IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

ROXANNE McEWEN, et al.,

Plaintiffs,

v.

BILL LEE, in his official capacity as Governor of the State of Tennessee, et al.,

Defendants,

and

NATU BAH, et al.,

Intervenor-Defendants.

Case No. 20-0242-II

Hon. Anne C. Martin

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

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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 five causes of action in Plaintiffs' complaint, which invokes constitutional and statutory claims: Cause No. 1 under Tenn. Const. Article XI, § 9 ("Home Rule Amendment"); Cause No. 2 under Article I, § 8 and Article XI, §§ 8, 12; Cause No. 3 under Article XI, § 12 ("Education Clause"); Cause No. 4 under Tenn. Code Ann. § 49-3-351, et seq., ("BEP Statute"); and Cause No. 5 under Tenn. Const. Article II, § 24 and Tenn. Code Ann. § 9-4-601 ("Appropriations Provisions"). The Court should grant Parents' motion for judgment on the pleadings because the ESA Pilot Program fully complies with the Tennessee Constitution, the BEP Statute, and Tenn. Code Ann. § 9-4-601.

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). 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 March 2, 2020 against State-Defendants and challenge the ESA Pilot Program under the following provisions of the Tennessee Constitution: Article XI, § 9, Article I, § 8, Article XI, §§ 8, 12, Article II, § 24. Plaintiffs also challenge the Pilot Program under the BEP Statute and Tenn. Code Ann. § 9-4-601.

[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).

On March 20, 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, 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.

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 Defendants' Mot. to Dismiss (filed Apr. 15, 2020); Greater Praise Christian Academy, et al.'s Mot. to Dismiss (filed Mar. 27, 2020). Also pending is Plaintiffs' motion for a temporary injunction under Rule 65.04 of the Tennessee Rules of Civil Procedure. 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 and statutory 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, 12 of the Tennessee Constitution. As Parents show in Part III, the ESA Pilot Program is in harmony with the Education Clause and thus Plaintiffs' third cause of action should also be dismissed. In Parts IV and V, Parents show why Plaintiffs have failed to state a claim under the BEP Statute and the Appropriations Provisions, respectively.

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*," Tenn. Code Ann. § 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.") ¶¶ 97–101. 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. ¶¶ 55–77, it somehow follows that there is a violation of the Home Rule Amendment because the Pilot Program "only applies to Shelby and Davidson *Counties*," *id.* ¶ 99 (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 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

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

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." (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 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. 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

[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).

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 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.

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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

[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.

govern the counties' affairs. Plaintiffs have failed to state a claim under the Home Rule Amendment (Cause No. 1), and thus the Court should render judgment in Parents' favor.

II. Plaintiffs Have Failed to State a Claim for Violations of the Education and Equal Protection Clauses Under Article I, § 8 and Article XI, §§ 8, 12.

Plaintiffs' second claim alleges that the ESA Pilot Program violates Article I, § 8 and Article XI §§ 8, 12 because it will deprive them of resources that would otherwise go to the public schools they attend. According to Plaintiffs, they will not receive substantially equal educational opportunities or an adequate education as a result. *See* Pls.' Compl. ¶¶ 102–08.

The Pilot Program does not result in the loss of substantially equal educational opportunities. This protection belongs to parents and students, not school districts. And Plaintiffs, like all others residing in LEAs located within Shelby County and Davidson County, have an equal opportunity to attend a public school or use the Pilot Program to attend a private school if their assigned public school fails to meet their needs.

At the outset, Parents observe that Plaintiffs are trying to use their second cause of action to litigate the adequacy of public school financing in Tennessee. *See* Pls.' Compl. ¶ 103 (alleging General Assembly must maintain a public school system that provides "adequate and substantially equal educational opportunities"); ¶ 106 (alleging that the Pilot Program diverts funds from school districts necessary to provide an adequate education). But such an attempt is misplaced. Unlike the public school funding system invalidated in *Tenn. Small School Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993) ("*Small Schools I*"), the ESA Pilot Program is an educational option for *children* assigned to some of Tennessee's most poorly performing public schools.[6] *See* Tenn. Code Ann. §§ 49-6-2601, *et seq.*

[6] This Court should set aside Plaintiffs' frequent invitation to analyze the "adequacy" of school funding under the Education Clause as part of the Equal Protection analysis. Pls.' Compl. at ¶¶ 70–73, 103–07. Parents appreciate that in the *Small Schools* cases, the Supreme Court recognized that adequacy of education was embraced within the Education Clause. *See Small Schools I*, 851 S.W.2d

Plaintiffs, in claiming that it is wrong for the General Assembly to provide additional educational opportunities, are trying to stretch the holding in *Small Schools I* to mean that the State can only offer to each student identical educational opportunities 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. ¶¶ 103, 106. 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 ESA 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 Tennessee 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

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at 151–52, 156; *Tenn. Small School Sys. v. McWherter*, 894 S.W.2d 734, 738–39 (Tenn. 1995) ("*Small Schools II*") ("Adequate funding is essential to the development of an excellent education program…."). However, since the Court ruled on equality grounds, the Court never reached the question of whether "the precise level of education mandated" comported with the Education Clause, *Small Schools I*, 851 S.W.2d at 152, making it technically dicta. Nevertheless, a textualist, originalist method is the only proper way to interpret the Education Clause. *See Hooker v. Haslam*, 437 S.W.3d 409, 426 (Tenn. 2014) (interpretation must be by text and, if ambiguous, the history as recorded in the notes of the constitutional convention); *Ragsdale v. City of Memphis*, 70 S.W.3d 56, 64 (Tenn. Ct. App. 2001) (court must articulate constitutional principles that "capture the intentions of the persons who ratified the constitution"). Properly interpreted, "adequacy" is no part of the Education Clause, notwithstanding *Small Schools*. To the extent the Court applies to the ESA Pilot Program the portions of those opinions addressing adequacy, or finds that they are binding, Parents wish to preserve the argument that they should be overruled.

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 using 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 their second cause of action rest upon such a reading, they fail to state a claim.[7]

The ESA Pilot Program does not violate the promise of an equal educational opportunity. If Plaintiffs choose a public school for their children, that choice will trigger the full BEP allotment for the district. Tenn. Code Ann. § 49-3-307(a)(1). And if Plaintiffs choose to instead utilize the educational opportunities under the ESA Pilot Program, they will receive their BEP allotment to attend the private school of their choice. Tenn. Code Ann. § 49-6-2605(a). As Parents explain 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. The ESA Pilot is such an educational option. And nobody, including Plaintiffs, are deprived of an equal educational opportunity under the Pilot Program.

If Plaintiffs choose public schools for *their* children, the Tennessee Constitution does not entitle them to force *other parents'* children to also attend public schools. As noted in footnote 7 of this brief, Tennessee children are not mere funding units for school districts.

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[7] Plaintiffs' second claim also ignores that Tennessee parents and their children are the intended beneficiaries of the ESA Pilot Program. As a result, their second 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* Pls.' Compl. ¶¶ 105–08. But 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."); *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.

While the ESA Pilot Program may cause some fluctuation in public school enrollment figures, including in its early implementation phase, the fact is that enrollment adjustments are part of the public school funding process, and that has been the case long before the ESA Pilot Program ever came into existence. Parents may decide to leave their assigned public school for many reasons. A parent might decide to home school her children. Or a family may move to another district—or even out of state. No matter why a student leaves, the reality is that providing parents and children with educational options does not cause unequal educational opportunities for Tennessee children. After all, a school district is losing funding only for those students it is no longer obligated to educate. The same is true here.

For all of the foregoing reasons, Plaintiffs have failed to state a claim for unequal educational opportunity and the Court should render judgment in Parents' favor.

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

Plaintiffs' third claim is that Article XI, § 12 mandates that the public school system be the *exclusive* means of supporting education in Tennessee. *See* Pls.' Compl. ¶¶ 110–118. Plaintiffs' claim suffers from two fatal flaws. First, as explained in Part A below, it ignores the fact that, after passage of the ESA Pilot Program, Tennessee's public school system remains open and available to all students in the state. And as Parents show in Part B, Plaintiffs' third claim wrongly assumes that participating entities become public schools by offering their services to students in the ESA Pilot Program.

A. The ESA Pilot Program Did Not Extinguish Tennessee's Public School System.

There is no support in Article XI, § 12's plain language for Plaintiffs' argument 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 postsecondary 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. But 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.[8] Because Tennessee students remain free to attend 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 threatens 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 are nearly identical to Plaintiffs' claim here. *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, 290 (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*,

[8] 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).

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 a 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). 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.

There is nothing in the language of Article XI, § 12 to suggest that the framers of the Tennessee Constitution meant to set forth the exclusive means of delivering publicly funded education to Tennessee's school children.

B. The ESA Pilot Program Does Not Create A Parallel System of Public Schools.

Plaintiffs recite the many ways that private school curricula and admissions standards differ from the public school system in support of this claim. *See* Pls.' Compl. ¶¶ 113–17. They do so because Plaintiffs believe the ESA Pilot Program establishes a parallel, non-uniform public school system "that do[es] not comply with the requirements of a single system of public schools." Pls.' Compl. ¶ 111. But there can only be a non-uniform system of public schools if the Pilot Program considers private schools to be public schools. The issue is thus whether the entities that participate in the ESA program become public institutions, rather than private ones. They do not.

Yes, private schools use different curricula than do public schools. It is true that private schools do not have to enroll every student that applies for admission. But as every court to decide this issue has held, private schools remain private. *Meredith*, 984 N.E.2d at 1224 ("[T]he voucher-program statute does not alter the structure or components of the public school system . . . ."); *Jackson*, 578 N.W.2d at 627 (holding that a school choice program "does not transform" private schools into district schools). The ESA Pilot Program respects the private nature of participating schools by not interfering with curricula, creeds, or other matters of operation.

Far from establishing a public school system that is inconsistent with Tennessee's Education Clause, the ESA Pilot Program empowers parents to exercise their pre-existing fundamental constitutional right to opt out of the public school system and to direct the education and upbringing of their children consistent with their own personal beliefs. *See In re Knott*, 197 S.W. 1097, 1098 (Tenn. 1917) (the interest of a parent "to its [child's] tutorage" is "sacred); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (striking down law requiring every child to attend a public school as "unreasonably interfer[ing] with the liberty of parents and guardians to direct the upbringing and education of children under their control"). Under the Pilot Program, parents and their children are free to stay at their assigned public school or not—because the General Assembly maintains a system of "free public schools" while also recognizing the "value of education and encourag[ing] its support" by providing the ESA Pilot Program. *See* Tenn. Const. Art. XI, § 12.

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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

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 framers of the Education Clause recognized the same when they drafted its opening sentence. 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" in the first part of the Clause with "free public schools" if they wanted to exclusively support only "free public schools"—but they chose not to. *See Hooker*, 437 S.W.3d at 426 ("[T]he words and terms in the Constitution should be given their plain, ordinary and inherent meaning."). The third claim in Plaintiffs' complaint assumes that Tennessee's founders intended to curtail innovation in an area as challenging and important as education. That assumption is not in harmony with the plain text of the Education Clause and the Court should reject it. The Court should render judgment on Cause No. 3 in Parents' favor.

IV. Plaintiffs Have Failed to State a Claim Under the BEP Statute.

The ESA Pilot Program does not—and cannot—violate the Basic Education Program statute. Plaintiffs' fourth cause of action alleges that the ESA Program is invalid because it violates the BEP Statute, which is the "statutory formula by which the General Assembly determines and appropriates the funds required to maintain and support Tennessee's system of free public schools." Pls.' Compl. ¶ 120. According to Plaintiffs, the ESA

[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.").

Program's distribution of BEP funds directly to parents is illegal because "[t]he BEP's statutory provisions provide for the determination, allocation, and apportionment of BEP funds to public school districts only." *Id.* ¶ 121.

In Part A, Parents show that by elevating school districts above the parents and students those districts serve, Plaintiffs flip the BEP Statute on its head. In Part B, Parents show why Plaintiffs' argument assumes that a previously enacted statute (the BEP Statute) invalidates a subsequent one (the ESA Program), and, as a result, they eviscerate foundational principles of legislative power and statutory interpretation. For these reasons, Plaintiffs have failed to state a claim under the BEP Statute and the Court should render judgment in Parents' favor.

A. The BEP Statute Serves Students and Parents, Not School Districts.

Tennessee's BEP Statute was enacted in 1992 in response to years of protracted litigation challenging the constitutionality of the state's then existing educational-funding regime, called the Tennessee Foundation Program ("TFP"). *See Small Schools I*, 851 S.W.2d at 139; *see also Tenn. Small School Sys. v. McWherter*, 91 S.W.3d 232, 235–38 (Tenn. 2002) ("*Small Schools III*") (describing the history of the BEP). In *Small Schools I*, the Tennessee Supreme Court held that the TFP deprived "students, on whose behalf the suit was filed" equal educational opportunities. 851 S.W.2d at 141 (emphasis added). The BEP was specifically designed to correct the flaws of the TFP—in short, "to maintain and support a system of free public schools that affords substantially equal educational opportunities to all students" as required by the Tennessee Constitution. *Small Schools II*, 894 S.W.2d 734.

In other words, the BEP Statute funds school districts as a means to an end: providing equal educational opportunities to Tennessee *students*. "The means whereby this obligation is accomplished[] is a legislative prerogative." *Small Schools I*, 851 S.W.2d at 141. The legislature determined that the ESA Program could achieve that same end by

distributing those funds directly to students. Interpreting the BEP Statute to forbid this kind of direct funding, as Plaintiffs urge, is to lose sight of the forest for the trees.

B. The ESA Program, as a Subsequent Enactment, Cannot Violate the BEP Statute.

Even if distributing BEP funds directly to parents under the ESA Program contradicts the BEP Statute as Plaintiffs suggest, it does not follow that the ESA Program is invalid. Rather, it is a bedrock principle of statutory interpretation that where two enactments conflict, the subsequent enactment generally controls. *See Lockhart v. United States*, 546 U.S. 142, 149 (2005) (Scalia, J., concurring) ("When the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs . . . ."); *see also, e.g.*, *Haley v. State*, 299 S.W. 799, 800 (Tenn. 1927) ("No principle of law is better settled than that a statute purporting to cover an entire subject repeals all former statutes upon the same subject, either with or without a repealing clause, and notwithstanding it may omit material provisions of the earlier statutes."); *Taylor v. State*, No. M2005-00560-CCA-R3-CO, 2005 WL 3262935, at *2 (Tenn. Crim. App. Dec. 1, 2005) ("[A]s between two conflicting statutes enacted at different points in time, . . . 'the later enactment will normally control.'" (quoting 82 C.J.S. Statutes § 354 (1999))).

To hold otherwise would permit one legislature to bind subsequent legislatures by mere statutory enactment. But as United States Supreme Court Chief Justice Marshall explained over two centuries ago: "[O]ne legislature cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck*, 10 U.S. 87, 135 (1810). "The correctness of this principle, so far as respects general legislation," he asserted, "can never be controverted." *Id.* The Court should reject Plaintiffs' attempt to do so here.

V. Plaintiffs Have Failed to State a Claim Under Tennessee's Appropriations Provisions.

Plaintiffs' cause of action under the Appropriations Provisions fare no better. Plaintiffs allege that the ESA Pilot Program is invalid because it violates Article II, § 24 of the Tennessee Constitution, which requires that the legislature appropriate first-year funding to an act during the session in which that act was passed. Pls.' Compl. ¶¶ 123–31. Plaintiffs also allege that, to the extent that the Tennessee Department of Education ("TDOE") funded administration of the program via a contract with ClassWallet, it illegally misappropriated funds in violation of Tenn. Code Ann. § 9-4-601(a)(1). *Id.* Plaintiffs' allegations are wholly unsupported by the case law and public record. In Part A, Parents explain why Article II, § 24 of the Tennessee Constitution is not a limit on the General Assembly's power but rather a procedural balanced-budget provision. In Part B, Parents show how the General Assembly and Tennessee Department of Education ("TDOE") complied with the Appropriations Provisions.

A. Article II, § 24 Is a Procedural Balanced-Budget Provision, Not a Limit on the General Assembly's Power.

Article II, § 24 of the Tennessee Constitution provides that "[n]o public money shall be expended except pursuant to appropriations made by law. Expenditures for any fiscal year shall not exceed the state's revenue and reserves . . . for that year." Pursuant to that overall objective, it also provides that "[a]ny law requiring the expenditure of state funds shall be null and void unless, during the session in which the act receives final passage, an appropriation is made for the estimated first year's funding." Tenn. Const. art. II, § 24. Collectively, these procedural provisions were "intended to prevent deficit spending and to force the legislature to fund any new programs that it implements." Tenn. Op. Atty. Gen. No. 04-142, 2004 WL 2326699, at *2 (citing *Journal and Debates of the 1977 Limited*

Constitutional Convention, 1112–13 (Report on the Limitations on State Spending Committee, remarks by Mr. Burson)).

Consequently, cases interpreting the provisions have given the legislature a wide berth by construing the provisions liberally. "It is true, as claimed, that no money can be rightfully drawn from the treasury except in pursuance of an appropriation made by law, but such an appropriation may be made impliedly as well as expressly, and in general as well as in specific terms." *State v. King*, 67 S.W. 812, 813 (Tenn. 1902) (citation omitted)[10]; *see also Joyner v. Priest*, 117 S.W.2d 9 (Tenn. 1938) (upholding an act against an appropriations challenge); *cf. Clover Bottom Hospital and School v. Townsend*, 513 S.W.2d 505, 508 (Tenn. 1974) (approving State liability for monetary damages in a FLSA action over the defense that damages amounted to an unauthorized "appropriation" of State funds). As discussed below, viewed through this lens, it is clear that both the General Assembly and the TDOE complied with the Appropriations Provisions.

B. The General Assembly and Department of Education Complied with the Appropriations Provisions.

As an initial matter, the General Assembly did, in fact, appropriate state funds toward implementing the ESA Program in the 2019–2020 budget. Governor Lee's proposed budget, which was presented to the General Assembly prior to the ESA Program's passage, included an appropriation of $25,450,000 for program implementation. *See* State of Tennessee, The Budget Document FY2019-20, at A-37 and B-78; [11] *see also* Pls.' Compl. ¶ 74

[10] In *King*, the Court examined the precursor to modern Article II, § 24 of the Tennessee Constitution, which was ratified in 1978. At the time *King* was decided, Article II, § 24 read: "No money shall be drawn from the treasury but in consequence of appropriations made by law; and an accurate statement of the receipts and expenditures of the public money shall be attached to and published with the laws at the rise of each stated session of the General Assembly." Tenn. Const. (1870). The 1978 Amendments kept both original provisions.

[11] Available online at https://www.tn.gov/content/dam/tn/finance/budget/documents/2020BudgetDocumentVol1.pdf.

(alleging that the proposed budget failed to include proper appropriations).[12] This proposed budget was incorporated into the final appropriations act. *See* Pub. Ch. 405, 111th General Assembly, at 52 (H.B. 1508 2019) ("From the appropriations made in this act, there hereby is appropriated a sum sufficient for implementation of any legislation cited . . . in the Budget Document transmitted by the Governor . . . .").[13] Because the timeline for implementing the program had changed since Governor Lee's proposed budget had been presented, the General Assembly included an amendment in the final appropriations act reducing Governor Lee's proposed appropriation by $24,678,700. *See* Pub. Ch. 405, 111th General Assembly, at 100 ("SB 795 / HB 939 - Education Savings Accounts - NR Reduction"). The remaining funds—$771,300—were all that were required to implement the program in its first year.

The TDOE similarly complied with the appropriations provisions when it entered its contract with ClassWallet using funds previously appropriated for the Tennessee Career Ladder program.[14] As an initial matter, Plaintiffs do not allege that the funds used for the

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[12] This Court may take judicial notice of public records including the proposed budget along with the final budget and committee hearing cited *infra* without transforming this motion into a motion for summary judgment. *See Athena of S.C., LLC v. Macri*, No. E2016-00224-COA-R3-CV, 2016 WL 5956984, at*5 (Tenn. Ct. App. Oct. 14, 2016) ("Courts may also consider matters that the complaint incorporates by reference, items subject to judicial notice, orders, and matters of public record without converting a motion to dismiss into a motion for summary judgment."); *Greenberg v. Life Ins. Co. of Virginia*, 177 F.3d 507, 514 (6th Cir. 1999) (citation omitted) (explaining that "when 'a document is referred to in the complaint and is central to the plaintiff's claim," the defendant may "submit an authentic copy to the court to be considered on a motion to dismiss, and the court's consideration of the document does not require conversion of the motion to one for summary judgment"); *see also Rodriguez v. Providence Community Corrections, Inc.*, 191 F. Supp. 3d 758, 762–63 (M.D. Tenn. 2016) (relying upon "hearing testimony and a number of affidavits and arrest warrants, which Plaintiffs submitted in support of their Motion for a Preliminary Injunction" to resolve Defendants' motion to dismiss where "Defendants have not disputed the factual accuracy of any of these submissions").

[13] Available online at https://publications.tnsosfiles.com/acts/111/pub/pc0405.pdf.

[14] That program was enacted in 1985 to provide teachers, principals, and supervisors who received outstanding evaluations with pay supplements. The General Assembly repealed the program in 2013, but with instructions to the Tennessee Department of Education to continue providing supplements to the remaining participants in the program for the rest of their tenure. *See* 2013 Pub. Acts, c. 214, § 1.

ClassWallet contract were improperly appropriated to the TDOE in the first instance—in other words, Plaintiffs have not alleged that the TDOE ordered the disbursement of state funds belonging to another department or state entity. This fact alone satisfies the constitutional appropriations provision, which concerns balancing the budget and separation of powers, not matters of administrative accounting.

To the extent that the statutory appropriations provision is concerned, the ClassWallet contract was also "duly authorized by law." Tenn. Code Ann. § 9-4-601(a)(1). The 2019-20 Budget specifically authorized departments to utilize budget surpluses within the department as needed. *See* Pub. Ch. 405, 111th General Assembly, at 53 ("[I]f the head of any department . . . of the state government finds that there is a surplus . . . under such entity, and a deficiency in any other division . . . then in that event the head of such department . . . may transfer such portion of such funds as may be necessary for the one division . . . where the surplus exists to the other . . . ."). And at the very same committee hearing where Plaintiffs allege that the TDOE deputy commissioner admitted to "diverting" funds improperly from the Career Ladder program, *see* Pls.' Compl. ¶ 52, the deputy commissioner explained that the Career Ladder program had "sunset" and that the funds were therefore no longer needed. *See* General Assembly Joint Government Operations Committee Hearing (Jan. 27, 2020), at 1:01:30–52.[15] Plaintiffs do not allege that the funds taken from the Career Ladder program were needed by that program to function or did not otherwise constitute surplus. Given that the Career Ladder program was repealed in 2013 and was only being funded on an expiring basis, *see supra* n.3, reallocating excess funds

[15] Video available online at http://tnga.granicus.com/MediaPlayer.php?view_id=424&clip_id=21304.

from the program to facilitate the ClassWallet contract was authorized by law in accordance with state statute.[16]

CONCLUSION

The ESA Pilot Program fully complies with the Tennessee Constitution, the BEP Statute, and Tenn. Code Ann. § 9-4-601. None of the five causes of action 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.

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Respectfully submitted,

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[16] Even if the ClassWallet contract was entered in violation of state law, the proper remedy would be to invalidate the contract, not the entire ESA Program. *See* Tenn. Code Ann. § 49-6-2611(b) ("If any provision of this part or this part's application to any person or circumstance is held invalid, then the invalidity must not affect other provisions or applications of this part that can be given effect without the invalid provision or application, and to that end the provisions of this part are severable.").