

IN THE CHANCERY COURT OF  
DAVIDSON COUNTY, TENNESSEE  
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

KARRIE MARREN,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. <u>19-1512-I</u>
	)	
TENNESSEE SCHOOL BOARDS	)	
ASSOCIATION,	)	
	)	
Respondent.	)	

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**REPLY TO TSBA’S RESPONSE TO MOTION TO SHOW CAUSE**

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Petitioner Karrie Marren respectfully submits this Reply to the Response filed by TSBA. Petitioner has shown that TSBA easily satisfies the functional equivalency test. She will not belabor those arguments. Instead, Petitioner confines herself to pointing out the uncontested arguments, which are sufficient for her to prevail, before then turning to reply to TSBA’s major points.

**I. The uncontested points are sufficient for Petitioner to prevail.**

As an interpretive tool, TSBA cannot deny the directive to construe the TPRA broadly and liberally interpret it “so as to give the fullest possible public access.” Tenn. Code Ann. § 10-7-505(d) (LexisNexis 2020); *Memphis Publ’g Co. v. Cherokee Children & Family Servs., Inc.*, 87

S.W.3d 67, 74 (Tenn. 2002). If this case was a close call – and it is not – any doubts must be resolved in favor of disclosure.

The following points are uncontested:

- TSBA’s function is classically public. Education is not just a core state function. It is a constitutional mandate. *See* Tenn. Const. art. XI, § 12. The state educational system relies on coordination between the Department of Education, local governments, and local school boards. TSBA sits atop that system, with an exclusive role training school boards and setting their ethical standards. TSBA easily satisfies the “cornerstone” of the functional equivalent analysis. *Id.* at 79.
- TSBA acknowledges its function is the training of school board members. (Stip. ¶ 16). It is true that governments hire TSBA, but they hire TSBA to do a governmental job. *See Friedmann v. Corr. Corp. of Am.*, 310 S.W.3d 366, 375 (Tenn. Ct. App. 2009) (CCA is a functional equivalent because the state is required to provide prison services).
- In any event, TSBA is not “only a service provider.” (Resp. at 7). The state is *legally required* to work with TSBA. (Stip. ¶ 23; Tenn. Code Ann. § 49-2-2001). TSBA “shall” develop and conduct most of the modules making up School Board Academies. (Stip. ¶ 23).
- 90% of TSBA’s funding consistently comes from public funds. (Stip. ¶ 13; Ans. ¶¶ 3, 33-34).
- Governmental influence of TSBA is pervasive. Voting membership of TSBA and its Board are exclusively made up of government officials. (Ex 5 at art IV, § 1; Stip. ¶ 8).
- By law, TSBA is a “political subdivision” of the state. (Stip. ¶ 41). By law, TSBA gets to participate in state retirement. (Stip. ¶ 39; Tenn. Code. Ann. §8-35-209(a)). Only two other

entities enjoy similar favor. *Id.* One, TSSAA, has already been designated a functional equivalent.

These uncontested points demonstrate on their own that TSBA's "relationship with the government is so extensive that the entity serves as the functional equivalent of a governmental agency [and therefore, that] the accountability created by public oversight should be preserved." *Id.* at 78-79. Petitioner will briefly turn to TSBA's principle points.

**II. The function and funding factors establish that TSBA is a functional equivalent. It is anything but a regular private vendor.**

In this Section, Petitioner replies to two points made by TSBA relating to its function and funding. *First*, governments may hire TSBA, but they hire TSBA to perform a public function: train school board members. And unlike a normal vendor, TSBA owes much of its role to legal mandates. *Second*, TSBA is overwhelmingly funded by public funds. All of the program services revenues are public funds and owe to legal preference.

**A. TSBA's function is public, and not at all like a regular service provider.**

TSBA's primary argument is to cast its obvious public function – the training of public-school board members – as merely that of a private vendor. (Resp. at 4-5). But functional equivalents are, by definition, private actors that act "as independent contractors." *See Cherokee Children*, 87 S.W.3d at 78. The "[m]ost critical[]" fact in the analysis is the public nature of the services provided. *Id.* at 79. State regulation requires school board members to take mandatory training at the School

Board Academy, administered by the Department of Education. Tenn. Comp. R. & Regs. 0520-01-02-.11(1), (2). But the Department hired TSBA to conduct School Board Academies, and create the materials. (See Ex. 3 at A.1-6 (“Scope of Services”).) This makes for a textbook example of privatization of a public responsibility. See *Friedmann*, 310 S.W.3d at 375 (“the State must still provide the constitutionally required services; it just does so, in part, through its contract with CCA.”).

TSBA does not acknowledge it, but the state is *required* to use TSBA’s services. The School Board Academy consists of state approved training modules, and TSBA “*shall* develop and conduct the majority of the approved modules.” Tenn. Comp. R. & Regs. 0520-01-02-.11(3) (emphasis added). Indeed, the contract itself indicates it was a “non-competitive selection.” (Ex. 3). No “regular service provider” (Resp. at 7) relies on regulatory directives. The janitorial or IT services who contract with governments do not get no-bid contracts because the law spells out the company by name as the sole service provider.<sup>1</sup>

TSBA’s special status with the Department of Education is legislatively mandated. Under Tenn. Code Ann. § 49-2-2001(b)(1), the Department is “authorized and empowered to cooperate with the Tennessee school boards association in its in-training programs for school board members and in encouraging and fostering cooperation.” Furthermore, TSBA’s president is entitled, by rule to a seat on the

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<sup>1</sup> TSBA sets a strawman afire in arguing that if Petitioner prevailed it would “wreak havoc,” on every private “service contract provider[]” who “merely does business with the state.” (Resp. at 5). TSBA has preferences normal vendors do not. These narrow facts set TSBA apart.

Advisory Committee for the School Board Academy. (Stip. ¶¶ 27-28). TSBA’s special seat at the table makes it a functional equivalent, even if the state is officially in charge. *See Wood v. Jefferson*, 2017 Tenn. App. LEXIS 643, at \*18 (Tenn. Ct. App. Sept. 26, 2017) (“whether an entity *participates* in the formulation of policies or decisions that binds public agency is a factor to be considered”) (emphasis added).

TSBA’s analogy to *Gautreaux* quickly disintegrates. (See Resp. at 3 (relying on *Gautreaux v. International Med. Educ. Found., Inc.*, 336 S.W.3d 536 (Tenn. 2011)). Merely “acting as a bookkeeper,” for a university is not a state mandated role that was offloaded to IMEF, unlike training school board members. *Id.* at 530. IMEF personnel are not mandated to participate on state committees. No government was mandated to use IMEF, unlike TSBA. While members of the IMEF were state faculty members, they were not governmental officials and its activities did not themselves weigh in favor of making it a functional equivalent. *Id.* at 531. *Gautreaux* is nothing like the facts at issue here.<sup>2</sup>

As a final point on its public function, TSBA disputes that it sets ethical standards for school board members. (Resp. at 5). However, “TSBA creates and disseminates model ethical standards for officials and

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<sup>2</sup> It is not important that Petitioner produces no evidence that a government was deliberately trying to avoid transparency by reposing documents with TSBA (Resp. at 5). *See Cherokee Children*, S.W.3d at 79 (avoidance can be “intentional or unintentional”). It is likewise unimportant that TSBA wasn’t created by the state (Resp. at 8). *See Cherokee Children*, 87 S.W.3d at 75-76 (overturning Court of Appeals ruling that corporation was not functional equivalent because it did not originate in the General Assembly).

employees of school districts.” (Stip. at ¶ 37); *see also* Tenn. Code Ann. § 8-17-105(a) (LexisNexis 2020) (TSBA sets models of ethical standards for school districts); (Ex. 4 at 9).

**B. TSBA’s funding, including its program services, are public. Even its program revenues owe to legal preferences.**

TSBA plays down the significance of its state contract by arguing that it makes up a relatively small portion of its revenues, with the bulk made up of other “Program Services Revenues.” (Resp. at 3-4). The factor looks to “the level of government funding,” *See Cherokee Children*, 87 S.W.3d at 78-79 (factor looks to “the level of government funding.”); *Friedmann*, 310 S.W.3d at 376. TSBA admits governments are the purchasers of these revenues that it flags. (Resp. at 3).

TSBA maintains that because these are purchases, not subsidies, it tilts the funding factor into its favor. What matters is the *purpose* of those funds and whether they are public, not whether they took the form of subsidies. *Cherokee Children*, 87 S.W.3d at 78-89. The Court of Appeals has already found that the education of school children is so “undeniabl[y]” a public function that the TSSAA’s relatively unimportant role in public education as the entity charged with running school sports made it a functional equivalent. *City Press Commc’ns, LLC v. Tenn. Secondary Sch. Athletic Ass’n*, 447 S.W.3d 230, 238 (Tenn. Ct. App. 2014). By contrast, all of the “Program Services Revenues” that make up the bulk of TSBA’s revenues are for services far more important to public education. In 2018, those were: the contract with the state, School Board Academy, seminars and workshops, and its convention. (Ex. 8 at VIII, 2(a)-(d)). All of these are public funds, and all were purposed to training

school board members. Public funds spent on a public purpose tilt this factor against TSBA.

Even when it comes to the program services not directly tied to state mandated training of school board members (i.e., seminars and the convention) those too are driven by legally embedded preferences specially set out for TSBA. Under Tenn. Code Ann. § 49-2-2001(c)(d), local school boards can pay for programs, as well as membership and travelling expenses for meetings and programs, *but only when administered by TSBA*. In the end, TSBA's funding, including the portions it calls attention to, is made up almost entirely of public dollars channeled towards TSBA by operation of the law.

### **III. TSBA is directly analogous to the TSSAA, another functional equivalent.**

TSBA's dismisses comparisons to the TSSAA and *City Press Commc'ns, LLC v. Tenn. Secondary Sch. Athletic Ass'n*, 447 S.W.3d 230 (Tenn. Ct. App. 2014) because it has no power to regulate and enforce. (Resp. at 5-6). The Court of Appeals rejected this precise argument in *Allen v. Day*, 213 S.W.3d 244, 256 (Tenn. Ct. App. 2006):

[I]n determining whether the organization in *Cherokee* was the functional equivalent of government, the Court never referred to a requirement that an organization govern or regulate. Furthermore, in holding that Cherokee was the functional equivalent of a governmental agency, it does not appear that Cherokee met such a requirement.

It is also unclear in what sense TSBA characterizes TSSAA as a "regulatory agency" with "enforcement authority," but TSSAA is, like TSBA, a non-profit, not a state agency. It referees games, but the only

“rules” that it enforces pertain to interscholastic athletics and have no legal effect.<sup>3</sup> Any state sanction of TSSAA is found in regulations. TSBA is likewise recognized in regulation and statute.

An appropriate analogy lies between the similarity of the arguments TSSAA unsuccessfully advanced. TSSAA argued that it only received 2% of its dues from direct government funding, with the remainder coming from contracts and gate receipts from the games TSSAA officiated. *Id.* at 236. The Court rejected the argument because the regulation designated TSSAA as the only organization capable of supervising and regulating the athletic activities of school sports, *id.* at 240-41, and the State Board of Education “recognized” the role of TSSAA in its rules. *Id.* at 236. TSSAA was unable to splice away the public origin of those funds because of its legal privilege. As related above, TSBA enjoys greater recognition under the law. *See* Tenn. Code Ann. § 49-2-2001; Tenn. Comp. R. & Regs. R. 0520-01-02-.11.

In the end, the Court declared TSSAA to be a functional equivalent by again returning to the central question: function. It was “undeniable that *education is a government function.*” *City Press Commc’ns*, 447 S.W.3d at 238 (emphasis added). The weight of these words falls heavily on TSBA. After all, TSSAA is only authorized to referee sports. TSBA’s role in training school board members lies at the heart of the educational function. TSSAA was declared a functional equivalent, not because it drafted “scrimmage rules” (Resp. at 6), but because it was legally set aside to have a role in public education, just like TSBA.

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<sup>3</sup> *See*: <https://tssaa.org/about-tssaa> (last viewed on May 15, 2020).

Further enriching the parallels, the Court recognized the commingling of public and private actors in TSSAA's organizational structure. *Id.* at 236-37 (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n.*, 531 U.S. 288 (2001)). All of TSBA's voting members come from school boards. (Ex. 5 at art IV, § 1). All of the Board of Directors come from school boards. (Stip. ¶ 8). TSBA's major policy decisions must be determined by the Delegate Assembly, the voting members of which are drawn exclusively from school boards. (See Ex. 5, art. IX §A(1)). Governmental control predominates within TSBA.

#### **IV. TSBA has governmental retirement privileges.**

TSBA dismisses its participation in the state's retirement program, arguing this "not one of the controlling *Cherokee Children* factors." (Resp. at 10). However, the stated factors in *Cherokee Children* were "non-exclusive." *Gautreaux*, 336 S.W.3d at 529. The overarching question asks how "extensive" the private entity's relationship with the government is. *Cherokee Children*, 87 S.W.3d at 78-79. Participation in state retirement has to be a strong indicator. TSBA casts itself as one of the "miscellaneous agencies" allowed to participate, (Resp. at 10), but again that soft peddles things. Only three (3) private entities are legally designated as "participating employers." See Tenn. Code Ann. § 8-35-209(a) (LexisNexis 2020). One is TSBA. Another is TSSAA.

This point is ignored by TSBA, but it is also statutorily defined to be a *political subdivision* of the state, with authority to submit plans for extending benefits under Title II of Social Security. (Stip. ¶ 41) See also Tenn. Code Ann. § 8-38-101(9), 108(a). If TSBA is a political subdivision,

then it is, *ipso facto*, an equivalent of government, and unlike typical vendors of government state services.

**V. TSBA also cannot invoke powers and privileges that belong to the General Assembly.**

Relying on art. II, § 2 of the Tennessee Constitution (separation of powers), TSBA states that it cannot be forced to disclose any of the communications to legislators within the possession of the TSBA without infringing on the powers of the legislature. (Resp. at 10). The privileges that protect the General Assembly are intended to “ensure[] frank and open discussion” among “high government officials.” *Swift v. Campbell*, 159 S.W.3d 565, 578 (Tenn. Ct. App. 2004). This privilege is applied “cautiously,” because otherwise “it could become the exception that swallows up the rule favoring governmental openness and accountability.” *Id.* This is a privilege reserved for when “*the General Assembly decides to invoke it.*” *Id.* (emphasis added). TSBA does not appear aware that is a privilege that applies to *governmental* officials, and TSBA purports to a private entity. Its position is incoherent.

Whatever legislative privileges may cabin the TPRA, they decidedly belong to the legislature. The General Assembly has not invoked it here. TSBA cannot invoke it on the legislature’s behalf. Even “a political subdivision of the state . . . ‘is limited to asserting rights that are its own.’” *City of Memphis v. Hargett*, 414 S.W.3d 88, 100 (Tenn. 2013). Indeed, if TSBA could invoke privileges belonging to the government, then it is an implicit acknowledgment that it is a public body. Moreover, the documents at issue are in TSBA’s possession. So even if they once were privileged, the privilege would no longer be intact. *See City Press*

*Commc'ns*, 447 S.W.3d at 241 (confidential private school documents “lost that status and protection when voluntarily provided to the TSSAA.”).

## **VI. TSBA cannot invoke exemptions for non-profits or comply in part with the TPRA.**

TSBA alludes to “another statutory exception” available to non-profits who make their Form 990s available. (Resp. at 13). The Court of Appeals has already concluded that the statutory exemption for non-profits is unavailable for functional equivalents of government. *See Fodness v. Newport & Cocke County Econ. Dev. Comm'n, Inc.*, No. E2004-01491-COA-R3-CV, 2005 Tenn. App. LEXIS 148, at \*1 (Tenn. Ct. App. March 16, 2005). TSBA does not mention *Fodness*, but it dispenses with the idea that “Petitioner’s remedy, if any, is in the General Assembly—not in this Court.” (Resp. at 13). Functional equivalents cannot avail themselves of the exemption for non-profits.

TSBA also says it “largely complied” with Petitioner’s request (Resp. at 13). However fair this description might be, TPRA is not limited in scope. *See Cherokee Children*, 87 S.W.3d at 74, 80. Absent an expressly stated exemption for particular documents, all of a functional equivalent’s documents are open. *See Friedmann*, 310 S.W.3d at 378-79. If TSBA is a functional equivalent, then it can only withhold documents when there is an exemption, not when it believes the public has seen enough.

## **VII. Conclusion**

TSBA overwhelmingly meets the test for being a functional equivalent. This Court should declare that they are beholden to the TPRA and order full disclosure.