STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

March 29, 2016

Opinion No. 16-11

Proposed Constitutional Amendment to Public Schools Clause, Tenn. Const. art. XI, § 12

Question

Would the language, if adopted, in HJR 493, 109th Gen. Assem. 2016, affect the equal protection provisions of article I, § 8, or article XI, § 8, of the Tennessee Constitution?

Opinion

No. The proposed amendatory language does not change the meaning of the public schools clause (article XI, § 12) of the Tennessee Constitution, and would not affect the equal protection provisions of article I, § 8 or article XI, § 8, of the Tennessee Constitution, which would still limit, as they do now, the authority of the General Assembly to determine how to provide for free public education in Tennessee pursuant to the public schools clause.

ANALYSIS

The public schools clause (article XI, § 12) of the Tennessee Constitution recognizes the importance of education to the State and its citizens and requires[1] the General Assembly to provide for a system of free public schools as follows:

> The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools.

House Joint Resolution 493, 109th Gen. Assem. 2016, proposes to amend the public schools clause by adding the italicized language:

> The General Assembly as the elected representatives of the people shall provide for the maintenance, support and eligibility standards of a system of free public schools in such manner as the General Assembly may determine.

You have asked whether the addition of the italicized language, if made part of the Constitution as an amendment to article XI, § 12, would "affect" the equal protection provisions of the Tennessee Constitution. We take the question to be whether the addition of the italicized language would allow the General Assembly to provide for a system of free public schools without

[1] Article XI, § 12, also provides that the "General Assembly may establish and support such postsecondary educational institutions, including public institutions of higher learning, as it determines."

having to take into consideration the limits and constraints otherwise imposed on law-making by those equal protection provisions.

The Tennessee Constitution guarantees "equal protection," i.e., equal privileges and immunities for all those similarly situated. It does so by limiting the power of the General Assembly in two ways. First, 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, immunitie, [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." Tenn. Const. art. XI, § 8. Second, "no man shall be . . . disseized of his freehold, liberties or privileges . . . or deprived of his life, liberty or property but by the judgment of his peers or the law of the land." *Id.*, art. I, § 8.

These equal protection provisions of the Tennessee Constitution require the legislature to perform its obligation to provide for free public schools in a nondiscriminatory way. *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 153, (Tenn. 1993). In other words, the legislature is required to maintain and support a system of free public schools that affords substantially equal educational opportunities. *Tennessee Small Sch. Sys. v. McWherter*, 894 S.W.2d 734, 738 (Tenn. 1995).

The amendatory language proposed in HJR 493, if adopted, would do nothing to change the fact that any legislation enacted in furtherance of the public schools clause must comply with the equal protection guarantees of the Tennessee Constitution. We reach that conclusion for two reasons.

First, the language that HJR 493 proposes to add to the public schools clause does not materially change the meaning of that clause. The members of the General Assembly are elected by the qualified voters of the State and *ipso facto* are acting as representatives of the people whenever they engage in the legislative process. *See* Tenn. Const. art. II, § 3 (vesting the legislative authority of Tennessee in "a General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people") and *Foster v. Roberts*, 219 S.W. 729, 730 (Tenn. 1919) (the legislature acts as representatives of the people). It is, therefore, redundant to add that the General Assembly "as the elected representatives of the people" shall provide for free public schools. The General Assembly cannot provide for public schools in any capacity other than as representatives of the people. Similarly, it is superfluous to add that the General Assembly shall provide for free public schools "in such manner as the General Assembly shall determine." It is already implicit in the current version of article XI, § 12, that the General Assembly determines the manner in which to provide for the required system of free public education.

In short, the proposed amendments to the public schools clause of the Tennessee Constitution do not substantively change that clause. For that reason alone, the language proposed by HJR 493 would not, if adopted, affect the equal protection provisions of the Tennessee Constitution.

Second, while the Tennessee Constitution vests in the General Assembly the broad authority to make, order, and repeal the laws, *Richardson v. Young*, 125 S.W. 664 (Tenn. 1910), that authority is not unlimited. The authority of the legislature is always subject to and limited by the provisions and requirements of the Tennessee and federal Constitutions. *Quinn v. Hester*, 186 S.W. 459, 460 (Tenn. 1916); *Smiddy v. Memphis*, 203 S.W. 512, 514 (Tenn. 1918) ("[T]here has never been a doubt in this State of the power of the legislature to do all acts *not forbidden by the State Constitution, or the Constitution of the United States, expressly or by necessary implication*" (emphasis added)). "As the representatives of the people the Legislature has the power to pass such laws *as are not directly or impliedly in contravention of the mandates of the Constitution*." *Foster v. Roberts*, 219 S.W. 729, 730 (Tenn. 1919) (emphasis added). The equal protection provisions of the Tennessee Constitution "forbid" certain kinds of legislation; the legislature does not have the power to pass laws that contravene the mandates of the equal protection provisions.

Accordingly, even assuming that the amendments proposed by HJR 493 make some substantive change in the public schools clause, they do not alter the fact that the General Assembly is subject to and constrained by the equal protection provisions of the Tennessee Constitution in determining the manner in which to fulfill its duties under the public schools clause, even as that clause would be amended by HJR 493. For this reason, too, HJR 493 does not affect the equal protection provisions of the Tennessee Constitution. Those equal protection provisions would continue to limit the ways in which the General Assembly could implement the public schools clause; any legislation enacted pursuant to the public schools clause, even if that clause were amended as proposed by HJR 493, would still have to comply with the equal protection provisions of the Tennessee Constitution.

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

Requested by:

The Honorable Bill Dunn
State Representative
115 War Memorial Building
Nashville, Tennessee 37243