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COMMENT

TENNESSEE TUSSLE: THE STRUGGLE OVER TENNESSEE'S COLLECTIVE BARGAINING CURTAILMENT AND ITS POTENTIAL FUTURE IMPACT

*William Gibbons*¹

I. Introduction

One representative referred to Tennessee's teacher collective bargaining bill as "...the tail wagging the dog."² Another said it signified a fight against "socialistic bargaining."³ A lobbyist for the Tennessee Education Association (TEA) said it "...turn[ed] back the clock 35 years."⁴ The bill's sponsor declared that the legislation would reverse the state teachers' union's "strangle [on] the hope of education reform."⁵ Without a doubt, the Tennessee 107th General Assembly's most contentious debate brought out hostile language from both sides. The final result, the Professional Educators Collaborative

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² Andrea Zelinski, *Amid Political Uncertainty, Collective Bargaining Bill Headed to House Floor*, TNREPORT (May 12, 2011), <http://www.tnreport.com/2011/05/amid-political-uncertainty-collective-bargaining-bill-headed-to-house-floor/> (statement of Rep. Gary Odom).

³ Richard Locker, *Teacher Bargaining Hinges on GOP*, COMMERCIAL APPEAL, May 20, 2011, at B1 (statement of Rep. Glen Casada) (hereinafter "Locker, "Bargaining Hinges").

⁴ Andrea Zelinski, *House Collective Bargaining Bill Clears Education Committee*, TNREPORT (March 23, 2011), <http://www.tnreport.com/2011/03/house-collective-bargaining-bill-clears-education-committee/> (statement of TEA lobbyist Jerry Winters).

⁵ *Ramsey Proud of Senate's Teacher Collective Bargaining Repeal Vote*, TNREPORT (May 2, 2011), <http://www.tnreport.com/2011/05/ramsey-proud-of-senates-teacher-collective-bargaining-repeal-vote/> (statement of Sen. Jack Johnson).

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Conferencing Act of 2011 (PECCA), formalized collective bargaining's replacement with "collaborative conferencing," in which education employees and administrators discuss proposals through "interest-based collaborative problem-solving."⁶

Opponents questioned the motives of the bill's sponsors, viewing it as an attack on teachers and the unions' previous political stances.⁷ Regardless of the truth of such convictions, detractors chafed while supporters hailed victory.⁸ This comment will explore the different versions of PECCA, how it became new law in Tennessee, and its possible impact on education in the state. It will also seek to demonstrate that although the bill's passage revealed the sometimes unpleasant nature of making law, PECCA could bring a potentially meaningful and positive policy change on Tennessee's education system.

II. Tennessee Collective Bargaining before PECCA

Tennessee teachers first won the right to bargain collectively in 1978 with the passage of the Education Professional Negotiations Act (EPNA).⁹ The legislation was part of a growing national trend favoring workers' rights.¹⁰ The baby-boomer generation had increased student enrollment, which spawned higher demand for teachers and increased their "babysitting" duties, such as monitoring

⁶ Professional Educators Collaborative Conferencing Act of 2011, TENN. CODE ANN. § 49-5-602(2) (2011).

⁷ *Teachers Lose PAC Deduction, Will Now Bargain "Collaboratively,"* TENN. J., May 27, 2011 (hereinafter "Teachers Lose").

⁸ *Id.*

⁹ TENN. CODE ANN. §§ 49-5-601 to -613 (1978) (repealed 2011); see *Teachers Lose*, *supra* note 7.

¹⁰ Jesse Fox Mayshark, *The War on Teachers*, METROPULSE (March 2, 2011), <http://www.metropulse.com/news/2011/mar/02/war-teachers/?print=1>.

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lunchrooms.¹¹ With greater responsibility, teachers wanted more in return.¹² Supported by then-Governor Ray Blanton, a Democrat, the EPNA granted professional employees' organizations exclusive negotiating authority with local school boards.¹³ Blanton praised the bill as "elevating government employees from being second-class citizens," and the TEA cheered at his surprise appearance at its convention.¹⁴ Teacher associations in 92 of 136 school districts used the law to bargain collectively.¹⁵

As the 1978 law stated, the purpose was "...to protect the rights of individual employees in their relations with boards of education, and to protect the rights of the boards of education and the public in connection with employer-employee disputes affecting education."¹⁶ To find that balance, the bill put forth a two-step system of elections leading to recognition of an "organization," which would then negotiate exclusively with local school boards.¹⁷ To be able to negotiate, the bill's first step called for thirty percent or more of professional employees to agree to request an election that would decide whether to bargain.¹⁸ After securing the thirty percent vote, the second step required a majority of those eligible to vote affirmatively to secure representation by the organization.¹⁹

¹¹ *Capitol Hill Conversation: History of Teachers' Collective Bargaining*, NASHVILLE PUBLIC RADIO (Feb. 28, 2011), <http://wpln.org/?p=24553>.

¹² *Id.*

¹³ *That Was Then, This Is Now*, TNREPORT (May 16, 2011), <http://www.tnreport.com/2011/05/that-was-then-this-is-now/>.

¹⁴ *House Collective Bargaining Bill Clears Education Committee*, *supra* note 4.

¹⁵ *Teachers Lose*, *supra* note 7.

¹⁶ TENN. CODE ANN. § 49-5-601(b)(3) (2009) (repealed 2011).

¹⁷ *See id.* § 49-5-605 (b)(8).

¹⁸ *See id.* § 49-5-605(a).

¹⁹ *See id.* § 49-5-605(b)(4).

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Once it gained a majority, an organization procured exclusive bargaining rights for the next two years.²⁰

Mandatory negotiation topics included salaries, grievance procedures, insurance, fringe benefits, working conditions, leave, student discipline, and payroll deductions.²¹ When disagreements arose, the law provided for mediation and conciliation that would extend indeterminately if the parties reached no resolution.²² With ninety-two school districts engaging in collective bargaining, the issue of overturning the practice did not reach serious levels, even during the 2010 election season.²³ Thus, when the legislature introduced PECCA, one had to wonder what brought about its unanticipated emergence.

III. Triggers of Change

Local school boards, organized through the Tennessee School Boards Association, opposed collective bargaining and officially favored its repeal beginning in 1982.²⁴ The Association's attempts to turn back the law, though, typically rose to no more than token efforts.²⁵ However, once Republicans across Tennessee triumphed in the 2010 elections, claiming significant majorities in both the Senate and the House, the Association saw opportunity in the altered political climate.²⁶ Perhaps adding to the Association's sense of opportunity was Tennessee's passage of several reforms as it sought funds in the federal

²⁰ See *id.* § 49-5-605(b)(8).

²¹ See *id.* § 49-5-611(a).

²² See TENN. CODE ANN. § 49-5-613.

²³ *Teachers Lose*, *supra* note 7.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

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Race to the Top competition.²⁷ Further, Tennessee's State Collaborative on Reforming Education (SCORE), under former Senate Majority Leader Bill Frist, brought various educational reform ideas into the public sphere.²⁸ Some of SCORE's proposals, such as tenure reform, have become policy in the state.²⁹ Taken together, education policy had entered the public dialogue, and perhaps the Association saw a climate of change taking hold in Tennessee. Indeed, when the Boards Association presented the idea to Senate Republicans, it caught their interest, setting the wheels in motion towards its eventual adoption.³⁰

IV. Evolution of Collective Bargaining's Repeal

A. *The Original Bill and its First Major Amendment*

Introduced on January 18, 2011, in the House and January 24, 2011, in the Senate, the initial PECCA bill proposed the complete repeal of the 1978 EPNA, outlawing negotiation between professional employees' organizations or teachers' unions and local school boards.³¹ While the changes would not have taken effect immediately, once the

²⁷ See J.E. STONE, EDUCATION CONSUMERS FOUNDATION, POLICY HIGHLIGHTS FROM TENNESSEE'S RACE TO THE TOP APPLICATION 2 (2010).

²⁸ See TENN. SCORE, A ROADMAP TO SUCCESS 14 (2010), available at <http://www.tnscore.org/wp-content/uploads/2010/06/SCORE-Roadmap-to-Success.pdf>.

²⁹ See TENN. SCORE, TENURE REFORM (SB 1528/HB 2010) TALKING POINTS (2011), available at <http://www.tnscore.org/wp-content/uploads/2011/03/TENURE-TALKING-POINTS.pdf>.

³⁰ *Teachers Lose*, *supra* note 7.

³¹ S.B. 113, 107th Gen. Assemb., Reg. Sess. § 2(a) (Tenn. 2011). See BILL INFORMATION, S.B. 113, 107th Gen. Assemb. (Tenn. 2011), <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB0113>; see also Eric Schelzig, *TN Teachers Collective Bargaining Targeted*, ASSOCIATED PRESS, <http://www.businessweek.com/ap/financialnews/D9KVF2K01.htm#fadetoblack>.

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active collective bargaining contracts ran their course, school boards would have had full policymaking authority, with no obligation to discuss ideas with employees' organizations.³²

Some viewed the first draft as going too far, and thus the Senate worked to revise it.³³ The amendment, Senate Amendment No. 5, rewrote the original bill and once again called for the repeal of the EPNA while setting forth a system of "collaboration" between professional employees or their representatives and local boards.³⁴ It also required local boards to develop manuals with procedures for creating employment policies.³⁵ Local boards were to receive "input" from professional employees and the general public in creating local manuals.³⁶ Further, the amendment required the Tennessee Organization of School Superintendents (TOSS), in conjunction with employee representative organizations and the Boards Association, to develop a separate training system manual for collaborative problem solving.³⁷ For use by local boards, this training manual would include procedures on discussing terms and conditions of contracts.³⁸ Employees could submit written input to local boards during a 45-day period following their local manual's release.³⁹ The board, however, possessed final authority under the amendment for the specification of terms and conditions.⁴⁰

³² S.B. 113, *supra* note 31, § 2(b).

³³ *Teachers Lose*, *supra* note 7; Joe White, *New Collective Bargaining Proposal Gives Management Job of Crafting Teacher Provisions*, NASHVILLE PUBLIC RADIO (Apr. 28, 2011), <http://wpln.org/?p=26447>.

³⁴ S. Amend. No. 5 to S.B. 113, 107th Gen. Assemb., Reg. Sess. §§ 1, 49-5-603 (Tenn. 2011).

³⁵ *Id.* § 49-5-610.

³⁶ *Id.* § 49-5-610(a)(2).

³⁷ *Id.* § 49-5-601(c).

³⁸ *Id.* § 49-6-608(a).

³⁹ *Id.* § 49-6-610(c)(3)(a).

⁴⁰ S. Amend. No. 5 to S.B. 113 § 49-6-608(a).

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The amendment required local boards to collaborate with professional employees or their representatives with regard to salaries or wages, grievance procedures, insurance, working conditions, leave, payroll deductions, and fringe benefits.⁴¹ As mentioned, though, the boards were to retain final authority on all of these topic areas.⁴² Further, the amendment prohibited collaboration on differentiated pay and incentive programs, expenditures of grants from such entities as the federal government and private foundations, evaluation standards, staffing decisions related to “innovative” programs, and personnel decisions concerning assignment of employees.⁴³ The amended version of the bill passed in the Senate on May 2, 2011, along a largely party-line vote of eighteen to fourteen.⁴⁴

B. Survival in the House and the House’s Revisions

With the amended bill having passed in the Senate, the remaining hurdles to its enactment resided in the House. Those hurdles proved to be more difficult than expected, however. The House initially voted to refer the Senate’s bill to its Education Committee, which, given the short time remaining in the session, seemed to indicate the House was tabling the bill.⁴⁵ The Education Committee, however, voted affirmatively on the bill.⁴⁶ Then, in a legislative oddity, Republican Speaker of the House Beth Harwell

⁴¹ *Id.* § 49-6-608(a)(1)-(7).

⁴² *Id.* § 49-6-608(a).

⁴³ *Id.* § 49-6-608(b)(1)-(5).

⁴⁴ Tom Humphrey, *Senate Votes to Abolish Bargaining for Teachers*, KNOX NEWS (May 3, 2011), <http://www.knoxnews.com/news/2011/may/03/senate-votes-to-abolish-bargaining-for-teachers/?print=1>.

⁴⁵ Richard Locker, *Collective Bargaining Bill Hits Snag*, COMMERCIAL APPEAL, May 4, 2011, at B2.

⁴⁶ Andrea Zelinski, *House Reverts to Scaled Back Collective Bargaining Plan*, TNREPORT (May 11, 2011), <http://www.tnreport.com/2011/05/house-reverts-to-scaled-back-collective-bargaining-plan/>.

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kept the bill alive in the Finance, Ways, and Means Committee by breaking a tie vote, using her right as speaker to vote in any committee.⁴⁷

With new life for the legislation, some members of the House sought to advance their own amendment, which was less comprehensive than the Senate's draft.⁴⁸ The amendment was also a rewrite of the original bill, but its distinction from the Senate Amendment meant the two bodies would have to develop a final version of the bill once the House made its changes.⁴⁹ Most fundamentally different was that the House version did not completely repeal the EPNA.⁵⁰ The amendment required local boards to negotiate with recognized professional employees' organizations only on conditions of employment for which performance requires the employee to have a license—essentially base salaries and benefits, among other issues.⁵¹ Like the Senate version, however, the House proposal specified that issues such as differentiated pay and incentives, expenditure of governmental and private grants, evaluation standards, salary and staffing issues relating to innovative educational programs, and personnel decisions regarding assignment would be off limits in negotiation.⁵²

⁴⁷ Tom Humphrey, *Harwell Casts Vote to Save Collective Bargaining Bill from Defeat*, HUMPHREY ON THE HILL (May 11, 2011, 6:39 PM), <http://blogs.knoxnews.com/humphrey/2011/05/harwell-casts-vote-to-save-col.html>

⁴⁸ Richard Locker, *Tennessee House Amends Bill to Limit Collective Bargaining by Teachers*, COMMERCIAL APPEAL, May 16, 2011, <http://www.commercialappeal.com/news/2011/may/16/tennessee-house-amends-bill-limit-collective-bargal/> (hereinafter "Locker, *House Amends*"); see also Joe White, *Collective Bargaining Vote Delayed, Another Union Bill Marches Forward*, NASHVILLE PUBLIC RADIO (May 16, 2011), <http://wpln.org/?26949>.

⁴⁹ Locker, *House Amends*, *supra* note 48.

⁵⁰ *Id.*

⁵¹ H. Amend. No. 1 to H.B. 130, 107th Gen. Assemb., Reg. Sess. § 12 (Tenn. 2011); see also Locker, *House Amends*, *supra* note 48.

⁵² H. Amend. No. 1 to H.B. 130, *supra* note 51, § 4(c)(1)-(5).

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After extensive debate on the House floor and several proposed amendments containing “opt-out” provisions for local systems, the House amendment passed fifty-nine to thirty-nine, necessitating synchronization between the two bodies.⁵³

C. Reaching a Compromise

The Senate, led by Senator Jack Johnson and Lieutenant Governor Ron Ramsey, both Republicans, refused to concur with the amended House bill, which they perceived as too weak.⁵⁴ To avoid a stalemate, the two bodies formed a conference committee charged with forming a compromise version of the bill.⁵⁵ After deliberating, the compromise banned collective bargaining, but kept much of the framework for its replacement, “collaborative conferencing,” the same as under EPNA.⁵⁶ The new bill retained the EPNA’s two-step voting structure for recognition of teacher organizations, although it lowered the percentage vote necessary to recognize an organization’s request to conference from thirty percent to fifteen percent.⁵⁷ In one significant departure from previous law, the conference committee took away the exclusive negotiating rights of a professional group, meaning multiple organizations could approach local boards.⁵⁸ Like the original statute, the compromise allowed conferencing only on salaries and wages, grievance procedures, working conditions, leave, payroll deductions of dues, and insurance

⁵³ Tom Humphrey, *House Passes Collective Bargaining Bill*, 59-39, HUMPHREY ON THE HILL (May 19, 2011, 5:01 PM), <http://blogs.knoxnews.com/humphrey/2011/05/house-passes-collective-bargai.html>.

⁵⁴ *Teachers Lose*, *supra* note 7.

⁵⁵ Locker, *Bargaining Hinges*, *supra* note 3.

⁵⁶ *See* TENN. CODE ANN. § 49-5-602(2).

⁵⁷ *See id* § 49-5-605(b)(1)-(6).

⁵⁸ *See id* § 49-5-605(c).

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and benefits, including retirement and pension.⁵⁹ Collective bargaining had mandated talks on each of these, as well as student discipline measures, meaning the new legislation kept the major topics of negotiation largely the same, but only suggested them while limiting the scope of talks beyond those topics.⁶⁰

Collaborative conferencing also called for collaboration to take place between even teams of seven to eleven representatives each between the local school system and teacher organizations, a change from EPNA's variation of team sizes based on school district size.⁶¹ Finally, a memorandum of understanding following collaboration would memorialize agreements the two sides could make, although the local school boards would possess ultimate power to decide unresolved matters.⁶² The compromise passed both legislative bodies along largely party-line votes, and Governor Bill Haslam signed the bill into law on June 1, 2011.⁶³

V. Criticism of the Bill

The bill received aggressive legislative commentary inside and outside of the legislature. Following the House's approval of the compromise, TEA members shouted "Shame on you" and "2012"—the year of the next set of

⁵⁹ See *id.* § 49-5-608(a).

⁶⁰ Senator Dolores Gresham, *Comparison of the Educational Professional Negotiations Act of 1978 and the Professional Educators Collaborative Conferencing Act of 2011*, available at <http://senatordoloresgresham.com/pdf/CollBarg%20vs%20CollabConferencing.pdf>.

⁶¹ See TENN. CODE ANN. § 49-5-605(b)(4); see also Gresham, *supra* note 60.

⁶² See TENN. CODE ANN. § 49-5-609(a)-(d).

⁶³ See TENN. CODE ANN.; Richard Locker, *Teacher Rights to Negotiate Repealed*, COMMERCIAL APPEAL, May 21, 2011, at A1.

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elections in Tennessee.⁶⁴ Democrats in opposition to the bill suggested that the primary reason for the bill's passage was revenge for the TEA's historical support of Democratic candidates.⁶⁵ "I have to say that it's not easy to give the benefit of the doubt any more. In fact, this process seems more and more to be a political vendetta," said Senator Andy Berke, a Democrat.⁶⁶

Republicans, however, denied that accusation, and some indicated that the TEA's reduced influence would in fact remove politics from education policy.⁶⁷ "We are not trying to punish the teachers, absolutely not. For too long, we have allowed the TEA to make education a political battleground in this state. We need to make education about education," said Representative Jim Gotto.⁶⁸ Other Republicans hailed the bill's passage as a major education breakthrough.⁶⁹ "For years upon years, one union has thwarted the progress of education in Tennessee," said Lieutenant Governor Ramsey. "The barrier that has prevented us from putting the best possible teacher in every classroom will soon be removed."⁷⁰

Outside the legislature, education association advocates have taken issue with the bill, mostly regarding

⁶⁴ *Lawmakers Vote to Repeal 1970s Era Collective Bargaining Law*, TNREPORT (May 21, 2011), <http://www.tnreport.com/2011/05/lawmakers-vote-to-repeal-1970s-era-collective-bargaining-law/>.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Jeff Woods, *State House Ok's Compromise Version of Proposal to Curtail Teachers' Collective Bargaining*, CITY PAPER, May 19, 2011, available at <http://nashvillecitypaper.com/content/city-news/state-house-oks-compromise-version-proposal-curtail-teachers-collective-bargaining>.

⁶⁸ *Id.*

⁶⁹ Tim Ghianni, *Tennessee Limits Collective Bargaining Rights for Teachers*, REUTERS, June 1, 2011, available at <http://www.reuters.com/article/2011/06/01/us-unions-states-tennessee-idUSTRE75071I20110601>.

⁷⁰ *Id.*

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its fairness but also concerning its legality. Tennessee courts have recognized public employees' right to join unions, but state and federal courts have not found a constitutional right to bargain collectively under Tennessee law.⁷¹

Still, challenges in Tennessee have emerged, focusing on PECCA's constitutionality in other respects.⁷² Three challenges have commenced in Blount, Dickson, and Sumner Counties in which local education associations have sued local boards, with the TEA general counsel serving in each.⁷³ While there are some differences in what the suits allege, they each proffer two fundamental arguments regarding PECCA's constitutionality—that it retrospectively removes powers education associations once possessed and that PECCA's content extends beyond its caption.⁷⁴

The education associations' first argument was that PECCA “retrospectively impairs” the rights of teachers'

⁷¹ Catherine E. Shuck, *Bargaining Power: Understanding the Rights of Public Sector Workers in Tennessee*, TENN. BAR J. 12-14 (2011).

⁷² Tom Humphrey, *Dickson Teachers' Lawsuit Contends Anti-Collective Bargaining Law Violates State Constitution*, HUMPHREY ON THE HILL (July 21, 2011, 2:37 PM), <http://blogs.knoxnews.com/humphrey/2011/07/dickson-teachers-lawsuit-conte.html>.

⁷³ Tennessee Education Association, *Locals Allege Violation of First Amendment Rights*, TEACH, Jan. 2012, at 3 (hereinafter “TEA, *Locals Allege*”).

⁷⁴ See Tennessee Memorandum of Law in Defense of the Constitutionality of 2011 Tenn. Pub. Ch. No. 378 at 2,4, Blount Cnty. Educ. Ass'n v. Blount Cnty. Bd. Of Educ., No. 2010-140 (Ch. Ct. of Blount Cnty. filed Oct. 28, 2011) (hereinafter “Blount Memo”); Tennessee Memorandum of Law in Defense of the Constitutionality of 2011 Tenn. Pub. Ch. No. 378 at 2,4, Dickson Cnty. Educ. Ass'n v. Dickson Cnty. Bd. Of Educ., No. 2011-CV-288 (Ch. Ct. Dickson Cnty. July 13, 2011) (hereinafter “Dickson Memo”); Tennessee Memorandum of Law in Defense of the Constitutionality of 2011 Tenn. Pub. Ch. No. 378 at 2,7, Sumner Cnty. Educ. Ass'n v. Sumner Cnty. Bd. of Educ., No. 2011 C-26 (Ch. Ct. Sumner Cnty. June 30, 2011) (hereinafter “Sumner Memo”) (all on file with author).

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unions formed under the EPNA in violation of Article I, Section 20 of the Tennessee Constitution,⁷⁵ which states that “no retrospective law, or law impairing the obligations of contracts, shall be made.”⁷⁶ Under Tennessee law, “retrospective statutes” are those that “operate forward but look backward” in attaching new consequences or legal significance in the future to past acts or facts that existed before the statute went into effect.⁷⁷ In response, the State Attorney General’s office has intervened by submitting memoranda in each case, arguing in favor of its constitutionality.⁷⁸ The memoranda maintained that PECCA is a prospective statute that does not apply to already existing contracts.⁷⁹ Instead, they point out that PECCA suspends bargaining between unions and school boards so that the two sides can develop new discussion procedures.⁸⁰ In other words, the suspension of negotiations was merely procedural, not substantive.⁸¹ The office points out that, under the logic of the plaintiff’s challenge, amending any state law could face the same constitutional difficulty.⁸² Further, the Attorney General’s office argues that no violation of Article I, Section 20 occurred because PECCA did not strip teachers of any “vested” rights even if

⁷⁵Blount Memo, *supra* note 74, at 2; Dickson Memo, *supra* note 74, at 2; Sumner Memo, *supra* note 74, at 7.

⁷⁶Tenn. Const. art. I, § 20.

⁷⁷Blount Memo, *supra* note 74, at 5; Dickson Memo, *supra* note 74, at 5; Sumner Memo, *supra* note 74, at 3.

⁷⁸See, e.g., Blount Memo, *supra* note 74.

⁷⁹Blount Memo, *supra* note 74, at 4; Dickson Memo, *supra* note 74, at 4; Sumner Memo, *supra* note 74, at 2.

⁸⁰Blount Memo, *supra* note 74, at 6-7; Dickson Memo, *supra* note 74, at 6; Sumner Memo, *supra* note 74, at 4.

⁸¹Blount Memo, *supra* note 74, at 7; Dickson Memo, *supra* note 74, at 7; Sumner Memo, *supra* note 74, at 5.

⁸²Blount Memo, *supra* note 74, at 5; Dickson Memo, *supra* note 74, at 5; Sumner Memo, *supra* note 74, at 3.

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the law was in fact retrospective.⁸³ Citing case law, the memoranda state that the Tennessee Constitution only prohibits retrospective laws that take away vested rights under existing law.⁸⁴ They argue that because teachers retained their right to form a union and to engage in negotiations, they kept their vested rights.⁸⁵

Second, the teachers' unions argue that PECCA extended beyond its caption, a violation of Article II, Section 17 of the Tennessee Constitution.⁸⁶ That section states that bills are to have just one subject and recite in the caption which law the bill may be amending, repealing, or reviving.⁸⁷ The unions argued that confusion arose from deleting the words "any locally negotiated agreement" in certain statutes PECCA amended and that the deletions broaden the meaning of the legislation beyond its caption, which reads "AN Act to amend Tennessee Code Annotated, Section 5-23-107 and Title 49, relative to the Education Professional Negotiations Act."⁸⁸ The Attorney General's office, however, has argued that the point of the Tennessee Constitution's caption provision is to evoke the overall purpose of the legislation.⁸⁹ It contended that the

⁸³ Blount Memo, *supra* note 74, at 6-8; Dickson Memo, *supra* note 74, at 6-8; Sumner Memo, *supra* note 74, at 4-6.

⁸⁴ Blount Memo, *supra* note 74, at 5-6; Dickson Memo, *supra* note 74, at 5; Sumner Memo, *supra* note 74, at 3.

⁸⁵ Blount Memo, *supra* note 74, at 6; Dickson Memo, *supra* note 74, at 6; Sumner Memo, *supra* note 74, at 4.

⁸⁶ Blount Memo, *supra* note 74, at 2; Dickson Memo, *supra* note 74, at 2; Sumner Memo, *supra* note 74, at 7.

⁸⁷ Blount Memo, *supra* note 74, at 3; Dickson Memo, *supra* note 74, at 2; Sumner Memo, *supra* note 74, at 7.

⁸⁸ Blount Memo, *supra* note 74, at 2-3; Dickson Memo, *supra* note 74, at 2; Sumner Memo, *supra* note 74, at 7.

⁸⁹ Blount Memo, *supra* note 74, at 3; Dickson Memo, *supra* note 74, at 3; Sumner Memo, *supra* note 74, at 7.

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bill's caption fulfills that goal and does not extend beyond what was in the EPNA.⁹⁰

In making their arguments, the unions hoped to enjoin the new legislation from taking effect, thereby forcing negotiations to take place using the EPNA, as well as a declaratory judgment stating that PECCA was unconstitutional.⁹¹ To this point, none of the suits has been successful, although none yet has reached a final judgment.⁹² In Dickson County, a judge denied the injunction, citing a lack of irreparable harm to the Dickson County Education Association.⁹³ Currently, the Dickson County Board of Education and the Dickson County Education Association are scheduling depositions in hopes of resolving the matter.⁹⁴

In Blount County, the local education association similarly argued for an injunction.⁹⁵ In particular, the union argued that the PECCA provisions on transfers, dismissals due to staff reduction, and director of school's responsibilities exceeded the limits of PECCA's caption.⁹⁶ Meanwhile, the Blount County Board of Education argued that it was too early to judge the lawsuit, maintaining an injunction was not necessary.⁹⁷ Additionally, the Blount County Board of Education argued that even if PECCA is

⁹⁰ Blount Memo, *supra* note 74, at 4; Dickson Memo, *supra* note 74, at 4; Sumner Memo, *supra* note 74, at 9.

⁹¹ Pierce Greenberg, *Union's Injunction Request Denied*, A COLLECTION FROM THE LONG ROAD, Oct. 2, 2011, available at <http://www.piercegreenberg.com/?p=340>; see TEA, *Locals Allege*, *supra* note 73.

⁹² Greenberg, *supra* note 91.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Matthew Stewart, *Judge Hears Blount Teachers' Union Claim*, DAILY TIMES, http://www.thedailytimes.com/Local_News/story/Judge-hears-Blount-teachers-union-claim-id-016822 (last visited Jan. 22, 2012).

⁹⁶ *Id.*

⁹⁷ *Id.*

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unconstitutional, that alone would not necessitate a return to collective bargaining, asserting that the General Assembly could have theoretically repealed collective bargaining and replaced it with nothing.⁹⁸

In Sumner County, additional First Amendment arguments regarding the local education association's freedom of speech and freedom of association placed the suit in federal district court.⁹⁹ The Sumner County Board of Education, however, argued that the Sumner County Education Association was a non-entity and that the Tennessee Education Association was acting on its behalf.¹⁰⁰ Because of that, the school board maintained, there was no legal basis for dealing with the Sumner County Education Association.¹⁰¹ That case is set for trial on October 23, 2012.¹⁰²

Despite these legal challenges, however, most of the legislation's criticisms pertained to its fairness. Teachers' unions across the state voiced their opposition because, in their view, it silenced their input on district policies.¹⁰³ "It's an attack on the rights of teachers to have a voice regarding their working conditions, which are also the learning conditions of students," said TEA spokesperson Alexei Smirnov shortly after the bill was introduced.¹⁰⁴ Democrats characterized the leeway given to local school boards as unjust.¹⁰⁵ "The biggest difference between this amendment

⁹⁸ *Id.*

⁹⁹ See TEA, *Locals Allege*, *supra* note 73.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See Tim Ghianni, *Tennessee Teachers Fight Bill to End Collective Bargaining*, REUTERS, (Feb. 21, 2011, 12:35 PM) <http://www.reuters.com/article/2011/02/21/us-tennessee-unions-idUSTRE71K46T20110221/>.

¹⁰⁴ *Id.*

¹⁰⁵ See Andrea Zelinski, *Collective Bargaining Bill Clears Senate*, TNREPORT (May 3, 2011), <http://www.tnreport.com/2011/05/collective-bargaining-bill-clears-senate/>.

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and the law today is... they have to meet but they don't have to consider their opinion," Senator Jim Kyle said shortly before the bill passed.¹⁰⁶

In essence, teachers' unions and their supporters appeared to be fearful of the possibility that their contracts could become overly one-sided. Under the old law, items reaching an impasse required continued negotiation; however, the new law gives school boards the power to make a final decision free of outside input.¹⁰⁷ As the Tennessee Education Department stated, "The PECCA...[makes] it clear the board may address terms and conditions of employment through policy if an agreement has not or cannot be reached."¹⁰⁸

As a result of school boards' increased negotiating power, combined with concerns about the issues prohibited from entering negotiations, opponents have expressed unease about what possibilities the law allows. For example, teachers' unions across the country have opposed merit-based pay schemes and bonuses for higher tests scores, two items that the law specifically stated are non-negotiable.¹⁰⁹

Opponents also viewed the state government as overstepping its bounds to pass a bill that they opposed and over which the General Assembly and the general public were divided.¹¹⁰ Proposed "opt-out" provisions spoke to the sentiment that the decision on collective bargaining take

¹⁰⁶ *Id.*

¹⁰⁷ *Blount Cnty. Educ. Ass'n. v. Blount Cnty. Bd. of Educ.*, 78 S.W.3d 307, 322 (Tenn. Ct. App. 2002); Tennessee Department of Education, *Professional Educators Collaborative Conferencing Act of 2011 Frequently Asked Questions*, available at http://www.state.tn.us/education/doc/PECCAFAQ_June17.pdf (hereinafter "PECCA FAQs").

¹⁰⁸ PECCA FAQs, *supra* note 107.

¹⁰⁹ Andrew J. Coulson, *The Effects of Teachers Unions on American Education*, 30 CATO J. 155-156, available at <http://www.cato.org/pubs/journal/cj30n1/cj30n1-8.pdf>.

¹¹⁰ *Teachers Lose*, *supra* note 7.

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place locally, where local education leaders could perhaps better gauge community needs.¹¹¹

VI. Potential Impact of the Bill

Because there are several stark contrasts between the EPNA and its replacement, the potential impact of the bill could be dramatic. Most fundamentally, the replacement of collective bargaining with collaborative conferencing provides more widespread access for teachers through nonexclusive negotiating rights and a reduced number of required votes to gain the right to conference.¹¹² This increased access could be positive for teachers, but it could also result in a more fragmented, less unified message to local school boards. With the new law's allowance of unilateral resolution of disputed issues, a more disjointed message from teachers could result from greater use of the board's ultimate power.

Additionally, local boards' newfound power to resolve unsettled discussions could have a significant impact in other ways.¹¹³ Among the topics for collaborative conferencing are teachers' pay, fringe benefits, insurance, leave policies, and improving working conditions.¹¹⁴ While EPNA ordered negotiation on these matters until the two sides reached an agreement, under the new law, a local school board may now alter one of these topic areas without the endorsement of its employees.¹¹⁵ If school boards chose to use their authority to act independently to its fullest extent, the effects could be considerable.

Even more, the new law's inclusion of explicit nonnegotiable items opens the door for other significant

¹¹¹ Richard Locker, *Senate Ends Bargaining by Teachers*, COMMERCIAL APPEAL, May 2, 2011, at B1; Humphrey, *supra* note 53.

¹¹² See TENN. CODE ANN. § 49-5-605(a)-(b).

¹¹³ See *id* § 49-5-609(d).

¹¹⁴ See *id* §§ 49-5-608(a) & 609(d).

¹¹⁵ *Id.*

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education reforms in Tennessee without input from teachers. The previous law had allowed negotiation of topics outside of the ones specifically mandated, such as differentiated merit pay and evaluation standards, but gave both parties the opportunity to refuse to negotiate, while allowing the other side to seek a court order demanding a meeting on that issue.¹¹⁶ While the topics of negotiation remained largely the same as under the EPNA, the new law was unequivocal in its opposition to discussions outside of its listed items for collaboration; and it barred discussion on differentiated pay, expenditure of grants or awards, evaluations, staffing decisions, assignment of employees, and payroll deductions for political activities.¹¹⁷ These all represent trendy areas of education reform discussion, but only evaluation procedures have seen change in Tennessee.¹¹⁸ School boards independently implementing such changes could face controversy because of the lack of outside input, and it could impact education statewide.

It is unclear what influence merit pay, for example, has on the teaching force or students, although teachers' unions have opposed the measures.¹¹⁹ In one instance, a study performed on three hundred teachers in the Nashville Metro School District showed little increase in student performance among those whose teachers had participated in the program.¹²⁰ However, most studies on the effects of merit pay are too recent to determine the long-term effects

¹¹⁶ TENN. CODE ANN. § 49-5-611(a) (2009) (repealed 2011).

¹¹⁷ TENN. CODE ANN. § 49-5-608(a)(5).

¹¹⁸ See *Tenure Reform (SB 1528/HB 2010) – Talking Points*, SCORE (Mar. 3, 2011), <http://www.tnscore.org/wp-content/uploads/2011/03/TENURE-TALKING-POINTS.pdf>.

¹¹⁹ Fredrick M. Hess & Martin R. West, *A Better Bargain: Overhauling Teacher Collective Bargaining for the 21st Century* (2006), available at www.hks.harvard.edu/pepg/PDF/Papers/BetterBargain.pdf.

¹²⁰ Michael Podgursky & Matthew Springer, *Teacher Compensation Systems in the United States K-12 Public School System*, 64 NAT'L TAX J. 165, 182 (2011). Similar studies in Chicago, New York, and Round Rock, Texas also revealed only marginal increase.

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of such legislation.¹²¹ Another form of differentiated pay involves paying more to teachers of a subject area in short supply. For example, nationally, schools lack qualified math and science teachers.¹²² Collective bargaining measures often leave administrators unable to take those shortages into account when offering salaries, as has been the case with Memphis City Schools.¹²³ Now, school boards can enact these changes without union support.

Personnel decisions, another nonnegotiable item, also allow potentially significant leeway to local school boards. For example, seniority determines which teachers avoid layoffs pursuant to the collectively bargained contract in Memphis City Schools.¹²⁴ In July 2011, the system laid off 150 teachers in compliance with the contract.¹²⁵ Among those laid off were four Teach for America teachers and one who had taught for 27 years in Johnson City, but for just one year in Memphis.¹²⁶ Each teacher's principal could attest to the talent of those teachers who faced dismissal, but seniority rules prevailed.¹²⁷ Under the new law, those teachers could have possibly averted layoffs, had administrators decided to change the system and deemed those teachers too talented to dismiss.¹²⁸

¹²¹ *Id.* at 186.

¹²² *See Hess, supra* note 119, at 24.

¹²³ *Id.*; *see* Agreement Between the Board of Education of the Memphis City Schools and the Memphis Education Association, an Affiliate of the Tennessee Education Association and the National Education Association Effective July 1, 2009 through June 30, 2012, *available at* <http://www.nctq.org/docs/17-07.pdf> (hereinafter "Memphis Agreement").

¹²⁴ Memphis Agreement, *supra* note 123.

¹²⁵ Jane Roberts, *Schools Caught in Seniority Quandary*, COMMERCIAL APPEAL, July 15, 2011, at A1.

¹²⁶ *Id.*

¹²⁷ *See id.*

¹²⁸ TENN. CODE ANN. § 49-5-608(a)(5).

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On the other hand, some believe the new law may have little impact. In school districts where relations between teaching organizations and school administrators are cordial, it is possible, even likely, that the difference between collective bargaining and collaborative conferencing may be mere terminology. Dickson Schools Director Jimmy Chandler said as much following the law's enactment, stating, "It didn't bother us because we've always worked well with our teachers. It's never been a big issue for us. We try to do everything we can as far as benefits and salaries [for our teachers]."¹²⁹ Though somewhat concerned with the law's potential impact if relations deteriorate between educators and administrators, Dickson's lead teachers' union negotiator agreed.¹³⁰ However, Dickson County has emerged as a site of a legal challenge to PECCA, and perhaps the initial optimism there and in other counties could wane.

At any rate, it is likely that this issue will remain a part of the public discourse. The year 2012 is an election year, and in the years ahead various collective bargaining contracts will expire. This means educators and system administrators will have to begin new negotiations under the new law. As future rounds of negotiation unfold, the practicability of this law will become apparent, and more lawsuits may arise.

As Tennessee's SCORE notes and other studies show, the most important factor in a child's educational development is quality teaching.¹³¹ If these studies are

¹²⁹ Pierce Greenberg, *Dickson Educators Respond to New Law*, DICKSON HERALD, (June 15, 2011), <http://www.tennessean.com/article/20110616/DICKSON01/110615050/Dickson-educators-respond-new-union-law>.

¹³⁰ *Id.*

¹³¹ *Improving Teacher Effectiveness: Tennessee's Recent Progress and Future Opportunities*, SCORE, Feb. 2011, available at <http://www.tnscore.org/wp-content/uploads/2010/12/SCORE-Teacher-Effectiveness.pdf>.

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accurate, educational policies should work towards having the best teachers possible in every classroom. Many of the reform ideas such as differentiated pay and altered layoff policy are somewhat unproven but offer intriguing possibility. Giving school system leaders the opportunity to implement those policies, and to some degree the opportunity to experiment with them, has positive potential for Tennessee, which is currently ranked among the nation's worst in student achievement metrics such as national assessment tests and percentage of citizens over twenty-five years old with a bachelor's degree.¹³² Increased system flexibility can allow school administrators to be more innovative. Collaborative conferencing achieves that mission while still providing educators a voice in local policies. While an outright bar to negotiations would have given school boards too much power and represented the state's acquiescence to the Tennessee School Boards Association's wishes without compromise, the allowance of collaborative conferencing strikes a balance, and arguably makes the process of running an entire school system easier.¹³³ In tandem with Tennessee's revised teacher tenure law, the new policies reduce the friction teachers' unions have generated and can lead to smoother operations, which in turn can give rise to greater innovation. While paying careful attention to the morale and desires of the teaching corps, administrators should seek to use their newly found opportunity to be bold, as students stand to benefit.

¹³² The State of Education-2010, SCORE, *available at* <http://www.tnscore.org/wp-content/uploads/2010/06/Score-2010-Annual-Report-Full.pdf>.

¹³³ *See Teachers Lose, supra* note 7.

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VII. A Final Thought

Before the passage of the PECCA, forty-four districts in Tennessee did not collectively bargain.¹³⁴ The Maryville Education Association, for example, an organization through which teachers and administrators formulate local school policies, operates without a contract.¹³⁵ Still, teachers say the relationship is cohesive.¹³⁶ “When we have really shown that we needed additional funds, additional increases in taxes and those types of things that have to happen in order to fund education, they’ve always been supportive of us,” Maryville teacher Stephanie Thompson said.¹³⁷ A similar system exists in Alcoa, Tennessee.¹³⁸ Both superintendents state that relations are pleasant, and the common goal of education rises above pettiness.¹³⁹ At the same time, nearby Blount County Schools collectively bargained peacefully before the new bill took effect, which demonstrates that both systems can work effectively.¹⁴⁰ All three districts typically register positive student achievement results.¹⁴¹ While different dynamics play a role in different school districts, the fact that both systems can work successfully should remind those on both sides of the debate that if school employees and administrators share the common goal of student achievement, positive solutions can surface.

¹³⁴ Christine Jessel, *Collective Bargaining in East Tennessee*, Southern Educ. Desk (Apr. 9, 2011, 7:00 AM), <http://www.southerneducationdesk.org/article/collective-bargaining-in-east-tennessee>.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *See id.*

¹⁴⁰ Jessel, *supra* note 134.

¹⁴¹ *Id.*

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