SUPREME COURT OF LOUISIANA

DOCKET NOS. 2013-CA-0120 *consolidated* with 2013-CA-0232

LOUISIANA FEDERATION OF TEACHERS, ET AL,
Plaintiffs/Appellees/Appellants

VERSUS

STATE OF LOUISIANA, ET AL,
Defendants/Appellants/Appellees

CONSOLIDATED WITH

LOUISIANA ASSOCIATION OF EDUCATORS, ET AL

VERSUS

STATE OF LOUISIANA, ET AL

CONSOLIDATED WITH

LOUISIANA SCHOOL BOARDS' ASSOCIATION, ET AL

VERSUS

STATE OF LOUISIANA, ET AL

A CIVIL PROCEEDING ON APPEAL FROM THE 19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA
CIVIL SUIT NUMBERS 612,733; 613,142; AND 613,320 OF SECTION 22,
DISTRICT JUDGE TIMOTHY E. KELLEY

ORIGINAL BRIEF ON BEHALF OF APPELLANTS, STATE OF LOUISIANA,
LOUISIANA BOARD OF ELEMENTARY AND SECONDARY EDUCATION,
AND LOUISIANA DEPARTMENT OF EDUCATION

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I. INTRODUCTION AND SUMMARY OF ARGUMENT[1]

The district court found that Senate Concurrent Resolution 99 (“SCR 99")[2] and Act 2[3] of the 2012 Louisiana Legislative Session unconstitutionally divert state and local funds from the Minimum Foundation Program (“MFP”) to non-public recipients in violation of Article VIII, § 13(B) & (C). (R. 484, 960). The district court denied challenges to Act 2 based on Article III, § 15(A) and challenges to the passage of SCR 99 based on Article III, §§ 2(A)(3)(a) and 15(G). The parties are before the Court on cross appeals under the Court’s appellate jurisdiction pursuant to Article V, § 5(D) of the Louisiana Constitution. (R. 485).[4]

This case involves the authority of the Legislature, the Louisiana Board of Elementary and Secondary Education (BESE), and the Louisiana Department of Education (collectively the "State," "State Defendants," or “Appellants”) to improve Louisiana's "public educational system" (La. Const. Art. VIII, §1) by providing choices for parents of students otherwise trapped by circumstances in inadequately performing public schools and by using economic disincentive to encourage local public school districts to improve those schools.[5] The “turf battle” over the MFP waged by the Plaintiffs and sanctioned by the district court disregards the goal of the public educational system - “to provide learning environments and experiences, at all stages of human development, that are humane, just, and designed to promote excellence in order that every individual may be afforded an equal opportunity to develop his full potential" (La. Const. Art. VIII, preamble) - and threatens the authority of BESE and the Legislature to evolve Louisiana’s antiquated and patently inadequate education model toward that end. In sum, the ruling at issue elevates a constitutional means (public schools) over the constitutional end itself (the public educational system). This clear conflation of priorities works to the disadvantage of those for whom the educational system is intended to benefit - the children.

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[1] For the sake of brevity, the Appellants adopt and incorporate by reference the Statement of the Case presented in the Appellant Brief of the Intervenors/Appellants, Valerie Evans, *et al*.

[2] A copy of SCR 99 is attached as Appendix “A.”

[3] A copy of Act 2 is attached as Appendix “B.”

[4] Section 5(D) provides that a case shall be appealable to the supreme court if a law has been declared unconstitutional.

[5] *See* testimony of Penny Dastugue, the 2012 BESE President, explaining the rationale for Act 2: “I guess in the short term by offering those children who are trapped in those schools who have no other options, that they – if their parents so choose, that they have an option to go to another school. Long-term, it is our hope that this action will spur the right actions to improve those schools.” R. 852.

First, the district court committed clear error in finding SCR 99 unconstitutional because it "diverts" MFP funding in violation of La. Const. Art. VIII, §13. On the contrary, SCR 99 is merely the instrument by which the Legislature approved the 2012-13 MFP, as the district court correctly determined. (R. 452). Beyond that, SCR 99 accomplishes no substantive purpose whatsoever. The inclusion of the MFP formula in SCR 99 is for the aid of legislators voting on the resolution. SCR 99 is not the MFP formula.

Second, the district court erred in finding that Article VIII, §13 limits the use of the MFP to calculating and appropriating funding solely for public school systems. Article VIII, §13 itself does not expressly answer the question of whether BESE may factor the cost of state-funded educational programs administered by non-public providers into the MFP formula and appropriate funds for such programs along with those allocated for public school systems. However, an affirmative answer is clearly compelled when considering Article VIII in its entirety, the broad authority of BESE (both constitutional and statutory), and the plenary authority of the Legislature. Furthermore, there simply is no compelling legal basis to afford the MFP mandate a restrictive interpretation that denies educational opportunities to children, segregates the State's education budgeting into silos (where increased cost are sure to occur), or that forces any child who relies on state funding for educational opportunities (by definition public educational programs) to annually endure the uncertainty of funding outside the MFP.[6] If BESE and the Legislature can accomplish the mandates of Article VIII, §13(B), while providing additional educational opportunities to children and a more efficient use of state resources, why not allow it?

Rather than focusing on the issue of whether the State fulfilled its obligation under Article VIII, §13(B) to formulate, fund, and equitably allocate a "minimum foundation program for education in all public elementary and secondary schools," the district court instead focused on whether the MFP formula can be used to calculate and appropriate funding for anything *other* than public school systems. In doing so, the court erroneously viewed Article VIII, §13(B) as a limited *grant* of authority to the Legislature, as reflected by the court's statement that "[n]owhere was it mandated that funds from the MFP, meant for public elementary and secondary school systems, be provided for an alternative education beyond what the Louisiana education system was set up for." (R. 475). This rationale conflicts with the plenary authority of the Legislature, as most recently observed by the Court in Louisiana High Sch. Athletics

[6] *See* R. 875.

Ass'n, Inc. v. State, 2012-1471, p. 8 (La. 1/29/13); – So.3d –, 2013 WL 336013.

Third, Act 2 causes no actual "diversion" of any local funds, dedicated or otherwise, as found by the district court. The calculation of a local contribution toward funding of the Act 2 programs is purely formulaic. In terms of real money, the state pays 100% of all Act 2 programs (on behalf of the local system because the child is counted in its MFP allocation). (R. 809 - 812). The district court found that the State is "reducing the MFP allocations to public schools by equivalent amounts [to the scholarships] thus violating" Article VIII, § 13(C) and Louisiana Revised Statutes 17:97.1[7] and 47:338.84.[8] (R. 481). The district court's ruling ignores two important considerations. First, BESE has broad discretion over the factors to include within the MFP formula, subject only to the mandatory requirements of Article VIII, §13(B). Under the district court's rationale, the inclusion or weighting of any factor in the formula that "effectively" increases the local share of the net per-child allocation causes the "diversion" of local funds. This rationale essentially freezes the current baseline for local districts, directly undermining BESE's authority to establish the "minimum" requirement. Second, the district court's reasoning disregards the fact that if a child chooses an Act 2 program, the local district will not be required to spend money to educate that child.

Finally, the district court erred in denying the State's exception of lack of subject matter jurisdiction[9] as to the Early High School Graduation Scholarship Program ("Early Graduation Program") and the Course Choice Program. The Early Graduation Program is merely referenced in SCR 99. It has not been statutorily enacted, programmatically implemented, or funded. Further, while Act 2 creates the Course Choice Program (La. R.S. 17:4002.1, *et seq.*), the program is not slated to begin until FY 2013-2014 and, thus, is not included in the 2012-2013 MFP. Hence, Article VIII, §13 is not currently

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[7] This statute provides a prohibition against proceeds derived from various local sources being "used or taken into consideration in any formula adopted by [BESE] . . . as required by Article VIII, Section 13(B) . . . for the allocation of funds to insure a minimum foundation program of education in all public elementary and secondary schools." The sources listed are proceeds related to sixteenth section land, severance taxes, and sales tax.

[8] This statute relates to a school system's authority to levy and collect a sales tax for the purpose of funding teachers' salaries and the operation of public schools, which excludes such funds from consideration in the MFP.

[9] The Exception of Lack of Subject Matter Jurisdiction is located at R. 973. The Court referred the matter to the merits. (R. 500).

implicated. A challenge based on those programs will not ripen unless and until a future MFP[10] providing funding for those programs is approved and funded by the Legislature. For purposes of a challenge based on funding authority, those programs are merely aspirational. The district court clearly erred in denying the State's exception to jurisdiction based on those two programs.

For these reasons, as explained more fully below, the court committed clear error in finding that SCR 99 and Act 2 unconstitutionally divert funding for public schools in violation of Article VIII, §13.

II. ASSIGNMENTS OF ERROR

1. The district court erred in declaring SCR 99 unconstitutional.
2. The district court erred in finding that Act 2 unconstitutionally diverts MFP funds to nonpublic entities in violation of Article VIII, §13(B) of the Louisiana Constitution.
3. The district court erred in finding that Act 2 unconstitutionally diverts local funds to nonpublic entities in violation of Article VIII, §13(C) of the Louisiana Constitution.
4. The district court erred in denying the State's Exception of Lack of Subject Matter Jurisdiction as to the claims based on the Early Graduation Program and the Course Choice Program.

III. LAW AND ARGUMENT

The constitutionality of a statute is a legal question requiring *de novo* review. Louisiana Mun. Ass'n v. State, 2004-0227 (La. 1/19/05); 893 So.2d 809, 842.[11]

A. Applicable Rules of Interpretation and Burden of Proof

It is well-settled law that the interpretation of a statute or a provision of the state constitution is an exclusive function of the courts of this state.[12] As stated by this Court many times, "statutes are presumed to be constitutional; therefore, the party challenging the validity of a statute has the burden of proving its unconstitutionality." City of New Orleans v. Louisiana Assessors' Ret. & Relief Fund,

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[10] The First Circuit's decision in Horne v. Louisiana State Bd. of Elementary & Secondary Education dictates that any opinion as to the constitutionality of a future MFP formula would be "purely advisory." 357 So.2d 1216, 1218 (La. App. 1 Cir. 1978); *superceded by constitutional amendment* on another issue as stated in Charlet v. Legislature of State of La., 97-0212 (La. App. 1 Cir. 6/29/98); 713 So.2d 1199 ("Accordingly, we do not view the record with the same finality as the plaintiffs concerning what BESE will finally recommend for 1977-78. Even if it were a fact that the MFP for 1977-78 had been given final approval, it is no part of this lawsuit. Therefore, we view our opinion as to the constitutionality of the formula in the future as purely advisory.").

[11] *See also* City of New Orleans v. Louisiana Assessors' Ret. & Relief Fund, 2005-2548 (La. 10/1/07); 986 So.2d 1, 12 ("This court reviews judgments declaring a statute unconstitutional *de novo*.").

[12] *See* State v. Expunged Record (No.) 249,044, 2003-1940 (La. 7/2/04); 881 So.2d 104, 107 ("The determination of a statute's constitutionality is a purely judicial function, which is constitutionally vested in the courts.") and Beauclaire v. Greenhouse, 2005-0765 (La. 2/22/06); 922 So.2d 501, 506.

2005-2548 (La. 10/1/07); 986 So.2d 1, 12. Specifically, Plaintiffs "must point to a particular provision of the constitution that would prohibit the enactment of the statute, and must demonstrate clearly and convincingly that it was the constitutional aim of that provision to deny the Legislature the power to enact the statute in question." Id.[13]

The analysis should begin with the premise that "[b]ecause the provisions of the Louisiana Constitution are not grants of power but instead are limitations on the otherwise plenary power of the people, exercised through the legislature, the legislature may enact any legislation that the constitution does not prohibit." City of New Orleans, at 12. Simply put, "[a]n act of the legislature is presumed to be constitutional until it is shown to be otherwise." LeBlanc v. Altobello, 497 So.2d 1373, 1375 (La. 1986) (internal citations omitted).[14] "This presumption is especially forceful in the case of statutes enacted to promote a public purpose." Bd. of Com'rs of N. Lafourche Conservation, Levee & Drainage Dist. v. Bd. of Com'rs of Atchafalaya Basin Levee Dist., 95-1353 (La. 1/16/96); 666 So.2d 636, 639. And due to this presumption, "this court must construe a statute so as to preserve its constitutionality when it is reasonable to do so. . . . [I]f a statute is susceptible of two constructions, one of which would render it unconstitutional, or raise grave constitutional questions, the court will adopt the interpretation of the statute which, without doing violence to its language, will maintain its constitutionality." City of New Orleans, at 12 - 13. "[T]o successfully challenge a legislative act as unconstitutional on its face, the challenger must establish that no circumstances exist under which the act would be valid." Id. at 18-19.

In this instance, the challenge to the legislation in question is based on an interpretation of constitutional language, rather than the language of the legislation itself. "When a constitutional provision is plain and unambiguous its language must be given effect." LeBlanc, at 1375. This Court's decision in City of New Orleans, at 15, summarized the rules of construction when interpreting constitutional provisions as follows:

> Under our well-settled rules of statutory construction, where it is possible, courts have a duty in the interpretation of . . . a constitutional provision . . . to adopt a construction which harmonizes and reconciles it with other provisions dealing with the same subject matter.

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[13] *See also* Louisiana Public Facilities Auth. v. Foster, 2001-0009 (La. 9/18/01); 95 So.2d 288, 301 (" . . . it is not enough to show that the constitutionality of a legislative act is fairly debatable. It must be shown clearly and convincingly that the Legislature lacks the power to enact the statute.").

[14] *See also* Beauclaire v. Greenhouse, at 506 ("Statutes are presumed to be valid, and the constitutionality of a statute should be upheld whenever possible.").

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> [A] court is not free to create an ambiguity where none exists, or to revise or re-write the language of the constitutional provisions under the guise of interpretation where the provisions are couched in unambiguous terms.

In the event a court is required to determine the intent of a constitutional provision, this Court has opined as follows:

> [T]he function of the court . . . is to ascertain and give effect to the intent of the people who adopted it. It is the understanding that can reasonably be ascribed to the voting population as a whole that controls.[15]

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> In carrying out this function, . . . the court should consider the object sought to be accomplished by the adoption of the provision.[16]

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> [E]ffect should be given to the purpose indicated by a fair interpretation of the language employed, and the construction which effectuates, rather than that which destroys a plain intent or purpose of the constitutional provision.[17]

In sum, the interpretation of a constitutional provision starts with the language itself. If the language is unambiguous, the inquiry ends there and the language must be given effect. If ambiguity is found, only then should a court look to the intent of the framers and the people who adopted the article.

B. SCR 99 Merely Approved the 2012-13 MFP; It Did Not Divert Any Funding

The district court correctly held that SCR 99 merely expressed the Legislature's approval of the 2012-13 MFP as contemplated by Article VIII, § 13(B), and thus does not have the "effect of law" within the meaning of Louisiana Constitution Art. III, §2(A)(3)(a). (R. 452). The district court erred, however, in finding that SCR 99 unconstitutionally diverts funds - any funds. (R. 477 and 481 - 482).[18] The error resulted from the district court's apparent treatment of SCR 99 as the MFP formula itself. This is plainly

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[15] Caddo-Shreveport Sales and Use Tax Com'n v. Office of Motor Vehicles, 97-2233 (La. 4/14/98); 710 So.2d 776, 780.

[16] Bd. of Com'rs of Orleans Levee Dist. v. Dep't of Natural Res., 496 So.2d 281, 298 (La. 1986).

[17] Id.

[18] "Specifically, this court finds that SCR 99 is unconstitutional to the extent that it expressly diverts public funds into "The Course Choice Program", "The Student Scholarships for Education Excellence Program", and "The Early High School Graduation Program", which are programs used to pass the MFP funds into nonpublic educational institutions." (R. 481).

incorrect.[19] Having found that SCR 99 has no effect, the resolution cannot have the "effect" of diverting funds. Per the district court's own findings, SCR 99 "does not unilaterally impose the legislative will and does not permanently apply to persons and things in general." (R. 452). Once the district court properly determined that SCR 99 does not have the effect of law, the analysis of the instrument should have ended.

C. The District Court Erred in Finding that Act 2 Offends the MFP Requirements of Article VIII, § 13(B)

The district court's finding that Act 2 is unconstitutional disregards the requirements of the MFP under Article VIII, §13(B) and the combined authority of the Legislature and BESE to define, fund and administer the public educational system.

BESE's authority derives from both the constitution and the Legislature.[20] Specifically, Article VIII, §3 provides in part:

> (A) Creation; Functions. The State Board of Elementary and Secondary Education is created as a body corporate. It shall supervise and control the public elementary and secondary schools and special schools under its jurisdiction and shall have budgetary responsibility for all funds appropriated or allocated by the state for those schools, all as provided by law. The board shall have other powers, duties, and responsibilities *as provided by this constitution or by law*, but shall have no control over the business affairs of a city, parish, or other local public school board or the selection or removal of its officers and employees. . .

Thus, the constitution expressly contemplates that BESE may be granted additional authority by the Legislature, which certainly may include authority over budgeting for non-traditional public school programs funded through the MFP, provided the requirements relating to public schools are met.[21] As noted by this Court, "as provided by law" is not ambiguous. City of New Orleans, 986 So.2d at 21.[22]

1. Act 2[23]

Act 2 modified and enacted provisions under Title 17, including the "Student Scholarships for

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[19] *See* testimony of Butch Speer, Clerk of the Louisiana House of Representatives, explaining that SCR 99 is not the MFP formula, and that that language in the resolution reciting the formula is merely for the aid of legislators. R. 639 - 640.

[20] La. R.S. 17:1, *et seq.*

[21] *See* Eiche v. Louisiana Bd. of Elementary and Secondary Educ., 582 So.2d 186, 189 (La. 1991) (discussing the relationship of the phrases "all as provided by law" and "or by law" in Article VIII, §3(A)).

[22] "The words 'authorized by law' are not ambiguous; nor are the words susceptible to more than one reasonable interpretation."

[23] Act 2 addresses Charter Schools, the Student Scholarships for Educational Excellence Program, and the Course Choice Program. As argued below, the Course Choice Program is merely aspirational and does not present a justiciable issue as to its funding. And the district court did not find that there was a diversion of local funds to Charter Schools.

Educational Excellence Program" ("SSEEP").[24] SSEEP provides "eligible" students of the public system a choice in providers when the school they attend has been assigned a grade of "C", "D", or "F" for the most recent year by the school or district accountability system.[25] Pursuant to Act 2 and Louisiana Revised Statutes 17:4016, "[e]ach scholarship recipient is a member of the local school system in which he attended or otherwise would be attending public school for that school year."[26] Further, "students entering kindergarten shall enroll in the membership of the local school system in which they otherwise would be attending public school for that school year." La. R.S. 17:4016. Thus, the scholarship recipients are all public school children within the public educational system.

Under SSEEP, the "per-child" MFP funds calculated for that student are sent by the State to the eligible school chosen by the student, which may be either private or public. La. R.S. 17:4013, *et seq.* The scholarships are funded exclusively by state funds paid directly to the recipient school. *See* La. R.S. 17:4016 and 4017; R. 812. No funds dedicated, collected or raised by any local entity or school system are used to fund the scholarships or any program under Act 2. (R. 812). Furthermore, pursuant to Louisiana Revised Statutes 17:4016(A), if the cost related to the scholarship recipient is less than the per-pupil amount, the difference "shall be returned to the state or to the local school system in which the scholarship recipient attended or otherwise would be attending public school for that year. . . ." The issue in this case arises from the fact that public school students receiving scholarships are counted in the MFP, yet the money allocated for those students is directed to the child's school of choice, *i.e.*, the school that will actually provide the service. The constitutional implication, according to the district court, occurs when the child chooses a nonpublic education provider. (R. 959).

2. The Minimum Foundation Program Formula

The MFP is a constitutionally-mandated formula to determine the cost of a minimum foundation

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[24] SSEEP is addressed in Act 2 beginning on Page 33 (R. 55, *et seq.*).

[25] La. R.S. 17:4013 defines an "eligible student."

[26] *See also* testimony of Elizabeth Scioneaux (R. 771) ("Q: . . . Are you saying that it is the position of the department that a child who takes a scholarship and goes to a nonpublic school is still a student of the public school system? A: Absolutely.").

program of education in all public elementary and secondary schools.[27] La. Const. Art. VIII, §13(B). BESE has broad constitutional (Article VIII, §13(B)) and statutory (Title 17) discretion over the MFP formula, subject only to the requirement that the formula provide for the "cost of a minimum foundation program of education in all public and elementary schools as well as to equitably allocate the funds to parish and city school systems." Article VIII, §13(B). The formula also must provide for a "contribution by every parish and city school system." Id. Otherwise, the constitution provides no direction to, or limitation on, BESE and the Legislature with regard to the creation or use of the formula, as observed by the court in Jones v. State Board of Elementary and Secondary Education, 2005-0668 (La. App. 1 Cir. 11/4/05); 927 So.2d 426, 431:

> According to the plain language of Article VIII, §13(B), BESE is only required to annually develop and adopt a formula. Charlet, 97-0212 at p. 15, 713 So.2d at 1207.[28] The Louisiana Constitution does not require that any particular items be included in the formula nor does it require that the formula be based on actual costs.[29]

Although the term "minimum" provides a limitation on the authority of BESE and the Legislature, the Plaintiffs have not alleged that the 2012-13 MFP provides less than the constitutional "minimum." Further, as noted by the court in Charlet v. Legislature of State of La., 97-0212 (La. App. 1 Cir. 6/29/98); 713 So.2d 1199, 1206, "The only way to logically discuss 'reaching' a 'minimum' is to ask whether any **less** can be provided, such that the **least** is finally attained. Applying this literal definition, if some funding is being provided by the State to every school district, the State has met whatever quantification may be implied by the word 'minimum' in the constitutional provision. It is not necessary for this court to re-define a word which has a generally accepted meaning in common usage."[30]

The local "contribution" requirement of Article VIII, §13(B) is merely a required factor - the only

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[27] *See* testimony of Penny Dastugue, R. 858 - 859. This Court addressed the MFP formula in Louisiana Ass'n of Educators v. Edwards, 521 So.2d 390, 394 (La. 1988) ("To arrive at the total cost of the 'minimum foundation program' the Department of Education apparently takes each item listed in the formula, uses the method for calculating the cost of that item as listed in the formula, uses the numbers that it has, makes a mathematical calculation and arrives at a dollar amount.")

[28] Charlet v. Legislature of State of La., 97-0212 (La. App. 1 Cir. 6/29/98); 713 So.2d 1199, 1206 *writ denied sub nom.* Charlet v. Legislature of State, 98-2023 (La. 11/13/98); 730 So.2d 934 *and writ denied sub nom.* Charlet v. Legislature of State, 98-2026 (La. 11/13/98); 730 So.2d 934 (emphasis in original).

[29] *See also* Judge Kuhn's concurrence in Jones, 927 So.2d at 433 ("Regardless of which specific funds are to be included in this formula, the plaintiffs, who will carry the burden of proof at trial, have failed to establish that the funds provided to their respective parishes under the current MFP formula are less than what is needed to actually fund a minimum foundation program.").

[30] Charlet, at 1206 (emphasis in original).

required factor - in the formula. This formulaic treatment of the local contribution is contrasted by Article VIII, §13(B)'s mandate that the Legislature appropriate sufficient funds to fulfill the State's MFP obligation. Hence, contrary to the district court's finding, the Act 2 programs do not actually divert any local funds, as explained by Beth Scioneaux, the Deputy Superintendent for Management of Finance at the Louisiana Department of Education:

> Q: . . . In fact, [local districts] don't actually put up any money to the scholarship programs, do they?
>
> A: True.
>
> Q: All that you described in that table 5F is a step within the formula that's mathematical for an equation for formulaic reasons; is that correct?
>
> A: Yes, that's correct.[31]
>
> *****
>
> Q: When the comments were made that the districts . . . are paying out of their own back pocket under the MFP, there's nothing in the MFP that requires the districts to actually pay anything, is it?
>
> A: That's true. It's an allocation, and it's just – it's a mathematical calculation to come to the state's number, actually.
>
> Q: Yes. And now, in arriving at the state's number, there are assumptions about what we believe – BESE believes the locals should spend on education, correct?
>
> A: Correct.
>
> Q: But the MFP formula itself doesn't require the locals to do anything, does it?
>
> A: Correct.[32]
>
> *****
>
> Q: . . . Does the local share that you were referencing represent an amount that the locals actually paid for the scholarship program, or does it represent an amount that is assigned within the formula to the local's participating the scholarship program?
>
> A: It's just an assignment.[33]
>
> *****
>
> Q: The entire amount that goes to the SSEEP programs, SSEEP schools, where does that come from?

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[31] R. 809.

[32] R. 810.

[33] R. 811.

A: From the state. It's all MFP moneys.

Q: So whether it's the entire amount of tuition or whether it's the ceiling that's placed on the amount that they will get, it all comes from the state?

A: It does, yes.[34]

*****

Q: . . . I'm simply trying to find out whether that means that there are MFP funds, state money, and local funds in two different – coming from two different sources?

A: Yes, they absolutely come from two difference sources.

Q: Over on the local side, the local pot, if you will, is it true that none of those local funds ever go to the SSEEP schools?

A: True.[35]

The original version of Article VIII, §13(B) under the Constitution of 1974 did not provide BESE with authority to dictate the amount of funding required for appropriation to meet the "minimum" requirement. On the contrary, that authority remained with the Legislature, as this Court determined in Louisiana Ass'n of Educators, 521 So.2d at 394. In that case, the plaintiffs sought to compel the Legislature to appropriate additional funding consistent with the MFP formula prepared by BESE. Reversing the district court, this Court made clear that the MFP (at that time) was for the purpose of assuring equitable allocation and that the Legislature maintained authority to determine the sufficiency of funding appropriate to meet the "minimum' standard. However, the Constitution was amended in 1987 to allow BESE to determine the "minimum" within the formula and to require the Legislature to appropriate funds based on the formula. Nevertheless, the basic requirements of Article VIII, §13(B) remain the same.

Plaintiffs introduced no evidence establishing that the sufficiency of funding under the 2012-13 MFP formula or to the allocation of funding to and among the local systems offended the requirements of Article VIII, §13. Thus, the court erred in declaring Act 2 unconstitutional.

D. The District Court Erred in Finding That Article VIII, §13(B) Restricts the Use of the MFP Formula to Public Schools

The logical interpretation of Article VIII, §13 and the weight of constitutional discretion assigned to BESE and the Legislature over this subject matter refutes the district court's finding of a constitutional

[34] R. 812.

[35] R. 818.

violation. Simply put, there is no language in Article VIII, §13 that *prohibits* the state from including Act 2 programs in the MFP formula.[36] These are state-funded programs directed to children in the public educational system. It is perfectly logical that they be included, if for no reason other than to promote fiscal integrity by assuring that the Legislature considers all such programs in the same debate.[37]

The MFP formula is intended to accomplish two objectives: (1) to determine the cost of a minimum foundation program of education in all public elementary and secondary schools; and (2) to equitably allocate funds to parish and city school systems necessary to accomplish the first objective. *See* Article VIII, § 13(B).[38] The 2012-13 MFP far exceeds that obligation by using various weights and rewards within the formula to provide for over $1 Billion to public school districts that is not constitutionally required. (R. 830). Of course, the Plaintiffs take no issue with the use of Article VIII, §13(B) by BESE and the Legislature to increase the allocation of state funding to the local districts. The constitutional discretion that allows BESE to construct the formula to provide funding above the "minimum" baseline is the very same constitutional discretion that allows BESE to factor Act 2 programs within the MFP formula, so long as the "minimum" baseline is not violated.

As noted by this Court just days ago, "[s]ince the provisions of the Louisiana Constitution are not grants of power but instead are limitations on the otherwise plenary power of the people, exercised through the Legislature, **the Legislature may enact any legislation the constitution does not *prohibit*.**" Louisiana High Sch. Athletics Ass'n, Inc., at p. 8 (emphasis added). Accordingly, "a party challenging the constitutionality of a statute must cite the specific constitutional provision that *prohibits* the legislative action." Id. (emphasis added). In this instance, the district court relied on the word

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[36] *See* Delegate Zervigon's discussion at IX Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts 2436-37 ("For the minimum program, the legislature appropriates the money, and it is distributed in accordance with this formula. Above that, of course, the legislature may do anything it likes that is not prohibited. We do not have any place in this proposal prohibit[ing] the legislature from appropriating additional funds for education.").

[37] *See* testimony of Beth Scioneaux at R. 818-819 ("Q: . . . from an education budgeting standpoint, is it helpful to the Department of Education to include the LEA's, those other programs, within the framework of the MFP? A: Yes, . . . for the purpose of state budgeting and the Department participating in, you know, trying to determine the cost that the state needs to contribute to education. It has been, you know, simpler. People can refer to one thing. It used to be that there were, you know, moneys outside, but now that everything is concentrated in the formula, it does appear, you know, a little clearer and a little bit easier for people to understand.").

[38] *See also* Horne v. Louisiana State Bd. of Elementary & Secondary Ed., 357 So.2d 1216, 1217 (La. Ct. App. 1978) *writ denied sub nom.* 359 So.2d 621 (La. 1978) ("The obvious purpose is to provide a minimum level of acceptable educational advantages to the youth of this state."); *see also* the testimony of Elizabeth Scioneaux regarding the "basis of the formula." (R. 795 - 796).

"public" as used in Article VIII, § 13(B) to infer a prohibition. The district court's analysis and its ultimate finding were in error.

The Court's decision in Orleans Parish School Board v. Louisiana State Board of Education, 41 So.2d 509 (La. 1949), proves instructive as it addresses the equivalent of the MFP under the Constitution of 1921: "All school funds . . . shall be distributed to each parish in proportion to the number of children therein between the ages of six and eighteen years. The Legislature shall provide for the enumeration of educable children." La. Const. 1921, Art. XII, § 14. In Orleans, the issue related to "the disbursement of an appropriation made by the Legislature of 1948 in the General Appropriation Act. . . to carry into effect the minimum salary schedule for public elementary and high school teachers of which Act No. 155 of 1948 directs the establishment and maintenance." Id. Notably, Act No. 155 specifically provided that the funds appropriated thereunder "shall form no part of the State Public School Fund." But an attempted veto of this section in conjunction with an appropriation placed under the General Appropriation Act of 1948 evidenced that "the Legislature and the Governor clearly displayed an intention to provide the listed sum for carrying into effect the minimum salary schedule, irrespective of whether payment was to be made from the State Public School Fund or the General Fund or from both." Orleans, at 513. In lieu of the veto, a provision was placed in the General Appropriation Act of 1948 directing the Treasurer to fund the Teacher's Salary Fund from the Public School Fund. Orleans, at 513. Article XII, § 14 of the 1921 Constitution provided the sources and allocations for the Public School Fund and a 3/4 on a per educable basis and 1/4 on the basis of equalization allocation to parish school boards. And as amended in 1947, it further provided "that the Legislature must and shall provide, by appropriate tax levies, appropriation or otherwise, a minimum amount in this State Public School Fund of not less than Ten Million Dollars ($10,000,000.00) per annum."

The essence of Plaintiff's argument was that distribution of the "minimum teacher salary legislation" by any plan *other* than the exact formula found in Article XII, § 14 would be unconstitutional, despite the fact *more* than the required $10 Million was appropriated for the Public School Fund. The issue arose because the excess was not to be allocated under the 3/4 - 1/4 formula. This Court found that the constitutionally-prescribed formula did not prohibit the Legislative action:

> A reading of the provisions of this section as presently constituted, without taking into consideration the history of their development or the legal principles relating to the Legislature's control over state finances, furnishes the impression that an appropriation

> from the State Public School Fund can legally be made only if and when the money is apportioned and distributed to the parishes and paid out to the parish school boards in accordance with the prescribed formula of 3/4ths on a per educable basis and 1/4th on the basis of equalization. If such be the correct interpretation of those provisions the appropriation by the 1948 Legislature from the State Public School Fund to carry into effect the minimum Teachers Salary Schedule provided in Act No. 155 of 1948 (unless apportioned and distributed on the 3/4th–1/4th basis) is, of course, unconstitutional and illegal. Likewise stricken with nullity are those other appropriations of 1948, as well as many made during preceding years, for such items as teachers' retirement, education for crippled children, vocational rehabilitation, and salary and expenses of State Superintendent of Education, because the appropriation for each of those has been from the State Public School Fund without apportionment and distribution to the parish school boards on a per educable and equalization basis.
>
> The provisions of the present Section 14 of Article XII of our Constitution, however, are not free of ambiguity; and, when considered in the light of the history of their development, they can reasonably be construed as requiring the Legislature only to maintain in the State Public School Fund, to be apportioned and distributed therefrom under the prescribed formula, an annual sum of at least $10,000,000.00. *Any excess in such fund, it logically follows under that construction, may be similarly apportioned, or it may be otherwise distributed for the support of public schools in such manner as the Legislature deems advisable, because, subject only to constitutional restrictions, that body's power over state funds is plenary.*

Orleans, at 722-23 and 515 (emphasis added). Thus, the Court found that the proper interpretation of the constitutional article is that the $10 Million was the"floor" of funding and so long as that was met the Legislature could allocate the remaining funds in any manner it deemed appropriate:

> The ambiguous provisions of Section 14, Article XII of the Louisiana Constitution with reference to disbursements from the State Public School Fund, it is thus seen, are reasonably susceptible of two different interpretations, namely, (1) the entirety of that fund, irrespective of the amount therein, must be apportioned and distributed to the parishes and paid out to the parish school boards on the basis of 3/4th per educable and 1/4th for equalization; or (2) the Legislature is required to disburse in accordance with the prescribed 3/4th-1/4th formula only $10,000,000.00 per annum, and it may pay out and distribute for public school purposes, but solely for those purposes, any excess of that sum in such manner as it deems advisable. Of these two possible interpretations the latter seems preferable, and, in our opinion, it should and must be adopted. Of course, a few of the parishes under that interpretation may not obtain as much of the state educational funds as they would if the 3/4 - 1/4th formula were applied to all money entering and disbursed from the State Public School Fund; *yet no parish will be denied the minimum state educational program, the providing of which Article XII, Section 14 of the Constitution primarily purposes to insure, as its historical development indicates.*
>
> *****
>
> This result would accord with the manifest intention of the Legislature and of the Governor to effectuate the minimum salary schedule for teachers, and it would be consistent with the well established principle of law that legislative acts are entitled to great respect and are presumed to be constitutional.

Orleans Parish Sch. Bd., at 517 (emphasis added).

This Court's decision in the more recent case of City of New Orleans v. Louisiana Assessor's

Retirement, 2005-2548 (La. 10/1/07); 986 So.2d 1, involved the constitutionality of statutory funding provisions of the Louisiana Assessors' Retirement Fund, La. R.S. 11:1481. The district court found that the provisions unconstitutionally diverted local taxes in violation of Louisiana Constitution Articles VI, §§26(B), 26(C), and 32. This Court reversed. The case is instructive to the instant matter because it demonstrates application of the rules of statutory and constitutional construction to avoid a conflict in constitutional provisions and to preserve the constitutionality of a statute, which on its face appeared to offend a specific constitution prohibition. The case also rejected a resort to legislative history "to construct an argument for the ambiguity of the constitutional provision" where the language itself was unambiguous. City of New Orleans, at 22. In particular, the plaintiff contended that the language "[a]fter deductions in each parish for retirement systems and commissions *as authorized by law*" in a constitutional provision prohibited legislatively created deductions after the adoption of the provision, *i.e.*, the only deductions allowed where those in place at the time of the provision's adoption. Id. (emphasis added). The court rejected that argument stating "had the framers of the constitution, and the voters who enacted it, intended to freeze the deductions for the benefit of retirement systems at levels existing at the time of the ratification of the constitution, they could easily have done so by adding the language the City would have us insert, 'as **presently** authorized by law.'" Id. (emphasis in original).

Similarly, the district court in the instant matter resorted to legislative history to support restricting use of the MFP to public schools (R. 469). This was unnecessary because the language of Article VIII, §13 plainly does not provide for a restriction. Further, as noted by this Court in Louisiana Ass'n of Educators, and as discussed above, the version of Article VIII, § 13(B) in the original constitution of 1974 made clear that the MFP formula was for purposes of allocating funds, not determining the sufficiency of funds. 521 So.2d at 394. That authority, according to the Court, remained with the Legislature. Thus, the convention comments relied upon by the district court (R. 469) are not relevant to determining whether the MFP formula affords BESE the authority to include the Act 2 programs as BESE's authority, as it exists today, did not come into existence until a 1987 constitutional

amendment to § 13(B).[39] At most, the convention comments reflect an expectation that the MFP would mandate funding for public school systems. The 2012-2013 MFP accomplishes that objective.

Next, the First Circuit's decision in Triplett v. Board of Elementary and Secondary Education is instructive on a court's interpretation of a constitutional provision that is limited in scope and the error of expanding that limitation to an implied prohibition. 2009-0691 (La. App. 1 Cir. 7/13/09); 21 So.3d 401. Triplett related to BESE's transfer of eight schools from the control of the East Baton Rouge Parish School Board to the Recovery School District ("RSD"). Among other arguments, plaintiffs contended that the creation of the RSD by the Legislature was unconstitutional because it created a state-wide "school board" or "school district" in violation of Article VIII, § 9(A), which provides that "the legislature shall create parish school boards and provide for the election of their members."[40] The First Circuit found the argument without merit:

> Even accepting as true for purposes of BESE's exception plaintiffs' allegation that the RSD operates and functions as a state-wide school board, the petition fails to state a cause of action as to this claim. As previously noted, the legislature has the power to pass any legislation not prohibited by the constitution. World Trade Center, 05-0374 at p. 11, 908 So.2d at 632. In this case, **while Article VIII, § 9(A) requires that the legislature create parish school boards, it does not prohibit the legislature from creating other school boards**. Since the constitution did not *prohibit* it, the creation of the RSD was within the plenary power of the legislature. Therefore, plaintiffs' petition fails to state a cause of action for declaratory judgment declaring La. R.S. 17:1990 A(1) & (2) to be unconstitutional, as applied.

Triplett, at 413 (emphasis added). Similarly, the fact the MFP references "public" schools does not, in turn, prohibit the use of the MFP for the purpose of including public-school children who are attending nonpublic schools and the allocation of state funds accordingly.

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[39] ACT NO. 948 - A JOINT RESOLUTION proposing to amend Article VIII, Section 13(B) of the Constitution of Louisiana, to require the State Board of Elementary and Secondary Education, or its successor, to annually develop and adopt a formula to be used to determine the cost of a minimum foundation program of education in all public elementary and secondary schools as well as to equitably allocate funds appropriated; to provide for return of the formula to the board for consideration of legislative recommendations; to require that such formula provide for contributions by each city and parish school system; to require the appropriation of funds sufficient to fully fund the cost to the state of such a minimum foundation program; to prohibit the reduction of such appropriation, except under certain circumstances; to provide for the use of the formula most recently adopted by the board, or its successor, and approved by the legislature; to provide for the submission of the proposed amendment to the electors, and to provide for related matters.

[40] "In their petition, plaintiffs assert that, 'notwithstanding the semantic difference between 'district' and 'board,' 'the RSD' operates and functions as a state-wide school board.' It further alleges that 'the RSD's actions are an unconstitutional usurpation of local school boards' control and their tax dollars because the entire creation of the RSD exceeded the express and limited scope of control and/or authority the state Constitution gives the legislature to create entities that have governing and/or managerial control over local public schools." Triplett, at 413.

The district court attempted to distinguish Triplett, though not on this specific point, by finding that the payment of MFP funds to the RSD - though managed by private entities - is acceptable whereas the "transfer" of MFP funds "into the hands of nonpublic entities" is not.[41] This is a distinction without a difference. *Both* scenarios are for the benefit of public school children and both allocate state funds to an entity other than a public school system. The RSD is not for the *benefit* of the "state-wide school district" created by it, but for the benefit of the at-risk public school children attending the failing school.

Also, this Court's decision in the earlier case of Bd. of Directors of Louisiana Recovery Dist. v. All Taxpayers, Prop. Owners, & Citizens of State of La., 529 So.2d 384 (La. 1988) is applicable. Bd. of Directors related to the creation of the Louisiana Recovery District and its ability to levy taxes and issue bonds. Considering the well-settled law that a party challenging a statute must show a constitutional aim to prevent the enactment of the statute,[42] the Court found that a choice of words in a statute does not equate an implied prohibition:

> In attacking the statute in the present case, Ms. Madden does not point to any constitutional provision which expressly limits the power of the Legislature to enact the legislation. Instead, she contends that several constitutional provisions which actually confirm the Legislature's power to create political subdivisions and vest them with taxing authority contain language that also impliedly deprives the Legislature of the ability to enact the statute in question. *In our opinion, her arguments based on this language constitute nothing more than speculation, rather than a clear showing of a constitutional intention to limit the power of the Legislature in the manner claimed.*[43]

Finally, the Second Circuit, in France v. East Central Bossier Fire Protection Dist. No. 1, 44,058 (La. App. 2 Cir. 2/25/09); 4 So.3d 959, found that the inclusion of certain classes of employees under classified civil service in Article X, § 16 does not equate a prohibition of other classes of employees being included in related legislative enactments:

> The addition to Article X, §§ 16 and 18 addressing "any fire protection district operating a regularly paid fire department" represents the first Louisiana constitutional provisions ever addressing civil service for any fire protection district. The effect of Article X, § 16 is to mandate that a system of classified civil service shall apply to such fire districts, and in Article X, § 18, the legislature is prevented from abolishing civil service for such districts. *There is nothing in these two sections of our existing constitution that prohibits a legislative act from creating a civil service system for those fire protection districts which*

[41] R. 474.

[42] Bd. of Directors of Louisiana Recovery Dist, at 388 ("In an attack upon a legislative act as falling within an exception to the Legislature's otherwise plenary power, it is not enough to show that the constitutionality is fairly debatable, but, rather, it must be shown clearly and convincingly that it was the constitutional aim to deny the Legislature the power to enact the statute.").

[43] Id. (emphasis added).

might be viewed as falling outside the particular fire protection districts addressed in these constitutional provisions. Just as Article X, § 16's provisions addressing the Larger Municipalities do not preclude by implication the legislature's power to provide civil service protection to the employees of smaller municipalities, the Article does not prevent such power of the legislature to provide civil service protection for the employees of any fire protection district, which might be determined as a district lacking a regularly paid fire department.

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Even if Article X, § 16 extends constitutional protection to a small subset of fire protection districts, *the Article makes no express prohibition barring the general plenary power of the Legislature to enact civil service laws for all other fire protection districts*.

France, at 965 - 67 (emphasis added).

Considering the jurisprudence and the plenary authority of the Legislature, the district court erred in creating an implied prohibition based on the use of the word "public" in Article VIII, § 13(B). While the state is obligated under the MFP to fund the state's public school systems, there is no prohibition against the MFP being used to support public children attending a private school under the Act 2 programs.

Although expressly acknowledging BESE's broad authority, the district court found BESE constrained by Article VIII, § 13(B)'s reference to "public" schools and that BESE has "very little control over private schools," according to the court. (R. 467). This observation regarding BESE's authority over private schools misses the point of Act 2 - to provide additional learning environments for public system children and to motivate underperforming public schools to improve.

Furthermore, the use of the word "public" in Section 13(B) – and not in Section 13(A)[44] nor (D)[45] – is logical considering that the state is required, under the Constitution, to "establish and maintain a public education system."[46] It is undisputed that the MFP formula is aimed at ensuring that this constitutional objective is accomplished, *i.e.,* a public education system maintained with state funds. And it is not disputed that the State has *no obligation* to fund nonpublic schools; which is why the word "public" is found (and necessary) in Section B, but not in Section A and D. Nonpublic schools have no

[44] Section A provides as follows: "The legislature shall appropriate funds to supply free school books and other materials of instruction prescribed by the State Board of Elementary and Secondary Education to the children of this state at the elementary and secondary levels."

[45] Section D simply provides that community and city school systems "shall be regarded and treated as parishes and shall have the authority granted parishes."

[46] *Preamble* to Article VIII of the Constitution. The district court's analysis on this point is located at R. 469 - 470.

basis to demand state funds and 13(B) ensures their lack of standing for such a demand. This same rationale applies to why "public" is used by BESE in its own literature and in SCR 99.[47] All parts of Section 13 should be read in conjunction with the others for a proper interpretation.[48] Thus, while the formula *must* include funding for public schools, there is no prohibition that other funding - particularly in favor of public school children - cannot be included. The district court erred in interpreting the constitutional safeguard to ensure public schools are funded with state money in favor of the districts as opposed to the "public education system" and Louisiana children.

Nevertheless, Louisiana's Constitution does not prohibit the use of state funds to pay private entities to provide education services that benefit the public, as the Plaintiffs have acknowledged and the district court was careful to expressly point out: "This Court is not suggesting that the State is prohibited from providing funding to nonpublic schools or nonpublic educational opportunities. . . ." (R. 477). The change from the1921 to the 1974 Constitution supports this position. A 2001 law review article precisely explains the changes from the 1921 to the 1974 constitution relating to state funding for private educational opportunities:[49]

> Another controversial issue during the constitutional convention was whether the constitutional prohibition against the use of public funds for private or sectarian schools should be eliminated. The Elementary and Secondary Education Subcommittee[50] and a joint session of the Elementary and Secondary and Higher Education subcommittees[51] of the Committee on Education and Welfare both voted to keep the prohibition in the constitution. But the full committee voted to delete the prohibition from the committee proposal by a vote of 8 to 7.[52] When the education article was debated on the convention floor, amendments to reinstate the prohibition were overwhelmingly defeated by a vote of

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[47] *See* the district court's Written Reasons For Judgment at R. 470.

[48] *See* Louisiana Mun. Ass'n, at 667 ("The language of La. Const. art. III, § 2(A)(2) relative to tax exemptions and exclusions is, by itself, clear and unambiguous. However, we must analyze the language, *both of the entire amendment and of the critical portion, in the context of the enactment of the amendment in order to determine if there is more than one reasonable interpretation*.") (emphasis added); *see also* Caddo-Shreveport Sales & Use Tax Com'n, at 780 ("Provisions on the same subject matter are interpreted with reference to each other.").

[49] Jackie Ducote, The Education Article of the Louisiana Constitution, 62 La. L. Rev. 117 (2001).

[50] XIII Records of the Louisiana Constitutional Convention of 1973: Louisiana Constitution of 1974 at 107 (May 1, 1973).

[51] XIII Records of the Louisiana Constitutional Convention of 1973: Louisiana Constitution of 1974 at 113 (May 28, 1973).

[52] XIII Records of the Louisiana Constitutional Convention of 1973: Louisiana Constitution of 1974 at 26-27 (June 1, 1973).

> 79 to 21.[53]
>
> Nonpublic school supporters also pushed for language in several other sections of the education article to help facilitate nonpublic school aid. Among these were Article VIII, Sections 1 and 4. Section 1 goes beyond requiring the legislature to establish and maintain a public educational system by stating that "[t]he legislature shall provide for the education of the people of the state and shall establish and maintain a public educational system."[54] Section 4 deals with approval of private schools and states that "[u]pon application by a private elementary, secondary, or proprietary school with a sustained curriculum or specialized course of study of quality at least equal to that prescribed for similar public schools, the State Board of Elementary and Secondary Education shall approve the private school. A certificate issued by an approved private school shall carry the same privileges as one issued by a state public school." The words "upon application" were specifically added at the beginning of this section during convention floor debate to preclude BESE from automatically instituting a school approval process for all nonpublic schools.[55]
>
> References in some of the funding sections of the education article were changed from "funds for public education" to "funds for the education of the school children of Louisiana."[56] This language is specifically included in Section 13(A), which requires the legislature to appropriate funds "to supply free school books and other materials of instruction . . . to the school children of this state at the elementary and secondary levels."

There is no doubt that the Legislature may provide for the Act 2 programs; the only question is whether it can be accomplished through the MFP, as noted by the district court. (R. 477). The overwhelming weight of authority makes clear that the answer to that question is yes.

In summary, the language of Article VIII, § 13(B) does not provide an expressed restriction on the authority of BESE or the Legislature. The provision plainly states what BESE "shall" do with regard to the MFP. Had the framers of this article intended to limit the use of the MFP, it would have been easy to express that intention. For example, Article VI, § 26, relating to parish *ad valorem* taxes, expressly provides that "all proceeds of the tax shall be used ***solely*** for the purpose or purposes set forth in the proposition." (Emphasis added). This same type of limitation could have easily been placed in Article VIII, § 13(B), but it was not.

The district court erred in declaring the Act 2 programs unconstitutional.

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[53] II Records of the Louisiana Constitutional Convention of 1973: Louisiana Constitution of 1974 at 832-34 (Nov. 16, 1973).

[54] La. Const. Art. VIII, § 1.

[55] I Records of the Louisiana Constitutional Convention of 1973: Louisiana Constitution of 1974 at 795 (Nov. 13, 1973).

[56] I Records of the Louisiana Constitutional Convention of 1973: Louisiana Constitution of 1974 at 427-28 (Sept. 5, 1973).

E. Consequences of the District Court's Interpretation of Article VIII, § 13(B) on Other, Non-Act 2 Programs

If Article VIII, § 13(B) is interpreted to make the MFP solely a vehicle for funding public schools under the control of local school systems/boards, the following entities would no longer receive funding through the formula: Recovery School District schools, LSU and Southern University Lab Schools, the Office of Juvenile Justice schools, the Louisiana School for Math, Science, and the Arts (LSMSA), the New Orleans School for the Creative Arts (NOCCA), Type 2 charter schools, the Student Scholarships for Educational Excellence Program, the Special School District (SSD), and the Louisiana School for the Deaf and Visually Impaired (LSDVI). Going forward, these entities would have to receive funds each year through line item appropriations and no protection for continued funding from year to year. Accordingly, the students who depend on these entities will not be guaranteed a school to attend.[57] Rather, BESE and the Legislature have made a determination to protect these important entities by funding them through the MFP. The Legislature's exercise of its constitutional and plenary authority to accomplish this object was proper.

F. The District Court Lacked Subject Matter Jurisdiction Over the Claims Based on the Early Graduation and the Course Choice Programs

Jurisdiction is defined as the "legal power and authority of a court to hear and determine an action or proceeding involving the legal relations of the parties, and to grant the relief to which they are entitled."[58] Jurisdiction over subject matter is "the legal power and authority of a court to hear and determine a particular class of actions or proceedings, based upon the object of the demand, the amount in dispute, or the value of the right asserted."[59] The jurisprudence of this Court "is well settled that, courts will not render advisory opinions. Cases submitted for adjudication must be justiciable, ripe for decision, and not brought prematurely." Louisiana Fed'n of Teachers v. State, 2011-2226 (La. 7/2/12); 94 So.3d 760, 763 (internal citations omitted). "Part and parcel of the state judiciary's exercise of judicial power is the threshold requirement of a dispute, in the sense that adverse parties with opposing claims ripe for judicial determination are considered essential to the court's exercise of general jurisdiction."

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[57] *See* testimony of Elizabeth Scioneaux (R. 875).

[58] La. C.C.P. art. 1.

[59] La. C.C.P. art. 2; *see also* Phillips Petro. Co. v. Batchelor, 560 So.2d 461, 464 (La. App. 1 Cir. 1990) ("The limitation of the exercise of judicial power to real controversies is a constitutional limitation on a court's subject matter jurisdiction.").

Perschall v. State, 96-0322 (La. 7/1/97); 697 So.2d 240, 251. This jurisdictional limitation is rooted in "the tripartite distribution of powers into the executive, legislative, and judicial branches of government." Id.

The justiciable requirement extends to those cases where solely declaratory relief is sought.[60] As this Court recently held in Louisiana Fed'n of Teachers v. State,

> A justiciable controversy connotes, in the present sense, an existing actual and substantial dispute, as distinguished from one that is merely hypothetical or abstract, and a dispute which involves the legal relations of the parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of conclusive character. Further, the plaintiff should have a legally protectable and tangible interest at stake, and the dispute presented should be of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. A court must refuse to entertain an action for a declaration of rights if the issue presented is academic, theoretical, or based on a contingency which may or may not arise. Further, a case is not ripe for review unless it raises more than a generalized, speculative fear of unconstitutional action.

94 So.3d at 763 (internal citations omitted). A court should review an enactment prior to enforcement only when "a justiciable controversy is a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." American Waste & Pollution Control Co. v. St. Martin Parish Police Jury, 627 So.2d 158, 161 (La. 1993).

This Court's 2012 decision in Louisiana Fed'n of Teachers v. State is squarely on point. In that case, the Louisiana Federation of Teachers and others filed a petition for declaratory judgment against the State of Louisiana and BESE seeking a judgment declaring Act 749 unconstitutional. Act 749 provides for waivers to be awarded to schools so they may be exempt from certain provisions of Title 17. The State argued that the claim was not justiciable:

> Pursuant to the subject statute, before a school district can apply for a waiver, the request must necessarily be approved by a majority of teachers, voting by secret ballot. Even then, BESE would not be required to issue a waiver, as the statute only provides that BESE "may ... issue a waiver." La.Rev.Stat. 17:4042.6. At this point, no school district has applied to BESE for a waiver; thus, according to the State, LFT is essentially seeking an advisory opinion. Further, the State contends the constitutional question is hypothetical or abstract because it is based on a contingency (*i.e.*, a request for a waiver), which may not arise.

Id. at 762-63. Ultimately, the Court agreed with the State and found the claim did not present a

[60] Prator v. Caddo Parish, 2004-0794 (La. 12/1/04); 888 So.2d 812, 815; *see also* American Waste & Pollution Control Co. v. St. Martin Parish Police Jury, 627 So.2d 158, 162 (La. 1993) ("Thus, even though the relief offered by the declaratory judgment provisions must be liberally construed and administered, in the absence of a justiciable controversy, declaratory relief is not available to an applicant.").

justiciable controversy. Id. at 765. The same outcome is compelled here.

Because the Early Graduation Program and Course Choice Program have not been funded under the FY 2012-2013 MFP formula and will require future events to effectuate any funding (which may or may not occur), challenges to these programs should have been dismissed for lack of subject matter jurisdiction as they are not justiciable.

1. The Early High School Graduation Scholarship Program

The Early Graduation Program would allow students who complete high school early to use allocated funds at an institution of higher education. However, the program is not included in Act 2 and is only mentioned in SCR 99 as a program slated for the 2013 - 2014 school year. Thus, as it stands, there is no Early Graduation Program. As testified to by BESE President, Penny Dastugue, the program is aspirational - "a program in language at this point." (R. 860). There have been no funds expended or allocated under the Program so there can be no unconstitutional diversion of funds, be it local or state. And the Program's funding is entirely dependent upon the approval of future MFP formulas.

2. The Course Choice Program

The Course Choice Program provides additional education choices to students through various resources, *e.g.*, post-secondary institutions, online course providers, business, and industry. While Act 2 creates the Course Choice Program, the Program (and any related funding) is not scheduled to begin until the FY 2013 - 2014.[61] Thus, there are various contingent events that must occur before the issue of how the Program is funded becomes justiciable: (1) the Course Choice Program must be included in the 2013-2014 MFP formula; and (2) the 2013-2014 formula must be approved by the Legislature, as required by Article VIII, §13. Simply put, the Course Choice Program may never be funded or it may be funded in a manner different than what Plaintiffs contend is unconstitutional.[62]

As with the Early Graduation Program, unless and until the Legislature approves an MFP formula and appropriates funding for the Course Provider Program, the program does not present a justiciable

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[61] The Course Choice Program is provided for in La. R.S. 17:4002.1, *et seq*.

[62] American Waste & Pollution Control Co., at 162 ("Consequently, a declaratory action cannot generally be maintained unless it involves some specific adversary question or controversy asserted by interested parties and based on existing state of facts."); *see also* Edgar Benjamin Fontaine Testamentary Trust v. Jackson Brewery Marketplace, 2002-2337 (La. App. 4 Cir. 5/7/03); 847 So.2d 674, 679 ("The jurisprudence in Louisiana is clear that a declaratory judgment should not be rendered if a contingency could change the existing facts in a case.").

controversy involving Article VIII, § 13. The State's exception is proper.

IV. CONCLUSION

The district court erred in finding that SCR 99 and Act 2 are unconstitutional to the extent they divert MFP and/or local funds to nonpublic entities. SCR 99 is merely the Legislature's approval required under Article III, § 13(B) and, thus, cannot unconstitutionally divert funds. Further, the inclusion of the Act 2 programs in the MFP formula is within BESE's and the Legislature's authority. Finally, the issue of funding regarding the Course Choice and the Early Graduation Programs is not ripe and should not have been adjudicated by the district court. As such, the district court's finding of an unconstitutional diversion of funds should be reversed.

Respectfully submitted

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CERTIFICATION OF SERVICE

Appellants submit the following certification:

STATE OF LOUISIANA

PARISH OF RAPIDES

BEFORE ME, the undersigned authority personally came and appeared, **JIMMY R. FAIRCLOTH, JR.**, who averred as follows:

That he is counsel of record for Appellants, State of Louisiana, Louisiana Board of Elementary and Secondary Education, and Louisiana Department of Education, and that he has notified the district court and all counsel of record that the preceding brief is being filed with this Court on the **14th** day of **February, 2013**, by United States mail, postage prepaid, as follows:

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That the forgoing brief and assertions therein are true and correct.

Alexandria, Louisiana, this **14th** day of **February, 2013.**

/s/ Jimmy R. Faircloth, Jr.

SWORN AND SUBSCRIBED
BEFORE ME, NOTARY, this
14th day of **February**, **2013.**

/s/ Angela C. Braddy
NOTARY PUBLIC
Notary no.: 49781; Commission expires: at death

APPENDIX

SCR 99. . . . . "A"

Act 2. . . . . "B"