows:

> There shall be a local public school system operated in each county or combination of counties. There may be a local public school system operated in a municipality or special school district. Any local public school system shall be administered by
>
> ***7** (1) A local board of education; and
>
> (2) A superintendent or director.

The court concluded that since the statute requires that a local public school system be operated, then it must be the county that operates it. According to the court, this conclusion is mandated because "there must be a local body to be held accountable for and against whom the requirement that there be a local public school system operated in each county be enforced." In conclusion, the trial court found:

> Putting all the foregoing statutes together reveals that the statutory scheme enacted by the legislature is that the county legislative body is the legal entity responsible for public education across the county. Municipalities and special school systems can carve out a school or schools to operate, administer and provide additional funds. The county can contract with municipalities, special school districts or private schools to operate county schools. But the county legislative body is not permitted to remove itself or withdraw from education in the county. At a minimum it must levy a countywide property tax for education, and it must maintain a sufficient administrative structure to at least contract with another entity to fulfill its statutory charge to erect and maintain one "first-class" high school[4] and to be accountable to the State.

The trial court declined to rule for Humboldt on several issues. The trial court found that Gibson County was not under a

constitutional duty to provide substantially equal educational opportunities since the state bears this constitutional duty. The trial court also found that the private act creating the GCSSD did not violate the state constitution.[5]

> It was not the Private Act creating the Gibson County Special School District that repealed the countywide property tax or provided for the abdication of the county from education; these defalcations were committed by the county legislative body after the Private Act was passed.

The trial court found that Gibson County's statutory violations harmed Humboldt in two ways. First, the trial court found failure to levy a countywide property tax for education deprived Humboldt of its share of the tax. Second, the court reasoned that without the county serving in an oversight role, there is no single entity for the State to work with and hold accountable. The trial court also found, however, Humboldt was not able to show that the students in Humboldt were receiving an education that was inferior to the education being received by students in the GCSSD. The trial court reserved the issue of remedies to be decided at a later date. The court noted that whether GCSSD should be abolished as part of the remedy would be decided later. The parties were invited by the trial court to consult their constituents for local input and to work together to fashion an appropriate remedy that addressed the deficiencies found by the court.

B) First Remedy Order

***8** After proposed remedies were submitted to the trial court by the parties, the trial court held an evidentiary hearing on September 20, 2001 regarding remedies. Thereafter, on November 8, 2001, the trial court entered its first order on the issue of remedies (hereinafter "First Remedy Order"). Humboldt's proposed remedy suggested the abolition of the GCSSD and assumption by Gibson County of GCSSD's responsibilities. The remedy presented by Gibson County and GCSSD provided for the election of the Gibson County Board of Education, appointment of a superintendent, and Gibson County's operation of a high school by agreement with the GCSSD. The proposed countywide tax basically would fund the high school. The trial court rejected both of these remedies.

In discussing the reasons why these proposed remedies were rejected, the court interjected for the first time a requirement that Gibson County have in place a "viable county school system for schools permissively maintained by the towns and cities to default to and fall back on upon surrender of their charter...." Therefore, the trial court concluded for the first time that "to fulfill the requirements of section 49–2–1002(a)(1), the county must provide a county K through 12 system."

The trial court, however, also did not accept Humboldt's proposed remedy:

> On the other hand, the Court seeks to avoid and stop short of abolishing the Gibson County Special School District, unless there is no other less intrusive remedy consistent with the law, because abolition is disruptive to the students and parents of the District. The Special School District has an identity important to its community. The Special School District has served well the students and parents of its district. Keeping in place the parochial benefits of operation of the high school by the same people with known policies and philosophies would provide continuity and security for parents and students of the District.

In its First Remedy Order, the court concurred with the proposed remedy suggested by the Attorney General.

> The problem, then, is how to keep in place the community approval, support and security achieved by the Special School District but to require the County to step up to the plate in fulfilling its statutory obligation to maintain a county system capable of absorbing and operating city schools who surrender their charter.
>
> The remedy is the one proposed by the Attorney General. That remedy allows the Gibson County Board of Education and the Gibson County Special Board to contract for the Special Board to operate the high school. The remedy, however, requires the County to also provide a county system for K through 8 education and to levy a true countywide tax. The remedy of the Attorney General spells out in more detail and thereby underscores the obligations of the County in the Agreement with the Special Board and eliminates the trigger provision. All of these modifications appropriately recast the County's role and require the County to assume its statutory obligation as the primary entity responsible for education in Gibson County.

***9** Therefore, the court ordered the parties to submit a revised proposed remedy that followed the original remedy proposed by Gibson County and GCSSD but modified as suggested by the Attorney General. The court also ordered that the countywide property tax for education in the next proposed remedy must be sufficient to fund the local share of BEP for the GCSSD and "the shares of tax proceeds due to (MSSD, TSSD, BSSD and HSS) pursuant to Tennessee Code

Annotated §§ 49–3–315 and 67–6–712 as calculated by the Tennessee Department of Education."

C) Second Remedy Order

On February 7, 2002, the trial court issued a clarification of its First Remedy Order upon request of the GCSSD. ("Second Remedy Order"). The court found that GCSSD's collection of property tax for it to meet the BEP match violates Tennessee law since Gibson County must fund the minimum BEP local match for GCSSD. The court found GCSSD was able, however, to tax for additional revenue that exceeded the match pursuant to the private act.

D) Third Remedy Order

On May 22, 2002, the trial court issued yet another order on the revised remedies proposed by the parties (Third Remedy Order). At that juncture, Gibson County and the GCSSD were not able to agree on a joint remedy. The trial court reasoned that since Gibson County and GCSSD were unable to agree, then a contractual remedy was not possible. Therefore, the court accepted the remedy offered by Humboldt to abolish the GCSSD, ordered the imposition of a countywide property tax to fund the minimum BEP match, and ordered that Gibson County provide a kindergarten through twelfth grade school system.

> What the Court is faced with, then, is that the opportunity the Court provided the Gibson Defendants to effect a remedy consistent with Gibson County's statutory duties but short of abolishing the Gibson County Special School District has not been taken. That the Gibson County Commission, Gibson County Special School District and Humboldt have been unable to agree upon a contract means that a contractual remedy is not possible. Accordingly, the only remedy for curing Gibson County's statutory violations is to abolish the Gibson County Special School District. While the Court found in its February 12, 2001 memorandum and order that the 1981 Private Act establishing the Gibson County Special School District was constitutional, the Court is now compelled, by the failure of a contractual remedy, to declare that the Private Act establishing the Gibson County Special School District is illegal because the Act interferes with and prevents Gibson County from performing its statutory duties.
>
> It is therefore ORDERED that the Court declares the 1981 Act creating the Gibson County Special School District illegal on the grounds that the Act interferes and prevents Gibson County from performing its statutory duties.

E) Legislative Amendment and the Court's Order on Constitutionality of That Amendment

On the same day that the trial court issued the Third Remedy Order, Chapter 770 of the Public Acts of the State of Tennessee for 2002 was signed by the governor amending Tenn.Code Ann. § 49–2–501 by adding the following subpart:

> ***10** (b)(2)(C) Notwithstanding any other provision of this title, in those counties in which all students in grades kindergarten through twelve (K–12) are eligible to be served by city and special school systems, the county shall not be required to operate a separate county school system, nor shall it be necessary that a county school board be elected or otherwise constituted.

The amendment took effect July 1, 2002 (hereinafter called "Chapter 770").

Given the obvious potential impact of Chapter 770 to this case, Humboldt promptly filed a Motion for Declaratory Judgment and Injunctive Relief on May 31, 2002 seeking to have Chapter 770 declared unconstitutional. Although Humboldt's initial objection to the legislation concerned its caption being "overly broad," Humboldt's primary objection to Chapter 770 was that it allegedly violates Article XI, Section 8 of the Tennessee Constitution prohibiting special legislation.

Gibson County and GCSSD both filed motions to alter or amend the court's Third Remedy Order in light of the enactment of Chapter 770.

On September 23, 2003, the trial court found Chapter 770 to be unconstitutional on the ground that it is special legislation in violation of Article XI, § 8 of the Tennessee Constitution and enjoined its enforcement (hereinafter "Order on Chapter 770"). Without further elaboration, the trial court expressly adopted as its reasoning the arguments and authorities stated in Humboldt's reply brief.

F) Appeal And Stay Of The Trial Court's Orders

Timely appeals of the trial court's orders were filed by Gibson County and GCSSD. First, the parties allege the trial court erred in finding that Gibson County is required by state educational statutes to have and operate its own school system and levy a countywide property tax to fund

education. (Order, First Remedy Order). Second, it is alleged that the trial court had no authority to abolish the GCSSD by declaring the Private Act creating it "illegal" absent a finding of constitutional infirmity. (Third Remedy Order). Third, the trial court is said to have erred in holding Chapter 770 unconstitutional. (Order on Chapter 770). Finally, the parties allege the trial court erred in the formulation of remedies. (First, Second, and Third Remedy Order). The State appealed the trial court's order finding Chapter 770 unconstitutional.

The trial court granted the defendants' motions to stay any proceedings to enforce the trial court's orders pending appeal.

IV. Chapter 770

By its adoption of Chapter 770, the General Assembly ratified the situation that currently existed as to the organizational structure governing the provision of education in Gibson County. Chapter 770 clarified the General Assembly's intent with regard to that structure and approved it. Thus, regardless of whether the statutory scheme prior to its enactment can be read, as the trial court did, to require a county to operate a school system, Chapter 770 clearly authorizes the arrangement present in Gibson County.

***11** Accordingly, if Chapter 770 is a constitutional exercise of the legislature's authority over and discretion to provide a system of public education, questions regarding the original private act creating GCSSD and the subsequent removal of Gibson County from the operation of schools are no longer at issue. Because determination of the issues surrounding the validity of Chapter 770 may pretermit consideration of other issues, we begin there.

In its Order on Chapter 770, the trial court found that Chapter 770 constituted special legislation in violation of Article XI, § 8 of the Tennessee Constitution and permanently enjoined its enforcement. As its reasoning, the court expressly adopted the arguments and authorities stated in Humboldt's Reply Brief without further elaboration. According to this rationale, Chapter 770 is unconstitutional since it (a) violates the provisions of *Tennessee Small School Systems v. McWherter,* 851 S.W.2d 139 (Tenn.1993) ("*Small Schools I* "); (b) contravenes the statutory system that designates counties to administer education; (c) represents unsound public policy; and (d) the rational basis for the legislation does not appear on its face.[6]

V. The *Small Schools* Opinions

Throughout its filings, Humboldt makes reference to constitutional protections of students and to the holdings of the Tennessee Supreme Court in a series of opinions in the *Small Schools* case. In concluding that Chapter 770 was unconstitutional, the trial court adopted Humboldt's rationale which included an argument that the amendment contravenes the provisions of the Tennessee Supreme Court's decision in *Small Schools I, supra.* In the second in the series, *Tennessee Small School Systems v. McWherter,* 894 S.W.2d 734 (Tenn.1995) ("*Small Schools II* "), the Court restated its holding in *Small Schools I:*

> [T]he Tennessee Constitution guarantees to the school children of this State the right to a free public education and 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.

894 S.W.2d at 734.

In *Small Schools I,* the Court held that Article XI, Section 12 of the Tennessee Constitution guaranteed a free public education and placed upon the General Assembly the duty to "maintain and support a system of free public schools that provides, at least, the opportunity to acquire general knowledge, develop the powers of reasoning and judgment, and generally prepare students intellectually for a mature life." 851 S.W.2d at 150–51. The Court did not, however, find the current system unconstitutional on the basis of the education clause of the Tennessee Constitution. 851 S.W.2d at 152 (holding that the extent the system did not comport with the education clause need not be determined).

Instead, the Court found the existing funding system created by the General Assembly was unconstitutional because it violated the Tennessee Constitution's equal protection clauses.[7] "These provisions of the Tennessee Constitution assure the nondiscriminatory performance of the duty created by Article XI, Section 12." 851 S.W.2d at 153.

***12** The Court found that the record demonstrated substantial disparities in the educational opportunities afforded students across the state and that those disparities were caused principally by the statutory funding scheme. 851 S.W.2d at 156. The court also held that the proof failed to show a legitimate state interest "justifying the granting

to some citizens educational opportunities that are denied to other citizens similarly situated." *Id.* Consequently, the statutory funding scheme failed the rational basis test.

In *Small Schools II, supra,* and *Small Schools III, Tennessee Small School Systems v. McWherter,* 91 S.W.3d 232 (Tenn.2002), the Court continued to make clear that the question was substantial equality of educational opportunities. *See, e.g., Small Schools III,* 91 S.W.3d at 243 ("the educational funding structure [must] be geared toward achieving equality in educational opportunity for students, not necessarily 'sameness' in teacher compensation.") The focus in all three cases was on the funding structure, because that had been shown to be a primary cause of the disparities in educational opportunities across the state.

In *Small Schools II,* the Court found the General Assembly's solution through the Education Improvement Act, implemented incrementally, met constitutional requirements, with the exception of teacher salaries which were not included as a component of the methodology for funding costs.[8]

In *Small Schools III,* the Court found that the failure of the State to include teacher salary equalization in the formula applicable to other costs continued to be a significant constitutional defect and rendered the salary equity plan unsatisfactory in fulfilling the State's obligation to provide a system that affords substantially equal educational opportunity to all students. 91 S.W.3d at 243. This conclusion was based upon the Court's finding that there was no rational basis for excluding teacher salaries from a basic funding system consisting of cost-driven components. *Id.* The facts showed that wide disparities in teacher salaries still existed, and the Court found that such disparities "can lead to experienced and more educated teachers leaving the poorer school districts to teach in wealthier ones where they receive higher salaries." 91 S.W.3d at 242. The result was the continuation of constitutional inequities. *Id.*

Thus, it is clear that the *Small Schools* case dealt with substantial equality of educational opportunity, the funding method that directly affected the quality of education and disparity of opportunity, and the General Assembly's duty to provide a funding scheme that assured substantially equal educational opportunities across the state. The "uniformity" that Humboldt asserts the Court required in the *Small Schools* opinions applies only to the provision of the components of a basic quality education and a substantially equal opportunity to obtain the benefits of that education.

***13** The *Small Schools* case was about the method of funding schools. In the course of its opinions in that case, our Supreme Court also discussed the legislature's wide discretion in fashioning a statewide system that meets constitutional requirements.

> 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.

Small Schools I, 851 S.W.2d at 156.

The legislature's plan to address the constitutional deficiencies found to exist in *Small Schools I* (including the BEP) contained both funding and governance provisions designed to provide the programs and services essential to basic K through 12 education across the state. 894 S.W.2d at 736. Funding was based on actual costs of 42 components identified as necessary to providing an education meeting constitutionally required standards. *Id.* With regard to governance, the Court found:

> The essentials of the governance provisions of the BEP are mandatory performance standards; local management within established principles; performance audits that objectively measure results; public disclosure by each local system of objectives, strategies, and results; removal from office of local officials unwilling or unable to effectively manage a local system; and final responsibility upon the State officials for an effective educational system throughout the State.

Small Schools II, 894 S.W.2d at 739. The Court found that each of the factors related to funding and governance was integral to the overall plan and indispensable to it. *Id.*

While the Court indicated that, along with a number of other factors, organizational structure could affect the quality and availability of educational opportunity, *Small Schools I,* 851 S.W.2d at 156; *Small Schools III,* 91 S.W.3d at 243, the Court did not impose any requirement for uniformity in organizational structure. To the contrary, the Court specifically recognized the General Assembly's wide discretion in designing a statewide system and also recognized the importance and expectation of innovation at the local level.

The focus on the funding method in *Small Schools* was based on the court's finding that the existing method was a primary cause of disparities in educational opportunities. Such a factual predicate has not been shown in the case before us with regard to the effect of the system of providing education that exists in Gibson County. There is simply no proof that the organizational structure in Gibson County adversely affects the quality of education delivered by any of the school systems or that there exists a disparity of educational opportunity between students in the Humboldt system and those in GCSSD. To the contrary, the record supports the trial court's finding that there was no showing that there was a disparity in the quality of education or the substantial equality of educational opportunities between the students of the two systems.

***14** Because the existing system has not been shown to affect the rights recognized in *Small Schools I* and its progeny, Chapter 770, which ratified that system, also has no effect on those protected rights. Without proof of a causal connection between the organization structure for the provision of education to the students who live in Gibson County and any disparity in educational opportunities among them, the principles of *Small Schools I* and its progeny are simply not implicated.

Finally, *Humboldt* argues that in *Small Schools I* the Supreme Court found that the county was the instrument through which the legislature must comply with the constitutional requirement of substantially equal educational opportunities. We disagree and conclude the Court did not place such a restriction on the legislature. To the contrary, in all three *Small Schools* opinions, the Court repeatedly recognized the prerogative of the legislature in establishing a statewide system of public education as long as that system met constitutional requirements.

In *Small Schools II,* the Court found the legislative remedy adopted in 1992 met constitutional requirements. The Education Improvement Act and BEP apportion responsibility and accountability between the State and "local school systems." Consequently, the Court's discussion of the system used the same terms. For example, the Court recognized that the objective of providing programs essential to a basic education for public school children was to be "accomplished by defining the essentials of an effective education plan suitable for every local system." *Small Schools II,* 894 S.W.2d at 736. The Court made reference to governance and accountability being in the local systems, not in the counties. The "local system" develops a plan, and performance of the "local system" is monitored by the State. *Id.* at 737. The Supreme Court in its decisions in *Small Schools I* and *Small Schools II* did not limit the legislature's prerogatives on how it met its constitutional educational responsibilities to require that the legislature act through the county.

Because the Court reviewed the General Assembly's plan for compliance with the mandates of *Small Schools I,* and approved that plan with the exception of the teacher salary component, we cannot read the Court's opinions as creating organizational or structural requirements separate or different from those established by statute.

Consequently, we conclude that the structure through which the public schools in Gibson County are operated does not contravene any constitutional requirement imposed by the Court in the *Small Schools* opinions.

VI. State System For Public Education

The Tennessee Constitution requires that the General Assembly provide for the maintenance and support of a system of free public schools. Tenn. Constit., Article XI, § 12. Under this clause, the General Assembly has extensive power and discretion regarding the methods and means used to provide the public school system. *Small Schools I,* 851 S.W.2d at 156.

***15** The system designed and maintained by the General Assembly is based upon direct delivery of educational services by local school systems or local education agencies. These entities may vary by name, method of creation, organization, or otherwise.

> "Local education agency (LEA)," "school system," "public school system," "local school system," "school district," or "local school district" means any county school system, city school system, special school district, unified school system, metropolitan school system, or any other local public school system or school district created or authorized by the general assembly.

Tenn.Code Ann. § 49–1–103(2). Thus, the General Assembly has the broadest discretion to create or allow various entities to provide educational services to children in the state. The

statute not only recognizes existing entities, but also provides for new entities that might be created.

In addition to the types of local school systems identified, the General Assembly has also provided for additional variations. For example, Tenn.Code Ann. § 49–2–1101 *et seq.* provides that the boards of education of any two or more local school systems (including county school systems) may operate a school or schools jointly by contract. Under Tenn.Code Ann. § 49–2–1201 *et seq.,* multiple local school systems within a county may agree to consolidate. Additionally, county boards of education may combine to operate schools as a single multi-county consolidated school system. Tenn.Code Ann. § 49–2–1251 *et seq.*

In designing the education system in Tennessee, the legislature has clearly placed both responsibility and accountability in the local education agency, whatever organizational structure it might have. Throughout the statutes describing state administration of education, time and again the state places responsibility on the local education agency ("LEA") or local school system to fulfill local education responsibilities. Tenn.Code Ann. § 49–1–101 *et seq.* As set out above, the legislature has defined LEA or local school system to mean **any** system authorized by the legislature to deliver education. The following are examples of instances where the state places responsibility directly on the local system and the system is likewise accountable to the state:

a) the state is to designate fiscal accountability standards for local school systems to be used by the state to evaluate the fiscal operations of local school systems. (Tenn.Code Ann. § 49–1–210);

b) the state is to conduct performance compliance audits of local school systems and publish an annual report of the compliance and performance audits of the local school systems, showing incentives and sanctions applied to any local system (Tenn.Code Ann. § 49–1–211);

c) local boards of education shall perform annual financial audits and be accountable to the State Comptroller for those audits (Tenn.Code Ann. § 49–2–112);

d) performance goals are set for each school district in order to meet the goal that each school district have a mean gain equal or greater than the national norms. (Tenn.Code Ann. § 49–1–601);

***16** e) the state is to designate a management information system to be used by the local school systems to report information to the state for internal control and system management (Tenn.Code Ann. § 49–1–209);

f) school systems may be placed on probation by the state for failing to meet state standards (Tenn.Code Ann. § 49–1–602). If a school system does not make progress to meet the standards for 2 years, the state may assume governance of the system but "the LEA will continue to be accountable for the match required by the BEP funding formula for students served." (Tenn.Code Ann. § 49–1–602(f)(1)(A);

g) the state is to develop and provide to the LEAs guidelines for evaluation of certified personnel and each LEA must develop an evaluation plan approved by the state to insure consistency with the state's guidelines. (Tenn.Code Ann. § 49–1–302(d)(1));

h) LEAs are expected to meet class size standards, Tenn.Code Ann. § 49–1–104;

i) the state is to coordinate with LEAs on family life education and preschool/parenting learning centers (Tenn.Code Ann. § 49–1–205 and 206);

j) the state is to provide technical assistance to the LEAs (Tenn.Code Ann. § 49–1–213);

k) the state is to develop advisory guidelines for LEAs about safety (Tenn.Code Ann. § 49–1–214);

l) each LEA is to submit a compliance report to the state on teacher planning periods (Tenn.Code Ann. § 49–1–302(e)(2));

m) state coordinated health grants are available to LEAs (Tenn.Code Ann. § 49–1–1003).

It is clear that the legislature has placed responsibility and accountability for schools in this state in the agencies actually operating them—whether that agency be a county school district, a special school district, a municipal school district, or any other type of district authorized by the legislature. In fact, to the extent duties are placed on boards of education, it must be noted that the legislature has defined such boards as "the board of education which manages and controls the respective local public school system." Tenn.Code Ann. § 49–1–103(1).

In this statutory scheme of responsibility and accountability, the county has no role unless and to the extent it is actually

operating a school system. Even then, it is the county school system, not the county government itself, that is accountable to the state for education. If a municipal or special school district is operating in a county, then that district is accountable to the state for the operation of the municipal or special school systems, not the county or the county school system.

Nothing in the statutes requires the county to oversee or be responsible for municipal, special, or other school districts that operate within the county's borders. To the contrary, the State is responsible for maintaining the system and ensuring its standards. The State Report Card appearing in this record, for example, demonstrates that reporting, accountability and other responsibilities lie with the individual school systems. The counties in which municipal or other school systems operate do not report for those systems and do not otherwise have a role between the state and those systems.

***17** The General Assembly has provided for various entities to provide educational services at the local level. Local control is a desirable goal with benefit to the students.[9] The statewide system designed by the legislature recognizes differences in structure and organization, while consistently requiring one responsible unit: the local school system or local education agency.

Consequently, we cannot agree with the proposition that the county is the entity that is responsible for education of all students living in the county, even without Chapter 770. Neither the statutes nor actual practice supports such a statement.

VII. Special Legislation

Article XI, § 8 of the Tennessee Constitution provides as follows:

> General laws only to be passed.—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 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.

The Tennessee Supreme Court has interpreted Article XI, Section 8 to place limitations on the ability of the legislature to enact laws that benefit a county or counties or an individual or individuals unless such special legislation is supported by a reasonable basis.

In order for the provisions of Article XI, Section 8 to be triggered, a statute which is either local or local in effect must contravene some general law which has mandatory statewide effect. *Leech v. Wayne County,* 588 S.W.2d 270, 273 (Tenn.1979); *see Rector v. Griffith,* 563 S.W.2d 899 (Tenn.1978). In *Leech,* the General Assembly enacted a statewide scheme regarding county legislative bodies but, through population classifications, made exceptions for two counties. 588 S.W.2d at 273. The trial court found the exception for two counties violated Article XI, Section 8 of the Tennessee Constitution. *Id.* at 274. The Supreme Court declined to find the exceptions unconstitutional under that provision:

> While a strong argument can be made in support of this conclusion, **in view of the broad powers which the General Assembly has with reference to the structure of local governments and their agencies,** we are reluctant to rest our decision on that provision of the state constitution nor do we find it necessary to do so.

Id. at 274. (emphasis added) The Court then continued its analysis to find the exception violated another provision of the constitution. *Id.* at 274.

At one time, caselaw suggested that the legislature had unlimited authority to enact private acts affecting local governments without violating Article XI, Section 8. *See Rector,* 563 S.W.2d 899 (Tenn.1978); *Brentwood Liquors Corp. of Williamson County v. Fox,* 496 S.W.2d 454 (Tenn.1973). The Supreme Court, however, has found "more authoritive" the caselaw that holds that the legislature may not suspend a general law with mandatory statewide application unless there is a reasonable basis for such departure. *Rector,* 563 S.W.2d at 903–04.

***18** The *Rector* court also made clear that if there is no general state law that has mandatory applicability, then the legislature has "almost unlimited discretion to enact private legislation affecting the structure and organization of local government units." *Id.* at 904.

Thus, Article XI, section 8 is implicated only when the statute at issue contravenes (or suspends) some general law that has mandatory statewide application. *Riggs v. Burson,* 941

S.W.2d 44, 53 (Tenn.1997) *cert. den.* 522 U.S. 982, 118 S.Ct. 444, 139 L.Ed.2d 380 (1997), citing *Civil Service Merit Board v. Burson,* 816 S.W.2d 725, 727 (Tenn.1991); *Knox County ex rel. Kessel v. Lenoir City,* 837 S.W.2d 382 (Tenn.1992).

Even where a statute contravenes general law or suspends the application of general law in specified circumstances, it does not violate Article XI, Section 8 if there is a rational basis for the distinctions made.

> Article XI, section 8 is implicated when a statute "contravene[s] some general law which has mandatory statewide application." *Civil Service Merit Board v. Burson,* 816 S.W.2d 725, 727 (Tenn.1991); *Knox County ex rel. Kessel v. Lenoir City,* 837 S.W.2d 382 (Tenn.1992). If a statute does suspend a general law, article XI, section 8 is not violated unless it creates classifications which are capricious, unreasonable, or arbitrary. *Civil Service Merit Board,* 816 S.W.2d at 727. If any reason can be conceived to justify the classification, it will be upheld as reasonable. *Stalcup v. City of Gatlinburg,* 577 S.W.2d 439 (Tenn.1978).
>
> We need not determine whether the provisions cited by the plaintiffs are laws with mandatory statewide application. As already discussed, article XI, section 8 is commonly cited as one of two provisions which guarantee equal protection of the law under the Tennessee Constitution. **The analysis for determining whether a statute suspends a general law in violation of the Tennessee Constitution is similar to that for determining whether there is a rational basis for a classification.** As we have held, the statute, and the classification therein, is rationally related to several legitimate legislative interests. Thus, we conclude that it does not violate article XI, section 8 of the Tennessee Constitution.

Riggs 941 S.W.2d at 53–54. (emphasis added).

In other words, even if a statute contravenes a statute of mandatory statewide application so that it is special legislation triggering Article XI, section 8 inquiry, it may nonetheless pass constitutional muster under an equal protection analysis. The Supreme Court recently provided further guidance on the appropriate analysis under Article XI, Section 8:

> We have often recognized that the Class Legislation Clause of Article XI, § 8 is similar to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and this Court has previously applied Equal Protection analysis to questions arising under the Class Legislation Clause. *See, e.g., Riggs v. Burson,* 941 S.W.2d 44, 52 (Tenn.1997). To this end, we have recognized that Article XI, § 8 "guarantees that persons similarly situated shall be treated alike" *Evans v. Steelman,* 970 S.W.2d 431, 435 (Tenn.1998) (citation omitted), and that it 'prohibits the General Assembly from suspending the general law or passing any law inconsistent with the general law for the benefit of any individual [or group of individuals]....' *Finister v. Humboldt Gen. Hosp. ., Inc.,* 970 S.W.2d 435, 440 n. 3 (Tenn.1998).
>
> ***19** However, the Class Legislation Clause does not remove from the General Assembly all power to draw classifications distinguishing among differing groups. "The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States, and the legislatures are allowed considerable latitude in establishing classifications and thereby determining what groups are different and what groups are the same." *State v. Smoky Mountain Secrets, Inc., 937 S.W.2d 905, 912 (Tenn.1996) (quoting Plyler v. Doe,* 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (internal quotation marks removed)). Therefore, unless the classification "interferes with the exercise of a 'fundamental right' or operates to the peculiar disadvantage of a 'suspect class,' Article XI, § 8 requires only that the legislative classification be rationally related to the objective it seeks to achieve. *See, e.g., Newton v. Cox,* 878 S.W.2d 105, 110 (Tenn.1994).

City of Chattanooga v. Davis, 54 S.W.3d 248, 276 (Tenn.2001).

Therefore, unless a fundamental right or suspect class is involved, legislative classifications are examined to determine whether there is a rational basis for the classification.[10]

A. Class Legislation

As discussed earlier, the first burden a party challenging a statute as unconstitutional class legislation must meet is to show that the statute contravenes general law of statewide mandatory application. *Civil Service Merit Board,* 816 S.W.2d at 731. The "general law" being contravened usually means a statute. *Id.* The State defendants, through the Attorney General, argue, along with Gibson County, that Chapter 770 does not contravene generally applicable law. We agree.

The General Assembly's duty to provide a system of public schools is accomplished in general terms in Tenn.Code Ann. §§ 49–1–101 through –104. "There is established a system of public education." Tenn.Code Ann. § 49–1–101. Significantly, "The system of public education in Tennessee shall be governed in accordance with laws enacted by the general assembly...." Consequently, it is the entire set of statutes governing public schools that establishes the system. That necessarily includes Chapter 770, codified at Tenn.Code Ann. § 49–2–501(b)(2)(C), which is in the chapter on local administration.

As shown in the preceding section of this opinion, the General Assembly has designed a plan for statewide education that is based on local school systems as the entities responsible for the delivery of educational services to students in this state. It has also created and authorized various organizational structures for such local school systems, including possibilities that no school systems have chosen to adopt yet (such as combining county school systems).

Chapter 770 ratified the situation already existing in Gibson County. It clarifies that where all students living in the county attend schools operated by municipal or special school districts, there is no requirement that the county operate a school system. This arrangement is simply another form of organizational structure added to those specifically recognized in the statutory scheme. Consequently, Chapter 770 merely amends the laws whereby the General Assembly has provided for a system of public education.

***20** Just as the General Assembly has the broadest discretion in designing the statewide system of public education, it necessarily has discretion to authorize various organizational structures within that system. That includes discretion to create new entities or organizational structures and to modify or eliminate others.[11] Similar amendments in furtherance of legislative purpose regarding the provision of a school system are routinely made.

While Chapter 770 ratified the situation that existed in Gibson County since 1981, it is not limited by its terms only to that county. For example, while Humboldt disputes that Carroll County falls within the purview of Chapter 770, its description of the Carroll County system indicates otherwise. According to Humboldt, Carroll County has an elected school board and operates a vocational school, a special education program, and a GEC Plus 2 program. Apparently, it does not operate K through 12 schools. If that is the case, all the students in the county in grades kindergarten through twelve are eligible to be served, and apparently are being served, by city and special school systems. Consequently, under Chapter 770, Carroll County would not be required to operate a separate county school system or have a county school board.

Similarly, while the situation in other counties may not currently meet the requirement for the application of Chapter 770, the potential exists for that situation to develop in other counties. Although current statute prohibits the creation of new special school districts, Tenn.Code Ann. § 49–2–501(b)(3), there is no prohibition on increasing the size of existing special school districts. Such decisions are within the legislature's prerogative.

Consequently, we cannot find that Chapter 770 contravenes a statute of mandatory statewide application.

B. Rational Basis

Even if Chapter 770 were found to constitute special or class legislation, it nonetheless would not violate Article XI, Section 8 if it is rationally related to a legitimate legislative interest. In applying the rational basis test, courts presume that the legislature acted constitutionally and will uphold the statute "if any state of facts can reasonably be conceived to justify the classification or if the reasonableness of the class is fairly debatable ..." *City of Chattanooga,* 54 S.W.3d at 276 (quoting *Bates v. Alexander,* 749 S.W.2d 742, 743 (Tenn.1988); *Phillips v. State,* 202 Tenn. 402, 410–11, 304 S.W.2d 614, 617 (1957); *Knoxtenn Theatres v. McCanless,* 177 Tenn. 497, 505, 151 S.W.2d 164, 167 (1941). The party attacking the statute bears the burden of showing that the classification does not rest upon a reasonable basis. *Stalcup,* 577 S.W.2d at 442; *Estrin v. Moss,* 221 Tenn. 657, 667, 430 S.W.2d 345, 349, (1968) *cert. den.* 393 U.S. 318 89 S.Ct. 554 (1969). It is not necessary that the reasons for the special legislation appear on the face of the legislation. *Stalcup,* 577 S.W.2d at 442; *State ex rel Melton v. Nolan,* 161 Tenn. 293, 296, 30 S.W.2d 601, 602 (1930).

***21** Applying this standard leads to the conclusion that Chapter 770 is supported by a rational basis and furthers a legitimate governmental interest. First, and most obviously, the legislature may prefer to avoid bureaucratic duplication. All students in Gibson County are served by municipal or special school districts which have their own governance structure. Like counties, these school districts are creatures of the legislature and are accountable to the state. It is not

reasonable to require that the county operate an administrative structure that would merely duplicate that of the existing school systems. Additionally, where all students in a county are served by municipal or special school systems, with good results, it is not reasonable to require that students be moved to a new school system with different governance.

Second, Chapter 770 resolves any potential ambiguity as to whether the county is to act as a "middle man" between the state and the school districts delivering the education. As discussed previously, the state looks to the local school systems for accountability and performance. To the extent the trial court's rulings in this case triggered the adoption of Chapter 770, the legislature has a legitimate interest in clarifying its intent.

Finally, if one were to agree with the trial court that without Chapter 770 the GCSSD must be either abolished or otherwise rendered ineffectual, then the avoidance of this upheaval in Gibson County is yet another legitimate legislative interest. As the trial court found at one point, keeping GCSSD would maintain the community approval and support the special school district enjoyed and lessen insecurity among the students and parents in GCSSD schools. Confidence in the school system is an important goal, and that confidence had been earned by GCSSD's performance.

Therefore, Chapter 770 clearly has a reasonable basis.

For these reasons, we reverse the trial court and find Chapter 770 to be constitutional.[12] Accordingly, the trial court's holdings that Gibson County must operate its own school system and have a school board are reversed. Further, the trial court's order that GCSSD be abolished and its schools transferred to the county school system is also reversed, that remedy having been rendered moot.

VIII. Countywide Property Tax

The issue left to be resolved is whether the county must levy a countywide property tax to fund the minimum BEP match for the schools in Gibson County, even though there is no county school system, and distribute the proceeds among the systems in the county. Humboldt argues that the BEP requires that counties contribute to the cost of education by levying a countywide property tax for education sufficient to fund the local match for minimum funding under the BEP for all systems in the county. The revenue then must be distributed to the local school systems according to a formula based largely on student population. This method, according to Humboldt, assures that money follows the children, whereas under the method in effect in Gibson County, property tax revenue is collected on property within each local school system and kept by that system. Consequently, schools are supported according to the location of the property taxed.

***22** Humboldt argues that only a countywide tax conforms to the requirements of the *Small Schools* opinions because otherwise, there exists the inherent possibility of inequity among the systems. "Gibson County's failure to fully fund the local BEP match for each district creates a situation where there is substantial fiscal capacity disparity among school districts."[13] According to Humboldt, without a countywide tax, funding disparities can occur, and the current method of funding schools in Gibson County violates *Small Schools I and II* because there is no mechanism available to provide for equalization based upon the fiscal capacity of the separate districts within the county.

Based on the record before us, we must conclude that it is the potential for inequity, rather than any actual inequity, in educational opportunity that Humboldt complains of. The record is full of uncontradicted evidence showing that the students served by the five (5) school districts in Gibson County are receiving more than the minimum funding required by the BEP formula and that all five (5) of the districts are in compliance with the state requirements under the BEP. When we look to the students in Humboldt, we find that Humboldt spends more per pupil than any of the other districts in the county. A comparison of the quality of education between Humboldt and the GCSSD in terms of accreditation, class size, staff, teacher's salaries, and amount spent per pupil reveals that Humboldt schools outperform the schools of GCSSD. No substantial disparities in educational opportunity have been shown to exist.

Disparity of educational opportunity afforded students across the state was the basis for the holding in *Small Schools I* that the state's system for funding education violated the Tennessee Constitution. The Tennessee Supreme Court made it clear that the *Small Schools* case was about the quality of and equality of opportunity for education and not "equality of funding." 851 S.W.2d at 156.

The BEP was approved by the Court as meeting constitutional requirements and its basic components discussed. *Small Schools II,* 894 S.W.2d at 736–37. The objective of providing

programs and services to K–12 students across the state is accomplished through the BEP by (1) determining the cost of an adequate basic education for each local school system,[14] (2) allocation of funds to each local school system based on those costs; (3) funding to be provided by the state; and (4) the minimum funding to be provided by local systems. *Id.* The amount of funds collected locally does not affect the funding provided to a local system. A proportionate share of the total cost of the BEP is assigned to each local system based on its county's relative fiscal capacity.[15] 894 S.W.2d at 737.

The BEP and the Court allow for differences in funding among the school systems. The BEP provides for a minimum of state and local funding to provide a basic education. Local systems are permitted to collect and spend money beyond the minimum to provide additional programs and services or otherwise improve the quality of education in their systems.

***23** That is what is happening in Gibson County. Humboldt, which as a municipality can levy and collect property taxes, levies, collects, and spends more local tax revenue per pupil than is provided to or spent by the other school districts. Humboldt spends substantially more per pupil than GCSSD; it is not required to do so, but has made that choice. GSSD also provides considerable additional funds beyond the required BEP local match.

It is important to remember that Gibson County levies and collects a local option sales tax for education that is apportioned among the local school systems according to the appropriate formula. This tax revenue goes toward the local BEP match.

There is simply no showing that the method used in Gibson County to raise revenue for schools has resulted in any disparities in educational opportunities. Neither has there been any showing that a countywide property tax levied, collected, and distributed by Gibson County would affect educational opportunity. The local system's minimum share of the BEP would not change. The amount provided by the state for each local system would not change. Local school systems could still raise and spend more than the required BEP minimum. We have not even been shown how a countywide property tax would result in greater funding or educational opportunity for Humboldt schools and students.

The *Small Schools* opinions dealt with the method of distributing funds to achieve more equal educational opportunities and required the state to assume a larger share and to insure distribution of funds raised locally as well as by the state in a manner that would achieve that goal. "Each local government is required by statute to appropriate the funds determined to be its share." *Small Schools II,* 894 S.W.2d at 737. The Court did not address taxing methods or how revenue for education was to be raised. "Appropriate" is not the same as tax. While the Court was concerned with how revenue was distributed, it did not delve into taxation, an area largely within the broad discretion of the legislature.

Consequently, the failure of Gibson County to levy and collect a countywide property tax for education when it is not required to operate a county school system, when it levies and collects a countywide local option sales tax for schools, and where there is no disparity in educational opportunity among the local school systems attributable to the current method of taxation does not run afoul of any of the constitutional principles established in the *Small Schools* case. We can find no basis in *Small Schools* to require Gibson County, as a matter of constitutionally required substantial equality of education, to levy and collect a countywide property tax.

Consequently, Humboldt's case must rest upon a statutory requirement that every county levy a countywide property tax for education and allocate the revenues among all school districts in the county. That inquiry, however, must be undertaken in the context of the General Assembly's authority and action in the exercise of its taxing authority.

***24** The legislature may not delegate taxing power beyond the extent allowed by the state constitution. *Gibson County Special School District v. Palmer,* 691 S.W.2d at 549; *B.O. Keesee et al. v. The Civil District Board of Education,* 46 Tenn. at 128–29. The Tennessee Constitution allows the legislature to delegate its taxing power to counties and towns. Article 2, § 29. *B.O. Kessee,* 46 Tenn. at 128–29. This taxing power may not be delegated to special school districts. *Gibson County Special School District v. Palmer,* 691 S.W.2d at 549; *Williamson v. McClain,* 147 Tenn. 491, 249 S.W. 811, 814–15 (1923).[16]

Statutes governing special school districts and municipal school districts clearly anticipate that property owners within the district will be taxed by private act of the General Assembly. It is also significant that those statutes contradict Humboldt's premise that all property in the county must be taxed at the same rate by the county for schools. Tennessee Code Annotated § 49–2–106 provides that no municipal

or special school districts may be created unless certain conditions are met, including:

> The expressed willingness of the people of such city or special school district, as indicated by a majority of its legal voters in a referendum, to raise local funds which, together with school funds received from the state and other sources, shall be sufficient to provide adequate educational opportunities for their children.

Tenn.Code Ann. § 49–2–106(b)(3). The county is not specifically mentioned as a source of revenue. Furthermore, Tenn.Code Ann. § 49–2–107 specifically provides that property owners in special school districts must pay the property taxes levied by the private act creating the special school districts. It is clear, contrary to Humboldt's argument, a condition of municipal and special school districts is that schools in those districts be supported largely by taxes on the property in that district.

The private acts creating the special districts in Gibson County, including the GCSSD, each set the amount of the property tax to be assessed in that district. The legislature, therefore, has directly exercised its authority to levy a property tax to fund education in the special school districts in Gibson County.[17] Judging by the fact that each district is adequately funded, even exceeding the BEP requirement, the inescapable conclusion is that the legislature has levied a property tax sufficient to fund the BEP match for the special school districts in Gibson County.

This conclusion is further supported by Tenn.Code Ann. § 67–5–1704(c) and (d) which provides that in counties with a population of less than 50,000, the legislature shall set the property tax rate "necessary" for the special school districts. It is, therefore, the legislature that has assessed the property tax necessary for these special school districts, including the GCSSD.[18] There is nothing in these statutes which speaks in terms of the legislature simply "supplementing" the county tax as suggested by counsel for Humboldt. For these reasons, we find that in Gibson County the legislature has exercised its authority to tax property in the special school districts sufficient to fund the district's share of the BEP.

***25** The General Assembly has itself exercised the authority to tax property for schools in the special school districts. This action, and the statutory scheme requiring or authorizing it, contradicts the basic premise of Humboldt's argument: that the county is the instrumentality selected by the legislature to levy and collect the local school systems' share of the BEP.[19]

We must analyze the statutes relied on by Humboldt and the trial court in light of the General Assembly's authority and actions in the area of taxing for special school systems.

It is also relevant to the proposition that the county is responsible for levying a countywide property tax to fund schools located in the county that the statute authorizing cities like Humboldt to tax property for school purposes recognizes that the county may not provide revenue. The statute governing municipal school tax clearly anticipates that circumstances may exist whereby the county may not levy a countywide property tax.

> No tax shall be levied and collected in any municipality for and in any year unless the county wherein same is situated shall fail or refuse, on or before the April term of each year, to levy a county tax for common school purposes. Nothing in this section shall be construed to prohibit any municipality from levying a school tax additional to the county school tax.

Tenn.Code Ann. § 49–2–401(c).

The trial court relied upon Tenn.Code Ann. § 49–2–101(6) for its statutory authority requiring Gibson County to levy a property tax for education since one of the duties of the county legislative body is to:

> (6) Levy such taxes for county elementary and county high schools as may be necessary to meet the budgets submitted by the county board of education and adopted by the county legislative body.

The question is whether this statute requires Gibson County to levy a property tax for education. There are several ways to interpret this statute and under each interpretation Gibson County is not in violation of it. First, we do not believe this duty to impose a tax requires that a property tax also be assessed when the legislature has already levied the tax, in the case of special school districts, and delegated its authority, in the case of municipal school districts, such that the BEP funding level is achieved. The legislature itself assessed the rate of the property tax in the private acts creating the GCSSD, the TSSD, the BSSD, and the MSSD. Obviously, the property tax rate assessed by the legislature for these special school districts is sufficient to fund education since all spend more for education than the BEP minimum.[20] Therefore, it is not "necessary" for the county to levy a property tax.

Second, since Gibson County is not required to operate schools or to have a board of education, there are no county schools and no budget for county schools to fund. Therefore,

Gibson County cannot be faulted for failing to fund a non-existent budget.[21] For these reasons, we do not believe Tenn.Code Ann. § 49–2–101(6) places an obligation on Gibson County to assess a countywide property tax to fund the minimum BEP share for all the local school systems in the county.

***26** Chapter 3 of Title 49 deals with "Finances" for education. Humboldt relies on several statutes in that chapter. Part 3 (the Education Finance Act) begins with the announcement that it establishes the procedure for "the funding of education for the public schools, grade kindergarten through twelve (K–12)." Tenn.Code Ann. § 49–3–303(a). Part 3 establishes the only procedure for funding K–12 education. Tenn.Code Ann. § 49–3–304. The distribution of state funds is governed by Tenn.Code Ann. § 49–3–314, and such funds are distributed directly to the local education agencies or local school systems. Tenn.Code Ann. § 49–3–315(b)(2).

Tenn.Code Ann. § 49–3–315 is specifically relied on by Humboldt, and it provides in pertinent part:

> (a) For each LEA there shall be levied for current operation and maintenance not more than one (1) school tax for all such grades as may be included in the LEA. Each LEA shall place in one (1) separate fund all school revenues for current school operation purposes received from the state, county and other political subdivisions, **if any**.... All school funds for current operation and maintenance purposes collected by any county ... shall be apportioned by the county trustee among the LEAs therein on the basis of the WFTEADA maintained by each, during the current year. (emphasis added).

This statute does not require every county to levy a countywide property tax for all school systems located within the county. It authorizes one levy for each LEA or school system, regardless of what entity makes the levy. It speaks in terms of school taxes, not property taxes. It specifically recognizes ("if any") that there may be no revenue from the county. It establishes the method of distribution of any school taxes that may be collected by the county. Gibson County distributes its sales tax for education in accordance with that method.

Notwithstanding the exclusive method of funding language in Tenn.Code Ann. § 49–3–304, the statutes comprising the BEP, Tenn.Code Ann. §§ 49–3–351 *et seq.*, establish "the only procedure for the funding of the BEP, kindergarten through grade twelve (K–12)" in the form of the formula prescribed. Tenn.Code Ann. § 49–3–351(b). These provisions require each LEA to establish a fund for "all appropriations from all sources to fund education." Tenn.Code Ann. § 49–3–352(b). State funds under the BEP formula are distributed directly to each LEA. State and local contributions are defined as percentages of the cost of components. Tenn.Code Ann. § 49–3–356. That statute also provides:

> 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.

This statute deals with appropriation, not raising revenue or taxing. Obviously, the reference to a school budget approved by the local legislative body applies only to those local school systems whose budgets must be approved by such a body. Although the reference to "local governments" creates some ambiguity,[22] we cannot read the statute as requiring that a county that operates no county schools is required to levy a countywide property tax for schools. In the context of the organizational structure of special school districts and the authority of the General Assembly to levy taxes for those districts, we interpret local government to mean the governing body of the system with authority to appropriate revenue. The statute does not address how revenue is raised. Each local school system in Gibson County collects, from the property tax levied by the General Assembly or the City of Humboldt, from sales tax revenue from the county, and elsewhere, the money needed for its local match under the BEP. We think that is the purpose of the language quoted.

***27** We have examined the other statutes cited by Humboldt, and we find nowhere in these statutes a clear directive that counties must levy a countywide property tax to fund schools when the county operates no school system and when all schools in the county are funded through property tax levies by the General Assembly or the municipality operating a local system and with the county sales tax.

It would take a clear statement to overcome the statutes, including private acts, authorizing or requiring the General Assembly to levy taxes on property located in special school districts, statutes requiring that people in a special school district or a municipal school district raise local funds for schools in that district, and statutes recognizing the possibility that a county may not in fact provide funds to municipal or special school districts. We find no such clear statement in the statutes cited.

Humboldt argues that Gibson County should be required to levy a countywide property tax for schools because every other county does so. While uniformity has its benefits and is a desirable goal in many systems, it is the prerogative of the legislature, not the courts, to make that decision. The basic components of the BEP achieve equality of educational opportunity through funding. While the General Assembly could have required uniformity in how those funds are raised, it did not. Perhaps it thought it advisable to leave taxing methods alone in view of the varying entities that can provide education, their varying organizational structures, and the limitations on their taxing authority.

We must conclude that there is no constitutional or statutory requirement that Gibson County levy, collect, and distribute a countywide property tax to fund the municipal and special school systems within the county.[23] As a result, we reverse the trial court's holding to the contrary.

The trial court's judgment is reversed. Costs are taxed to the appellees, the City of Humboldt, its Mayor and Board of Aldermen of the City of Humboldt, for which execution may issue if necessary.

All Citations

Not Reported in S.W.3d, 2005 WL 2051284

Footnotes

1 Portions of the record and the parties' briefs suggest that all students in Carroll County are also served by special or other school districts and that Carroll County, like Gibson County, operates no K–12 schools. Carroll County operates certain other programs, such a vocational training, and collects a countywide property tax for education.

2 The Humboldt City School System was later allowed to intervene.

3 However, Gibson County also thinks the effort is misguided since, according to its calculations, a countywide property tax sufficient to meet the minimum BEP requirement would result in an eight cent per $100 increase in the tax rate in Humboldt.

4 This is a reference to Tenn.Code Ann. § 49–2–101(8).

5 In *Gibson County Special School District v. Palmer,* 691 S.W.2d 544 (Tenn.1985), our Supreme Court addressed the constitutionality of the referendum provisions in a 1984 Private Act that allowed the property tax rate of the GCSSD to be increased. This 1984 Private Act, in effect, amended the 1981 Private Act creating the GCSSD by raising the property tax rate. The court found the referendum provision to be unconstitutional but applied the doctrine of elision to uphold the remaining provisions of the 1984 Act. *Id.* at 551–52.

6 Humboldt does not renew this argument on appeal. The law is well-settled to the contrary. *Stalcup v. City of Gatlinburg,* 577 S.W.2d 439, 442 (Tenn.1978); *Board of Education of Memphis v. Shelby County,* 207 Tenn. 330, 373–74, 339 S.W.2d 569 (1960) (opinion on pet. to rehear).

7 Article I, § 8 and Article XI, § 8.

8 The Court warned that the exclusion of teacher salaries put the entire plan at risk functionally and, therefore, legally. 894 S.W.2d at 738. At the core of this decision was the Court's finding that teachers are the most important component of any education plan and a major part of any education budget, dismissing the State's argument that teacher salaries did not affect the quality of instruction or educational opportunity.

9 While the Supreme Court found that the benefits of local control do not justify the disparities in educational opportunity shown to exist in *Small Schools I,* in large part because local control did not require the funding scheme that created the disparities, it recognized the value of such control. *Small Schools I,* 851 S.W.2d at 154–55.

10 No party to this matter attempted to argue that a heightened level of scrutiny was appropriate, and all parties cast the issue in terms of whether or not Chapter 770 was supported by a rational basis. No fundamental right or suspect class is implicated by Chapter 770. There is no fundamental right to a particular administrative structure to deliver public

education. There is no fundamental right to have the county, as opposed to a local school system operate the schools and be accountable to the state for that operation. Furthermore, there is no evidence in the record that Chapter 770 adversely affects any suspect class.

11 For example, Humboldt places great significance in parts of its brief on legislation adopted in 1982 that prohibited the creation of new special school districts after April 30, 1982. Tenn.Code Ann. § 49–2–501(b)(3). That legislation also abolished existing special school districts that were not taxing districts. Tenn.Code Ann. § 49–2–501(a)(1). Statute also limits the number of special school districts in counties with specified populations. Tenn.Code Ann. § 49–2–501(b).

12 Alternatively, Humboldt argues on appeal that Chapter 770 never came to bear on the GCSSD since the trial court ordered the GCSSD abolished in May of 2002 and Chapter 770 did not become effective until two months later, in July of 2002. In fact, the trial court's third remedy order was entered the same day Chapter 770 became effective and remained subject to modification and to post-judgment motions, which is what were filed herein.

13 As Humboldt asserts, the fiscal capacity component of the BEP is measured on the basis of the county since statistical data is not available for smaller units.

14 This calculation involves a formula that takes into account the variations in costs across the state.

15 A county's fiscal capacity is based on sales tax base, property tax base, and income. Each county's capacity is calculated as a percentage of the total capacity of all counties. 894 S.W.2d at 737.

16 All parties and the trial court appear to have assumed that a special district has the authority to levy a tax and thus the issue became whether the county or the special school district had the obligation to levy the property tax to fund education in the first instance.

17 As for the municipal school district in Gibson County, the legislature delegated to Humboldt its authority to levy a property tax to fund education. Tenn.Code Ann. § 49–2–401.

18 Tenn.Code Ann. § 67–5–1704(d) provides it is not applicable to any county of the first, second, or third class as defined in Tenn. code Ann. § 8–24–101. Tenn.Code Ann. § 8–24–101 defines these three (3) classes as having populations of over Fifty Thousand (50,000) people according to the most recent federal census. *See* Tenn.Code Ann. § 8–24–101(a)(1)(2)(3) and (b). The 2000 census population for Gibson County was Forty–Eight Thousand One Hundred Fifty–Two (48,152), thus making Tenn.Code Ann. § 67–5–1704 applicable.

19 It is important to note that the issue is not whether a county must assess a countywide property tax to fund education but whether a county must also do so when the entire county is already being taxed by the legislature or municipality. There is no question that absent taxation by the legislature the county would bear this responsibility.

20 As discussed earlier, Tenn.Code Ann. § 67–5–1704(c) specifically requires the legislature to “set the tax rate for [each] special school district at a level to generate the ad valorem revenue necessary for such special school district.”

21 We also note that the county is collecting a local option sales tax, and the statute does not prescribe a property tax.

22 School districts are local governmental entities. Tenn.Code Ann. § 29–20–102(3)(A).

23 Humboldt has brought this case as one based on constitutional principles and statutes regarding education with the goal of ensuring protection of students' rights to equal educational opportunity. It appears to us, however, that much of the real complaint is about taxation, taxpayers, and those who levy taxes. For example, Humboldt argues that “equal educational opportunity requires that each student ought to have equal access to funding and, if a school district is required to levy a higher tax rate on its citizens than others within the county, then equal access has been impaired.” This argument demonstrates what we perceive as an attempt to transform a tax issue into an education issue. To resolve the issues as presented, we need not examine the information presented about tax rates, tax base, and tax yield in the various districts and need not determine whether any taxpayer disparity actually exists. We simply note that the kind of disparity

Humboldt complains of was recognized in the statutes allowing the creation of municipal and special school systems. In any event, it has not been shown to have any effect on educational opportunities of the students.

End of Document

EXHIBIT B

nature that you would like to bring to that committee, they are, hopefully, getting close to a final report in there, so if you want any input in that committee, you can go to that committee. Tomorrow at 12:00 noon, the Attorneys General sub-committee will meet briefly with Chairman Bailey. He requested a meeting at 12:00 noon tomorrow, in the Senate Chamber.

MR. PRESIDENT LEE: Chairman Oehmig.

MR. OEHMIG: Mr. Chairman, I would like to make an announcement at this time although it might be out of order on the agenda, while we have some time.

MR. PRESIDENT LEE: Not at all, we are on the Regular Order now.

MR. OEHMIG: We have a meeting of the Judiciary that was called at 10:00 a.m. It will be immediately after this session. We have two speakers scheduled. What I want to call to the whole Judicial Committee is that this afternoon at the invitation of Delegate Bernstein, we have Dean Penegar from the University of Tennessee Law School, to speak to us. I think everyone will be interested in hearing what Dean Penegar has to say.

MR. PRESIDENT LEE: Delegate Evans.

MR. EVANS: Mr. President, I have been informed that Style and Drafting which was to meet at 12:30 p.m., would like to meet immediately after the session, this morning, in Room 305, in order to avoid a conflict with another committee or two. So they will meet in Room 305 immediately after the session. That is Style and Drafting.

MR. PRESIDENT LEE: Dr. Rowe, that was your announcement, was it?

MR. ROWE: That confirms what I was going to say.

MR. PRESIDENT LEE: Chairman Burson.

MR. BURSON: Mr. Chairman, two announcements on the State Spending Committee. One is, this afternoon, beginning at 12:30 p.m., we will have with us a gentleman who is very knowledgeable with the New Jersey law, which is the only legislative provision that we know of in the States, dealing with state limitations. He will be addressing us and explaining how that works. Also, Mayor Wyeth Chandler of Memphis will address us after that presentation. For all the members of the Convention and for the delegates, the Convention will be privileged tomorrow, at 2:00 p.m., to hear by a two-way telephone hook-up, Dr. Walter Heller, from the University of Minnesota. Dr. Heller is kind of the "contra" to Dr. Milton Friedman. Dr. Heller is considered the father of revenue sharing, and has been Chairman of the President's Board of Economic Advisors under Kennedy and Johnson. His call is being brought to us through the League of Women Voters. All of you are invited to attend tomorrow at 2:00 p.m.

MR. PRESIDENT LEE: Delegate Evans.

MR. EVANS: If there is no other business, I move we adjourn until 9:00 a.m. tomorrow morning.

MR. PRESIDENT LEE: Is there a second? It has been moved and seconded that we stand adjourned until 9:00 a.m. tomorrow morning. All those in favor, let it be known by saying aye, opposed, no. We stand adjourned till 9:00 a.m. tomorrow morning.

The Journal of the Debates

of the

LIMITED CONSTITUTIONAL CONVENTION OF 1977

STATE OF TENNESSEE

WEDNESDAY, SEPTEMBER 28, 1977

THIRTIETH DAY

MR. PRESIDENT LEE: Will the Convention please come to order? Will the delegates and visitors please stand and the invocation will be delivered by the Chaplain for the Day, the Reverend Louis Johnson, who is Pastor of the Connell United Methodist Church of Goodlettsville. He is here with us as a guest of Delegate Shirley Duer of Crossville.

(Invocation)

MR. PRESIDENT LEE: Please remain standing while the Pledge to the Flag will be led by Delegate Harold Jude Smith and his son, Harold Jude Smith, Jr., Honorary Page, who is to my immediate left, from Nashville.

(Pledge of Allegiance to the Flag)

MR. PRESIDENT LEE: Delegate North.

LADY NORTH: Mr. President, I move we dispense with the reading of the Journal.

MR. PRESIDENT LEE: Delegate North has moved that the reading of the Journal be dispensed with. Is there a second? All those in favor, let it be known by saying aye, opposed, no. At the sound of the bell, will the delegates please answer the roll call. Has every delegate answered the roll call?

MR. CLERK: Mr. Little, blue button please. Mrs. Corley, is your button not working?

MR. PRESIDENT LEE: Record the roll call, Mr. Clerk.

(Roll Call)

MR. CLERK: Mr. President, there are 91 delegates present.

MR. PRESIDENT LEE: There is a quorum present. Regular Order of Business, Mr. Clerk.

MR. CLERK: Reports from Standing Committees. Reports from Select Committees. Resolutions Referrals. Introductions of Resolutions. Resolution No. 143 by Mr. Sterling to amend Article XI, Section 11 of the Constitution of Tennessee relative to Homestead Exemption.

MR. PRESIDENT LEE: Lies over.

MR. CLERK: Resolution No. 144 by Mr. Townsend, et al., to amend Article VI of the Constitution of Tennessee relative to the defense of indigents.

MR. PRESIDENT LEE: Lies over.

MR. CLERK: Unfinished Business. Mr. President, as directed by the Calendar and Agenda Committee, we have scheduled a meeting of the Committee of the Whole this morning, to consider the Report from Committee on Education.

MR. PRESIDENT LEE: Does everyone have a copy of the Committee on Education's Report? Delegate Walker.

MR. WALKER (RHEA): Mr. President, I move at this time that we resolve ourselves into Committee of the Whole to consider this article on education.

MR. PRESIDENT LEE: Is there a second? It has been moved and seconded that we . . . Did you put a time limit on that, Mr. Walker?

MR. WALKER (RHEA): Mr. Chairman, I would like to put a one hour time limit on that, if I may.

MR. PRESIDENT LEE: It has been moved and seconded that we resolve ourselves into Committee of the Whole to consider education for one hour. It is now 9:10 a.m., so that would put us at 10:10 a.m. All those in favor, let it be known by saying aye, opposed, no. We will resolve ourselves into Committee of the Whole. The Chair would like to ask Larry Brown of Memphis to come forward and chair the Committee of the Whole.

CHAIRMAN BROWN: May the Committee of the Whole come to order please? The Chair ascertains that there is a quorum present and we will begin to take care of business that is before this committee. We are in session for the purpose of considering the Report of Committee on Education. The Chair will recognize Delegate Helms for the purpose of presenting the report of the committee.

MR. HELMS: Mr. Chairman, permission is requested to approach the Well for the purpose of presenting the Education Committee's Report.

CHAIRMAN BROWN: It is granted.

MR. HELMS: Mr. Chairman, fellow delegates, the Education Committee submits this report to you for your consideration and addition.

CHAIRMAN BROWN: The Clerk will read the report of the committee.

MR. CLERK: "Mr. President and Members of the 1977 Limited Constitutional Convention: Your Committee on Education held six meetings. During this time we have heard from Dr. Cavit Cheshire of the Tennessee Educator's Association; Ms. Esther Swink of the Metro Nashville Educator's Association; Mrs. Rose McGee, Chairman; and Mrs. Marty Nord of the Education Committee for the Tennessee League of Women Voters; Mr. J. H. Warf, former Commissioner of Education; Jack Ownby, Executive Director of the Tennessee School Board Association; John Lewis, Legal Counsel to the Convention; Sam Ingram, present Commissioner of Education. We received reports from members of the legislative branch of

government and had the research assistance of Rick Choate, Del Gustafson, Don Daugherty, and John Sieppe from the Vanderbilt School of Law. We have carefully considered Resolutions Nos. 8, 18, 33, 55, 101, and 116, and have unanimously voted to recommend to the Convention a proposal in lieu of these resolutions.

"Thereby, we respectfully submit our committee report which reads as follows: 'BE IT RESOLVED BY THE LIMITED CONSTITUTIONAL CONVENTION OF 1977, THAT THE FOLLOWING AMENDMENT TO THE CONSTITUTION OF TENNESSEE BE PROPOSED BY THIS CONVENTION AND SUBMITTED TO THE PEOPLE OF TENNESSEE FOR THEIR RATIFICATION: That Article XI, Section 12 of the Constitution of Tennessee be amended by deleting the present section in its entirety and substituting in lieu thereof the following: Section 12. Inherent Value of Education. The State of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility of a system of free public schools open to all persons in the State and shall establish and support such other post-secondary educational institutions, including public institutions of higher learning, as may be determined by the General Assembly.' "

MR. HELMS: In considering this report, I would like to commend the Education Committee for its sincere dedication to the task. That was evidenced, I think, by unusually good attendance and arriving at a unanimous decision in the report. I would like to thank the following for their contributions and advice and research to the committee, in addition to those already named in the report just read.

Mr. Jerry Lee, Budget Director, helpful in budgetary items; Mr. Leonard Bradley, Assistant to the Comptroller; Dr. Howell Todd, Former Director of Research; Mr. David Porteous, Counselor for the State Board of Regents; Mr. James Vaden, Business Manager, State Board of Regents; Dr. Roy Nix, State Board of Regents; Dr. Wayne Brown, Tennessee Higher Education Commission; Dr. Edward Boling, President, University of Tennessee; and our faithful secretary, Miss Melissa McCrary.

In addition to these people making their contributions to this report, the sponsors of House Bill 290, Messrs. Ashford, Murray, and Moore, and the sponsor of Senate Bill 388, Senator Ashe, were contacted and asked the intent of placing the Education Call on the Limited Agenda along with their advice. Some of the facts of the bills' placement on the Limited Agenda are contained in the summary report that should be on your desks. I will not take the time to have that summary report read unless there are several delegates who have failed to receive a copy or have some question about it. Would you like to have that report read? Well then, let me say that the net result is that the committee with an outdated article and a very narrow call, was not originally intended that the Education Article be placed on the Limited Agenda. It came in the back door by way of an amendment to the Senate Bill. At that particular time, one of the senators said he would like to have white and Negro schools removed from that particular section since it was an affront to his race. This was adopted. The scope was not enlarged. So, it did leave us in a very precarious sort of situation. The entire article is outdated and outmoded. It has not been touched for one hundred seven years. So, in effect, they were asking us to go into a dusty room and clean one corner. We chose to clean the entire room. We tried to stay within the scope of the Call, and I believe we have in this particular article that we are submitting to you.

Section 12 of Article XI did contain two hundred and ninety-two words and had the short titles, Education to be Cherished, Common School Fund, Poll Tax, Whites and Negroes. We left the section with seventy-four words and the short title, Inherent Value of Education,

Public Schools, and Support of Higher Education. We tried diligently to stay within the subject matter of the section, and tried to avoid any controversial items that could endanger ratification of our proposal. We felt like that some of the items that we considered might have had merit, but to place them in there would place a controversial item and new subject matter within the section, thereby endangering it from a legal standpoint, if not the standpoint of ratification. Mr. Chairman, we are ready for questions or further action.

CHAIRMAN BROWN: At this time, the Chair will entertain questions delegates might have relative to the report. I know we have several amendments; we will get to those after we finish with the questions to Delegate Helms. The Chair recognizes first, for the purpose of a question, Delegate Crawford.

MR. CRAWFORD: When the report and resolution was read by the Clerk, I think I caught a word that was added that was not in the copy I have on my desk. Can you tell me what that was again?

MR. HELMS: Yes, there is a change. In fact, there are two changes. I think they are editorial and can be made by Style and Drafting. They could be made, I think, at this time, too, because the entire committee has been consulted on the change. The first one is the "State of Tennessee recognizes", that should be present tense rather than past. Then further on down, in the middle of the article, the "General Assembly shall provide for maintenance support and eligibility standards." That was the word that was inserted. This is a matter of good syntax, I think, more than anything else. It does not change the meaning.

MR. CRAWFORD: Let me ask what this meant by the phrase, "eligibility standards."

MR. HELMS: You will notice in the article there, that we have said, a system of free public schools opened to all persons. Without eligibility standards, it would be possible, if you have a free public school system open to all persons, a mother with a three-year-old child to say, "Here is Mary Lou; take care of Mary Lou, while I go to work." This was the intent. We do have that sort of thing defined by legislation now in compulsory attendance ages; eligibility is set for that, six to age seventeen or through age sixteen. This is the nature of the same thing.

MR. CRAWFORD: Mr. Helms, did the three amendments which we have on our desks, appear before the committee in the form of other resolutions?

MR. HELMS: Let me ask you this; the three amendments? I only have two; two have been distributed to me.

MR. CRAWFORD: The third amendment is Delegate Dixon's regarding prayer in public schools.

MR. HELMS: Yes, that amendment, prayer in the schools, was considered. It was rejected, not because the committee did not feel like it was a worthwhile endeavor for individuals, but because we felt like it had no place in the Constitution; that the inclusion of such an article would be new subject matter. It would go beyond the scope of Mr. Lewis' interpretation, and certainly beyond the Attorney General's interpretation. It would be controversial, it would endanger ratification. There is no support for it by those who spoke to us in the committee. Already we had precedents, a large number of U.S. Supreme Court decisions saying that this matter is unconstitutional. We removed the poll tax because it was unconstitutional from this article, and it has been so declared. We did not want to include another that would have been unconstitutional.

MR. CRAWFORD: Delegate Helms, can you give us the committee's views on the other two amendments?

MR. HELMS: All right.

CHAIRMAN BROWN: The Chair next saw Delegate Eskind, then Delegate Hennessee, and then Delegate Denton. Delegate Denton, did you have a question?

MR. DENTON: I did not understand that question about talking on all amendments before they are even called up. Do we not work on one at a time?

CHAIRMAN BROWN: Just a minute, Delegate Denton, if you please. The Chairman cannot hear you. Go ahead, Herb.

MR. DENTON: I am sorry to break stride here, but there is something I caught about talking on the amendments. Usually they are called up one at a time and discussed. I did not understand that.

CHAIRMAN BROWN: Are you directing your question to me?

MR. DENTON: Let me put it in the form of a question. Are we going to discuss each amendment and vote it up or down? It seems there was someone who said we should discuss all the amendments and that the chairman should give his opinion on all the amendments at one time.

CHAIRMAN BROWN: No, we will consider each amendment in order. We will conclude questions on the report of the committee, entertain a motion to adopt that report, then take up the amendments in the order in which they were presented. Are there any other questions pertaining to the report of the committee? Delegate Hyder.

MR. HYDER: Mr. Committee Chairman, I wanted to ask for the record, what does the committee mean in the wording of the first sentence of the section? "The State of Tennessee recognizes the inherent value of education and encourages its support." Do you mean the people of the State, the government of the State, or what? What is meant by that sentence? Is it not superfluous to have it in there because then you go on to provide for it, which, of course, indicates that this Constitution believes in it and supports it? I just wondered what you meant by it.

MR. HELMS: Let me give you a little background on that. I believe it will clear it up, Delegate Hyder. Education came into the Constitution almost as a memorial. The precedent was set in the ordinances of 1785 and 1787 at the time the Northwest Territory was opened up. One of the conditions for becoming a state of the three conditions at that particular time, was to make some provision for education, to have a judiciary and to have a certain number of people, about 60,000. So, it came to be written into the Constitutions of that day, some type of memorializing statement, indicating that you would consider education and give education a place in the state. Constitutions following the Northwest Ordinance precedent, put this in their constitutions. The State Constitution of 1796, first one for Tennessee, did not include such memorializing statements simply because we organized under an ordinance other than the Northwest Ordinance. We did, in the next Constitution in 1834, include this short title, Education is to be Cherished. It is a tribute or memorial to education. We have shortened that memorial by saying that there is an inherent value in education. In other words, it is a good that should be supported by the State. That is the reason, Delegate Hyder, for including that. It is a historical sort of precedent.

CHAIRMAN BROWN: Are there any other questions for Chairman Helms concerning the committee's report? Delegate Holloman.

MR. HOLLOMAN: Just a brief question. I believe the present Constitution provides that funds that are escheating to the State, go to the educational fund, whatever there was. I just wondered if this cuts off any vehicle for escheatment property coming to the State to go for education.

MR. HELMS: We have checked carefully with all the people concerned, the Comptroller's Office, the Director of Budget. There are no items included in the funding of education today that can be identified in any way with the common school fund or the escheatment of property. Probably, the escheatment was lost for several reasons. One is, that it was tied to the common school fund. Of course, on your desks you have the historical backgrounds that have the common school fund. It is very interesting and almost like fiction really. But it is history. The common school fund was, of course, lost and declared legally dead in 1873. The escheatment of property was tied to the common school funds, so it is not a factor. Even in its heyday, there was not more than a hundred thousand dollars derived from the common school fund for the support of education. All of this became inadequate after the turn of the century, and especially in the twenties. Later on, all of it was ploughed under, so to speak, even the interest from the common school fund, by legislation in 1949 which set a taxation base for the support of education. I assure you, Delegate Holloman, there are no diminishing of funds for education as a result of the changes that we made in this article.

CHAIRMAN BROWN: Delegate Walker of Roane.

MR. WALKER (ROANE): Mr. Helms, in the terminal part of the proposed change where it says, "shall establish and support such other post-secondary educational institutions, including public institutions", would that be implying that it would also permit the legislature to fund private institutions?

MR. HELMS: This would be a matter, I suppose, for legislative decision. It is today. That is, in the matter of tuition grants or anything of that sort. It leaves untouched; it is pretty much the style and the intent of the original language. But we did not consider that; we considered this sort of thing, post-secondary institutions might include community college, libraries, vocational education programs outside of the public school system, and other educational endeavors beyond grade 12 that the State might wish to undertake in the future. We did not want to close all doors or restrict too tightly.

CHAIRMAN BROWN: If there are no further questions . . . Delegate Bernstein.

MR. BERNSTEIN: Mr. Helms, I notice in the last sentence you have used the words "the General Assembly", at the beginning of the sentence and also at the end of the sentence. Can you not leave it out in one of those places?

MR. HELMS: I am sure Style and Drafting will take care of this. If that is the way it should be, I recommend that they do that.

CHAIRMAN BROWN: The Chair sees Delegate Holloman standing. Realizing our rule, one time speakers before someone else speaks a second time, is there any other person who would like to speak before the Chair recognizes Delegate Holloman? Delegate Holloman.

MR. HOLLOMAN: Thank you. The original Constitution speaks toward common schools throughout the State. Your proposed amendment speaks of free public schools. Could this be construed to establish state public schools instead of county-wide public schools?

MR. HELMS: No, it has nothing to do with that. The terminology "common school" came into being very early. In fact, it was for the common people. Nobody attended the common school much in the beginning. It did not have any studies, it did not have prestige. Nevertheless, it came to be known as the common school. It was poorly funded and not funded at all until about 1806, and meagerly then. Later on it was some better. Nevertheless, it is a historical sort of statement for public schools.

CHAIRMAN BROWN: If there are no further questions to the chairman, the Chair will, at this time, entertain a motion to adopt the report of the committee. It has been moved and seconded that the report of the Committee on Education be adopted: Is there any discussion? We are now ready to take up the matter of the amendments. We have Amendment No. 1 by Delegate Smith. I think it would be proper at this time for Delegate Smith to move that the report be amended. The Chair will recognize Delegate Smith for that purpose. Delegate Wilder.

MR. WILDER: Has the motion been formally made that this be adopted?

CHAIRMAN BROWN: Yes.

MR. WILDER: Thank you. I am sorry.

CHAIRMAN BROWN: Delegate Akin made the motion to adopt the committee report which was seconded by Delegate Hennessee. Delegate Smith.

MR. SMITH (HAMILTON): I make a motion that Amendment No. 1 be adopted.

CHAIRMAN BROWN: It has been moved and seconded by Delegate McDaniel that Amendment No. 1, which you have on your desks, be adopted as an amendment to the proposed report of the Committee on Education. Mr. Clerk, would you read Amendment No. 1?

MR. CLERK: Amendment No. 1 by Mr. Smith to amend the report of the Committee on Education by adding an additional paragraph to the proposed amendment of Article XI, Section 12 as follows: "The policy-making body of each local school system shall be elected by the registered voters of that school district."

CHAIRMAN BROWN: We will now open the Floor for discussion on Amendment No. 1. Discussion on Amendment No. 1. Delegate Helms.

MR. HELMS: Amendment No. 1, here, the policy-making body of each local school system, of course, means your board of education. This was discussed in committee. We decided to reject this idea for several reasons; it is not a function of the Constitution to get into matters of this sort. There is a remedy, through law, now through private act, if you wish to have this done, you can have it done. It is not excluded by the Constitution; it is not aided or abetted by the Constitution; it is a matter of local importance. If we include the details of operation in such an article, we run a risk of going over into the legislative area and leaving the memorializing intent of the section to begin with. If it is valid, and I personally favor the idea, though not in the Constitution, it would be a matter of local government rather than a matter of education. The philosophy of a man who is respected in education, Arthur E. Wise, and he was the former Associate Director of the National Institute of Education, had this to say about trying to escalate educational policy to higher levels.

He says, "While we may applaud many of the results of the new educational policy, we should be worrying about a major unintended effect, the increased centralization of

educational policy-making. We should be concerned especially because recourse to higher authority is becoming habitual." If there are problems at the local level with boards of education, then the dirty linen should be washed at home. There is no support, there was no support, by those speaking to us for the inclusion of this particular amendment in the Constitution, although two of the members who spoke to us were in favor of this particular action, but not inclusion in a Constitution. It is new subject matter; as new subject matter, it would go beyond the scope of the Call as outlined by Mr. Lewis, and certainly by the Attorney General. It is controversial; it would endanger the ratification of this article, and we want this article ratified more than anything else, simply because it will remove two unconstitutional provisions and a lot of deadwood.

CHAIRMAN BROWN: Delegate Cunningham.

MR. CUNNINGHAM: Under the draft by the Local Government Committee, they have a paragraph there that reads, "the county legislative bodies, the Board of Education, if elected or other elected bodies shall be elected in its entirety at the August 1978 general election." If that passes, I believe that would take care of the Board of Education in the counties.

MR. HELMS: Yes, it does not belong in this article, according to the committee's opinion.

CHAIRMAN BROWN: Delegate McDaniel.

MR. McDANIEL: Mr. Chairman, I think that in regard to this question of this statement, the resolution in the Local Government Committee deals with the county boards of education, and the resolution in this committee dealt with all district boards of education, including the cities as well. The one in the county government will deal only with the county boards of education, but this one here would deal with the city and other districts.

CHAIRMAN BROWN: Delegate Gibson.

MR. GIBSON: Mr. Chairman, I would agree with Mr. McDaniel; that applies only to the counties, and furthermore, under the wording of the article as it is presently constituted, it says, "school boards, if elected"; it makes no mandatory election possible. That may be changed in the committee; there have been some suggestions that it be so. But in any event, it does not attempt to apply to cities.

CHAIRMAN BROWN: Delegate Price.

MR. PRICE: Mr. Chairman, at the expense of seeming to be technical, and I hope I never do, I would like to address myself, just very briefly, to the one objection to amendments to this particular article involved with the question of whether or not it is inside or outside the Call. I would like to caution that, perhaps, this should be referred to Style and Drafting, that the inherent language of this particular recommendation by this committee saying, be amended by deleting the present section in its entirety and substituting in lieu thereof, has, by that very language, opened the entire article for amendment.

MR. HELMS: May I respond to that, Mr. Chairman?

CHAIRMAN BROWN: Yes, Mr. Chairman.

MR. HELMS: That is true, but if you will look at the short titles in the original article and the short titles in the proposed article, they are much the same; they stick to the same subject matter as the old article. Of course, those items that we wish to delete are not mentioned.

CHAIRMAN BROWN: Any further discussion concerning Amendment No. 1 to the proposed report of the Committee on Education? Delegate Oehmig.

MR. OEHMIG: Mr. Chairman, fellow delegates, I think the committee acted wisely in not placing this amendment in the report that they have before us today. Actually, the selection of a school board or whatever you want to call it is certainly a local matter, and aside from it being out of the subject matter that is in the Call, in my opinion, this certainly is not a proper bit to have in the Constitution directing the counties how they shall act and how they shall select their school board. In my opinion the amendment should be defeated.

CHAIRMAN BROWN: Delegate Bailey.

MR. BAILEY: Mr. Chairman, I have reviewed this and particularly heard the comment previously stating that by deleting the present section in its entirety and substituting in lieu thereof, by that terminology, I also get the impression that it would leave us a little more leeway to make revisions such as that proposed in Amendment No. 1 and perhaps some of the other amendments. I want to speak particularly to the comment of Chairman Helms whereas he said, school problems tend to escalate to higher levels. While I think that may be true, I believe that the intent of Amendment No. 1, instead of escalating a problem to a higher level, you are presenting that problem to the one level that can best speak to it, and that is the electorate. It seems to me that whether or not we include this amendment in this particular item, or whether it is included in Local Government, I do not believe you can go to a higher level for determination of a problem than that of the citizens of this State at the polls. Therefore, I do not believe that that statement in itself would be apropos in this instance.

CHAIRMAN BROWN: Any further discussion? The Chair sees Delegate Cunningham who has spoken once on this amendment. Yes, just a minute, you did speak on Amendment No. 1. Any other delegates who would like to speak ? We will get back to Delegate Cunningham.

MR. CUNNINGHAM: I would like to speak for this amendment. The policy-making bodies of each local school system shall be elected by the registered voters of that school district. It gives local county school boards, sort of a policing action also. In other words, a lot of states, the state turns down books and all kind of criteria for public education, that some of the parents throughout the State do not agree with. If we put in here that the local school body, elected by the public, and has a policing effect upon the state school system, I think it would be a good amendment, so I speak for this amendment.

CHAIRMAN BROWN: The Chair saw Delegate Holloman standing. Do you still wish to make a statement?

MR. HOLLOMAN: I will reserve my statement for just a minute.

CHAIRMAN BROWN: Delegate Wilder.

MR. WILDER: Mr. Chairman, I am certainly in harmony with the idea of an elected school board for a local school district; but I cannot help but agree with the committee that this would be not appropriate, or inappropriate, to include in this particular amendment to the Constitution. I hope that, as it has been indicated, it will always be an option open to a local school district; nevertheless, I do not believe it should be here and therefore, I would be opposed to the amendment.

CHAIRMAN BROWN: If there is no further discussion, the Chair sees Delegate McDaniel. Is there a delegate who has not spoken to this amendment who would like to speak before the Chair recognizes Delegate McDaniel? Delegate McDaniel.

MR. McDANIEL: Mr. Chairman, fellow delegates, I speak in support of this amendment, even though I was on the committee, and because the question came up in the committee as to whether it is in the scope of the Call. We have really, various interpretations of the scope of our work, and there were some of us who felt that it would be better for this Body to decide whether or not that it felt that this amendment was in the scope of our Call. Secondly, we did receive information that the majority of the counties already elect their school board members. Thirdly, the teachers, the TEA, also supports this resolution for an elected school board, giving some power to the residents of that school district. Some of you may live in areas that your school board is not responsive to the people. We feel that it is a factor of uniformity; if we are seeking uniformity in other areas of our State Government, we feel there is some virtue of uniformity in terms of the field of education. One of the fields where I think the State . . . I do not know what percentage of its money goes . . . but I am sure that the greater percentage of monies for a county will go to the educational system. I think that the voters should have some say as to who would be on the policy-making board of that education board. I would suggest that we would vote for this amendment.

CHAIRMAN BROWN: The Chair does not see any other delegate standing at this time, so the Chair will recognize Delegate Smith, proponent of the amendment, for final words, before we vote on the amendment.

MR. SMITH (HAMILTON): I believe that about sixty-five to seventy-five percent of all school systems now have elected school boards. I just want to reiterate that this would give uniformity to our school systems across the State. I believe that the school board creates policy which dictates the education to your children and to the children of the State of Tennessee. I think this policy-making body should be directly responsible to the local citizens in each county. I think these people should come before the electorate. Some counties have self-perpetuating boards; some city school systems perpetuate themselves. We have quarterly courts which appoint school board members which serve seven years. I am not saying that the people who serve on these boards, in many cases, have not been very good school board members. They have done good jobs. But, I do think that in some cases they have not. I do think the ultimate responsibility should be left in the hands of the parents who pay the bills. Eighty to ninety percent of your tax dollars goes to the school system.

So I think the people should have some say in the way their tax dollars are spent. The way we have non-elected boards is really spending your tax dollars without representation. We might say that this is a matter of local government. Education is a matter of the people, not of government. So I plead for you to pass this bill so the public would have a direct input, by election, into the election of their school board members.

CHAIRMAN BROWN: Thank you, Delegate Smith. We are now ready for the vote on Amendment No. 1 to the proposed Report of the Committee on Education. Is there any delegate who would like to have the amendment read or any question about the amendment before we vote? If not, it will be a roll call vote. At the sound of bell, all delegates in favor of the amendment, vote aye, all opposed, no. Has every delegate voted? Does any delegate wish to change his vote? Mr. Clerk, record the vote.

(Roll Call)

MR. CLERK: Ayes 36, noes 47, Mr. Helms votes no, Chairman Brown votes aye.

CHAIRMAN BROWN: Motion fails on Amendment No. 1. Now on to Amendment No. 2.

MR. CLERK: Amendment No. 2 by Mr. Smith, to amend the Majority Report of the Committee on Education by adding an additional paragraph to proposed amendment to Article XI, Section 12. It reads as follows: "The General Assembly shall provide for the funding of any law relative to education at the time of its passage."

CHAIRMAN BROWN: The Chair will recognize Delegate Smith for the purpose of moving the adoption of Amendment No. 2.

MR. SMITH (HAMILTON): I so move.

CHAIRMAN BROWN: Is there a second? Delegate Ingram seconds it. We are now into discussion on Amendment No. 2. Discussion on Amendment No. 2. The Chair recognizes Delegate Denton.

MR. DENTON: Mr. President, has this been moved and seconded now?

CHAIRMAN BROWN: Yes, it was moved by Delegate Smith, seconded by Delegate Ingram.

MR. DENTON: Members of the Convention, I appreciate Delegate Smith's interest in this and I certainly agree with it, but the proposal that will come out of the Limitations on State Spending Committee will almost certainly include the provision that any law passed by the legislature shall also provide for the funding. It will apply to any law passed by the legislature, education or anything else. So I think it would probably be better if we did not pass this amendment but waited on the full report to come from the Limitations on State Spending Committee which will almost certainly include a provision like this. I think it would possibly be more appropriate.

CHAIRMAN BROWN: The Chair saw Delegate Smith standing. You realize the Chair will recognize you for the final words, so if you will, we will go on to other delegates. Delegate Williams, then Delegate Gibson, I believe I saw next.

MR. WILLIAMS: Thank you, Mr. Chairman. With all due respect to Delegate Denton, I would like to make sure that any opportunity we have to force the legislature to fund any program at the time of its passage, and he used the words "almost certainly", we can make it almost positive by adopting this amendment, therefore, I wholeheartedly endorse this Amendment No. 2.

CHAIRMAN BROWN: Delegate Gibson.

MR. GIBSON: Mr. Chairman, fellow delegates, I agree with Delegate Williams. We have a two-shot chance at this. I wholeheartedly endorse the amendment. I would point out too, we do not know what is going to come out of the Committee on State Spending. It very well may be a controversial issue; it may be something that would be defeated at the polls. I have no objections to this being included, this mandatory function being included in both the proposed amendments. As I said, that would give us two chances of having it enacted into law, so I urge you to vote in favor of the amendment.

CHAIRMAN BROWN: Delegate Holloman, then Delegate Price, and Delegate Cox.

MR. HOLLOMAN: This may be more of a question than discussion, but it appears to me that the language of this Amendment No. 2 could provide that should the General Assembly pass a law creating a school system in some county, then the General Assembly would then have to fund that school system, thereby forcing the State to fund county school systems.

CHAIRMAN BROWN: Delegate Price passes. Delegate Cox.

MR. COX: Mr. Chairman, I just want to state that I am in favor of this amendment. I think it is a good one.

CHAIRMAN BROWN: Delegate Crawford, did you rise for a question? No? Delegate Crawford.

MR. CRAWFORD: I cannot pass up that opportunity. As I understand the amendment, at the time of passing of any law relative to education, you have to fund it. If you pass a law to provide for a future ongoing program, how do you provide for its funding at that time? You can only provide for the funding of a program in that fiscal year. I am concerned about the mechanics of this.

CHAIRMAN BROWN: Delegate Burson, then Delegate Pleasant.

MR. BURSON: This is, as Delegate Gibson said, one of the issues that is being seriously deliberated in the State Spending Committee. It is a problem that is not only incurred in education but that is incurred in other areas.

The committee is addressing the exact problem that Delegate Crawford just raised as to the funding. We are working on a provision which would require funding in a manner of really requiring it for the first operating year, because that is a problem to perpetually require for the funding. I would urge, at this time anyway, the defeat of this amendment. I would anticipate State Spending coming out with its recommendation within the next ten to twelve days. I think rather than taking up an amendment like this in this section and in possibly other sections, let us see if we cannot cover it all in the State Spending amendment. If that fails you could propose an amendment when this comes back to the Convention Floor on the Education Bill. So, at this time, because of the deliberations in State Spending, I would urge defeat of this amendment.

CHAIRMAN BROWN: Delegate Pleasant.

MR. PLEASANT: Thank you, Mr. Chairman. I rise for a point of information and clarification as relates to the proposed amendment. In reading it, I get the impression that this particular proposal could apply to public or private education. So I would like to ask the sponsor of this amendment as to what is his intent with regards to any law relative to education. Can that be construed to include both public and private education?

CHAIRMAN BROWN: I think the correct answer is probably that it will depend on litigation if it is ever challenged on that point. If Delegate Hyman will wait, I will recognize Delegate Smith for the purpose of responding to your question.

MR. SMITH (HAMILTON): I could not understand him exactly.

CHAIRMAN BROWN: The question, I believe, was as this amendment is written, there is a possibility that it could be construed to provide for the funding of private as well as public schools. Delegate Pleasant wants to know your feeling regarding that construction of it.

MR. SMITH (HAMILTON): I think that would be a matter left to the legislature to decide and not a constitutional matter. The real intent of the amendment was that the legislature could not pass such laws as the 839 Bill that they passed recently, and then not fund it. What I am trying to get across here or the intent of the amendment is that if the legislature passes an act requiring that the educational system form some educational function, that they in turn will have to fund that at the time they pass that bill.

CHAIRMAN BROWN: Does that satisfy your question, Delegate Pleasant?

MR. PLEASANT: My only point is that I think that the amendment should be limited to public education and stated specifically as such.

CHAIRMAN BROWN: If that is your concern, I think the proper way to address that would be to move to amend the amendment or the report if the amendment is adopted. Delegate Hyman.

MR. HYMAN: Mr. Chairman, I would like to speak in favor of this amendment, I think probably for the opposite reason Mr. Burson said we should wait till later. I think this amendment would receive far wider support from the education people of the State. We have seen examples of particularly some of the trade schools have been built without any funds for staffing them or operational funds. I think the worst one of all they did was to pass a law that all handicapped children had to be educated, and yet made no provisions for the funds. We had a human cry then from parents and teachers wanting cities to fund it. I think for the same reason they want to leave it out now, it could be taken out later.

The spending bill comes along with the provisions in it, then there is no real problem. There is no real problem with it being duplicated for that matter, even in the Constitution. There is going to be a tremendous fight to get anything passed in this State by the voters on the curtailment of spending. If we reword it and said a curtailment of taxes, I think it might pass, but everybody is going to be looking after their red wagon and not wanting to cut back spending because they think you are going to cut their project. But I think if you put it in here, it would be a positive item under the education because there has been more abuse in education, I think, from the state legislature passing rules and not funding them than in any other department.

CHAIRMAN BROWN: I am getting some complaints from some of the delegates saying they are not able to hear other delegates speaking because of activities that are going on in the Chamber. I ask your cooperation in remaining quiet or quiet enough so that everybody can hear when we have speakers on the Floor. The Chair saw Delegate Eskind.

MR. ESKIND: Mr. Chairman, I am in complete agreement with Delegate Crawford with regard to the mechanics of future funding as the amendment discusses. But I would like, specifically, to address another subject which Chairman Helms alluded to earlier. Without trying to raise any controversy with respect to various legal opinions, be they from Mr. Lewis or from the Attorney General or from any of the attorneys who are members of this Convention, it occurs to me that as I understand it from Chairman Helms, the history of the items in this section are such that they are all, I believe the word was cobwebs in a dusty room.

It seems to me that the committee has resolved its dilemma by concluding that even if they were to agree that the changes they are proposing are outside of a strict interpretation of this Call, that in fact as the committee has proposed this amendment, it is not going to make any serious difference. The fact is that the changes they are proposing in the net result of their product is that it is very very unlikely that, even if it could be challenged, that anybody would challenge it as an item outside the Call.

I think, however, with respect to Amendment No. 2 which is the matter of discussion now, that it could well be that we are beginning to interfere with the legislative process, which is not a subject, necessarily, of the education section; and, that in fact, if we were to include this amendment in this item, we would open up a can of worms because it would no longer be essentially non-controversial. It seems to me that by including this amendment in this part of the process, rather than in the State Spending part of the process, that we are severely

jeopardizing the whole possibility of either this amendment being ratified by the voters or, even worse, even if ratified whether in fact it is within this Call. So I would very much suggest that we defeat this amendment and have this item of funding considered elsewhere.

CHAIRMAN BROWN: The Chair would point out at this time that we have approximately four minutes remaining in our limits in our meeting of the Committee of the Whole. We have Amendment No. 2 which we are on and another amendment to consider, if time permits, so keeping that in mind would you, when you are making your comments or talk about making comments. The Chair next saw Delegate North who passes. The Chair will then recognize Delegate Helms.

MR. HELMS: In the words of Speaker McWherter, we would like to keep this thing clear, clean and understandable. I think by the exclusion of this amendment and similar amendments, even though they may have merit and worth, we can keep it clean, we can keep it non-controversial. It is important that we do so.

As Delegate Hyman spoke, it would give a sort of positive context to the funding. Any time you get positive, you get opposition too. We want to keep this article wide open and let the legislature do its work. From Delegate Denton, I understand the legislature has done its work. There is a general law on the books. It has been in court and supported by the courts. So, there is recourse to full funding of educational programs that are passed by the legislature. If you open up the can of worms, in Delegate Eskind's language there, you get not only into this, but there is just as much justification to say that you shall support basic education, because that is popular now or any of the other educational programs that a certain group of people favor. This is not the purpose of the educational article in the Constitution. It may properly belong, this amendment, in another area. But certainly, I personally, though I am not speaking for the committee, because it has not come before the committee, I personally would oppose it.

CHAIRMAN BROWN: Any further discussion on Amendment No. 2? If not, the Chair will recognize Delegate Smith for final words before we take a vote on Amendment No. 2, keeping in mind that we have approximately two minutes before our time expires. Delegate Smith.

MR. SMITH (HAMILTON): Let me remind the delegates here that this amendment addresses itself specifically to the funding of educational programs as they are passed by the legislature. I think enough has been said, Mr. Chairman.

CHAIRMAN BROWN: We are ready now, excuse me, Delegate Burson.

MR. BURSON: Really it is Delegate Bacon; she pointed this out. That is a question of whether or not this amendment would require, it may have been addressed but I did not hear it addressed, the way it is worded, total state funding of education as opposed to the funding that is now done on the local level. She seems to be concerned, and I am too, when she pointed out that this may be interpreted as a requirement of total state funding for education. It says "any law relative to education". Is that the intent, and if it is not, I would suggest that it be clarified in some way, or that it be voted down as it is.

CHAIRMAN BROWN: The Chair believes that Delegate Smith read earlier that that, in his opinion, would be a matter for the legislature and that it was not his intent that it require state funding of school systems. Yes, Mr. Clerk.

MR. CLERK: Mr. Chairman, we just have introduced an amendment to the amendment. We will have to address ourselves to that before we vote on the amendment.

CHAIRMAN BROWN: Having been informed of that, and seeing that we have a minute left, approximately, I will ask the Clerk to read the amendment to Amendment No. 2.

MR. CLERK: Amendment No. 1 to Amendment No. 2 of the Majority Report of the Committee on Education by inserting between the words "relative to" and "education" the word "public".

CHAIRMAN BROWN: At this point, since the Chair believes we will have to take up the amendment to the amendment before proceeding with the Amendment No. 2, the Chair will recognize a motion for the adoption of the amendment to Amendment No. 2.

FROM THE FLOOR: Mr. Chairman, I move the adoption of the Amendment No. 1 to Amendment No. 2 of the Education Committee Report.

CHAIRMAN BROWN: Do I hear a second? Second? Do I hear a second? I have a second from Delegate Hyman. The time for the Committee of the Whole has expired. The Clerk has informed that we no longer have a need to have a motion to rise and report when the time has expired, it is automatic. So, at this point, I rule that the Committee of the Whole has ended because of expiration of time. I yield back to Mr. President Lee.

MR. PRESIDENT LEE: The Chair recognizes the Chairman of the Committee of the Whole, Delegate Larry Brown, for a report of the Committee of the Whole. Mr. Brown.

MR. BROWN: Mr. President, your Committee of the Whole met, studied the Report of the Committee on Education. Two amendments proposed to that report, one amendment was defeated, discussion was in progress on the second amendment at the time of the expiration of time. There was no final action taken.

MR. PRESIDENT LEE: Thank you very much. Delegate Evans.

MR. EVANS: Mr. President, I move, at this time, that we resolve ourselves into Committee of the Whole to undertake the matter on education for additional forty-five minutes.

MR. PRESIDENT LEE: Is there a second? It has been moved and seconded that we resolve ourselves into Committee of the Whole to consider continuation of discussion on education. All those in favor, let it be known by saying aye, opposed, no. The ayes have it. We will resolve ourselves into Committee of the Whole for forty-five minutes. That would be 10:57 a.m. I would like to ask Delegate Larry Brown to chair the Committee of the Whole. Delegate Brown, approach the Chair.

CHAIRMAN BROWN: I now declare the Committee of the Whole in session. Having previously ascertained that a quorum is present, I again ascertain that a quorum is present. We will continue our business at the point where we left off. I see Delegate Tidwell standing. I will recognize him.

MR. TIDWELL: Mr. Chairman, parliamentary inquiry. You had already asked for the final argument from the sponsor of Amendment No. 2. Is it not improper, now that he has given his final argument, to amend that amendment at this time?

CHAIRMAN BROWN: I believe it is proper to propose an amendment at any time to a report. Our process of recognizing the proponent of a motion, I think, is more of a matter of courtesy than out of any fixed rule here in the Committee of the Whole. Even after he has had his final word, another delegate could speak to the proposal, since there is no limitation on the debate in the Committee of the Whole.

MR. TIDWELL: I was under the impression that once he gave his final argument, no one else could speak on it.

CHAIRMAN BROWN: I will have to disagree with you on that in the Committee of the Whole. Every delegate can speak as long as he cares to. We are now back into business that is before us, and that is the amendment to Amendment No. 2. Amendment No. 1 to Amendment No. 2. We are into discussion on Amendment No. 1 to Amendment No. 2. The Chair will recognize Delegate Wilder.

MR. WILDER: Mr. Chairman, I believe we have interjected something now that is very important in this consideration. As I read the report of the committee, we are talking about free public education, which, public schools, that is, relates primarily as I understand it, to K through 12. But when you get into the matter of higher education or post-secondary education, we do not talk about free anymore. Of course, I question that any education is free. It costs somebody something. It costs certainly the taxpayers a great deal. But there are those who would advocate free higher education, free post-secondary education. I seriously question something that is voluntary being made at no cost to the individual. When you begin to say that and try to delimit this article to apply to only public institutions, which are two matters before us.

One is an amendment to this Amendment No. 2. I think we have interjected a very serious problem. There are some legislative matters that deal with support of students who have physical handicaps, for instance, who can attend any public higher education institution, public or private. If we begin to delineate that legislation can only fund those attending public institutions, or support of public institutions, these handicapped students could not attend private institutions under this kind of funding legislation. Likewise, the other suggestion that is made here to change the report of the committee which we really are not discussing at this point, endeavors to do the same type of thing. So I think we have a very important policy decision to make at this point; when you insert the matter of funding higher education or post-secondary education, as to whether or not we are going to delimit, that we are going to put limitations upon how and where the legislature may endeavor to utilize the educational resources of this State.

There are thirty-nine private colleges and universities in the State of Tennessee that are educating 40,000 students in this State, at a tremendous savings to the taxpayers of this State. The legislature has, in its wisdom, from time to time, seen that this is a resource that does not need to be forced out of business; it is a resource that does not need to be discouraged, but rather encouraged. I hope that we will not put something into the constitutional amendment that will in any way limit and hamper the legislature in taking advantage of the utilization of this tremendous resource to our State. I think when you do this, put this word "public" at this point into the matter, that you are beginning to do that very thing. Therefore, I am opposed to the amendment to the amendment.

CHAIRMAN BROWN: Let me caution you to please confine your comments to the amendment to the amendment, if you have some statement you would like to make. Any other delegates who would like to speak to Amendment No. 1 to Amendment No. 2? Delegate Helms.

MR. HELMS: Amendment No. 1 to Amendment No. 2, and the amendment itself, strikes at the very philosophy of the particular article that we are trying to draft. It makes it almost in opposition at one point. We said, "The State of Tennessee recognizes inherent value of education and encourages its support." Now, if we are going to mandate the type to support, we better get on with it and detail the support more specifically than we have here.

It gets away from the memorializing and the historical aspects of an article on education in the Constitution when we get to such amendments as these. By inserting the word "public", as you have seen here, it increases the controversy. To increase the controversy endangers the entire article. We wanted a standard sort of article in the Constitution that would leave the legislature free to act as conditions and circumstances change, to provide the necessary types of programs across the State that the people need and to fund it in a way that was feasible at that particular time. All of us have seen periods of maybe abundance and periods of scarcity. We cannot predict those. The legislature needs a free hand in the funding of its programs. We do have, as Herb Denton pointed out, already a general law on the book, that all programs must be funded, and I would oppose not only the amendment to the amendment, but the amendment also.

CHAIRMAN BROWN: Any other delegate who would like to speak? Yes, Dr. Rowe.

MR. ROWE: Mr. Chairman, I firmly urge the delegates to vote against this amendment. In good conscience, I would have to go back home and campaign against ratifying this entire amendment to the Constitution. To my mind, when you limit the encouragement of education to merely public institutions, the State is taking a stance against the private institutions. It certainly is not going to encourage it; it is not going to be able to do anything in the way of funding various aspects of non-public education. I think it would be a dangerous stance to take. I could not support the amendment nor, if the amendment is enacted, the report itself, and would take an active role in seeing that it was defeated at the polls.

CHAIRMAN BROWN: Any other discussion on the Amendment No. 1 to Amendment No. 2? Delegate Bickers.

MR. BICKERS: Mr. Chairman, ladies and gentlemen, after listening to the very able delegates propound on this subject, which I think a lot of us had very little opinion on it at the beginning, except very vaguely, and after listening to the reasoning presented here, it would seem to me that maybe we should think twice before passing this particular amendment to the amendment and also the amendment itself. It seems to me that our literacy rate in Tennessee is quite high at this time, and that if the legislature veers too far off path, the public outcry will be most loud. At this time, I feel it would be better for us to let this pass. Also, we will have a little additional time to study it, and if we should find any good reason to make any such change, we will have one more shot at it at a later date. Thank you.

CHAIRMAN BROWN: Any further discussion? Realizing that the Chair will recognize Delegate Pleasant for the final word, and will also recognize delegates after that if anyone so desires, but, if possible, anybody who would like to speak, let us do it before the Chair recognizes Delegate Pleasant. If not, Delegate Pleasant.

MR. PLEASANT: Mr. Chairman, the intent of the amendment is that, at this particular point in time, I would like to see some type of language that would tend to discourage the proliferation of non-public schools. The points that have been made by the other honorable delegates are well taken. But I really have strong misgivings as to whether or not the legislature in its wisdom will consider this particular problem of the proliferation of non-public schools. So, I would like to see some type of constraints placed on the legislature in this regard. It may be that suitable or acceptable language can be worked out such that it encompasses those things and concerns that have been voiced by the other delegates. Thank you.

CHAIRMAN BROWN: We are now ready for the vote on Amendment No. 1 to Amendment No. 2. It will be a roll call vote. The proposed amendment adds the word "public" to Amendment No. 2 between the words "to" and "education". At the sound of the bell, all

delegates in favor of Amendment No. 1 to Amendment No. 2, vote aye, all those opposed vote no. Has every delegate voted? Who has not voted? Has every delegate now voted? Does any delegate wish to change his vote? Mr. Clerk, record the vote.

(Roll Call)

MR. CLERK: Ayes 15, noes 66; Chairman Brown votes aye, Chairman Helms votes no.

CHAIRMAN BROWN: Amendment No. 1 to Amendment No. 2 fails. We are back on discussion now of Amendment No. 2, original Amendment No. 2. There has been quite a bit of discussion; perhaps we will not need much more. Is there any other discussion? Delegate Ingram.

MR. INGRAM: Mr. Chairman, I would like to reiterate the point made by Delegate Hyman a few moments ago about the funding of laws passed by the legislature relative to schools such as he mentioned and encourage the people to vote for the amendment for that reason; so that they will not be building any facilities without providing the necessary funding for those facilities.

CHAIRMAN BROWN: Any further discussion before the Chair recognizes Delegate Smith for final words, if he desires? Delegate Smith, do you desire a final word?

MR. SMITH (HAMILTON): I think enough has been said and we are ready for the vote.

CHAIRMAN BROWN: We are ready to vote now on Amendment No. 2. It will be a roll call vote. All delegates in favor of Amendment No. 2, at the sound of the bell, vote aye, those opposed vote no. Does any delegate desire to change his vote? Mr. Clerk, record the vote.

(Roll Call)

MR. CLERK: Ayes 18, noes 64. Chairman Brown and Chairman Helms vote no.

CHAIRMAN BROWN: Amendment No. 2 fails. We are now down to Amendment No. 3. I will ask the Clerk to read Amendment No. 3.

MR. CLERK: Amendment No. 3 by Mr. Dixon, to amend the Majority Report on Education by adding an additional paragraph to the proposed amendment of Article XI, Section 12, as follows: "It is the public policy of the State of Tennessee that public prayer should be encouraged and, to this end, no department, agency, or official of this State shall in any way inhibit or prohibit the exercise of the right of the freedom of worship through public prayer in the schools of this State."

CHAIRMAN BROWN: The Chair will recognize Delegate Dixon for the purpose of moving that Amendment No. 3 be adopted.

MR. DIXON: Mr. Chairman, in consideration of Amendments No. 5 and No. 7, I move for the adoption of Amendment No. 3.

CHAIRMAN BROWN: Is there a second? It has been moved and properly seconded that Amendment No. 3 to the Majority Report of the Committee on Education be adopted. We are now ready for discussion. Mr. Clerk.

MR. CLERK: Mr. Chairman, we have an Amendment No. 1 to Amendment No. 3. Amendment No. 1 by Mr. Jenkins (Davidson), by inserting in Amendment No. 3, the word "voluntary" between the words "that" and "public". It should read, "It is the public policy of the State of Tennessee that voluntary public prayer . . . "

CHAIRMAN BROWN: Do I have a motion to adopt Amendment No. 1 to Amendment No. 3?

FROM THE FLOOR: Mr. Chairman, I so move that we adopt Amendment No. 1 to Amendment No. 3, to insert the word "voluntary" before the words "public prayer".

CHAIRMAN BROWN: Is there a second? It has been moved and seconded that Amendment No. 1 to Amendment No. 3 be adopted. Is there any discussion? The Chair will recognize Delegate Jenkins.

MR. JENKINS (DAVIDSON): Mr. Chairman, if this is in order, I would like to ask the sponsor if he would just accept that amendment.

CHAIRMAN BROWN: Delegate Dixon, will you accept that amendment? Right, then I still think it would be necessary to have a vote on it to be proper, but we will take a voice vote. If there is no objection, all in favor of Amendment No. 1 to Amendment No. 3, let it be known by saying aye, opposed, no. The ayes have it. Amendment No. 1 to Amendment No. 3 is carried. Now we are on Amendment No. 3 as amended. Is there any discussion on Amendment No. 3 as amended? Delegate McDaniel.

MR. McDANIEL: Mr. Chairman, fellow delegates, I rise to speak in opposition to this amendment. I am well aware of the fact that this amendment deals with a matter that there ought not be any doubt that I am a part of it and I am in favor of prayer. However, when we come to this sort of Body and to deal with prayer, public prayer, in our school system, I must rise to speak against it.

First point, I feel that if Amendment No. 1 to this educational bill was not in the Call of this Convention, then it seems to follow that Amendment No. 3 is also outside of the Call of this Convention.

The second point that I feel is that the essence of this resolution is unconstitutional in regards to our United States Constitution. Most of you know that I stand here today because of a ruling of the United States Supreme Court Justice in my fight over an article within our State Constitution that prohibits ministers from serving in this Body. I am a strong believer in the separation of Church and State. I feel that this Body ought not to involve itself, regardless of our own personal sentiment, to seek to include or present to the people, a resolution calling for public prayer within the school system.

One may, and it has been amended to use the word "voluntary", but we must be aware of the fact that no one can really take away from anybody the right to pray. Prayer is that of an inward feeling and inward desire. It does not, to be effective, need to be verbalized. It is in the original motion that the State would not prohibit nor inhibit. I think when one does not inhibit nor prohibit, then one permits. According to our system, I feel that once it is permitted in any way, it will develop to such an extent that the State will find itself in the area of religion. Because of the multiplicity of beliefs within our system, I do not believe that there is any place in our school system, especially in this bill, for this amendment. So, I would strongly ask of each delegate that even though you may believe in the essence of this resolution, that for the good and welfare of our State, you will vote against it. Thank you.

CHAIRMAN BROWN: The Chair next saw Delegate Helms, then Bickers, Akin, then Littleton.

MR. HELMS: I recognize the good intention of the sponsor of this bill, but I think he is going about this thing the wrong way. I think he is jeopardizing something, if it is something that he wants. He is jeopardizing it very much by highlighting it in the Constitution. One of our delegates, Delegate Ray Bodiford, has, at his instigation and support, created two general laws that permit just exactly what Mr. Jenkins' amendment to Mr. Dixon's amendment would accomplish. I refer you to Tennessee Code Annotated 49-1922, Use of School Time for Prayer or Meditation. "During the first hour of any school day, any local boards of education may provide for the setting aside of specific time, a period of time which students and faculty may use for prayer, meditation and personal reflection, and so forth."

In other words, what you are asking to put into the Constitution, at this point, is already there by general law. Further, Tennessee Code Annotated 49-1923, refers to Voluntary Prayer Participation by Pupils. It says, "It shall be lawful for any teacher in any school in the State, which is state-supported, in whole or in part by public funds of the State, to permit the voluntary participation of students or others in prayer." So what you have is already there as a matter of law. If those laws are challenged, they may tumble. But if they tumble, they tumble as law. If you put it in the Constitution and it is challenged, it may tumble that particular part of the Constitution. We are striving, more than anything else, to get unconstitutional concepts out of this particular section; to include prayer would jeopardize that particular aim. It is new subject matter. The old article did not speak to this. Being new subject matter, it jeopardizes the section from a legal standpoint. You know, too, of course, that this will be controversial, though it should not be greatly controversial. There will be some good Christians who will oppose this particular thing for the reasons cited by Mr. McDaniel.

There will be others who are non-Christians or not belonging, maybe, to the Christian faith, who subscribe to prayer, but oppose it also. The precedent cases strongly suggest, ever since 1949, that this is unconstitutional. Those precedent cases arose out of the State of Illinois in McCullouch vs. Board of Education in 1949 when they were trying to use even the facilities of the school for prayer purposes and it was declared unconstitutional. There is, of course, a provision for release time for prayer that was another precedent-setting case. The New York Board of Regents tried to construct a prayer which would declare it unconstitutional, very harmless prayer. I do not think it would bother the Lord at all and it would not bother anybody else. Nevertheless, it was declared unconstitutional.

Madeline Murray O'Hare is still around, too. I understand she is going to be in my home town very shortly. Out of the Baltimore decision, Madeline Murray O'Hare was combined with Shemp West Avington Township. They combined; the case was heard before the Supreme Court, and the Lord's Prayer was declared unconstitutional. It is a matter of subjecting, in this particular case, other students that were a captive audience to prayer. Of course, Madeline Murray O'Hare is a self-confessed atheist. She said she did not want her child to listen to those things. It is a concept that is very doubtful, very questionable. It is a thing, I think, that you can settle outside of the schools.

We would recommend, and it was considered by the committee and the committee voted this sort of thing down or rejected the concept. It is a thing that would, I think, go beyond the scope of the Call as it could be even liberally interpreted by Mr. Lewis. We would oppose it and ask you to vote against the amendment.

CHAIRMAN BROWN: Delegate Bickers.

MR. BICKERS: Mr. Chairman, ladies and gentlemen, I hold Mr. Helms and Mr. McDaniel, Reverend McDaniel, in very high esteem, but on this occasion I respectfully differ with them. Since the beginning of the founding of our nation, the beginning of our nation, we have acknowledged our faith in God, and I have on my desk here a dime, a nickel, and a quarter, and on each I checked, and they still read, "In God We Trust." In our Tennessee Constitution, this has been acknowledged at its earliest concept, it has been in our Constitution. This is no new idea or great thing. A lot of people have become disgruntled over the years with government and politicians, and especially in recent years since Watergate, with politicians in particular. Our credibility is suspect at all times at the present. I think that this particular amendment would need to be worked over by the Style and Drafting a good bit, because I am a little bit concerned about the prohibition to inhibit, and just how this would work its way out.

In the conduct of school affairs, we know that there has to be some type of agenda, some type of a program, and just how far the construction or the interpretation of an inner vision would be taken, I do not know. We cannot just go and sit at the schools all day and just wait and allow everybody a chance to pray all the time. Somehow or other, it would have to be worded differently, I believe. But I think that if we do have, we could approve this amendment, and I do not believe that if this portion were ruled unconstitutional, for some reason, that it would endanger the entire amendment. I do believe that if we have something close to the intent of this wording in our amendment to the Constitution, that more people back home across our State would feel a little bit better about us and the work that we have done here. They would be a little bit more encouraged to go to the polls and to vote, because they would feel that they have something positive.

It would be only an expression. I submit that, really, as far as our right to worship, our right to pray in the schools would not be affected one iota because that is preserved under our United States Constitution. So, as far as the practicality of it, the effect in our schools, I think it will not make one iota. But we have, just as we have passed out here, the legislature has passed laws on this same subject matter. It is in our Tennessee Code Annotated. In different ways, it is in our government. I see nothing wrong with having some sort of provision similar to the one we have before us indicating our support for prayer, voluntary public prayer. I can see no harm in our passing this, and I can see where it could help the overall work of this Body when the voters of the State of Tennessee go to the polls and vote. Some people will go and vote who would not otherwise vote because of this one provision, and probably will vote on some of the other matters passed that we have approved here. Thank you.

CHAIRMAN BROWN: The Chair has the names of seven delegates who desire to speak, but at this time, I will point out to you that we have less than fifteen minutes remaining in the time scheduled for Committee of the Whole. I have been informed that there are now a total of eight amendments which have been proposed that we need to address ourselves to. This is not an attempt to limit debate or anything of that nature, but simply to give you some guidance in your discussion. So, having said that, the Chair will recognize Delegates Akin, Littleton, Slyman, Walker of Rhea, Walker of Roane, and Bernstein, in that order.

MR. AKIN: Thank you, Mr. Chairman, I will try to be brief. I do not know what your religions are, collectively, individually, or otherwise, and I am not going to ask you. I do not know what the teachings of your religions are individually. I know what mine is. I also know that a lot of us claim to worship the same and yet have individual differences. I am going to state one of those differences now, maybe a difference in interpretation between my line of thinking and your line of thinking. As I interpret it, the founder of my religion made a direct statement in opposition to public prayer. You may disagree with that. As I interpret, the

founder of my religion said, do not worship publicly in the street. I do not argue with your interpretation; what I argue with is your asking the State to encourage my children to go against that interpretation. I beg you to defeat this amendment.

CHAIRMAN BROWN: Delegate Littleton.

MR. LITTLETON: Mr. Chairman, I disagree to some extent with my good friend, Mr. Akin. I think this boils down to a public proclamation, if this Body does, in fact, adopt this amendment, in that, we all know that public proclamation eventually turns to the legislature and creates laws and also to the Supreme Courts who change their opinions, based on public proclamation. I think all this is, is a public proclamation. I am for it.

CHAIRMAN BROWN: Delegate Slyman.

MR. SLYMAN: I will try to be very brief. When I first read the amendment, I had a real favorable response, but as I began to study it, I felt like it had some fallacies, and then when Mr. Jenkins made his amendment to this amendment, I think it makes sense. I am in support of it. The Constitution, it has been said, is not the place to put this. I think it is the perfect place to put something like this. It was done two hundred years ago with the founding of this country. It probably protects a very basic right. I think it enables us, as delegates, to allow Tennessee to become a leader. It does not require anything; it does not start a religious revival, or anything like that. It does allow us to recommend a basic philosophy. It does prevent educators from undermining a basic freedom that each of us should have. I think it is an excellent amendment. If the courts, later on, decide that there is something illegal about it, then they can strike it down. It is a good amendment, and I strongly recommend your voting for it.

CHAIRMAN BROWN: Delegate Walker of Rhea.

MR. WALKER (RHEA): Mr. Chairman, first of all, I will be very brief. I do not think I have abused my microphone that much in the Convention. I would like to commend the committee on a very fine resolution, first of all. Second of all, state that I believe in prayer, public or private, either one. No constitution or assembly can deny me my right to prayer because it is personal with me. I live in the first county of the State that took advantage of the legislature's action which permitted prayer in the public schools on a voluntary basis. So, we already have this. I just simply do not think it should be in the Constitution. We all have a basic right to prayer and I do not think we ought to put it in the Constitution. I do not think we ought to change this very fine resolution that this committee has brought to us which is in the form that many resolutions should be in for our Constitution. It is broad; it is brief. I urge you to vote against the amendment.

CHAIRMAN BROWN: Delegate Walker of Roane. He passes. Delegates Bernstein, Hooks, Jenkins, and North, in that order.

MR. BERNSTEIN: Mr. Chairman, fellow delegates, I stand before you to speak against this amendment. I would like, for one, to tell you that it is not easy to be in a minority religious group, but my rights are protected by the Constitution of the United States and the Constitution of the State of Tennessee. I have to stand up for my rights vigorously at all times because it is so easy for a majority to take away the rights of a minority. I do not have to trace the history of this country; I do not have to tell you of whites vs. blacks; of Christians vs. non-Christians. If you think about it, you will recall that tortured history of our country.

We have developed in our country over the past two hundred years, a recognition that most of the people in this country believe in a Supreme Being. Those of you who read the cases, the

Avington School District Case, the Clauson Case, the Zorok Case, and the others, know that the Supreme Court of the United States recognized that we do have this historical recognition of belief in the Supreme Being; that is how this country got started. People were religious dissidents in the countries of our origin and they came here.

When they wrote this magnificent Constitution, the First Amendment to it provided that there would not be the recognition of the establishment of religion; not just the Church of England, it could have stated that, but any religion. We have adhered to that principle and our cases have talked about the high walls which separate state and religion.

Nothing has begun in this country to deprive you or me of our right to worship in our own way. Worship, prayer, is a very personal matter. It is not the business of the State. Someone wrote that religion is not the business of the State, and the State is not the business of religion. I heartily concur.

By adopting this resolution or this amendment, some of you have used the expression that it is a good thing, it is a matter of public policy. Horrible things have occurred in this country because of what appeared to be simple expressions of public policy.

Let me tell you what it is like to be a child in a classroom and the only child in the classroom who does not have the same religion as everybody else, when they read a prayer which is not your prayer from a Bible which is not your Bible. You sit there and shuffle and kick your feet, and you look embarrassed. Do you really want that for your child if you belong to a minority? I experienced it. I grew up, and I made it. I do not want anybody else to have to go through that. I do not think you do either.

Tennessee, for some reason, has this hangup on public religion. I hope we have outlived the Scopes Case; I hope we have outlived the theory of evolution and all that business in our history. Do we need to start that now? What will be the result of the adoption of this resolution?

School teachers with fervent belief in God, with fervent feelings about religion, are going to try to start bringing religion back into that classroom as a public measure. Can you do that? Can you divorce yourself from your religious feelings because there are people in the classroom with different religious feelings? It is very hard to do.

Think with me for a few minutes about our opening prayers, if you will. How many of those prayers were non-denominational? Everyone of them express the belief of the invocator, do they not? Each one prayed in his own way. That is really what we are trying to do; to preserve for each of us and our children, the right to pray in our own way, free of interference by the State, free of the State telling us how to pray, collectively, or in small groups or anything else.

My friends, if you want your children to pray, pray at home, where it is meaningful. The family that prays together probably will stay together. Do not send that child off to school and expect the State of Tennessee to lead him in public prayer which, by its nature, has to be sectarian. I urge you not to take a step backward, take a step forward. Declare in your own hearts and your own minds religion as a personal matter. It belongs to each person in this State to believe or not to believe; to pray or not to pray. Do not get it mixed up, in the business of the State, in the business of education, under some flowery phrase about religion, contemplation, study and all that. I leave you with one last thought.

That is, in the Avington School District Case, they took testimony from leading theologians in this country about the place of prayer and how it should be used in schools or not used. The

expression was made by both Christian and non-Christian theologians as well, that prayer really means study. You do not read the Bible; you study the Bible if it is going to be meaningful. How can that be done in a classroom of young children or older children, given the teacher's predilections to a certain thing or desires with preference to a certain faith. Let us not get involved in that sort of business here. It is not in the Call; it does not belong in the Call; it is not before us; let us not go out on a limb. I urge you, as one of those minority groups, recognizing that I have all the rights that everybody has, and minorities have a tendency to change in this country, and all those rights are protected in the Constitution, to vote this down. Thank you.

(Applause)

CHAIRMAN BROWN: We have approximately three minutes left. The Chair will recognize Delegate Hooks. Delegate Hooks passes. Delegate Jenkins. Delegate Jenkins passes. Delegate North.

LADY NORTH: Mr. Chairman, I rise to speak and ask the delegates to vote against this amendment. Mr. Bernstein said my sentiments beautifully. Thank you.

CHAIRMAN BROWN: Any other delegate who would like to speak before I recognize Delegate Smith? Mr. Smith of Davidson.

MR. SMITH (DAVIDSON): Fellow delegates, before you vote, I would like to ask just this one question. Is the Constitution for some of the people or all of the people?

CHAIRMAN BROWN: Delegate Jenkins, do you now desire to speak?

MR. JENKINS (DAVIDSON): Mr. Chairman, I really enjoyed Delegate Bernstein's remarks also. But there is something that he forgot when he was making those remarks to you here today. That is, the word "voluntary" has been added to this amendment. No one is imposing prayer upon anyone in the school system. No one is asking anyone to pray any particular prayer in the school system, because the word "voluntary" is there. It seems today that many of us are afraid to pray. We are afraid to express our feelings to one another; but this is not necessarily true. I feel that if an individual wants to pray in the school system today, he should have a time set aside for it. If he wants to pray a voluntary prayer, if he or she wants to pray a voluntary prayer, then I think he should have that opportunity to do so. A precedent has been set. Let me say one other thing; it is not unconstitutional to pray in the school system. There has been a ruling by the Supreme Court to take away this particular right. We are not talking about an amendment to the Constitution.

If you recall, Senator Baker has strived for some time, and Dirksen before Baker, to try to get an amendment in the United States Constitution to give all Americans an opportunity to express themselves in their own voluntary way. No one is trying to impose their views upon anyone. This is not what this amendment of Delegate Dixon does, I do not think. I would not have supported that amendment if the word "voluntary" had not been added to that amendment. I think it is a good amendment. I think if we could pass this amendment, if it could become part of our Constitution here in Tennessee, that it would be a giant step forward for Tennesseans; that we will be saying to America that Tennessee took a step. When many other states rewrite their constitutions maybe they will make the effort, at that time, to add something in their constitution to let the Supreme Court, which we have no control over, know exactly how we feel about the rights of us as individuals. I would urge support of this amendment.

CHAIRMAN BROWN: The Chair sees several other delegates who desire to speak, but our time has expired. I must declare this session of the Committee of the Whole adjourned. We will rise and report to the Convention.

MR. PRESIDENT LEE: The Chair recognizes Delegate Larry Brown, Chairman of the Committee of the Whole, for a report.

MR. BROWN: Mr. President, your Committee of the Whole met, considered several proposed amendments to the Report of the Committee on Education, but no final action was taken.

MR. PRESIDENT LEE: The Chair recognizes Delegate Evans.

MR. EVANS: Mr. President, I move at this time that we resolve ourselves into Committee of the Whole for an additional forty-five minutes to resolve some of these amendments that we have.

MR. PRESIDENT LEE: It has been moved and seconded that we resolve ourselves into Committee of the Whole. It is now 11:00 a.m., that would put us at 11:45 a.m. All those in favor, let it be known by saying aye, opposed, no. The ayes have it. The Chair wishes to ask Delegate Larry Brown to come forward and chair the Committee of the Whole.

CHAIRMAN BROWN: I now call to order the third meeting of the day of Committee of the Whole. Having twice ascertained a quorum to be present, I will once again ascertain that a quorum is present. We will continue with our discussion relative to Amendment No. 3 to the Report of the Committee on Education. I will recognize first Delegate Bickers, then Delegate Cohen.

MR. BICKERS: Mr. Chairman, ladies and gentlemen, ...

CHAIRMAN BROWN: Yes, Delegate Cohen, for a point of order.

MR. COHEN: I believe Delegate Bickers has spoken on this point before.

CHAIRMAN BROWN: You are correct, Delegate Cohen. Thank you for pointing that out. Delegate Bickers, it will be necessary to allow Delegate Cohen to speak first since he has not spoken on this amendment. Delegate Cohen.

MR. COHEN: I would just like to raise two points. Number one is, the fact that we have come here, and one of the purposes for which we came here, is to bring our Constitution into line with 1977 constitutional theory, striking unconstitutional provisions pertaining to non-mixing of the races in public schools. To pass this amendment will be to take us backward rather than forward, which is the purpose for which we are here; to pass another amendment which conflicts with the federal Constitution. That is number one.

Number two, Delegate Jenkins says this only encourages voluntary prayer. I know of no way to inhibit voluntary prayer. When one wants to pray or meditate, one does so from their own heart, soul, or mind. There is no way within a school, or on the street, or anywhere else, to prohibit a person from voluntarily praying themselves. I would ask everyone to vote against this amendment.

CHAIRMAN BROWN: The Chair will recognize Delegate Hooks, Delegate Pruitt, then Delegate Harr, all of whom have not had their first chance.

MR. HOOKS: Thank you, Mr. Chairman. I rise to speak in favor of this amendment. Mr. Jenkins' sentiments are very similar to mine. The word "voluntary", as I see it, allows everyone to worship and pray as they see fit. I think in our public schools, in the early ages of childhood, I think that independence would be, in my mind, of being able to pray, and to be able to have that discretion as one would see fit, would be a guidance and a pattern in the child's life.

There have been several arguments against, there have been several arguments for. Many of you have a concern that it does not come within the Call. So I have introduced an amendment as a severability clause. In fact, if it is ruled unconstitutional if this amendment passes, it will not knock out the whole article. I did want to make the Body aware of that. I think that is probably a bearing factor, whether this amendment passes or fails. But, in the area of prayer, I do not think it is a discrimination or a discriminatory clause against any particular group of people or religious belief. I think, as Mr. Cohen has brought out, anybody can pray and meditate in their own heart and mind as they see fit. I think it would be a positive step for this Convention to bring to hundreds of thousands of people who do believe in prayer, to go to the polls and ratify this, and have something in their hearts that they truly believe in. At this point, I urge all of you to vote for this amendment, and let us make Tennessee go a step forward in an area that many states have been afraid to address themselves to, and let us give our kids something to believe in early in life. Thank you.

CHAIRMAN BROWN: Let me first apologize to Delegate Harr, I believe it is, for mispronouncing his name. The Chair will recognize Delegate Pruitt.

LADY PRUITT: Thank you, Mr. Chairman. I would like to point out the fact that the teacher is the most dominant factor in any classroom situation. It is very difficult for anyone to be subjective on any matter in the classroom, be it religion or what have you. I would like to leave that thought with you. I urge, from what I have just said, you to vote against this measure.

CHAIRMAN BROWN: Delegate Harr.

MR. HARR: It now reads that "voluntary public prayer should be encouraged". It would seem to me that if it was going to be the policy of the State of Tennessee to encourage prayer, it would be somewhat less than voluntary. I, therefore, urge the defeat of this amendment.

CHAIRMAN BROWN: Delegate Bacon. I would remind the delegates that we are on the amendment as amended, which adds the word "voluntary", which Delegate Harr just pointed out. Go ahead, Delegate Bacon.

LADY BACON: I am Delegate Bacon, and I am a member of the committee. I feel like that our report is adequate. I would like to remind you that as Mary Pruitt brought out, the teacher has a great influence over the influence in her classroom. We do have, probably, some teachers who would take advantage of this. I urge you to vote against this amendment.

CHAIRMAN BROWN: Any other delegate who has not spoken before I go to those who have already had one shot at it? Delegate Knight.

LADY KNIGHT: I have been in the classroom for twenty-nine years; I have seen the abuse of prayer many many times. I urge you to vote against it.

CHAIRMAN BROWN: Any other first timers? If not, the Chair will recognize Delegate Bickers.

MR. BICKERS: Mr. Chairman, ladies and gentlemen, I fully respect the feelings of Mr. Bernstein and others here. I can appreciate the singularity that one can find themselves in as a minority in many situations. We have many different types of minorities, just like school children who are poor, maybe who are barefooted going to school, and maybe made fun of by other boys and girls. This is not right. But you cannot legislate it; you cannot change it. I can relate, myself, to that particular type of minority when I was a child. I think that probably my religious feelings, my knowledge of Christ, was what helped me through many of those crises. I would like to remind you that this particular amendment, like I said before, needs some improvement, but it does not say to whom one prays. It does not say or even suggest, what religion that you must worship, or anything of that nature. It only acquiesces the right of voluntary prayer. I think that we need to do this from time to time. I think that we need to reaffirm ourselves from time to time.

I think that when we, as individuals, talk with one another and come to know one another, that we need to share our faith. We need to share our feelings and we gain support. Three years ago I became another kind of minority, a singular in this particular Convention. It has been an enlightening experience. All of a sudden, for forty-three years you are healthy, you have been in the military, you have been in the Reserves for twenty-five years, and you have cancer, a malignant tumor in your arm, and your doctor, you go to the doctor, and two doctors say that it is a fatty tissue tumor and nothing to worry about. They take it out, do a biopsy, say it is malignant, all of a sudden they say, we are going to take your arm off above the elbow. That was sort of a shocker.

I want to witness to you now the benefit of prayer. Without it I would have been one of the statistics that a doctor in Memphis, who is a noted hand surgeon, stated in the paper a few months ago, that the majority of cases where men have their hands or their arms amputated, require psychiatric care. But through prayer, through my faith, I have not had to have any psychiatric care; I have not had any depression. I went back to work. I made up my mind at the beginning, with the Lord's help, that I could laugh about it, or I could cry about it. There is no profit in crying about it. I have had a lot of fun since then with it. I have helped to educate a lot of people. But you still have little things like kids who will make a lot of remarks; "Hey, Mama, what happened to that man's hand, or his arm?" I will show them, because I want people to understand better.

I submit that nothing in this amendment or how it may be finally worded, will affect what is happening now in the public schools. You have had passed out to each of you a copy of Tennessee Code Annotated which spells out just how prayer is related to the schools. Therefore, the arguments that have been presented that there would be any different decorum in the schools because of our passing an amendment mentioning prayer, will have little effect; except it will have a message to the people across the State of Tennessee. I submit that it does not contain any affront to any religious group, unless by work of it they would have a majority to abide by their non-religion, if that were the case.

Ladies and gentlemen, I think that we need to say something to the people back home about what we believe in, acquiescent by some type of amendment. Like I said before, I believe this amendment will need to be worked over a good bit by Style and Drafting, but I think that we need it, and I think it will help the work of this Convention. Thank you very much for listening to me the second time.

CHAIRMAN BROWN: The Chair has seen one other delegate who desires to speak. After that, it is the intention of the Chair to recognize Delegate Dixon for his final words, if no other delegate would like to make a comment. So, at this time, the Chair will recognize Delegate Cunningham.

MR. CUNNINGHAM: I think we all recognize that we have been taught all up through our schools that the three greatest institutions are the home, the church, and the school. We have private prayer, or voluntary prayer, in the home, and in the church. Our Federal Constitution does not limit any kind of voluntary prayer. It is only the mandated prayer that our Federal Constitution speaks to and eliminates. I believe when we insert the word "voluntary" in our State Constitution, I see no irreverence about that. I speak for this amendment. I see no reason why a child who wants to pray voluntarily does not have that right. I speak for this amendment, that we might approve it.

CHAIRMAN BROWN: The Chair at this time will recognize Delegate Dixon for any final comments he wants to make relative to the amendment.

MR. DIXON: Mr. Chairman, ladies and gentlemen of the Convention, I was very moved by the remarks of Delegate Bernstein. In fact, I think they were of such high caliber that I would want him to defend me at any time. I would just like to ask you to think about, number one, that you as members of this Convention, of this august Body, have had prayer since August 1, not only just every morning, but I can recall special occasions when you have allowed yourselves the opportunity to have prayers memorializing certain individuals. To me, there is something wrong, something unfair, about an inequity that would allow those who make policy for this great State, and for those of us who would have to follow that policy.

To me, you are saying that, on one hand, the members of constitutional conventions, state legislatures, and other governmental bodies, can be afforded the right to pray, can be afforded the right to be inspired by those who bring words from an Omnipotent Being. On the other hand, you are saying to those who have to follow that policy, that you cannot be afforded that right. You cannot be afforded because we do not feel that it is right. I think that is wrong. I think that goes beyond benign neglect to callous neglect.

I think that the real issue here today is no affront to anybody's personal feelings, whether you worship under the Star of David, or the Shadow of the Cross, that is not the issue. The real issue is whether or not you recognize an Omnipotent all-powerful Being, and whether or not this State will take a lead and set the example that there is a Supreme Being, and that we incorporate that into our Constitution, and let the world know that this State is a State that recognizes that there is a God.

On every hand, all across this country, we are letting one or two individuals destroy the basic fiber that built this country. Our Federal Constitution has a rich tradition, a rich history, a religious innuendo in it. I think that ought to be the case with our State Constitution. Our Federal Constitution does not deny that there is a Supreme Being. I do not think that our State Constitution ought to do that also.

The Supreme Court cases, the judges have said on every hand, the real issue is what is the intent. I think that our intent here is to allow the majority to express their wishes. I can understand a need to protect minorities, but what about the majority? Are we going to deny those, who fundamentally believe that there is a Supreme Being, to exercise that right? Mr. Chairman, at this time I move the adoption of this amendment.

CHAIRMAN BROWN: The Chair recognizes Delegate McDaniel.

MR. McDANIEL: Thank you, Delegate Dixon, you have been very eloquent. I think it is not the issue of this Convention, in terms of the Omnipotence of God, or his Being. I think the issue of this amendment is whether or not we shall make it a part of the resolution before us. Therefore, I feel that it is out of order, at this time, and I hope that this Convention will vote it down.

CHAIRMAN BROWN: Delegate Dixon.

MR. DIXON: Mr. Chairman, you know, sometimes we get elected to office, and we forget about people who are not lawyers, people who are not heads of tremendous bodies. We forget about the average man on the street. During this time that I introduced this resolution, I had the opportunity to talk with certain individuals, and, of course, certain individuals called me.

I found a deep and abiding faith that this proclamation, this proclaiming, this tremendous stand that the State of Tennessee could take today, would win the hearts and souls of so many people. I think that we ought to advocate that this country will not go the route of role, and on every hand we will stop removing prayer. There is a move afoot to take IN GOD WE TRUST off the money we carry in our pockets. If we continue to allow this to happen, as I said earlier, we will continue to erode the fundamental principles that built not only this State, but this country also. Mr. Chairman, I move you the adoption of this amendment.

CHAIRMAN BROWN: Delegate Baxter.

MR. BAXTER: Mr. Chairman, I believe we have heard a lot of eloquent, flowery speeches. I think we have heard enough that I do not believe there are not many here who have not made up their minds one way or the other. Is there any way that we can have the voice to vote on this thing without sitting here all day and listening to conversations?

CHAIRMAN BROWN: There is no formal way to end the debate, but the Chair is ready to take a vote at this time, if there is no further discussion. Delegate Hooks.

MR. HOOKS: Thank you, Mr. Chairman. I might add that Delegate Dixon and I have been in contact with over five hundred churches in the Memphis area, totaling about 250,000 people in congregations. They are in favor of prayer in public schools, voluntary prayer, in public schools. Thank you.

CHAIRMAN BROWN: Having been properly moved and seconded, and thoroughly discussed, we will now take a roll call vote on Amendment No. 3, as amended. At the sound of the bell, all delegates in favor of the amendment, vote aye, all opposed vote no. Has every delegate voted? Does any delegate wish to change his vote? Mr. Clerk, record the vote.

(Roll Call)

MR. CLERK: Ayes 28, noes 57, Chairman Helms and President Lee vote no, Chairman Brown votes no.

CHAIRMAN BROWN: The amendment fails. We are now down to Amendment No. 4. I will ask the Clerk to read Amendment No. 4.

MR. CLERK: Amendment No. 4 by Delegate Camp, to amend the Report of the Education Committee, that the report be amended as follows: In line six, to delete the words "eligibility standards", and substitute in lieu thereof the words "age requirement."

CHAIRMAN BROWN: I see Delegate Camp standing. I will recognize him. Delegate Camp.

MR. CAMP: Mr. Chairman, since preparing this amendment, although I am not real comfortable with the words "eligibility standards", I have talked with most of the members of the committee. I understand their intent. I think the words "age requirement" would not do

what they intended to do although I believe it could be sharpened up some. I respectfully withdraw the amendment.

CHAIRMAN BROWN: Delegate Camp wishes to withdraw his amendment. Without objection, Amendment No. 4 is withdrawn. We are on Amendment No. 5. Mr. Clerk, will you read Amendment No. 5.

MR. CLERK: Amendment No. 5 by Delegate Pleasant, to amend the Majority Report of the Committee of Education by inserting between the words "such other" and "post-secondary", the word "public".

CHAIRMAN BROWN: At this time, the Chair will entertain a motion for the adoption of Amendment No. 5. Delegate Pleasant.

MR. PLEASANT: I move the adoption of Amendment No. 5.

CHAIRMAN BROWN: Do I hear a second to that motion? Just a minute. Since the amendment was withdrawn, Amendment No. 4 was withdrawn . . .

MR. CLERK: Mr. Chairman, we have an amendment to an amendment that was originally as an amendment, so we lost our numbering. Number 6 now is Number 5.

CHAIRMAN BROWN: That is Delegate Pleasant?

MR. CLERK: Yes, sir.

CHAIRMAN BROWN: Delegate Pleasant's amendment is No. 5 at this time. Is everybody straight on that? I had a motion to adopt; do I have a second? We are now into discussion on Amendment No. 5. Does any delegate desire to be heard relative to Amendment No. 5? Delegate Wilder.

MR. WILDER: I thought that possibly Delegate Pleasant would want to explain his intention in that before I speak. I would appreciate it if he would.

CHAIRMAN BROWN: The Chair will recognize Delegate Pleasant for that purpose.

MR. PLEASANT: The reason for the amendment is simply as stated earlier. Again, with the proliferation of non-public schools, I feel that we need a more definitive definition as to what we mean by such other post-secondary educational institutions.

Secondly, if I understood the Chairman of the Education Committee correctly, it was his expression that the other would include public schools, and there was no intention that it would apply to private schools. So, in order to have clear concise language in the Majority Report of the Education Committee, then, of course, I would ask that the Majority Report be amended to include the word "public" as stated in the amendment. The other thing is, that I wish to raise the question as to whether or not state aid would go to church-related schools. Maybe the chairman of that committee can address that point.

CHAIRMAN BROWN: Having answered the question of Delegate Wilder, I will go back to him first to make his comments, if he has any to make at this time.

MR. WILDER: Mr. Chairman, simply taking up what I said relative to the amendment to the Amendment No. 3, the same principles that I stated then, seem to me to apply very clearly at this point, even more clearly. I like the wording of the committee's report, which says, "The

General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools." When we speak of public schools, as I understand it, in traditional language, this is K-12. Then it says, "open to all persons of the State, and shall establish and support such other post-secondary educational institutions, including public institutions of higher learning as may be determined by the General Assembly."

If we insert the word as the amendment has suggested, "public", in both of those places, this would preclude any type of aid to students to get education where they can. For instance, take Meharry Medical College, which is one of the great medical colleges of our country that has done work and performed great services for the black constituency, not only of Tennessee, but of the South, and of the nation, having produced a majority of the present black physicians in our country. This institution, which we did, as you know now, the State of Tennessee does support students attending Meharry, which is a private institution.

Likewise, other states from the southeastern educational board division also support students attending this institution. We also have students being supported at the School of Nursing at Vanderbilt and other places. There are many things that I do not have before me now that the State of Tennessee and other states with public funds support students because the facilities are available in these institutions and are cheaper for the State and the region to fulfill its obligation for providing education for the citizens of our State.

Likewise, there are other programs such as the tuition grant program, which include opportunities for students to receive aid from the State to attend the institution of their choice. There are facilities available in some of the private institutions that are not available elsewhere. It would cost the State more to provide those facilities than it is to utilize the facilities of the post-secondary institutions in our State. I think it would be a great mistake for us, either to mandate the support of students attending private institutions, as it would be to mandate that we not do it. Therefore, I think the wording of the present resolution is very clear that we support and establish other post-secondary educational institutions.

Naturally, if the State of Tennessee established an institution it would be a public institution. They cannot establish a private institution. Therefore, the insertion of the word "public" would not affect that in any way. I believe it would be extremely important for us not to include this language in the committee's report.

CHAIRMAN BROWN: The Chair at this time is going to recognize Delegate Helms to respond to a question by Delegate Pleasant, after which we will recognize Delegates Ramsey and Akin.

MR. HELMS: As it appears in the proposed article, Delegate Pleasant, it is a matter to be determined by the General Assembly.

CHAIRMAN BROWN: Delegate Ramsey.

MR. RAMSEY: Mr. Chairman, is it proper at this time to ask the proponent of the amendment a question?

CHAIRMAN BROWN: I think that would proper, yes.

MR. RAMSEY: Mr. Pleasant, are you familiar with the tuition-grant program in this State?

MR. PLEASANT: Somewhat familiar, but I think what we are addressing is institutions and not individuals.

MR. RAMSEY: Do you feel, with your amendment, saying public, that you would not do harm to the tuition-grant program in this State?

MR. PLEASANT: I do not. We are talking about institutions, not individuals.

MR. RAMSEY: Yes, I agree you are talking about institutions, but I, like Dr. Wilder, feel that this amendment would probably do harm to that program and to other programs. I believe the Majority Report of the committee is well drafted. I think the intent is very clear. I believe the addition of the word "public" could possibly muddy the water pertaining to the tuition-grant program, so, Mr. Chairman, I strongly urge the delegates to oppose Amendment No. 5.

CHAIRMAN BROWN: Prior to recognizing Delegate Akin, let the Chair say that I have been informed that Amendment No. 7, which has been dropped down to Amendment No. 6, has now been withdrawn, so the amendment we are on now is the final amendment which is on the Clerk's desk, relative to the committee report, and we should be getting to a vote on the report of the committee shortly. That is for the purpose of the numerous delegates I see who are presently out of the room. Delegate Akin and then Delegate Rowe.

MR. AKIN: Thank you, Mr. Chairman. Delegate Wilder, of course, is an associate of a private institution. The statements that he has made, I support. I have been associated with a state institution for the last, with the exception of the last eighteen months, six or seven years. I have seen some of the needs the State cannot possibly afford to provide. There are a lot of instances where there are very limited fields. For example, here in the city of Nashville, associated with Peabody and Vanderbilt, is the Bill Wilkerson Speech and Hearing Center. Maybe the State could pick that one up, and then you find another need, and maybe the State could pick that one up. But, if the State begins to make public institutions to cover all these needs that the public needs, we will put ourselves out of business awfully fast.

We would have schools all over the State that were strictly public institutions. The State needs to be allowed to provide for some support for private institutions instead of duplicating the effort of the private institutions. That is what we are talking about. When I was associated with Vanderbilt University Medical School, not as an instructor, obviously it was as a peon, we were training nuclear medicine technicians. There is no public education in Middle Tennessee training nuclear medicine technicians. Maybe you have not even heard of such a thing. But they are needed; and it is post-secondary. The State needs to provide some funding for it if we are going to allow that education, or encourage that educational field. I strongly urge that you defeat this amendment so that it cannot impair the legislature from providing support for some limited private schools in some limited fields. Thank you.

CHAIRMAN BROWN: Delegate Rowe.

MR. ROWE: Thank you, Mr. Chairman. I feel compelled to rise to speak against this amendment. The amendment would, in effect, contradict the very first statement in the report which says, that "The State of Tennessee recognizes the inherent value of education and encourages its support." A major segment of education in the State revolves around something like thirty-nine private independent colleges and universities in this State.

If the State's encouragement and support is going to be confined to merely the public sector, it is going to very dramatically discourage the other segment, the private sector. I think from that fact alone we should reject this amendment, but more than that, it incorporates a highly controversial area into the Majority Report. In fact, it opens up that can of worms again that we have heard mentioned. I believe it would subject the entire report to being challenged

as being outside the scope of the Call. I just could not support the Majority Report if it is going to include this amendment, and is going to be a part of the ballot that is going to be voted upon. In fact, I would just have to, just on the basis of restricting the encouragement of the private sector of education, warrant an active role on my part to defeat that at the polls. I encourage the delegates to reject this amendment.

CHAIRMAN BROWN: Delegate Bickers.

MR. BICKERS: Mr. Chairman, ladies and gentlemen, after this last vote, maybe my credibility is such that we will get an opposite vote from my recommendation. In any event, I feel that in this particular case, that we need to allow the legislature some latitude, because we have such a complex system of education, public, private, mixed, and so forth, that I think if we started our lines too narrowly we can handicap, we can interfere with one of the most vital resources, and one of the most necessary resources of our State, that is, our educational resources. Should we do that, through some action today, the consequences of which we are not aware at the present, then we have put Tennessee back further, a lot further back than where we already stand among the other states. We never have been right up front on very many things at all. So, let us leave our educational programs broad enough, leave the latitude broad enough so that the legislature can regulate, in this field, as necessary, and warranted for the circumstances. I would urge each of you to vote against this particular amendment. Thank you.

CHAIRMAN BROWN: Let me just point out that we have seven minutes remaining. No more amendments. We may be able to get to the full report. Chairman Helms has requested a comment, so I will recognize Chairman Helms at this time.

MR. HELMS: After that call for a vote, I pass.

CHAIRMAN BROWN: Delegate Pleasant, do you wish to make a final statement? All right, we are now ready for a vote on Amendment No. 5 to the proposed Report on Education. At the sound of the bell, all delegates in favor of Amendment No. 5, vote aye, all opposed vote no. Has every delegate voted? Does any delegate wish to change his vote? Mr. Clerk, record the vote.

(Roll Call)

MR. CLERK: Ayes 3, noes 80, Chairman Helms votes no, President Lee votes no, Chairman Brown votes aye. Mr. Sterling votes no.

CHAIRMAN BROWN: The amendment fails. We are now on the Report of the Committee on Education. Any discussion? Delegate Bass.

MR. BASS: Mr. Chairman, one question, if I could. I am concerned that the language as it appears in the report may, in fact, indicate that the State is to support a system of free public schools which may be more than just primary and secondary schools. I would like to ask the chairman, is it the intention of the committee report that the free public schools be primary and secondary schools only, and not schools of higher education?

CHAIRMAN BROWN: Chairman Helms, for the purpose of responding to a question.

MR. HELMS: This is a matter to be determined by the legislature as it has in the past. Free public schools, as we normally think about it, or the common way of thinking, is K-12. It used to be 1-12; but with the advent of the community college it would include that, too.

MR. BASS: I would simply ask that the Committee on Style and Drafting address themselves to that question, so that we do not have any confusion in the thing as it finally comes out. I agree with the committee's intention, but I do want to point out that, it seems to me, perhaps open to some question.

CHAIRMAN BROWN: The Chair will point out to Delegate Bass, which I am sure he is already aware of, that this matter will come back to the full Convention, so if you find something wrong with that, you will have a chance to propose an amendment, or so forth at that time. Any other discussion prior to taking a vote on the Report of the Committee on Education? If not, I will recognize Chairman Helms for any final comments he desires to make.

MR. HELMS: By all means, we ought to vote. I just want to express my appreciation to you for your interest in education. I had felt at one time, maybe, that we were sort of a back burner sort of institution, but I have changed my mind now. Mr. Chairman, I move you the adoption of this report.

CHAIRMAN BROWN: Three minutes. Delegate Holloman.

MR. HOLLOMAN: I just have one inquiry. I thought we had another amendment on our desks.

CHAIRMAN BROWN: It was withdrawn.

MR. HOLLOMAN: Good.

CHAIRMAN BROWN: We are now ready for a vote on the Report of the Committee on Education. At the sound of the bell, all delegates in favor of this report, vote aye, all opposed vote no. Has every delegate voted? Does any delegate wish to change his vote? Mr. Clerk, record the vote.

(Roll Call)

MR. CLERK: Ayes 86, noes 0, 1 present and not voting, President Lee votes aye, Chairman Brown votes aye, and Chairman Helms votes aye.

CHAIRMAN BROWN: Delegate Rowe votes aye. The Committee Report is adopted in its original form. Having concluded our business with two minutes to spare, I will now entertain a motion to rise and report.

MR. EVANS: I so move you, Mr. Chairman.

CHAIRMAN BROWN: It has been moved and seconded that we rise and report. All those in favor, let it be known by saying aye, opposed, no. We will rise and report. I yield to Mr. President Lee.

MR. PRESIDENT LEE: The Chair recognizes, at this time, Delegate Larry Brown, Chairman of the Committee of the Whole, for a report.

MR. BROWN: Mr. President, I am pleased to report that your Committee of the Whole met, thoroughly considered, and discussed the Report of the Committee on Education, after considering numerous amendments, all of which failed, the Committee of the Whole adopted the Report of the Committee on Education as originally proposed.

MR. PRESIDENT LEE: Thank you very much. Mr. Clerk, that now goes to Style and Drafting, does it not?

MR. CLERK: Yes, sir, that is correct.

MR. PRESIDENT LEE: The report now goes to Style and Drafting, then will come back to this Body for final consideration at a later date to be assigned by the Calendar and Agenda. Delegate Evans.

MR. EVANS: Mr. President, I would like to announce that our committees will pick up with the 11:30 a.m. schedule. Some of them are going to have some shorter meetings. The Attorney General sub-committee wants to meet at 12:00 noon in the Senate Chamber briefly. That note should be made. Those committees will pick up with the 11:30 a.m. schedule. Some of the meetings will be shorter, but I think we can get some of those committee meetings in.

MR. PRESIDENT LEE: Delegate Duncan Crawford.

MR. CRAWFORD: Mr. President, I would like to announce that I have talked to Delegate Leonard Ambrose. He is recovering at his home from a minor illness, and expects to be back with us Monday or Tuesday.

MR. PRESIDENT LEE: Chairman Burson.

MR. BURSON: Mr. Chairman, Dr. Heller will be addressing us at 2:00 p.m. today, rather than at 1:30 p.m. I would like the members of the committee, if they could, to begin to assemble at about 1:45 p.m. Please have your questions written out. In our previous hook-up, we did have delegates who wanted to ask questions. If you would prepare them in advance and hand them in, we will have a committee member ask that particular question. We have a session at 7:00 p.m. tonight which should be a lively debate between, in our final public meeting session on public spending, Mr. Copeland and Nelson Biddle. So, if you have nothing else to do at 7:00 p.m., I would urge you to come and listen to those two presentations.

MR. PRESIDENT LEE: Chairman Walker.

MR. WALKER (ROANE): Mr. President, I would like to announce that Local Government will, today, commence to entertain and deliberate about the resolutions that have been presented, and resolutions that have been collated among committee members. If any person desires to be present, and involve himself or herself in that, we certainly invite them to do so.

MR. PRESIDENT LEE: Chairman Bailey.

MR. BAILEY: Mr. President, I want to encourage all the members on the sub-committee for Attorneys General to attend the meeting at 12:00 noon. We expect to deliberate on the various resolutions that have been presented to our committee by referral, with the expectation of, hopefully, beginning to work toward a final report to present to the Judicial Article Committee. I am not sure that meeting will be quite as short as Delegate Evans had indicated.

MR. PRESIDENT LEE: Chairman Oehmig.

MR. OEHMIG: Mr. Chairman, I would like to announce that the Judicial Committee that was scheduled for this morning, will be combined with the one at 2:00 p.m. this afternoon. We have several judges from the Court of Appeals and other speakers who are scheduled. That will be at 2:00 p.m. in Room 16.

The Journal of the Debates

of the

LIMITED CONSTITUTIONAL CONVENTION OF 1977

STATE OF TENNESSEE

TUESDAY, OCTOBER 11, 1977

THIRTY-SEVENTH DAY

MR. PRESIDENT LEE: Will the Convention please come to order? Will the delegates and visitors please stand and the invocation will be delivered by the Chaplain for the Day, Dr. Eric Greenwood, Pastor of the Christ Episcopal Church of Nashville, Tennessee. He is here with us as a guest of Joe Baugh of Franklin.

(Invocation)

MR. PRESIDENT LEE: Please remain standing while the Pledge to the Flag will be led by Delegate Claude Ramsey.

(Pledge of Allegiance to the Flag)

MR. PRESIDENT LEE: Delegate Evans.

MR. EVANS: I move to dispense with the reading of the minutes of the last meeting.

MR. PRESIDENT LEE: Is there a second? It has been moved and seconded that the reading of the Journal be dispensed with. All those in favor, let it be known by saying aye, opposed, no. It carries. At the sound of the bell, will the delegates please answer the roll call. Has every delegate answered the roll call? Does any delegate need additional time? Chairman Taylor is here. Mr. Clerk, give us the roll call.

(Roll Call)

MR. CLERK: Mr. President, there are 91 delegates present.

MR. PRESIDENT LEE: There is a quorum present. Regular Order of Business, Mr. Clerk.

MR. CLERK: Reports from Standing Committees. "Mr. President, Your Committee on Calendar and Agenda begs leave to report that we have met and set the Report of the Committee on Homestead Exemption on the calendar for Thursday, October 13, 1977, for consideration in the Committee of the Whole. Terry L. Evans, Chairman."

"Mr. President, Your Committee on Calendar and Agenda begs leave to report that we have met and set the Report on Legislative Vacancies on the calendar for Monday, October 17, 1977, for final action. Terry L. Evans, Chairman."

"Mr. President, Your Committee on Style and Drafting begs leave to report that we have carefully considered and recommend the Final Report on Governor's Veto, dealing with Article III, Section 8, and further recommend that it be referred to the Calendar and Agenda Committee. Donald R. Rowe, Chairman."

MR. PRESIDENT LEE: It is so referred.

MR. CLERK: Reports from Select Committees. Resolutions Referrals. Introductions of Resolutions. Unfinished Business. Mr. President, our calendar for this morning is the Report of the Committee on Style and Drafting, the final Report on Article XI, Section 12, concerning Education.

MR. PRESIDENT LEE: Chairman Rowe.

MR. ROWE: Mr. President, I ask permission for Chairman Helms and me to approach the Well.

MR. PRESIDENT LEE: Would Chairmen Rowe and Helms please approach the Well for presentation of this amendment.

MR. ROWE: Mr. Chairman, your committee on Style and Drafting has completed a careful consideration of the proposal from the Committee on Education dealing with Article XI, Section 12. We bring it before the Body for final consideration. Before the Clerk reads the proposal from the Style and Drafting Committee, I would like to call everyone's attention to a typographical error that occurred in the final typing of the report. If you will look at the fifth line from the bottom of the report, the word "persons" is followed by an "n". That "n" should be deleted.

MR. PRESIDENT LEE: Without objection, that will be corrected.

MR. ROWE: Mr. Chief Clerk, would you kindly read the proposal?

MR. CLERK: Report of Committee on Style and Drafting. The Committee on Style and Drafting has examined the Report of the Committee on Education as approved by the Committee of the Whole and recommends that the report be adopted as follows:

"BE IT RESOLVED BY THE LIMITED CONSTITUTIONAL CONVENTION OF 1977, That the following amendment to the Constitution of Tennessee be proposed by this Convention and submitted to the people of Tennessee for their ratification.

"PROPOSAL_____: CHANGES RELATIVE TO EDUCATION. That Article XI of the Constitution of Tennessee be amended by deleting therefrom in its entirety, Section 12, and substituting therefor the following: Section 12. Inherent Value of Education. Public Schools. Support of Higher Education. The State of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools, open to all persons in the State. The General Assembly may establish and support such post-secondary educational institutions, including public institutions of higher learning as it determines."

MR. ROWE: Just a few words before I move for adoption. The Style and Drafting Committee made a few changes in structure and in wordage, without, in any way, impinging upon the basic ideas or the intent that the Education Committee conveyed in their report. The Chairman of the Education Committee, Chairman Helms, and I believe one or two others of

the committee, were present with us, and helped us in making this restructuring, and wholeheartedly, as I understand, concurred in the final product that appears before you. Mr. President, I move that the proposal from your Style and Drafting Committee be adopted as read.

MR. PRESIDENT LEE: It has been moved by Chairman Rowe and seconded by Chairman Helms that this report be adopted. Discussion. Chairman Holloman.

MR. HOLLOMAN: I would just like to ask one question for clarification. You have in that fifth line from the bottom, the free public schools are open to all persons in the State. Why did you word it, "persons in the State" rather than "people of the State" or something denoting residency? This would sort of connotate that visitors and sojourners in the State would be, or have access to our public school system.

MR. HELMS: I do not think there was any particular significance attached to that expression. We are thinking about drafting an educational article for the State of Tennessee, naturally we would put "in the State" in it. It was not the intent of the committee, as far as I know, to attach any special significance to that.

MR. HOLLOMAN: My question was, did you consider this wording when you put it in, as far as residency requirements? Was that even considered?

MR. HELMS: It was not considered; it was not discussed. This was taken from the model State Constitution, the wording. So I presume that present practices would continue.

MR. HOLLOMAN: I would disagree, and I would think that the words here could lead to construction by the Supreme Court which would be detrimental to the school system. I would just merely make that suggestion that these words should be more clear and be clarified.

MR. ROWE: Do you have an amendment to propose?

MR. PRESIDENT LEE: Mr. Bass, then Mr. Akin. I do not believe there are any amendments on the desk, are there, Mr. Clerk?

MR. CLERK: No, sir.

MR. PRESIDENT LEE: Delegate Bass.

MR. BASS: I would like to ask of the Chairman of the Education Committee if he would explain the intent of the committee in using the term "free public schools". Does that mean grades 1-8 and high school? Is it intended to leave the door open for whatever the Legislature may determine in that regard? What is the intent?

MR. HELMS: Yes. You will notice up here, "shall provide for the maintenance, support, and eligibility standards." When we discussed free public schools, we felt like the Legislature would need some sort of support there, especially if someone claimed, well, now look, this is kindergarten through grade 14. The Legislature will determine the eligibility standards. When you say, open to all persons in the State, we, at the present time, do not have nursery schools, but at some time, ages 3 and 4 may be included in the public school system. So this leaves it to the Legislature to determine the eligibility standards.

MR. BASS: So then it is not the intention of the committee to require, by any means, that the State furnish a free college education, for example, to all persons in the State?

MR. HELMS: No, it is not. Of course, the committee would have nothing to do with that. It would be a matter for the Legislature to make the determination as to what type of system that we could have. I presume that they could remove kindergarten, if they wanted to. It is within their prerogative. I see no way in which the meaning of this particular article could be twisted, even by some ingenious lawyers, to make that possible.

MR. BASS: One other question, if I could. I understand it is also the intention of the committee that the last sentence of the article of the section, would authorize, as present law does, the Legislature to support private post-secondary educational institutions. Is that correct?

MR. HELMS: It does not require; it permits it.

MR. BASS: Thank you.

MR. PRESIDENT LEE: Delegate Ambrose.

MR. AMBROSE: I think Delegate Holloman has put his finger on something that is rather important. I take it the intention of this proposal is that the free public schools shall be open to all residents of the State. Persons in the State can include transients. I think maybe we ought to think a little bit more before we adopt this language, "all persons in the State." I would suggest "all residents of the State," I think, or I am sure, that must have been the intention of the committee. We do not want to educate everybody who is going through on a trip to Florida.

MR. HELMS: As long as the General Assembly is determining the eligibility standards, I presume they could control that within the context of this article.

MR. PRESIDENT LEE: Delegate Bernstein.

MR. BERNSTEIN: Mr. Chairman, I think the way to correct that problem is just to stop after the words "free public schools." The sentence would read, "The General Assembly shall provide for maintenance, support, and eligibility standards of a system of free public schools." Then the eligibility standards would get into residence and things of that sort. I think that is the way to resolve that problem.

I really want to address the committee on a more serious matter. Last week I became aware of the fact that the State of New Jersey, in a recent case, I think it was about two years ago, was faced with a challenge to the public school system and the absence of adequate support to public education on the college level. A case was filed and ultimately the Supreme Court of New Jersey held that the State of New Jersey was committed to providing expanded college education for the residents of that State. They relied on a section in the State Constitution which is not the same as our section, but is there nevertheless, which again was a flowery prose about support of education. That ultimately led to the adoption of the state income tax for the first time in the history of that State. I wonder whether the committee was aware of that decision, and how the wording in that particular Constitution compared to our own.

MR. HELMS: We were aware of that. There are two safeguards, as I see it, in this particular article to guard against that. In your sentence there, the first one, it says "The General Assembly shall provide for the maintenance, support, and eligibility standards." The eligibility standards determination was one safeguard. That would be with your free public schools as the Legislature might determine, and that, normally, would be kindergarten through grade twelve.

A second one down there, "The General Assembly may establish and support such post-secondary institutions including public institutions of higher learning." I believe that was the case in New Jersey. As it determines, in other words, the Legislature would have the final determination there as to what it would support in the way of higher education. I think you would have two safeguards in this. This is a pretty standard article. It is one that, so far as I can see, would not create the problems that you envision.

MR. BERNSTEIN: Mr. Helms, I brought the article to the attention of our counsel, Mr. Lewis. I wondered if he had counseled with you about it.

MR. HELMS: I am sorry, would you repeat it please.

MR. BERNSTEIN: I brought the court decision to the attention of John Lewis, our counsel, last week, when I became aware of it. I wondered if you had had a chance to review it with him.

MR. HELMS: Yes, I have. I talked it over with Mr. Lewis. Mr. Lewis says as it is presently written, there is no problem.

MR. BERNSTEIN: I am going to write it in marble that Mr. Helms said, no problem, no income tax in Tennessee.

MR. HELMS: No income tax. I am for that.

MR. PRESIDENT LEE: Delegate Elion.

MR. ELION: Mr. Chairman, I differ with Delegates Holloman and Ambrose in that we do have transients coming to our State who are entitled to an education in Tennessee. The migrant workers are just one example. I do not think that any of us would want to shut off free and public education to these children. Now, again, as the proposed resolution is now written, it does not preclude the Legislature from setting standards. As a matter of fact, that is emphasized in that resolution. The Legislature still has the authority to set standards, and this is what we are talking about, standards. In other words, if a child is going to be a resident, or what have you. Personally, I feel that we should not move to shut off free and public education to these children. Thank you.

MR. PRESIDENT LEE: Delegate Dixon.

MR. DIXON: Mr. Chairman, I disagree with my colleague, Mr. Holloman, based on a different ground. Maybe because I am not a lawyer, I do not have any problems with the amendment. The first part seems to be dealing with those institutions which are not post-secondary institutions which we are talking about elementary and high schools, and there is no problem there with residency requirements. If someone comes in from California to go to grade school or high school, then there is no problem. There should not be a residency requirement. I think the last sentence speaks to those schools which are post-secondary schools. It does not even mention the fact of setting up eligibility standards, and that seems to be left to the Legislature and to those post-secondary schools. So, as I see it, the way the proposed resolution is drawn, there is really no problem, because the first article, Mr. Holloman, seems to be dealing with the public school system. The last sentence is dealing with higher education.

MR. PRESIDENT LEE: Delegate Holloman.

MR. HOLLOMAN: I would like to just respond. Mr. Dixon talks about having residency requirements. This language, "open to all persons in the State," could, effectively, prohibit

residency requirements in the public schools. If the neighboring states were to have school problems, we could have a lot of children visiting their relatives in Tennessee, and we would be educating the children of the surrounding states.

MR. PRESIDENT LEE: Delegate Holloman, I have on the desk, Amendment No. 1. That is yours, is it not? Delegate Holloman.

MR. HOLLOMAN: Mr. President, I move the adoption of Amendment No. 1, which is pursuant to Mr. Bernstein's suggestion, just to delete those words, "open to all persons in the State."

MR. PRESIDENT LEE: Is there a second? Under Rule 42, this will require a two-thirds vote of the membership of the Convention to become part of the resolution to amend the Constitution, relative to Article XI, Section 12. Back to you, Mr. Holloman.

MR. HOLLOMAN: I think it would be in order for me to suspend the rules, at this time, so that we can consider the amendment.

MR. PRESIDENT LEE: The motion to suspend the rules has been made and seconded. The Chair rules that is in order. This would take two-thirds vote of this Body of those present on the Floor this morning to suspend the rules for the consideration of this. Delegate Camp.

MR. CAMP: I move the previous question, Mr. President.

MR. PRESIDENT LEE: Is there a second? There has been a motion made that the Chair put the previous question. All those in favor that the Chair put the previous question, let it be known by saying aye, opposed, no. The ayes have it. This is on the motion to suspend the rules. At the sound of the bell, those in favor of suspending the rules, let it be known by voting aye, those opposed, no. Has every delegate voted? Does any delegate wish to change his vote? Record the vote, Mr. Clerk.

(Roll Call)

MR. CLERK: Ayes 76, noes 12.

MR. PRESIDENT LEE: The rules are suspended. Back to Amendment No. 1 of Mr. Holloman. Delegate Ambrose.

MR. AMBROSE: Mr. President, I think that adoption of this amendment is good. It puts the control of the school system, as it should be, in the Legislature. I think that the Legislature will take care of Delegate Elion's remarks about transients. If there are any little children running around the State who are not in school, the truant officer will get them. They will not know whether they are residents or not. They will put them in school.

MR. PRESIDENT LEE: Delegate Burson.

MR. BURSON: Mr. Chairman, I have two comments. One is, I would like to hear, I may have missed it, Mr. Helms may have addressed himself to it, the specific reason for having included that language, "open to all persons in the State," in a clear statement of what the intent of that language is.

The second thing pertains not only to this amendment, but to some extent, last night until today. The reason, and I voted against the suspension of the rules of this, is that we are now

passing what is going into the Constitution. This is the final vote. We have a Committee of the Whole debate where this thing is published in advance. The purpose of that is for us to seriously and deliberately look at this thing, and pick these problems up. There is no reason for us to, if this is a serious problem, have missed that in the Committee of the Whole and then in Style and Drafting, and to come on the floor now and just require a majority vote to amend without, perhaps, proper deliberation, something that is going to go into the Constitution. I think it is a dangerous precedent for us to establish to have suspended the rules when we have, just as last night, somewhat of a last minute change on final passage. Personally, I cannot see the damage that would be done by this particular amendment, but I do think it is a dangerous precedent to be established, and one which we should exercise with a great deal of caution in the future. I would like to hear from Delegate Helms as to the specific reasons, and how he feels this would affect this particular article, by deleting that verbiage.

MR. PRESIDENT LEE: Chairman Helms.

MR. HELMS: Again, I want to thank all the delegates for their interest in education. As we started off here, it looked like there was not much interest, but we have considerable interest. Delegate Burson, this particular passage that you were talking about was discussed. It had nothing to do with residency requirements, or the movement back and forth between states or things of that sort.

In education, we have to deal with this matter now. "Open to all persons in the State," would not affect it in any way. The intent of this, and it was discussed in the committee, was simply this. If we say, "open to all persons in the State" it will prevent discrimination against any particular group. Education has not always been open to all persons within the State. It has just been within recent years that we have moved to permit certain handicapped students to come into the school. They had to be in a separate type of institution. There are possibly other types who might be discriminated against also. This is why this particular phrase was put in there, "open to all persons in the State." It had nothing to do with the movement back and forth between states.

MR. PRESIDENT LEE: Back to Mr. Dixon and then Mr. Ambrose.

MR. DIXON: Mr. President, I would like to address a question to Chairman Helms. As I said earlier, I am not a lawyer, and I agree with Mr. Burson. It seems very concise and clear to me, but, Chairman Helms, does not the intent seem to be that public schools would mean those schools that are not post-secondary schools?

MR. HELMS: That is the way I interpret it.

MR. DIXON: Then from that point I think you deal with the matter of post-secondary schools in the last sentence, is that correct?

MR. HELMS: That is correct.

MR. DIXON: What I am saying is that, right now if someone moves here from Arkansas or Mississippi, then they ought not be charged to go to a high school or to an elementary or grade school.

MR. PRESIDENT LEE: Mr. Ambrose and then Mr. Eskind.

MR. AMBROSE: Mr. President, in a brief reply to Delegate Burson, the whole purpose of sitting as Committee of the Whole, and then adopting in the Convention, is to give this Body

the right and ability to correct its mistakes, to refine and produce an excellent product, we hope. I think that one thing we should always think about in the Constitution is to make it brief. Do not put a word in there that you can get by without. I think that this amendment proposed by Delegate Holloman should be adopted.

MR. PRESIDENT LEE: Delegate Eskind, and then back to Chairman Helms for a response to that.

MR. ESKIND: Mr. President, fellow delegates, I have listened to the discussion, the explanation by Chairman Helms, the comments by Delegate Bernstein, by Delegate Burson, and others, and I am beginning to believe that there is substantive difference between the wording that has been presented in this final report and what happens with the amendment. Therefore, sir, I would move that this be returned to the Committee of the Whole for further discussion.

MR. PRESIDENT LEE: Is there a second? It has been moved and seconded that this report be committed back to Calendar and Agenda for scheduling back to the Committee of the Whole. No other discussion on the motion to commit? At the sound of the bell, those in favor of committing it back to committee, let it be known by voting aye, those opposed vote no. Has every delegate voted? Does any delegate wish to change his vote? Record the vote, Mr. Clerk.

(Roll Call)

MR. CLERK: Ayes 20, noes 69, 1 present and not voting, Chairman Helms and Chairman Rowe vote no.

MR. PRESIDENT LEE: The motion to commit fails. Back on Amendment No. 1, still discussing Amendment No. 1. Mr. Holloman. Excuse me, Mr. Helms, did you wish to respond before Mr. Holloman?

MR. HELMS: Yes. Delegate Burson asked the second part of his question and I did not get to explain it. He says what effect would deleting this particular phrase have on the entire article. I do not know what the committee would think of this; I prefer to keep it in there, but I do believe it is just a personal opinion, that in the long run it probably would have a minimum sort of effect, or none at all. As long as the Legislature can determine the eligibility standards and make its determination about the institution it supports, I can see no possible harm coming of this. Yet, at the same time, I think it is an article that is clear enough as to its intent. As to the verbiage in this thing, I would remind you that the article that we worked with had two hundred ninety-two words in it. This one has been reduced to something like seventy, or a few more than seventy words. So we have been very much aware of the fact that we need to simplify the language and I believe we have.

MR. PRESIDENT LEE: Mr. Holloman, did you have a word?

MR. HOLLOMAN: Thank you. I would just like to reiterate on my amendment. I think this is a serious matter we are taking up and if there is a possibility of passing an amendment to the Constitution that has a fault in it, we should cure it, no matter when. I think that this amendment will cure a default which could prohibit residency requirements should the Legislature desire to have residency requirements. This language could also lend itself to a court decision which could construe this to handcuff the Legislature. I think the article is just more workable without those words in it.

MR. PRESIDENT LEE: Delegate Price.

MR. PRICE: Mr. President, thank you. Mr. Chairman, fellow delegates, I share the apprehension of Delegate Holloman and of Delegate Ambrose, and rise to speak in favor of the amendment. I find no qualms with those questions raised by Delegate Elion and others with respect to transients. The children of service personnel, children of transitory workers, when those families come into the state, under the law in Tennessee, the kitchen sink rule applies. They become residents at that time. The question raised by Delegate Holloman has to do with such things as he raised the point.

We have had cases where children of one county will run across to go to school in another county. The ability of our population now is such that children can be moved great distances, across state lines, or otherwise, unless prohibited, and become students in our schools at the expense of our taxpayers. I certainly believe that the language should be so clearly established that that sort of thing could not happen.

One further point, this section modified as has been reported here without the amendment, does recognize that the Legislature shall have the right to set eligibility standards, but I remind this Body that those eligibility standards may not be in contradistinction of the clear language of the Constitution. If the language as is in the resolution without the amendment, "open to all persons in the State", remains, the Legislature would be precluded from making any eligibility standards which are contradictory to that. Thank you.

MR. PRESIDENT LEE: Delegate Bickers.

MR. BICKERS: Mr. President, fellow delegates, I have an example situation present right now where one of my clients called me the other day; they live, I think, in Haywood County, and they are sending their child over to a school over in Shelby County, and they are apprehensive that they may not be able to do this. Actually, this is a situation where they are not paying taxes in Shelby County, and there should be a tuition arrangement. But anyway, we could have this same problem across state lines.

If we do not have the word "free" before "public schools," then I could see no objection to leaving the rest of the sentence in, "open to all persons in the State," but since we do say "free public schools," then I feel that probably we should put the period after the schools, in order that the Legislature would be able to work out some arrangement for tuition and so forth, in certain situations where the persons would not, obviously, qualify for free public education in Tennessee. So, as it reads, I would be in favor of the amendment. Thank you.

MR. PRESIDENT LEE: The Chair saw counsel to the Convention, John Lewis, at the Well. I just asked him if he wished to be heard. He says that he does not. He reiterated that he advised, as Chairman Helms indicated, in his opinion, that the striking of the words "open to all persons in the State," does not change the intent of the article in his opinion. Delegate Walker of Roane, then Tidwell.

MR. WALKER (RHEA): Thank you. This is Delegate Walker of Rhea. I do not think this is so much of a problem as one county to the other. It simply says "open to all persons in the State." If I lived across the state line in Georgia and wanted to send my child to school in Tennessee, it would seem to me this mandates that if that person is in Tennessee, it does not say residents or anything, they can go to school in Tennessee. So I rise to speak in favor of the amendment. It does not put any other requirements on it as I can see it, except just being in the State of Tennessee, should the Legislature not act on it.

MR. PRESIDENT LEE: Thank you, Delegate Walker of Rhea. Mr. Tidwell.

MR. TIDWELL: Mr. Chairman, I call for the question.

MR. PRESIDENT LEE: The question has been moved. Is there a second? All those in favor that the Chair put the question, let it be known by saying aye, opposed, no. The ayes have it. Now, on Amendment No. 1. At the sound of the bell, those in favor of the adoption of Amendment No. 1 to the Final Report on Article XI, Section 12, relative to Education, let it be known by voting aye, those opposed, no. Has every delegate voted? Does any delegate wish to change his vote? Mr. Clerk, record the vote.

(Roll Call)

MR. CLERK: Ayes 78, noes 12, 3 present and not voting, Chairman Helms and Chairman Rowe vote no.

MR. PRESIDENT LEE: The amendment carries. Now, on the final report itself, as amended. All those in favor of adopting the Report of the Committee on Style and Drafting relative to the final report on Article XI, Section 12, concerning Education, at the sound of the bell, let it be known by voting aye, those opposed, no. Has every delegate voted? Does any delegate wish to change his vote? Mr. Clerk, record the vote.

(Roll Call)

MR. CLERK: Ayes 87, noes 1, 5 present and not voting, Chairman Helms and Chairman Rowe vote aye.

MR. PRESIDENT LEE: The report is adopted. Without objection, the motion to reconsider will go to the table. Delegate Eskind.

MR. ESKIND: Mr. President, for future proceedings, I would like to request that the Clerk provide for us, in addition to the final report as it comes out of Style and Drafting, the report that comes out of the Committee of the Whole going to Style and Drafting, if that would be possible. So we can see what actual changes have been made in Style and Drafting.

MR. PRESIDENT LEE: Mr. Eskind, that is in the Journal.

MR. ESKIND: It is in the Journal, but if we could afford one Xerox page to go with this, stapled to it, I think it would expedite the proceedings.

MR. PRESIDENT LEE: Mr. Dixon.

MR. DIXON: Mr. President, I just wanted to say that I voted no mainly because the Call dealt with eliminating segregated schools. By eliminating that phrase we did not deal with the Call at all. Thank you.

MR. PRESIDENT LEE: Regular Order, Mr. Clerk.

MR. CLERK: Announcements.

MR. PRESIDENT LEE: Chairman Bailey.

MR. BAILEY: Mr. President, I noticed that on the agenda there is scheduled a meeting of the Attorney General subcommittee at 10:00 a.m. today, 10:00 a.m. Wednesday. I would like to announce there will be no further meetings of that subcommittee because we have completed

our work and the report is ready to go to the Judicial Article Committee. Therefore, these two meetings can be stricken from the calendar.

MR. PRESIDENT LEE: Chairman Burson.

MR. BURSON: Mr. Chairman, the State Spending Committee will begin deliberations today taking up the amendments, I mean the proposed amendments or resolutions that have been submitted to it. During this time, there are about five or six concepts that we are dealing with, and I urge, I think a lot of the questions that will come before the Committee of the Whole and come up later, can be answered if delegates will make an effort to attend this session. I think the same is true of the other sessions, getting ready to go into debates over their final resolutions in their committees. I strongly urge you, if possible, to come to this meeting; State Spending Committee has moved a long way from, perhaps, original impressions and concepts. Many things have come out in the hearings that we are trying to deal with. I urge you to attend and to ask questions and let us get as many of those things as we can in questions resolved before our final report comes out and so there will be a full understanding of what the committee is doing when we come before the Committee of the Whole. After we produce our final report, or have it in final form, we will also have special, maybe one or two sessions, for committee members to come and voice their suggestions and recommendations before that final report goes to Committee of the Whole. So I urge you, if possible, to attend these committee meetings this week.

MR. PRESIDENT LEE: Chairman Rowe.

MR. ROWE: Mr. President, your Style and Drafting Committee is set up to meet at 11:30 this morning in the War Memorial Building, Room 305. We have some important business to undertake. I urgently request that all members be present. We have been having a problem getting a quorum together. It will just delay the overall work of the Convention if we cannot get our group together. Would you kindly attend this morning at 11:30?

MR. PRESIDENT LEE: Delegate Leech.

MR. LEECH: Mr. President, am I to assume that the schedule which was put on our desks last night is the schedule for the committee meetings today?

MR. PRESIDENT LEE: That is my understanding. You might ask Mr. Evans for clarification on that, but that is my understanding.

MR. LEECH: It is the same, there has been no change?

MR. PRESIDENT LEE: Mr. Evans.

MR. EVANS: Mr. President, I move we adjourn until 9:00 tomorrow morning.

MR. PRESIDENT LEE: Is there a second? It has been moved and seconded that we stand adjourned until 9:00 tomorrow morning. All those in favor, let it be known by saying aye, opposed, no. We stand adjourned until 9:00 tomorrow morning.

The Journal of the Debates

of the

LIMITED CONSTITUTIONAL CONVENTION OF 1977

STATE OF TENNESSEE

WEDNESDAY, OCTOBER 12, 1977

THIRTY-EIGHTH DAY

MR. PRESIDENT LEE: Will the Convention please come to order? Will the delegates and visitors please stand and the invocation will be delivered by the Chaplain for the Day, Dr. N. Horace Mann, Dean of the School of Dentistry at Meharry College, also a member of the Presbytery here in Nashville. He is here with us as a guest of Delegates Harold Smith and Mary Pruitt of Nashville.

(Invocation)

MR. PRESIDENT LEE: Will the delegates and visitors please remain standing while the Pledge to the Flag will be led by Delegate LeFevre.

(Pledge of Allegiance to the Flag)

MR. PRESIDENT LEE: Delegate North.

LADY NORTH: Mr. President, I move we dispense with the reading of the Journal.

MR. PRESIDENT LEE: Is there a second? It has been moved and seconded that the reading of the Journal be dispensed with. All those in favor, let it be known by saying aye, opposed, no. It carries. At the sound of the bell, will you please answer the roll call. Has every delegate answered the roll call? Does any delegate need additional time to answer the roll call? Mr. Clerk, record the roll call.

(Roll Call)

MR. CLERK: Mr. President, there are 91 delegates present.

MR. PRESIDENT LEE: There is a quorum. Regular Order of Business, Mr. Clerk.

MR. CLERK: Reports from Standing Committees. "Mr. President, Your Committee on Style and Drafting begs leave to report that we have carefully considered the Report on Voting Age and recommend that it be referred to the President of this Convention, and further recommend that the President re-refer that report to the Committee on Voting Age. Signed, Donald R. Rowe, Chairman."

EXHIBIT C

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

TRAVIS BEAVER AND WENDY PETERS,

Petitioners/Plaintiffs,

v.

RILEY MOORE, in his Official Capacity as State Treasurer of West Virginia; W. CLAYTON BURCH, in his Official Capacity as State Superintendent of West Virginia; MILLER L. HALL, in his Official Capacity as President of West Virginia's Board of Education; CRAIG BLAIR, in his Official Capacity as the President of the West Virginia Senate; ROGER HANSHAW, in his Official Capacity as the Speaker of the West Virginia House of Delegates; JIM JUSTICE, in his Official Capacity as Governor of West Virginia; and the State of WEST VIRGINIA,

Respondents/Defendants,

and

KATIE SWITZER and JENNIFER COMPTON,

Intervenor-Defendants.

Civil Action No. 22-P-24
Civil Action No. 22-P-26

Judge Joanna I. Tabit

FINAL ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF AND DECLARATORY JUDGMENT AND RULING ON VARIOUS OTHER MOTIONS

On July 6, 2022, came the Plaintiffs, Defendants, Parent-Intervenors, and the Prospective Intervenor State of West Virginia, by counsel, for hearing on the Plaintiffs' Motion for Preliminary Injunction and Declaratory Judgment; the Parent-Intervenors' Motion for Judgment on the Pleadings; the State of West Virginia's Motion to Intervene; Defendants Moore and Justice's

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Motion to Dismiss; Defendant Blair and Hanshaw's Motion to Dismiss; and Plaintiffs' Motion for Judicial Notice. Upon review and consideration of the parties' respective motions and legal memoranda, responses, and replies, as well as oral argument presented at the hearing, the Court makes the following rulings:

- The State of West Virginia is preliminarily and permanently enjoined from implementing House Bill 2013 ("HB 2013") codified at W. Va. Code § 18-31-1 *et seq.*
- Plaintiffs are entitled to a declaratory judgment that HB 2013 violates Article XII, Sections 1, 2, 4, and 5; Article X, Section 5; and Article VI, Section 39 of the West Virginia Constitution.
- Parent-Intervenors' Motion for Judgment on the Pleadings is denied.
- The State of West Virginia's Motion to Intervene is granted.
- Defendants Moore and Justice's Motion to Dismiss on the merits is denied.
- Defendants Blair and Hanshaw's Motion to Dismiss on the merits is denied.
- Plaintiffs' Motion for Judicial Notice is denied.

FINDINGS OF FACT

A. The Parties to this Action

1. On January 19, 2022, Plaintiffs Travis Beaver and Wendy Peters[1] initiated this action challenging the constitutionality of HB 2013.
2. Plaintiffs are parents of students enrolled in West Virginia public schools.

[1] Karen Kalar was initially a plaintiff in the action but she withdrew for personal reasons. The parties agreed by stipulation to her dismissal.

3. Plaintiff Travis Beaver is a resident of Putnam County, West Virginia. He has two children in West Virginia public schools. Mr. Beaver's son, S.B., was in the sixth grade during the 2021-22 school year. Mr. Beaver's daughter, J.B., was in the fifth grade in 2021-22. J.B. has been diagnosed with nonverbal/preverbal autism and ADD/ADHD. J.B. has an individualized education program ("IEP") to address her need for special education and related services. Mr. Beaver is not aware of any private school in his area that would accept J.B. or be able to meet her special education needs.
4. Plaintiff Wendy Peters is a resident of Raleigh County, West Virginia and teaches middle school English Language Arts in the Raleigh County School District. Ms. Peters has been an educator for twenty years. Her child, M.P., was in third grade in 2021-22 and has autism. M.P. has an IEP. Ms. Peters is not aware of any private school in her area that would be able to meet M.P.'s special education needs.
5. Defendant Riley Moore is the West Virginia State Treasurer.
6. Defendant W. Clayton Burch is the West Virginia State Superintendent of Schools.
7. Defendant Miller L. Hall is the President of the West Virginia Board of Education ("WVBOE").
8. Defendant Craig Blair is the President of the West Virginia Senate.
9. Defendant Roger Hanshaw is the Speaker of the West Virginia House of Delegates.
10. Defendant Jim Justice is the Governor of the State of West Virginia.
11. Intervenor Kate Switzer is a resident of Morgantown, West Virginia and has four young children, two of whom, A.S. (aged six) and R.S. (aged four) will be school-aged in the fall. R.S. has a speech disorder that affects her ability to vocalize.

12. Intervenor Jennifer Compton is a resident of Albright, West Virginia. She has two children: K.C., who just graduated high school, and J.C., who is five and is in preschool. J.C. has a sensory sensitivity and feeding disorder.

13. The State of West Virginia has intervened in the action.

B. Procedural History

14. Plaintiffs filed their Complaint on January 19, 2022.

15. On January 21, 2022, parents Katie Switzer and Jennifer Compton moved to intervene as Defendants and filed an Answer to Plaintiffs' Complaint.

16. Defendants filed a Notice of Bona Fide Defense on March 4, 2022.

17. Plaintiffs filed a Motion for Preliminary Injunction and a Request for Judicial Notice in Support of Motion for Preliminary Injunction on March 30, 2022.

18. Defendants Moore and Justice filed a Motion to Dismiss on April 4, 2022. Defendants Blair and Hanshaw filed their own Motion to Dismiss on the same day.

19. On April 8, 2022, Parent-Intervenors filed a Motion for Judgment on the Pleadings.

20. On May 5, 2022, all of the parties to the action except for the State of West Virginia, which was not yet a party, filed a joint stipulation requesting the voluntary dismissal of Plaintiff Karen Kalar. That same day, those same parties submitted an agreed order for the consolidation of the remaining two cases; granting of the pending pro hac vice motions; and approval of the intervention of the Parent-Intervenors, subject to agreed terms. The Court entered the joint stipulation and agreed order on May 9, 2022.

21. On June 15, 2022, Plaintiffs filed their omnibus opposition to Defendants Moore and Justice's Motion to Dismiss, Defendants Blair and Hanshaw's Motion to Dismiss, and Parent-Intervenors' Motion for Judgment on the Pleadings; Defendants W. Clayton Burch

and Miller L. Hall filed a response in support of Granting Plaintiffs' Motion for Preliminary Injunction; Parent-Intervenors filed their Opposition to Plaintiffs' Motion for Preliminary Injunction; and Defendants Moore, Blair, Hanshaw, and Justice filed their Response to Plaintiffs' Motion for Preliminary Injunction and their Response to Plaintiffs' Request for Judicial Notice in Support of Motion for Preliminary Injunction.

22. On June 29, 2022, Plaintiffs filed their Reply in support of the Motion for a Preliminary Injunction; Parent-Intervenors filed their Reply in Support of their Motion for Judgment on the Pleadings; Defendants Moore and Justice filed their Reply to Plaintiff's Omnibus Opposition to their Motion to Dismiss; and Defendants Blair and Hanshaw filed their Reply to Plaintiff's Opposition. Defendants Moore, Blair, Hanshaw, and Justice also filed their Omnibus Reply to Defendant Burch and Miller's Response in Support of Plaintiffs and Amici Curiae Brief Supporting Plaintiffs.

23. The State of West Virginia also filed its Motion to Intervene on June 29, 2022.

24. A hearing on all of the pending motions was held on July 6, 2022.

C. HB 2013

25. On March 17, 2021, the Legislature enacted HB 2013, W. Va. Code § 18-31-1 *et seq.*, and on March 27, 2021, the Governor signed it into law.

26. HB 2013 establishes a program under which a student receives a payment of public money to subsidize private school tuition or pay for other private education or homeschooling expenditures (the "voucher program").

27. HB 2013 creates the Hope Scholarship Board to oversee the voucher program. W. Va. Code § 18-31-3.

28. Under HB 2013, funding for the voucher program is appropriated by the Legislature. W. Va. Code § 18-9A-25. The State Treasurer transfers the funds for the voucher program to the West Virginia Department of Education ("WVDOE"). West Va. Code § 18-31-6. The WVDOE then transfers the funds to the Hope Scholarship Board. W. Va. Code § 18-9A-25.

29. The WVDOE must transfer to the Hope Scholarship Board an amount "equal to 100 percent of the prior year's statewide average net state aid share allotted per pupil based on net enrollment adjusted for state aid purposes[.]" W. Va. Code § 18-9A-25; W. Va. Code § 18-31-6(b). The Hope Scholarship Board then places the money in accounts for parents referred to as Education Savings Accounts or ESAs. W. Va. Code § 18-31-5.

30. To be eligible for the voucher program during the first three years, applicants must be enrolled in a public school for 45 days at the time of application and remain so enrolled until an award letter is issued by the Hope Scholarship Board; have been enrolled in a public school for the previous year; or be eligible for enrollment in a kindergarten program. W. Va. Code § 18-31-2(5).

31. If, on July 1, 2026, the participation rate for the voucher program is less than five percent of public school enrollment for the previous school year, then any West Virginia child of public school age becomes eligible for the program. W. Va. Code § 18-31-2(5)(B).

32. Voucher funds can be used for a variety of private education and homeschool expenditures, including: private school tuition or fees; homeschooling expenses; tutoring services; fees for standardized tests; tuition for online non-public learning programs; transportation fees; curriculum materials; and summer or after-school programs. W. Va. Code § 18-31-7(a).

33. Parents can use the money to pay a wide array of "education service providers," which are defined as "a person or organization that receives payments from Hope Scholarship accounts to provide educational goods and services to Hope Scholarship students." W. Va. Code § 18-31-2(4). This includes all manner of schools and other providers, as well as parents engaging in home schooling.

34. There are no qualification requirements for private schools, other private education service providers, or homeschool parents to receive voucher funds. W. Va. Code § 18-31-11(c); *see* Lubienski Aff. ¶ 11.

35. If a student who receives a voucher wants to take classes at a public school or use any other public school resources, the student has to pay for these services. W. Va. Code, § 18-31-8(f); Pauley Aff. ¶ 17.

36. The price for the public school services will be set by the Hope Scholarship Board in conjúnction with the WVDOE. *Id.*

37. The statute expressly limits governmental oversight of education service providers: "Education service providers shall be given maximum freedom to provide for the educational needs of students without governmental control." W. Va. Code § 18-31-11(c).

38. HB 2013 does not require private schools to show that voucher students are making academic progress, nor does it mandate any curriculum standards or teacher certification requirements. W. Va. Code § 18-31-11(c).

39. The statute asks parents receiving the voucher funds to sign an agreement with the Hope Scholarship Board "promising" to provide education in reading, language, mathematics, science and social studies. *See* W. Va. Code § 18-31-5.

40. For students who are homeschooled, to remain eligible they can either (1) take a nationally normed standardized test that "show[s] improvement from the prior year's results" or (2) obtain a determination from a certified teacher that the student is making academic progress commensurate with his or her age and ability. W. Va. Code § 18-31-8(a)(4).

41. HB 2013 provides limited mechanisms for fiscal accountability, providing only for random audits of the use of the voucher funds. W. Va. Code § 18-31-10.

42. HB 2013 provides no safeguards to prevent private entities from emerging to take state dollars without sufficient means and/or intent of ensuring quality education in return. Nor does the statute provide safeguards preventing parents in poverty or battling drug addiction from taking the money for their own ends. Thus, the opportunity for abuse by private education providers and parents is significant.

43. The financial impact of HB 2013 will be substantial. The WVDOE's fiscal note projects that the cost of funding the voucher program will exceed $120 million annually by fiscal school year 2027. Pauley Aff. ¶ 16; W. VA. DEP'T OF EDUC., HB 2013 FISCAL NOTE (2021).[2]

44. Because state funding for public education is based in large part on student enrollment, HB 2013 will result in a reduction in public school funding. Pauley Aff. ¶¶ 12-13; Meadows Aff. ¶¶ 4-5. This reduction in funding will occur without a reduction in fixed costs—libraries, administration, maintenance, and numerous other expenses that do not decrease with each individual student who takes a voucher. *See* Lubienski Aff. ¶ 28; Meadows Aff. ¶ 8; Pauley Aff. ¶ 14. Variable costs, including the amount necessary to pay teachers'

[2] *Available at* https://www.wvlegislature.gov/Fiscalnotes/FN(2)/fnsubmit_recordview1.cfm?RecordID=799856152.

salaries, will also not decrease at a pace commensurate with the departure of students. *See* Lubienski Aff. ¶ 28.

45. Because private schools cost more than the voucher amount, and there are many expenses outside tuition that families must cover (such as food and transportation), vouchers can only be used by families with the resources to pay for the additional private school tuition and expenses or by families affluent enough for a parent with the necessary skills to stay home to educate their child. *Id* ¶ 23. Students in poverty cannot use them.

46. Because private schools are frequently unwilling and/or unable to serve students with disabilities, many of these students will be unable to use the vouchers. *See* Peters Aff. ¶¶ 9, 10, 23; Beaver Aff. ¶¶ 12-14; Lubienski Aff. ¶ 19. HB 2013 expressly provides that such private schools are "not required to alter [their] creed, practices, admission policy, hiring policy or curriculum . . . ." W.Va. Code § 18-31-11(d).

47. As a result, the public schools will have fewer funds to educate a higher proportion of students with the most significant needs—including students from low-income families and students with disabilities—who are among the most expensive to educate. Meadows Aff. ¶ 10; Pauley Aff. ¶ 15; Lubienski Aff. ¶ 30.

48. HB 2013 requires private schools accepting the funds not to discriminate on the basis of race but it specifically excludes the antidiscrimination provisions that protect public school students and families from discrimination on the basis of religion, gender identity, sexual orientation, or disability. W. Va. Code §18-31-11(a)(4) and 6(d).

49. Under HB 2013, private schools that accept voucher funds can discriminate on all of these grounds. Such discrimination may take the form of refusing admission; failing to provide services students need to access their education, such as special education; or disciplinary

practices, including expulsion, based on discriminatory criteria. *Id.* and *see* Lubienski Aff. ¶ 20.

50. The Hope Scholarship Board began accepting applications in March 2022. *See* W. Va. Code §18-31-5(c).

51. To date, it has been reported that over 3,000 applications for vouchers, at the amount of $4300 per student, have been approved. Conzett Aff. ¶ 11.

CONCLUSIONS OF LAW

A. The West Virginia Constitution

52. Article XII, Section 1 of West Virginia's Constitution states: "The legislature shall provide, by general law, for a thorough and efficient system of free schools." W. VA. CONST. art. XII, § 1.

53. Section 2 states: "The general supervision of the free schools of the State shall be vested in the West Virginia board of education. . . ." *Id.* art. XII, § 2.

54. Section 4 creates a "School Fund" that must be "applied to the support of free schools throughout the State, and to no other purpose whatever." *Id.* art. XII, § 4.

55. Under Section 5, the "Legislature shall provide for the support of free schools," through School Fund interest, all forfeitures and fines, and "by general taxation of persons and property or otherwise." *Id.* art. XII, § 5.

56. The Taxation article of the West Virginia Constitution states: "The power of taxation of the Legislature shall extend to provisions for the payment of the state debt, and interest thereon, the support of free schools, and the payment of the annual estimated expenses of the state. . . ." *Id.* art. X, § 5.

57. The Constitution also states that: "[I]n no case shall a special act be passed, where a general law would be proper[.]" *Id.* art. VI, § 39.

58. Since its founding, the State of West Virginia has emphasized the importance of public education. In 1861, delegates to the First Constitutional Convention recognized that the "virtue and general intelligence among the people . . . is the only sure foundation on which Republican governments can rest," Granville Parker, *Debates & Proc.*, FIRST CONST. CONVENTION OF W. VA. (Dec. 2, 1861),[3] and therefore mandated that "[t]he legislature shall as soon as conveniently may be, provide by law for the establishment of a system of public free schools throughout the State, in such manner as to make education as nearly universal as possible." W. E. Stevenson, *Debates & Proc.*, FIRST CONST. CONVENTION OF W. VA. (Dec. 2, 1861).[4] Another drafter added, "the highest and most binding duty of any community is to provide for the education of its children. . . . [T]he State owes it as a duty to the children themselves who are to become its future citizens." P.G. Van Winkle, *Debates & Proc.*, FIRST CONST. CONVENTION OF W. VA. (Jan. 27, 1862).[5] A third drafter explained the requests he heard from his constituents: "I well recollect when talking to my people on the subject of a new State that one of their great hopes was that we would get a good free school system." Robert Hagar, *Debates & Proc.*, FIRST CONST. CONVENTION OF W. VA. (Jan. 27, 1862).[6] A fourth drafter summed it up this way: "All Money [directed to fund education] . . . shall . . . be sacredly devoted and applied to the support of the primary education in common schools [that is, public schools] throughout the State, and to no other

[3] *Available at* https://archive.wvculture.org/history/statehood/cc120261.html.

[4] *Available at* https://archive.wvculture.org/history/statehood/cc120261.html.

[5] *Available at* https://archive.wvculture.org/history/statehood/cc012762.html.

[6] *Available at* https://archive.wvculture.org/history/statehood/cc012762.html.

purpose whatever." Rev. Gordon Battelle, *Debates & Proc.*, FIRST CONST. CONVENTION OF W. VA. (Dec. 19, 1861).[7]

59. Prior to West Virginia becoming a separate state, "Virginia's failure to provide a system of free public education had long rankled the western counties" that seceded to form West Virginia. *Randolph Cty. Bd. of Educ. v. Adams*, 196 W. Va. 9, 15 (1995) (quoting ROBERT M. BASTRESS, THE W. VA. STATE CONST.—A REFERENCE GUIDE 271 (1995)). As the Supreme Court of Appeals has acknowledged, "[t]he framers of our Constitution lived among the ruins of a system that virtually ignored public education and its significance to a free people." *Id.* As a result, when the convention met in 1861 to create West Virginia's first constitution, the framers gave high priority to public education. *Id.* Likewise, the 1872 convention delegates "strengthened the education article." *Id.* In doing so, the delegates cemented public education as a sacrosanct constitutional right in West Virginia.

B. Injunctive and Declaratory Relief

60. This Court may issue a preliminary injunction upon a balancing of the following factors: "(1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest." *Ne. Nat. Energy LLC v. Pachira Energy LLC*, 243 W. Va. 362, 366 (2020).

61. Where a statute is unconstitutional on its face, the proper remedy is a permanent injunction, making the statute null and void. *See Simon v. Southern R. Co.*, 236 U.S. 115, 120 (1915);

[7] *Available at* https://archive.wvculture.org/history/statehood/cc121961.html.

see also Norton v. Shelby Cty., 118 U.S. 425, 442 (1886); *Foster v. Cooper*, 155 W. Va. 619, 623 (1972); *Morton v. Godfrey L. Cabot, Inc.*, 134 W. Va. 55, 56 (1949).

62. Under West Virginia law, courts "shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." W. Va. Code § 55-13-1.

i. HB 2013 is Unconstitutional

a. HB 2013 Exceeds and Frustrates the Legislature's Powers and Duties in Regard to Education.

63. The Federal Constitution is a grant of power, while a state Constitution is a restriction of power. *Foster*, 155 W. Va. at 622; *Robertson v. Hatcher*, 148 W. Va. 239, 250 (1964).

64. Provisions of the Constitution addressing the same subject, or *in pari materia*, should be read together. *Howard v. Ferguson*, 116 W. Va. 362, 362 (1935).

65. Under the doctrine of *expressio unius est exclusion alterius* ("*expressio unius*")—"the expression of one thing, being the exclusion of the other"—the State may not take any actions that exceed or frustrate express constitutional obligations. *State v. Gilman*, 33 W. Va. 146, 150 (1889); *see also State ex rel. Downey v. Sims*, 125 W. Va. 627, 633 (1943); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012).

66. Article XII, Section 1 of the West Virginia Constitution states that the "Legislature shall provide, by general law, for a thorough and efficient system of free schools." W. VA. CONST. art. XII, § 1. Article XII, Section 2 states that "general supervision of the free schools of the State shall be vested in the West Virginia board of education . . . ." W. VA. CONST. art. XII, § 2. Article XII, Section 4 states that public monies existing in the "school fund . . . shall be annually applied to the support of free schools throughout the

state, and to no other purpose whatever." W. VA. CONST. art. XII, § 4. Article XII, Section 5 states that the "Legislature shall provide for the support of free schools . . . by general taxation" and other public monies. W. VA. CONST. art. XII, § 5. And, the taxation provision provides that "[t]he power of taxation of the Legislature shall extend to. . . the support of free schools. . . ." W. VA. CONST. art. X, § 5.

67. Taken together these provisions of the Constitution require the State to raise revenue for, fund, and maintain only a thorough and efficient system of free schools supervised by the WVBOE.

68. HB 2013 exceeds Article XII, Sections 1, 2, 4, and 5 and Section 5 of Article X by authorizing a separate system of education, governed by a separate board, funded by West Virginia taxpayer money.

69. HB 2013 also exceeds the Constitution because it puts in place a system that requires students to exchange their fundamental right to a public education for a payment of $4300.

70. HB 2013 further exceeds the Constitution because it requires students to pay for public school services. If a student who receives a voucher wants to take classes at a public school or use other public school resources, the student will have to pay for those public school resources. W. Va. Code, § 18-31-8(f).

71. HB 2013 frustrates Article XII, Sections 1, 2, 4, and 5 by incentivizing students enrolled in the public schools to leave public schools. Funding for the public schools, based largely on enrollment numbers, will decline. Pauley Aff. ¶¶ 12-13; Meadows Aff. ¶¶ 4-5; Lubienski Aff. ¶¶ 23, 30. Public schools must serve an increased concentration of high-need students.

72. HB 2013 also frustrates Sections 1, 2, 4, and 5 by diverting public funds that could be used for West Virginia's underfunded public schools to subsidize private education. When fully implemented, HB 2013 will cost taxpayers $120 million a year to subsidize the private education of West Virginia's more affluent students. W. VA. DEP'T OF EDUC., HB 2013 FISCAL NOTE (2021).[8] West Virginia has long struggled to fully fund its public schools. Siphoning off public money to subsidize those parents that choose private education will frustrate the State's ability to adequately fund public schools.

b. HB 2013 Impinges on West Virginia Children's Fundamental Right to an Education Without Meeting Strict Scrutiny

73. Public education is an "essential constitutional right." *W. Va. Educ. Ass'n v. Legislature of State of W.Va.*, 179 W.Va. 381, 382 (1988). The Legislature cannot take actions that impinge that right without meeting strict scrutiny. *State ex rel. Bd. of Ed. v. Rockefeller*, 167 W. Va. 72, 76 (1981). The State must demonstrate that such actions meet a compelling state interest and are narrowly tailored to achieve that compelling interest. *Pauley v. Kelly*, 162 W. Va. 672, 708 (1979). HB 2013 does not meet either prong of the strict scrutiny analysis.

74. HB 2013 impinges on the fundamental right to an education by reducing the funds available to public schools through the state-incentivized reduction in public school enrollment.

75. HB 2013 also trades a student's fundamental right to a public education for a sum of money. Students will not be protected from for-profit entities or parents that do not use these funds for providing an adequate education.

[8] *Available at* https://www.wvlegislature.gov/Fiscalnotes/FN(2)/fnsubmit_recordview1.cfm?RecordID=799856152.

76. The State cannot impinge on a single child's constitutional right to a public education without a compelling interest in doing so. The State has no constitutional interest in subsidizing the expenses of those who choose private school or homeschooling. The State's sole constitutional mandate is to create a thorough and efficient system of free schools. W. VA. CONST. art. XII, § 1.

77. HB 2013 also fails strict scrutiny because it is not narrowly tailored. *Cathe A. v. Doddridge County Bd. Of Educ.*, 200 W. Va. 521, 528 (1997). HB 2013 is an expansive program. There is no limitation on eligibility based on geography, family income, school performance, or the particular educational needs of the student, and no cap or limit on the number of vouchers that can be given out. HB 2013 offers a voucher to every child starting kindergarten without regard to whether their family can already afford private school or homeschooling. In three years, the voucher program can be available to every child in the State, and it will definitely be available to all such students when fully implemented because each new class of kindergarten students can start with a voucher that is paid out every year of their school career. HB 2013 does not require private schools or homeschooling parents to meet educational quality or other standards and offers insufficient accountability for those using the funds. It is therefore not narrowly tailored to meet a compelling interest and is unconstitutional.

c. Public Funds Can Only Be Used to Fund Public Schools

78. HB 2013 violates Article XII, Sections 4 and 5, and Article X, Section 5, which require that state taxation and funding pay only for *public* K-12 education.

79. Article XII, Section 4 states that the "School Fund" shall be dedicated to support "free schools throughout the State, and to no other purpose whatever." W. VA. CONST. art. XII,

§ 4. "If the language of a constitutional provision is plain and unambiguous it is not subject to judicial interpretation[.]" *State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 108 (1973). This was the original funding mechanism for public education in the Constitution and makes patent that the Framers intended public funds only be used for public education.

80. Similarly, Article XII, Section 5 grants a broad mandate to the Legislature to use general taxation authority to provide only for free schools. Section 5 states: "The Legislature shall provide for the support of free schools . . . by general taxation of persons and property . . . ." W. VA. CONST. art. XII, § 5 (emphasis added).

81. The Taxation article states: "The power of taxation of the Legislature shall extend to provisions for the payment of the state debt, and interest thereon, the support of free schools, and the payment of the annual estimated expenses of the state. . . ." W. VA. CONST. art. X, § 5.

82. Taken together, Article XII, Sections 4 and 5 and Article X, Section 5, comprise the constitutional parameters for raising and spending public dollars on K-12 education. Each provision makes clear that public funds for K-12 education are for the free schools and no other purpose whatsoever.

d. HB 2013 Improperly Places Authority over the State Expenditure of Funds for Education Outside the West Virginia Board of Education

83. HB 2013 improperly usurps the constitutional authority of the WVBOE, which is vested "general supervision of the free schools of the State." W. VA. CONST. art. XII, § 2. The West Virginia code confirms the proper interpretation of Article XII, Section 2 as imposing upon the WVBOE the duty to "carry[] into effect the laws and policies of the state relating to education." W. Va. Code § 18-2-5. When the Legislature passes laws that "interfere[]"

with the Board of Education's constitutional authority, those laws are "unconstitutional." *West Virginia Bd. of Educ. v. Hechler*, 180 W.Va. 451, 454 (1988).

84. "'General supervision' is not an axiomatic blend of words designed to fill the pages of our State Constitution, but it is a meaningful concept to the governance of schools and education in this state. Decisions that pertain to education must be faced by those who possess expertise in the educational area. These issues are critical to the progress of schools in this state, and, ultimately, the welfare of its citizens." *Hechler*, 180 W. Va. at 455.

85. HB 2013 unconstitutionally interferes with the Board of Education's supervisory and rule-making authority over public funds spent to educate the state's children by creating a separate Hope Scholarship Board to supervise spending of public funds for vouchers. HB 2013 unconstitutionally restricts the WVBOE's exercise of academic and financial oversight over the use of these funds, despite the fact that voucher funds flow directly through the WVDOE. W. Va. Code § 18-31-11(c), (e); W. Va. Code § 18-9A-25. The Hope Scholarship Board is unconstitutional.

e. HB 2013 is an Unconstitutional Special Law

86. The West Virginia Constitution has a strong presumption against laws that treat people differently, preferring generally applicable laws. W. VA. CONST. art. VI, § 39 ("[I]n no case shall a special act be passed, where a general law would be proper[.]"). This provision operates as "an equal protection clause [that is designed] to prevent the arbitrary creation of special classes, and the unequal conferring of statutory benefits." *State ex rel. City of Charleston v. Bosely*, 165 W. Va. 332, 339-40 (1980); *see also State ex rel. Heck's, Inc. v. Gates*, 149 W. Va. 421, 449 (1965) (every law must operate alike "on all persons and property similarly situated"). Legislation will be invalidated if it excludes without

reasonable basis persons that "would otherwise be subject to a general law." *State ex rel. Cty. Ct. of Cabell Cty. v. Battle*, 147 W. Va. 841, 841 (1963); *see also State ex rel. Taxpayers Protective Ass'n of Raleigh Cty. v. Hanks*, 157 W. Va. 350, 355 (1973) (invalidating as a "special law" a statute that only allowed counties with more than 100,000 people to close their courthouses on Saturdays).

87. HB 2013 is an unconstitutional special law. It creates a class of students in private school or homeschooling who have to pay for public school resources—the voucher recipients—and those who do not—students without vouchers. It also creates two classes of students who receive public funds for education: students protected from all discrimination, and students unprotected from most types of discrimination.

88. Public school students are protected by federal and state antidiscrimination laws, including the West Virginia Human Rights Act and state special education law. *See, e.g.*, W. Va. Code § 5-11-9. These same antidiscrimination protections are not available to students receiving public funds for private education expenditures under the voucher program. W.Va. Code § 18-31-11(d) ("A participating school or education service provider is not required to alter its creed, practices, admission policy, hiring policy or curriculum in order to accept eligible recipients whose parents pay tuition or fees from a Hope Scholarship account[.]"). Private education service providers remain free to discriminate on the basis of religion, gender identity, sexual orientation, and disability.

89. Because HB 2013 creates separate classes of students with different benefits and protections, it is unconstitutional.

ii. Injunctive Relief

90. Because HB 2013 is unconstitutional on its face, the Court permanently enjoins the State from implementing the statute. As a result, the preliminary injunction analysis is not necessary. Nevertheless, the Court finds that the basis for a preliminary injunction is also met. As outlined above, Plaintiffs are likely to succeed and, indeed, have succeeded on the merits.

91. The Plaintiffs also will be irreparably harmed without an injunction. Constitutional violations constitute irreparable harm without an additional showing of injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Leaders of a Beautiful Struggle v. Baltimore Police Dept.*, 2 F.4th 330, 346 (4th Cir. 2021).[9]

92. There is also evidence of imminent and irreparable harm beyond the per se irreparable harm of implementing an unconstitutional statute. To date, over 3,000 applications for vouchers, at the amount of $4,300 per student, have been accepted. Public funds will be disbursed to families as early as August 15, reducing public school enrollment and diminishing the public funds available for public education. *See* W. VA. CODE § 18-31-6(d). Logistically, the State would have a very difficult task clawing back these public funds from families already putting them to use. Likewise, these 3,000 students exiting public schools or entering kindergarten, thus not attending the public schools, will reduce the enrollment for districts across the state in a mere few months. These students will be missing from the October 1, 2022 enrollment count, which sets the enrollment figures for funding for the next school year. Pauley Aff. ¶ 8.

[9] West Virginia state courts look to federal courts where issues are not addressed in state law. *See Hardwood Group v. Larocco*, 219 W. Va. 56, 62 (2006); *Mauck v. City of Martinsburg*, 167 W. Va. 332, 337-38 (1981).

93. Defendants will not be irreparably harmed if an injunction is issued. The status quo remains in place. The State of West Virginia has never appropriated taxpayer dollars to subsidize private school or homeschooling. Families have always been able to choose private and home schooling at their own expense and they remain able to do so.

94. The public interest strongly favors an injunction. The need to "effectively educate students in our State with competent and qualified teachers in a safe environment" is squarely in the public interest. *Scott v. Stewart*, No. 02-C-1887, 2002 WL 34232464 (W. Va. Cir. Ct. Oct. 1, 2002); *see also Three Run Maintenance Ass'n, Inc. v. Heavner*, No. CC-02-2017-P-412, 2017 WL 11515028, at *1 (W. Va. Cir. Ct. 2017) (deciding that the risk of harm to children weighed in favor of a preliminary injunction). Public funds are set to be disbursed in August—no one is served well by distributing these funds if they are ultimately to be clawed back or cut off. Public schools lose enrollment and available public funds, families are given misdirection and children unsettled, and private entities will gain and then lose funding. Public schools would be further disrupted if the students from whom voucher funds were clawed back returned to public schools in the middle of the school year. In short, all of the preliminary injunction factors weigh in favor of a preliminary injunction.

C. Plaintiffs Have Standing

95. Taxpayers in West Virginia may challenge the constitutionality of a statute which affects the administration of justice and requires the payment of public funds. *Myers v. Frazier*, 173 W. Va. 658, 676 (1984) (recognizing taxpayer standing); *see also State ex rel Goodwin v. Cook*, 162 W. Va. 161, 164-65 (1978); *Howard v. Ferguson*, 116 W. Va. 362 (1935); *Kanawha Cnty Pub. Libr. Bd. v. Board of Educ. of Kanawha Cnty*, 231 W. Va. 386, 397

(2013); *Affiliated Constr. Trades Found. v. W. Va. Dep't of Transp.*, 227 W. Va. 653, 657 n.8 (2011).

96. Plaintiffs are residents of West Virginia who pay state and local taxes. Peters Aff. ¶¶ 1-2; Beaver Aff. ¶¶ 1-2. HB 2013 uses taxpayer funds to subsidize private education and homeschooling. Compl. ¶ 46. Plaintiffs have taxpayer standing here.

97. The elements of traditional standing are also met: (1) an "injury-in-fact" or "an invasion of a legally protected interest which is (a) concrete and particularized" and "(b) actual or imminent and not conjectural or hypothetical"; (2) a "causal connection" between the injury and the conduct forming the basis of the lawsuit; and (3) Plaintiffs' injury will be redressed through a favorable decision of the court. *Men & Women Against Discrimination v. Family Protection Services Bd.*, 229 W. Va. 55, 61 (2011); *see also Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 94 (2002) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

98. Constitutional violations are recognized as per se harm. *See Elrod*, 427 U.S. at 373; *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (same); *Leaders of a Beautiful Struggle*, 2 F. 4th at 346 (same); *Ross v. Meese*, 818, F.2d 1132, 1135 (4th Cir. 1987) (same).

99. HB 2013 will also imminently siphon millions of dollars in public funds that may otherwise be used for the support of public schools to subsidize more affluent families' private education.

100. Because West Virginia appropriates money to public schools, in part, based on the number of students who attend public schools, this harm is two-fold. Parents have always

had the legal option to send their children to private school or provide home schooling. But, now the government is providing parents with $4300 per child to take this route, diminishing the funds available for public education. At the same time, this is direct state action creating an incentive to leave the public school system, reducing its enrollment and funding. The loss of this funding will impact public school students, including Plaintiffs' children who have special needs that can only be met through West Virginia's public schools. *See* Peters Aff. ¶ 13, 15; Beaver Aff. ¶ 16; Lubienski Aff. ¶ 28.

101. The WVDOE and the West Virginia Legislative Auditor both conclude that HB 2013 will result in reduced public school enrollment and will cost the state over $100 million, and potentially over $120 million, a year when fully implemented, which will harm Plaintiffs in the public schools. W. VA. DEP'T OF EDUC., HB 2013 FISCAL NOTE (2021);[10] W. VA. LEGIS. AUDITOR, H.B. 2013 FISCAL NOTE (2021);[11] Pauley Aff. ¶ 16.

102. This harm is redressed by an injunction permanently enjoining the statute. Thus, Plaintiffs have also met the requirements for traditional standing.

D. Plaintiffs' Claims are Ripe

103. Ripeness does not require Plaintiffs to "await consummation of threatened injury" before bringing an action. *State ex. Rel. Universal Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338, 345 n.15 (2017) (citing *Gopher Oil Co. v. Bunker*, 84 F.3d 1047, 1050 (8th Cir. 1996) (internal quotes omitted)). Instead, a Plaintiff challenging a statute must demonstrate only "a realistic danger of sustaining a direct injury as a result of the statute's

[10] *Available at* https://www.wvlegislature.gov/Fiscalnotes/FN(2)/fnsubmit_recordview1.cfm?RecordID=799856152.
[11] *Available at* https://www.wvlegislature.gov/Fiscalnotes/FN(2)/fnsubmit_recordview1.cfm?submitID=10395&recordid=799669695.

operation or enforcement." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 298, 298 (1979); *see also State ex rel Rist v. Underwood*, 206 W. Va. 258 (1999). Passage and near implementation of an unconstitutional statute is sufficient to make it ripe for adjudication. *Id.*

E. Plaintiffs' Constitutional Challenge is Not a "Political Question"

104. Courts are "charged with the solemn duty of determining what acts of the Legislature are constitutional[.]" *State ex rel. Heck's Discount Ctrs., Inc. v. Winters*, 147 W. Va. 861, 869 (1963).

105. The constitutionality of a statute is squarely "a question of law" for courts to determine. *State v. Haught,* 218 W. Va. 462, 464 (2005); *see also Chrystal R.M. v. Charlie A.L.,* 194 W. Va. 138 (1995). This case is entirely about whether HB 2013 is constitutional and thus it is not a political question.

Plaintiffs' Request for Judicial Notice in Support of Preliminary Injunction

106. Rule 201 of the West Virginia Rules of Evidence does not allow for judicial notice of the documents identified by Plaintiffs in their request and the request is denied. W. Va. R. Evid. 201.

CONCLUSION AND COURT'S ORDERS

Based upon the foregoing, it is **ORDERED** that:

- The State of West Virginia is **PRELIMINARILY AND PERMANENTLY ENJOINED** from implementing House Bill 2013 (W. Va. Code § 18-31-1 *et seq.*), and declaratory relief is **GRANTED** as to the unconstitutionality of the statute;
- Plaintiffs' Request for Judicial Notice in Support of Preliminary Injunction is **DENIED**;

- Parent-Intervenors' Motion for Judgment on the Pleadings is **DENIED**;
- Defendants Moore and Justice's Motion to Dismiss on the merits is **DENIED**;
- Defendants Blair and Hanshaw's Motion to Dismiss on the merits is **DENIED**; and
- The State of West Virginia's Motion to Intervene is **GRANTED**.

The State of West Virginia moved to Stay the Court's Preliminary and Permanent Injunction, which motion is **DENIED**.

The objections and exceptions of all parties aggrieved by this Order are noted and preserved.

The Clerk of the Circuit Court is directed to send a certified copy of this Order to all counsel of record.

All of which is **ORDERED**, accordingly.

ENTERED this 22nd day of July, 2022.

Joanna I. Tabit
THE HONORABLE JOANNA I. TABIT

Drafted by: ***(Entered as Modified by the Court)**

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EXHIBIT D

INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

ICA EFiled: Aug 02 2022
06:13PM EDT
Transaction ID 67893213

State of West Virginia,
Petitioner

vs.) No. 22-ICA-1

Travis Beaver, Wendy Peters,
W. Clayton Burch, Miller L. Hall,
Katie Switzer, and Jennifer Compton,
Respondents

ORDER

On August 2, 2022, the Intermediate Court of Appeals of West Virginia made and entered the following order, in vacation:

On July 19, 2022, Petitioner State of West Virginia, by counsel Lindsay S. See, Solicitor General, presented to the Court a motion for stay pending appeal of an order of the Circuit Court of Kanawha County in Case Nos. 22-P-24 and 22-P-26, together with a motion to expedite consideration of the motion for stay. That same day, Respondents Katie Switzer and Jennifer Compton, by counsel Michael Kawash, Robinson & McElwee PLLC, likewise filed a motion for stay, together with a motion to expedite consideration of the motion for stay. On July 29, 2022, Respondents W. Clayton Burch and Miller L. Hall, by counsel Michael W. Taylor, Bailey & Wyant PLLC, and Respondents Travis Beaver and Wendy Peters, by counsel John H. Tinney, Hendrickson & Long PLLC, filed responses to the motions for stay.

On July 21, 2022, Respondents W. Clayton Burch and Miller L. Hall, by counsel, presented to the Court a motion to dismiss. On July 22, 2022, Petitioner State of West Virginia, by counsel, and Respondents Katie Switzer and Jennifer Compton, by counsel, filed responses in opposition to the motion to dismiss. On July 26, 2022, Respondents W. Clayton Burch and Miller L. Hall, by counsel, with leave of the Court, filed a reply in support of the motion to dismiss.

Upon consideration and review, the Court refuses the motions for stay and also refuses Respondents' motion to dismiss. Having addressed the matter in its July 25, 2022, order, the Court renders moot the motions for expedited consideration regarding the stay. It is so ordered.

Chief Judge Daniel W. Greear, disqualified.

Judge Jennifer P. Dent, sitting by temporary assignment.

Judge Charles O. Lorensen would have granted the stay.

A True Copy

Attest: /s/ Edythe Nash Gaiser
Clerk of Court

EXHIBIT E

STATE OF WEST VIRGINIA

At the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on August 18, 2022, the following order was made and entered **in vacation**:

State of West Virginia,
Petitioner

and

Katie Switzer and
Jennifer Compton,
Petitioners

vs.) No. 22-616

Travis Beaver,
Wendy Peters,
David L. Roach, State Superintendent of Schools, and
L. Paul Hardesty, President of the West Virginia Board of Education,
Respondents

ORDER

The Supreme Court of Appeals of West Virginia may, on its own accord, obtain jurisdiction over any civil case filed in the Intermediate Court of Appeals of West Virginia. West Virginia Code §51-11-4(b)(1) and Rule 1(b), Rules of Appellate Procedure. It is **ORDERED** that jurisdiction of the Intermediate Court appeal (Consolidated Intermediate Court Nos. 22-ICA-1 and 22-ICA-3) is transferred to this Court, and the appeal shall be expedited. The consolidated appeal is docketed as Supreme Court No. 22-616. The motion for direct review under Rule 29(f), Rules of Appellate Procedure, is refused.

The appeal is expedited for briefing and consideration. Therefore, both motions for expedited relief are refused as moot.

The petitioners are directed to file the petitioner's briefs, and a joint appendix, on or before **September 6, 2022**. The respondents are directed to file the respondent's briefs on or before **September 23, 2022**. Any reply brief deemed necessary may be filed by the petitioners on or before **September 30, 2022**. Due to the expedited nature of this matter, no motions for extension of time will be considered.

This matter is scheduled for oral argument under Rule 20 of the Rules of Appellate Procedure on Tuesday, **October 4, 2022**, at **11:30 a.m**. This order constitutes the Notice of Argument under Rule 20(b).

Pleadings have been filed as follows.

On August 4, 2022, the petitioner, State of West Virginia, by Lindsay S. See, Solicitor General, Michael R. Williams, Senior Deputy Solicitor General, and Caleb A. Seckman, Assistant Solicitor General, filed a notice of appeal from a final order of the Circuit Court of Kanawha County (Case Nos. 22-P-24 and 22-P-26) entered on July 22, 2022. In addition, the petitioner filed a motion for direct review, a motion for expedited relief, and a motion for stay pending appeal.

On the same day, August 4, 2022, petitioners, Katie Switzer and Jennifer Compton, by counsel, Michael A. Kawash and Jonathan C. Stanley, Robinson & McElwee PLLC, filed a motion for expedited relief and a motion for stay pending appeal.

Also on August 4, 2022, yes. every kid. Foundation, by counsel, Elbert Lin and Erica N. Peterson, Hunton Andrews Kurth LLP, filed a motion for leave to file an amicus curiae brief in support of the petitioner's motion for stay, along with the amicus curiae brief. The motion for leave to file an amicus curiae brief is granted and the brief is ordered filed.

On August 5, 2022, the respondents, Travis Beaver and Wendy Peters, by counsel, John H. Tinney, Jr., Hendrickson & Long, PLLC, filed a response in opposition to the motion for expedited review. On the same day, the respondents, W. Clayton Burch, former State Superintendent of Schools, and Miller L. Hall, former President of the West Virginia Board of Education, by counsel, Kelly C. Morgan, Michael W. Taylor, and Harrison M. Cyrus, Bailey & Wyant, PLLC, filed a joinder in the response in opposition to the motion for expedited review.

The petitioners, Katie Switzer and Jennifer Compton, by counsel, filed a response in support of the motion for direct review on August 8, 2022.

On August 15, 2022, the respondents, the State Superintendent of Schools and the President of the West Virginia Board of Education, by counsel, filed a response in opposition to the motion for stay. The respondents, Travis Beaver and Wendy Peters, by counsel, filed a response opposing the motion for direct review and a response opposing the motion for stay on the same date. The respondents, the State Superintendent of Schools and the President of the West Virginia Board of Education, by counsel, filed a response in opposition to the motion for direct review on August 16, 2022.

It is ORDERED that both motions for a stay pending appeal are refused. Justice Armstead and Justice Bunn would grant a stay.

SUMMARY OF DEADLINES: Appeal No. 22-616

Appeal Perfected:	**September 6, 2022**
Respondent's Brief:	**September 23, 2022**
Reply Brief:	**September 30, 2022**
Oral Argument:	**October 4, 2022**

The Clerk of Court is directed to serve a copy of this order upon all parties and file the order in consolidated Intermediate Court case Nos. 22-ICA-1 and 22-ICA-3.

A True Copy

Attest: /s/ Edythe Nash Gaiser
Clerk of Court

EXHIBIT F

2005 WL 1981810
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

CITY OF New JOHNSONVILLE

v.

Kevin E. HANDLEY, et al.

and

Gene Plant, et al.

v.

Kevin E. Handley, et al.

No. M2003-00549-COA-R3-CV.
|
March 3, 2005 Session.
|
Aug. 16, 2005.
|
Application for Permission to Appeal
Denied by Supreme Court
Feb. 6, 2006.

Direct Appeal from the Chancery Court for Humphreys County, Nos. CH-01-179 & CH-01-211; Robert E. Burch, Chancellor.

Attorneys and Law Firms

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T. Holland McKinnie, City Attorney, Franklin, TN; Michael R. Hill, Milan, TN, for Appellee, City of New Johnsonville, TN.

Benjamin C. Regen, Dickson, TN, for Appellees, Kevin E. Handley & Gloria J. Handley.

Stephen D. Wakefield, Memphis, TN, for Appellee, E.I. Dupont De Nemours and Company.

John Lee Williams, Robert I. Thomason, Jr., Waverly, TN, for Appellee, Volunteer Title Company, Inc., Trustee.

Lewis L. Cobb, Jerry P. Spore, J. Brandon McWherter, Jackson, TN, for Appellee, Union Planters Bank.

ALAN E. HIGHERS, J., delivered the opinion of the court, in which DAVID R. FARMER, J., joined, and HOLLY M. KIRBY, J., concurred separately.

OPINION

ALAN E. HIGHERS, J.

***1** This appeal involves protracted litigation over a parcel of land conveyed by the City of New Johnsonville, Tennessee, to a member of the New Johnsonville City Council. The mayor, on behalf of the city, subsequently filed suit against the councilman seeking to nullify the transaction. During the pendency of that litigation, several taxpayers filed their own suit against the councilman alleging the same causes of action set forth in the city's complaint. The city and the councilman ultimately settled their lawsuit. The taxpayers' lawsuit continued, ultimately naming the city as a defendant. The trial court partially granted the defendants' motions for summary judgment by ruling that the taxpayers did not have standing to contest the land transaction between the city and the councilman. The court ruled that the taxpayers did have standing to continue with their other causes of action concerning allegations that the councilman engaged in illegal business transactions with the city. The taxpayers subsequently took a voluntary nonsuit on their remaining claims and filed an appeal to this Court to contest the trial court's grant of summary judgment on their claim regarding the land transaction. We vacate the trial court's decision regarding the land transaction, and we remand for further proceedings not inconsistent with this opinion.

I.

Factual Background and Procedural History

This appeal involves protracted litigation between numerous parties concerning the transfer of a parcel of land located in New Johnsonville, Humphreys County, Tennessee. The facts, as set forth in over 2,000 pages of technical record, are largely undisputed.

In 1986, Mr. and Mrs. E.W. Lucas (the “Lucases”) conveyed, as a gift, approximately eighty (80) acres of property (the “Lucas Property”) located in the City of New Johnsonville (“City”) to the City. Although not expressly stated in the

deed, the Lucases and the City apparently reached an oral agreement that the City would use the property for industrial development. Specifically, the City agreed to convey the Lucas Property at no cost to entities desiring to engage in industrial and/or commercial development on the Lucas Property for the overall benefit of the City.

The City subsequently created an industrial park on the Lucas Property by conveying several tracts of land to various industries at no cost. In approximately July of 1999, Mayor Lawrence A. Hethcoat ("Mayor Hethcoat")[1] began negotiating with E.I. DuPont de Nemours & Company ("DuPont"), an already existing industry in the City, about locating its new warehouse and distribution facility in the City's industrial park. DuPont expressed its desire to have someone else build the facility on the property which DuPont would, in turn, lease. The City offered to convey a portion of the Lucas Property to an entity selected by DuPont to build the facility.

During the course of the City's negotiations with DuPont, Kevin E. Handley ("Councilman Handley") served as a member of the New Johnsonville City Council ("City Council").[2] Councilman Handley alleged that, in August of 1999, he had a chance meeting with a DuPont employee at a local restaurant. Councilman Handley learned from the employee that DuPont had decided to accept the City's offer. During the course of their conversation, Councilman Handley inquired about bidding on the construction of the DuPont facility. In September of 1999, DuPont mailed Councilman Handley a "Request for Proposal" form. Councilman Handley completed his bid proposal and submitted it to DuPont. On November 1, 1999, DuPont sent a letter to Councilman Handley notifying him that it had, in essence, selected his bid proposal over the others submitted.

***2** Thereafter, Councilman Handley communicated to Mayor Hethcoat that he had been selected by DuPont to build the facility. Mayor Hethcoat convened a special called meeting of the City Council on November 19, 1999, to discuss conveying a portion of the Lucas Property to Councilman Handley and his wife (along with Councilman Handley, collectively referred to as "the Handleys"). Councilman Handley came to the meeting and informed the other members of the City Council that he had been selected to build the DuPont facility. At the special called meeting, the City Council passed a resolution for the conveyance of 32.657 acres of the Lucas Property to the Handleys. That same day, Mayor Hethcoat, on behalf of the City, executed a "Warranty Deed" conveying 32.657 acres of the Lucas Property in consideration of $1.00 to the Handleys, d/b/a Mid South Logistics.

In the interim, the Handleys secured a loan from Union Planters Bank, N.A. ("Union Planters") in the amount of $5,373,181.69 to construct the DuPont facility.[3] On January 3, 2000, the Lucases conveyed an additional 19.11 acres of property located adjacent to the parcel at issue to the Handleys in consideration of $38,220.00. On January 17, 2000, the Handleys executed a lease agreement with DuPont calling for the construction and subsequent lease of a warehouse. A "Side Letter" executed by the Handleys and DuPont set forth DuPont's specifications and called for the construction of a warehouse 297,5000 square feet in size. Councilman Handley proceeded to build an industrial warehouse partially located on the parcel obtained from the City and partially located on the parcel obtained from the Lucases.

At some point, the citizens of the City elected Mayor Gene Plant ("Mayor Plant") as their new mayor. After the transaction between the City and the Handleys had been concluded, the Comptroller of the Treasury for the State of Tennessee (the "Comptroller") conducted an investigation and audit of the City's records for a period spanning July 1, 1998, through March 31, 2000, "to determine the extent of the [City's] compliance with certain laws and regulations." On December 12, 2000, the Comptroller issued his findings which revealed several problem areas. The first area discussed in the Comptroller's report addressed the transaction between the City and Councilman Handley, providing:

> 1. ***FINDING:*** **Apparent conflict of interest**
>
> Two city councilmen had apparent direct conflicts of interest between their official duties and personal interests. The City purchased goods and services from two councilmen as well as conveying a 32-acre tract of land to one of them. Section 12-4-101(a)(1), *Tennessee Code Annotated,* states:
>
> > It is unlawful for any officer, committee member, director, or other person whose duty it is to vote for, let out, overlook, or in any manner to superintend any work or any contract in which any municipal corporation, county, state, development district, utility district, human resource agency, or other political subdivision created by statute shall or may be interested, to be directly interested in any such contract. "Directly interested" means any contract with the official personally or with any business

in which the official is the sole proprietor, a partner, or the person having the controlling interest....

***3** In addition, the New Johnsonville municipal code, Section 4-101, states, "Except for the receipt of such compensation as may be lawfully provided for the performance of his municipal duties, it shall be unlawful for any municipal officer or employee to be privately interested in, or to profit, directly or indirectly, from business dealings with the municipality."

RECOMMENDATION:

To provide impartial decisions regarding the city's contracts, official should ensure that unlawful conflicts of interest, as defined in Section 12-4-101, *Tennessee Code Annotated,* are avoided. Business dealings between the officials and the city should be avoided as required by Section 4-101 of the municipal code. The mayor and members of the city council should seek legal advice and take appropriate corrective action.

MANAGEMENT'S RESPONSE:

Mayor Plant and Councilmen C. Dellinger, J. Dellinger, Handley, Harbison, and James:

We concur. The city will abide and enforce Section 12-4-101, *Tennessee Code Annotated,* and will seek legal advice from the city attorney.

Former Mayor Hethcoat:

Failed to respond.

Councilman Laughlin:

I concur. Unused land should be returned immediately. An agreement should be negotiated for the land used.

The City's attorney subsequently issued an opinion letter expressing his opinion that the City could not lawfully convey real property to a member of the City Council.

On July 31, 2001, Mayor Plant, acting on behalf of the City, filed a complaint in the Chancery Court of Humphreys County against the Handleys individually; their business, Mid South Logistics; Volunteer Title Company, Inc., the trustee holding title to the property at issue; and Union Planters as mortgagee.[4] The complaint alleged that the transaction between the City and Councilman Handley violated several provisions of the City's municipal code and state law, specifically Section 12-4-101(a)(1) of the Tennessee Code. The City requested that the trial court issue a temporary restraining order against the Handleys to prevent further construction on the subject parcel; enter an order requiring the rental payments under the DuPont lease be paid into the court pending resolution of the matter; an accounting of all profits received in connection with the use of said property; an order requiring the Handleys to turn over to the City all rents or profits received in connection with the use of the property; an order finding the transaction failed for lack of consideration; an order finding the execution of the deed by the City in favor of the Handleys constituted an *ultra vires* act; an order finding the special called meeting a nullity in violation of section 8-44-103(b) of the Tennessee Code; and an order terminating and extinguishing all liens the Handleys placed on the property. Mr. R. Eric Thornton ("Mr.Thornton"), with the law firm Ramsey & Thornton, PLC in Dickson, Tennessee, filed the complaint on behalf of the City.

***4** In August of 2001, several citizens of the City appeared at a special called meeting of the City Council to present a petition signed by numerous citizens asking the City Council to support the lawsuit filed by Mayor Plant. A motion was made at the meeting to support the lawsuit, but the motion failed to pass. On September 4, 2001, several citizens of the City (hereinafter referred to as the "Taxpayers") filed a motion with the trial court asking, pursuant to Rule 20.02 of the Tennessee Rules of Civil Procedure, to join the lawsuit. That same day, the City filed a motion to amend its complaint to allege that the Handleys were trespassers and had vandalized the subject property. The trial court subsequently granted the City's motion. On September 17, 2001, the Taxpayers filed a complaint in the trial court against the Handleys, individually; the Handley's business, Mid South Logistics; Volunteer Title Company, Inc.; Union Planters; and DuPont. Mr. Thornton represented the Taxpayers in this lawsuit as well.[5] The Taxpayers' complaint alleged the same violations and requested the same relief as the complaint filed by the City, particularly a violation of Section 12-4-101(a)(1) of the Tennessee Code. On December 3, 2001, the City filed a motion to amend its complaint once more to add allegations that Councilman Handley, since taking office, had engaged in at least twenty-eight (28) illegal business transactions with the City.

On January 17, 2002, the trial court entered an order on the City's second motion to amend its complaint. In that order, the trial court stated as follows:

> *Came the Plaintiff, City of New Johnsonville,* by and through its attorney, and moved the Court for permission to amend its Complaint to add an additional party, averments and prayers for relief.
>
> The Court upon consideration of said motion ... is of the opinion that said motion should be granted. *Plaintiff* has sixty (60) days to file a *consolidated complaint* with all amendments and prayers for relief in this cause.

(emphasis added). Thereafter, on January 24, 2002, Mr. Thornton filed an "Amended and Consolidated Complaint" with the trial court which stated as follows: "Come now the Plaintiffs, *pursuant to Court Order* consolidating the actions filed by Plaintiffs, and file this Amended and Consolidated Complaint restating the allegations of the Plaintiffs in one action, consolidated under *Docket Number CH-01-179.*" (emphasis added). In the "consolidated" complaint, Mr. Thornton restated the various allegations lodged against the Handleys and other defendants, namely, that the land transaction between Councilman Handley and the City violated city and state laws; that the Handleys were trespassers; that the Handleys had vandalized the property; and that Councilman Handley had engaged in at least twenty-eight (28) illegal business transactions with the City since taking office.[6]

On September 9, 2002, Mayor Carolyn Ingram ("Mayor Ingram") took office as the City's newly elected mayor. On the same day that Mayor Ingram took office, Councilman Handley's term of office apparently ended. Additionally, Mayor Ingram, on the same day she took office, issued a letter to Mr. Thornton terminating his representation of the City in this matter. Also on September 9, 2002, the Handleys tendered a settlement offer to the City. The settlement offer called for the City to dismiss with prejudice all claims filed in its lawsuit against the Handleys and other defendants. In turn, the Handleys agreed to dismiss all of their counterclaims filed in the case. In addition, the agreement called for the City to execute a quitclaim deed in favor of the Handleys re-conveying the property originally conveyed in the November 16, 1999, deed. Finally, the agreement proposed that the parties enter into a mutual covenant not to sue. The new City Council discussed the Handleys' proposal at its September 9, 2002, scheduled meeting and passed a resolution accepting the offer.[7] Thereafter, the Handleys and the City entered into a "Mutual General Release and Covenant Not to Sue," and Mayor Ingram executed a "Quitclaim Deed" in favor of the Handleys.

***5** On September 10, 2002, the City filed a "Notice of Voluntary Dismissal" with the trial court seeking to voluntarily dismiss all claims filed in the case. In turn, the Handleys filed their "Notice of Dismissal" seeking to dismiss all of their counterclaims against the City that same day. On September 12, 2002, the Taxpayers, still represented by Mr. Thornton, filed a motion for summary judgment seeking a ruling that, as a matter of law, the City's grant of a portion of the Lucas Property to the Handleys was null and void as an *ultra vires* act, and any subsequent attempt by the City to convey the property to the Handleys remained an *ultra vires* act. That same day, the Taxpayers filed a motion seeking partial summary judgment by asserting that some 20.31 acres of the entire 32.657 acres conveyed to the Handleys was not encumbered by Union Planters' mortgage, and they sought a ruling that, as a matter of law, the Taxpayers were entitled to a judgment on the issue of liability for damages to and profits from the 20.31 acres of land.

On October 4, 2002, the Handleys filed their response to the Taxpayers' motions and alleged that genuine issues of fact remained to be resolved by trial of the matter. In their response, the Handleys argued, in essence, that the Taxpayers did not have standing to contest the City's conveyance of the property at issue to the Handleys, and the Taxpayers' action became moot when the City settled the action with the Handleys, thereby extinguishing any claims the Taxpayers had. That same day, the Handleys filed their own motion for summary judgment against the Taxpayers reiterating the arguments in their response to the Taxpayers' motions.[8] In addition, the Handleys filed a motion with the trial court seeking to amend their counterclaim to include additional causes of action against the Taxpayers, and a motion to amend their answer to include additional affirmative defenses.[9]

On October 9, 2002, the trial court entered an order, pursuant to the agreement between the Handleys and the City, dismissing the City's claims and the Handleys' counterclaims with prejudice. On October 24, 2002, the Taxpayers filed a motion asking the trial court to alter or amend its October 9, 2002, order to reflect that the dismissal was not with prejudice. On November 8, 2002, Union Planters filed its motion for summary judgment in this case. On November 25, 2002, DuPont joined Union Planters' motion for summary judgment.

On January 27, 2003, the trial court entered an order addressing the Taxpayers' motion to alter or amend the court's October 9, 2002, order, stating:

> These *consolidated civil actions* came on to be heard ... upon the motion of Gene Plant and other individual plaintiffs in *Gene Plant et al. v. Kevin E. Handley et al., Civil Action No. CH-10-211* before the Court (*the "Individuals' Action"*), to alter or amend the Court's order entered on October 9, 2002, dismissing with prejudice the claims and counterclaims asserted by the parties in *City of New Johnsonville, Tennessee v. Kevin E. Handley, et al., Civil Action No. CH-01-179* before the court (*the "City Action"*. ...)[.]
>
> I.
>
> ***6** IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the motion of Gene Plant and others to alter or amend the Order of Dismissal be and the same hereby is denied, to the extent the said motion seeks to affect the rights and claims of the parties to the CityAction or the legal effect of the Order of Dismissal upon those rights and claims.
>
> II.
>
> IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the motion of Gene Plant and others to alter or amend the Order of Dismissal be and the same hereby is granted, to the extent that the said motion seeks a clarification by the Court that the Order of Dismissal does not, in and of itself, alter the present procedural posture of the Individuals' Action.
>
> III.
>
> IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, notwithstanding the Order of Dismissal does not in and of itself affect the procedural posture of the Individuals' Action, the Court does not hereby rule or purport to rule upon the legal effect of the Order of Dismissal on the claims asserted by the plaintiffs in the Individuals' Action. The legal effect of the Order of Dismissal on those claims shall be and remain as provided by applicable law.
>
> ....
>
> V.
>
> IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that for all purposes this order is a final order in *City of New Johnsonville, Tennessee v. Kevin Handley, Gloria J. Handley, Volunteer Title Company, Inc., Trustee, and Union Planters Bank, N.A.,* Civil Action No. CH-01-179 before this Court, and the Order of Dismissal shall operate as a complete and final adjudication of all the right [sic] and claims of all parties thereto.

(emphasis added). On February 21, 2003, the Taxpayers filed a motion, pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure, asking the court to set aside its October 9, 2002, order.

On February 21, 2003, the Taxpayers filed a motion asking the trial court for permission to amend their complaint to add additional causes of action related to the City's alleged attempt to ratify the land transaction by settling with the Handleys. That same day, the Taxpayers filed a notice of appeal to this Court to contest the trial court's January 27, 2003 order.[10]

On August 29, 2003, the trial court entered two memorandum opinions addressing the motions for summary judgment filed by the parties. In the first memorandum opinion, the trial court addressed the defendants' motions for summary judgment.[11] The court began by examining the standing issue. The court found that any demand by the taxpayers to the City Council requesting it to correct any illegality would be futile, therefore, any failure on the part of the Taxpayers to make such demand was excused. Next, the trial court concluded that land, especially land gifted to a city, does not constitute "public funds." Therefore, the court concluded that the Taxpayers did not have standing to challenge the City's transfer of 32.657 acres of the Lucas Property to the Handleys. Conversely, the trial court held that the Taxpayers did have standing to contest the allegedly illegal business transactions occurring between Councilman Handley and the City. Thus, the trial court granted in part and denied in part the defendants' motions for summary judgment.

***7** Next, the trial court issued a memorandum opinion addressing the Taxpayers' motions for summary judgment.[12] Alluding to its previous finding that the Taxpayers did not have standing to contest the transfer of land by the City to the Handleys, the trial court denied the Taxpayers' motions. On September 19, 2003, the trial court entered an order incorporating the findings from its memorandum opinions.[13]

On December 16, 2003, the trial court entered an order setting the case for trial and granting the Taxpayers thirty (30) days to name the City as a defendant in their civil action.[14]

On January 16, 2004, the Taxpayers filed an amended complaint adding the City as a defendant to their civil action.[15] Since the Taxpayers' amended complaint contained essentially the same causes of action and requests for relief related to the land transaction between the Handleys and the City that they previously asserted, the Handleys, on February 17, 2004, filed a renewed motion for summary judgment. That same day, the Handleys filed a notice of their intent to take a voluntary nonsuit as to all of their counterclaims.[16] On March 5, 2004, the trial court entered an order dismissing the Handleys' counterclaims without prejudice. On April 5, 2004, the trial court entered an order, based upon the agreement of the parties, granting the Handleys' renewed motion for summary judgment to the extent the court had already ruled on the land transaction in its previous September 19, 2003, order. On May 27, 2004, the Taxpayers filed a notice of voluntary dismissal regarding their remaining claims. That same day, the Taxpayers filed a second notice of appeal to this Court. On June 2, 2004, the trial court entered an order dismissing the Taxpayers' remaining claims without prejudice.

On appeal, the Taxpayers have presented two issues for our review. At the outset, we must place these issues in the proper context. The Taxpayers are, in essence, asking this Court to determine whether the trial court erred in granting summary judgment to the Handleys and the other defendants on the Taxpayers' claim contesting the land transaction between the City and Councilman Handley. When considering this primary issue, the Taxpayers ask this Court to entertain the following issues:

I. Whether the taxpayers of a municipality have standing to challenge an illegal conveyance of real property from a municipality to an elected official of that municipality; and

II. Whether an illegal conveyance of real property from a municipality to an elected official of that municipality is void under the doctrine of *ultra vires*.[17]

For the reasons set forth more fully herein, we vacate the trial court's order granting the Appellees' partial summary judgment and remand this case to the trial court.

II.

Jurisdiction To Entertain Certain Issues

This Court is required to consider whether or not we have subject matter jurisdiction over an appeal regardless of whether a party presented such issue for our review. *See* Tenn. R.App. P. 13(b) (2004); *Martin v. Washmaster Auto Ctr., Inc.,* No. 01-A-01-9305-CV-00224, 1993 Tenn.App. LEXIS 464, at *3, 1993 WL 241315 (Tenn.Ct.App. July 2, 1993); *Huntington Nat'l Bank v. Hooker,* 840 S.W.2d 916, 922 (Tenn.Ct.App.1991). On appeal, the Handleys assert that this Court is without jurisdiction to entertain the appeal filed by the Taxpayers. Specifically, the Handleys assert that, since the Taxpayers were not parties to the City's action against them, the Taxpayers could not file a motion to alter or amend the court's order dismissing that case. Therefore, the Handleys argue that the Taxpayers' motion, filed on October 24, 2002, did not toll the running of the thirty (30) day period for filing an appeal.[18] *See* Tenn. R.App. P. 4(a) (2004). In turn, they contend that, even if the Taxpayers could file an appeal of the order dismissing the City's action against them, the time for filing an appeal began to run from October 9, 2002, the date the trial court entered the order. Since the Taxpayers did not file their first notice of appeal until February 21, 2003, well beyond the allowed thirty (30) day period, the Handleys argue that this Court has no jurisdiction to review the lawsuit filed by the City. *See* Tenn. R.App. P. 2 (2004) (noting that the Court is without authority to extend the time for filing a notice of appeal set forth in Tenn. R.App. P. 4(a)); *Am. Steinwinter Investor Group v. Am. Steinwinter Inc.,* 964 S.W.2d 569, 571 (Tenn.Ct.App.1997) ("The 30-day rule for notices of appeal is mandatory and jurisdictional and may be not waived...."). In turn, the Taxpayers argue that their motion to alter or amend tolled the running of the thirty (30) day period. Furthermore, the Taxpayers contend that, even if the first notice of appeal is not timely, their second notice of appeal permits them to raise all issues related to this consolidated action.

***8** It is apparent to this Court that the parties lost sight of the exact nature of these actions during the course of the proceedings below. On September 4, 2001, the Taxpayers filed a motion with the trial court entitled "Motion to Join in Lawsuit" in which they sought to join the City's lawsuit against the Handleys and other defendants "pursuant to Rule 20.01." On September 17, 2001, Mr. Thornton filed a complaint in the trial court on behalf of the Taxpayers. On

January 17, 2002, the trial court entered an order entitled "Order on Motion to Amend Complaint and Second Motion to Amend Complaint" in which the trial court stated as follows:

> *Came the Plaintiff, City of New Johnsonville ...* and moved the Court for permission to amend its Complaint to add an additional party, averments and prayers for relief.
>
> The Court ... is of the opinion that said motion should be granted. *Plaintiff* has sixty (60) days to file a consolidated complaint with all amendments and prayers for relief in this cause.

(emphasis added). Thereafter, on January 24, 2002, Mr. Thornton filed a complaint entitled "Amended and Consolidated Complaint" which provided:

> Come now the *Plaintiffs, pursuant to Court Order consolidating the actions filed by Plaintiffs,* and file this Amended and *Consolidated* Complaint restating the allegations of the *Plaintiffs* in *one action, consolidated* under Docket Number: CH-01-179.

(emphasis added).

Nowhere in the voluminous record filed in this case do we find an order from the trial court either joining or consolidating the actions filed in this case. On appeal, the Handleys refer to the trial court's January 17, 2002, order in their briefs as "an order consolidating the City Action and the Individuals' Action for discovery and trial." The trial court's January 17, 2002, order does nothing of the sort. To the contrary, the order, by its express language, only addressed the City's motion to amend its complaint.

Whether these cases have been joined or consolidated is a matter we do not take lightly due to the effect the characterization of a lawsuit has on our appellate review. The Taxpayers' motion asked for permission to join the lawsuit already filed by the City. Permissive joinder of parties is provided for in Rule 20.01 of the Tennessee Rules of Civil Procedure, which states:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action....

Tenn. R. Civ. P. 20.01 (2004); *see also Fred's Fin. Co. v. Fred's of Dyersburg, Inc.,* 741 S.W.2d 903, 907-09 (Tenn.Ct.App.1987). Consolidation of two separate trials is provided for in Rule 42.01 of the Tennessee Rules of Civil Procedure, and it states:

> When actions involving a common question of law or fact are pending before a court, the court may order all the actions consolidated or heard jointly, and may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

***9** Tenn. R. Civ. P. 42.01 (2004).

The interplay between these two procedural rules can be explained in the following terms:

> To understand the requirements for and the consequences of permissive joinder of parties under Rule 20.01, it is useful to distinguish joinder of parties from consolidation of actions under Rule 42.01. Plaintiffs and defendants properly joined under Rule 20 .01 are *all parties to the same civil action,* even when the claims by or against them are several, as opposed to joint. Consolidation of separate actions under Rule 42.01, on the other hand, *does not create one action or make those who are parties in one suit parties in another.* Consolidation simply allows a single trial of common issues and permits joint discovery for purposes of judicial economy.
>
> Several consequences may follow from the distinction between joinder and consolidation. *When parties are joined in an action, they and the claims by or against them must be taken into account for a number of important purposes such as determining whether ... a judgment is a final appealable order*[19]*.... When actions are consolidated, on the other hand, a party or a claim in only one of the actions may not be taken into account for these purposes in the other consolidated actions.*
>
> The prerequisites for joinder and consolidation also differ. Consolidation is proper when there are "actions involving a common question of law or fact pending before a court." For joinder of parties in one action, on the other hand, the additional "transaction or occurrence" test must be satisfied. The claims by or against the parties must be "in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences." When, therefore, multiple claims that will entail decisions on common issues of law or fact cannot be joined because of limitations on joinder, consolidation may provide a beneficial alternative for achieving judicial economy.

> Robert Banks, Jr. & June F. Entman, Tennessee Civil Procedure § 6-5(b) (1999) (emphasis added).

The complaint filed by Mr. Thornton on January 24, 2002, rather confusingly refers to the actions as consolidated, yet it states that the actions have become "one action, consolidated under Docket Number: CH-01-179."[20] However, it is apparent after reviewing the record, that despite the lack of a definitive order, the trial court treated these two lawsuits as consolidated, not joined. The City's lawsuit was originally docketed as "Civil Action No. CH-01-179." The Taxpayers' action was originally docketed as "Civil Action No. CH-01-211." When the Handleys responded to the Taxpayers' motions for summary judgment, their response indicated that it addressed "Civil Action No. CH-01-211." When the City and the Handleys moved to dismiss their respective claims against each other, the parties' motions both reflected that they were addressing a case docketed as "Civil Action No. CH-01-179." The trial court's order dismissing the City's lawsuit provides that the order is addressing "Civil Action No. CH-01-179." When Union Planters filed its motion for summary judgment against the Taxpayers, it listed "Civil Action No. CH-01-211," but the "211" was marked through and "179" written above it. When the trial court issued the order on the Taxpayers' motion to alter or amend the court's previous order dismissing the City's lawsuit, the order listed both docket numbers, called the cases "consolidated," and referred to them as separate actions. The trial court's orders addressing the motions for summary judgment filed between the Taxpayers, the Handleys, and the other defendants all refer to the action as "Civil Action No. CH-01-211." The trial court's final order dismissing the Taxpayers' remaining claims refers to the case as "Civil Action No. CH-01-211."[21]

***10** Additionally, this Court received a consolidated record, and the parties have briefed these actions as if they were consolidated. Accordingly, we will regard the two cases as consolidated by the trial court. *See Local 2173 of the Am. Fed'n of State, County, and Mun. Employees v. McWherter,* No. 87-34-II, 1987 Tenn.App. LEXIS 2726, at *1, 1987 WL 11762 (Tenn.Ct.App. June 5, 1987). Thus, the City's action and the Taxpayers' action remained distinct and separate lawsuits throughout the proceedings below. *Patton v. Aerojet Ordinance Co.,* 765 F.2d 604, 606 (6th Cir.1985); *Masson v. Anderson,* 62 Tenn. (3 Baxt.) 290, 298-99 (Tenn.1873); *Chitwood v. Myers,* 443 S.W.2d, 830-31 (Tenn.Ct.App.1969).

Having characterized these lawsuits, we first address the effect of the trial court's order dismissing the lawsuit between the City and the Handleys. "A consent decree is a contract made final and binding upon the parties by the approval of the court." *City of Shelbyville v. State ex rel. Bedford County,* 220 Tenn. 197, 415 S.W.2d 139, 144 (Tenn.1967) (citing *Boyce v. Stanton,* 83 Tenn. 346 (Tenn.1885)). "Consent decrees, compromise and settlement agreements, and agreed orders are favored by the courts and represent the achievement of an amicable result to pending litigation." *In re Estate of Williams,* No. M2000-02434-COA-R3-CV, 2003 Tenn.App. LEXIS 313, at *33, 2003 WL 1961805 (Tenn.Ct.App. Apr.28, 2003). "In the absence of duress, fraud, mistake or collusion a consent judgment is valid and binding, as such, as *between the parties thereto and their privies.*" 49 C.J.S. *Judgments* § 187 (1997) (emphasis added). Absent the existence of one of the limited exceptions, a consent order is not appealable by the parties entering into the agreement. *See City of Shelbyville,* 415 S.W.2d at 144; *Bacardi v. Tenn. Bd. of Registration in Podiatry,* 124 S.W.3d 553, 562 (Tenn.Ct.App.2003); *Bickers v. Lake County Bd. of Educ.,* No. 02A01-9307-CV-00163, 1994 Tenn.App. LEXIS 7, at *3-4, 1994 WL 8157 (Tenn.Ct.App. Jan.13, 1994). Thus, when the City and the Handleys agreed to settle their case and the trial court subsequently entered an order dismissing the City's and the Handleys' claims against each other, neither party could appeal the trial court's order.

Since the Taxpayers' action remained a separate and distinct lawsuit, the Taxpayers could not file a motion to alter or amend or to set aside the trial court's order dismissing the suit between the City and the Handleys. "It is fundamental that '[a] person who is not a party of record to a lawsuit has no standing therein which enables him or her to take part in the proceedings.' " *In re Estate of Reed,* No. W2003-00210-COA-R3-CV, 2004 Tenn.App. LEXIS 424, at *5, 2004 WL 1488568 (Tenn.Ct.App. July 1, 2004) (citations omitted); *see also* 47 Am.Jur.2d *Judgments* § 757 (2004) ("The general rule is that strangers to the record, unless authorized by statute, ordinarily have no standing on which to base an application to vacate a judgment."). Moreover, the Taxpayers could not file an appeal contesting the trial court's order regarding the lawsuit between the City and the Handleys. "A party to one action may not appeal from a judgment or order in a second action with which the first is consolidated for trial." 4 C.J.S. *Appeal and Error* § 157 (1993). Accordingly, the Taxpayers have no standing to raise any issues in the instant appeal related to the trial court's disposition of the City's suit against the Handleys and other defendants. Likewise, this Court is without jurisdiction to entertain any issues raised by the Appellees concerning the City's action against the Handleys.

***11** We also note that, since the Taxpayers voluntarily nonsuited their claim regarding the allegedly illegal business transactions between the City and Councilman Handley, we cannot entertain any issues raised by the parties regarding that claim in this appeal. A plaintiff is generally permitted to take a voluntary nonsuit of his case. *See* Tenn. R. Civ. P. 41.01 (2004). Upon doing so, however, there is no longer any existing controversy regarding those claims to which the plaintiff voluntarily dismissed. Accordingly, this Court cannot entertain an appeal of issues related to the allegedly illegal business transactions between the City and Councilman Handley which the Taxpayers voluntarily dismissed. *See Payne v. Savell,* No. 03A01-9708-CV-00352, 1998 Tenn.App. LEXIS 81, at *5-6, 1998 WL 46454 (Tenn.Ct.App. Feb.5, 1998) (noting that, when a party takes a voluntary nonsuit, the parties cannot appeal the resulting order of dismissal without prejudice); *Bickers v. Lake County Bd. of Educ.,* No. 02A01-9307-CV-00163, 1994 Tenn.App. LEXIS 7, at *4, 1994 WL 8157 (Tenn.Ct.App. Jan.13, 1994) ("A party is estopped or waives his right to appeal when judgment is entered at his request."); *Oliver v. Hydro-Vac Services, Inc.,* 873 S.W.2d 694, 696 (Tenn.Ct.App.1993) (concluding that a party is ordinarily not aggrieved when no judgment is rendered against him); *Martin v. Washmaster Auto Ctr., Inc.,* No. 01-A-01-9305-CV-00224, 1993 Tenn.App. LEXIS 464, at *6, 1993 WL 241315 (Tenn.Ct.App. July 2, 1993) ("No present controversy exists after the plaintiff takes a nonsuit."); *Huggins v. Nichols,* 59 Tenn.App. 326, 440 S.W.2d 618, 620 (Tenn.Ct.App.1968) ("Although there are some exceptions to the rule, the general rule is that a plaintiff or defendant cannot appeal or prosecute a writ of error from or to a judgment, order, or decree in his own favor, since he is not aggrieved thereby.").

III.

Summary Judgment on the Taxpayers' Claim Challenging the Land Transaction

Having determined that the Taxpayers' suit remained separate from the City's action against Councilman Handley, we now address the correctness of the trial court's decision to grant partial summary judgment to the Appellees by ruling that "plaintiffs have no standing to challenge the transfer of the 32.657 acres to Defendant Handley and this part of the action must be dismissed."

A.

Standard of Review

"Summary judgments are proper in virtually any civil case that can be resolved on the basis of legal issues alone." *Summers v. Cherokee Children & Family Services, Inc.,* 112 S.W.3d 486, 507 (Tenn.Ct.App.2002). "A party is entitled to summary judgment where he or she establishes that there is no genuine issue as to any material fact and that a judgment may be rendered as a matter of law ." *Stovall v. Clarke,* 113 S.W.3d 715, 721 (Tenn.2003) (citing *Penley v. Honda Motor Co.,* 31 S.W.3d 181, 183 (Tenn.2000)); *see also* Tenn. R. Civ. P. 56.04 (2003). The party moving for summary judgment has the burden of proving that the motion satisfies these requirements. *Bain v. Wells,* 936 S.W.2d 618, 622 (Tenn.1997) (citing *Downen v. Allstate Ins. Co.,* 811 S.W.2d 523, 524 (Tenn.1991)). Once the moving party has established that there is no genuine issue of material fact, the burden shifts to the non-moving party to demonstrate, by affidavits or other discovery materials, that there is a genuine issue of material fact to be resolved by trial of the matter. *Byrd v. Hall,* 847 S.W.2d 208, 211 (Tenn.1993) (citations omitted). "In reviewing a motion for summary judgment, the Court must examine the evidence and all reasonable inferences from the evidence in the light most favorable to the non-moving party." *Stovall,* 113 S.W.3d at 721 (citing *Webber v. State Farm Mut. Auto. Ins. Co.,* 49 S.W.3d 265, 269 (Tenn.2001)). The trial court should grant a motion for summary judgment "only when both the facts and the conclusions to be drawn from the facts permit a reasonable person to reach only one conclusion." *Carvell v. Bottoms,* 900 S.W.2d 23, 26 (Tenn.1995) (citing *Byrd,* 847 S.W.2d at 210-11)).

***12** "Summary judgments enjoy no presumption of correctness on appeal ." *Summers,* 112 S.W.3d at 508. "Our task on appeal is to review the record to determine whether the requirements for granting summary judgment have been met." *Church v. Perales,* 39 S.W.3d 149, 157 (Tenn.Ct.App.2000). "This court must use the same standard [as the trial court] in reviewing a trial court's judgment granting summary judgment." *Prince v. Saint Thomas Hosp.,* 945 S.W.2d 731, 733 (Tenn.Ct.App.1996) (citing *Clifton v. Bass,* 908 S.W.2d 205, 208 (Tenn.Ct.App.1995)). Since our inquiry on appeal involves purely questions of law, *Carvell,* 900 S.W.2d at 26, "the standard for reviewing a grant of summary judgment is *de novo* without any presumption that the trial court's conclusions were correct." *Webber,* 49 S.W.3d

at 269; *see also Kelley,* 133 S.W.3d at 591; *Bain,* 936 S.W.2d at 622.

B.

Taxpayer Standing

"A citizen's standing to sue a governmental entity is a threshold issue that should be resolved before addressing the merits of the case." *Ragsdale v. City of Memphis,* 70 S.W.3d 56, 62 (Tenn.Ct.App.2001). As our supreme court previously stated in a similar case:

> The initial question is whether our courts will entertain a taxpayer suit contesting the legality of payments made to county officials from public funds; that is, whether a taxpayer/citizen has standing to litigate the issue presented in the complaint.
>
> It is not at this point appropriate to examine the merits of the ultimate question. The Court should determine whether a party may litigate the legality of a public officer's payments to himself, without first deciding whether those payments are, in fact and law, illegal. Because citizen suits do burden the conduct of public affairs, a defendant entity or officer should not be obliged to defend on the merits if he is entitled to a dismissal for lack of standing. Nor should the court critique the conduct of public officials if the cause is not justiciable.

Cobb v. Shelby County Bd. of Commissioners, 771 S.W.2d 124, 125 (Tenn.1989). Standing is a judge-made doctrine used by the courts of this state " 'to refuse to determine the merits of a legal controversy irrespective of its correctness where the party advancing it is not properly situated to prosecute the action.' " *Phillips v. County of Anderson,* No. E2000-01204-COA-R3-CV, 2001 Tenn.App. LEXIS 308, at *9, 2001 WL 456065 (Tenn.Ct.App. Apr.30, 2001) (quoting *Knierim v. Leatherwood,* 542 S.W.2d 806, 808 (Tenn.1976)). Accordingly, we will begin by addressing the Taxpayers' first issue-whether they have standing to challenge the conveyance of real property from the municipality to an elected official of that municipality.

"The rule in Tennessee is well established that citizens and taxpayers are without standing to maintain a lawsuit to restrain or direct governmental action unless they first allege and establish that they will suffer some special injury not common to citizens and taxpayers generally." *LaFollette Med. Ctr. v. City of LaFollette,* 115 S.W.3d 500, 503 (Tenn.Ct.App.2003) (citing *Patton v. City of Chattanooga,* 108 Tenn. 197, 65 S.W. 414, 420-21 (Tenn.1901)); *see also Badgett v. Rogers,* 222 Tenn. 374, 436 S.W.2d 292, 294 (Tenn.1968); *Reams v. Bd. of Mayor & Alderman of McMinnville,* 155 Tenn. 222, 291 S.W. 1067, 1068 (Tenn.1927). As a policy justification for this general rule, the Tennessee Supreme Court has stated as follows:

> ***13** On the one hand, it is undeniably the right of a taxpayer to know that his taxes are expended properly and are not unlawfully diverted or misused. On the other hand, the courts have long recognized the necessity of allowing municipal officials to perform their duties without interference from frequent and possibly frivolous litigation and the inexpedience of putting municipal officers at hazard to defend their acts whenever any member of the community sees fit to make the assault, whether for honorable motives or not. The courts have been commensurately reluctant to usurp or supersede the discretion of municipal authorities to determine which municipal undertakings are necessary and appropriate.

Badgett, 436 S.W.2d at 293-94; *see also Parks v. Alexander,* 608 S.W.2d 881, 885 (Tenn.Ct.App.1980) ("The generally acknowledged purpose of this requirement of special damage or private harm to the individual rests in the public policy of protecting public corporations from a profusion of suits.").

However, the general rule regarding taxpayer standing is not without exception. "[T]he courts have recognized an exception to the general rule where it is asserted that the assessment or levy of a tax is illegal or that public funds are misused or unlawfully diverted from stated purposes." *Badgett,* 436 S.W.2d at 294; *see also LaFollette Med. Ctr.,* 115 S.W.3d at 504. The Taxpayers in the instant case, being unable to establish any specific injury not sustained by the citizens of the City in general, rely on this exception to assert they possess standing to contest the land transaction between the City and Councilman Handley. Specifically, the Taxpayers seek to establish that the land transaction at issue constituted an illegal use of "public funds."

In order for a taxpayer to have standing to challenge the legality of the expenditure of public funds, the following elements must be found to exist: (1) the plaintiff/taxpayers have taxpayer status; (2) the taxpayers allege a specific illegality in the expenditure of public funds; and (3) the taxpayers have made a prior demand on the governmental entity asking it to correct the alleged illegality. *Cobb v. Shelby County Bd. of Commissioners,* 771 S.W.2d 124, 126

(Tenn.1989); *Ragsdale v. City of Memphis,* 70 S.W.3d 56, 62 (Tenn.Ct.App.2001).

The trial court used this three-prong test in this case to evaluate whether the Taxpayers had standing to challenge the land transaction. Regarding the first element, the trial court ruled that "there is no material dispute of fact that some of the plaintiffs are taxpayers of the City of New Johnsonville." Turning to the third element, the trial court ruled that "any prior demand by the taxpayers to correct the alleged illegality would have been a futile gesture. This being the case, failure to make a prior demand is excused." The largest area of contention between the parties on appeal is the second element required in order for the Taxpayers to have standing to pursue their claim against the Appellees (*i.e.,* whether they allege a specific illegality in the expenditure of "public funds"). The trial court ruled that, as a matter of law, "[l]and, especially land given to the city, is not 'public funds.' " Accordingly, the trial court held that, since the Taxpayers failed to satisfy the second element of taxpayer standing, summary judgment was appropriate as to this claim.

***14** The Taxpayers argue that this ruling constitutes error because "the ordinary and plain meaning of public funds includes property held by a municipality for the benefit of its citizens." Conversely, the Appellees contend that the term "public funds" must mean the diversion of funds in the form of money derived from taxation in order for taxpayers to have standing. Since the real property at issue was not acquired with tax revenue (*i.e.,* it was a gift), the Appellees argue that a subsequent disposition of the land cannot be considered a disposition of "public funds."

Our independent review of the law applicable to the present case reveals that the trial court applied an incorrect legal standard when granting partial summary judgment to the Appellees in this case. Stated differently, to ascertain if the Taxpayers in the instant case have standing, we need not determine if land owned by a municipality constitutes "public funds" as the parties suggest in their briefs.

The Taxpayers alleged in their complaint that the land transaction between the City and Councilman Handley violated provisions in the City Charter as well as section 12-4-101(a)(1) of the Tennessee Code. Section 12-4-101(a)(1) provides, in relevant part, as follows:

> It is unlawful for any officer, committee member, director, or other person whose duty it is to vote for, let out, overlook, or in any manner to superintend any work or any contract in which any municipal corporation, county, state, development district, utility district, human resource agency, or other political subdivision created by statute shall or may be interested, to be directly interested in any such contract. "Directly interested" means any contract with the official personally or with any business in which the official is the sole proprietor, a partner, or the person having the controlling interest. "Controlling interest" includes the individual with the ownership or control of the largest number of outstanding shares owned by any single individual or corporation....

Tenn.Code Ann. § 12-4-101(a)(1) (2003). The legislature also set forth the penalty for violating section 12-4-101(a)(1) of the Tennessee Code, stating:

> Should any person, acting as such officer, committee member, director, or other person referred to in § 12-4-101, be or become directly or unlawfully indirectly interested in any such contract, such person shall forfeit all pay and compensation therefor. Such officer shall be dismissed from such office the officer then occupies, and be ineligible for the same or a similar position for ten (10) years.

Tenn.Code Ann. § 12-4-102 (2003).

In *State ex rel. Wallen v. Miller,* 202 Tenn. 498, 304 S.W.2d 654, 656 (Tenn.1957), our supreme court noted that the legislature did not include within section 12-4-101 and section 12-4-102 of the Tennessee Code a procedure for enforcing these provisions. Accordingly, the supreme court stated that "it is fundamental that for the enforcement of a statute of this kind where there is no statute prescribing the procedure that the proceedings should be prosecuted according to the practice under the common law[.]" *Miller,* 304 S.W.2d at 657 (citing *Olsen v. Sharpe,* 191 Tenn. 503, 235 S.W.2d 11 (Tenn.1950)). In setting forth the procedure to apply when a violation of section 12-4-101 of the Tennessee Code is alleged, the court stated:

> ***15** Under such circumstances it seems to us that this statement is applicable:
>
> > "Public wrongs or neglect or breach of public duty cannot be redressed at a suit in the name of an individual or individuals whose interest in the right asserted does not differ from that of the public generally, or who suffers injury in common with the public generally, even, it seems, though his loss be greater in degree, unless such right of action is given by statute. In cases of purely public concern and in actions for wrongs against the public, whether actually committed or only

> apprehended, the remedy, whether civil or criminal, is as a general rule *by a prosecution instituted by the state in its political character, or by some officer authorized by law to act in its behalf, or by some of those local agencies created by the state for the arrangement of such of the local affairs of the community as may be intrusted to them by law.*"
>
> "In the enforcement of matters of public interest it is generally recognized that *the attorney general appearing as a public officer is a proper party to maintain litigation.*" 39 Am.Jur., p. 863, Sec. 11.

In a proceeding of this kind it is well said that:

> "In the absence of constitutional or statutory regulations providing otherwise, *quo warranto* proceedings are *the only proper remedy in cases in which they are available.*" 74 C.J.S. *Quo Warranto,* sec. 4, p. 179; *State ex rel. Bryant v. Maxwell,* 189 Tenn. 187, 224 S.W.2d 833.

Id. at 657-58 (emphasis added). "Here a civil remedy, that of *quo warranto,*[22] is *the only one that is available* in view of the fact the legislators did not see fit to provide any additional procedure for their enforcement." *Id.* at 658 (emphasis added); *see also State ex rel. Abernathy v. Anthony,* 206 Tenn. 597, 335 S.W.2d 832, 833 (Tenn.1960).

The legislature has chosen to codify the common law remedy of *quo warranto* in section 29-35-101 *et seq.* of the Tennessee Code. *See City of Fairview v. Spears,* 210 Tenn. 404, 359 S.W.2d 824, 825 (Tenn.1962) (applying the statutory codification of the *quo warranto* to a citizen's private suit against a municipality); *Miller,* 304 S.W.2d at 658. "Actions based upon violations of T .C.A. § 12-4-101 *et seq.* are governed by the procedure set out in T.C.A. § 29-35-101 *et seq.* ..." *Town of Smyrna ex rel. Odom v. Ridley,* 730 S.W.2d 318, 321 (Tenn.1987). Accordingly, since the Taxpayers seek relief under section 12-4-101 of the Tennessee Code, their lawsuit must be evaluated for its compliance with section 29-35-101 *et seq.* of the Tennessee Code.[23]

Section 29-35-101 of the Tennessee Code provides, in relevant part, as follows:

> An action lies *in the name of the state* against the person or corporation offending, in the following cases:
>
> ....
>
> (2) Whenever any public officer has done, or suffered to be done, any act which works a forfeiture of that officer's office[.]

***16** Tenn.Code Ann. § 29-35-101 (2003) (emphasis added). Pursuant to section 12-4-102 of the Tennessee Code, a public officer found to have violated section 12-4-101 of the Tennessee Code "*shall* be dismissed from such office the officer then occupies." Tenn.Code Ann. § 12-4-102 (2003) (emphasis added). Moreover, the legislature has expressly provided as follows:

> The suit is brought *by the attorney general* for the district or county, when directed so to do by the general assembly, or by the governor and attorney general of the state concurring.

Tenn.Code Ann. § 29-35-109 (2003) (emphasis added).[24] At no point during the proceedings below did the Taxpayers seek to comply with section 29-35-101 *et seq.* of the Tennessee Code by having the district attorney general prosecute the lawsuit on their behalf. However, this omission does not end our inquiry.

Our supreme court has allowed for a limited exception to the requirement that suits be instituted by the district attorney general, stating:

> It is the settled law in this state that private citizens, as such, cannot maintain an action complaining of the wrongful acts of public officials unless such private citizens aver special interest or a special injury not common to the public generally. *Patton v. City of Chattanooga,* 108 Tenn. 197, 65 S.W. 414 (1901); *Skelton v. Barnett,* 190 Tenn. 70, 227 S.W.2d 774 (1950); *Badgett v. Broome,* 219 Tenn. 264, 409 S.W.2d 354 (1966).
>
> ....
>
> If the District Attorney General, in matters such as this, should act arbitrarily or capriciously or should be guilty of palpable abuse of his discretion in declining to bring such an action, or in authorizing its institution, the courts will take jurisdiction upon the relation of a private citizen, in the name of the State of Tennessee. *See People ex rel. Graves v. District Court of Second Judicial Circuit,* 37 Colo. 443, 86 P. 87; *White v. Eagle Oil & Ref. Co. v. Gunderson,* 48 S.D. 608, 205 N.W. 614, 43 A.L.R. 397; *State ex rel. Lamb v. Cunningham,* 83 Wis. 90, 53 N.W. 35.
>
> When citizens sue to rectify a public wrong, under these circumstances, a copy of the complaint shall be served upon

> the District Attorney General. It shall be the duty of the trial court forthwith to conduct an *in limine* hearing designed to determine whether to permit plaintiffs to proceed. If it be determined that the District Attorney General's refusal to bring the action, or to authorize the use of his name in its institution, was improper or unjustified, or that plaintiff's case is *prima facie* meritorious, the trial court shall permit the action to proceed.

Bennett v. Stutts, 521 S.W.2d 575, 577 (Tenn.1975); *see also Metro. Gov't for Nashville & Davidson County ex rel. Anderson v. Fulton,* No. 86-221-II, 1986 Tenn.App. LEXIS 3615, at *6, 1986 WL 14806 (Tenn.Ct.App. Dec.31, 1986) ("Private citizens may not maintain a *quo warranto* action without first showing that the acts of public officials affected a special interest or caused them loss not a common injury to the public generally and may not do so unless the District Attorney has unreasonably or improperly refused to bring the suit."); *Wooten v. Macon County,* 1988 Tenn.App. LEXIS 83, at *16-17, 1988 WL 9821 (Tenn.Ct.App. Feb. 17, 1988) ("It appears to be well established that actions to enforce T.C.A. § 12-4-101 *et seq.* are suits in the nature of *quo warranto* which generally may be prosecuted only by the District Attorney General on behalf of the State and that a private citizen has no standing to pursue an action for illegal actions of a public official without showing a special injury thereform."); *State ex rel. Vaughn v. King,* 653 S.W.2d 727, 729 (Tenn.Ct.App.1982) ("Our supreme court has held in [*Bennett*] that private citizens cannot maintain a *quo warranto* action complaining of the acts of public officials unless the private individuals aver a special interest or injury not common to the public generally.").

***17** As previously noted, the Taxpayers in the instant case sought to establish that the exception set forth in *Badgett* applied because they were unable to establish an injury different from the public at large. *See Badgett v. Rogers,* 222 Tenn. 374, 436 S.W.2d 292, 294 (Tenn.1968) (stating that taxpayers may proceed with a lawsuit alleging an illegal use of public funds even though they are unable to establish an injury different from that sustained by the public at large). Having failed to allege an injury different from that sustained by the public at large in that instance, the Taxpayers necessarily fail to do so in this instance as well. Moreover, a copy of the Taxpayers' complaint was never submitted to the district attorney general, and the record is devoid of any mention of a hearing held by the trial court to determine if the Taxpayers should be allowed to proceed without the district attorney general's approval. Accordingly, the Taxpayers cannot avail themselves of the limited exception set forth in *Bennett.* As such, the trial court, albeit for an erroneous reason, was correct to conclude that the Taxpayers do not have standing to pursue their claim against the Appellees.[25]

Although the Taxpayers do not have standing to pursue their claim in its present form, we are not inclined to dismiss their lawsuit outright by affirming the trial court's grant of partial summary judgment on this claim. In resolving this issue, we are guided by a prior decision of this Court, stating:

> The present record does not demonstrate that the relators or any of them has sustained any special damage resulting from the wrongful acts complained of, that is, no damage which would not be sustained in common with all other citizens of Macon County. Therefore, relators have no standing to pursue this suit except in the name of the District Attorney General or by special authority granted by the Trial Court under *Bennett v. Stutts, supra.* ...
>
> In this posture of the proceeding, it does not appear to be in order to summarily dismiss the suit. The reason for this is that the relators have undertaken to state and support a suit on behalf of the public which, if meritorious ought to be prosecuted by the District Attorney General. It would therefore be manifestly unfair to the public and to the District Attorney General to dismiss this suit without an adequate opportunity to the District Attorney to pursue the suit on behalf of the public.
>
> Under the authorities discussed herein, the Trial Judge should require the District Attorney General, after investigating and considering all elements of the present suit, to make his discretionary decision as to whether the suit has merit and should be prosecuted, and to ask that his name be substituted for the present relators and proceed with the prosecution of the case, including resistance to the defendant's motion for summary judgment, to authorize the relators to proceed in his name or to move for dismissal.
>
> ***18** If the Trial Court finds that the motion of the District Attorney General to dismiss or his failure to enter or authorize prosecution of the suit is reasonably within his discretionary powers, the motion should be sustained.
>
> If the Trial Court finds that the decision of the District Attorney General not to prosecute or authorize prosecution, or failure to make a decision is "arbitrary, capricious, or a palpable abuse of discretion", the Trial Court should overrule the motion to dismiss and grant special permission to the relators to proceed without participation of the

District Attorney General as provided in *Bennett v. Stutts, supra.*

Wooten v. Macon County, 1988 Tenn.App. LEXIS 83, at *20-22; 1988 WL 9821 *see also Munsey v. Russell Bros.,* 31 Tenn.App. 187, 213 S.W.2d 286, 289 (Tenn.Ct.App.1948).

In accordance with our statement in *Wooten,* we vacate that portion of the trial court's order awarding summary judgment to the Appellees on this issue. The Taxpayers' cause of action challenging the land transaction between the City and Councilman Handley is remanded to the trial court for further proceedings not inconsistent with this opinion.[26] Due to our holding in this case, it is not necessary that we reach the second issue raised by the Taxpayers on appeal, therefore, it is pretermitted.

IV.

Conclusion

Since these lawsuits were consolidated and not joined, this Court is without jurisdiction to entertain the issues presented by the parties relating to the City's lawsuit against the Handleys and other defendants. We are also without jurisdiction to entertain any issues related to the claim which the Taxpayers voluntarily nonsuited. As for the trial court's decision to grant the Appellees summary judgment on the Taxpayers' challenge to the land transaction between the City and Councilman Handley, we vacate the trial court's order and remand this case to the trial court for further proceedings not inconsistent with this opinion. Costs of this appeal are taxed to the Appellants, Gene Plant, *et al.* and their surety, for which execution may issue if necessary.

KIRBY, J., concurring.

I agree with the careful reasoning in the majority opinion, with clarification on the remedy ultimately available. Here, ouster of the public official alleged to have engaged in self-dealing, Handley, is likely a moot issue, since the record apparently indicates that his term of office as Councilman ended the day before the settlement with the City. The settlement, however, left the Handleys with a handsome profit from the land transaction at issue, profit that the Taxpayers apparently allege should be disgorged as the product of the wrongdoing.

State ex rel. J.H. Wallen v. Miller, 202 Tenn. 498, 304 S.W.2d 654 (Tenn.1957), discussed at length by the majority, indicates that disgorgement of funds received in violation of law by a public official, could be obtained under Tennessee Code Annotated Sections 12-401 and 402. ***Id.*** at 656-657. These statutes are, of course, the predecessor to the present Tennessee Code Annotated § 12-4-101, *et seq.*, which Councilman Handley is accused of violating. T.C.A. § 12-4-101 (1999).

In ***Wallen,*** citizens of Hamilton County filed suit against defendant Miller, alleging that he had purchased school buses in the names of others, and then, acting as chairman of the Board of Education, entered into contracts for these buses on behalf of the Board of Education. ***Wallen,*** 304 S.W.2d at 500. The plaintiff citizens alleged that this was in violation of then existing T.C.A. § 12-401 et seq. The penalty for violating both the prior version of the statute and the current version is to "forfeit all pay and compensation therefor." T.C.A. § 12-4-102 (1999). Based on this alleged violation, the plaintiffs in ***Wallen*** sought to have the defendant "removed from office and declared to be ineligible for the same or similar position for ten years and to obtain a recovery for ... the amounts wrongfully paid this officer." ***Wallen,*** 304 S.W.2d at 500. The defendant moved to dismiss the action because it was not brought in the name of the District Attorney. ***Id.*** at 501-02. The trial court found that the action was not a *quo warranto* action because it did not have the required signature of the district attorney and was not an action under the Ouster Law[1] because it named only seven complainants instead of the required ten. ***Id.*** at 502.

After an apparently heated trial, the trial court found the defendant guilty, ordered him removed from office and ordered him to return the $2,480 that he had earned on the illegal transaction. ***Id.*** at 502-03. On appeal, the Court of Appeals concluded that the plaintiffs were only entitled to relief under the Ouster Law because they failed to obtain joinder of the District Attorney. ***Id.*** at 503. This outcome was more clearly stated in ***Wooten v. Macon County,*** 1988 WL 9821, *2 (Tenn.Ct.App.1988), a subsequent decision in which this Court, discussing ***Wallen,*** observed that "the only relief available to private citizens *without joinder of the Attorney General* was removal from office under the ouster law." ***Wooten v. Macon County,*** 1988 WL 9821, *2 (Tenn.Ct.App.1988) (emphasis added).

In ***Wallen,*** the decision of the Court of Appeals was appealed to the Tennessee Supreme Court. In its discussion, the Tennessee Supreme Court separated the claims into two distinct issues-one for recovery of wrongful profits and one

for the removal of a public figure from office. ***Wallen,*** 304 S.W.2d at 656, 657 (citing ***Savage v. Mynatt,*** 156 Tenn. 119, 299 S.W. 1043, for repayment to city of funds received in violation of statute). As to the claim for recovery of monetary amounts, the court stated that, "[i]n all of the cases so far as we know where the public officer has had an interest in the contract or there has been a suit for recovery back on an invalid contract because of his interest, the courts have held unquestionably that the officer could not recover for work done or things furnished under this statute." ***Id.*** at 657. Thus, ***Wallen*** indicates that a suit for recovery of wrongful gains may be pursued under the forerunner to T.C.A. § 12-4-101, et seq.

The ***Wallen*** court went on to analyze the issue of removing a public official from office. On this issue, the court noted that the statute prohibiting a public official from having a personal interest in a contract with public entity did not provide a procedure for removing that official from office. ***Wallen,*** 304 S.W.2d at 657. As noted by the majority, the ***Wallen*** court held that, in absence of such a provision, "proceedings should be prosecuted according to the practice under common law." ***Id.*** The court then stated that the proper procedure for removing a public official from office under these circumstances is the common law remedy of *quo warranto.* ***Id.***

The ***Wallen*** court then noted that the issue of ouster was moot because Miller's term of office had expired. ***Id.*** at 660. Therefore, it affirmed the decision of the Court of Appeals, that is, that the only relief that the taxpayers could obtain, absent joinder of the District Attorney, was under the Ouster Law. ***Id.*** at 656, 660.

On remand, it appears that the remedy of requiring repayment of illegally obtained funds is available pursuant to T.C.A. § 12-4-101 *et seq.* From ***Wallen,*** it appears that such relief may require joinder of the District Attorney General, through the vehicle of a *quo warranto* action. Therefore, in addition to the repayment of illegally obtained funds available under T.C.A. § 12-4-101 *et seq.,* through joinder of the Attorney General, I would permit the trial court to consider whether the issue of removing Councilman Handley from office is moot.

On this basis, I concur.

All Citations

Not Reported in S.W.3d, 2005 WL 1981810

Footnotes

1 Mayor Hethcoat served as Mayor of New Johnsonville from 1988 to 2000.

2 Councilman Handley took office in September of 1998.

3 Pursuant to its mortgage with the Handleys, Union Planters took a security interest in the Deed of Trust to secure the mortgage. As further security for the mortgage, the Handleys also executed an Assignment of Leases and Rents in favor of Union Planters.

4 The original complaint filed by the City did not name DuPont as a defendant. The Handleys subsequently filed a motion with the trial court, pursuant to Tennessee Rule of Civil Procedure 12.02(7), seeking to dismiss the action for the City's failure to join an indispensable party. The trial court denied the Handleys' motion and granted the City thirty (30) days to amend its complaint to name DuPont as a defendant.

5 During the course of this litigation, attempts were made to disqualify Mr. Thornton from representing both the City and the Taxpayers. Despite such efforts, the trial court allowed Mr. Thornton to represent both parties during the course of the proceedings below. Mr. Thornton is now representing the Taxpayers as the Appellants on appeal.

6 Even the Appellees appear confused as to whether these actions were joined or consolidated by the trial court. In the fact section of their brief, the Handleys assert that the January 17, 2002, order entered by the trial court constituted "an order consolidating the City Action and the Individuals' Action for discovery and trial, and directed that an amended and consolidated complaint in both actions be filed." To support this fact, the Handleys cite to the trial court's January 17, 2002, order in the record. They further assert that the consolidated complaint filed by Mr. Thornton was in response to this order.

7 Due to an apparent oversight, the City Council had to re-vote on the Handleys' proposed settlement at its October 7, 2002, meeting. The City Council, by resolution, voted to re-affirm its decision to accept the Handleys' proposed settlement offer.

8 Union Planters filed its response to the Taxpayer's motions for summary judgment that same day as well. DuPont filed its response to the Taxpayers' motions on October 9, 2002, adopting, pursuant toTennessee Rules of Civil Procedure 10.04, Union Planters' responses to the motions. Likewise, Volunteer Title Company, Inc. filed a response on October 9, 2004, adopting the responses contained in Union Planters' response.

9 The trial court subsequently granted these motions.

10 The Taxpayers' notice of appeal provides that they are contesting the trial court's January 23, 2003, order. However, the order, although signed by the trial judge on January 23, 2003, was not filed until January 27, 2003. Therefore, it became effective as of January 27, 2003. *See* Tenn. R. Civ. P. 58 (2004).

11 This Order is entitled “Memorandum Opinion on Defendants' Motion for Summary Judgment.” The order provides that this order is to address Civil Action “No. CH-01-211.” As noted below, the trial court uses the same number when addressing the Taxpayers' motion.

12 This order is entitled “Memorandum Opinion on Plaintiff's Motion for Summary Judgment and for Partial Summary Judgment.” Interestingly, this order provides that it too is addressing Civil Action “No. CH-01-211.”

13 Once again, the trial court's order provides that it is addressing Civil Action “No. CH-01-211.”

14 Although we find no such motion in the record, the court's order states that the Handleys filed a motion to dismiss for the Taxpayers' failure to add the City as an indispensable party.

15 On March 13, 2003, the City had filed a motion seeking to disqualify Mr. Thornton from representing the Taxpayers due to an alleged conflict of interest. The trial court apparently found that no conflict existed and permitted Mr. Thornton to continue his representation of the Taxpayers. On March 22, 2004, the City filed another motion renewing its objection to Mr. Thornton's representation of the Taxpayers in the instant litigation. A hearing was apparently set for June 7, 2004, to argue the motion before the trial court, but subsequent events made the need for a decision on this motion moot.

16 On February 18, 2004, the Handleys filed an amended notice of their intent to take a voluntary nonsuit on their counterclaims due to a typographical error in their prior notice.

17 The Appellees have presented numerous issues similar in nature to those raised by the Appellants. However, for reasons more fully explained below, we need not address these additional issues.

18 Ordinarily, “[i]n a civil action, if a timely motion under the Tennessee Rules of Civil Procedure is filed in the trial court by any party ... under Rule 59.04 to alter or amend the judgment[,] the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion.” Tenn. R.App. P. 4(b) (2004).

19 *See* Tenn. R.App. P. 3(a) (2004); Tenn. R. Civ. P. 54.02 (2004).

20 “Consolidation does not, however, create one lawsuit where there were two. It simply allows a single trial and permits joint discovery.” Robert Banks, Jr. & June F. Entman, Tennessee Civil Procedure § 6-12(b) (1999).

21 The trial court ultimately allowed the Taxpayers to name the City as a defendant in their lawsuit. Interestingly, a determination that these cases had been joined would necessarily mean that the City would be both a plaintiff and a defendant in the same case.

22 *Quo warranto* is a common law remedy characterized in the following terms:

> “In its broadest sense, *quo warranto* is a writ of inquiry as to the warrant for doing the acts of which complaint is made. It is the remedy or proceeding by which the sovereign or state determines the legality of a claim which a party

> asserts the use or exercise of an office or franchise and ousts the holder from its enjoyment, if the claim is not well founded, or if the right to enjoy the privilege has been forfeited or lost." 44 Am.Jur., p. 88, Sec. 2.

Miller, 304 S.W.2d at 658.

23 "Article VII, section 1, of the [Tennessee] Constitution declares that county officers ... shall be removable from office for malfeasance or neglect of duty and clothes the legislature with power to prescribe the mode of procedure through which removal may be affected." *State ex rel. Complainant v. Ward,* 163 Tenn. 265, 43 S.W.2d 217, 219 (Tenn.1931). We are cognizant of the fact that the legislature has provided for a suit by *private citizens* to challenge the legality of a public officials actions. Section 6-54-107 of the Tennessee Code provides, in relevant part, as follows:

> (a) No person holding office under any municipal corporation shall, during the time for which such person was elected or appointed, be capable of contracting with such corporation for the performance of any work *which is to be paid for out of the treasury.* Nor shall such person be capable of holding or having any other direct interest in such a contract. "Direct interest" means any contract with any business in which the official is the sole proprietor, a partner, or the person having the controlling interest. "Controlling interest" includes the individual with the ownership or control of the largest number of outstanding shares owned by any single individual or corporation.
>
> (b) No officer in a municipality shall be indirectly interested in any contract to which the municipality is a party unless the officer publicly acknowledges such officer's interest. "Indirectly interested" means any contract in which the officer is interested but not directly so, but includes contracts where the officer is directly interested but is the sole supplier of goods or services in a municipality.

Tenn.Code Ann. § 6-54-107 (2003) (emphasis added). Section 6-54-108 of the Tennessee Code provides as follows:

> Every officer of such corporation who shall unlawfully be concerned in making such contract, or who shall unlawfully pay money upon the same to or for any person declared incapable in § 6-54-107, shall forfeit the amount so paid; and such officer shall be jointly and severally liable to an action for the same, *which action may be prosecuted by any citizen of the corporation in its name.*

Tenn.Code Ann. § 6-54-108 (2003) (emphasis added).

One member of this Court has explained the operation of the aforementioned statutes by stating:

> Standing is a judge-made doctrine whose purpose is to determine whether a party should be permitted to pursue a claim. *Knierim v. Leatherwood.* 542 S.W.2d 806, 808 (Tenn.1976) and *Curve Elementary School Parent and Teacher's Organization v. Lauderdale County School Board,* 608 S.W.2d 855, 858 (Tenn.Ct.App.1980). It calls upon the court to determine whether the plaintiff has alleged such a personal stake in the outcome to warrant its invocation of the court's jurisdiction and to justify the exercise of the court's powers on its behalf. *See Browning-Ferris Industries, Inc. v. City of Oak Ridge,* 644 S.W.2d 400, 402 (Tenn.Ct.App.1982).
>
> In cases involving statutory causes of action, a party's standing may depend upon requirements contained in the statute creating the cause of action. If these requirements have been defined by statute, it is proper for the courts to conclude that the General Assembly has exercised its constitutional prerogative to determine the conditions under which a party will be permitted access to the courts. Thus, courts should defer to legislative standing criteria contained in statutes creating new causes of action.
>
> Private citizens have rarely been given standing to bring suit to challenge the actions of public officials. *Metropolitan Government ex rel. Anderson v. Fulton,* 701 S.W.2d 597, 601 (Tenn.1985). Thus, in the absence of legislative authority, a private citizen must demonstrate either a special interest, status or wrong not common to the public as a whole or that the proper public officials have not taken remedial action after being called upon to do so. *See Bennett v. Stutts,* 521 S.W.2d 575, 576 (Tenn.1975); *Badgett v. Rogers,* 222 Tenn. 374, 379, 436 S.W.2d 292, 294 (1968); *Bayless v. Knox County,* 199 Tenn. 268, 274, 286 S.W.2d 579, 582 (1955); and *State ex rel. Vaughn v. King,* 653 S.W.2d 727, 729 (Tenn.Ct.App.1982).

> Cases involving municipal officials' self-dealing in public contracts are among the rare situations where the General Assembly has specifically authorized private citizens to challenge the legality of the actions of public officials.... It is reasonable to infer from the enactment of this statute that the General Assembly understood that a contract involving self-dealing by public officials is the very type of case in which the cooperation of other public officials should not be reasonably expected. *See* *Burns v. City of Nashville,* 142 Tenn. 541, 574, 221 S.W. 828, 837 (1920). It is also reasonable to infer that the General Assembly determined that conflicts of interest of local governmental officials were so inimical to the public interest that private citizens should be permitted to take remedial action.

Metro. Gov't for Nashville & Davidson County ex rel. Anderson v. Fulton, No. 86-221-II, 1986 Tenn.App. LEXIS 3615, at *25-28, 1986 WL 14806 (Tenn.Ct.App. Dec.31, 1986) (Koch, J., concurring).

Our supreme court has also had occasion to address an instance where a *quo warranto* proceeding under section 12-4-101 of the Tennessee Code was joined with a citizen's private suit brought pursuant to section 6-54-108 of the Tennessee Code. *Town of Smyrna ex rel. Odom v. Ridley,* 730 S.W.2d 318, 319 (Tenn.1987). In dismissing the citizen's private suit, the court stated:

> The city cannot recover two forfeitures, one under T.C.A. § 12-4-102 and the other under T.C.A. § 6-54-108. In either case, the money forfeited belongs to the city, but it is not due a double recovery. We find no legislative intent for such a double recovery and forfeiture in the circumstances of this case. These statutes were intended to provide alternative remedies....The *quo warranto* action by the State affords complete relief in this case and *must take precedence over the § 6-54-107 action by the city;* the latter should have been dismissed. The error is so plain that we notice it now and dismiss the complaint insofar as it seeks to join the "action of debt" under T.C.A., § 6-54-107 *et seq.* with the *quo warranto* under T.C.A., § 12-4-101 *et seq.*

Ridley, 730 S.W.2d at 322 (emphasis added). The Taxpayers in the instant case did not file a claim under section 6-54-108 of the Tennessee Code. Therefore, we need not evaluate whether the Taxpayers lawsuit is in actuality a suit under section 6-54-108 of the Tennessee Code. Since the Taxpayers expressly stated in their complaint that they are alleging a violation of section 12-4-101 of the Tennessee Code, we are only concerned with their ability to pursue a claim under that statute.

24 The statutory scheme also sets forth the procedure for filing the suit on behalf of a private individual, Tenn.Code Ann. § 29-35-110 (2003), the proper venue for filing the suit, Tenn.Code Ann. § 29-35-111 (2003), and the content of the complaint, Tenn.Code Ann. § 29-35-112 (2003). Even when a suit is brought on behalf of private citizens, "it must be in the name of the Attorney General." *State ex rel. Wallen v. Miller,* 202 Tenn. 498, 304 S.W.2d 654, 659 (Tenn.1957). The district attorney general, at his discretion, may dismiss the suit should he determine that it is improperly instituted. *Id.* "[I]f the district attorney general has the right to dismiss the suit at any stage when it appears to him that the suit is improperly brought, he would have the right to refuse to bring it in the first place, if he thought it was not in the interest of the public to do so." *State v. Parker,* 204 Tenn. 30, 315 S.W.2d 396, 397 (Tenn.1958).

25 Ordinarily, we will affirm a trial court's decision correct in result, but rendered upon an erroneous legal basis. *See Cont'l Cas. Co. v. Smith,* 720 S.W.2d 48, 50 (Tenn.1986); *Arnold v. City of Chattanooga,* 19 S.W.3d 779, 789 (Tenn.Ct.App.1999).

26 We are mindful that DuPont and the City have raised for this Court's consideration the issue of whether the trial court should have disqualified Mr. Thornton from representing the Taxpayers in this case. However, the trial court never rendered a decision on the motion due to the grant of partial summary judgment and the Taxpayers' subsequent decision to nonsuit their remaining claims prior to the hearing on the motion. During the pendency of this appeal, the City filed a motion asking this Court to disqualify Mr. Thornton from representing the Taxpayers on appeal. This Court denied the City's motion.

Rule 6 of the Rules of the Court of Appeals of Tennessee provides, in relevant part, as follows:

> (a) Written argument in regard to each issue on appeal shall contain:

> (1) A statement by the appellant of the *alleged erroneous action of the trial court* which raises the issue ... *with citation to the record where the erroneous or corrective action is recorded.*
>
> (2) A statement showing how such *alleged error* was seasonably called to the attention of the trial judge with citation to that part of the record where appellant's challenge of the alleged error is recorded.

Since the trial court never had an opportunity to rule upon this motion, we have no alleged error to review on appeal. Moreover, this Court may only entertain a trial court's final judgments. *See* Tenn. R.App. P. 3(a) (2004). Since the trial court never entered a judgment on the City's motion, we have no judgment on this issue to review on appeal. *See Thompson v. Dickerson,* No. 02A01-9702-CV-00034, 1997 Tenn.App. LEXIS 547, at *8, 1997 WL 437228 (Tenn.Ct.App. Aug.1, 1997).

In passing on this issue, we must also take into account our holding in this case. The district attorney general's potential involvement in this case on remand may render a decision on the issue moot. We are also mindful that, in compliance with our holding and the aforementioned authorities, the potential exists that the Taxpayers may be permitted to pursue their claim without the involvement of the district attorney general. In the event that this contingency occurs, the City is free to re-file its motion at the appropriate time so that the trial court may render a decision on the issue.

1 The Ouster Law, codified at that time at T.C.A. § 8-2701, was used to oust a public official from office for improper conduct.

EXHIBIT G

1992 WL 74569
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee, Eastern Section.

TOWN OF ERWIN, et al., Plaintiff–Appellee,

v.

UNICOI COUNTY, Tennessee,

Defendant–Appellant.

No. 03A01–9111–CH–00382.

|

April 15, 1992.

Unicoi Chancery, Richard Johnson, Judge.

Attorneys and Law Firms

James H. Epps, III., Thomas Judd, Johnson City, for plaintiff-appellee.

Douglas K. Shults, Shults & Shults, Erwin, for defendant-appellant.

OPINION

FRANKS, Judge.

***1** Defendant appeals from the Chancellor's enjoining it from "using property tax revenues for the purpose of collecting and disposing of refuse, until it complies with Tennessee Code Annotated § 5–19–101, *et seq.* ...".

Erwin is a town located in Unicoi County and provides weekly curbside garbage collection to its residents, and funds the service through municipal taxes. Unicoi County provides "drop-off" sites to its residents, and one of the sites is located within the town of Erwin. This service is funded through the general tax levy on all county residents.

The town of Erwin and its Mayor, Russell Brackins[1] sued for declaratory and injunctive relief on the grounds the general levy was contrary to applicable law and imposed a double tax on town residents for garbage service. The parties filed cross-motions for summary judgments on stipulated facts, and the Chancellor held the county's landfill resolution did not meet the statutory requirements of Tennessee Code Annotated § 5–19–103, and *inter alia* enjoined further collection of taxes for that purpose.

Defendant first questions plaintiffs standing and argues the town has not alleged a special injury to create standing. Plaintiffs argue they have an interest in the county's compliance with the statutory scheme to avoid double taxation.

In *City of Greenfield v. Butts,* 582 S.W.2d 80 (Tenn.App.1979), taxpayers and several municipalities sought relief from a county tax used to repair county roads but not city streets. Since municipal residents had already paid for city street repairs, these plaintiffs sought either a reallocation of county funds or an injunction against the tax. Standing was not litigated, but the status of the parties to this case is analogous.

Taxpayer standing was directly at issue in *Wamp v. Chattanooga Housing Auth.,* 384 F.Supp. 251 (E.D.Tenn.1974), when civic-minded residents challenged the development of a historic area. The Court held that taxpayers may not sue to restrain governmental action without alleging a special injury uncommon to other citizens, but an exception to this rule arises when a taxpayer asserts the assessment or levy is illegal or that public funds are misused. 384 F.Supp. at 255.

In this case, plaintiffs have an interest in determining the statutory scheme applicable to them is followed. The Declaratory Judgment Act at Tenn.Code Ann. § 29–14–103 authorizes this approach as illustrated by *City of Greenfield.* The stipulations establish a justiciable controversy between the parties as to whether the county has properly exercised its power to tax i.e., whether the method of taxing complies with Tennessee Code Annotated § 5–19–101 *et seq.*

The Chancellor correctly determined Unicoi County has not properly exercised its powers under Tennessee Code Annotated § 5–19–103.

Tennessee Code Annotated § 5–19–101 authorizes counties to provide garbage collection and/or disposal services as defined in § 5–19–102. To exercise these powers, a county must pass a resolution to offer services through an existing agency, a county sanitation department, a board, or by contract with a municipality, utility, service district or private garbage service. T.C.A. § 5–19–103.

***2** As a condition to the exercise of this power by resolution, Tennessee Code Annotated § 5–19–112 mandates:

"No county shall adopt the resolution provided for in § 5–19–103 until there shall have been presented to the regional planning commission serving such county a plan of services for a specified area or areas for study and a written report to be rendered within ninety (90) days after such submission unless, by resolution of the county legislative body or other governing body, a longer period is allowed."[2]

The record contains copies of contracts between Unicoi County and Bumpass Cove Environmental Control and Minerals for garbage disposal from 1972 to 1974. A document dated 1973 purports to be Unicoi County's resolution to provide garbage service by private contract. It appears to have been drafted after the effective date of the 1972 contract. An undated report ties the contracts not to T.C.A. § 5–19–102, but to the Tennessee Solid Waste Disposal Act. The report is not otherwise identified, but affidavits of county employees establish the plaintiff, town, was providing collection service before the landfill contracts were effective and after they expired in 1977. The record does not establish compliance with the statutory mandate to submit the proposed resolution as required by Tennessee Code Annotated § 5–19–112.

On the record before us, the county has not properly exercised its power by resolution to offer collection and disposal services. Its "resolution" is dated after one of the landfill contracts, nor was there otherwise compliance with the statutory requirement.

Accordingly, we do not reach the issue of whether the method of funding is in contravention of T.C.A. § 5–19–108. Since the resolution was initially defective, the county is without authority to continue its present funding for collection and disposing of refuse pursuant to the resolution.

Accordingly, the judgment of the Trial Court is affirmed as to the declaration that the County has not complied with T.C.A. § 5–19–101 *et seq.,* and is enjoined from levying a tax under the existing resolution. The remainder of the Court's judgment is vacated and the cause is remanded for entry of a judgment consistent with this opinion with the costs assessed to appellant.

GODDARD and McMURRAY, JJ., concur.

All Citations

Not Reported in S.W.2d, 1992 WL 74569

Footnotes

1 The Mayor, Russell Brackins, sued in his personal capacity as a taxpayer.

2 Section (d) of this Statute provides:

"In the event there is no such regional planning commission, then the referral shall be to the local planning commission of the largest municipality within the county having such a commission, and, if no municipality within the county has such a planning commission, to the state planning office."