IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

TONI JONES, individually and on behalf of those similarly situated, **Appellant,**	)	
v.	)	**Case No. M2016-00483-COA-R3-CV**
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, **Appellee.**	)	

Appeal from the Final Judgment of Chancery Court
For Davidson County, Case No. 15-1475-III

BRIEF OF THE APPELLANT

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

This case was brought pursuant to 42 U.S.C. § 1983 to vindicate deprivations of Plaintiff's constitutional right to a free public education by the Defendant. This case was dismissed pursuant to Tenn. R. Civ. P. 12.02(6) upon Appellee Metropolitan Government of Nashville and Davidson County's ("Metro") Motion to Dismiss for Failure to State a Claim upon which relief could be granted. Ms. Jones had filed a Motion for Summary Judgment that was not heard in light of this ruling.

The Chancellor stated her ruling as follows:

> Plaintiff filed her lawsuit on December 7, 2015, alleging violations of both her procedural and substantive due process rights when she was removed from her Algebra I class and deprived of a teacher during the 2013-2014 school year prior to the end of course exam. The Metropolitan Government moved to dismiss the Complaint under Tenn. R. Civ. P. 12.02(6) asserting that the complaint failed to allege a protected property interest in remaining in a particular class. On February 12, 2016, the Court heard the Metropolitan Government's Motion to Dismiss.
>
> Based on the authority cited by the Metropolitan Government the allegations of the complaint do not rise to the level of a constitutional property right. The property interest at stake here is the right to a public education, not the right to particular course-placement, or other aspects of an education that the student believes to be the most appropriate. e.g. *Goss v. Lopez*, 419 U.S. 565, 579 (1975); *Gallagher v. Pontiac School District.*, 807 F.2d 75, 78-79 (6th Cir. 1986); *Stevenson v. Blytheville School District*, 800 F.3d 955, 968 (8th Cir. 2015). The Metropolitan Government's motion to dismiss is hereby granted, and costs are taxed to Plaintiff, for which execution may issue if necessary.
> (T.R. 48 - 49).

Ms. Jones timely appealed to this court.

STATEMENT OF FACTS

Because this case was decided on a Rule 12 Motion the facts are the allegations of the Complaint. These, for purposes of a Rule 12 Motion, are to be taken as true. [Citations infra]

Ms. Jones, prior to the argument of Metro's Rule 12 Motion, moved for Summary Judgment pursuant to Tenn. R. Civ. P. 56. That motion was not discussed or decided, however, in light of the Court's ruling that allegations that her removal from a required class and deprivation of a teacher did not state a claim as a matter of law.

Ms. Jones alleged that in the 2013 – 2014 school year she was required by law to attend Pearl-Cohn Comprehensive High School (¶ 6) and was enrolled in Algebra I (¶ 7, T.R. 2). She was required to take practice tests known as "Discovery Education Assessments." Metro viewed these tests as predictive of performance on the End of Course Exam. ("EOC"). (¶ 7, T.R. 2, 3).

Ms. Jones was passing Algebra I. Metro did not inform her of any consequences of these practice exams or that low scores could lead to her removal from class and placement in a program without direct teacher instruction.

EOC scores were used to measure success within individual Metro Public Schools. The removal of pupils not expected to score well served artificially to inflate EOC score averages based on artificially inflated percentiles of passing students. (¶ 9, T.R. 3). Because teachers and administrators were instructed by Metro's central office to remove students who might perform poorly on these tests, these actions were taken pursuant to an official policy or practice. (¶ 10, T.R. 3). The purpose of removing Ms. Jones from her class and depriving her of an Algebra teacher and the opportunity to take the required final exam was purely cynical: " ... so that Metro public schools could artificially inflate their end of course scores based on the fraudulently increased percentile of passing students." ¶9 (T.R. 3)

The removal of Ms. Jones and others similarly situated deprived her the opportunity to take the graded EOC exam and therefore meant she could not be promoted. (¶ 9, T.R.3). The purported "remedial class" had no teacher and therefore no instruction. (¶ 7, 11, T.R.3).

The Complaint Specifically Alleged:

> " ... Plaintiff was placed in a remedial 'credit recovery' program, and instructed to complete a computer-based 'A+ program **without any direct instruction from an actual teacher; thus depriving her of the education she was entitled to receive."** (¶ 11, T.R. 3).

Some of the additional deleterious consequences of this arbitrary action were that in the following academic year she was placed in Geometry for which she was unprepared because she had not been allowed to complete Algebra I. Geometry did not require an EOC. She was not removed from this course – which she was failing – or given any sort of remedial assistance – despite having been removed from Algebra I at a time in which she was *passing* the course. (¶ 12, T.R. 3, 4).

Neither Ms. Jones nor her mother were given any notice or explanation, nor allowed any discussion regarding the removal. She had no opportunity to appeal the decision. (¶ 11, T.R. 3).

STANDARD OF REVIEW

A defendant who files a motion to dismiss for failure to state a claim admits the truth of all the relevant and material allegations contained in the Complaint, but asserts that the allegations fail to establish a cause of action. In considering such a motion, the Court must construe the Complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences drawn therefrom. Tenn. R. Civ. P. 12.02(6); *Webb v. Nashville Area Habitat for Humanity*, 346 S.W. 3d 422 (Tenn. 2011).

This Court will review the trial court's legal conclusion *de novo*. *Id.*; *Lourcey v. Estate of Scarlett*, 146 S.W. 3d 48 (Tenn. 2004)..

ISSUES PRESENTED

1. ***Whether the right to a teacher is inherently part of a child's right to a free public education under the Tennessee and Federal Constitutions?***

2. ***Whether a Complaint that alleges that a child has been arbitrarily removed from a required course which she was passing and denied a teacher fails as a matter of law to state a claim under Rule 12.02(6), Tenn. R. Civ. P.?***

ARGUMENT

I. TONI JONES WAS DEPRIVED OF HER RIGHT TO A FREE PUBLIC EDUCATION BECAUSE SHE WAS ARBITRARILY REMOVED FROM CLASS AND DENIED A TEACHER.

A. Tennessee students have a constitutionally protected right to a free public education.

The Metropolitan Government conceded in oral argument and in its brief that Tennessee pupils have a property interest in a free public education in Tennessee. The manner in which this right has been expressed in case law is nonetheless useful to review.

This property interest is derived from Article 11, Section 12 of the Constitution of the State of Tennessee, which provides:

> "The State of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support, and eligibility standards of a system of free public schools. The General Assembly may establish in support such post-secondary educational institutions, including public institutions of higher learning, as it determines."

This section was essential to the landmark decision of the Supreme Court of Tennessee in *Tennessee Small School Systems, et al., v. McWherter*, 851 S.W. 2d 139 (Tenn. 1993) ("Small Schools I"), a case which originated in the Chancery Court for Davidson County. This case concerned disparities arising from funding inequities among rural and urban schools. The Defendants in *Small Schools I* denied that the Tennessee Constitution guaranteed "an education that is exactly or substantially the same education received by children in other counties," and argued that the education clause contained, "no enforceable qualitative standard for assessing the quality of education." *Small Schools I, supra*, at 148. The Supreme Court exhaustively reviewed the law of our sister states on this issue as well as the constitutional history of public education in Tennessee. The Defendant's argument, the Court wrote, "overlooks the plain meaning of Article 11, Section 12. That provision expressly recognizes the *inherent value* of education and then requires the General Assembly to provide for the maintenance, support, and

eligibility standards of a system of free public schools." The Court observed that the Constitution "speaks directly to a right of inherent value, education." *Small Schools I, 851 S.W.2d* at 150.

The Court adopted the definition of "education" found in the Random House Dictionary of the English Language: "The act or process of imparting or acquiring general knowledge, developing the powers of reasoning and judgment, and generally preparing oneself or others intellectually for mature life." *Id.* Adding "modifiers," the Court held, "would detract from the eloquence and certainty of the constitutional mandate - that the General Assembly shall maintain and support a system of free public schools that provides, at least, the *opportunity* to acquire general knowledge, develop the powers of reasoning and judgment, and generally *prepare* students intellectually for mature life." This standard, the Court held, "is an enforceable standard for assessing the educational *opportunities* provided in the several districts throughout the state." *Small Schools I,* supra, at 150, 151. (Emphasis added).

The Court described the value of education "to each person and to society" as "immeasurably great." *Id.*

Our Supreme Court quoted from *Brown v. Board of Education*, 347 U.S. 483, 493 (1954):

> "It is doubtful that any child may reasonably be expected to succeed in life if he is denied the *opportunity of an education.* Such an *opportunity*, where the State has undertaken to provide it, is a right which must be made available to all on equal terms."

The Court quoted as well from *Leeper v. State*, 103 Tenn. 500, 515, 53 S.W. 962, 965 (Tenn. 1899) with this declaration:

> "The kind and quality of instruction given to the young is as important as the food furnished the people, and the public school is, in the highest sense, a public institution..." *Id.*

The arbitrary deprivation of a right to public education in Tennessee triggers due process rights. In *Heyne v. Metropolitan Nashville Board of Public Education*, 280 S.W. 3d 715 (Tenn. 2012), the Tennessee Supreme Court acknowledged a fundamental right of pupils of an opportunity to be educated, in the context of student discipline. "Due process," the Court found, "entitles students facing discipline for infractions of school rules that could result in a suspension greater than 10 days to a hearing 'at a meaningful time and in a meaningful manner.'" See *Matthews v. Eldridge* 424 US at 333, 96 (Tenn. 1893); *Heyne* at 734. Toni Jones was not disciplined. Her only offense was performance on tests for which she could receive no credit.

Ms. Jones was arbitrarily deprived of classroom instruction afforded other children without any opportunity to be heard. These were the clear and well-established fundamental rights of Toni Jones the day she was pulled from her class without explanation. Her claim may be defeated only by characterizing the removal as something other than what it is.

Although Ms. Jones had no constitutional right to pass the test or to be promoted, she had a well-established right to be trained by a certified and qualified teacher of Algebra and to have afforded to her the *opportunity* to learn, and to have an *opportunity* to pass the course and be promoted.

The deprivation of this right is neither attenuated nor abstract.

The foregoing is drawn directly from Plaintiff's Memorandum in Response to Defendant's Motion to Dismiss [and in support of Motion for Summary Judgment]. This was the essence of Plaintiff's argument at the hearing of the motion.

The facts submitted in support of Ms. Jones' Motion for Summary Judgment demonstrated that the allegations of the Complaint concerning the harm caused were not hypothetical. They represent the factual basis upon which the Complaint was prepared.

To deprive a student of a teacher and an opportunity to complete a required course is to deprive her of an education. Having alleged as much, Ms. Jones should have been entitled to prove her case, which could readily have been done.

B. The Motion of the Metropolitan Government

In its Motion to Dismiss and Memorandum in Support (T.R. 8-13) Metro argued that Ms. Jones did "not have a constitutionally protected interest in being promoted to the next grade level." (T.R. 9) Because she had no right to promotion and remained in the school system, Metro argued, she had no justiciable claim." (T.R. 12)

It is therefore clear that the deprivation of a teacher was not even addressed in Metro's own motion. The loss of Ms. Jones' *opportunity* to be promoted resulted from being deprived the opportunity to complete the teacher-led course. These are *consequences* of her removal, alleged to demonstrate harm flowed from the Constitutional deprivation.

II. THE RIGHT TO A PUBLIC EDUCATION INCLUDES THE RIGHT TO A TEACHER.

Because the Chancellor dismissed this case pursuant to Rule 12.02(6); and, because Ms. Jones had alleged that she had been removed from a required course class and placed in a purported remedial program that lacked actual teacher instruction, (¶s 7, 11 T.R. 2, 3), the Chancellor has found as a matter of law that the deprivation of a teacher is not the deprivation of an education. This holding is inconsistent with the law of Tennessee and the United States and is a direct affront to the honored profession of teaching.

The right to an education inevitably implies the right to a teacher. Whatever our recollections of school and college, whether of success or of failure, they are inevitably and inextricably connected to our teachers and professors. No one who reads these words can fail to

recall those teachers who influenced us the most. We have been fundamentally shaped by those who have taught us.

The Small Schools Cases

This concept has never been seriously questioned. Three cases involving the finding of public education are referred to as "*Small Schools I, II*, and *III*." The first, *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139 (Tenn. 1993), *supra*, establishes the right to a free public education as a constitutionally protected property right under both the Tennessee and Federal Constitutions.

Small Schools II and *III* specifically addressed the requirement of teacher pay equality as a prerequisite to the constitutionality of state funding for education. In *Small Schools II*, *Tennessee Small School Systems v. McWherter*, 894 S.W.2d 734 (Tenn.1995), the Court rejected the argument that "increasing and equalizing teacher salaries was not a component of a basic education," and it "does not offset student performance."

"Teachers," the Court found, "**are the most important component of any education plan or system**." *Id.* The case was remanded so that the General Assembly could remedy this constitutional defect in the educational funding plan.

The legislature's failure in this task led to *"Small Schools III," Tennessee Small School Systems v. McWherter,* 91 S.W. 3d 232 (Tenn. 2002). The Court characterized its holding in *Small Schools II, inter alia*, as follows:

> " ... for it is undeniable that ***teachers are the most important component*** of any effective education plan ...,"

Small Schools III, 91 S.W. 3d at 240.

Because teacher salaries are an indispensable part of any constitutional funding plan "... no part of that plan can be compromised without destroying the integrity and effectiveness of the entire plan." *Id.*

The Court made clear its mandate: The system of public education must afford substantially equal educational opportunities to all students. This included the equalization of teacher pay. "Until that mandate is met," the Court said, "the inherent value of education will not be fully realized by all students in the state, regardless of where they live and attend school, and the students of Tennessee will continue to be unconstitutionally denied substantially equal educational opportunities." *Small Schools III,* 91 S.W.2d at 241.

The Court further said that "the objective of teacher salary equalization is to provide substantially equal opportunities *for students, not teachers.*" *Small Schools III,* 91 S.W. 3d at 243. The failure to equalize teacher salaries, the Court expressly held, failed 'to satisfy the State's constitutional obligation to formulate and maintain a system of public education that affords a substantially equal educational opportunity to all students." *Id.*

These cases stand for the propositions that Tennessee school children have a constitutional right to a free education; that inequality in teacher pay deprives them of this right by depriving the pupils of one school district the quality of teaching in others; and, that teaching is the most important single right of the student.

The Metropolitan Government misconstrued Ms. Jones' Complaint as claiming a constitutional right to a promotion. The Court misconstrued the case as claiming a property interest in remaining in a particular class. Toni Jones was, without notice to her or her mother, removed from a *required* class she was passing and placed in front of a computer screen without a teacher. This removal deprived her of an education. Her failure to complete the course and

thereby to have been promoted were the consequences of Metro's arbitrary decision to cease educating this child for its own selfish and cynical purposes.

This misapprehension is obvious in the cases cited by the Chancellor, none of which are germane to this claim.

Goss v. Lopez, 419 U.S. 565 (1995) holds that high school students have a due process right to a hearing prior to a ten-day suspension.

Gallagher v. Pontiac School District; 807 F.2d 745 (6th Cir. 1986) concerned the right to a free and appropriate public education of a handicapped student under the Education of the Handicapped Act, 20 U.S.C. §§ 1412, 1412 (2) (A-E). Because the Act did not become effective until October 1, 1977, and the student had been enrolled prior to that date, the statute did not apply. The student participated in the classes but did not fully benefit from them due to deafness. The Court found this not to have been a constitutional deprivation.

Gallagher was probably cited because it contains dictum observing that 42 U.S.C. § 1983 was not intended as a vehicle to challenge errors in the exercise of discretion or conflicts in the daily operation of school districts. That is not the claim stated by Ms. Jones in her complaint. Ms. Jones alleges and the Chancellor was compelled to accept as true for Rule 12 purposes that she was removed from a required course, denied the opportunity to take its End of Course exam and denied a teacher in order to allow the school systems to manipulate average student performance scores, and, that this choice was cynical and self-serving, in furtherance of personal and institutional ambition.

Gallagher has nothing to teach in this case.

Stevenson v. Blytheville School District, 800 F. 3d 955 (8th Cir. 2015) merely held that a school district's decision to opt out of the Arkansas Public School Choice Act did not violate the

students' equal protection rights, as the pupils remained entitled to choose a private school and school choice was not racially mandated. The point of Ms. Jones' complaint is that she was excluded from a required course, taught by a classroom teacher and was thereby deprived of her right to a free public education.

The Chancellor seems to have regarded what was done to Ms. Jones as akin to assigning her to classes based on genuine educational considerations. The Complaint alleges that the removal had nothing to do with her wellbeing, or placement in a class better suited to her needs. This decision was made for the benefit of those who might profit from better averages.

CONCLUSION

In order to affirm this decision, this Court must find that the clearly established right to a free public education in Tennessee does not include the right to a teacher and the opportunity to complete a course in which she had already been placed. If this ruling is affirmed, the public schools of Davidson County would be at liberty to summarily remove all pupils at economically disadvantaged schools and to place them all in front of laptops in the school gymnasium.

The dismissal of the Complaint should be reversed and the matter remanded to consider Plaintiff's Motion of Summary Judgment.

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I hereby certify that on this 8th day of July, 2016, a true and correct copy of the foregoing was sent via United States Mail, postage prepaid to:

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IN THE TENNESSEE COURT OF APPEALS
MIDDLE SECTION

TONI JONES	)	
	)	
Appellant,	)	
v.	)	
THE METROPOLITAN GOVERNMENT OF NASHVILLE & DAVIDSON COUNTY,	)	M2016-00483-COA-R3-CV
	)	
Appellee,	)	Appeal from the Final Judgment of the Chancery Court for Davidson County, Case No. 15-1475-III

THE METROPOLITAN GOVERNMENT'S APPELLEE BRIEF

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ORAL ARGUMENT REQUESTED

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ISSUE PRESENTED FOR REVIEW

Was the Trial Court correct in ruling that a student's property interest in a public education does not extend to an interest in a particular course placement or the ability to direct a school system to provide what he or she determines is the most appropriate education?

STATEMENT OF THE CASE AND FACTS

During the 2013-2014 school year Ms. Jones was enrolled in Pearl-Cohn Comprehensive High School, which is a school run by Metropolitan Nashville Public Schools. TR. 2, Compl. ¶ 7.[1] According to the Complaint, as part of her freshman curriculum, Ms. Jones took an Algebra I class. *Id.* During the second semester, prior to the end of course exams, MNPS reassigned Ms. Jones from the Algebra I class and placed her in the A+ remedial credit recovery program. *Id.* at 3, ¶ 8, 11. The A+ classes are computer based with a teacher supervising the students as they work independently. *Id.* at 3, ¶ 11. Ms. Jones does not allege that she was re-assigned from any of her other classes.

On December 7, 2015, Ms. Jones filed suit in the Chancery Court of Davidson County alleging a violation of her substantive and procedural due process rights based on the conduct above. *Id.* at 1- 6.

Thereafter, the Metropolitan Government filed its Motion to Dismiss under TENN. R. CIV. P. 12.02(6) asserting that Ms. Jones had not alleged a property interest protected by the Due Process Clause of the Fourteenth Amendment. *Id.* at 8-13.

The Trial Court granted the Metropolitan Government's motion, stating:

> [T]he allegations of the complaint do not rise to the level of a constitutional property right. The property interest at stake here is the right to a public education, not the right to particular course-placement, or other aspects of an education that the student believes to be the most appropriate.

Id. at 48-49. Ms. Jones timely appealed that ruling. *Id.* at 50.

[1] The record in this case consists of one technical record ("TR").

SUMMARY OF ARGUMENT

A student has a property interest in receiving an education. However, a student does not have a constitutional right to a particular course placement or to mandate what he or she believes to be the most appropriate education. Ms. Jones brings this action under 42 U.S.C. §1983 claiming that her federal constitutional rights were violated by being removed from her Algebra I class and placed in a remedial class for the remainder of the school year, which she claims ultimately led to her not being promoted to the next grade level after the 2013-2014 school year. Ms. Jones does *not* allege that she was removed from the Metro school system, or permanently denied an opportunity to receive an education. Instead, her allegations focus on the decision to move Ms. Jones from one classroom setting to another. There is no protected property interest in remaining in a particular class or the right to mandate what the student feels is the most appropriate education. Accordingly, the Trial Court appropriately granted the Metropolitan Government's Motion to Dismiss.[2]

[2] A Rule 12.02(6) motion challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence. *Webb v. Nashville Area Habitat for Humanity,*346 S.W.3d 422, 426 (Tenn. 2011). A trial court's legal conclusions regarding the adequacy of the complaint are reviewed *de novo*. *Id.*

ARGUMENT

I. MS. JONES DOES NOT HAVE A PROPERTY INTEREST IN A PARTICULAR COURSE PLACEMENT OR TO MANDATE WHAT SHE BELIEVES TO BE THE MOST APPROPRIATE EDUCATION FOR HERSELF.

A. The property interest at stake in this case is the right to an education.

The property interest at stake here is the right to a public education, not the individual components that a student believes to be the most appropriate. *E.g., Goss v. Lopez,* 419 U.S. 565, 579 (1975); *Stevenson v. Blytheville School Dist.,* 800 F.3d 955 (8th Cir. 2015)("under *Goss* the property interest which is protected by the Due Process Clause is the right to participate in the entire education process and not the right to participate in each individual component of that process."). The Tennessee Constitution vests students with a property interest in a public education. ARTICLE XI § 12 OF THE CONSTITUTION OF TENNESSEE. There are no statutes, constitutional provisions, or cases that create the right to a particular course placement.

Property interests are created at the state level. *Bd. Of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972). It is "*federal constitutional law* [that] determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause." *Town of Castle Rock, Colo. v. Gonzales,* 545 U.S. 748, 757 (2005)(emphasis in the original).

B. The right to a public education does not include the student's own notions of what he or she believes to be the most appropriate courses.

The right to a public education has never been expanded to recognize an action that is less than a complete removal from the school environment. *See Laney v. Farley,* 501 F.3d 577, 581-583 (6th Cir. 2007)(an in-school suspension does not implicate a property interest in public education because the student is not excluded from school);

See also Tennessee Small Sch. Sys. v. McWherter (Small Schools I), 851 S.W.2d 139, 151 (Tenn. 1993)[3](defining the right to an education as "at least, the opportunity to acquire general knowledge, develop the powers of reasoning and judgment, and generally prepare students intellectually for a mature life.")

Similarly, Courts have refused to permit a due process claim when the student claims that he or she did not receive the most appropriate education. In *Gallagher v. Pontiac Sch. Dist.,* 807 F.2d 75 (6th Cir. 1986), the plaintiff was deaf, unable to speak, and mentally handicapped but had been enrolled in the school district's special education program. *Id.* at 77. The plaintiff alleged that despite being present in the classroom his mental limitations precluded him from being aware of what was happening or participating in the process and thus the school effectively "excluded" him from the education process. The Court held that the "plaintiff is not constitutionally entitled to the most appropriate education that might have assisted him in respect to his severe handicap." *Id.* at 79 (due process claim).

II. MS. JONES DOES NOT ALLEGE THAT SHE WAS EXPELLED OR OTHERWISE DENIED AN EDUCATION.

Ms. Jones has never alleged that she was expelled or otherwise excluded from school. Instead, she challenges MNPS's placement of her in an alternative classroom setting for *one* of her classes.

According to the Complaint, Ms. Jones was removed from her Algebra I class and then placed in a computer based A+ credit recovery program. (TR 3, Compl. ¶11). And

[3] Ms. Jones relies exclusively on the *Small Schools* cases to establish her property interest. But, the *Small Schools* cases implicated the Equal Protection Clause of the Constitution, not the Due Process Clause and solely related to the funding of the public school system throughout the state of Tennessee. *Small Schools I,* 851S.W.2d at 151.

while the A+ setting may have been computer based, there are no allegations that Ms. Jones was excluded from the "opportunity to acquire general knowledge, develop the powers of reasoning and judgment." *Small Schools*, 851 S.W.2d at 151. According to the Complaint, Ms. Jones was given an additional year of instruction at the freshman grade-level. (TR 3, Compl. ¶13.)

No other changes to her freshman courses are alleged. Both Ms. Jones and the plaintiff in *Gallagher* advance the same argument: that they were denied the type of education that they believed was *appropriate for them*. The Sixth Circuit (as well as the Trial Court in our case) correctly refused to recognize such a constitutional right because the courts are not supposed to intervene in the resolution of conflicts which arise in the daily operation of school systems:

> The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members, and *§ 1983 was not intended to be a vehicle for federal-court corrections of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees.*

Gallagher, 807 F.2d at 78-79 (emphasis added)(citations omitted).

"Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson v. State of Ark.*, 393 U.S. 97, 104 (1968).

Here, that is what Ms. Jones is asking the Court to do - intervene in an educational decision to place her in a remedial class and then later to hold her back for another school year. Ms. Jones's proposed remedy would invite the court system to recognize a constitutional right in a particular course placement, which is something the courts have repeatedly warned against and refused to do. *E.g., Goss,* 419 U.S. at 579; *Wood v. Strickland,* 420 U.S. 308, 326 (1975); *See, also, Johnpoll v. Elias*, 513 F. Supp. 430, 432

(E.D.N.Y. 1980)("With all due respect to the plaintiff's parental concern, this court cannot be used as a vehicle to review fundamental administrative decisions such as student placement.")

CONCLUSION

Ms. Jones does not have a federal constitutional right to what she considers to be the most appropriate education. The right to a public education has never been expanded to include a right to be placed in a particular grade, to be promoted to the next grade, or to be placed in a particular course of instruction. Therefore, the Metropolitan Government respectfully requests that this Court affirm the Trial Court's dismissal of this action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed to: W. Gary Blackburn, Bryant Kroll, The Blackburn Firm, PLLC, 213 Fifth Avenue North, Suite 300, Nashville, TN 37219 on this the 12th day of September, 2016.

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Appellee.	)	

REPLY TO BRIEF OF APPELLEE

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ORAL ARGUMENT REQUESTED

This case presents a simple and essential question to this Court:

Does the long-recognized constitutional right to a free public education in Tennessee include the right to a teacher?

The reply of the Metropolitan Government attempts to avoid this question, which was squarely presented in the issues presented on appeal in the Brief of Appellant at Page 4. The means to avoid addressing this question is simply to change the subject. Metro suggests that this case somehow involves the selection of a course and whether a student has some constitutional right to a particular course placement. That contention is nowhere in these pleadings, nor in the Brief of the Appellant.

Ms. Jones had already been placed as deemed appropriate by the Metropolitan Government in the required course, Algebra I. She was passing that course. She was then summarily removed from this course, not as a consequence of any articulated educational reason or to confer some pedagogical benefit (courts will decline to intrude in such decisions). Instead, Ms. Jones was removed without notice or explanation for the cynical reason of inflating average test results which might make the principal, the school, or the school system appear to have performed at a higher level than the truth would allow. Metro has never articulated a reason for the removal.

It is undisputed, because it is alleged in the Complaint and this appeal is from a dismissal under Rule 12, that Ms. Jones was then placed in front of a computer screen with no teaching assistance at all.

None of the cases cited by the Metropolitan Government involved the deprivation of teachers to students. Because of this, the Appellee's brief grudgingly acknowledges only the first of the "*Small Schools Trilogy*," *Tennessee Small School Systems v. McWherter* (*Small*

Schools I), 851 S.W.2d 139, 151 (Tenn. 1993). Metro then, without quoting, distinguishing, or responding in any manner to the teaching of *Small Schools II* and *Small Schools III* dismisses the teaching of these cases with the toss of a hand, in a footnote. These cases only implicate the equal protection clause, says Metro, not the due process clause.

This avoids the entire point of these cases as discussed in the Brief of Appellant. It is plainly held in these cases, beyond dispute, that a school child in Tennessee has a constitutionally protected property interest in a free public education. The Plaintiffs in those cases were school systems throughout Tennessee. The reason disparate funding for these schools created equal protection issues for students as discussed in *Small Schools II* and *III*, was the failure of the General Assembly to provide equal funding for teachers. The prior judicial mandate for equalization, specifically was held to have included teacher pay. "Until that mandate is met," the Court said, the inherent value of education will not be fully realized by all students in the state, regardless of where they live and attend school, and the students of Tennessee will continue to be unconstitutionally denied substantially equal educational opportunities." *Small Schools III*, 91 S.W. at 241. This was because paying teachers less money in a school system inherently may serve to deny the students the best quality among those teachers available for employment.

If funding must be equalized so that the quality of teaching may be equalized, how can it conceivably be argued that the denial of a teacher *entirely* fails to deny the pupil her opportunity for an education?

Finally, the Metropolitan Government understandably ignores the appalling consequences of a finding by this Court that the right to an education does not include the right to a teacher. If that were true, and if this were merely a question of local decision-making, then a

school could choose to balance its budget and to avoid the tax consequences of funding public schools through a substantial reduction in force, in which school systems may replace the wisdom, experience, dedication and personal skills of a classroom teacher with the pale, pixelated glow of a computer screen.

Given the obvious savings inherent in dismissing a substantial number of the teachers, then why not dismiss them all? What would prevent this dystopian world if the right to an education does not include the right to a teacher? Classrooms would become anachronisms. A gym with rows of tables and computers would then suffice.

CONCLUSION

It is respectfully submitted that the ruling of the Chancellor should be reversed and this matter remanded for further proceedings.

Respectfully Submitted,

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I hereby certify that on this 16th day of September, 2016, a true and correct copy of the foregoing was sent via United States Mail, postage prepaid to:

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IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

TONI JONES, individually and on behalf of those similarly situated, Plaintiff/Appellant, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, Defendant/Appellee.	)	No. M2016-00483-COA-R3-CV

BRIEF OF TENNESSEE EDUCATION ASSOCIATION
AS *AMICUS CURIAE*

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BRIEF OF TENNESSEE EDUCATION ASSOCIATION AS *AMICUS CURIAE*

The Tennessee Education Association ("TEA") submits this brief as *amicus curiae* in support of the Plaintiff Toni Jones.

INTEREST OF *AMICUS CURIAE*

The TEA is a voluntary membership association and is Tennessee's largest professional organization. The TEA's members include thousands elementary and secondary teachers, school administrators, education and support personnel, higher education faculty, and students preparing to become teachers in the public school setting. Among the pertinent purposes and goals of the TEA are the defense of the civil and professional rights of educators and the securing and enforcement of fair and equitable employment procedures for educators.

In order to secure a large federal "Race to the Top" grant, Tennessee moved in 2010 to a data-driven system of school and teacher evaluation. On January 16, 2010, then-Governor Bredesen signed into law the First to the Top Act, codified at Tenn. Code Ann. § 49-1-302(d)(2). Acting pursuant to the First to the Top Act, the Tennessee State Board of Education adopted Policy 5.201. The First to the Top Act and State Board of Education Policy 5.201 require that

35% of each teacher's evaluation criteria be comprised of "growth" data represented by TVAAS results. TVAAS is described in Tenn. Code Ann. § 49-1-603(a)(1) as a statistical system for educational outcome assessment that uses measures of student learning to enable the estimation of teacher, school and school district statistical distributions. [Trout Doc. No. 41, ¶ 11; Taylor Doc. No. 47, ¶ 12]. Explaining value added assessment, Tenn. Code Ann. § 49-1-603(a)(2) states:

> "The statistical system will use available and appropriate data as input to account for differences in prior student attainment, such that the impact that the teacher, school and school district have on the educational progress of students may be estimated on a student attainment constant basis. The impact that a teacher, school or school district has on the progress, or lack of progress, in educational advancement or learning of a student is referred to hereafter as the "effect" of the teacher, school, or school district on the educational progress of students."

The data used to produce TVAAS results are student scores on standardized tests administered in the Tennessee Comprehensive Assessment Program (TCAP) and state-approved End of Course (EOC) exams.

TVAAS results are not a measure of student achievement. TVAAS results are estimates of growth in student test scores on a single standardized test administered on a single occasion during a given school year. TVAAS estimates do not address proficiency or achievement. They address only year-over-year increases in standardized test scores and attempt to estimate teacher, school, and school district effect on those standardized test score results. In addition to the use of these standardized test-based statistical estimates in important decisions about school performance that can lead to an assortment of consequences for the school itself, state law in the First to the Top Act and State Board of Education Policy 5.201 mandates that evaluations – and hence these volatile TVAAS estimates – be used in every consequential decision affecting a teacher's employment.

Arne Duncan, former Secretary of Education under President Obama, led a national push for more data-driven decisionmaking in public education. Former Tennessee Commissioner of Education Kevin Huffman followed Secretary Duncan's lead, pushing for more data-driven decisionmaking in all levels of public elementary and secondary education, even though the data relied on – TVAAS statistical estimates – was often volatile and unreliable and was in all instances used as a measure of relative "effectiveness" even though the statistics don't permit such an interpretation.

This case illustrates one of the dangers of this decade's data-driven reform movement. The case arises because school officials attempted to control the data generated in a class by excluding certain students from taking the EOC test that would produce that data. The school's effort was taken at the expense of the Plaintiff, who was placed in a classroom without a teacher. This sort of decisionmaking at the school level undermines the goal of having great public schools for all students, a goal shared by TEA's members and by TEA as an association of those members. In addition, the notion that public education can be delivered to students without a teacher being present is at odds with Tennessee Supreme Court precedent and at odds with fundamental educational principles. TEA, as an association of tens of thousands of public school educators in Tennessee, has a strong interest in the outcome of this case and the reversal of the Trial Court's decision.

QUESTION PRESENTED FOR REVIEW

The question presented for review that is pertinent to the TEA as *amicus curiae* is the first question presented by the Plaintiff/Appellant:

> "1. Whether the right to a teacher is inherently part of a child's right to a free public education under the Tennessee and Federal Constitutions?"

Stated more generally, TEA believes that the critical question presented by this case is whether the established Tennessee constitutional right to equal educational opportunity that is enjoyed by every public school student in Tennessee requires the delivery of educational services by a properly trained and licensed teacher.

STATEMENT OF FACTS

For purposes of this brief, the TEA as *amicus curiae* adopts the "Statement of Facts" contained in the Plaintiff's brief.

DISCUSSION

It is now beyond peradventure that every child in Tennessee enjoys a constitutional right to the opportunity for an education and that that opportunity must be equal to the opportunity provided to other children in Tennessee. In *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 140-41 (Tenn. 1993) ("*Small Schools I*"), the Tennessee Supreme Court held:

> "The constitutional mandate that the General Assembly shall provide for a system of free public schools guarantees to all children of school age in the state the opportunity to obtain an education. The provisions of the constitution guaranteeing equal protection of the law to all citizens, require that the educational opportunities provided by the system of free public schools be substantially equal. The constitution, therefore, imposes upon the General Assembly the obligation to maintain and support a system of free public schools that affords substantially equal educational opportunities to all students."

In *Small Schools I*, the Court held that the means by which these constitutional obligations were achieved were left largely to the Legislature. However, the *Small Schools* case returned to the Supreme Court on two more occasions because the Legislature attempted to satisfy its constitutional obligation by enacting a version of the BEP funding formula from which teachers' salaries were excluded. In *Tennessee Small Sch. Sys. v. McWherter*, 894 S.W.2d 734, 738 (Tenn. 1995) ("*Small Schools II*"), the State contended that increasing and equalizing teachers' salaries did not affect student performance and was not a component of basic education. The Court disagreed:

> "The omission of a requirement for equalizing teachers' salaries is a significant defect in the BEP. The rationale supporting the inclusion of the other important factors constituting the plan is equally applicable to the inclusion of teachers' salaries. **Teachers, obviously, are the most important component of any education plan or system**, and compensation is, at least, a significant factor determining a teacher's place of employment. The costs of teachers' compensation and benefits is the major item in every education budget. The failure to provide for the equalization of teachers' salaries according to the BEP formula, puts the entire plan at risk functionally and, therefore, legally."

Id. (emphasis supplied).

After *Small Schools II*, the State attempted to equalize teachers' salaries on a one-time basis without including those salaries in the BEP formula. Hence, the State was back before the Court once again in *Tennessee Small Sch Sys. v. McWherter*, 91 S.W.3d 232 (Tenn. 2002) ("*Small Schools III*"), where the Court once again held that the State's failure to include teachers' salaries in the BEP formula violated students' constitutional right to equal educational opportunity. The Court explained:

> "We can think of no rational basis, and the defendants have not suggested one, for structuring a basic education program where all of its components, including salaries for custodians, secretaries, nurses, librarians, social workers, principals and their assistants, assessment personnel, coordinators, supervisors, psychologists, and superintendents, are cost-driven, except for the largest and most important component of all, the cost of providing teachers. It seems to us, as we said in *Small Schools II*, that the rationale for cost determination and annual review of the BEP components applies with equal if not greater force to teachers' salaries, for **it is undeniable that teachers are the most important component of any effective education plan**, and that their salaries, a major item in every education budget, are a significant factor in determining where teachers choose to work. *Small Schools II, 894 S.W.2d at 738*. **We recognized this fact seven years ago in *Small Schools II*, and we strongly reiterate it again today**. *Id.*"

Small Schools III, 91 S.W.3d at 240 (emphasis supplied).

The Tennessee Supreme Court's repeated observation that teachers are the most important component of any effective education plan is, as the Court put it, "undeniable." It is not a novel observation. According to the RAND Corporation, a leader in public policy research, "Many factors contribute to a student's academic performance, including individual

characteristics and family and neighborhood experiences. But research suggests that, among school-related factors, teachers matter most."[1] Indeed, a fundamental theoretical underpinning behind Tennessee's use of TVAAS in its current model of education reform is the belief that "the effectiveness of the teacher is the major determinant of student academic progress."[2]

In March 2016 the Tennessee Department of Education, Division of Data and Research, published a report called "Equitable Access to Highly Effective Teachers for Tennessee Students."[3] The Executive Summary of the report begins:

> "Decades of research have confirmed that teachers are the most important in-school factor for improving student achievement. Furthermore, studies find that access to effective teachers is most critical for students who struggle academically."

It is inconceivable then that a student like the Plaintiff, regarded as struggling because of her performance on a "pre-test," would be placed in a classroom with no teacher at all. Such a placement disregards the student's interest entirely, sacrificing that interest for the sake of the school's performance on a standardized measuring tool the State uses.

TEA believes that the State's heavy emphasis on standardized test results, and on invalid statistical estimates derived from those results, is wrong-minded and ineffective in achieving real improvement in public education. But until the Legislature has the will to look more deeply into the shortcomings of TVAAS as a tool to "measure" effectiveness of teachers and schools, all of us in public education in Tennessee must live with the current system. One of the unfortunate

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[1] See, http://www.rand.org/education/projects/measuring-teacher-effectiveness/teachers-matter.html.

[2] See, "Research Findings from the Tennessee Value-Added Assessment System (TVAAS) Database: Implications for Educational Evaluation and Research," William L. Sanders and Sandra P. Horn, *Journal of Personnel Evaluation in Education* 12:3 247-256 (1998).

[3] Although local boards of education administer the schools at the local level, the State possesses the constitutional authority to establish a statewide system of public education. The Legislature has plenary and exclusive authority to establish the makeup and structure of Tennessee's system of free public schools. *Thompson v. Memphis City Schools Bd. of Educ.*, 395 S.W.3d 616, 622 (Tenn. 2012). The system is a statewide system with local administration. *Lawrence County Educ. Ass'n v. Lawrence County Bd. of Educ.*, 244 S.W.3d 302, 310 (Tenn. 2007).

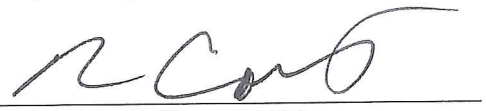
byproducts of that system is that it drives schools and teachers to focus excessively on standardized testing at the expense of truly effective teaching. That is what happened in this case.

Unfortunately, the way that the excessive emphasis on standardized testing materialized was through a clear violation of the Plaintiff's constitutional right to public educational services and to equal educational opportunity. Assignment of the Plaintiff to a classroom without a teacher – without "the most important component of any effective education plan"[4] – cannot possibly satisfy the constitutional mandates relied on by the Court in the Small Schools cases.

CONCLUSION

TEA respectfully requests that this Court hold that the presence of a teacher is a necessary element of a student's public education and that assignment of a student to a classroom without a teacher is an actionable deprivation of that student's constitutional guarantee of an opportunity to obtain an education and of his or her constitutional right to equal educational opportunity.

Respectfully submitted,



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[4] *Small Schools III*, 91 S.W.3d at 240.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Tennessee Education Association as *Amicus Curiae* has been placed in the United States Mail, postage prepaid to W. Gary Blackburn and Bryant Kroll, The Blackburn Firm, PLLC, 213 Fifth Avenue North, Suite 300, Nashville, Tennessee 37219; and to Melissa Roberge and Catherine J. Pham, Metropolitan Attorneys, 108 Metropolitan Courthouse, P.O. Box 196300, Nashville, Tennessee 37219, on this 14th day of October, 2016.

Richard L. Colbert