

**STATE OF TENNESSEE**  
OFFICE OF THE  
**ATTORNEY GENERAL**  
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June 17, 2009

Opinion No. 09-122

Constitutionality of Section 2 of Amendment No. 1 to SB 2133 Limiting Applicability to School District Population

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**QUESTION**

Is it a violation of the Equal Protection Clause of the Fourteenth Amendment of the federal constitution or any other provision of the federal or state constitution to restrict the availability of charter schools only to those who are enrolled in local education agencies that have an average daily attendance of more than 12,000 students.

**OPINION**

No, provided there is a rational basis for the distinction.

**ANALYSIS**

Your question concerns a portion of Amendment No. 1 to Senate Bill 2133 (SB2133). SB2133 revises various portions of the Tennessee Charter Schools Act of 2002 (Tenn. Code Ann. §§ 49-13-101 through 130). Section 2 of Amendment No. 1 to SB 2133 states as follows:

SECTION 2. Tennessee Code Annotated, Section 49-13-106(a)(1), is amended by deleting subdivision (E) in its entirety and by substituting instead the following language:

(E) Students who are eligible for free or reduced-price lunch and who are enrolled in LEAs that have an average daily membership (ADM) of twelve thousand (12,000) students or more;

Tenn. Code Ann. § 49-13-106(a)(1) currently states as follows (Subsection (E), which would be replaced by the language quoted above, is in bold type):

(a)(1) Public charter schools may be formed to provide quality educational options for students. The prospective student population shall be:

(A) Students who were previously enrolled in a charter school;

(B) Students who are assigned to, or were previously enrolled in, a school failing to make adequate yearly progress, as defined by the state's accountability system, giving priority to at-risk students;

(C) Students who, in the previous school year, failed to test proficient in the subjects of language arts/reading or mathematics in grades three through eight (3-8) on the Tennessee comprehensive assessment program examinations;

(D) Students who, in the previous school year, failed to test proficient on the gateway examinations in language arts/reading or mathematics;

**(E) Students in grades kindergarten through three (K-3) who are eligible for free or reduced-price lunch, who may only be enrolled no earlier than August 1; or**

(F) Students who are under the jurisdiction of a juvenile court and who, in the court's judgment, would benefit from a work experience and career exploration program. The proposed public charter school shall, in addition to complying with the application requirements of § 49-13-107, apply to the commissioner of education for approval of its proposed work experience and career exploration program.

Tenn. Code Ann. § 49-13-106 thus sets forth six (6) categories of students who are eligible to attend charter schools. The effect of replacing the current version of Tenn. Code Ann. § 49-13-106(a)(1)(E) with the language contained in Amendment No. 1 to SB2133 would be to further limit charter school attendance for that category of students whose ability to attend charter schools is based upon their eligibility for free or reduced-price lunch by also limiting this category to those students who are also enrolled in LEAs that have an average daily membership (ADM) of twelve thousand (12,000) students or more. The result of this change would be to limit charter school attendance on the basis of eligibility for free or reduced-price lunch to students in the larger school systems in Tennessee.<sup>1</sup>

There is no constitutional right to attend a charter school in Tennessee. As interpreted by the Tennessee Supreme Court in *Tennessee Small School Systems v. McWherter*, 851 S.W.2d

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<sup>1</sup> According to information from the Tennessee Department of Education, there are 12 school systems in Tennessee that have an average daily membership of 12,000 or more: Memphis City Schools, Davidson County, Knox County, Shelby County, Hamilton County, Rutherford County, Williamson County, Montgomery County, Sumner County, Wilson County, Sevier County, and Madison County.

139, 150 (Tenn. 1992) (“Small Schools I”), the Tennessee Constitution mandates that the State maintain and support a system of free public schools that provides the opportunity to acquire an education.<sup>2</sup> Under both current law and SB2133, as amended, Tennessee charter schools are optional school choices available to some students in certain school districts. All charter school students have the option of attending traditional public schools.

The courts have construed the equal protection clause of the Fourteenth Amendment and Article XI, Section 8, of the Tennessee Constitution as prohibiting the General Assembly from enacting legislation that applies only to certain citizens, or that excludes a class of citizens from the general law, unless there is a rational basis for the classification.<sup>3</sup> Under this standard, if a rational basis can be found for the classification, or if any state of facts reasonably may be conceived to justify it, the classification will be upheld.<sup>4</sup> Under the Fourteenth Amendment and Article XI, Section 8, of the Tennessee Constitution, if a rational basis exists, states need not treat all classes of persons identically; the State may classify its citizens for various purposes and treat those classes differently.

With regard to Section 2 of Amendment No. 1 to SB2133, while the legislative intent of drawing an eligibility line for certain students from those school systems with an average daily membership of 12,000 or more is not readily apparent, we cannot say that a rational basis cannot be found. For example, charter schools are still a fairly new creation of the legislature in Tennessee, and SB2133 may well be simply an effort to explore further this educational option in a limited number of school districts, while refining how charter schools will be managed and regulated. Given this plausible reason for Section 2 of Amendment No. 1, this Office cannot conclude that a reviewing court could find no rational basis for Section 2 of Amendment No. 1 to SB2133.

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<sup>2</sup> See also *Tennessee Small School Systems v. McWherter*, 894 S.W.2d 734, 735 (Tenn. 1995) (“Small Schools II”) (referring to the General Assembly’s obligation to establish a public school system that would afford “substantially equal educational *opportunities* to the public school students throughout the State.” (emphasis added)); *Tennessee Small School Systems v. McWherter*, 91 S.W.3d 232, 243 (Tenn. 2002) (“Small Schools III”) (“The critical point, however, is that the educational funding structure be geared toward achieving equality in educational *opportunity* for students, not necessarily ‘sameness’ in teacher compensation.” (emphasis added)).

<sup>3</sup> See, e.g., *City of Chattanooga v. Harris*, 223 Tenn. 51, 442 S.W. 2d 602 (1969) (Courts will strictly construe classifications that impinge on fundamental rights or that involve a suspect class such as race, but the proposed legislation clearly does not interfere with the exercise of a fundamental right or operate to the disadvantage of a suspect class).

<sup>4</sup> *Dandridge v. Williams*, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970); *Harrison v. Schrader*, 469 S.W. 2d 822 (Tenn. 1978).

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