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

MEMORANDUM OF LAW IN SUPPORT OF INTERVENOR-DEFENDANTS' JOINT MOTION FOR JUDGMENT ON THE PLEADINGS UNDER RULE 12.03

BEACON CENTER OF TENNESSEE

Braden H. Boucek (BPR No. 021399)
P.O. Box 198646
Nashville, TN 37219
Tel: (615) 383 -6431
Fax: (615) 383-6432
Email: braden@beacontn.org

Attorney for Intervenor-Defendants Bria Davis and Star Brumfield

Jason I. Coleman (BPR No. 031434)
7808 Oakfield Grove
Brentwood, TN 37027
Tel: (615) 721-2555
Email: jicoleman84@gmail.com

Local Counsel for Intervenor-Defendants Natu Bah and Builguissa Diallo

INSTITUTE FOR JUSTICE

Arif Panju* (TX Bar No. 24070380)
816 Congress Avenue
Suite 960
Austin, TX 78701
Tel: (512) 480-5936
Fax: (512) 480-5937
Email: apanju@ij.org

David Hodges* (D.C. Bar No. 1025319)
Keith Neely* (D.C. Bar No. 888273735)
901 N. Glebe Road
Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321
Email: dhodges@ij.org
Email: kneely@ij.org

*Admitted *pro hac vice*
Attorneys for Intervenor-Defendants Natu Bah and Builguissa Diallo

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

INTRODUCTION

Through this litigation, Plaintiffs seek to eliminate the Education Savings Account Pilot Program, Tenn. Code Ann. §§ 49-6-2601, *et seq.*, ("ESA Pilot Program" or "Pilot Program"). The Pilot Program is an educational lifeline for elementary and secondary aged children trapped in some of Tennessee's worst-performing public schools, including the children of Intervenor-Defendants Natu Bah, Builguissa Diallo, Bria Davis, and Star Brumfield ("Parents"). For children in public schools that are failing to meet those children's needs, the ESA Pilot Program provides a way for low-and middle-income families to afford a better educational environment at a private school. Before Plaintiffs can extinguish the Pilot Program, however, they must first state a claim upon which relief can be granted.

This Plaintiffs have failed to do. Below, Parents address all three counts in Plaintiffs' complaint: Count No. 1 under Tenn. Const. Article XI, § 9 ("Home Rule Amendment"); Count No. 2 under the equal protection guarantees contained in Article I, § 8 and Article XI, § 8; and Count No. 3 under Article XI, § 12 ("Education Clause"). The Court should grant Parents' motion for judgment on the pleadings because the ESA Pilot Program fully complies with the Tennessee Constitution.

BACKGROUND

To provide context for the arguments offered below, Parents briefly describe the ESA Pilot Program and the procedural posture of the case.

The ESA Pilot Program

Tennessee's ESA Pilot Program offers a lifeline to families who would like to leave public schools that do not meet their children's needs, but who lack the financial resources to afford doing so. The Pilot Program makes educational savings accounts (ESAs) available to low-income and middle-income children who are being educated in school districts that

have "consistently had the lowest performing schools on a historical basis," which include both the state's Achievement School District (ASD) and those school districts that have ten or more schools that have been identified as "priority schools" by Tennessee's accountability system or ranked "[a]mong the bottom ten percent (10%) of schools, as identified by the department [of education]." Tenn. Code Ann. §§ 49-6-2602(3)(C); 49-6-2611(a)(1). Under the ESA Pilot Program, eligible students receive an ESA containing funds for a wide array of eligible educational expenses, including tuition, textbooks, and tutoring services.[1] *Id.* § 49-6-2603(a)(4)(A)–(L). The ESA Pilot Program can aid 5,000 qualified students in its first year, and up to 15,000 students by 2025. Tenn. Code Ann. § 49-6-2604(c).

Procedural Posture of Case

Plaintiffs filed this lawsuit on February 6, 2020 against State-Defendants and challenge the ESA Pilot Program under the following provisions of the Tennessee Constitution: Article XI, § 9, Article I, § 8, and Article XI, §§ 8, 12.

On March 6, 2020, this Court granted three motions to intervene filed by (1) Natu Bah and Builguissa Diallo; (2) Bria Davis and Star Brumfield; and (3) Greater Praise Christian Academy, Sensational Enlightenment Academy Independent School, Ciera Calhoun, Alexandria Medlin, and David Wilson, Sr. *See* Agreed Order (entered Mar. 20, 2020). All three sets of intervenors were granted full-party status to participate in the defense of the ESA Pilot Program.

[1] The ESA Pilot Program provides each student with his or her per pupil expenditure of state funds from the Basic Education Program (BEP), as well as the required minimum match in local funds, to create an individualized education savings account. Tenn. Code. Ann. § 49-6-2605(a). The amount of the ESA will be approximately $7,100 for the 2020–21 academic year. *See* Education Savings Accounts Explained, *available at* https://www.schoolchoicetn.com/education-savings-accounts-explained/ (retrieved Feb. 19, 2020).

Pending before this Court are two motions filed under Rule 12.02(6) of the Tennessee Rules of Civil Procedure to dismiss Plaintiffs' Complaint for failure to state a claim upon which relief can be granted. *See* State Defs.' Mot. to Dismiss (filed Mar. 11, 2020); Greater Praise Christian Academy, et al.'s Mot. to Dismiss (filed Mar. 6, 2020). Also pending is Plaintiffs' motion for summary judgment on Count No. 1. Parents are filing their motion for judgment on the pleadings on all of Plaintiffs' claims. The above-referenced motions are all set for hearing on April 29, 2020.

STANDARD OF REVIEW

Courts resolving motions for judgment on the pleadings under Rule 12.03 of the Tennessee Rules of Civil Procedure "use the same standard of review" governing motions to dismiss for failure to state a claim under Rule 12.02(6). *Young v. Barrow*, 130 S.W.3d 59, 63 (Tenn. Ct. App. 2003) (citing *Waller v. Bryan*, 16 S.W .3d 770, 773 (Tenn. Ct. App.1999)). To decide the issues presented, Tennessee courts accept as true "all well-pleaded facts and all reasonable inferences drawn therefrom" alleged by the party opposing the motion for judgment on the pleadings. *Cherokee Country Club, Inc. v. City of Knoxville*, 152 S.W.3d 466, 470 (Tenn. 2004) (internal quotation marks omitted). Although courts accept as true all well-pleaded facts alleged by the party opposing a motion for judgment on the pleadings, any "[c]onclusions of law are not admitted . . . ." *See McClenahan v. Cooley*, 806 S.W.2d 767, 769 (Tenn. 1991).

ARGUMENT

The Court should grant Parents' motion for judgment on the pleadings. The ESA Pilot Program does not violate the constitutional provisions raised in Plaintiffs' Complaint. In Part I, Parents show that Plaintiffs have failed to state a claim upon which relief can be granted under the Home Rule Amendment. In Part II, Parents explain why Plaintiffs have failed to state a claim under the equal-protection guarantees in Article I, § 8 and Article XI,

§ 8 of the Tennessee Constitution. As Parents demonstrate in Part III, the Pilot Program is in harmony with the Tennessee Constitution's Education Clause and thus Plaintiffs' third cause of action should also be dismissed.

I. Plaintiffs Have Failed to State a Claim Under the Home Rule Amendment.

Plaintiffs' Home Rule arguments fail as a matter of law. The ESA Pilot Program applies to Local Education Agencies ("LEAs"), Tenn. Code Ann. § 49-6-2602(3)(C), a term that refers to any "public school system or school district created or authorized by the *general assembly*," *Id.* § 49-1-103 (emphasis added). Plaintiffs' Complaint fails to allege or demonstrate even once how the Home Rule Amendment applies to school districts. It does not. Plaintiffs premise their first cause of action on this unsupported assumption. *See* Complaint ("Pls.' Compl.") ¶¶ 175–89. The State Defendants address in their motion to dismiss why the Pilot Program is not a private or local law. Parents incorporate those arguments here and instead focus on why the Pilot Program applies to school districts, not counties.

According to Plaintiffs, because only public school districts in Shelby County and Davidson County[2] satisfy the eligibility criteria for the ESA Pilot Program, Pls.' Compl. ¶¶ 32–33, it somehow follows that there is a violation of the Home Rule Amendment because the Pilot Program "will only ever apply to students zoned to attend public schools in Davidson or Shelby *counties*," *id.* ¶ 183 (emphasis added). In other words, Plaintiffs assume that school districts and counties are interchangeable when interpreting Article XI, § 9, while ignoring precedents that undermine their assumption.

In Part A, Parents first explain why the ESA Pilot Program applies to school districts and not counties. In Part B, Parents describe why Plaintiffs' first cause of action

[2] Parents will refer to the Metropolitan Government of Nashville and Davidson County as "Metro."

falls apart when viewed alongside the plain text of the Home Rule Amendment (which requires that an act of the General Assembly be directed to a county "in its governmental or its proprietary capacity" to fall within the scope of the Amendment). *See* Tenn. Const. Art. XI, § 9. In Part C, Parents show how Plaintiffs' Home Rule arguments are further undermined 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.

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

The ESA Pilot Program was enacted to improve educational opportunities for children in the state who reside in LEAs that have "consistently had the lowest performing schools on a historical basis." Tenn. Code Ann. § 49-6-2611. 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); *see also* Tenn. Code Ann. § 49-1-103 (defining "Local Education Agency"). It is an "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) ("Not only does Article XI, § 12, of the Tennessee Constitution expressly require the General Assembly to 'provide for the maintenance, support and eligibility standards of a system of free public schools,' but this Court has recognized for many years that education is a State function."); *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 chose to provide better educational options to Parents and families with children trapped in some of Tennessee's worst-performing public school districts, the exercise of legislative authority to create the Pilot Program was a state function, and not an

act directed at "a particular county . . . in its governmental or its proprietary capacity." Tenn. Const. Art. XI, § 9.

B. School Districts Do Not Fall Within the Scope of the Home Rule Amendment.

In 1953, Tennessee added the Home Rule Amendment to its state constitution to "strengthen local self-government." *Civil Serv. Merit Bd. of City of Knoxville 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).

In the decade after the Home Rule Amendment passed, the Tennessee Supreme Court twice rejected attempts to expand the Amendment's scope beyond its text to cover more than counties or municipalities in their governmental or proprietary capacities. 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 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 Amendment's scope when it held the Amendment 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.* The Court explained that the Amendment did not extend to special school districts because they did "not come within the definition of a municipality as contemplated in said Home Rule Amendment." *Id.* (noting that the Amendment "is not broad enough to cover special school districts").

Tennessee is not alone in refusing to apply its Home Rule Amendment to school districts. *See, e.g.*, *State 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, 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").

Thus, Plaintiffs have failed to state a claim under the Home Rule Amendment because their allegations are aimed at school districts and not counties or municipalities "in [their] governmental or [] proprietary capacit[ies]." Tenn. Const. Art. XI, § 9.

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

Plaintiffs' failure to state a claim is further shown by the text of the charters for Shelby County and Metro, which do not permit them to control school districts.[3] As Parents show below, to accept Plaintiffs' first cause of action is to accept the proposition that the ESA Pilot Program has taken from the counties something they never had.

The plain text of Shelby County's Home Rule Charter presents a roadblock for Plaintiffs. Under Article VI ("Prohibitions"), the 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), at 34.[4] In other words, even if the Home Rule Amendment allowed Shelby County to control school districts within its "governmental" and "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.

Plaintiffs face a similar roadblock in Metro's Charter. Though that 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.[5] The Charter contemplates some level of financial relationship between Metro and the school district, but it is the legislature that requires Metro to "provide

---

[3] "[C]ity charter[s] and code provisions [do] not raise matters of law or fact . . . 'outside the pleadings.'" *See Cherokee Country Club, Inc. v. City of Knoxville*, 152 S.W.3d 466, 478 (Tenn. 2004) (quoting Tenn. R. Civ. P. 12.03).

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

[5]https://library.municode.com/tn/metro_government_of_nashville_and_davidson_county/codes/charter?nodeId=THCH_PTICHMEGONADACOTE_ART9PUSC.

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) (citation omitted). 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.

***

Plaintiffs' attempt to equate counties and school districts in order to shoehorn the latter into the Home Rule Amendment fails as a matter of law. It finds no support in the Amendment's text, it conflicts with binding precedent, and it contradicts the charters that govern the counties' affairs. Plaintiffs have failed to state a claim under the Home Rule Amendment (Count No. 1), and thus the Court should render judgment in Parents' favor.

II. Plaintiffs Have Failed to State a Claim for Violations of the Equal Protection and Education Clauses Under Article I, § 8 and Article XI, § 8.

Plaintiffs have also failed to state a claim under the equal-protection guarantees of the Tennessee Constitution. Count No. 2 of Plaintiffs' complaint rests upon the Tennessee Supreme Court's decision in *Tenn. Small School Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993) ("*Small School I*"), which held that the then-funding mechanism for the State's public schools was unconstitutional because it created substantial inequalities. But as explained in Part A, Plaintiffs' complaint attempts to recast that decision as requiring that every student in Tennessee must be treated exactly the same—and that an additional opportunity for some students necessarily creates "disparities" for others. *See* Pls.' Compl. ¶¶ 190–209. But that is not what *Small Schools I* requires, and to accept Plaintiffs' legal theory would have radical implications and run headlong into the Education Clause.

Furthermore, as Parents show in Part B, Plaintiffs' allegations that two counties are being treated differently than all others is actually just a restatement of their claim under the Home Rule Amendment, which fails for the reasons stated above. Plaintiffs cannot resurrect that claim under the guise of equal protection.

A. Plaintiffs Have Failed to State a Claim Under *Small Schools Systems I*.

Plaintiffs have failed to state an equal-protection claim under *Small School I*. Plaintiffs allege the ESA Pilot Program leads to the inequitable distribution of funds and thus constitutes a violation of the equal-protection clauses under *Small Schools I*. *See* Pls.' Compl. ¶ 207. In other words, Plaintiffs are asking the Court to equate, for purposes of claiming an equal protection violation, Tennessee's statewide funding mechanism for *public schools* with a pilot program benefitting low- and middle-income *children*. The Court should reject Plaintiffs alleged equal-protection violation under *Small Schools I*, which fails for two reasons.

First, Plaintiffs' allegations misunderstand *Small Schools I*, which held that the General Assembly was obligated to maintain a public school system that "affords substantially equal educational opportunities to all students," 851 S.W.2d at 140–41. But Plaintiffs, in claiming that it is wrong for the General Assembly to provide additional educational opportunities, are trying to stretch that holding to mean that the State can only offer identical educational opportunities to each student that cost exactly the same amount of money—and that any difference whatsoever constitutes an equal protection violation. Stretching *Small Schools I* in this manner—that is, transforming "substantial equality" into "exactly identical" is the only way that Plaintiffs' allegations can be read to state a claim.

This Court should decline to do so. *See* Pls.' Compl. ¶¶ 202, 207–09. To accept Plaintiffs' reading of *Small Schools I* would effectively bar the General Assembly from engaging in innovative education policy—including existing policies that go well beyond the Pilot

Program. In *Small Schools I*, the Court specifically recognized the importance of innovation in education: "Given the very nature of education, an adequate system, by all reasonable standards, would include innovative and progressive features and programs." 851 S.W.2d at 156. After all, children in TN have different opportunities, costing different amounts of money, than their peers in a variety of educational settings—charter schools, magnet schools, reading/math programs, etc. If the rule of law Plaintiffs' rely upon to succeed on this claim were correct, the impact on Tennessee's education system would be radical. There could be no tailoring of education to meet individual students' specific needs. No programs designed to provide additional assistance to those children who need it. No way to try to create "substantial equality" by addressing deficiencies in the current system with additional opportunities like the Pilot Program. *Small Schools I* should not be read to paralyze Tennessee's education system in this manner. Because Plaintiffs' allegations under this claim rest upon such a reading, they fail to state a claim.

Second, Plaintiffs' expansive reading of *Small Schools I* conflicts with the Education Clause. As discussed in Part III, *infra*, the Education Clause of Article XI, § 12, does not require the General Assembly to *exclusively* support a system of free public schools—rather, it may provide Tennessee children with additional educational options in addition to a system of free public schools. But under Plaintiffs' view of *Small Schools I*, any educational option that is not the public school system would result in an equal protection violation. Such an expansive reading of *Small Schools I* would—unnecessarily— place it in direct conflict with the Education Clause and should thus be rejected.[6]

[6] Plaintiffs' attempt to frame an equal-protection claim under *Small Schools I* also ignores that Tennessee parents and their children are the intended beneficiaries of the ESA Pilot Program. As a result, their claim invites the Court to apply the Tennessee Constitution in a manner that treats children as mere conduits for the flow of money into Tennessee's public school system. But Tennessee's public school system is constitutionally required to serve children, not the other way

B. Plaintiffs' Home Rule Amendment Claims Are Not Equal Protection Claims.

The Court should also reject Plaintiffs attempt to recast and resurrect their Home Rule Amendment claim—which fails for the reasons stated above in Part I—as equal-protection violations. Plaintiffs allege that the ESA Pilot Program violates the Tennessee Constitution's equal-protection guarantees because the ESA Pilot Program is available to children residing only in Shelby County and Davidson County. *See* Pls.' Compl. ¶ 201 (complaining of unequal treatment among counties by the General Assembly); ¶ 205–06 (same); ¶ 208 (same). This is an attempt to claim that two counties are being treated differently than all other counties and is thus properly raised under the Home Rule Amendment, not the equal protection clause. *Compare* Tenn. Const. Art. XI, § 9 (acts "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") *with* Article I, § 8 ("That no man shall be . . . deprived of his life, liberty or property . . . ."). Accordingly, the Court should render judgment in Parents' favor.

III. Plaintiffs Have Failed to State a Claim Under the Education Clause.

Plaintiffs' third claim alleges that the ESA Pilot Program runs afoul of Article XI, § 12, because it will deprive school districts in their counties of resources. *See* Pls.' Compl. ¶¶ 210–218. According to Plaintiffs, the Pilot Program results in unequal educational opportunities due to allegedly "inequitable distribution of funds" because the Pilot Program provides an educational option (in addition to the public schools), for families residing in LEAs located within their counties. *See id.* ¶¶ 215–18. Count No. 3 of Plaintiffs' complaint fails to state a claim upon which relief can be granted because it suffers from two fatal

around. *See Small Schools I*, 851 S.W.2d at 156; *see also* Tenn. Const. Art. I, § 8 ("[N]o man shall be . . . disseized of his . . . liberties or privileges . . ."). The Court should reject Plaintiffs' invitation to turn the Tennessee Constitution on its head.

flaws: In Part A, Parents show why the Education Clause protects parents and children, not school districts. In Part B, Parents show why the Pilot Program comports with the Education Clause.

A. The Education Clause Protects Parents and Children, Not School Districts.

First, Plaintiffs fail to state a claim under the Education Clause because they wrongly assume that the protections in the Clause belong to school districts, rather than to the parents and children those school districts exist to serve. As a result, their claim asks this Court to apply the Tennessee Constitution in a manner that treats children as mere conduits for the flow of money into Tennessee's public school system. *See, e.g.* Pls.' Compl. ¶¶ 216. The first part of the Clause states, in broad terms: "The state of Tennessee recognizes the inherent value of *education* and encourages its support." Tenn. Const. Art. XI, § 12 (emphasis added). The Framers could have easily replaced the word "education" with "free public schools" if it wanted to elevate public school districts above Tennessee children and their education—but they chose not to. *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."). As a result, Tennessee's public school system is constitutionally required to serve children, not the other way around. *See Small Schools I*, 851 S.W.2d at 156 (the "mandated result" is "a public school system that provides substantially equal educational opportunities to the school children of Tennessee"). And, consistent with the framing of the Education Clause, the intended beneficiaries of the ESA Pilot Program are also parents and their children. *See* Tenn. Code Ann. §§ 49-6-2601, *et seq.* The Court should reject Plaintiffs' invitation to instead treat school districts as the beneficiaries of the Education Clause.

B. The ESA Pilot Program Is in Harmony With the Education Clause.

Second, Plaintiffs fail to state a claim under Count No. 3 because the ESA Pilot Program is in harmony with the Education Clause. Just as with their claim under Tennessee's Equal Protection Clause, Plaintiffs' allegations rely on a misreading of *Small Schools I*—translating "substantial equality" into "identical treatment"—that this Court should reject because of its radical implications. *See* Pls.' Compl. ¶¶ 212–14, 218. And this Court should reject this claim for the additional reason that accepting it requires reading the Education Clause to *exclusively* support a system of free public schools. *See id.* ¶¶ 213–14. But this is not a proper reading of the Clause, which allows the General Assembly to provide Tennessee children with educational options *in addition to* a system of free public schools. The ESA Pilot Program is such an educational option.

There is no support in Article XI, § 12's plain language supporting Plaintiffs' assumption that it sets out the exclusive means of publicly funding education. Tennessee's Education Clause has three parts:

> The State of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools. The General Assembly may establish and support such post-secondary educational institutions, including public institutions of higher learning, as it determines.

Tenn. Const. Art. XI, § 12. The second part contains a mandate requiring the General Assembly to maintain "a system of free public schools." *Id.* There is no dispute that the Education Clause imposes a duty on the General Assembly to provide for a public school system. Thus, the real question is whether the ESA Pilot Program impedes the General Assembly's ability to meet that obligation. Here, just like before the passage of the Pilot Program, a public school system remains firmly in place and fully available to parents who

wish to send their children there.[7] Because students remain free to attend a public school if they desire to do so, the State is not violating its duty to maintain "a system of free public schools." And nothing in the ESA Pilot Program does away with the public school system—or threaten to do away with (or even injure) that system.

It is therefore no surprise that most state supreme courts interpreting similar state constitutional provisions have rejected "exclusivity" claims that Plaintiffs premise their third cause of action on.[8] This Court should join the supreme courts of Nevada, North Carolina, Indiana, Ohio, and Wisconsin and refuse to transform the duty to provide for a public school system into a prohibition on funding educational options outside that system.

***

For the foregoing reasons, Plaintiffs' have failed to state a claim under Article XI, § 12. The Education Clause allows educational options besides "free public schools." The General Assembly's adoption of policies designed to give Tennessee children educational

---

[7] The General Assembly, through its statutes and budgets, continues to authorize, maintain, and support Tennessee's public schools. *See* Tenn. Code Ann. Title 49, Chapter 2 (creating local school districts) and Chapter 6 (governing elementary and secondary education generally); Public Chapter 405 of the 111th General Assembly (Fiscal Year 2019-20 state budget) (appropriating $4.9 billion in state expenditures to public education through the BEP).

[8] *See Schwartz v. Lopez*, 382 P.3d 886, 896 (Nev. 2016) (rejecting challenge to an ESA program under Nevada's Education Article because it did "not alter the existence or structure of the public school system"); *Hart v. State*, 774 S.E.2d 281, 289–90 (N.C. 2015) (upholding constitutionality of voucher program and noting that "[t]he uniformity clause applies exclusively to the public school system and does not prohibit the General Assembly from funding educational initiatives outside of that system"); *Meredith v. Pence*, 984 N.E.2d 1213, 1223 (Ind. 2013) (holding that "so long as a 'uniform' public school system, 'equally open to all' and 'without charge,' is maintained, the General Assembly has fulfilled the duty imposed" to establish a public school system); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 & n.2 (Ohio 1999) (rejecting claim that the "thorough and efficient system of common schools" provision of Ohio's constitution prohibited private school voucher program absent showing that the program actually "undermine[d]" or "damage[d]" public education); *Jackson v. Benson*, 578 N.W.2d 602, 628 (Wis. 1998) (holding that the challenged school voucher program "merely reflects a legislative desire to do more than that which is constitutionally mandated"); *Davis v. Grover*, 480 N.W.2d 460, 474 (Wis. 1992) (same).

options is well within its discretion.[9] While not popular with Plaintiffs, the passage of the ESA Pilot Program simply recognizes that there is no one-size-fits-all approach to educating children. The Court should render judgment on Count No. 3 in Parents' favor.

CONCLUSION

The ESA Pilot Program fully complies with the Tennessee Constitution. None of the three counts raised in Plaintiffs' complaint states a claim upon which relief can be granted. For these reasons, the Court should grant Parents' motion for judgment on the pleadings.

Dated: April 15, 2020.

Respectfully submitted,

/s/ Braden H. Boucek

Braden H. Boucek (BPR No. 021399)
P.O. Box 198646
Nashville, TN 37219
Tel: (615) 383-6431
Fax: (615) 383-6432
Email: braden@beacontn.org

Attorney for Intervenor-Defendants Bria Davis and Star Brumfield

Jason I. Coleman (BPR No. 031434)
7808 Oakfield Grove
Brentwood, TN 37027
Tel: (615) 721-2555
Email: jicoleman84@gmail.com

Local Counsel for Intervenor-Defendants Natu Bah and Builguissa Diallo

/s/ Arif Panju

Arif Panju* (TX Bar No. 24070380)
816 Congress Avenue
Suite 960
Austin, TX 78701
Tel: (512) 480-5936
Fax: (512) 480-5937
Email: apanju@ij.org

David Hodges* (D.C. Bar No. 1025319)
Keith Neely* (D.C. Bar No. 888273735)
901 N. Glebe Road
Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321
Email: dhodges@ij.org
Email: kneely@ij.org

*Admitted *pro hac vice*

Attorneys for Intervenor-Defendants Natu Bah and Builguissa Diallo

[9] Other state high courts have reached the same conclusion when reviewing the constitutionality of educational choice programs. *See, e.g.*, *Meredith*, 984 N.E.2d at 1216 ("In the absence of a constitutional violation, the desirability and efficacy of school choice are matters to be resolved through the political process."); *Kotterman v. Killian*, 972 P.2d 606, 623–24 (Ariz. 1999) ("Some might argue that the statute in question runs counter to these goals by encouraging more students to attend private schools, thereby weakening the state's public school system. But that is a matter for the legislature, as policy maker, to debate and decide.").