IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al., Plaintiffs, v. TENNESSEE DEPARTMENT OF EDUCATION, et al., Defendants, and NATU BAH, et al., Intervenor-Defendants.	Case No. 20-0143-II Hon. Anne C. Martin

INTERVENOR-DEFENDANTS' JOINT RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON COUNT 1 OF THE COMPLAINT

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INTRODUCTION

Intervenor-Defendants Natu Bah, Builguissa Diallo, Bria Davis, and Star Brumfield ("Parents") file this joint brief in opposition to Plaintiffs' motion for summary judgment on Count 1 of their Complaint. Plaintiffs seek to eliminate the Education Savings Account ("ESA") Pilot Program, Tenn. Code Ann. §§ 49-6-2601–2612 ("ESA Pilot Program" or "Pilot Program"), which expands educational options for elementary and secondary-aged children assigned to Tennessee public schools that have failed to meet their needs. In support of their motion for summary judgment, Plaintiffs argue that the Pilot Program violates Article XI, Section 9 of the Tennessee Constitution ("Home Rule Amendment").

As Parents demonstrate below, Plaintiffs' arguments under the Home Rule Amendment are without merit. The ESA Pilot Program does not violate the Amendment—it is in harmony with it. Accordingly, this Court should deny Plaintiffs' motion.

COUNTERSTATEMENT OF FACTS[1]

In support of their motion for summary judgment, Plaintiffs also filed a Concise Statement of Facts Not In Dispute ("SUMF"). While Parents generally do not dispute Plaintiffs' SUMF, they highlight here several misleading aspects of Plaintiffs' factual narrative contained in the memorandum of law supporting Plaintiffs' motion. *See* Pls.' Mem. Law Supp. Pls.' Mot. Summ. J. on Count 1 of Compl. ("Pls.' MSJ") at 2–10. In Part A, Parents explain how Plaintiffs inaccurately describe how the Pilot Program actually functions. In Part B, Parents show that the legislative history that Plaintiffs heavily rely on is much more nuanced than Plaintiffs portray—and it reveals that lawmakers were focused on helping children in poorly performing school districts.

[1] Parents incorporate herein the State-Defendants' response to Plaintiffs' SUMF and will not repeat the same here.

A. Plaintiffs Mischaracterize How the ESA Pilot Program Functions.

The ESA Pilot Program is designed to assist low- and middle-income families that are zoned to attend public schools in some of Tennessee's worst-performing school districts.[2] The Pilot Program enables up to 5,000 students in its first year to obtain ESAs containing approximately $7,000 that their parents may spend on a variety of educational services.[3] Parents and their children are the intended beneficiaries of the Pilot Program. The ESA Pilot Program makes it possible for parents to remove their children from public schools that are failing to meet their needs and enroll them instead in private schools that will.

Plaintiffs mischaracterize the way the ESA Pilot Program functions. Ignoring that it is designed to benefit parents and children, Plaintiffs assert that the ESA Pilot Program "radically alters the counties' local administration of public education and requires them to use local tax revenue to send their students to private schools." Pls.' MSJ at 1. In that single sentence, Plaintiffs make three critical mischaracterizations.

First, the ESA Pilot Program does not "alter[] the counties' local administration of public education," *see id.*, because as Parents explain in Part III, *infra*, Shelby County's and Metro's[4] own charters do not allow them to control or administer public school districts. Second, the Pilot Program does not require counties to use local tax revenue to send students to private schools. Rather, the Pilot Program is funded through state dollars as

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[2] Eligibility for the ESA Pilot Program requires satisfying three criteria. First, a student must have either attended a Tennessee public school last year for the full school year or be eligible for the first time to enroll in a Tennessee school. Tenn. Code Ann. § 49-6-2602(3)(A). Second, the student must be a member of a household with an annual income for the previous year that does not exceed twice the federal income eligibility guidelines to qualify for a free school lunch. Tenn. Code Ann. § 49-6-2602(3)(D). Third, the student must be zoned to attend a Shelby County district school, a Metro Nashville public school, or a school in the Achievement School District (ASD)—all of which are some of the worst-performing school districts in Tennessee as determined by objective measures. *See* Tenn. Code Ann. § 49-6-2602(3)(C).

[3] *See* Tenn. Code. Ann. § 49-6-2603(a)(4); -2603(l); -2603(g) (explaining that ESA funds can be used for a variety of educational expenses, including tuition, or rolled over into a college fund).

[4] Parents will refer to Plaintiff Metropolitan Government of Nashville and Davidson County as "Metro" and Plaintiff Shelby County Government as "Shelby County."

explained in the statute. *See* Tenn. Code Ann. § 49-6-2605. First, the *amount* of the ESA is calculated: "The maximum annual amount to which a participating student is entitled under the program must be equal to the amount *representing* the per pupil state and local funds generated and required through the basic education program (BEP)" under state law. *Id.* § 49-6-2605(a) (emphasis added). Second, after the *amount* is determined, the next step is to disburse it to the student using only *state*—not local—BEP funds: "The ESA funds for participating students must be subtracted from the *state* BEP funds otherwise payable to the LEA." *Id.* § 49-6-2605(b)(1) (emphasis added). Contrary to Plaintiffs' assertion, the counties are not using their local tax revenue to fund ESAs. Third, the ESA Pilot Program does not require that counties send "their" students to private schools. *See* Pls.' MSJ at 1. Instead, it is parents—not counties—who decide where to send their children to school. Some parents may select private schools; other parents may choose to keep their children in their assigned public school.

Simply, the ESA Pilot Program empowers parents and children assigned to some of Tennessee's most poorly performing school districts to pursue other educational options.

B. Plaintiffs' Heavy Reliance on the ESA Pilot Program's Legislative History Ignores That It Is More Nuanced than Plaintiffs Portray.

Plaintiffs' selective use of legislative history falls flat. Strikingly, Plaintiffs invoke legislative history in an attempt to bolster their argument that the ESA Pilot Program targets two counties—and wholly ignore the legislative history showing that the purpose of the Pilot Program is instead to help students in poorly performing school districts.

First, Plaintiffs selectively use the Pilot Program's legislative history to create the impression that the General Assembly's objective was to target two counties. For example, Plaintiffs quote from the legislative transcript to create the impression that then-Deputy House Speaker Matthew Hill singled out the counties for partisan political reasons. *See*

Pls.' MSJ at 7. But when Plaintiffs' exhibits are read in their entirety, the legislative history clearly reflects that the ESA Pilot Program is the second prong of a two-prong approach: where school districts are performing well, the existing policy continues, but where school districts are performing poorly, a limited policy will take root to assist parents and children zoned to attend schools in those school districts. *See* Pls.' SUMF Ex. 5 at 22–26; *see also* Pls.' SUMF Ex. 4 at 3 ("[W]e wanted to see if we could strike a balance between helping the school systems that have been identified as the lowest performing schools in our state, while at the same time protecting and helping those schools in the rural areas of our state that are in many cases excelling and doing very well.").

Second, Plaintiffs' own exhibits show that the purpose of the ESA Pilot Program is to help students and families assigned to schools in poorly performing school districts, not to target the counties. As Deputy Speaker Hill said, "The ESA benefit will cease when an eligible recipient moves outside of the eligible district." Pls.' SUMF Ex. 4 at 3; *see also* Pls.' SUMF Ex. 5 at 26. This sentiment was also shared by other lawmakers. For example, Senators Dolores Gresham and Paul Rose expressed support for helping families. Pls.' SUMF Ex. 7 at 6 ("I would call it refocusing on the highest concentrations of poverty in our state[,] in the highest concentrations of priority schools in the state."); SUMF Ex. 7 at 16 ("[This bill was] produced by many, many hours, trying to come up with something to help children."). The Court should reject Plaintiffs' selective use of legislative history.

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The facts omitted from Plaintiffs' narrative serve to provide the proper context for the ESA Pilot Program's adoption by the General Assembly. The Pilot Program is an educational lifeline designed to assist parents and children of modest means that are assigned to some of the worst-performing public school districts in Tennessee.

STANDARD OF REVIEW

A party is entitled to summary judgment in their favor if the pleadings and evidence "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. The trial court must take the "strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence." *Byrd v. Hall*, 847 S.W.2d 208, 210–211 (Tenn. 1993). The moving party must also "demonstrate[] that the nonmoving party's evidence is insufficient as a matter of law at the summary judgment stage to establish the nonmoving party's claim or defense." *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 238 (Tenn. 2015). "If there is a dispute as to any material fact or any doubt as to the conclusions to be drawn from that fact, the motion must be denied." *Byrd*, 847 S.W.2d at 211. (citations omitted).

ARGUMENT

Plaintiffs' Home Rule arguments fail as a matter of law. The State-Defendants have shown why the ESA Pilot Program is not a private or local law. Parents incorporate those arguments here and instead focus on demonstrating that because the Pilot Program applies to school districts, rather than counties, it does not violate the Home Rule Amendment. In Part I, Parents show that the ESA Pilot Program does not apply to counties, but rather to school districts. In Part II, Parents demonstrate that because legislation applying to school districts does not fall within the scope of the Home Rule Amendment, the Pilot Program does not violate the Amendment. And in Part III, Parents show that this conclusion is bolstered by the plain terms of the Shelby County Home Rule Charter and Metro's Charter, both of which prohibit the counties from controlling or administering public education.

I. The ESA Pilot Program Applies to School Districts, Not Counties.

Plaintiffs ask the Court to disregard the plain text of the ESA Pilot Program and the statutory definition of "Local Education Agency" because both undermine their legal theory under the Home Rule Amendment. *See* Pls.' MSJ at 21. The Pilot Program applies to Local Education Agencies ("LEAs"), *see* Tenn. Code Ann. § 49-6-2602(3)(C), a term that unambiguously refers to any "public school system or school district created or authorized by the *general assembly*," *id.* § 49-1-103(2) (emphasis added). The ESA Pilot Program was enacted to improve educational opportunities for children in the state who reside in school districts that have "consistently had the lowest performing schools on a historical basis." *Id.* § 49-6-2611(a)(1). It does not single out specific counties. School districts such as LEAs are "mere instrumentalit[ies] of the State created exclusively for public purposes subject to unlimited control of the Legislature." *Perritt v. Carter*, 325 S.W.2d 233, 234 (Tenn. 1959) (citation omitted). That the text of the Pilot Program applies to LEAs rather than counties is consistent with the "accepted fact that public education in Tennessee rests upon the solid foundation of State authority to the exclusion of county and municipal government." *Cagle v. McCanless*, 285 S.W.2d 118, 122 (Tenn. 1955) (emphasis omitted); *State v. Ayers*, 756 S.W.2d 217, 221 (Tenn. 1988) ("[T]his Court has recognized for many years that education is a State function.") (citation omitted); *accord Rollins v. Wilson Cty. Gov't*, 967 F. Supp. 990, 996 (M.D. Tenn. 1997) ("[E]ducation is, at core, a state rather than a county or municipal function."). When the General Assembly created the ESA Pilot Program to provide better educational options for children trapped in some of Tennessee's worst-performing public school districts, it exercised its authority over a state matter.[5]

[5] The Tennessee Supreme Court "expressly recognized that corporate entities created for educational purposes are under the control of the Legislature, 'so that [they] may be abolished or [their] power may be enlarged or [their] responsibilities increased at any time by that body, without the danger of

II. Because School Districts Do Not Fall Within the Scope of the Home Rule Amendment, the Pilot Program Does Not Violate that Amendment.

In 1953, Tennessee added the Home Rule Amendment to its state constitution to "strengthen local self-government." *Civil Serv. Merit Bd. v. Burson*, 816 S.W.2d 725, 728 (Tenn. 1991). In pertinent part, the Home Rule Amendment states:

> [A]ny act of the General Assembly private or local in form or effect applicable to a particular *county* or municipality either *in its governmental or its proprietary capacity* shall be void and of no effect unless the act by its terms either requires the approval by a two-thirds vote of the local legislative body of the municipality or county, or requires approval in an election by a majority of those voting in said election in the municipality or county affected.

Tenn. Const. art. XI, § 9 (emphasis added). "The whole purpose of the Home Rule Amendment was to vest control of local affairs in local governments." *Farris v. Blanton*, 528 S.W.2d 549, 551 (Tenn. 1975). As written, a challenged law falls within the scope of the Home Rule Amendment only if it is "*applicable* to a particular county . . . in its *governmental or its proprietary capacity* . . . ." Tenn. Cons. art. XI, § 9 (emphasis added). This unambiguously refers to a requirement that laws challenged under the Home Rule Amendment must be *applicable* to a *county* in a specific manner: in their *governmental* or *proprietary* capacities. *See* Tenn. Const. art. XI, § 9.

Thus, the only way that the ESA Pilot Program can violate the Home Rule Amendment is if it applies to a particular county or municipality in its governmental or proprietary capacity. As shown above, the Pilot Program applies to LEAs, not counties. Thus, the Pilot Program does not violate the Amendment. To attempt to overcome this problem with their argument, Plaintiffs endeavor to expand the scope of the Amendment

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encountering constitutional difficulties.'" *S. Constructors, Inc. v. Loudon Cty. Bd. of Educ.*, 58 S.W.3d 706, 715 (Tenn. 2001) (internal citations omitted).

beyond its text in order to include school districts.[6] But Plaintiffs cannot escape the plain meaning of the Amendment, which does not apply to districts. *See Hooker v. Haslam*, 437 S.W.3d 409, 426 (Tenn. 2014) ("[T]he words and terms in the Constitution should be given their plain, ordinary and inherent meaning.").

Nor can Plaintiffs escape a series of cases in which courts have refused to expand the scope of the Home Rule Amendment beyond its text. Indeed, in the decade after the Amendment passed, the Tennessee Supreme Court twice rejected such attempts. First, in *Fountain City Sanitary District v. Knox County Election Commission*, the Court examined the Home Rule Amendment to determine whether it applied to a law amending the powers of a sanitary district. 308 S.W.2d 482 (Tenn. 1957). Noting that the "lead line" of the Amendment is "Home rule for cities and counties," the Court explained that the word "municipality" must be construed "within the general understanding of . . . 'city'." *Id.* at 484. Next, the Court distinguished between governmental entities such as cities, towns, and villages (which are municipalities under the Amendment) to contrast with case law involving school districts, irrigation districts, and soil-erosion districts (which are quasi-public corporations) and thus distinguishable from the former. *Id.* at 484–85. Although such districts share certain regulatory characteristics with cities and counties, they are not

[6] Plaintiffs' attempt to re-write the Home Rule Amendment to fit their legal theory by swapping out the word "applicable" and replacing it with "affecting" when describing how a law must apply to a county's governmental or proprietary functions. *See* Pls. MSJ at 12 (using "affecting" instead of "applicable" to describe the relationship between a challenged law and a county's governmental or proprietary functions); *see also id.* at 32 (asserting that "the ESA Act substantially affects . . . Davidson and Shelby counties"). The Framers could have easily replaced the word "applicable" with "affecting" if they wanted to broaden the scope of the Home Rule Amendment—but they chose not to. *See Martin v. Beer Bd.*, 908 S.W.2d 941, 947 (Tenn. Ct. App. 1995) (courts must uphold "the intentions of the persons who ratified the constitution."). Plaintiffs fare no better when invoking *Chattanooga-Hamilton County Hospital Authority v. City of Chattanooga* in support of their attempt to expand the scope of the Amendment—it is unremarkable that the law at issue in that case was found to "affect the County" because the challenged law, *on its face*, concerned a hospital district "acting on behalf of the County," thus providing "an obvious basis for requiring [local] approval . . . ." 580 S.W.2d 322, 328 (Tenn. 1979).

synonymous and therefore do not have the same constitutional status. *Id.* Accordingly, the Court held that because neither sanitary districts nor school districts are municipalities, the Home Rule Amendment did not apply.

Two years later, the Court again rejected an attempt to expand the scope of the Home Rule Amendment and held that it does not apply to special school districts. *Perritt*, 325 S.W.2d at 234. In *Perritt*, the plaintiffs challenged a private act that sought to enlarge the Huntington Special School District within Carroll County, arguing that it violated the Home Rule Amendment. *Id.* at 233. The Court explained that the Amendment did not extend to special school districts because such districts did "not come within the definition of a municipality as contemplated in said Home Rule Amendment." *Id.* at 234. (noting that the Amendment "is not broad enough to cover special school districts").

Notably, Plaintiffs do not cite or discuss *Perritt* or *Fountain City Sanitary District*. And the cases Plaintiffs *do* cite fail to support their bare assertion that school districts like LEAs are no different than counties and thus fall within the scope of the Home Rule Amendment. Rather, each case cited by Plaintiffs in support of their argument reflects the unremarkable proposition that laws addressing a county's governmental or proprietary capacity sometimes implicate the Home Rule Amendment and sometimes do not. *See* Pls.' Mem. at 20–24 (citing *Doyle v. Metro. Gov't of Nashville & Davidson Cty.*, 471 S.W.2d 371 (Tenn. 1971) (upholding law granting power to set court costs for violations of city ordinances); *Farris*, 528 S.W.2d 549 (striking down law regulating county runoff elections); *Bozeman v. Barker*, 571 S.W.2d 279 (Tenn. 1978) (upholding law regulating salaries of court officers in counties with certain populations); *Leech v. Wayne Cty.*, 588 S.W.2d 270 (Tenn. 1979) (striking down law regulating county reorganization and local elections); *Burson*, 816 S.W.2d 725 (upholding law regulating municipal service boards)). None of

these cases support Plaintiffs' attempt to expand the Home Rule Amendment beyond its plain text.

The result is no different when Plaintiffs reach for the federal district court opinion in *Board of Education of Shelby County, Tennessee v. Memphis City Board of Education*, 911 F. Supp. 2d 631, 656 (W.D. Tenn. 2012). Pls.' Mem. at 22–23. Plaintiffs invoke the district court's standing analysis and attempt to shoehorn it into the Home Rule Amendment analysis here, in order to expand the Amendment's applicability beyond its plain text. *See id.* But as with the cases discussed above, *Board of Education of Shelby County* concerned a law that regulated a local function—county referendums. *Id.* at 639. The General Assembly had allowed municipalities that met certain conditions to "request the county election commission to conduct a referendum" on creating a municipal school district. *Id.* at 653. In striking down the challenged law, the district court recognized the "differences between a local school board and a county legislative body under Tennessee law," namely that "the two entities have separate[] origins, functions, and management." *Id.* at 644 (internal quotations and citations omitted).[7] Simply, none of the cases that Plaintiffs cite support their assertion that laws applicable to school districts trigger the Home Rule Amendment.

Tennessee is not alone in refusing to apply its Home Rule Amendment to school districts. *See, e.g.*, *State ex rel. Harbach v. Milwaukee*, 206 N.W. 210, 213 (Wis. 1925) (Home Rule Amendment "imposes no limitation upon the power of the Legislature to deal with the subject of education"); *see also Barth v. Sch. Dist. of Philadelphia*, 143 A.2d 909,

[7] Notably, the district court in *Board of Education of Shelby County* held that "[t]o pass constitutional muster under [Article XI] Section 9, [the challenged law] must be potentially *applicable to one or more"* additional counties. 911 F. Supp. 2d at 657 (emphasis added). This holding undermines Plaintiffs' claim that laws applicable to more than one county can still trigger the Home Rule Amendment. *See* Pls.' MSJ at 20–21.

911 (Pa. 1958) ("A School District is a creature or agency of the Legislature and has only the powers that are granted by statute . . . ."); *Gurba v. Cmty. High Sch. Dist. No. 155*, 18 N.E.3d 149, 156 (Ill. App. Ct. 2014) (explaining that a school district has "the somewhat lesser status of a quasi-municipality, acting for the state as its administrative arm overseeing the establishment and implementation of free schools").

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The Home Rule Amendment does not apply because the ESA Pilot Program applies to school districts, not counties. And as discussed below, Plaintiffs' attempt to include school districts within the scope of the Amendment is further undermined by Shelby County's and Metro's charters, which make clear that the counties do not control or administer the school districts within their boundaries.

III. The Charters for Shelby County and Metro Further Undermine Plaintiffs' Claim Under the Home Rule Amendment.

The ESA Pilot Program does not violate the Home Rule Amendment because it does not apply to counties. Plaintiffs' attempt to expand the scope of the Amendment to include school districts located within their boundaries is further undermined by the fact that their own charters make clear that they do not control those school districts. Thus, they are in effect arguing that the Pilot Program has taken something from them that they never had.

First, the plain text of Shelby County's Home Rule Charter makes it unambiguously clear that "[t]he provisions of this charter shall not apply to county school funds or to the county board of education, or the county superintendent of education." *See* Shelby Cty. Home Rule Charter art. VI, § 6.02(A).[8] In other words, even if the Home Rule Amendment allowed Shelby County to control school districts within its "governmental" and

[8] https://www.shelbycountytn.gov/DocumentCenter/View/475/Shelby-County-Charter?bidId=

"proprietary" powers—which it does not—Shelby County has not done so. Its Charter makes clear that its powers do not extend either to education funding or to control of the local school district.

Second, although Metro's Charter established a school district, it did not remain under Metro's control—rather, the Charter requires that the school district be "administered and controlled" by the Metropolitan Board of Public Education. Charter of the Metropolitan Government of Nashville and Davidson County § 9.01.[9] The Charter contemplates some level of financial relationship between Metro and the school district, but it is the legislature that requires Metro to "provide necessary funds to enable the county board to meet all obligations." Tenn. Code Ann. § 49-2-101(1)(A). "The fact that there are financial connections between a local school system and local government does not detract from the essentially separate functions of these two entities." *Hill v. McNairy Cty.*, No. 03-1219-T, 2004 WL 187314, at *2 n.2 (W.D. Tenn. Jan. 15, 2004). Indeed, as explained by the Tennessee Supreme Court in *Ayers*, even though sometimes budgetary laws concern county government officials, "education is fundamentally a State concern." 756 S.W.2d at 222 (citation omitted).

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Plaintiffs' attempt to argue that the ESA Pilot Program violates the Home Rule Amendment fails because the Pilot Program applies to school districts, not counties. And Plaintiffs' attempt to expand the scope of the Amendment to include school districts finds no support in the Amendment's text, conflicts with binding precedent, and contradicts the counties' own charters. Accordingly, the Court should deny Plaintiffs' motion.

[9] https://library.municode.com/tn/metro_government_of_nashville_and_davidson_county/codes/charter?nodeId=THCH_PTICHMEGONADACOTE_ART9PUSC_S9.01PUSCSYES.