IN THE CHANCERY COURT FOR HAMILTON COUNTY, TENNESSEE

HAMILTON COUNTY EDUCATION ASSOCIATION, Plaintiff, v. HAMILTON COUNTY BOARD OF EDUCATION, Defendant.	))))))))))	Case No. 12-0182

MEMORANDUM IN SUPPORT OF APPLICATION FOR PRELIMINARY INJUNCTION

The Plaintiff Hamilton County Education Association ("HCEA") submits this Memorandum in support of its application for a preliminary injunction. The HCEA requests that this Court issue an order enjoining the Defendant Hamilton County Board of Education ("Board of Education") from its refusal to negotiate with the HCEA regarding "reopeners" in accordance with Article XXV, Section 3, of the parties' collective bargaining agreement (the "CBA"), pending a trial on the merits and entry of a final judgment in this action.

INTRODUCTION

The HCEA is a professional employees' organization for professional employees in the Hamilton County school system. The HCEA achieved "recognition" under Tenn. Code Ann. § 49-5-605 of the EPNA.[1] As a result of that recognition, the HCEA became the exclusive

[1] The Legislature has authored some confusion by using existing code sections of the EPNA for the new provisions of the Professional Educators Collaborative Conferencing Act of 2011 ("PECCA"), even though PECCA contemplates that the recognition and right to negotiate under the EPNA will remain in effect and continue to be applicable where, as in Hamilton County, there are current agreements in effect that were ratified under the EPNA. Accordingly, throughout this Memorandum the HCEA has identified duplicate code sections by the Act (the EPNA or PECCA, respectively) that is being referenced.

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representative of all professional employees in the Hamilton County school system for the purpose of negotiating, in accordance with Tenn. Code Ann. § 49-5-606 of the EPNA.

The HCEA and the Board of Education entered into their current CBA on May 19, 2011, prior to PECCA becoming law on June 1, 2011. The CBA is effective until June 30, 2014. Article XXV, Section 3, of the CBA provides for the negotiation of "reopeners."

Under new Tenn. Code Ann. § 49-5-601(d) of PECCA, the HCEA's "recognition" as the exclusive representative of the professional employees for the purpose of negotiating remains unaffected by PECCA, and the relationship between the HCEA and the Board of Education is not governed by PECCA, until the CBA expires. Consistent with these pronouncements, the Tennessee Department of Education has issued "frequently asked questions" about PECCA in which the Department has stated that PECCA does not affect the obligation to negotiate "reopeners" under an existing collective bargaining agreement. In addition, the Tennessee Organization of School Superintendents (TOSS), which was charged in PECCA with the obligation to work with other public education stakeholders to develop a training program for collaborative conferencing, has stated in its report to the General Assembly that PECCA does not affect the obligation to negotiate "reopeners" under an existing collective bargaining agreement.

Nonetheless, the Board of education has refused to abide by its contractual obligation to negotiate reopeners.

The injury to the HCEA and the professional employees of Hamilton County from the Board's unlawful refusal to recognize and negotiate with the HCEA has been immediate, is continuing, and is irreparable.[2] In addition, if injunctive relief is denied, the Board of

[2] The HCEA has no adequate remedy at law for the injury it continues to suffer by virtue of the Board of Education's continued unlawful refusal to negotiate. The injury therefore is irreparable for purposes of Rule 65.

Education's refusal to negotiate "reopeners" will render relief on the merits for the HCEA ineffectual since the negotiation of reopeners is annual and time-sensitive as it relates to the school system's annual budgetary process. The HCEA therefore respectfully requests that the Court issue a preliminary injunction to restrain and enjoin the Board of Education from its continued refusal to negotiate "reopeners" with the HCEA.

ARGUMENT

A. The Relief the HCEA Seeks Is Appropriate.

The preliminary injunction that the HCEA seeks here is a simple one – an injunction to prevent the Board of Education from its continued refusal to negotiate "reopeners" in good faith with the HCEA. This injunction, if granted, will not embroil the Court in resolution of the parties' disagreements at the bargaining table. It will not compel the Board of Education to agree to any particular bargaining proposal the HCEA may make. It will simply compel the Board of Education to negotiate with the HCEA in good faith.

The justification the Board has offered for its refusal to negotiate is that the passage of PECCA makes the contractual provision for negotiation of "reopeners" an "orphan" of the legislative process.[3] As is discussed below, that position is legally untenable.

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[3] The Board also has suggested, in its lawyer's letter, that a provision for negotiation of "reopeners" is simply an unenforceable "agreement to agree." However, the statutory scheme of the EPNA expressly contemplates the reopening of negotiations by providing for multi-year agreements while at the same time directing that provisions that require funding are to be renegotiated if sufficient funds are not appropriated. The Board's position would render the allowance of multi-year agreements in the EPNA a nullity since appropriation decisions in all public school systems are made annually as a part of the fiscal year budgetary process. Moreover, even with a "reopener" provision, the terms of the CBA are sufficiently definite as a matter of general contract law to be enforceable since they provide a basis for determining the existence of a breach and for giving an appropriate remedy. *Doe v. HCA Health Services of Tennessee*, 46 S.W.3d 191, 196 (Tenn. 2001); *Strickland v. Cartwright*, 117 S.W.3d 766, 772 (Tenn. Ct. App. 2003) (quoting *Restatement (Second) of Contracts* § 33(2) (1981)). The provision on "reopeners" is not an "agreement to agree," but rather an agreement to negotiate in good faith. If those negotiations don't produce an agreement on a reopened item, the existing contract provisions continue to control. *Smith County Education*

B. The Relief the HCEA Seeks Satisfies the Requirements of Rule 65.04.

Under Tenn. R. Civ. P. 65.04(2), a preliminary or temporary injunction may be granted if it is clearly shown by verified complaint, affidavit or other evidence that the movant's rights are being or will be violated by an adverse party and that the movant will suffer an immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual. In deciding whether to grant or deny an injunction, the test in both federal and state courts is a familiar one. The Court must consider (1) the threat of irreparable harm to the plaintiff if the injunction is not granted, (2) the balance between that harm and the injury that granting the injunction would inflict on the defendant, (3) the probability that the plaintiff will succeed on the merits, and (4) the public interest. *Denver Area Meat Cutters & Emplrs. Pension Plan v. Clayton*, 120 S.W.3d 841, 857 (Tenn. Ct. App. 2003); *South Central Railroad Authority v. Harakas*, 44 S.W.3d 912, 919 n. 6 (Tenn. Ct. App. 2000).

No single factor is dispositive, and the factors are not prerequisites that must be met. *See, e.g.*, *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 400 (6th Cir. 1997); *Washington v. Reno*, 35 F.3d 1093, 1099 (6th Cir. 1994). Instead, the Court is to balance the factors, weighing the equities to determine whether an injunction ought to be granted. *Id.* Consequently, even the absence of a strong probability of success on the merits will not preclude the grant of a preliminary injunction if the movant has shown serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if the injunction is issued. *Six Clinics Holding Corp.*, 119 F.3d at 399-400.

Association v. Anderson, 676 S.W.2d 328, 339-340 (Tenn. 1984); *see also*, *Hamblen County Education Association v. Hamblen County Board of Education*, 892 S.W.2d 428, 434 (Tenn. Ct. App. 1994).

1. **The HCEA and the professional employees of Hamilton County will continue to suffer irreparable harm without an injunction.**

The HCEA is attempting to negotiate "reopeners" with the Board of Education. If no injunction is issued, the will of the majority of the professional employees who chose the HCEA as their bargaining agent will be thwarted. Without an injunction, the HCEA cannot bring the Board of Education back to the bargaining table. The ability of the HCEA to negotiate effectively with the Board of Education will be destroyed by the action the Board has taken to cease negotiations, despite its contractual commitment to negotiate. The inability of the HCEA to negotiate will in turn discourage other teachers from joining the HCEA or from maintaining their membership in the HCEA, for they will see that efforts by the HCEA to negotiate – a primary function of the HCEA – are futile.

The provisions of the EPNA were patterned largely after the comparable provisions in the National Labor Relations Act (NLRA). *Smith County Education Association v. Anderson*, 676 S.W.2d 328, 339 (Tenn. 1984). Addressing the obligation to negotiate in good faith under the NLRA, the United States Supreme Court long ago explained that an employer's unlawful refusal to bargain with its employees' chosen representatives "disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions." *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704 (1944). And in *Overnite Transportation Company*, 333 NLRB 1392, 1393 (2001), the NLRB explained that it was the objective tendency of the employer's unfair labor practices to undermine union support that was critical, not the actual effect of the unfair labor practices. *Id.*, at 1395.

The right to negotiate is not only a statutory right under the EPNA. It is a contractual right under the CBA, to which the HCEA is a party and of which the professional employees are

the intended beneficiaries. Collective bargaining agreements include provisions for "reopeners" like this one because there are financial matters that the Board of Education and the county commission must address annually. Provisions are included for the negotiation of additional items, beyond the financial matters, in recognition that there may have to be some *quid pro quo* for a change in financial subjects or there may simply be something that has occurred that makes it appropriate to revisit certain subjects.

Because the financial matters like salary and insurance and fringe benefits are dealt with annually, the Board's refusal to negotiate is immediately undermining the contractual rights of the HCEA and the professional employees. While refusing to negotiate, the Board will be engaged in a budgetary process that directly affects those financial matters that should be the subject of negotiations.

The harm is not only irreparable, but it is immediate and continuing. Moreover, the continued refusal to negotiate "reopeners" by the Board will tend to make relief on the merits for the HCEA ineffectual. That is particularly so given the passage of PECCA, which will bring to an end the HCEA's recognition and right to negotiate when the CBA expires.

2. The balance of harm weighs in favor of the HCEA.

No harm will come to the Board of Education if it is simply compelled to return to the bargaining table to negotiate in good faith with the HCEA and maintain the status quo. An injunction will not compel the Board of Education to reach any particular agreements with the HCEA. An injunction will simply compel the Board of Education, while the litigation proceeds, to "meet [with the HCEA] at reasonable times and confer, consult, discuss, exchange information, opinions and proposals, in a good faith endeavor to reach agreement on matters

within the scope of discussions, and incorporate such agreements into a written agreement." Tenn. Code Ann. § 49-5-602(8) of the EPNA.

The Board of Education will be obliged by an injunction to do no more than it agreed to do in Article XXV of its contract with the HCEA. But the absence of such an injunction will continue to deprive the HCEA of its fundamental purpose and will continue to deprive the professional employees of the right to negotiate through a representative that they voluntarily chose to represent them, a right they should enjoy not only by statute but by virtue of the Board's contractual commitment to engage in those negotiations.

3. The HCEA Is Likely to Succeed On The Merits.

PECCA is the Board's only excuse for its refusal to negotiate "reopeners" in good faith with the HCEA. PECCA provides no safe harbor for the Board. The Tennessee Department of Education and the Tennessee Organization of School Superintendents (TOSS) both have acknowledged the inarguable statutory construction that the Board refuses to accept. New Tenn. Code Ann. § 49-5-604(b) leaves "recognition" unaffected until the existing CBA expires and postpones effectiveness of PECCA until the CBA expires. The "Compiler's Notes" at the outset of PECCA point to the appendix – which contains the EPNA – "for provisions applicable to contracts or agreements governing terms and conditions of professional service that were negotiated and entered into by a board of education and a recognized professional employees' organization before June 1, 2011." The "Compiler's Notes" to new Tenn. Code Ann. § 49-5-601 of PECCA explain that under Section 4 of PECCA[4] nothing in the Act was to be construed to

[4] Chapter 378, Public Acts 2011, § 4.

abridge or impair a contract entered into prior to June 1, 2011; and that under Section 12 of PECCA[5] the EPNA continues to be applicable to such contracts.

(a) The Tennessee Constitution prohibits retrospective laws and laws that impair contracts.

If the Tennessee Department of Education and TOSS are wrong in their interpretations of these statutory provisions, and if the Board of Education instead is correct that PECCA bans the negotiation of "reopeners" despite the parties contractual commitment to do so by virtue of the suspension of bargaining in Tenn. Code Ann. § 49-5-601(d) of PECCA, then that suspension of bargaining – at least as to "reopeners" pursuant to an existing contract – is unconstitutional.

Article I, Section 20, of the Tennessee Constitution declares:

> **"That no retrospective law, or law impairing the obligations of contracts, shall be made."**

To the extent that the terms of PECCA call for the action the Board has taken here, then PECCA must be declared to be unconstitutional as a retrospective law and a law that impairs contracts.

The Board of Education has a contract with the HCEA, a contract which in Article XXV calls for the parties to engage in negotiation of "reopeners" on an annual basis. That contract remains in effect. Tenn. Code Ann. § 49-5-601(d) of PECCA, meanwhile, declares that "[a]ny and all bargaining being conducted pursuant to the Education Professional Negotiations Act on the effective date of this act shall be suspended indefinitely." This directive in PECCA directly contravenes Article I, Section 20, of the Tennessee Constitution by impairing the obligation of contract that appears in Article XXV of the parties' CBA.

PECCA also is a retrospective law, violating the other component of this constitutional protection. Statutes are presumed to operate prospectively unless the legislature clearly indicates otherwise. *Stewart v. Sewell*, 215 S.W.3d 815, 826 (Tenn. 2007); *Nutt v. Champion*

[5] Chapter 378, Public Acts 2011, § 12.

International Corporation, 980 S.W.2d 365, 368 (Tenn. 1998); *Shell v. State*, 893 S.W.2d 416, 419 (Tenn. 1995); *Kee v. Shelter Ins.*, 852 S.W.2d 226, 228 (Tenn. 1993); *Woods v. TRW, Inc.*, 557 S.W.2d 274, 275 (Tenn. 1977). The prohibition on retrospective laws in Article I, Section 20, of the Tennessee Constitution is a limitation on the General Assembly's exercise of its legislative power. *Estate of Bell v. Shelby County Health Care Corporation*, 318 S.W.3d 823, 836 (Tenn. 2010); *Dupuis v. Hand*, 814 S.W.2d 340, 343 (Tenn. 1991); *Hanover v. Ruch*, 809 S.W.2d 893, 896 (Tenn. 1991). The prohibition does not mean that absolutely no retrospective law shall be made, but it does mean that no retrospective law that impairs the obligation of contracts, or divests or impairs vested rights, shall be made. *Estate of Bell*, 318 S.W.3d at 829; *Ford Motor Co. v. Moulton*, 511 S.W.2d 690, 696 (Tenn. 1974). For purposes of this constitutional prohibition, a "vested right," although difficult to define with precision, is one which it is proper for the state to recognize and protect and of which an individual could not be deprived arbitrarily without injustice. *Doe v. Sundquist*, 2 S.W.3d at 923; *Morris v. Gross*, 572 S.W.2d 902, 907 (Tenn. 1978). Article I, Section 20 prohibits retrospective substantive legal changes which take away or impair vested rights acquired under existing laws or create a new obligation, impose a new duty, or attach a new disability in respect of transactions or considerations already passed. *Estate of Bell*, 318 S.W.3d at 829; *Doe v. Sundquist*, 2 S.W.3d at 923.

Retrospective statutes present problems of unfairness because they can deprive individuals of legitimate expectations and upset settled transactions. *Estate of Bell*, 318 S.W.3d at 836 (citing *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992)). Courts have traditionally opposed retrospective statutes because they tend to create instability and because the legislature can unfairly benefit favored groups or harm disfavored groups more easily with

retrospective statutes than it can with prospective statutes. *Estate of Bell*, 318 S.W.3d at 836.[6] "It is the business of the courts 'to see that the scales of justice be held with an even hand.'" *Estate of Bell*, 318 S.W.3d at 838 (quoting *Officer v. Young*, 13 Tenn. (5 Yer.) 320, 321 (1833)).

The prohibition against retrospective laws is not unique to the Tennessee Constitution. Retrospective statutes have been viewed with disfavor throughout the Nation's history. *Estate of Bell*, 318 S.W.3d at 836 (citing *Eastern Enters. v. Apfel*, 524 U.S. 498, 532-33 (1988)). "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 265 (1994). The principle that the effect of conduct should ordinarily be assessed under the law that existed when the conduct took place "has timeless and universal appeal." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring). The constitutional prohibitions on retrospective laws restrict governmental power by restraining arbitrary and potentially vindictive legislation. *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981). Without such a prohibition, the Legislature's "responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf*, 511 U.S. at 266.[7]

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[6] On June 8, 2011, the Associated Press reported that Tennessee Senator Jack Johnson, the original sponsor of the Senate bill that became PECCA, was reconsidering the provision in PECCA that addresses the use of dues collected through payroll deduction to engage in "political activities." While this provision plainly was intended to harm the disfavored Tennessee Education Association (TEA), the AP reported that Senator Johnson's willingness to reconsider the provision came when he learned that the provision also adversely affects a smaller rival and favored organization, the Professional Educators of Tennessee (PET).

[7] Earlier decisions have suggested that on the question of impairment of contracts, the prohibition on retrospective laws in the Tennessee Constitution is coextensive with prohibition in Article I, § 10 of the United States Constitution. *See, e.g., First Utility Dist. v. Clark*, 834 S.W.2d 283, 287 (1992). More recently, where the retrospective application of a law impaired other types of vested rights and not simply contracts, the Tennessee Supreme Court intimated that Article I, Section 20, of the Tennessee Constitution may provide even greater protection to parties in civil matters than do the various prohibitions on retroactive legislation in the United States Constitution. *Estate of Bell*, 318 S.W.3d at 829.

In determining whether a retrospective statute impairs or destroys vested rights, the most important inquiries are (1) whether the public interest is advanced or retarded, (2) whether the retroactive provision gives effect to or defeats the bona fide intentions or reasonable expectations of affected persons, (3) whether the statute surprises persons who have long relied on a contrary state of the law, and (4) the extent to which the statute appears to be procedural or remedial. None of these factors is dispositive, and there is no precise formula to apply in making this determination. *Estate of Bell*, 318 S.W.3d at 839 n.10; *Doe v. Sundquist*, 2 S.W.3d at 924. More generally the Tennessee Supreme Court recently explained:

> "It is best to keep in mind that the underlying repugnance to the retrospective application of laws is that an act or transaction, to which certain legal effects were ascribed at the time they transpired, should not, without cogent reasons, thereafter be subject to a different set of effects which alter the rights and liabilities of the parties thereto."

Estate of Bell, 318 S.W.3d at 832 (quoting with approval *State ex rel. St. Louis-San Francisco Ry. v. Buder*, 515 S.W.2d 409, 411 (Mo. 1974)).

In this case there are at least two varieties of rights – in addition to the HCEA's contractual right to negotiate "reopeners" – that were vested before PECCA became law and would be impaired by PECCA's retrospective application as proposed by the Board of Education. Those rights include (1) the right of the professional employees in the Hamilton County school system to negotiate terms and conditions of employment through a representative of their choice, and (2) the right of the HCEA to serve as the exclusive representative of all professional employees in Hamilton County for the purpose of negotiating terms and conditions of employment by virtue of its "recognition."

The Legislature in new § 49-5-604(b) of PECCA apparently recognized that recognition was a vested right and declared that PECCA did not "annul or modify any recognition heretofore

entered into between a board of education and a professional employees' organization until the termination of an existing agreement between a local board of education and a professional employees' organization." However, by directing in new § 49-5-601(d) of PECCA that all bargaining pursuant to the EPNA is suspended indefinitely, the Legislature effectively took away the vested right of "recognition" that it purported to preserve. The substance of "recognition" is found in Tenn. Code Ann. § 49-5-606 of the EPNA. Under that statute, "recognition" is the right to act as the "***exclusive*** representative of all the professional employees employed by that board of education ***for the purpose of negotiating***." [emphasis supplied]. Without that exclusivity, and without the ability to negotiate, "recognition" is meaningless.

Consistent with Article I, Section 20, of the Tennessee Constitution, PECCA cannot be applied in the Hamilton County school system while the collective bargaining agreement between the HCEA and the Board remains in place and while the HCEA remains the "recognized" professional employees' organization under the EPNA for Hamilton County professional employees.

(b) The body of PECCA is broader than its caption.

If the Court agrees either that PECCA's passage does not limit the Board of Education's obligation to negotiate "reopeners" or that Tenn. Code Ann. § 49-5-601(d) of PECCA is unconstitutional under Article I, Section 20, of the Tennessee Constitution to the extent it does limit that obligation, then the Court need go no further because the parties' relationship continues to be governed by the CBA and by the EPNA. However, if the Court disagrees with both of the foregoing alternative contentions of the HCEA, then the Court should declare PECCA unconstitutional in its entirety for an entirely different reason.

Article II, Section 17, of the Tennessee Constitution declares that no bill shall become a law which embraces more than one subject, that subject to be expressed in the title; and that all acts which repeal, revive or amend former laws shall recite in their caption, or otherwise, the title or substance of the law repealed, revived or amended. The purpose of this provision is to prevent surprise or fraud upon the Legislature, by means of provision in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted. *Tennessee Municipal League v. Thompson*, 958 S.W.2d 333, 336 (Tenn. 1997). The constitutional provision is intended to prohibit bills containing hidden provisions which legislators and other interested persons might not have fair or appropriate notice of. *Thompson*, 958 S.W.2d at 336; *State ex rel. Blanton v. Durham*, 526 S.W.2d 109, 111 (Tenn. 1975).

Sections 2 and 3 of PECCA address matters outside the EPNA, namely transfers under Tenn. Code Ann. § 49-5-510 and dismissals due to staff reduction under Tenn. Code Ann. § 49-5-511(b), respectively. Section 9 of the PECCA amends Tenn. Code Ann. § 49-2-301(b)(1)(EE), under which the local board of education assigns to the director of schools the responsibility for various personnel decisions. PECCA eliminates the requirement that these various personnel actions be in accordance with "any locally negotiated agreement."

The caption of PECCA describes it as an act to amend Title 49 "relative to the Education Professional Negotiations Act."[8] By repealing the broader statutory requirements that personnel actions be taken in accordance with "any locally negotiated agreement" in Tenn. Code Ann. §§ 49-2-301(b)(1)(EE), 49-5-510, and 49-5-511(b), the Legislature has extended the reach of PECCA beyond its caption.

[8] The word "amend" is sufficiently broad to cover the legislative process of repeal and substitution. *Block Coal & Coke Corp. v. Case*, 246 S.W.2d 52, 53 (Tenn. 1952). The caption of PECCA also mentions amendment of another specific Code section, Tenn. Code Ann § 5-23-107, which is irrelevant to the discussion here.

Other Code sections amended by PECCA referred specifically to agreements under the EPNA. PECCA removed the following from Tenn. Code Ann. § 49-1-201(d)(2):

> "No provisions of subdivision (d)(1) shall be construed to impact **agreements negotiated under the Education Professional Negotiations Act, compiled in chapter 5, part 6 of this title**."

[emphasis supplied]. PECCA removed the following from Tenn. Code Ann. § 49-1-207(g):

> "No provision of this section shall be construed to impact **agreements negotiated under the Education Professional Negotiations Act, compiled in chapter 5, part 6 of this title**."

[emphasis supplied]. The Legislature's repeal of these portions of Tenn. Code Ann. §§ 49-1-201(d)(2) and 49-1-207(g) is consistent with PECCA's caption.

In contrast, Tenn. Code Ann. §§ 49-2-301(b)(1)(EE), 49-5-510, and 49-5-511(b) refer not specifically to agreements negotiated under the EPNA but generally to "any locally negotiated agreement." When interpreting these statutes, it is not the role of the courts to read limitations that the Legislature did not include. When construing a statute, it must be presumed that the legislature purposefully chose each word used in the statute. *State v. Hannah*, 259 S.W.3d 716, 721 (Tenn. 2008). Had the legislature intended in these various statutes to limit the phrase "locally negotiated agreement" to one negotiated pursuant to the EPNA, it would not have included the word "any," and it would have referenced a collective bargaining agreement under the EPNA as it did in other statutes like Tenn. Code Ann. §§ 49-1-201(d)(2) and 49-1-207(g) where its intended limitation was evident.[9]

[9] The statutory references to "any locally negotiated agreement" cannot be construed in a way that renders the word "any" surplusage. *Bowden v. Memphis City Schools Board of Education*, 29 S.W.3d 462, 466 (Tenn. 2000).

While "any locally negotiated agreement" might be an agreement under the EPNA,[10] it might also be an individual employment contract, a differentiated pay plan or other incentive pay program, or now an agreement under PECCA. It could be a grant or award from a local government or foundation or other private organization like those identified in the new Act's § 49-5-608(b)(2). It could be an employment agreement with a teacher to perform coaching duties, a separate agreement that carries enforceable contract rights but that falls outside the EPNA since the teacher is not a professional employee in his coaching duties. *Lawrence County Education Association v. Lawrence County Board of Education*, 244 S.W.3d 302 (Tenn. 2007);[11] *White v. Banks*, 614 S.W.2d 331, 334 (Tenn. 1981).[12]

In construing a statute, the Court must presume that the Legislature intended that each word be given full effect. *Nye v. Bayer Cropscience, Inc.*, 347 S.W.3d 686, 694 (Tenn. 2011); *Lanier v. Rains*, 229 S.W.3d 656, 661 (Tenn. 2007). Unless a statute is ambiguous, the Legislature's intent is determined from the natural and ordinary meaning of the statutory language without any forced or subtle construction that would extend or limit the statute's meaning. *In re Adoption of A.M.H.*, 215 S.W.3d 793, 808 (Tenn. 2007). The Court's search for a statute's purpose begins with the words of the statute, and an unambiguous statute is to be enforced as written with no recourse to the broader statutory scheme, legislative history, historical background, or other external sources of the Legislature's purpose. *Calaway ex rel.*

[10] *See, e.g., Lawrence County Education Association v. Lawrence County Board of Education*, 244 S.W.3d 302, 312 (Tenn. 2007); *Marion County Board of Education v. Marion County Education Association*, 86 S.W.3d 202, 208 (Tenn. Ct. App. 2001). In both of these cases, the particular "locally negotiated agreement" at issue was a collective bargaining agreement.

[11] "[P]rofessional employees who assume duties for which no license is required are governed in that supplemental capacity by year-to-year contracts." *Lawrence County*, 244 S.W.3d at 318.

[12] In *White v. Banks, supra*, the Tennessee Supreme Court held that a teacher with coaching duties does not have tenure as a coach, but he is protected in his position as a coach by whatever contract he has with the board of education to perform coaching duties, and his removal from that coaching assignment is a "transfer" subject to the requirements of Tenn. Code Ann. § 49-5-510.

Calaway v. Schucker, 193 S.W.3d 509, 516 (Tenn. 2005); *In re Conservatorship of Clayton*, 914 S.W.2d 84, 90 (Tenn. Ct. App. 1995). The Courts presume that the Legislature "says in a statute what it means and means in a statute what it says." *Gleaves v. Checker Cap Transit Corp.*, 15 S.W.3d 799, 803 (Tenn. 2000) (quoting *BellSouth Telecommunications, Inc. v. Greer*, 972 S.W.2d 663, 673 (Tenn. Ct. App. 1997)).

PECCA's "severability" provision cannot save it from this constitutional infirmity under Article II, Section 17 of the Tennessee Constitution. If an act embraces more than one subject, or if the title does not express the subject of the act, the entire act is unconstitutional and invalid. *Thompson*, 958 S.W.2d at 336.[13] The result is that PECCA must be declared unconstitutional in its entirety, and the Act that it purported to repeal – the EPNA – remains in effect and governs the rights and obligations of the parties in this action. *Miller v. State*, 584 S.W.2d at 761; *State v. Dixon*, 530 S.W.2d at 74.

4. The public interest favors an injunction.

The duty of the Board of Education to negotiate in good faith with the HCEA is a part of the fabric of Tennessee public policy as expressed by the General Assembly in the EPNA, which remains the controlling statutory scheme in Hamilton County while the CBA remains in effect. Tenn. Code Ann. § 49-5-601(b)(2) of the EPNA explains:

> "Boards of education and their professional employees have an obligation to the public to exert their full and continuing efforts to achieve the highest possible education standards in the institutions which they serve. This requires establishment and maintenance of an educational climate and working environment which will attract and retain a highly qualified professional staff and stimulate optimum performance by such staff."

Tenn. Code Ann. § 49-5-601(b)(3) of the EPNA further explains:

[13] This result, disregarding severability provisions like the one the Legislature inserted in Section 13 of PECCA, makes perfect sense given the purpose of Article II, Section 17, of the Tennessee Constitution.

> "Experience has shown that boards of education and their professional employees can best reach these objectives if each utilizes the ability, experience, and judgment of the other in formulating policies and making decisions that involve terms and conditions of professional service and other matters of mutual concern. It is the purpose and policy of this part . . . to recognize the rights of professional employees of boards of education, to form, join, and assist professional employee organizations to meet, confer, consult and negotiate with boards of education over matters relating to terms and conditions of professional service and other matters of mutual concern through representatives of their own choosing, to engage in other activities for the purposes of establishing, maintaining, protecting and improving educational standards, and to establish procedures which will facilitate and encourage amicable settlements of disputes."

The public interest also strongly favors the enforcement of contracts. The principle of freedom of contract is "rooted in the notion that it is in the public interest to recognize that individuals have broad powers to order their own affairs by making legally enforceable promises." *Baugh v. Novak*, 340 S.W.3d 372, 382 (Tenn. 2011) (citations omitted). The fact that our State's founders saw fit to include in our Tennessee Constitution a prohibition on legislation that impairs the obligations of contracts is strong evidence of the public interest in the enforcement of contracts. The public interest favors compliance by the Board with its contractual obligation, under Article XXV of the collective bargaining agreement, to negotiate in good faith about "reopeners."

CONCLUSION

PECCA does not provide the Board with a free pass to disregard its contractual obligations under the collective bargaining agreement or its statutory obligations under the EPNA. If it does, then PECCA is unconstitutional under Article I, Section 20 of the Tennessee Constitution. PECCA suffers from the additional constitutional infirmity that it is broader than its caption, contrary to Article II, Section 17 of the Tennessee Constitution. An unconstitutional act designed to supersede an existing law does not repeal or change the former act but leaves it in

full force and effect. *Miller v. State*, 584 S.W.2d 758, 761 (Tenn. 1979); *State v. Dixon*, 530 S.W.2d 73, 74 (Tenn. 1975).

Either by virtue of the statutory construction of PECCA adopted by the Tennessee Department of Education and TOSS and called for in the Compiler's Notes to Tenn. Code Ann. § 49-5-601 or by application of constitutional limitations on any contrary statutory construction of PECCA, the EPNA continues in full force and effect and controls the issues in this case.

The HCEA respectfully requests that the Court enter an Order that preliminarily enjoins the Board of Education from continuing in its refusal to negotiate "reopeners" with the HCEA.

Respectfully submitted,

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Franklin, Tennessee 37064
615-790-6610

Attorneys for Plaintiff, Hamilton County Education Association

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Application for Preliminary Injunction has been placed in the United States Mail, postage prepaid to D. Scott Bennett, 801 Broad Street, Third Floor, Pioneer Building, Chattanooga, Tennessee 37402, attorney for the Defendant, this 8th day of March, 2012.

Richard L. Colbert

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TEA Legal Services

February 10, 2012

Ms. Tina Rose Camba
Staff Attorney
TEA Legal Services Division
801 Second Avenue North
Nashville, TN 37201-1099

Re: Hamilton County Education Association

Dear Tina:

Thank you for your letter of February 2, 2012, in which you ask on behalf of the Hamilton County Education Association that the Hamilton County Department of Education undertake a new round of negotiations pursuant to the reopener clauses of their existing Memorandum of Agreement. As we have discussed previously, however, I do not believe that the Hamilton County Department of Education is authorized to conduct any such negotiations or to revise the current Memorandum of Agreement.

I base this conclusion upon the express language of the Professional Educators Collaborative Conferencing Act (PECCA), Section 1 of which has amended *T.C.A.* § 49-5-601(d) to provide that "any and all bargaining being conducted pursuant to the Education Professional Negotiations Act on the effective date of this Act shall be suspended indefinitely." Moreover, Section 1 of PECCA expressly repeals the Education Professionals Negotiation Act. Since the EPNA was in derogation of the common law, its repeal has left local boards with no legal authority to negotiate, much less to ratify any negotiated agreement.

While Section 4 of PECCA provides that "nothing in this Act shall be construed to abridge or impair the contract or agreement governing the terms and conditions of professionals service entered into by a board of education…before the effective date of this Act," it does not follow *a fortiori* that the General Assembly intended to preserve a local board's ability to ratify any agreement that an administration and an association might negotiate through a reopener clause. Since local boards have never had to agree

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under the EPNA, reopener clauses are nothing more than "an agreement to agree" to which the law gives no substantive recognition. With the repeal of the EPNA, these clauses are essentially orphans of the legislative process.

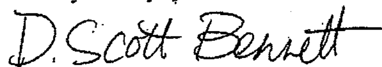
The language of Section 12 strengthens my conclusion. This section provides that the Code Commission should keep the text of the EPNA in the Appendix of Title 49 "for the sole purpose of providing a readily available reference for those affected by such contracts or agreements until the time that all contracts or agreements negotiated under the Act have expired." The General Assembly referred to "contracts or agreements" in the sense that those contracts and agreements *already exist*. It does not envision new contracts or agreements, which is exactly what the HCEA would have the Board to adopt – some new contract or agreement based upon the issues HCEA wishes to negotiate.

Without question, the General Assembly's adoption of PECCA has forced boards of education to consider the rights of employees who do not belong to their local associations. If the Hamilton County Board of Education were to enter into a new agreement with the Hamilton County Education Association under present circumstances, and if I am correct that the Board no longer has the authority to ratify any such agreement, then employees who are not members of the Association would have a legal claim against the Board of Education for its having altered the terms and conditions of professional service that were otherwise fixed upon the repeal of the EPNA.

If HCEA believes this is a critical issue, then I will gladly ask one of our local legislators to seek an attorney-general's opinion to provide us with guidance. Personally, I would prefer clarity to confusion, so please advise if this is a route you wish me to pursue.

I look forward to working with you to resolve this matter.

Very truly yours,



D. SCOTT BENNETT
For the Firm

DSB/rg

Cc: Mr. Rick Smith

Professional Educators Collaborative Conferencing Act of 2011

Frequently Asked Questions

On June 1, 2011, Governor Haslam signed into law the Professional Educators Collaborative Conferencing Act (PECCA). The PECCA replaces the Education Professional Negotiations Act (EPNA), effectively substituting collaborative conferencing for Tennessee's traditional collective bargaining process. While there are some similarities between the two laws, the PECCA is substantially different from the EPNA, creating new avenues of communication between teachers and school boards and stressing inclusiveness of all professional employees' organizations.

1. **The board is in the second year of a three-year collective bargaining agreement with the recognized professional employees' association. Does the new law void the agreement?**

   No. The PECCA replaces the EPNA; however, the new law does not terminate an existing agreement. Once any existing agreement has expired, the provisions of the new law govern any future agreements between the board and its professional employees relative to certain terms and conditions of employment.

2. **Our current agreement contains re-opener language relative to insurance benefits. Does the PECCA prohibition against bargaining pertain to discussions on re-opener issues?**

   No. Because re-opener language is contained in your existing contract and because existing contracts remain valid, boards and the recognized professional employees' organizations that are parties to the contract must continue to abide by all provisions and negotiate re-opener items.

3. **The board and the recognized professional employees' association are currently negotiating a new agreement pursuant to the EPNA. Should negotiations continue?**

   No. As of June 1, 2011, the effective date of the PECCA, all bargaining on a new contract pursuant to the EPNA must cease and no new collective bargaining agreement may be ratified.

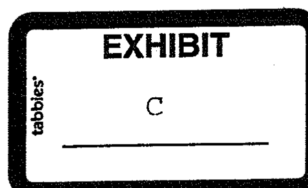
4. **What is collaborative conferencing?**

   Pursuant to the PECCA, collaborative conferencing is the process by which the chair of the board of education and the board's professional employees, or representatives designated by either party, meet to confer, consult, discuss and exchange information, opinions and proposals on matters relating to terms and conditions of professional service using the principles and techniques of interest-based collaborative problem-solving.

5. **What is interest-based collaborative problem-solving?**

   Interest-based collaborative problem solving is not defined in the PECCA; however, it is likely the General Assembly modeled the communication method after interest-based bargaining – a process by which the parties discuss areas of concern in an open, non-adversarial manner. To assist school districts and employees with this process, the PECCA directs the Tennessee Organization of School Superintendents (TOSS) to develop a training program in the principles and techniques of interest-based collaborative problem-solving by January 1, 2012.

Tennessee Department of Education, June 17, 2011.



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6. **Our district never participated in collective bargaining. Are all districts required to participate in collaborative conferencing?**

   No. Collaborative conferencing is required only if the professional employees vote to conduct collaborative conferencing with the board. In other words, just like the EPNA, the PECCA does not force participation by the professional employees.

7. **How is collaborative conferencing initiated?**

   Upon submission of a written request to conduct collaborative conferencing by 15 percent or more of the professional employees in the district, the board must establish a special question committee for the purpose of conducting a confidential poll of eligible employees to determine if a majority of the employees desire to participate in collaborative conferencing. The poll will contain two questions. First, eligible employees will be asked the following:

   > *Shall the professional employees of this LEA undertake collaborative conferencing with the board of education?*

   The employee will answer "Yes" or "No".

   Second, the employee will be asked to indicate which of the professional employees' organizations having a presence in the LEA he or she prefers to represent the employee in collaborative conferencing. This second question will include an option for a response of "Unaffiliated" in the event the employee has no preference. If the employee answers "No" to the first question, the second question will additionally contain an option for the response of "None of the above." This "None of the above" response will indicate that the employee does not want to be represented in collaborative conferencing even if such conferencing is approved and takes place.

8. **Who serves on the special question committee and how are the members appointed?**

   The board of education appoints an equal number of professional employees and board members to serve on the committee.

9. **Do all licensed employees vote in the collaborative conferencing poll and, if approved, subsequently participate in collaborative conferencing?**

   No. Only "professional employees" as defined by the PECCA participate in the process. Unlike the EPNA, which included all licensed employees within the definition of "professional employee" and therefore included all such employees within the same negotiating unit, the PECCA excludes members of the "management team." These individuals are defined in the new law as employees who devote a majority of their time to system-wide areas of professional management, fiscal affairs or general management. Specifically, principals, assistant principals, supervisors and others whose principal responsibilities are administration rather than teaching are included within the definition of management team employees, meaning they excluded from the teachers' collaborative conferencing unit.

10. Who does the board collaborate with?

If a majority of the eligible employees vote to support collaborative conferencing, the board will collaborate with representatives of those professional employees' organizations that receive 15 percent or more support pursuant to the second question contained in the confidential poll. If 15 percent or more indicate a preference for "Unaffiliated," then the special question committee will appoint a person or persons to serve as an unaffiliated representative. For the purposes of particular representation, the option of "None of the above" is not considered a professional employees' organization.

11. Does this mean that the board will no longer negotiate solely with one "recognized" professional employees' association?

Correct, provided more than one professional employees' organization receives at least 15 percent or more of the vote relative to the second question contained in the confidential poll. Unlike the EPNA, which provided for exclusive recognition of a professional employees' organization, the PECCA is inclusive of all professional employees' organizations that receive the specified minimum level of support (15 percent) through the voting process.

12. Who represents the board in collaborative conferencing?

The board appoints at least seven but no more than 11 persons to serve as "management personnel." These individuals represent the board in the collaborative conferencing process.

13. How many individuals represent the professional employees in collaborative conferencing?

The professional employees are entitled to the same number of representatives as the number of management personnel selected by the board to represent it in the process.

14. How is representation for the professional employees determined?

Representation is determined according to each employees' organization's proportional share of the responses to the confidential poll and limited only to those organizations receiving at least 15 percent of the vote.

15. If the category of "Unaffiliated" is entitled to representation, who chooses the representative(s)?

The special question committee will appoint the person or persons to serve as unaffiliated representatives.

16. When does the district have to begin collaborative conferencing?

Collaborative conferencing cannot take place until the LEA implements the training program in the principles of interest-based collaborative problem solving developed by TOSS (See Question 5). Such training must be implemented by the LEA by July 1, 2012. Therefore, it's possible the employees could initiate an election for collaborative conferencing and vote for such conferencing as early as October of 2011. However, until the training program has been developed by TOSS and implemented by the LEA, collaborative conferencing may not take place.

17. What terms and conditions of employment must be discussed in collaborative conferencing?

The following items are required for discussion:

1) Salaries or wages;
2) Grievance procedures;
3) Insurance;
4) Fringe benefits;
5) Working conditions, except those working conditions prescribed by federal law, state law, private act, municipal charter or rules and regulations of the state board of education, the department of education or any other department or agency of state or local government;
6) Leave; and
7) Payroll deductions, except such deductions for political activities.

18. Are there certain terms and conditions that are prohibited from being discussed as part of collaborative conferencing?

Yes. The following items are prohibited:

1) Differentiated pay plans or other incentive compensation programs tied to performance that exceed expectations or that aid in hiring and retaining highly qualified teachers for hard-to-staff schools and subject areas;
2) Expenditure of grants or awards from federal, state or local governments; foundations; or other private organizations that are expressly designated for specific purposes;
3) Evaluation of professional employees;
4) Staffing decisions and policies relative to innovative educational programs under T.C.A. 49-1-207; innovative high school programs under Title 49, Chapter 15; virtual education programs; and other innovative schools or school districts that may be enacted by the General Assembly;
5) All personnel decisions concerning assignment of professional employees, including, but not limited to, filling of vacancies, assignments to specific schools, positions, professional duties, transfers, layoffs, reductions in force and recall. In addition, no agreement may include provisions that require personnel decisions to be determined on the basis of tenure, seniority or length of service; and
6) Payroll deductions for political activities.

19. How are agreements between the professional employees and the board during collaborative conferencing confirmed and ratified?

If agreement is reached, the parties jointly prepare a memorandum of understanding that is valid for a period not to exceed three years. The memorandum of understanding is then presented to the board of education as an item on the agenda of a regular or special called board meeting.

20. Is the memorandum presented to the professional employees or their organizations for approval?

No. Once the memorandum has been agreed to by the parties involved in the collaborative conferencing process, only the board of education must approve its adoption.

21. **Is the memorandum of understanding binding?**

Yes. If the board of education approves the memorandum of understanding, the terms and conditions contained therein are binding.

22. **What if an agreement cannot be reached on certain terms and conditions through the collaborative conferencing process?**

Absent an agreement and memorandum of understanding memorializing such agreement, the board of education has the authority to address any terms and conditions through board policy. In other words, while the board is required to participate in conferencing if the professional employees vote to participate, nothing in the PECCA requires the board to agree on terms or conditions or enter into a memorandum of understanding if agreement has not been reached.

This is one of the primary differences between the PECCA and the EPNA. The EPNA prevented the board from implementing policy relative to a mandatory subject of negotiations until either an agreement was reached or the two parties had met a legal determination of impasse. Many legal disputes relative to the EPNA revolved around the issue of whether a true impasse had been met and whether the board's subsequent implementation of policy translated into bad faith bargaining. The PECCA removes the confusion and legal implications of implementing policy after impasse by making it clear the board may address terms and conditions of employment through policy if an agreement has not or cannot be reached.

23. **Are teachers permitted to strike under the new law?**

No. Just as with the EPNA, the PECCA prohibits teachers from engaging in a strike.

24. **Are individual teachers required to be represented by a professional employees' organization relative to terms and conditions of employment?**

No. In fact, the PECCA specifically permits each professional employee to represent himself or herself in the types of discussions authorized by the law. In addition, the director of schools is permitted to communicate with professional employees concerning any subject relative to the operation of the school system through any means he or she chooses.

25. **Is technical assistance available to school districts relative to the PECCA and its requirements?**

Yes. The Tennessee Department of Education is available to assist districts with questions and concerns. In addition, we encourage districts to consult with their local board attorneys and professional organizations for clarification and advice.

These FAQs will continue to be updated as we communicate with districts and receive additional questions and insight. For more information, contact Stephen Smith, Assistant Commissioner, Legislation & External Affairs, at 615-741-1111 or Stephen.M.Smith@tn.gov.