

**STATE OF TENNESSEE**

OFFICE OF THE  
ATTORNEY GENERAL  
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July 10, 2013

Opinion No. 13-53

Eligibility of Home School Students for Hope Scholarship

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**QUESTION**

Does the requirement that home school students be enrolled in a Tennessee home school program for two years prior to graduation in order to be eligible for the HOPE scholarship violate the United States or Tennessee Constitutions?

**OPINION**

No, this requirement likely would be upheld against any constitutional challenge.

**ANALYSIS**

In order to be eligible to receive a Tennessee HOPE scholarship, a student must have been a Tennessee resident “for one (1) year immediately preceding the date of application for a scholarship” and “graduated from an eligible high school, graduated from a high school located in Tennessee that is not an eligible high school, *completed high school in a Tennessee home school program* or obtained a GED after January 1, 2003.” Tenn. Code Ann. § 49-4-905(a)(1) and (b)(2) (emphasis added). A home school student eligible for a Tennessee HOPE scholarship is

a student who completed high school in a Tennessee home school program meeting the requirements of § 49-6-3050. For two (2) years immediately preceding completion of high school as a home school student, the student shall have been a student in a home school associated with a church-related school as defined by § 49-50-801 and registered with the Tennessee local school district that the student would otherwise attend as required by § 49-6-305(a)(2)(C)(i) or an independent home school student whose parent or guardian has given notice to the local director of a Tennessee school district under § 49-6-3050(b)(1) of intent to conduct a home school.

Tenn. Code Ann. § 49-4-902(23). *See generally Crites v. Smith*, 826 S.W.2d 459, 468-472 (Tenn. Ct. App. 1991) (Koch, J., concurring in part and dissenting in part) (discussing the development of Tennessee’s home school statute).

The criteria established by the General Assembly for home school students to obtain eligibility for a Tennessee Hope Scholarship do not transgress federal or State constitutional requirements. This Office recently explained the parameters of these equal protection guarantees as follows:

Article I, Section 8, and Article XI, Section 8, of the Tennessee Constitution as well as the Fourteenth Amendment to the United States Constitution “guarantee to citizens the equal protection of the laws.” *Brown v. Campbell County Bd. Of Educ.*, 915 S.W. 2d 407, 412 (Tenn. 1995). . . .

These federal and State constitutional provisions confer the same protections, and they apply the same rules in determining the validity of classifications made in legislative enactments. *Brown v. Campbell County Bd. of Educ.*, 915 S.W.2d at 412. The “law of the land” referred to in Article I, Section 8, and “any general law” within the meaning of the prohibition in Article XI, Section 8, on legislation “inconsistent with the general laws of the land” mean the same thing, namely, that a law must embrace and affect alike all persons who are in, or may come into, the same or similar situation, condition, and circumstances. *Harwell v. Leech*, 672 S.W.2d 761, 762-63 (Tenn. 1984); *Maney v. State*, 74 Tenn. 218 (1880).

While these equal protections guarantees require that persons similarly situated be treated alike, not all classifications made by the General Assembly are necessarily prohibited. *See Gallaher v. Elam*, 104 S.W.3d 455, 461 (Tenn. 2003); *State v. Tester*, 879 S.W.2d 823, 327-28 (Tenn. 1994). Unless the classification impacts a fundamental right or discriminates as to a suspect class, a classification is valid if it can be supported by any rational basis. *Gallaher v. Elam*, 104 S.W. 3d at 461-62; *Harrison v. Schrader*, 569 S.W.2d 822, 825 (Tenn. 1978). The rational basis test provides the General Assembly “the initial discretion to determine what is ‘different’ and what is ‘the same’” and allows the General Assembly “considerable latitude in making those determinations.” *Gallaher v. Elam*, 104 S.W.3d at 461. A classification will be upheld under the rational basis test “if any state of facts may reasonably be conceived to justify it.” *Id.* The question is “whether the classifications have a reasonable relationship to a legitimate state interest.” *Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn. 1988). If so, there is a presumption of validity. The legislative body may make distinctions and treat various groups differently so long as the classification is not arbitrary. Reasonableness depends upon the facts of the case, and no general rule can be formulated for its

determination. The burden of showing that a classification is unreasonable and arbitrary is placed upon the individual challenging 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, the statute must be upheld. *See Gallaher v. Elam*, 104 S.W.3d at 461; *Harrison v. Schrader*, 569 S.W.2d at 825-26.

Tenn. Att’y Gen. Op. 13-37 at 2-3 (May 2, 2013).

Initially, for equal protection to apply where home school students are arguably treated differently than students attending other type schools, home school students must be “similarly situated” to students attending other type schools. *See, e.g., Posey v. City of Memphis*, 164 S.W.3d 575, 579 (Tenn. Ct. App. 2004) (citing *Osborn v. Marr*, 127 S.W.3d 737, 741 (Tenn. 2004)) (recognizing that “if two classes are being treated differently, the equal protection clause has no application unless the classes are similarly situated within the meaning of the equal protection clause”). Under the law of Tennessee, home schools are separately regulated and administered from other public and private elementary and secondary educational institutions. *See* Tenn. Code Ann. § 49-6-3050 (establishing criteria for home schools operating in Tennessee). Thus, given the differences in administration of home schools and other types of public and private secondary and elementary institutions, it is unlikely that home school students would be considered “similarly situated” to students attending other type institutions. *Cf. Rust v. Rust*, 864 S.W.2d 52, 56-7 (Tenn. Ct. App. 1993) (stating that “[h]ome schooling is a permissible educational alternative in Tennessee” which allows “parents to educate their children at home and provides that home schooling is an exception to the mandatory school attendance laws as long as the educational program meets the requirements of state law”).

Nonetheless, even if all students are deemed to be “similarly situated,” the HOPE scholarship eligibility requirements for home school students should still withstand equal protection challenge. This classification does not impact any fundamental right or suspect class; thus it would be reviewed under the rational basis test. Because home schooling is by its nature subject to less governmental and accreditation supervision than public or private schooling, the General Assembly could reasonably have concluded that home schools in Tennessee, which must comply with the state’s accreditation criteria, will more reliably prepare students qualified for HOPE scholarships than home schools in other states. *Cf. Crites v. Smith*, 826 S.W.2d at 469 (Koch, J., concurring in part and dissenting in part) (observing that early in the legislative debate on the creation of home school criteria the General Assembly proposed to adopt minimum education requirements that were apparently stricter than other states’ laws governing home schools). Additional rational bases might also exist to support this classification. The conclusion that a rational basis exists to support this classification is consistent with several instances where this Office has opined that similar classifications created for HOPE scholarship eligibility would withstand an equal protection challenge. *See* Tenn. Att’y Gen. Op. 03-065 (May 20, 2003) (stating that if the General Assembly has a reasonable basis for requiring some students to meet one set of lottery scholarship eligibility criteria and other students a second set of eligibility criteria, then a court could sustain such a classification against an equal protection challenge); Tenn. Att’y Gen. Op. 03-030 (Mar. 25, 2003) (opining equal protection guarantees are not

implicated if the State awards lottery scholarships only to students who attend college immediately after graduation from high school or the State denies lottery scholarships to college students who are under the age of 40 and who graduated high school several years before their enrollment in college). *But cf.* Tenn. Att’y Gen. Op. 08-36 (Feb. 26, 2008) (opining that HOPE scholarship eligibility for a student who attended high school in another state was only met if one of the student’s parents was a member of the military *and* entered into the military while a resident of Tennessee was constitutionally suspect, since this criteria triggered intensified scrutiny under equal protection standards by inappropriately burdening the fundamental right to travel under the United States Constitution or, in the alternative, was not supported by a rational basis).

In sum, the eligibility standards set by the General Assembly for home school students to qualify for a HOPE scholarship are defensible against an equal protection challenge. This Office is aware of no other constitutional infirmities with these eligibility standards.

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