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Opinion No. 10-36

Requiring Local Education Agencies to Pay Portion of Health Insurance Costs from BEP Funds

QUESTIONS

House Bill 3193/Senate Bill 3125 (the “Bill”) requires local education agencies to pay a minimum percentage of the medical insurance premium for support staff. The General Assembly would set the minimum percentage in each appropriations act. The Basic Education Program (“BEP”), which provides for distribution of state funds to local education agencies, includes a component that reflects thirty percent of the cost of support staff medical insurance premiums. But current law does not require local education agencies to pay any portion of support staff medical insurance premiums, and some of the agencies do not use funds from this component for that purpose. These agencies use the funds to provide other educational services; if the Bill becomes law, they will have to find other funds to provide those services, or cease providing them. Paragraph 4 of Article II, Section 24, of the Tennessee Constitution (“State Share Requirement”) provides that “[n]o law of general application shall impose increased expenditure requirements on cities or counties unless the General Assembly shall provide that the state share in the cost.”

1. Does the Bill violate the State Share Requirement?
2. Under the Bill, must the General Assembly in each year’s annual appropriations act establish a minimum percentage of support staff premiums that local education agencies must pay?
3. Would setting the minimum percentage at or lower than the thirty percent component now in the BEP violate the State Share Requirement?
4. Would setting the minimum percentage higher than the component for that expense included in the BEP violate the State Share Requirement?

OPINIONS

1. No, the Bill requires local education agencies to pay an expense they were previously not required to pay. But these agencies receive funds under the BEP for this cost. Assuming that the General Assembly sets the minimum percentage at thirty percent, the General Assembly is in effect providing a one hundred percent state share of the increased expenditure

requirement. Even if the BEP only roughly approximates the total that local education agencies must pay under the Bill, the Bill complies with the State Share Requirement because the State's share is substantial and not so "miniscule" as to be an ineffective compliance with the Constitution. That some agencies would have to find other funds to cover services they have been providing from this BEP cost component would not render the Bill unconstitutional.

2. No, the Bill contains no such requirement. Instead, the General Assembly is free to set a minimum percentage or set none at all. If it sets none at all, then local education agencies would not be required to pay any percentage of support staff medical insurance premiums unless some other law requires it.

3. No, if the minimum percentage in the annual appropriations act is equal to the corresponding component in the BEP, then the State has provided the entire amount necessary to cover mandated increased expenditures. Similarly, if the minimum percentage in the annual appropriations act is less than the corresponding component in the BEP, then the State has provided more than enough to cover mandated increased expenditures. Neither result would violate the State Share Requirement.

4. This result would not violate the State Share Requirement so long as the BEP component represents a substantial share of the resulting local obligation and is not so "miniscule" as to be an ineffective compliance with the Constitution. For example, the result would be defensible if the BEP component still reflected ten percent or more of the amount that local education agencies must pay for support staff medical insurance premiums under the Bill.

Even if this component is less than ten percent or the BEP is changed to eliminate it entirely, a court would also look to the State's share of a local education agency's total local education expenses. So long as, considered as a whole, the State's share of an agency's total local education expenses is substantial and not so "miniscule" as to be an ineffective compliance with the Constitution, the Bill would not violate the State Share Requirement.

ANALYSIS

This opinion concerns the constitutionality of House Bill 3193/Senate Bill 3125 (the "Bill"). State support for financing insurance coverage for employees of local education agencies is provided through the Basic Education Program (the "BEP") administered by the Department of Education. The BEP formula is calculated by the Commissioner of Education with the approval of the State Board of Education in accordance with statutory guidelines. Tenn. Code Ann. §§ 49-1-302, -306 & -307. Funds appropriated to the BEP are distributed to local education agencies under a formula set forth in Tenn. Code Ann. § 49-3-351. The current BEP formula includes an insurance factor of forty-five percent for each instructional employee position (referred to as "eligible employee" in current law) and thirty percent for each support staff position generated by the staffing formula of the BEP. Thus, the BEP formula for each local education agency includes an amount reflecting forty-five percent of the estimated medical insurance premium for instructional employees and thirty percent for the estimated medical insurance premium for support staff employees.

Under Tenn. Code Ann. §§ 8-27-301, *et seq.*, the Local Education Insurance Committee approves a group insurance plan for “eligible local education employees.” Tenn. Code Ann. § 8-27-302(a). The term “eligible local education employee” means persons included within the definition of § 8-34-101, and who are not eligible for coverage under the group insurance plan for state employees. Tenn. Code Ann. § 8-27-302(e)(2). Under current state law, the Department of Education is authorized to pay, on behalf of each “eligible local education employee” and the employee’s dependents, an amount on the total cost of such person’s participation in the basic insurance plan. Tenn. Code Ann. § 8-27-303(a)(1)(A). This level is set under the annual appropriations act. *Id.* The current level is set at forty-five percent. 2009 Tenn. Pub. Acts Ch. 554, § 11. Under Tenn. Code Ann. § 8-27-303(a)(2), if a local education agency makes medical insurance available to its eligible employees and the benefits are equal or superior to the basic plan authorized by the Local Education Insurance Committee, the local education agency may receive these payments directly. Under Tenn. Code Ann. § 8-27-303(j), beginning July 1, 1998, each local education agency is required to pay as a minimum the percentage specified in the general appropriations act for each “eligible employee” participating in health insurance coverage under § 8-27-302(a) or (a)(2). Current law does not require local education agencies to pay any portion of a medical insurance premium for support staff employees. Thus, while a figure reflecting this amount is included in calculating BEP funds to which a local education agency is entitled, the agency may use that amount for a different educational purpose.

Information assembled by the Benefits Administration Division of the Department of Finance and Administration indicates that 30 school districts are paying less than 30 percent of the premium for support staff participating in the employer sponsored health insurance coverage. The same source indicates that five school districts are not making coverage available to support staff.

The Bill would amend Tenn. Code Ann. §§ 8-27-302 and -303. Section 3 of the Bill deletes the term “eligible local education employee”¹ as a defined term under Tenn. Code Ann. § 8-27-302(e)(2) and inserts the following two definitions in an amended subsection (e):

(2) “Instructional employee” means those persons employed by a local education agency who are included within the definition in § 8-34-101(46), and who are not eligible for insurance coverage under § 8-27-201;

(3) “Support staff” means those persons employed by a local education agency who are not defined as an “instructional employee[.]”

¹ A compiler’s note to Tenn. Code Ann. § 8-27-302 states that this section of the Code “has been set out to substitute ‘defined in § 8-34-101’ for ‘defined in § 8-34-101(46).’” Subsection (46) defines the term “teacher.” Tenn. Code Ann. § 8-34-101 contains an extensive list of definitions governing the state retirement system. Based on the representations in the request, we assume the term “eligible local education employees” as used in the current statutes § 8-27-302 and § 8-27-303 has not been interpreted to include “support staff” included within the new definition in the Bill.

Under Tenn. Code Ann. § 8-34-101(46), the term “teacher” means:

(A) Any person employed in a public school as a teacher, helping teacher, librarian, principal or supervisor, and includes any superintendent of public schools, or administrative officer of a department of education, or of any educational institution supported in whole or in part by and under the control of the state; or

(B) Any person employed in a public school as a teacher, librarian, principal, superintendent or chief administrative officer of a public school system, a supervisor of teachers, or any other position whereby the state requires the employee to be certificated as a teacher, or licensed as a nurse or physical therapist, in the public schools or of any educational institution supported in whole or in part by and under the control of the state. “Teacher” also includes any person employed in a public school as a reserve officer training corps (ROTC) instructor. It is further provided that any teacher who has taught in the public schools for a period of at least one (1) year who transfers to a position within the Tennessee public school system that does not require a teacher's certificate shall continue participation in the retirement plan as a teacher. This definition shall be in effect from and after July 1, 1986, and shall be applied to all persons seeking membership in the retirement plan as a teacher from this date forward[.]

Section 4 of the Bill deletes the current Tenn. Code Ann. § 8-27-303(a)(1) and substitutes the following:

(a)(1)(A) From the appropriations made each year in the general appropriations act for that purpose, the department of education is authorized to pay, on behalf of each *eligible instructional employee of a local education agency*, and the employee's dependents, an amount, determined annually in the general appropriations act, on the total cost of such person's participation in the basic insurance plan. Effective July 1, 1992, each local education agency shall provide for any increased amounts needed for its instructional employees and their dependents, above the amount funded by the state for fiscal year 1991-1992, from funds appropriated for the basic education program.

(B) No state funds appropriated to fund the provisions of this part shall be distributed to any local education agency which, on April 1, 1986, was paying the total cost or a portion of the total cost of insurance for instructional employees as defined in this part, if such local education agency reduces the funding for such insurance in any fiscal year below the level of funding for such purpose in the immediately preceding fiscal year; provided, that such local education agency shall have the option to expend such funds to continue to fund such insurance, to increase the local salary supplement, to provide other employee benefits that accrue to the instructional employees and continue to be eligible to receive such state funds, or for any other improvement in the education program.

(C) From the appropriations made each year in the general appropriations act for that purpose, the department of education is authorized to pay, on behalf of each eligible support staff employee of a local education agency, and the employee's dependents, an amount, determined annually in the general appropriations act, on the total cost of such person's participation in the basic insurance plan. The amount set for support staff may be different than the amount set in (a)(1)(A) of this section.

(Emphasis added). Section 7 of the Bill deletes the current subsection (j) from Tenn. Code Ann. § 8-27-303 and substitutes the following:

Beginning July 1, 1998, each local education agency shall pay on behalf of each instructional employee, as defined in § 8-27-302(e)(2), participating in the health insurance coverage authorized by § 8-27-302(a) or subdivision (a)(2) as a minimum the percentage specified in the general appropriations act of the premium collected on behalf of each such employee of the local education agency. Beginning January 1, 2011, each local education agency shall pay on behalf of each support staff employee, as defined in § 8-27-302(e)(3), participating in the health insurance coverage authorized by § 8-27-302(a) or subdivision (a)(2) as a minimum the percentage specified in the general appropriations act of the premium collected on behalf of each such employee of the local education agency. Distribution of a like amount to each eligible employee through a flexible spending arrangement authorized by § 125 of the Internal Revenue Code shall satisfy the requirements of subsection (j). Such amounts shall be certified to the commissioner of education and the director of each local education agency by the local education insurance committee each year.

(Emphasis added).

As amended by the Bill, Tenn. Code Ann. § 8-27-302 would authorize the Department of Education to pay a portion of the premium for “instructional employees” and a portion of the premium for “support staff” from BEP funds. The payments would be made directly to local education agencies that make medical insurance available to their eligible employees with benefits equal or superior to the basic plan authorized by the Local Education Insurance Committee. The portion for each would be set forth in the appropriations act. Under Tenn. Code Ann. § 8-27-303(j) as amended by the Bill, local education agencies would be required to pay a portion of the premium for “instructional employees” and a portion of the premium for “support staff employees” at the levels specified in the appropriations act.

The net effect of the Bill is to mandate that local education agencies pay a portion of the premium for their support staff employees who participate in the agency’s medical insurance plan. The request states that some local education agencies either do not pay at least thirty percent of the medical insurance premium for support staff employees and their dependents or do not make medical insurance available to support staff employees at all. These agencies receive

BEP funds that reflect a component for support staff premiums, but they use these funds for other educational purposes. The Bill would require these agencies to provide this minimum share of these benefits. But the Bill does not provide for any increase in funding to pay these benefits. Instead, these local education agencies will receive the same BEP funding, including the component in the formula for support staff premiums, but they will actually be required to pay a minimum portion of the support staff premiums. In effect, assuming the BEP formula continues to include a component reflecting support staff premiums, those funds will be earmarked or designated for a particular purpose. If these agencies wish to maintain the services they now pay for out of this BEP component, they will have to find other funds to cover the cost. The fiscal note for the Bill indicates that this result implicates Paragraph 4 of Article II, Section 24, of the Tennessee Constitution (the “State Share Requirement”), which provides:²

No law of general application shall impose increased expenditure requirements on cities or counties unless the General Assembly shall provide that the state share in the cost.

1. State Share Requirement

The first question is whether the Bill on its face violates the State Share Requirement. The Tennessee Court of Appeals addressed the meaning of the State Share Requirement in *Morris v. Snodgrass*, 886 S.W.2d 761 (Tenn. Ct. App. 1994), *no application for permission to appeal filed*. In that case, the Mayor of Shelby County challenged state laws requiring DUI offenders to serve mandatory jail sentences. The Mayor claimed that the laws imposed increased expenses on local governments without sharing in the cost. The Court found that the General Assembly, by providing for minimum fines to be returned to the local jailing officer to cover the cost of imprisoning offenders, had met its state share obligations. The Court noted that the original draft of the State Share Requirement, adopted by the 1977 Constitutional Convention, contained the expression “reasonable mutual participation,” and that the Chairman referred to this as “something more than nominal.” The Court pointed out that the convention removed the words “reasonable mutual participation” from the final version of the clause. The Court stated:

This Court concludes that the Legislature is constitutionally empowered to elect what the share of the State shall be in the subject expenses.

Since the share enacted by the Legislature is substantial, there can be no insistence that it is so miniscule as to be an ineffective compliance with the Constitution.

886 S.W.2d at 763.

² For the purposes of this opinion, we assume that at least some of the local education agencies that would be affected by the Bill are cities or counties, or special school districts affiliated with cities or counties. The State Share Requirement does not apply to special school districts that are not affiliated with counties and cities. Op. Tenn. Att’y Gen. 87-195 (December 18, 1987).

The Court of Appeals did not define the term “substantial.” Our Office has stated that the state share in increased costs under this clause must be “reasonable and not nominal.” Op. Tenn. Att’y Gen. 79-204 (April 30, 1979), or “more than a nominal or a token portion.” Op. Tenn. Att’y Gen. 80-148 (March 11, 1980). This Office concluded that a bill setting the State’s share at three percent was “constitutionally suspect” because the State’s share might be found to be a nominal or token portion of the fiscal impact on the counties. Op. Tenn. Att’y Gen. 81-364 (June 9, 1981).

By its terms, the State Share Requirement prohibits the General Assembly from imposing “increased expenditure requirements” on cities or counties *unless* it provides that the State share in the cost. As described, the Bill does require local education agencies to pay an expense they were not previously required to pay. But these agencies receive funds under the BEP that reflect this cost. Assuming that the General Assembly sets the minimum percentage at thirty percent, the General Assembly is in effect providing a one hundred percent state share of the entire increased expenditure requirement. Even if the BEP only roughly approximates the total that local education agencies must pay under the Bill, the Bill complies with the State Share Requirement because the State’s share is substantial and not so “miniscule” as to be an ineffective compliance with the Constitution. That some agencies may now have to find other funds to provide services they have been paying for from this component does not make the Bill unconstitutional under the State Share Requirement.

2. Minimum Percentage in Appropriations Act

The next questions address how the Bill, if passed, would be implemented. The first question is whether, under the Bill, the General Assembly must establish a minimum percentage of support staff premiums that local education agencies must pay. The Bill contains no such requirement. Instead, the General Assembly is free to set a minimum percentage or set none at all. If it sets none at all, then local education agencies would not be required to pay any percentage of support staff medical insurance premiums unless some other law requires it.

3. Minimum Percentage Less Than or Equal to Corresponding Component in the BEP

The next question is whether the General Assembly would violate the State Share Requirement if, in the appropriations act, it sets a minimum percentage that is less than or equal to the corresponding component in the BEP. As noted above, if the minimum percentage in the annual appropriations act is equal to the corresponding component in the BEP, then the State has provided the entire amount necessary to cover mandated increased expenditures. Similarly, if the minimum percentage in the annual appropriations act is less than the corresponding component in the BEP, then the State has provided more than enough to cover mandated increased expenditures. Neither result would violate the State Share Requirement.

4. Minimum Percentage Higher than Corresponding Component in the BEP

The last question is whether the General Assembly would violate the State Share Requirement if, in the appropriations act, it sets a minimum percentage that is more than the corresponding component in the BEP. In this case, the BEP component would not provide the entire amount that local educational agencies must pay for support staff medical insurance premiums. But the result would not violate the State Share Requirement so long as the BEP component represents a substantial share of the resulting agency obligation and is not so “miniscule” as to be an ineffective compliance with the Constitution. For example, the result would be defensible if the BEP component still reflected ten percent or more of the amount that local education agencies must pay for support staff medical insurance premiums under the Bill.

As the request indicates, the BEP formula presently includes a component that reflects a portion of support staff insurance premiums. Because of this practice, the State’s share of increased expenditures under the Bill can be ascertained fairly readily. Even if the component is less than ten percent or the BEP is changed to eliminate it entirely, a court would also look to the State’s share of a local education agency’s total local education expenses. So long as, considered as a whole, the State’s share of an agency’s total local education expenses is substantial and not so “miniscule” as to be an ineffective compliance with the Constitution, the Bill would not violate the State Share Requirement.

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