

0IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE  
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

ELIAS ZARATE, )

Plaintiff, )

v. )

THE TENNESSEE BOARD )  
OF COSMETOLOGY AND BARBER )  
EXAMINERS; ROXANA GUMUCIO, )  
in her official capacity as executive director )  
of the Tennessee Board of Cosmetology; )  
RON R. GILLIHAN II, KELLY BARGER, )  
NINA COPPINGER, JUDY MCALLISTER, )  
PATRICIA J. RICHMOND, MONA )  
SAPPENFIELD, FRANK GAMBUZZA, )  
AMY TANKSLEY, ANITA CHARLTON, )  
YVETTE GRANGER, JIMMY BOYD, )  
BRENDA GRAHAM, and REBECCA )  
RUSSELL, in their official capacities )  
as members of the Board, )

Defendants. )

Case No. 18-534-II

**MEMORANDUM AND ORDER**

This matter is before the Court upon competing motions for summary judgment filed by Plaintiff Elias Zarate, and Defendants the Tennessee Board of Cosmetology and Barber Examiners, its executive director Roxana Gumicio, and the members of the Board. Plaintiff sued seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. The Plaintiff alleges that the Tennessee master barber licensing statute's academic achievement requirement, which is enforced by the Defendants under color of state law, is unconstitutional on its face. These claims are brought against the Defendants in their official capacity. Defendants seek to dismiss this action, asserting that there are no material facts in dispute and that the Plaintiff cannot prevail as a

matter of law. Having reviewed the motions, the parties' submissions, the applicable law and the argument of counsel, the Court finds as follows.

### **FACTUAL FINDINGS**

Elias Zarate ("Mr. Zarate" or "Plaintiff") is a citizen of Tennessee and a resident of the city of Memphis. At the time of the filing of this suit, Zarate did not have a high school diploma or a recognized equivalent. Defendant, Tennessee Board of Cosmetology and Barber Examiners ("the Board"), is empowered by the laws of the State of Tennessee to govern the practice of barbering in Tennessee, including through rules, examinations, licenses, and policy. Defendant Roxana Gumucio is the executive director for the Board. The members of the Board are the agents ultimately responsible for governing the practice of barbering, drafting the regulations pertaining to barbering, and carrying out the enforcement of the barbering licensing regime.

The practices of barbering and cosmetology have a long history, and both have been regulated in Tennessee since the early 1900s. The Barber Board was established by Public Act in 1929, and the Cosmetology Board was established by Public Act in 1939. Both boards regulate licensure and sanitation of these two professions. Historically, barbering was a practice that catered to men, while cosmetology catered to women. This gender divide is now an outdated stereotype, and barbers and cosmetologists each provide services to both men and women.

On July 1, 2014, the State's barber and cosmetology boards merged, establishing the Board. The primary objective of the Board is the health, safety and welfare of the public, with a focus on sanitation and safely using chemicals and tools. The Board drafts and enforces different sets of regulations for barbers and cosmetologists, which are written to be easily understood by the average layperson. The Board also handles complaints regarding individuals licensed in these fields. Meanwhile, barbers and cosmetologists are still regulated by two different sections of the

Tennessee Code: Tenn. Code Ann. § 62-3-101, *et seq.* (“the Barber Act”) and the Cosmetology Act of 1986, Tenn. Code Ann. § 62-4-101, *et seq.* (“the Cosmetology Act”). The Board is established in the Cosmetology Act and is referenced in the Barber Act as the governing body for both professions. Tenn. Code Ann. §§ 62-3-101 and 62-4-103.

The Barber Act describes that profession as involving:

- (1) Shaving or trimming the beard;
- (2) Cutting or styling the hair;
- (3) Giving facial and scalp massages or treatments with oils, creams, lotions or other preparations either by hand or mechanical appliances;
- (4) Singeing, curling, shampooing, coloring, bleaching or straightening the hair or applying hair tonics;
- (5) Cutting, fitting, measuring and forming head caps for wigs or hair pieces;
- (6) Hair weaving, excluding medical or surgical procedures;
- (7) Applying cosmetic preparations, antiseptics, powders, oils, clays or lotions to scalp, face, neck or other parts of the body; or
- (8) Manicuring and nail care.

Tenn. Code Ann. § 62-3-105. It is a crime to practice barbering without a license. Tenn. Code Ann. § 62-3-130.

The scope of practice for barbers and cosmetologists overlaps substantially, but not entirely. Both barbers and cosmetologists cut and style hair. Both use chemicals for perming and coloring hair. Both use chemicals for keeping their stations and shops clean, and for addressing blood spills,<sup>1</sup> should they occur. Both barbers and cosmetologists can shave clients, but barbers

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<sup>1</sup> At her deposition, the Board’s expert witness, Casey Haugner Wrenn, stated that the blood spill procedures for barbers and for cosmetologists “look identical.”

can shave them using a straight razor, while cosmetologists must use a safety blade with a protective edge.

Applicants for a Master Barber License must be at least 17 years old, have a high school education or the equivalent, and complete 1500 hours at an approved school or institution. Tenn. Code Ann. § 62-3-110(b). All such applications are submitted to and reviewed by the Board. Applicants who maintain an active license in another U.S. jurisdiction may also apply through reciprocity.

According to Director Gumacio, and the State's 30.02(6) witness Hosan William, the average cost of attending barbering school is approximately \$10,000. The program includes 240 "general hours" of education and training in history and fundamentals, health and biology, elementary chemistry relating to sterilization and sanitation, shaving, haircutting, chemical theory, and manicure and nail care. Tenn. Comp. R & Regs. 0200-01-.02(2). Included in the curriculum are instructions on safety and sanitation to help students prevent injury to themselves and their clients. *Id.* Students are also given instruction on how to obey the laws, rules, and regulations governing the profession. *Id.*

Barber school also includes 360 "chemical hours" including permanent waving, hair relaxing, hair coloring, bleaching and toning, and manicures. *Id.*

The 1500 hours are rounded out with 900 "physical hours," including the actual practice of barbering, e.g., how to shave a client using a straight razor and how to properly sanitize the razor afterwards. *Id.*

According to witness deposition testimony, after completing barber school, a student can apply to take the two (2) exams needed for licensure. A third-party vendor, PSI Services LLC ("PSI"), administers the exams, which include a theory and law portion, and a practical exam. The

theory portion consists of 100 questions taken in two hours; the law portion consists of 25 questions taken in 40 minutes, including the topics of sanitation, disinfection, and safety. A passing score is 70%. Tenn. Comp. R & Regs. 0200-01-.09(1). Calculators, papers, and pens are not allowed for the theory exam. At the practical exam, test takers are instructed to bring a specified set of items, including mannequin parts and various pieces of equipment for work on the head and hands. Barber applicants also bring premixed chemicals and disinfectants to the exam for sanitation purposes. Tenn. Comp. R & Regs. 0200-01-.15. They are tested on use of a straight razor during their practical exam by shaving a balloon. If the balloon pops, the test is over, and the applicant fails. The barber exam pass rate is 84% for the practical exam and 53% for the theory exam.

The Cosmetology Act describes that profession as involving:

- (A) Arranging, dressing, curling, waving, cleansing, cutting, singeing, bleaching, coloring or similar work on the hair of any person by any means;
- (B) Caring and servicing of wigs and hair pieces;
- (C) Manicuring;
- (D) Massaging, cleansing, stimulating, manipulating, exercising, beautify or similar work upon the hands, arms, face, neck or feet with hands or by use of cosmetic preparations, antiseptics, tonics, lotions or creams;
- (E) Placing or applying artificial eyelashes;
- (F) Giving facials, applying makeup, giving skin care or removing superfluous hair by tweezing, depilatories, or waxing;
- (G) Providing a necessary service that is preparatory or ancillary to a service pursuant to this subdivision (a)(3);
- (H) Treating a person's mustache or beard by arranging, beautifying, coloring, processing, styling, trimming, or shaving with a safety razor;
- (I) Shampooing; or
- (J) Natural hair styling.

Tenn. Code Ann. § 62-4-102(a)(3). It is a crime to practice cosmetology without a license. Tenn. Code Ann. § 62-4-129.

The licensure requirements for cosmetologists are very similar to those for barbers, and they are both regulated by the Board. Aspiring cosmetologists are allowed to apply to cosmetology school at age 16, rather than age 17. Tenn. Code Ann. § 62-4-110(a)(2). More relevant to this case, however, is that students are eligible to apply if they have completed two (2) years of high school, or have a score of at least 450 on a General Educational Development test. Tenn. Comp. R & Regs. 0440-01-.04. Like barbers, cosmetologists are required to have 1500 hours at an approved school or institution, including 300 “general hours,” 600 “chemical hours,” and 600 “physical hours.” Tenn. Comp. R & Regs. 0440-01-.03(3). The third-party vendor PSI also administers the cosmetology exam, which has the same apportionment of theory and law sections as the barber exam.

The Board licenses both cosmetology and barbering shops; both must be overseen by managers. Tenn. Code Ann. §§ 62-3-109 and 62-4-118. Shop managers must hold a valid practitioner license and enforce sanitation standards. Tenn. Code Ann. §§ 62-3-109 and 62-4-118, and Tenn. R. & Regs. 0200-03-.14(1). The Board also issues a “dual license,” enabling a shop to provide both types of services. Managers in dual licensed shops can hold either a barber or cosmetology license; cosmetologists can manage barbers and vice versa. Tenn. Code Ann. § 62-3-109(c)(4) and Tenn. R. & Regs 0200-03-.14(3).

The sanitation standards are not more exacting or difficult to administer for barbers than for cosmetologists. Blood spills and transmission of bodily fluids are the highest sanitation imperatives for barbers and cosmetologists, and both must learn and demonstrate competency with blood spill procedures. *See generally* Tenn. Comp. R & Regs. 0200-03 and 0440-03.

Prior to 2015, one did not need a high school diploma or the equivalent to legally practice barbering in Tennessee. The current version of the academic achievement requirement for barbers is set out in the 2015 Tennessee Public Acts at Section 3, Chapter 402, and is codified at Tenn. Code Ann. § 62-3-110(b). This law was enacted one year after barbering and cosmetology were grouped under the jurisdiction and governance of a single board.

## **LEGAL CONCLUSIONS**

### **Summary Judgment Standard**

Tenn. R. Civ. P. 56.04 sets forth the summary judgment standard, requiring that summary judgment be granted “if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Tennessee law interpreting Rule 56 provides that the moving party shall prevail if the non-moving party’s evidence is insufficient to establish an essential element of her claim. Tenn. Code Ann. § 20-16-101; *Rye v. Women’s Care Center of Memphis, M PLLC*, 477 S.W.3d 235, 261-62 (Tenn. 2015). In response, the non-moving party “may not rest upon the mere allegations or denials of the adverse party’s pleading, but his or her response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” *Tolliver v. Tellico Village Property Owners Ass’n, Inc.*, 579 S.W.3d 8, 21 (Tenn. Ct. App. 2019) (citing Tenn. R. Civ. P. 56.06).

### **Due Process and Equal Protection Claims**

Barbering, like other professions, may be regulated by the State pursuant to its police powers. *State v. Greeson*, 174 Tenn. 178, 124 S.W.2d 253, 255 (1939). “This right, however, is not absolute, but one that must be exercised in a reasonable manner and so as not to interfere with

private rights.” *Id.* (citing *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Campbell v. McIntyre*, 165 Tenn. 47, 52 S.W.2d 162 (1932)).

The Due Process Clause of the Tennessee Constitution, found at Article I, section 8, provides

[t]hat no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

This provision is also considered part of the Tennessee Constitution’s Equal Protection Clause,<sup>2</sup> found at Article XI, section 8, which states that

[t]he Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie [immunities], or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law. No corporation shall be created or its powers increased or diminished by special laws but the General Assembly shall provide by general laws for the organization of all corporations, hereafter created, which laws may, at any time, be altered or repealed, and no such alteration or repeal shall interfere with or divest rights which have become vested.

The Tennessee Supreme Court has stated that the equal protection rights guaranteed under the Tennessee Constitution provide “essentially the same protection” as those guaranteed by the U.S. Constitution. *Hughes v. TN Bd. of Probation & Parole*, 514 S.W.3d 707, 715 (Tenn. 2017) (quoting *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993)). The court has also interpreted the due process protections in the Tennessee Constitution as being “co-extensive”

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<sup>2</sup> “[Article I, § 8 of the Tennessee Constitution] was intended to secure to weak and unpopular minorities and individuals equal rights with the majority, who, from the nature of our government, exercise the legislative power. Any other construction of the constitution would set up the majority in the government as a many-headed tyrant, with capacity and power to oppress the minority at pleasure, by odious laws binding on the latter.” *Wally's Heirs v. Kennedy*, 10 Tenn. 554, 557 (1831).

with those of the United States Constitution. *State v. NV Sumatra Tobacco Trading Co.*, 403 S.W.3d 726, 741 (Tenn. 2013) (citing *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d 635, 646 (Tenn. 2009)). But the high court has also acknowledged that some fundamental rights granted under the Tennessee Constitution are broader than those found in the U.S. Constitution, as evidenced by the differing language of the provisions. *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 12-15 (Tenn. 2000).<sup>3</sup>

The Petitioner brings a substantive due process challenge, rather than a procedural challenge, to the Barber Act's academic achievement requirement. In bringing this claim, he alleges that the requirement is a "(1) deprivation[] of a particular constitutional guarantee and (2) [an] action[] by the government which [is] "arbitrary[] or conscience[] shocking in a constitutional sense."'" *In re Walwyn*, 531 S.W.3d 131, 139 (Tenn. 2017) (quoting *Lynch v. City of Jellico*, 205 S.W.3d 384, 391-92 (Tenn. 2006) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 128, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992); *Valot v. Se. Local Sch. Dist. Bd. of Educ.*, 107 F.3d 1220, 1228 (6th Cir. 1997)).

This Court must begin its analysis "with a strong presumption that acts passed by the legislature are constitutional." *State v. Decosimo*, 555 S.W.3d 494, 506 (Tenn. 2018) (quoting *Lynch*, 205 S.W.3d at 390). The Court must also "indulge every presumption and resolve every

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<sup>3</sup> In *Planned Parenthood of Middle Tenn.*, the Tennessee Supreme Court analyzed a challenge to abortion statutes under the Tennessee Constitution's right to privacy. In rendering its decision on the constitutionality of the statutes, the court stated that

the provisions of our Tennessee Declaration of Rights from which the right to privacy emanates differ from the federal Bill of Rights in marked respects . . . [W]e remain opposed to any assertion that previous decisions suggesting that synonymity or identity of portions of our constitution and the federal constitution requires *this* Court to interpret our constitution as coextensive to the United States Constitution. "Tennessee constitutional standards are not destined to walk in lock step with the uncertain and fluctuating federal standards and do not relegate Tennessee citizens to the lowest levels of constitutional protection, those guaranteed by the national constitution."

38 S.W.3d at 12-15 (quoting *State v. Black*, 815 S.W.2d 166, 193 (Tenn. 1991)).

doubt in favor of the statute's constitutionality.” *Id.* (quoting *Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003)). This presumption applies with even greater force where, as here, the facial constitutional validity of a statute is challenged. *Id.*

An equal protection challenge to a government regulation or action basically asserts that similarly situated individuals are being treated differently in violation of their civil rights. “The concept of equal protection espoused by the federal and our state constitutions guarantees that ‘all persons similarly situated shall be treated alike.’” *Tenn. Small Sch. Sys.*, 851 S.W.2d at 153 (quoting, *Doe v. Norris*, 751 S.W.2d 834, 840-42 (Tenn. 1988)). “To state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff ‘disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis.’” *Center for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011).

As with claims grounded in the rights afforded by the U.S. Constitution, an analysis of rights under the due process and equal protection clauses of the Tennessee Constitution require a determination of whether the right at issue is a fundamental right, thus requiring a heightened level of scrutiny. *Gallaher*, 104 S.W.3d at 460. “Absent implication of a fundamental right, a legislative act will withstand a substantive due process challenge if the government identifies a legitimate governmental interest that the legislative body could rationally conclude was served by the legislative act.” *Consolidated Waste Systems, LLC v. Metro Government of Nashville*, M2002-02582-COA-R3-CV, 2005 WL 1541860 (Tenn. Ct. App. June 30 2005), at \*6 (citing *Parks Properties v. Maury County*, 70 S.W.3d 735, 744-45 (Tenn. Ct. App. 2001)).

The rational basis analysis used in an equal protection challenge does not differ in substantial regard from the rational basis test used when considering a substantive due process

claim. *Id.* at \*7. Equal protection requires only that the legislative classification be rationally related to the objective it seeks to achieve. *Id.* (citing *Wilson v. Yaklich*, 148 F.3d 596, 604 (6<sup>th</sup> Cir. 1998), *cert denied*, 5 U.S. 1139, 119 S.Ct. 1028 (1999); *City of Chattanooga v. Davis*, 54 S.W.3d 248, 276 (Tenn. 2001); *Newton v. Cox*, 878 S.W.2d 105, 110 (Tenn. 1994)).

Other Tennessee courts have described the rational basis test as requiring a presumption of constitutionality if there is “a reasonably conceivable set of facts to justify the classification within the statute.” *Riggs v. Burson*, 941 S.W.2d 44, 53 (Tenn. 1997). “[I]f some reasonable basis can be found for the classification [in the statute] or if any state of facts may reasonably be conceived to justify it, the classification will be upheld.” *Id.* (quoting *Tennessee Small Sch. Sys.*, 851 S.W.2d at 153). The specific expectation is that the law at issue “bears a reasonable relationship to the public health, safety, or welfare; if so, it is a valid exercise of police power.” *Consolidated Waste Systems, LLC*, 2005 WL 1541860, at \*6. *See also Smith v. State*, 6 S.W.3d 512, 519 (Tenn. Crim. App. 1999) (“A legislative enactment will be deemed valid if it bears a real and substantial relationship to the public’s health, safety, morals or general welfare and it is neither unreasonable nor arbitrary.”) (citing *Nashville, C & L. Ry. v. Walters*, 294 U.S. 405, 55 S.Ct. 486, 79 L.Ed. 949 (1935); *Estrin v. Moss*, 221 Tenn. 657, 430 S.W.2d 345, 348 (Tenn. 1968)). The rational basis test is a deferential standard used to determine if a statute “should be deemed arbitrary, capricious, and unreasonable.” *In re: Cumberland Bail Bonding*, 599 S.W.3d 17, 24 (Tenn. 2020) (citing *McCallen v. City of Memphis*, 786 S.W.2d 633, 641 (Tenn. 1990)). In *State v. Tester*, the Court summed up this standard as follows:

“[T]he classification must not be mere arbitrary selection. It must have some basis which bears a natural and reasonable relation to the object sought to be accomplished, and there must be some good and valid reason why the particular individual or class upon whom the benefit is conferred, or who are subject to the burden imposed, not given to or imposed upon others should be so preferred or discriminated against. ***There must be reasonable and substantial differences in***

***the situation and circumstances of the persons placed in different classes which disclose the propriety and necessity of the classification.*** If legislation arbitrarily confers upon one class benefits, from which others in a like situation are excluded, it is a grant of a special right, privilege, or immunity, prohibited by the Constitution, and a denial of the equal protection of the laws to those not included.... ***The fundamental rule is that all classification must be based upon substantial distinctions which make one class really different from another; and the characteristics which form the basis of the classification must be germane to the purpose of the law....***”

879 S.W.2d 823, 829 (Tenn. 1994) (quoting *State v. Nashville, Chattanooga & St. Louis Railway Co.*, 124 Tenn. 1, 135 S.W. 773, 775-76 (1910)) (emphasis in original).

Tennessee courts have also held that a proffered rational basis cannot be one of general application, but must be specific to the circumstances or persons affected. *Livesay v. Tennessee Board of Examiners in Watchmaking*, 322 S.W.2d 209 (Tenn. 1959). In *Livesay*, a Tennessee regulatory board required that an applicant be “a person of good character” in order to avoid “incompetency and fraud” in the watch repair profession. *Id.* at 211. The Tennessee Supreme Court found no rational basis for imposing this type of generic requirement on this particular profession, stating that

if the opportunity for a dishonest person in pursuit of a private occupation to defraud his customer is to become a justification for the regulation under the police power rule of an otherwise private occupation, then the legislature may well regulate every conceivable business, and “the claim of the police power rule would . . . become . . . a delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint.”

*Id.* at 213 (quoting *Greeson*, 124 S.W.2d at 258).

In the present case, while the Plaintiff contends that his right to earn a living is a fundamental right, he also asserts that a strict scrutiny test need not be applied by this Court in its summary judgment analysis, as the academic achievement requirement of the Barber Act cannot withstand review even under the rational basis standard. Accordingly, for purposes of this motion, the Court will apply the rational basis test in analyzing the constitutionality of the Barber Act.

### **Rational Basis Analysis**

The Board has asserted four bases for the academic achievement requirement in the Barber Act. It asserts that the requirement:

1. promotes the goal of education in the State of Tennessee by creating an incentive to complete high school;
2. ensures that master barbers have reading comprehension sufficient to allow them to read and understand materials used in barbering schools and the testing materials;
3. ensures that, once certified, master barbers are able to understand and comply with federal and state rules and regulations that govern the practice; and
4. ensures that applicants and master barbers are versed in mathematical skills and knowledge including the use of measurement and fractions in an algebraic context for the purpose of understanding and applying information about chemical compositions and the mixture of solutions.

The Court will address each of these justifications in turn.

#### **1. Graduation Requirement as an Incentive to Complete High School.**

As an initial matter, the Court rejects the concept that requiring barber applicants to have high school diplomas will incentivize Tennessee citizens to complete their secondary school educations. The generic aspiration that Tennessee students finish 12 years of school has no particular relation to the barbering profession. To be clear, the Court agrees with the Board on the importance of education and notes the Tennessee Constitution's recognition of education's "inherent value." Tenn. Const. art. XI, sec. 12. Tennessee law rightly requires every child between the ages of six and seventeen years of age to attend a public or private school. Tenn. Code Ann. § 49-6-3001(c)(1). This recognition of education's vital role in society does not, however, provide a rational basis for requiring that barbers have high school diplomas, absent some demonstrable connection between that academic achievement and the actual work performed by barbers. As

already noted, cosmetology, a profession that is extremely similar to barbering, does not require that its practitioners graduate from high school. This contradictory treatment of a similar profession highlights the logical inconsistency in the Board’s argument. Accordingly, this justification for the education requirement must fail.

## **2. High School Graduation Ensures Reading Comprehension Skills.**

The Board next asserts that barber school applicants need high school diplomas to ensure that they have the reading comprehension required for success in barber school and on licensing examinations. The Board relies on a report submitted by its expert witness, Casey Haugner Wrenn, to support this proposition. Ms. Wrenn is an Assistant Commissioner with the Tennessee Department of Education. Since July of 2019, she has overseen the Department’s standardized assessment for K through 12 students in Tennessee.

In her expert witness report, Ms. Wrenn opines that it is appropriate to require barbers to have a high school diploma for the following reasons:

- A high school degree matched up “[t]he literacy comprehension requirements for licensing” with “an assessment or milestone which is connected to an individual mastering those requirements.”
- A high school degree is “a proxy for measuring [literacy comprehension], as it is one of the most easily accessible, economical, and nationally benchmarked measures of academic skill and competency available to individuals.”
- “[T]here is no way that every piece of information a practicing barber . . . would need to abide by could be covered in 1,500 hours of vocational training.”<sup>4</sup>

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<sup>4</sup> In her deposition, Ms. Wrenn discussed the high school career technical education programs in Tennessee schools which include some courses in barbering and cosmetology. The Barber Act does not, however, require applicants to have pursued those studies in high school. Rather, the requirement is generically a high school degree or equivalency. The *specialized* education requirements for licensure all are from barber school. Tenn. Code Ann. § 62-3-110.

Ms. Wrenn used the Lexile® Framework and Text Measures to arrive at her opinion on the necessity of a high school diploma for barber applicants. This tool measures both reading ability and the text complexity of reading materials. Ms. Wrenn opined that the complexity of the material used for barber training and licensure requires a textual understanding that is above the average level of a person with a 10<sup>th</sup> grade education. “A student who had successfully completed high school would have a much higher likelihood of comprehending more of the information in the textbook,” she stated. Her opinion, in short, is that someone who has not completed high school would be less likely to understand the information that one must learn to become a barber.

Ms. Wrenn may be correct that barber school students with a high school degree have a learning advantage over students who do not. This, in itself, does not justify making a high school diploma a license requirement. By all accounts, barber school is a rigorous program incorporating 1500 hours of instruction, both academic and experiential. This training is specific to the actual profession of barbering. Before aspiring barbers can be licensed, they must demonstrate their proficiency in both a written examination and a demonstration of skills. Those who do so are admitted to the profession. While an additional year of high school might assist an aspiring barber with his reading skills, an additional year of barbering practice would most likely increase his barbering skills.

In denying Plaintiff’s motion to exclude Ms. Wrenn’s opinions pursuant to T.R.E. 702 and 703, the Court explained that it was reserving judgment on how much weight to give those opinions, consistent with *Shiple v. Williams*, 350 S.W.3d 527 (Tenn. 2011). As the *Shiple* court held,

[i]n its role as a gatekeeper, the trial court is to determine (1) whether the witness meets the competency requirements of Tennessee Code Annotated section 29–16–115(b) and, (2) whether the witness' testimony meets the admissibility requirements of Rules 702 and 703. The trial court is not to decide [at this juncture]

how much weight is to be given to the witness' testimony. Once the minimum requirements are met, any questions the trial court may have about the *extent* of the witness's knowledge, skill, experience, training, or education pertain only to the weight of the testimony, not to its admissibility.

*Id.* at 551.

While Ms. Wrenn's analysis is interesting, and her eight years working for the Department of Education in a variety of roles is impressive, her report does not persuade the Court that the Board's high school graduation requirement is rationally related to the licensing of barbers. The Court also notes that the Lexile® test results provided by Ms. Wrenn do not distinguish between the reading comprehension of 11<sup>th</sup> graders as opposed to 12<sup>th</sup> graders, but instead groups this information together. No data is given for the average reading comprehension of a graduate. Therefore, this information does not advance the State's argument and does not overcome the strong evidence that the comprehensive barbering school program covers the materials necessary for licensure. Barbers-in-training undergo extensive and exacting instruction to gain barber-specific skills, whereas a high school education imparts a broader, more generic skill set. Furthermore, Ms. Wrenn did not explain why this skill set was a necessity for barbers, but not for cosmetologists, who are not required to have a high school diploma or its equivalent.

**3. High School Graduation Ensures that Barbers Will Understand and Comply with Federal and State Rules and Regulations.**

In her expert witness report, Ms. Wrenn makes the case that a high school education will ensure that a barber understands the rules and regulations that apply to his profession. She states as follows:

- “It is my opinion that the requirement of a high school diploma or equivalent is an adequate measure of academic competency such that it would effectively discern between individuals who have a lower probability of being able to comprehend specific text and those who should have a high likelihood of comprehending a specific text.

This discernment is appropriate to differentiate between applicants who would be qualified to not only obtain the license but also fully comply with governing regulations while practicing and those who may be able to complete specific tasks with fidelity but may not be able to fully comprehend or comply with governing laws in perpetuity.”

- “In order for the state of Tennessee to feel confident an individual could fully comprehend these laws, rules, and regulations, it is reasonable for the state to require that an individual provide evidence of mastering a specific level of academic competence, particularly in literacy comprehension.”

This argument mirrors Ms. Wrenn’s assertion that barber applicants need high school diplomas to ensure that they have adequate reading comprehension skills, which the Court addresses in the section above. This argument, similarly, is not persuasive.

#### **4. High School Graduation Ensures Aspiring Barbers Have Mathematical Skills.**

Ms. Wrenn’s report does not address the Board’s fourth justification for the academic achievement requirement, i.e., that a high school diploma ensures barbers will have the necessary mathematical skills and knowledge, including the use of measurements and fractions in an algebraic context, for chemical compositions and the mixture of solutions.<sup>5</sup> The Court recognizes that Mr. Zarate, as the challenger, has the burden of demonstrating that “no set of circumstances exist[s] under which the Act would be valid.” *City of Memphis v. Hargett*, 414 S.W.3d 88, 103 (Tenn. 2013) (quoting *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 525 (Tenn. 1993)). Further, the Court recognizes that the State was not required to proffer an expert witness to explain why a high school degree would result in a barber candidate having sufficient

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<sup>5</sup> Upon questioning at her deposition, Ms. Wrenn tied barbering’s sanitation requirements to her necessary-math-skills analysis. However, she did not address this topic in her report. Frankly, the issue seemed an afterthought and was certainly not part of Ms. Wrenn’s Lexile® analysis. The Board has not provided the Court with an adequate basis to determine whether this opinion is within Ms. Wrenn’s area of expertise.

mathematical skills for the profession. See *In re Adoption of E.N.R.*, 42 S.W.3d 26, 31 (Tenn. 2001); see also *Gallaher*, 104 S.W.3d at 459-60 (quoting *West v. Tenn. Hous. Dev. Agency*, 512 S.W.2d 275, 279 (Tenn. 1974)) (“[T]he party attacking the constitutionality of a statute ‘must bear a heavy burden in establishing some constitutional infirmity of the Act in question.’”). Even so, while the State has no obligation to substantiate its purported rational basis, the Court has to analyze its reasoning based upon the record before it. In this case, the State has not demonstrated what math skills a barber candidate would need from a high school education as opposed to skills acquired during the rigorous barber training program.

Throughout its brief, the Board continues to take the position that the academic achievement requirement was included “to protect the safety and welfare of the public through the regulation of professional conduct.” Respectfully, that appears to be a *Livesay* argument which does not meet the rational basis test. The Board simply does not make a sufficient tie between a high school degree and barbering. Zarate, on the other hand, has provided the Court with detailed information regarding the barber training program and licensure exam. The program’s thorough coverage of all matters related to barbering, including sanitary requirements, chemical solutions, and the use of straight razors satisfies the Court that the material makes public safety a priority.

#### **Equal Protection Analysis with Cosmetologists**

The Board argues that cosmetologists and barbers are not similarly situated because they are governed by separate statutory and regulatory regimes, which admittedly is “a legacy of the time when the professions were governed by entirely separate boards.” It basically contends that because the General Assembly says the classifications are different, then they are, in fact, sufficiently different to defeat an equal protection challenge. This facile explanation does not answer the constitutional question posed here: are the two classifications sufficiently similarly

situated such that there is not even a rational basis to justify the different academic achievement requirements? The Court finds that they *are* sufficiently similarly situated, and that the Board has failed to provide a rational basis for the different treatment. While different statutory classifications need not be “perfect,” *Harmon v. Angus R. Jessup Associates, Inc.*, 619 S.W.2d 522, 524 n.2 (Tenn. 1981) (citing *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976)), here, they are not even arguably rational. The two professions are practically the same, although traditionally distinguished by the gender of their clients. These long-standing stereotypes are outdated, and are not included in the Barber Act or the Cosmetology Act, or in either set of related regulations. Such stereotypes cannot be deemed either rational or reasonable under the current statutory scheme. The Court finds no rational basis for requiring that a barber have a high school degree, while a cosmetologist need only have two years of high school.

### **Plaintiff's Remedies**

In his complaint, the plaintiff seeks declaratory and injunctive relief pursuant to the Declaratory Judgment Act, Tenn. Code Ann. § 29-14-101, *et seq.* and § 4-5-225, and Tenn. Code Ann. § 1-3-121, which creates a cause of action “for any affected person who seeks declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a governmental action.” The Court declares that the academic achievement requirement of the Act, codified at Tenn. Code Ann. § 62-3-110(b)(2), is unconstitutional, unlawful, and unenforceable. The Court further orders a permanent injunction preventing state officials from implementing and enforcing the academic achievement requirement. The Plaintiff is entitled to recover costs, expenses, and reasonable attorney’s fees under 42 U.S.C. § 1988 and Tenn. Code Ann. § 29-14-111.

Costs are taxed to the Board.

It is so ORDERED.

*Anne C. Martin*

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**RULE 58 CERTIFICATION**

A copy of this Order has been served by U.S. Mail upon all parties or their counsel named above.

s/Megan Broadnax  
Deputy Clerk & Master

8-5-20  
Date