

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 CA 1416

IBERVILLE PARISH SCHOOL BOARD

VERSUS

LOUISIANA STATE BOARD OF ELEMENTARY AND
SECONDARY EDUCATION AND THE STATE OF LOUISIANA
THROUGH THE STATE DEPARTMENT OF EDUCATION

CONSOLIDATED WITH

2015 CA 1417

LOUISIANA ASSOCIATION OF EDUCATORS, CADDO
ASSOCIATION OF EDUCATORS, CALCASIEU ASSOCIATION OF
EDUCATORS, INC., CONCORDIA ASSOCIATION OF
EDUCATORS, THE EAST BATON ROUGE ASSOCIATION OF
EDUCATORS, LAFAYETTE PARISH ASSOCIATION OF
EDUCATORS, MADISON ASSOCIATION OF EDUCATORS,
MONROE ASSOCIATION OF EDUCATORS, ST. LANDRY
ASSOCIATION OF EDUCATORS, ST. MARY ASSOCIATION OF
EDUCATORS, ANN BURRUSS, REV. OSCAR HAMILTON,
DEBORAH HARGRAVE, MELINDA WALLER MANGHAM AND
THOMAS TATE

VERSUS

STATE OF LOUISIANA, THE LOUISIANA STATE BOARD OF
ELEMENTARY AND SECONDARY EDUCATION AND THE STATE
OF LOUISIANA THROUGH THE DEPARTMENT OF EDUCATION

DATE OF JUDGMENT: JAN 09 2017

Holdridge, J., dissents with Reasons
Whipple, C.F. dissents for reasons assigned by J. Holdridge

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER C633193 C/W C633874, SECTION 25,
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE WILSON E. FIELDS, JUDGE

* * * * *

Michael R. Fontham
John Mark Fezio
W. Brett Mason
New Orleans, Louisiana

Counsel for Plaintiff-1st Appellant
Iberville Parish School Board

Brian F. Blackwell
Charles L. Patin, Jr.
Baton Rouge, Louisiana

Counsel for Plaintiffs-2nd Appellants
Louisiana Association of Educators,
Calcasieu Association of Educators,
Inc., The East Baton Rouge
Association of Educators, Lafayette
Parish Association of Educators,
Madison Association of Educators,
Monroe Association of Educators, St.
Landry Association of Educators, St.
Mary Association of Educators, Ann
Burruss, Deborah Hargrave, Melinda
Waller Mangham, and Thomas Tate

Juston M. O'Brien
Kimberly H. Lorio
Baton Rouge, Louisiana

Counsel for Defendant-Appellee
State of Louisiana through the
Department of Education

Joan E. Hunt
Willa R. LeBlanc
R. Christopher Fruge
Baton Rouge, Louisiana

Mark R. Beebe
Lee C. Reid
Jaimme A. Collins
Kellen J. Mathews
New Orleans, Louisiana

Counsel for Defendants-Intervenors
Community School for Apprenticeship
Learning, Inc. d/b/a Madison
Preparatory Academy, Lake
Charles Charter Academy Foundation,
Inc., The International School of
Louisiana, New Orleans Military and
Maritime Academy, Inc., The Delta
Charter Group, Delhi Charter School,
Glencoe Education Foundation, Inc.
d/b/a V.B. Glencoe Charter School and
The Louisiana Association of Public
Charter Schools

James D. “Buddy” Caldwell
Attorney General
Patricia H. Wilton
Assistant Attorney General
Baton Rouge, Louisiana

Counsel for Defendant-Appellee
Louisiana Board of Elementary and
Secondary Education

Preston J. Castille, Jr.
Katia Desrouleaux Bowman
Ne’Shira Millender
Baton Rouge, Louisiana

Counsel for Amici
Jennette Franklin, Christin Kaiser and
PublicSchoolOptions.org

* * * * *

BEFORE: WHIPPLE, C.J., GUIDRY, WELCH, HOLDRIDGE, AND CHUTZ, JJ.

Disposition: REVERSED AND RENDERED.

CHUTZ, J.

Plaintiffs-appellants, Iberville Parish School Board (IPSB) and various regional educational associations and individuals, including the statewide organization, Louisiana Association of Educators (collectively LAE),¹ respectively appeal the trial court's judgment dismissing their claims for injunctive and declaratory relief against defendants-appellees, the State of Louisiana, Department of Education (DOE) and the Louisiana Board of Elementary and Secondary Education (BESE) based on a finding that funding of New Type 2 charter schools does not impinge on the constitutional mandates of the minimum foundation program (MFP). We reverse and render.

BACKGROUND

Before us is the constitutionality of provisions of Senate Concurrent Resolution No. 55 of 2014 (SCR 55),² which provides funding for the State portion of the MFP of education and applies the MFP formula contained in La. R.S. 17:3995 of the Charter School Demonstration Law for the fiscal year 2014-2015.³ Plaintiffs point to La. Const. art. VIII, §13, the salient provisions of which state:

¹ In addition to the Louisiana Association of Educators, these appellants specifically include: Calcasieu Association of Educators, Inc., the East Baton Rouge Association of Educators, Lafayette Parish Association of Educators, Madison Association of Educators, Monroe Association of Educators, St. Landry Association of Educators, and St. Mary Association of Educators, as well as Ann Burruss, Deborah Hargrave, Melinda Waller Mangham, and Thomas Tate in their respective individual capacities. Other regional associations of educators and a named individual were dismissed by the trial court; however, none of these named plaintiffs have appealed their respective dismissals.

² It is undisputed that SCR 55 is incorporated into Act 15 of 2014, the general appropriations bill passed by the legislature for fiscal year 2014-2015.

³ As noted in *Louisiana Federation of Teachers v. State*, 2013-0120 (La. 5/7/13), 118 So.3d 1033, 1045, the legislature's nominal approval of BESE's MFP formula is accomplished by a senate concurrent resolution, SCR 55 in the case presently before us. SCR 55 is a 29-page, largely arcane document, replete with jargon and esoteric terms not defined in the document, but which are apparently known to those few who are well-initiated in the state's budgetary processes and in the administration of education. A detailed description of the formulaic principles was set forth by the *Louisiana Federation of Teachers* court in its examination of SCR 99, addressing an earlier fiscal year budget, and is not repeated here.

(B) [MFP]. [BESE] ... shall annually develop and adopt a formula which shall 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 the funds to parish and city school systems. Such formula shall provide for a contribution by every city and parish school system. Prior to approval of the formula by the legislature, the legislature may return the formula adopted by [BESE] to [BESE] and may recommend to [BESE] an amended formula for consideration by [BESE] and submission to the legislature for approval. The legislature shall annually appropriate funds sufficient to fully fund the current cost to the state of such a program as determined by applying the approved formula in order to insure a minimum foundation of education in all public elementary and secondary schools. Neither the governor nor the legislature may reduce such appropriation, except that the governor may reduce such appropriation using means provided in the act containing the appropriation provided that any such reduction is consented to in writing by two-thirds of the elected members of each house of the legislature. The funds appropriated shall be equitably allocated to parish and city school systems according to the formula as adopted by [BESE] ... and approved by the legislature prior to making the appropriation.

In 2014, the legislature passed SCR 55, the vehicle by which the legislature “approved” the MFP formula developed and adopted by BESE for the 2014-2015 fiscal year as required by La. Const. art. VIII, §13. According to SCR 55, the formula set forth therein determined allocations for city, parish, and other public school systems or schools.

Specifically, IPSB and LAE challenged the allocation of MFP funding as set forth in SCR 55 for New Type 2 charter schools. A Type 2 charter school is a new school or a preexisting public school converted and operated as the result of and pursuant to a charter between the nonprofit corporation created to operate the school and BESE. See La. R.S. 17:3973(2)(b)(ii). And a “New” Type 2 charter school “is a Type 2 [c]harter school approved after July 1, 2008 by [BESE].” See SCR 55(II)(B).⁴

The pertinent provisions of SCR 55(II)(B), insofar as funding of New Type 2 charter schools, provide:

⁴ According to SCR 55(I)(D)(2), Type 2 charter schools approved by BESE before July 1, 2008 are “Legacy Type 2” charter schools. The allocation of MFP funding to Legacy Type 2 charter schools is not challenged by plaintiffs in this case.

1. State Cost Allocation.

a. Any New Type 2 [c]harter [s]chool shall annually be provided a State Cost Allocation as determined by the formula contained in R.S. 17:3995.

b. The State Cost Allocation equals the number of students multiplied by the average State Cost Allocation Per Pupil in the system in which the student resides.

c. Mid-Year Adjustments shall adhere to the guidelines established in this document.

2. Local Cost Allocation.

a. Any New Type 2 [c]harter school shall annually be provided a Local Cost Allocation as determined by the formula contained in R.S. 17:3995.

b. The Local Cost Allocation equals the number of students multiplied by the Local Cost Allocation Per Pupil for the system in which the student resides.

c. One exception to R.S. 17:3995 is that the Local Cost allocation will be funded with a transfer from the city or parish school system in which the attending students reside.

d. The city or parish where students attending the New Type 2 [c]harter school reside is the local taxing authority and shall provide the local support for the students.

e. Mid-Year Adjustments shall adhere to the guidelines established in this document.

PROCEDURAL HISTORY

IPSB and LAE filed petitions seeking injunctive and declaratory relief and named DOE and BESE as defendants. Plaintiffs claimed that they were entitled to a declaratory judgment decreeing that SCR 55 unconstitutionally allocated MFP funding to New Type 2 charter schools and to a permanent injunction prohibiting future allocations in accordance with the methodology set forth under the provisions of SCR 55.⁵ A group of New Type 2 charter school organizations

⁵ Although IPSB also pled entitlement to damages for transfers of MFP funds to New Type 2 charters located within the district that were unconstitutionally allocated, the evidence and argument before the trial court was limited to the issues related to declaratory and injunctive relief.

intervened in the litigation (intervenor), aligning themselves with DOE and BESE.⁶

Subsequent to hearings on plaintiffs' claims for a preliminary injunction for which the trial court denied relief, the matter proceeded to a trial on the merits of plaintiffs' claims for declaratory and permanent injunctive relief. After a three-day trial in which plaintiffs, defendants, and intervenors participated and for which testimonial and documentary evidence was adduced, the trial court denied relief and dismissed all the claims of IPSB and LAE. This appeal followed.

DISCUSSION

The question of whether SCR 55, which applies the formula contained in La. R.S. 17:3995, is constitutional is a legal question that will be reviewed *de novo*. See *State v. All Prop. & Cas. Ins. Carriers Authorized & Licensed To Do Bus. In State*, 2006-2030 (La. 8/25/06), 937 So.2d 313, 319. Statutes and legislative acts are generally presumed to be constitutional, and the party challenging the validity of a legislative act has the burden of proving it is unconstitutional. *Id.* Because the provisions of the Louisiana Constitution are not grants of power, but instead are limitations on the otherwise plenary power of the people of the State, exercised through the legislature, the legislature may enact any legislation that the constitution does not prohibit. Therefore, the party challenging the constitutionality of legislation must also cite to the specific provision of the constitution that prohibits the legislative action. *Id.* Thus, in this declaratory judgment action, plaintiffs bear the burden of proving the unconstitutionality of SCR 55, which applies the formula contained in La. R.S. 17:3995, and must demonstrate clearly and convincingly that it was the constitutional aim of La.

⁶ Intervenors are Community School for Apprenticeship Learning, Inc. d/b/a Madison Preparatory Academy, Lake Charles Charter Academy Foundation, Inc., The International School of Louisiana, New Orleans Military and Maritime Academy, Inc., The Delta Charter Group, Delhi Charter School, Glencoe Education Foundation, Inc. d/b/a V.B. Glencoe Charter School, and The Louisiana Association of Public Charter Schools.

Const. art. VIII, §13 to deny the legislature the power to apply the MFP formula in the manner set forth in SCR 55. See *World Trade Ctr. Taxing Dist. v. All Taxpayers, Prop. Owners*, 2005-0374 (La. 6/29/05), 908 So.2d 623, 632.

Plaintiffs assert the language in La. Const. art. VIII, §13 initially directs BESE “to equitably allocate the funds to parish and city school systems” and subsequently mandates that the MFP funds appropriated by the legislature “shall be equitably allocated to parish and city school systems.” Thus, they reason, because New Type 2 charter schools are not schools within the term “parish and city school systems,” the allocation of MFP funds to New Type 2 charter schools as set forth in SCR 55, is a power denied to the legislature by the constitution.

According to SCR 55, the definition of city, parish, or local public school systems and schools shall include:

city or parish school systems, Recovery School District including operated and Type 5 charter schools, Louisiana School for Math, Science, and the Arts (LSMSA), New Orleans Center for Creative Arts (NOCCA), New Type 2 [c]harter schools, Legacy Type 2 [c]harter schools, Office of Juvenile Justice (OJJ) schools, and Louisiana State University and Southern University Lab schools.

Thus, by its own terms, SCR 55 distinguishes, among others, New Type 2 charter schools from city or parish school systems.

Indeed, defendants do not assert that charter schools are parish and city school systems or any subpart of the existing parish and city school systems. The gist of defendants’ argument is that while La. Const. art. VIII, §13(B) requires allocation of MFP funds to parish and city school systems, nothing precludes BESE and the legislature from allocating funds to other public schools in addition to the MFP funding it has allocated to the parish and city school systems.

In an earlier case successfully challenging the voucher system, the Louisiana Supreme Court addressed a similar argument as follows:

The [S]tate defendants argue there is no language in Article VIII, § 13(B) prohibiting the [S]tate from including [voucher] programs in

the MFP formula. Emphasizing the first two sentences of Article VIII, § 13(B), the defendants argue the constitution only requires that the formula provide for “the cost of a minimum foundation program of education” in all public schools. Otherwise, the constitution provides no direction to or limitation on BESE and the legislature with regards to the MFP formula, as the defendants further argue in reliance on *Jones v. State Board of Elementary and Secondary Education*, [2005-0668 (La. App. 1st Cir. 11/4/05)], 927 So.2d 426, 431 (“BESE is only required to annually develop and adopt a formula.... 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.”). These arguments miss the point.

Louisiana Federation of Teachers v. State, 2013-0120 (La. 5/7/13), 118 So.3d 1033, 1050.

Because the Louisiana Constitution is fundamentally structured such that it contains limitations, not grants, of power, according to *Louisiana Federation of Teachers*, the determination then before the court in that case -- and before us now -- is whether the constitution contains any relevant limitation on MFP funds. More simply stated, the constitutional question is not about what items BESE may put into the MFP formula, but whether the constitution restricts the use of MFP funds. See *Louisiana Federation of Teachers*, 118 So.3d at 1050.

The *Louisiana Federation of Teachers* court held that in La. Const. art. VIII, §13(B), there are clear and unambiguous restrictions on the use of MFP funds. Emphasizing the sixth sentence of the paragraph, which states in pertinent part: “The funds appropriated shall be equitably allocated to parish and city school systems,” the court reasoned that under well-established rules of interpretation, the word “shall” excludes the possibility of being “optional” or even subject to “discretion.” Instead “shall” means “imperative, of similar effect and import with the word ‘must.’” *Id.*, 118 So.3d at 1050-51. Accordingly, the *Louisiana Federation of Teachers* court concluded, “even if the first two sentences of Article VIII, § 13(B) could be construed as permitting BESE to include voucher and other nonpublic school programs in the MFP formula once the minimum baseline for

public education is met, the MFP funds still must be allocated equitably to ‘parish and city school systems.’” *Id.*, 118 So.3d at 1051.

Although the *Louisiana Federation of Teachers* court noted that the voucher case involved MFP funding to nonpublic schools and that “the breadth of the term ‘parish and city school systems’ in Article VIII, § 13(B)” was not a question before it, we find its rationale equally applicable where, as here, SCR 55, by its own terms, defines parish and city school systems as unique elements separate and apart from New Type 2 charter schools. Further, New Type 2 charter schools are not public schools in the sense of the Louisiana Constitution. The court in *Louisiana Federation of Teachers* recognized that “[n]onpublic schools are not owned or operated by ‘parish and city school systems.’” *Louisiana Federation of Teachers*, 118 So.3d at 1055. The case distinguishes between “public schools” and “nonpublic schools” and concludes that MFP funds cannot be diverted to nonpublic schools. See *Louisiana Federation of Teachers*, 118 So.3d at 1055. So, while the New Type 2 charter schools may be subject to the same requirements as public schools and may not necessarily be considered “private” schools, they clearly do not meet the constitutional definition of “public schools” and, therefore, are not entitled to MFP funding.

As such, we conclude that plaintiffs have borne their burden of demonstrating clearly and convincingly that, under its plain language, it was the constitutional aim of La. Const. art. VIII, §13 to deny the legislature the power to apply the MFP formula pursuant to the methodology set forth in SCR 55 insofar as the provisions that fund New Type 2 charter schools. Accordingly, the trial court erred in upholding the constitutionality of SCR 55, which provides funding for the State portion of the MFP of education and applies the MFP formula contained in La. R.S. 17:3995 for New Type 2 charter schools. The trial court’s judgment, dismissing plaintiffs’ claims for a declaratory judgment is reversed. Judgment is rendered,

decreeing that those provisions of SCR 55, applying the formula contained in La. R.S. 17:3995, see SCR 55(II)(B), which provide MFP funding for New Type 2 charter schools, are unconstitutional.⁷

The trial court denied plaintiffs the requested injunctive relief. A petitioner is entitled to injunctive relief without a showing of irreparable injury or that no other adequate legal remedy exists when the conduct sought to be restrained is unconstitutional. *East Baton Rouge Par. Sch. Bd. v. Foster*, 2002-2799 (La. 6/6/03), 851 So.2d 985, 1000.

Because we have found SCR 55(II)(B), applying the formula contained in La. R.S. 17:3995, is unconstitutional insofar as allocation of MFP funds to New Type 2 charter schools, the trial court erred in its dismissal of plaintiffs' claim for a permanent injunction. Accordingly, the trial court's judgment is reversed and we render a judgment issuing a permanent injunction, which enjoins the unconstitutional allocation of MFP funds to New Type 2 charter schools pursuant to the methodology set forth in SCR 55(II)(B), which applies the formula contained in La. R.S. 17:3995.

DECREE

The trial court's judgment is reversed. We render a declaratory judgment, decreeing that the methodology set forth in SCR 55(II)(B), applying the formula contained in La. R.S. 17:3995 to allocate MFP funding to New Type 2 charter schools, is unconstitutional in violation of La. Const. art. VIII, §13, which requires BESE to equitably allocate MFP funds to parish and city school systems; and further that the funds appropriated by the legislature shall be equitably allocated to parish and city school systems according to the formula developed and adopted by BESE. We also render a judgment, issuing a permanent injunction, enjoining the

⁷ Because we have found those provisions of SCR 55(II)(B) that apply the formula contained in La. R.S. 17:3995 to allocate MFP funds to New Type 2 charter schools to be unconstitutional, we pretermitted a discussion of the thornier constitutional issue of the validity of the local cost allocation in the manner set forth in SCR 55(II)(B)(2). See *Louisiana Federation of Teachers*, 118 So.3d at 1055-56.

unconstitutional allocation of MFP funds to New Type 2 charter schools pursuant to the methodology set forth in SCR 55(II)(B), which applies the formula contained in La. R.S. 17:3995. The matter is remanded for further proceedings consistent with this opinion. Appeal costs in the amount of \$12,265.00 are assessed to defendants, the State of Louisiana, Department of Education and the Louisiana Board of Elementary and Secondary Education (BESE).

REVERSED, RENDERED, AND REMANDED.

**IBERVILLE PARISH
SCHOOL BOARD**

STATE OF LOUISIANA

COURT OF APPEAL

VERSUS

FIRST CIRCUIT

**LOUISIANA STATE BOARD
OF ELEMENTARY AND
SECONDARY EDUCATION
AND THE STATE OF
LOUISIANA THROUGH THE
STATE DEPARTMENT OF
EDUCATION**

2015 CA 1416 CW 1417

HOLDRIDGE, J., dissenting.

I respectfully dissent.

Louisiana Constitution article VIII, §13(B) provides that the Louisiana Board of Elementary and Secondary Education:

shall annually develop and adopt a formula which shall be used to determine the cost of a minimum foundation program (MFP) of education in all public elementary and secondary schools as well as to equitably allocate the funds to parish and city school systems. It further provides that the legislature shall annually appropriate funds sufficient to fully fund the current cost to the state of such a program as determined by applying the approved formula in order to insure a minimum foundation of education in all public elementary and secondary schools.

The language of the Louisiana Constitution is clear and without dispute that the purpose of article VIII, §13(B) is to establish a MFP of education in all public elementary and secondary schools and that the legislature is to annually appropriate funds sufficient to fully fund the cost of such a program to “insure a [MFP] of education in all public elementary and secondary schools...”

While the language of the constitution is unambiguous that the legislature must fund the cost of the MFP in all public schools, a question has been raised in the majority opinion as to what is a “public school.” Senate Concurrent Resolution No. 55 of 2014 (SCR 55) established that city, parish, or local public school systems and schools shall include:

city or parish school systems, Recovery School District including operated and Type 5 charter schools, Louisiana School for Math, Science, and the Arts (LSMSA), New Orleans Center for Creative Arts (NOCCA), New Type 2 [c]harter schools, Legacy Type 2 [c]harter schools, Office of Juvenile Justice (OJJ) schools, and Louisiana State University and Southern University Lab schools.

SCR 55 recognizes the fact that there are public schools which are not part of a city or parish school system, such as LSMSA, NOCCA, New Type 2 charter schools, OJJ schools, and Louisiana State University and Southern University Lab schools.

However, the majority holds that because Type 2 charter schools (as well as the Lab schools, LSMSA, OJJ schools, and NOCCA) are not part of the “parish and city school systems,” they are not “public schools in the sense of the Louisiana Constitution.” In no article or section of the constitution is this distinction made. The constitution is clear that all public schools should be funded with MFP funds. There are no exceptions in the language of the constitution that provide that public schools that are not part of the parish or city school systems are somehow different from other public schools or that they should be funded differently. When article VIII, §13(B) was enacted, there were public schools in existence that were not part of a public school system (see for example Louisiana State University and Southern University Lab schools). After the enactment of the constitution and legislation establishing the MFP funding, the public schools that were not part of a city or parish school system were funded under the MFP. Neither the constitution, legislation nor jurisprudence require that the words “public schools” mean “public schools in parish or city school systems.” The constitution and legislation do require that all public schools are to be funded regardless of whether or not they are part of a city or parish school system.

The majority’s tortured interpretation of article VIII, §13(B) is not supported by the plain language of the article or any judicial interpretation. All public schools are to be funded by the legislature. The funding of a public school through the MFP

funding is not affected by the year, the place, or the method that the public school is created. The constitution's only requirement is that the school to be funded is a public school. A reasonable interpretation of the constitution and legislation recognizes that MFP funds should be allocated to the city or parish school systems where applicable and to the public schools themselves, which are not part of the school systems. If the drafters of the constitution wanted the funds to only be allocated to parish and city school systems, the language would have been altered to read "shall only be allocated to parish and city school systems." The constitution would not have insisted on funding for all public schools if the only public schools that would have been funded were those in parish and city school systems. *Louisiana Federation of Teachers v. State*, 2013-0120 (La. 5/7/13), 118 So. 3d 1033, 1045, is clearly distinguishable from this case as it involved MFP funding to nonpublic schools. It does not and cannot stand for the proposition that public schools (such as LSU and Southern Lab schools, NOCCA, OJJ schools, and Type 2 charter schools) are not "constitutional public schools" because they are not part of a parish or city school system. While MFP funds cannot be directed to nonpublic schools, they should and must be paid in accordance with article VIII, §13(B) to all public schools to "insure a minimum foundation of education in all public elementary and secondary schools." La. Const. art. VIII, §13(B).

Accordingly, I believe that the plaintiffs have failed to carry their burden to demonstrate by clear and convincing evidence that applying the MFP formula to all public schools defined in SCR 55 was unconstitutional. *See World Trade Center Taxing District v. All Taxpayers, Property Owners*, 2005-0374 (La. 6/29/05), 908 So.2d 623, 632. I would affirm the trial court's judgment insofar as Type 2 charter schools should be funded in accordance with SCR 55 and La. R.S. 17:3995. However, I would remand the matter to the trial court for additional evidence as to the nature of each local school tax so that a determination can be made as to the

constitutionality of the local cost allocation as applied to the Iberville Parish School Systems.