



## AlaFile E-Notice

03-CV-2013-901470.00

Judge: HON. EUGENE W. REESE

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# NOTICE OF ELECTRONIC FILING

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IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

DR. DANIEL BOYD ET AL V. JULIE P MAGEE ET AL  
03-CV-2013-901470.00

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**IN THE CIRCUIT COURT  
FOR MONTGOMERY COUNTY, ALABAMA**

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DR. DANIEL BOYD, ANITA GIBSON, and  
SENATOR QUINTON T. ROSS, JR.,

Plaintiffs,

vs.

Civil Action No.  
03-CV-2013-901470.00  
(Judge Reese)

JULIE MAGEE, in her official capacity as  
Commissioner of Revenue of the State of Alabama;  
THOMAS L. WHITE, JR., in his official capacity  
as Comptroller of the State of Alabama,

Defendants.

TEQUILA M. ROGERS, DANYAL JONES, and  
MARK JONES,

Intervenor-Defendants.

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**ORDER**

This lawsuit involves a constitutional challenge to the Alabama Accountability Act ("AAA"). Currently pending before the Court are the Plaintiffs' Motion for Judgment on the Pleadings As To Counts 1-8, the State Defendants' Motion to Dismiss the Complaint in its entirety, and the Intervenor-Defendants' Motion for Judgment on the Pleadings as to all counts.<sup>1</sup> For the reasons set forth below, Plaintiffs' motion is granted, and the motions of the State Defendants and Intervenor-Defendants are denied with respect to Counts 1-8 and denied as moot with respect to Counts 9-10.

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<sup>1</sup> Because the parties were in agreement that Counts 1-8 presented purely legal questions appropriate for resolution on the pleadings, the Court accepted the parties' proposal that these counts could be most efficiently resolved by simultaneous consideration of cross-motions for judgment on the pleadings under Rule 12(c), along with the State Defendants' motion to dismiss under Rule 12(b)(6), notwithstanding that the pleadings were not officially closed.

## FACTUAL BACKGROUND

This lawsuit was filed on August 26, 2013, by Plaintiffs Dr. Daniel Boyd, Anita Gibson, and Senator Quinton T. Ross, Jr., in their individual capacities as Alabama citizens and taxpayers. Plaintiffs' Complaint alleges that the AAA violates multiple provisions of the Alabama Constitution, asserting both procedural violations relating to the enactment of the statute as well as substantive violations relating to the AAA's use of taxpayer funds. Named as defendants are the Commissioner of Revenue and the State Comptroller ("State Defendants"). Without opposition, three parents of children wishing to attend private schools under the AAA ("Intervenor-Defendants") were allowed to intervene in defense of the statute.

Because the issue in this case is, in substantial part, whether the AAA was enacted in conformity with constitutional requirements, it is appropriate to begin by reviewing the enactment history of the statute. The bill that became the AAA was originally introduced on February 5, 2013, as House Bill 84 ("HB84"), entitled the "Local Control School Flexibility Act of 2013." Def. Ex. A at 22.<sup>2</sup> In its original form, HB84 created a mechanism by which local public school districts could enter into contracts with the State in order to obtain exemptions from certain state laws and regulations. Plt. Ex. A. The purpose of the Act, as set forth in its text, was "to advance the benefits of local school and school system autonomy in innovation and creativity by allowing flexibility from state laws, regulations, and policies." *Id.* at §§ 1, 2(b). HB84 passed the House on February 14, 2013. *See* Def. Ex. A at 54-55, 166-177, 188.

Two weeks later, on February 28, the Senate adopted the bill – but with an amendment that made minor changes in the bill's text without changing its substance. *See* Def. Ex. B at 19-

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<sup>2</sup> "Def. Ex." refers to exhibits attached to the State Defendants' Motion to Dismiss, while "Plt. Ex." denotes exhibits attached to Plaintiffs' Complaint. These exhibits consist of legislative materials of which the Court can take judicial notice.

21; Plt. Ex. B. Within a matter of hours following the Senate's action, the House voted to non-concur in the Senate amendment, and a conference committee was convened the same day – ostensibly to address the “disagreement of the two Houses” on the Senate amendment. Def. Ex. A at 408-09. Rather than considering that non-substantive difference between the versions of the “Flexibility Act” adopted by the two Houses, the conference committee instead was presented by the Majority conferees with a substitute version of HB84. The substitute bill – no longer the “Local Control School Flexibility Act of 2013” but now titled the “Alabama Accountability Act” – was three times as long as the prior version, adding two entirely new sections to the bill. Plt. Ex. C. The substitute was quickly adopted by the conferees on a party-line vote, and then passed both the House and the Senate the same evening. *See* Def. Ex. A at 432; Def. Ex. B at 40-41.

The new sections added to HB84 in conference committee were Sections 8 and 9 of the AAA, which created two new tax-credit programs to fund the cost of educating Alabama schoolchildren in private schools. Section 8, codified as Ala. Code § 16-6D-8, provides a 100% income tax credit to reimburse parents for the cost – up to a maximum of 80% of the average annual state cost for a public K-12 student – of transferring their child from a “failing” public school to a non-failing public school or a private school. *Id.* at § 16-6D-8(a)(1). The Section 8 tax credit is refundable, so that if the credit amount exceeds the parent's state income tax liability, the parent will receive a payment from the State. *Id.* These tax credits are paid out of sales tax revenue earmarked for the Education Trust Fund (“ETF”). *Id.* at § 16-6D-8(a)(2).

Section 9 of the AAA, Ala. Code § 16-6D-9, creates a separate 100% income tax credit that may be claimed by both individuals and corporations to reimburse them in full for contributions made to a “scholarship granting organization.” *Id.* at § 16-6D-9(a). Such

organizations provide grants to pay all or part of the cost of tuition and fees for eligible students to attend a non-failing public school or a private school. *Id.* at §§ 16-6D-4(1), (2), (11), (12).

The House Education Budget Committee estimated that the tax credits provided by the AAA would reduce state tax revenue by \$40 million. Accordingly, the 2013-14 ETF appropriation cap, *see* Ala. Code § 29-9-3, was reduced by the same \$40 million amount.

### LEGAL STANDARD

“A Rule 12(c) motion for judgment on the pleadings disposes of a case when the material facts are not in dispute.” *McCullough v. Alabama By-Products Corp.*, 343 So. 2d 508, 510 (Ala. 1977). In addressing a motion under Rule 12(c), “the trial court reviews the pleadings filed in the case and, if the pleadings show that no genuine issue of material fact is presented, the trial court will enter a judgment for the party entitled to a judgment according to the law.” *B.K.W. Enters., Inc. v. Tractor & Equip. Co., Inc.*, 603 So. 2d 989, 991 (Ala. 1992).

### ANALYSIS

The principal focus of Plaintiffs’ Complaint is on provisions of the Alabama Constitution that govern the legislative process generally. The Court agrees with Plaintiffs that the AAA was enacted in violation of several of these procedural requirements and for that reason must be held to be null and void. While these procedural flaws in the statute’s enactment are sufficient ground for holding the AAA unconstitutional, the Court will also address briefly the remaining grounds, involving prohibited uses of public funds, on which Plaintiffs seek judgment on the pleadings.

#### I. UNCONSTITUTIONAL ENACTMENT

Most of the claims for which Plaintiffs seek judgment on the pleadings assert violations of constitutional provisions that impose procedural requirements on the enactment of legislation. Specifically, Plaintiffs contend that the AAA is unconstitutional because it violates (1) the single

subject rule set forth in Sections 45 and 71 of the Alabama Constitution; (2) the original purpose doctrine set forth in Section 61; and (3) the three-readings requirement set forth in Section 63.

The Court agrees that the AAA violates each of these provisions.

Before turning to the merits of these claims, the Court rejects the State Defendants' argument that the Section 61 and 63 deficiencies were "cured" by the subsequent passage of House Bill 658 ("HB658"), which amended several provisions of the AAA. In enacting HB658, the legislature voted only on whether to approve those amendments. *See* Def. Ex. C at 20-22, 28-42, 48; Def. Ex. D at 18-35, 44-46. As our Supreme Court has held, procedural deficiencies in the passage of legislation are not cured by a subsequent vote on amendments to that legislation. *See State v. Martin*, 48 So. 846, 847 (Ala. 1909). The case relied on by the State Defendants is wholly inapplicable. In *Glass v. Prudential Insurance Co.*, 22 So. 2d 13 (Ala. 1945), the original statute had been held void. Accordingly, the legislature was not amending an existing statute, but rather was "creat[ing] a new one, complete and definite, in full compliance with the requirements of the Constitution." *Id.* at 16 (quoting *Harris v. State*, 151 So. 858, 862 (Ala. 1933)). HB658 was not a vote to reenact a void or repealed statute. Indeed, the sections of the AAA not affected by the amendments were not even reprinted in HB658, let alone considered or voted on by the legislature. Thus, as the court held in *Martin*, the subsequent approval of these amendments could not cure the procedural defects in the enactment of HB84.

Furthermore, the Court notes that the Alabama Supreme Court's recent decision in *Ex parte Marsh*, No. 1120781, \_\_\_ So. 3d \_\_\_, 2013 WL 5298570 (Ala. Sept. 20, 2013) – a case involving this same statute – has no application here. In *Marsh* the court held that a challenge to the AAA based in part on alleged violations of legislative rules was not justiciable, observing that "[i]t is not the function of the judiciary to require the legislature to follow its own rules." *Id.*

at \*6. Here, however, the claim is not that the legislature violated its own rules, but that it violated *the Constitution*. While the Court is, of course, mindful of the deference owed to legislative judgments and of the presumption of constitutionality that attaches to legislative enactments, at the end of the day it is indeed “the function of the judiciary to require the legislature to follow” the Constitution when it enacts legislation. For the reasons that follow, the legislature failed to do so in adopting the AAA.

#### **A. Single Subject Rule (Counts 3-5)**

The Constitution requires, with certain exceptions not applicable here, that “[e]ach law shall contain but one subject, which shall be clearly expressed in its title.” Ala. Const. art. IV, § 45; *see also id.*, art. IV, § 71 (“All . . . appropriations [other than general appropriations] shall be made by separate bills, each embracing but one subject.”). The AAA, which provides in Sections 5-7 for local school flexibility contracts, and in Sections 8-9 for tax credits to pay private-school tuition, contains two separate subjects. The tax-credit programs have no relation to the flexibility-contract provisions, and these sections do not interact with each other. No attempt is made in the statute to link these provisions in any way, and indeed the only apparent relationship between them is the legislature’s use of the flexibility-contract bill as a vehicle for enacting the tax-credit legislation.

The State Defendants’ attempt to identify a “single subject” that encompasses all aspects of the AAA is unavailing. In *Opinion of the Justices No. 323*, 512 So. 2d 72 (Ala. 1987), the court concluded that a bill that made appropriations for educational purposes to both public and private entities contained more than one subject in violation of the single subject rule. *Id.* at 77 (holding that the bill was “infirm at least to the extent that it includes ‘non-state agencies’”). Although recognizing that the bill covered “education appropriations,” the Court did not accept

“education” generally as an acceptable single subject; and “public education” similarly was not the single subject in light of the inclusion of appropriations to non-state agencies. *Id.* at 77-78. Nor is there any merit to the State’s contention that the flexibility contracts and tax credits are part of the same subject because they both “give their beneficiaries ‘flexibility’ from entrenched policies.” Such a broad reading of Section 45 would effectively nullify the constitutional requirement limiting each bill to one subject.

The AAA violates Section 45 in another way as well. The Supreme Court held in *Childree v. Hubbert*, 524 So. 2d 336, 341 (Ala. 1988), that a bill that repeals an earmark and also makes an appropriation of the same funds contains more than one subject in violation of Section 45. Tax revenue in the ETF is “earmarked or set aside for appropriation for public educational purposes.” Ala. Code § 29-9-2. Section 8 of the AAA removes this earmark on sales tax revenue deposited in the ETF and instead appropriates those funds to be used to reimburse parents for the cost of enrolling their children in private schools. *See* Ala. Code § 16-6D-8(a)(1)-(2). This constitutes two subjects in violation of Section 45. *See Childree*, 524 So. 2d at 341 (“Thus, any appropriation bill appropriating [ETF] funds other than as specified in the acts creating the [ETF] and in the Code would violate § 71 or § 45 of the Constitution.”).

#### **B. Original Purpose Doctrine (Count 1)**

The Constitution provides that “no bill shall be so altered or amended on its passage through either house as to change its original purpose,” Ala. Const. art. IV, § 61, but that is just what happened here. With the introduction of the substitute bill on February 28, 2013, HB84’s purpose to “advance the benefits of local school and school system autonomy in innovation and creativity by allowing flexibility from state laws, regulations, and policies,” Plt. Ex. A at § 2(b), was transformed into providing tax credits to pay for children to leave the public schools to

which they were assigned and instead attend nonpublic schools. These provisions do not advance local school system autonomy or provide school systems with additional flexibility; if anything they do the opposite, by setting up a system under which certain schools deemed to be “failing” will lose students and resources. This alteration of the purpose of HB84 is further confirmed by the change in the bill’s title from “Local Control School Flexibility Act” to “Alabama Accountability Act,” as well as the significant change in the bill’s fiscal impact, which went from essentially zero to an estimated \$40 million.<sup>3</sup>

### C. Three-Readings Requirement (Count 2)

The Constitution requires that “[e]very bill shall be read on three different days in each house.” Ala. Const. art. IV, § 63. The purpose of this provision is to “prevent[] hasty and ill-advised action, to the assurance of cautious and deliberate judgment by the bodies.” *Jones v. McDade*, 75 So. 988, 992 (Ala. 1917). There is no dispute that the tax-credit legislation was not read on three different days; to the contrary, it was introduced, adopted by the conference committee, and passed by both Houses in a single afternoon.

The State Defendants contend, however, that the requirements of Section 63 were satisfied because HB84 – in its previous version without the tax-credit provisions – was read on three different days. But it is well established that where, as here, the substitute version of a bill differs substantially from the original version, the Constitution requires that the new version be read on three different days. In *In re Opinions of the Justices No. 12*, 136 So. 585 (Ala. 1931), the Supreme Court considered a bill that, like the AAA, was significantly amended during the

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<sup>3</sup> The State’s reliance on *Ex parte Hilsabeck*, 477 So. 2d 472 (Ala. 1985), is misplaced. Contrary to the State Defendants’ characterization in their reply brief, that decision did not “essentially reverse[] the policy” of the original bill. The original bill provided incentive time to inmates with one exception. The amended bill continued to provide incentive time to inmates but added a second exception. *See id.* at 474-75.

legislative process.<sup>4</sup> Because the amended version introduced content that became “the major subject and purpose” of the bill and was “foreign” to the subject of the original bill, the failure to read this new version on three separate days “violated both the letter and spirit” of the Constitution. *Id.* at 588. The same circumstances are present here. The substitute version of HB84 was significantly different from the original version and introduced new provisions that became the “major subject and purpose” of the AAA and were “foreign” to the prior content of the bill. That being the case, because the amended version of HB84 was not read on three separate days in each House, it was enacted in violation of Section 63.

## **II. UNCONSTITUTIONAL USE OF PUBLIC FUNDS**

Having held that the AAA was unconstitutionally enacted, the Court will address only briefly Plaintiffs’ substantive arguments that the AAA uses public funds in ways prohibited by the Alabama Constitution.

### **A. Prohibited Appropriation to Non-State Entities (Count 6)**

The Constitution prohibits an appropriation of public funds “to any charitable or educational institution not under the absolute control of the state, other than normal schools established by law for the professional training of teachers for the public schools of the state,” unless approved by a “vote of two-thirds of all the members elected to each house.” Ala. Const. art. IV § 73. It is undisputed that the AAA did not obtain the requisite two-thirds super-majority, and the only question therefore is whether it provides an appropriation to charitable or educational institutions. The Court holds that it does.

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<sup>4</sup> Because the bill at issue in that opinion was a proposed constitutional amendment, the Court applied the three-readings requirement contained in Section 284 of the Constitution, which is substantively identical to that of Section 63.

The AAA contains an appropriation of public funds to pay for the refundable tax credits provided by Section 8 to parents in reimbursement of the cost of private school tuition. It is not dispositive that the funds appropriated by Section 8 reach the private schools indirectly rather than directly. The intent of the appropriation is to pay the tuition for eligible students to attend private schools; this is the purpose for which the funds are appropriated, and parents receive the tax refunds only in reimbursement of money they have spent for that purpose. It has long been established that “the legislature cannot do indirectly that which it is forbidden to do directly.” *Ex parte State ex rel. Patterson*, 108 So. 2d 448, 453 (Ala. 1958). An instructive case is *Haley v. Clark*, 26 Ala. 439 (1855), in which the Alabama Supreme Court held that the Constitution reserved to the executive branch the power to grant pardons and remit fines, and that the legislature could not circumvent this restriction on its authority through a bill *refunding* certain fines after they had been paid. So too here, the legislature cannot avoid the constitutional limitation on appropriating funds to private charitable and educational institutions by instead reimbursing to parents the cost of their tuition payments at such institutions.

The Section 9 tax credit for “donations” to charitable scholarship-granting organizations is equally problematic. Because this tax credit reimburses such donations *in full*, there is in fact no private contribution, but simply a re-direction of funds from the public fisc to scholarship granting organizations. If it were possible for the legislature by this artifice to avoid the Constitution’s funding restrictions, Section 73 – and numerous other constitutional provisions that place restrictions on the use of public funds – would be rendered toothless.

#### **B. Prohibited Use of Income Tax Revenue (Count 7)**

Amendment 61 to the Alabama Constitution requires that income tax revenue deposited into the ETF “be used for the payment of public school teachers salaries only.” Ala. Const.

amend. 61(B)(2). In this instance, Section 9 of the AAA uses funds that otherwise would have been deposited into the ETF – up to \$25 million each year – for a purpose other than the payment of public school teachers’ salaries. Instead, these funds go to pay for the education of certain schoolchildren in nonpublic schools – contrary to the intent and purpose of Amendment 61. For reasons discussed above in connection with Section 73, the contention that the funds going to scholarship granting organizations under Section 9 are private contributions rather than income tax revenue ignores the real substance of the matter, and if accepted would allow the legislature to circumvent the constitutional restrictions by doing indirectly what it is clearly prohibited from doing directly.

### **C. Prohibited New Debt (Count 8)**

The Constitution provides, with limited exceptions not applicable here, that “no new debt shall be created against, or incurred by the state,” and that “any act creating or incurring any new debt against the state ... shall be absolutely void.” Ala. Const. art. XI, § 213 (as amended by Amendment 26). Section 213 “prevents the legislature from enacting laws that would deplete the funds available and necessary to meet the state’s current obligations in future years.”

*Opinion of the Justices No. 359*, 692 So. 2d 825, 826-27 (Ala. 1997).

Legislation creates a debt when an “obligation is imposed on the state to pay money.” *Ala. Alcoholic Beverage Control Bd. v. City of Pelham*, 855 So. 2d 1070, 1081 (Ala. 2003) (quoting *Opinion of the Justices No. 346*, 665 So. 2d 1357, 1361 (Ala. 1995)). The AAA imposes obligations on the State to pay money in the form of tax refunds to parents who claim the Section 8 refundable tax credit. Section 8 is written in mandatory terms and requires the State to make payments to as many taxpayers as are entitled to claim the tax credit in whatever amounts they are entitled to. *See* Ala. Code. §§ 16-6D-8(a)(2), 16-6D-8(c). The AAA thus

expressly imposes an obligation on the State to pay money, and therefore creates a new debt of the State within the meaning of Section 213. *See Opinion of the Justices No. 88*, 36 So. 2d 475, 479 (Ala. 1948) (finding unconstitutional legislation that would “bind the State ... to pay money monthly for a period of thirty years”).

While the State is free to create continuing financial obligations otherwise within its constitutional authority, “[i]n order to escape being a new debt of the State, there must be a new source of revenue provided to retire the debt.” *Opinion of the Justices No. 359*, 692 So. 2d at 827 (finding invalid legislation that appropriated proceeds of existing tax on cellular radio telecommunications to pay for new obligations). Thus, “[n]o part of the taxes presently paid into the general fund of the State will or can be used” to satisfy the new obligations created by the legislation. *Edmonson v. State Indus. Dev. Auth.*, 184 So. 2d 115, 117 (Ala. 1966). It is undisputed that the AAA does not contain any new source of revenue to finance the new obligations created by Section 8. Rather, it diverts funds from an *existing* revenue source to pay those obligations. *See* Ala. Code § 16-6D-8(a)(2) (“Income tax credits authorized by this section shall be paid out of the sales tax collections made to the Education Trust Fund.”). Because the AAA imposes new financial obligations on the State without a corresponding new source of revenue to pay those obligations, it creates a new debt in violation of Section 213.

### **III. RELIGION CLAUSES**

Plaintiffs’ Complaint also includes, in Counts 9 and 10, claims that, because the funds the AAA channels to private schools will go principally to religious institutions, the program violates the Alabama Constitution’s provisions, in Sections 3 and 263, governing the separation of church and state. Plaintiffs have not moved for judgment on the pleadings with respect to these two counts, however, as they contend that factual development would be necessary for

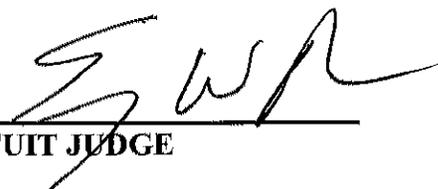
their resolution. Counts 9 and 10 are, therefore, before the Court only on the State Defendants' and Intervenor-Defendants' motions seeking dismissal of the Complaint in its entirety.

Because the Court has already ruled that the AAA is unconstitutional for other reasons, it is unnecessary to determine whether Counts 9 and 10 of the Complaint state claims on which relief could be granted. Defendants' motions will, therefore, be denied as moot with respect to these two counts.

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For the reasons set forth above, the Court finds that there are no disputed material facts and that Plaintiffs are entitled to judgment as a matter of law on Counts 1-8 of their Complaint. It is, accordingly, ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion for Judgment on the Pleadings is GRANTED, and that the State Defendants' Motion to Dismiss and Intervenor-Defendants' Motion for Judgment on the Pleadings are DENIED with respect to Counts 1-8 and DENIED AS MOOT with respect to Counts 9-10. It is further ORDERED that the AAA is DECLARED to be unconstitutional and null and void, and that Defendants, and all persons and entities acting under their direction or in concert with them, are ENJOINED from taking any measures to implement the AAA. In the exercise of its equitable discretion, and to respect the actions of private individuals taken in reliance on the statute, the Court further ORDERS that this injunction shall apply prospectively only, so as not to affect tax credits under Section 8 for expenditures made with respect to the 2013-14 school year, and tax credits under Section 9 with respect to donations made prior to the date of this Order.

DONE this 28 day of MAY, 2014.

  
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CIRCUIT JUDGE