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IN THE CHANCERY COURT FOR THE TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, TENNESSEE

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

PLAINTIFFS' RESPONSE IN OPPOSITION TO THE MOTION TO DISMISS BY INTERVENOR-DEFENDANTS' GREATER PRAISE CHRISTIAN ACADEMY, *ET AL.*

The Court should deny the motion to dismiss filed by Intervenor-Defendants Greater Praise Christian Academy, Sensational Enlightenment Academy Independent School, Ciera Calhoun, Alexandria Medlin, and David Wilson, Sr. ("Intervenor-Defendants"). The motion fails for the following reasons:

- The Metropolitan Government of Nashville and Davidson County has clear capacity to challenge the Act, which Intervenor-Defendants have not challenged. As a result, the Metropolitan Board of Education does, as well.
- Count I of the Complaint states a viable claim for a Home Rule Amendment violation because legislation that may only ever apply in two counties, such as the ESA Act, is local in form or effect under the amendment.
- Count II of the Complaint states a viable equal protection claim because education is a fundamental right under the Tennessee Constitution, and the ESA Act is not narrowly-tailored, or even loosely-related, to its purported State interest in improving school

performance in Davidson and Shelby counties' LEAs. Moreover, the ESA Act is not a pilot program at all; it will exist in perpetuity absent further action from the General Assembly.

- Count III of the Complaint states a viable claim under the Education Clause because the ESA Act's diversion of public funds from the Davidson County and Shelby County school systems, while protecting all other counties and LEAs from the financial burdens of the ESA program, violates the State's obligation to provide a substantially equal educational opportunity to all students in Tennessee and will impair the delivery of educational services to students in Davidson and Shelby counties.

STATEMENT OF FACTS

For purposes of a motion to dismiss, the Court must accept the facts properly pled in the complaint as true. Accordingly, for purposes of this motion, the following facts are deemed true. Furthermore, most of the Complaint's allegations are drawn from state law, the ESA Act's legislative history, and other public records of which the Court may take judicial notice.

The ESA Act's Coverage

In May 2019, the Tennessee General Assembly passed the ESA Act, Public Chapter 506, with an effective date of May 24, 2019. 2019 Tenn. Pub. Acts ch. 506. The Act is codified at Tenn. Code Ann. §§ 49-6-2601, *et seq*. Under the Act, a "participating" student will receive an education savings account to pay for tuition, fees, and other education-related expenses at participating private schools. Tenn. Code Ann. §§ 49-6-2603(a)(4), -2607(a). The student's account is funded by diverting state and local funds from the student's public-school district in an amount equal to the district's per-pupil state and local funding required by the state's Basic Education Program ("BEP") or the combined (state and local) statewide average of BEP funding, whichever is lower. Tenn. Code Ann. § 49-6-2605(a).

To qualify as a "participating student," a student must be an "eligible student" under the ESA Act. An "eligible student" must be in a family with an annual household income not exceeding

twice the federal income eligibility guidelines for free lunch and meet the following geographic restrictions:

> (i) is zoned to attend a school in an LEA,[1] excluding the achievement school district (ASD), with ten (10) or more schools:
>
> > (*a*) Identified as priority schools in 2015, as defined by the state's accountability system pursuant to § 49-1-602;
> >
> > (*b*) Among the bottom ten percent (10%) of schools, as identified by the department in 2017 in accordance with § 49-1-602(b)(3); *and*
> >
> > (*c*) Identified as priority schools in 2018, as defined by the state's accountability system pursuant to § 49-1-602; or
>
> (ii) Is zoned to attend a school that is in the ASD on the effective date of this act.

Tenn. Code Ann. § 49-6-2602(3)(C) (emphasis added).

The "priority" and "bottom ten percent" schools addressed in Section 49-6-2602(3)(C)(i) are defined under Tennessee law. With respect to priority schools, at least every three years, "the commissioner of education shall recommend for approval to the state board a listing of all schools to be placed in *priority, focus or reward status*." Tenn. Code Ann. § 49-1-602(b)(1) (emphasis added). "Schools identified as *priority schools* shall include the bottom five percent (5%) of schools in performance, all public high schools failing to graduate one-third (1/3) or more of their students, and schools with chronically low-performing subgroups that have not improved after receiving additional targeted support." *Id.* § 49-1-602(b)(2) (emphasis added).[2]

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[1] The Tennessee Code refers to a public-school system, including a county school system, as a "local education agency" or "LEA." Tenn. Code Ann. § 49-1-103(2).

[2] The "achievement school district (ASD)" addressed in Section 49-6-2602(3)(C)(ii) is a special school district administered by the TDOE. More specifically, state law defines the ASD as "an organizational unit of the department of education, established and administered by the commissioner for the purpose of providing oversight for the operation of schools assigned to or authorized by the ASD." Tenn. Code Ann. § 49-1-614(a). Although the ASD describes itself on its website as a "local education agency," the enabling statute refers to the ASD as "an organizational unit of the department of education, established and administered by the commissioner." Tenn. Code Ann. § 49-1-614(a). The commissioner has discretionary authority to assign priority schools within an LEA to the ASD. Tenn. Code Ann. § 49-1-614(c)(1). Presently, the only schools the commissioner has assigned to the ASD are in Davidson County and Shelby County.

With respect to bottom ten percent schools, "[b]y October 1 of the year prior to the public identification of priority schools pursuant to subdivision (b)(1), the commissioner shall notify any school and its respective LEA if the school is among the *bottom ten percent (10%) of schools* in overall achievement as determined by the performance standards and other criteria set by the state board." *Id.* § 49-1-602(b)(3) (emphasis added).

The only LEAs that meet all of the specifications in Section 49-6-2602(3)(C)(i) for an "eligible student" are MNPS and Shelby County Schools. (*Id.* ¶¶ 32-33.)[3] Several counties had similar or higher concentrations of priority or bottom 10% schools in the relevant years, such as Fayette, Hamilton, and Madison. (Compl. ¶ 23-30.) These counties, however, were intentionally omitted from the ESA Act's application. In fact, every county other than Davidson and Shelby was removed from the legislation because that was the intent of the General Assembly: to protect all other counties while imposing the Act's inevitable and negative consequences in the "deep blue" counties. (*Id.* ¶¶ 57, 82-84, 202.)

The ESA Act's Impact on MNPS, Shelby County Schools, and the Counties.

The BEP is defined under Tennessee law as a statutory "formula for the calculation of kindergarten through grade twelve (K-12) education funding necessary for our schools to succeed." Tenn. Code Ann.§ 49-3-302(3). The amount of BEP funding allocated to each LEA for public education is determined exclusively by Tennessee Code Annotated Title 49, Chapter 3, Part 3. (Compl. ¶ 98.) As outlined in the ESA Act, the annual amount MNPS or Shelby County Schools must pay into each participating student's ESA is either the per-pupil state and local funding required by the BEP in MNPS and Shelby County Schools or the combined statewide per-pupil average of BEP funding, whichever is less. Tenn. Code Ann. § 49-6-2605(a). (Compl. ¶ 110.)

[3] Although the "eligible student" definition is based on the number of priority and bottom 10% schools and ASD schools in an LEA, the ESA Act does not limit participation only to students in low-performing schools. Tenn. Code Ann. § 49-6-2602(3)(C). Thus, every student in MNPS and Shelby County Schools who meets the income requirement, regardless of which school the student attends, is "eligible."

If MNPS and Shelby County Schools' ESA payments were based on BEP figures for the current fiscal year of 2019-2020, each of their per-pupil BEP funding requirements, taking into account funds reserved by the state for ASD and State Board of Education charter schools in their districts, would be higher than the combined statewide BEP average of $7,593. Therefore, they would pay $7,593, the combined statewide average, into an account for each student in their district participating in the ESA Program. Tenn. Code Ann. § 49-6-2605(a). (Compl. ¶ 112.)

The Tennessee General Assembly Fiscal Review Committee estimated in the Corrected Fiscal Memorandum on HB 939 – SB795 (May 1, 2019) that the ESA Act would result in a program-wide "shift in BEP funding" in Davidson and Shelby counties of $36,881,150 in year one (this fall); $55,321,725 in year two; $73,762,300 in year three; $92,202,875 in year four; and $110,643,450 in year five and subsequent years. (Compl. ¶ 120.) The Fiscal Memorandum also notes that Davidson and Shelby counties will incur increased costs, potentially totaling more than $1 million, without an offset in additional funding, to provide "equitable services" to students in private schools participating in Titles I, II, and IV of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 6301, *et seq*. ("ESEA"). (Compl. ¶ 121-23.) The Fiscal Memorandum further states that each of the counties' LEAs will incur more than $1 million in increased costs over five years for students returning to the LEAs for testing. (*Id.* ¶¶ 154-58.)[4]

Movement of students out of MNPS and Shelby County Schools does not generate a proportionate reduction in costs. Many of MNPS and Shelby County Schools' costs—such as facility maintenance, technology costs, food services, transportation, facility operations, long-term contracts, and post-employment benefits such as pension and insurance—are fixed and largely unaffected by movement of students between schools or out of the system. (Compl. ¶ 142.) All schools, regardless of enrollment, must be staffed with a principal, librarian, bookkeeper, literacy

[4] Based on the Fiscal Review Committee's estimates, and if students are divided among the two LEAs in proportion to their overall student enrollment, MNPS will incur approximately $1.1 million over the first five years of implementation, and Shelby County Schools will incur approximately $1.5 million. (Compl. ¶¶ 154-58.)

coach, secretary, counselor, and half-time advanced academics instructor. (*Id.* ¶ 149.) If enrollment decreases are spread across an entire school system, student-teacher ratios must be maintained, and buildings must continue to operate with the same amount of technology, food service staff, and administrative staff, despite the significant loss of BEP funding that accompanies a loss of students. (*Id.* ¶¶ 145-48.)

The ESA Act includes a three-year unfunded grant program to be paid from a "school improvement fund." The grant program, however, is unfunded under the ESA Act; it is "subject to appropriation" and not a condition precedent to implementation or continuation of the Act. Tenn. Code Ann. § 49-6-2605(b)(2)(A). As a result, the grant program provides no assurance that it will offset the fiscal damage that Davidson and Shelby counties' LEAs will suffer. (Compl. ¶ 127.) Even if fully funded, the grant program only lasts three years absent new legislation. Tenn. Code Ann. § 49-6-2605(b)(2)(A). As a result, it will not permanently offset the fiscal damage to the Davidson and Shelby counties' LEAs. (Compl. ¶ 129.) Further, funds from the ESA grant program are only "to be used for school improvement." Tenn. Code Ann. § 49-6-2605(b)(2)(A). Funds that are restricted to school-improvement efforts cannot be treated as general operating funds as BEP funding can and therefore do not make MNPS or Shelby County Schools whole for their loss of BEP funding. (Compl. ¶¶ 131-32.) Finally, the ESA grant program only provides funds for students who attended an MNPS or Shelby County school for one full school year before the student joins the ESA program. Tenn. Code Ann. § 2605(b)(2)(A)(i). Despite having to plan, budget, and prepare buildings, staff, and curriculum for new incoming students, MNPS and Shelby County Schools will receive no grant funds for students who would otherwise be entering kindergarten but elect to use ESA funds instead. (Compl. ¶ 134.)[5]

[5] The same will be true for students who move into Tennessee from another State. In fact, Tenn. Code Ann. § 49-6-2602(3)(A)(i) requires only that the student have attended "a Tennessee public school" for a year, not a school in the particular LEA. Meanwhile, the grant program only accounts for students who were enrolled in and attended school *in the LEA* for the prior year. *Id.* § 49-6-2605(b)(2)(A)(i). In other words, a student whose family moves into Davidson County or Shelby County after attending school in a neighboring county may be immediately eligible under the program, requiring the

STANDARD OF REVIEW

A motion filed under Rule 12.02(6) of the Tennessee Rules of Civil Procedure tests the legal sufficiency of a complaint, not the strength of the plaintiff's proof. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 432 (Tenn. 2011). "[T]he threshold for surviving a motion to dismiss for failure to state a claim is generally low." *Moses v. Dirghangi*, 430 S.W.3d 371, 375 (Tenn. Ct. App. 2013). The Court may grant the Intervenor-Defendants' motion to dismiss only if "the allegations in the complaint, when considered alone and taken as true, are insufficient to state a claim as a matter of law." *Moses*, 430 S.W.3d at 375 (citing *Cornpropst v. Sloan*, 528 S.W.2d 188 (Tenn. 1975)). In addition, the Court must construe the complaint liberally, presuming all factual allegations to be true and giving Plaintiffs the benefit of all reasonable inferences. *Id.*; *see also Moore-Pennoyer v. State*, 515 S.W.3d 271, 276 (Tenn. 2017).

Plaintiffs seek a declaratory judgment that the ESA Act violates the Home Rule Amendment, Equal Protection Clauses, and Education Clause in the Tennessee Constitution. "A decision on whether to entertain a declaratory judgment falls squarely within a trial court's discretion, which has been described by th[e Tennessee Supreme] Court as 'very wide.'" *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 193 (Tenn. 2000) (quoting *S. Fire & Cas. Co. v. Cooper*, 292 S.W.2d 177, 178 (Tenn. 1956); *Hinchman v. City Water Co.*, 167 S.W.2d 986, 992 (Tenn. 1943); *Newsum v. Interstate Realty Co.*, 278 S.W. 56, 57 (Tenn. 1925)). In addition, the Declaratory Judgment Act is "remedial" and "is to be liberally construed and administered." Tenn. Code Ann. § 29-14-113, *cited in Brown & Williamson*, 292 S.W.2d at 193; *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 837 (Tenn. 2008).

Intervenor-Defendants' motion to dismiss raises the issue of standing. "Standing is a judge-made doctrine" that "is used to refuse to determine the merits of a legal controversy irrespective of its correctness where the party advancing it is not properly situated to prosecute

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contribution of state and local BEP funds to the student's private school costs; but that student will not be taken into account in disbursement of grant funds.

the action." *Knierim v. Leatherwood*, 542 S.W.2d 806, 808 (Tenn. 1976). The issue of standing "is therefore raised by a specific denial or defense (but not an affirmative defense under Rule 8.03) in the answer or responsive pleading, or by a motion to dismiss under Rule 12.02(6) or in proper cases by a motion for judgment on the pleadings under Rule 12.03, or motion to strike under Rule 12.06." *Id.* Where standing is raised in a Rule 12.02(6) motion, as here, "the issue must be framed on the face of the pleadings." *Id.*

LEGAL ARGUMENT

I. THE METROPOLITAN GOVERNMENT HAS STANDING TO CHALLENGE THE ESA ACT.

Intervenor-Defendants first argue that the Plaintiff Metropolitan Nashville Board of Public Education (the "Board") lacks capacity to challenge the ESA Act's constitutionality. (Intervenor-Defs.' Mem. L. at 5-6.)

The Board, like all school boards, is tasked with the duty to "[m]anage and control all public schools established or that may be established under its jurisdiction." Tenn. Code Ann. § 49-2-203(a)(2). A school board may challenge a law that has a fiscal or unconstitutional impact on the school system. *See, e.g., Bd. of Ed. of Memphis County Schools v. Shelby County*, 339 S.W.2d 569, 582 (Tenn. 1960) ("We conceive it to be the plain duty of any such Board [of Education] to exercise every legal means for the protection and preservation of funds that may belong to the school system which it operates."); *Coffee Cty. Bd. of Educ. v. City of Tullahoma*, No. M2014-02269-COA-R3-CV, 2015 WL 6550563, at *3-4 (Tenn. Ct. App. Oct. 28, 2015) (board of education had implied power to file suit to recover liquor-by-the-drink tax revenue); *Bd. of Educ. of Shelby Cty., Tenn. v. Memphis Cty. Bd. of Educ.*, No. 11-2101, 2011 WL 3444059, at *19-*20 (W.D. Tenn. Aug. 8, 2011) (determining that Shelby County Board of Education met standing requirements based on costs incurred in assuming responsibility for educating Memphis schoolchildren).

The ESA Act's limits on legal challenges raise serious concerns about legislative interference with the judiciary's role in reviewing the constitutionality of legislation. *See Willeford v. Klepper*, -- S.W.3d --, 2020 WL 977073, at *12-*13 (Tenn. Feb. 28, 2020) (rejecting General

Assembly's attempt to remove trial court discretion in granting protective orders, finding impermissible intrusion on judicial authority over procedural matters); *State v. Mallard*, 40 S.W.3d 473 (Tenn. 2001) (Supreme Court read as suggestions rather than mandates an attempt by the General Assembly to revise rules of evidence).

However, it is not necessary to resolve these issues here. As established above, Plaintiffs Metropolitan Government and Shelby County have standing, and if one plaintiff has standing, identical claims may be brought by other parties. *Bd. of Educ. of Shelby Cty, Tenn. v. Memphis City Bd. of Educ.*, 911 F. Supp. 2d 631, 646 (W.D. Tenn. 2012) (quoting *1064 Old River Rd., Inc. v. City of Cleveland*, 137 F. Appx. 760, 765 (6th Cir. 2005); *Clinton v. City of New York*, 524 U.S. 417, 431 (1998) ("Because both the City of New York and the health care appellees have standing, we need not consider whether the appellee unions also have standing to sue.").)

II. COUNT I OF THE COMPLAINT STATES A VIABLE CLAIM FOR A HOME RULE AMENDMENT VIOLATION.

The Intervenor-Defendants argue that the Home Rule Amendment claim in Count I of the Complaint fails because the ESA Act applies to more than one county and to students in the ASD. (Intervenor-Defs.' Mem. L. at 7-9.) The Tennessee Supreme Court, however, has held that legislation with no potential applicability beyond two counties is "local in form or effect" under the Home Rule Amendment and must contain a local approval option. In addition, the Home Rule Amendment does not create an exception to the local approval option language where a state entity, such as the ASD, is also affected by the legislation. Accordingly, Intervenor-Defendants' arguments concerning Count I of the Complaint should be rejected.

A. Legislation that May Only Ever Apply to Two Counties Is "Local in Form or Effect."

The second paragraph of Article XI, Section 9, commonly referred to as the "Home Rule Amendment," reads in relevant part as follows:

> and any 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.

The amendment applies to any act of the General Assembly that is "private or local in form or effect," "applicable to a particular county or municipality," and affecting "its governmental or its proprietary capacity." *Id.*; *Farris v. Blanton*, 528 S.W.2d 549, 551 (Tenn. 1975) ("[A]ny and all legislation 'private and local in form or effect' affecting Tennessee counties or municipalities, in any capacity, is absolutely and utterly void unless the Act requires approval of the appropriate governing body or of the affected citizenry.").

The Tennessee Supreme Court adopted a test in *Farris v. Blanton* to determine whether an act is "private or local in form or effect." 528 S.W.2d at 551-56. This "local in form or effect" test does not rely on self-serving language used by the General Assembly: "The test is not the outward, visible, or facial indices, not the designation, description or nomenclature employed by the Legislature. Such a criterion would emasculate the purpose of the amendment."[6] *Id.* at 551; *see also id.* at 554 (enaction as a public act "in and of itself is of no significance" if the act is local in effect) (quoting Mem. Op'n by Justice William Harbison, sitting as Special Chancellor (citing and reaffirming *Lawler v. McCanless*, 417 S.W.2d 548, 550 (Tenn. 1967))).

Accordingly, the ESA Act's designation as a "public" rather than "private" act of the legislature is not determinative, nor is the legislative description of the Act as a "pilot program." Rather, "[t]he sole constitutional test must be whether the legislative enactment, irrespective of its form, is local in effect and application." *Id.* at 551. To apply this test, a court must determine whether the legislation is "potentially applicable" throughout the state. *Id.* at 552. If so, it is not local in effect, even if it applies to only one county at the time of passage. *Id.*

[6] The act challenged in *Farris* was styled a public act designed, according to its caption, "to provide for a run-off election in counties with a mayor as head of the executive or administrative branch of the county government." 528 S.W.2d at 550 (citing 1975 Pub. Acts 866). Shelby County was the only county meeting that description. *Id.* at 552.

For example, the act at issue in *Farris*, Chapter 354 of the Public Acts of 1975, provided for run-off elections in counties with a mayor as the head of the county's executive branch. *Id.* at 550. Only Shelby County had a county mayor, and no other county could have this form of government "except by the affirmative action of the General Assembly." *Id.* at 552. In such situations, a court "cannot conjecture what the law may be in the future" and is "not at liberty to speculate upon the future action of the General Assembly." *Id.* at 555. Without language in an act under which other counties may come within its scope, the court should find such an act "local in form or effect." *Id.*

This test has been applied consistently in subsequent cases. In cases where the act upon passage applied only to a small number of local governments but was drafted with population brackets or other provisions so that "[i]t can become applicable to many other counties" without further amendment, the act was held not to fall within the Home Rule Amendment. *Bozeman v. Barker*, 571 S.W.2d 279, 282 (Tenn. 1978) (legislation was not local in effect where it "presently applie[d] to two populous counties" and "can become applicable to many other counties depending on what population growth is reflected by any subsequent Federal Census); *see also Doyle v. Metro. Gov't of Nashville & Davidson County*, 471 S.W.2d 371 (Tenn. 1971) (despite applying only to the Metropolitan Government at the time, the "Act applie[d] throughout the State to all those who desire to come within its purview"—that is, to any government that became a metropolitan government in the future); *Civil Serv. Merit Bd. of the City of Knoxville v. Burson*, 816 S.W.2d 725, 729-30 (Tenn. 1991) (legislation that applies generally to counties with a minimum population of 300,000 is not local in form or effect, even though it applies to only three counties, because other counties could grow into compliance); *County of Shelby v. McWherter*, 936 S.W.2d 923, 935-36 (Tenn. Ct. App. 1996) (statute that applies upon passage to only to Shelby County but "is potentially applicable to numerous counties" based on population bracket is not subject to Art. XI, § 9).

But where the scope of a bill is frozen in time, like the ESA Act, so that it is not potentially applicable to other counties without further legislative action, the act is local in form or effect, even if applicable to two counties. *See, e.g.*, *Leech v. Wayne County*, 588 S.W.2d 270, 274 (Tenn. 1979) (legislation that exempts two counties from a "permanent, general provision, applicable in nearly ninety counties" is local in form and effect in violation of Art. XI, § 9); *see also Farris*, 528 S.W.2d at 554 (""The Court is of the opinion that the subject statute is such a local Act. At the time of its passage, only two counties of the state were affected by the population classification set out therein."") (quoting Mem. Op'n by Justice William Harbison, sitting as Special Chancellor (declaring as "local in effect" 1968 Public Acts ch. 530, which contained a 250,000 – 400,000 population bracket), 1968 Pub. Acts 424).[7]

In *Leech v. Wayne County*, the Tennessee Supreme Court examined a 1978 statutory scheme that restructured county governments across the state. 588 S.W.2d at 270-71, 273. The court examined the scheme under both Article XI, Section 9 and Article XI, Section 8. *Id.* at 273. As to Article XI, Section 8, the court noted that some "special temporary provisions made in a number of counties" were "necessary" and that the provisions did not "violate any general mandatory statewide scheme existing prior to the 1978 legislation or created within it." *Id.* at 273. That said, a "somewhat different problem" was presented by provisions of the statute relating to Wayne County's legislative body. *Id.* The act created a county legislative body with certain discretionary authority, but separate language "purport[ed] to except from th[is] provision . . . two counties by population bracket, one of these being Wayne County." *Id.* at 274. That exception violated the Home Rule Amendment, with the Tennessee Supreme Court holding as follows:

> Where, however, the General Assembly has made a permanent, general provision, applicable in nearly ninety of the counties, giving the local legislative bodies discretion as to the method of election of their members, ***we do not think it could properly make different provisions in two of the counties, by population bracket, in the manner attempted here.*** Insofar as Wayne County is concerned,

[7] Notably, the Tennessee Supreme Court in *Bozeman* and *Burson* did not dismiss the Art. XI, § 9 claims because the challenged statutes applied to more than one county but because the statutes were potentially applicable to additional counties. *Bozeman*, 571 S.W.2d at 282; *Burson*, 816 S.W.2d at 730.

> this amounted to nothing more than a private act relating to the composition of its county legislative body, without any statement of reasons and without requirement of a local referendum. In our opinion, neither Article VII nor Article XI, s 9 authorizes this type of legislation, nor can it be justified as being a transitional part of a general restructuring scheme.

Id. (emphasis added).

This is precisely what the Tennessee General Assembly did with the ESA Act. The Act left ninety-three counties empowered to use local education public funds for the general good of their public school students, but in two counties, and only two counties, local education public funds may be diverted to pay private school tuition for up to 15,000 "participating" students. There is no Tennessee authority holding that legislation applying to one or two counties *with no potential to apply to any others* is anything other than "local in form or effect" under the Home Rule Amendment. In fact, *Leech* unequivocally establishes otherwise.

The ESA Act attempts to disguise its local effect by basing its application on the number of low-performing schools in a district during specified years. The Act defines "eligible student" to include only students zoned to attend a school in an LEA with ten or more schools listed (1) as priority schools in 2015, (2) on the bottom 10% list in 2017, *and* (3) as priority schools in 2018. Tenn. Code Ann. §49-6-2602(3)(C)(i). By its selective use of numbers of schools in particular years, the ESA Act excludes every school district except Davidson and Shelby counties. (Compl. ¶¶ 18, 21, 32.)[8] The Act will never apply to any other county's LEA absent future legislative action. (*Id.*) The Act's exception to its severability clause ensures that it will never apply in its current form in any other county. Tenn. Code Ann. § 49-6-2611(c). In the words of Sen. Joey Hensley (R-

[8] The Tennessee State Board of Education's rules for ESAs, on the other hand, are explicit: they state on their face that an "eligible student" is one who, among other requirements, is "zoned to attend a school in Shelby County Schools, Metropolitan Nashville Public Schools, or is zoned to attend a school that was in the Achievement School District on May 24, 2019." State Board Rule 0520-01-16-.02(11)(b). (Compl. ¶ 97.) The Tennessee Department of Education's ("TDOE") website is more explicit. (*See* TDOE, "Education Savings Account (ESA) Program," https://www.tn.gov/education/school-options/esa-program.html ("Tennessee's Education Savings Account (ESA) program is planned to launch for the 2020-21 school year in Davidson and Shelby counties.").) (Compl. ¶ 91.)

Hohenwald), as confirmed by Sen. Dolores Gresham (R-Somerville), "no other LEA will be able to grow into the program over the years." (Compl. ¶ 82-84.)

While the Intervenor-Defendants correctly note that "the Legislature is free to use categories or classifications that may currently affect only a small number of counties but are flexible to change or add additional counties over time" (Intervenor-Defs.' Mem. L. at 8), that is not what the ESA Act does. The "eligible student" definition is not "flexible to change"; it is based on the number of low-performing schools in specified years and therefore is frozen in time, and intentionally so, to exclude all but Davidson and Shelby counties. Tenn. Code Ann. § 49-6-2602(3)(C). (Compl. ¶¶ 18, 21, 32.)

B. The ESA Act Is "Applicable to a Particular County" Despite Its Inclusion of the ASD.

The ESA Act's inclusion of schools in the ASD within the definition of "eligible student" likewise does not save the Act from the Home Rule Amendment's requirements. The ASD is an "organizational unit of the department of education," which is administered by the State. Tenn. Code Ann. § 49-1-614(a). It is not a county or municipality. The Home Rule Amendment applies to "any 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" and makes no exception for acts that *also* apply to a state entity. Thus, the ESA Act's application to a separate state entity *in addition to* "a county or municipality" does not diminish the Act's substantial effect on the two counties. In fact, any other conclusion would undermine the intent of the Home Rule Amendment by permitting the State to insulate itself from challenge merely by including one of its own agencies in the bill. Because the ESA Act directly affects Davidson and Shelby counties, that "effect" falls within the Home Rule Amendment's protection notwithstanding the Act's application to a non-local entity. *See Chattanooga-Hamilton Cty. Hosp. Auth. v. City of*

Chattanooga, 580 S.W.2d 322, 328 (Tenn. 1979) (holding that the Home Rule Amendment requires local approval by a city or county where the legislation "affects" that city or county).[9]

III. COUNT II OF THE COMPLAINT STATES A VIABLE EQUAL PROTECTION CLAIM.

The Intervenor-Defendants next argue that Plaintiffs' equal protection claim should be dismissed because there are several purported rational bases for the ESA Act. (Intervenor-Defs.' Mem. L. at 9-13.) The Intervenor-Defendants' equal protection argument, however, is based on the false premise that the claim is subject to rational-basis review. (*Id.*) And while the ESA Act does not survive rational-basis scrutiny, it certainly fails under the stringent strict scrutiny test that applies to legislation affecting a fundamental right, such as the ESA Act.

A. Because Education Is a Fundamental Right Under the Tennessee Constitution, Strict Scrutiny Applies to the ESA Act.

The right to equal protection of the laws is guaranteed by Article I, Section 8 and Article XI, Section 8 in the Tennessee Constitution. *McClay v. Airport Mgmt. Servs., LLC*, -- S.W.3d --, 2020 WL 915980, at *5 (Tenn. Feb. 26, 2020). "The equal protection provisions of the Tennessee Constitution and the Fourteenth Amendment are historically and linguistically distinct" and "differ in their perspective because of their respective positions in the nation's scheme of federalism." *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993) ("*Small Schools I*"). Nevertheless, the Tennessee Supreme Court has recognized that the Tennessee Constitution "confer[s] essentially the same protections as the Fourteenth Amendment to the United States Constitution, despite the[se] historical and linguistic differences." *Gallaher v.*

[9] The ESA Act does not, as Intervenor-Defendants contend, apply to students zoned to attend a school in the ASD now or in the future. (Intervenor-Defs.' Mem. L. at 9 ("[I]ts application to the [ASD] means that it could potentially affect any county in Tennessee.").) Rather, the Act defines "eligible student" to include one who "[i]s zoned to attend a school that is in the ASD *on the effective date of this act*." Tenn. Code Ann. § 49-6-2602(3)(C)(ii) (emphasis added). Consistent with the General Assembly's intent to exclude all students outside Shelby and Davidson counties, no schools in the ASD on the Act's effective date were outside Davidson or Shelby counties. The TDOE's website also confirms that no student outside Davidson or Shelby counties can be an "eligible students." (*See* TDOE, "Education Savings Account (ESA) Program," https://www.tn.gov/education/school-options/esa-program.html.) (Compl. ¶ 91.)

Elam, 104 S.W.3d 455, 460 (Tenn. 2003) (citing *State v. Tester*, 879 S.W.2d 823, 827 (Tenn. 1994)); *see also Newton v. Cox*, 878 S.W.2d 105, 109 (Tenn. 1994).[10]

As a result, the Tennessee Supreme Court "has adopted an analytical framework similar to that used by the United States Supreme Court in analyzing equal protection challenges." *Gallaher*, 104 S.W.3d at 460. "The concept of equal protection espoused by the federal and our state constitutions guarantees that 'all persons similarly circumstanced shall be treated alike.'" *Norris*, 751 S.W.2d at 841 (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). Under the equal protection framework, one of three levels of scrutiny applies to any legislative enactment being challenged on equal protection grounds. *Gallaher*, 104 S.W.3d at 460. The highest level of scrutiny, commonly referred to as "strict scrutiny," applies to legislation that "interferes with the exercise of a fundamental right" or "operates to the peculiar disadvantage of a suspect class." *Id.* Heightened scrutiny is an intermediate level of scrutiny. *Newton*, 878 S.W.2d at 109 (citing *Small Schools I*, 851 S.W.2d at 152-54). Reduced scrutiny is the lowest level of scrutiny, applying a rational-basis standard. *Id.*; *Gallaher*, 104 S.W.3d at 460.

Intervenor-Defendants first assert that the Complaint acknowledges that rational-basis scrutiny applies to the ESA Act. (Intervenor-Defs.' Mem. L. at 10.) Intervenor-Defendants are incorrect. While the Complaint alleges that the ESA Act cannot survive rational-basis scrutiny, the Complaint takes no position on the question of law as to which level of scrutiny applies. Furthermore, if the ESA Act does not satisfy rational-basis review, as the Complaint alleges, it necessarily does not satisfy strict scrutiny. As to the legal question of whether strict scrutiny applies, applicable law establishes that it does.

In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the U.S. Supreme Court held that education is not a fundamental right under *the U.S. Constitution*. *Id.* at

[10] In its interpretation of the Tennessee Constitution, the Tennessee Supreme Court "is always free to expand the minimum level of protection mandated by the federal constitution." *Doe v. Norris*, 751 S.W.2d 834, 838 (Tenn. 1988).

37. And while that holding does not dictate whether education is a fundamental right under the *Tennessee Constitution*, *Rodriguez* is instructive on that issue, as well. The Supreme Court began its analysis of the issue by referencing its decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), which "recognized that 'education is perhaps the most important function of state and local governments.'" *Rodriguez*, 411 U.S. at 29 (quoting *Brown*, 347 U.S. at 493). "But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause" in the U.S. Constitution. *Id.* at 30. Nor is "the key to discovering whether education is 'fundamental' . . . to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing" or "by weighing whether education is as important as the right to travel." *Id.* at 33. "Rather, the answer lies in assessing *whether there is a right to education explicitly or implicitly guaranteed by the Constitution*." *Id.* (emphasis added).

Following this reasoning, the Supreme Court noted that education is not enumerated in the U.S. Constitution as a protected right. *Id.* at 35. The Supreme Court likewise did not "find any basis for saying it is implicitly so protected." *Id.* Accordingly, *Rodriguez* held that education is not a fundamental right *under the U.S. Constitution* and declined to apply strict scrutiny to the Texas school-financing system at issue. *Id.* at 37-40.

The implication of *Rodriguez*, however, is *not* that all statutes addressing education are subject to rational-basis review. Rather, *Rodriguez* provides an analytical framework for determining whether a right is fundamental for purposes of a constitutional challenge: Where the right is "explicitly or implicitly guaranteed by the Constitution," the right is fundamental. *Id.* at 33; *see also Norris*, 751 S.W.2d at 841 (examining a Tennessee equal protection claim and stating, "According to the United States Supreme Court, to determine whether a particular right is deserving of the strict scrutiny analysis, the Constitution must be examined 'to see if the right infringed has its source, explicitly or implicitly, therein.'" (quoting *Plyler v. Doe*, 457 U.S. 202, 217 n.15 (1982))).

Following this rationale, the Tennessee Supreme Court concluded in *Heyne v. Metropolitan Nashville Board of Public Education*, 380 S.W.3d 715 (Tenn. 2012), that education is a fundamental right when examining a high school student's due process claim. Citing *Rodriguez*, the court states:

> The United States Supreme Court has declined to recognize that the right to a free public education is a fundamental right protected by the Equal Protection Clause of the Fourteenth Amendment. However, Article XI, § 12 of the Constitution of Tennessee "guarantees to all children of school age in the state the opportunity to obtain an education." To implement this constitutional imperative, the General Assembly has created a statutory right to a public education that benefits all school-age children in Tennessee. Accordingly, Mr. Heyne has a claim of entitlement to a public education that warrants procedural due process protection.

Heyne, 380 S.W.3d at 731-32 (citing *Rodriguez*, 411 U.S. at 35-36; *Small Schools I*, 851 S.W.2d at 140) (internal citations and footnote omitted).

Though the plaintiff in *Heyne* asserted a due process claim, the reasoning applies equally here. *See Riggs v. Burson*, 941 S.W.2d 44, 53 (Tenn. 1997) ("Here, the parties agree that the statute does not interfere with a *fundamental right* nor does it involve a suspect class; thus, *like the due process challenge*, the equal protection analysis of this state statute involves the rational basis test." (emphasis added)). The right to an education is explicitly conferred in the Tennessee Constitution:

> 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. Unlike the U.S. Constitution, the right to an education is "explicitly guaranteed" by the Education Clause in the Tennessee Constitution. *See Rodriguez*, 411 U.S. at 33. Accordingly, education is a fundamental right under the Tennessee Constitution, and strict scrutiny applies to legislation affecting it. *Newton*, 878 S.W.2d at 110.[11]

[11] In the *Small Schools* litigation, the Chancellor found that the education financing system failed all three levels of equal protection scrutiny. The Tennessee Supreme Court passed over the question of

B. The ESA Act Cannot Survive Strict Scrutiny.

Under the strict scrutiny test, the State has the "burden to show that the regulation is justified by a compelling state interest and narrowly tailored to achieve that interest." *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 18 (Tenn. 2000). "A regulation cannot qualify as narrowly tailored if there are alternative means of achieving the state interest that would be less intrusive and comparably effective." *Hargett*, 414 S.W.3d at 102-03.

The State cannot meet this taxing burden. The ESA Act makes bold claims about the State's interest and the General Assembly's intentions, stating:

> The general assembly recognizes this state's legitimate interest in the *continual improvement of all LEAs and particularly the LEAs that have consistently had the lowest performing schools on a historical basis*. Accordingly, it is the intent of this part to establish a pilot program that provides funding for access to additional educational options to students who reside in LEAs that have consistently and historically had the lowest performing schools.

Tenn. Code Ann. § 49-6-2611(a)(1) (emphasis added). There is no connection, however, between those claims and the means by which the legislature seeks to achieve them. Despite the State purportedly having a legitimate interest in *improving the performance of LEAs*, the ESA Act *removes funding* from those LEAs. And it permits students to leave the LEA, even students in the highest-performing schools in those LEAs, to use those public funds to attend private schools. Any claim that diverting money and students away from LEAs is narrowly-tailored or even loosely-related to a desire to improve those LEAs' performance is nonsensical.

In fact, the outright refusal of legislators to vote for the Act if their own counties were included in its application emphasizes this flaw. If, as the General Assembly contends, the ESA Act was passed to improve the performance of the LEAs to which it applies, then there would

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whether education is a fundamental right, noting that "if the [education financing] system fails to meet the 'rational basis' test, which imposes upon those challenging the constitutionality of the system the greatest burden of proof, the plaintiffs will be found to prevail and further analysis will not be necessary." 851 S.W.2d at 153. Because the court found that the funding scheme failed rational-basis scrutiny, the court never had to address whether education was a fundamental right. *Id.* at 156. *Heyne* subsequently answered that question. 380 S.W.3d at 731-32.

have been no need to "protect" other counties from its application. The General Assembly had no intention of improving the performance of the LEAs in Davidson and Shelby counties when it passed the ESA Act, nor does the ESA Act have any plausible chance of doing so. Removing BEP funding from an LEA certainly is not the least restrictive means of improving school performance in that school district.

But even if the Act's stated "legitimate interest" wasn't patently false, and even assuming the General Assembly instead wants to improve the performance of *students in LEAs* with low-performing schools, the Act could not satisfy strict scrutiny. Importantly, the ESA Act does not provide students in *low-performing schools* with the right to use public funds to attend private school. It gives *any student* meeting the income threshold the right to do so—even students attending the highest performing schools in MNPS or Shelby County Schools. (Compl. ¶ 22.)

In addition, there is no connection between the purported "legitimate purpose" of "continued improvement of all LEAs and particularly the LEAs that have consistently had the lowest performing schools on a historical basis" and the definition of "eligible student" under the Act. The Act did not define "eligible student" based on any data earlier than 2015, and the data used reflects multiple counties with equally-poorly performing schools as a percentage of the district. In fact, Hamilton, Fayette, and Madison counties' school performance declined during the time period on which the General Assembly relied, yet those counties were excluded from the Act's application.

To illustrate, in 2015, 15 out of 154 Davidson County schools (9.7%) and 45 out of 221 Shelby County schools (20.4%) were in a priority status. (Compl. ¶ 24.) The same year, 5 out of 79 Hamilton County schools (6.3%), 4 out of 90 Knox County schools (4.4%), and 2 out of 27 Madison County schools (7.4%) were in a priority status. (*Id.*)

In 2017, the TDOE identified 168 (later reduced to 166) schools from 14 LEAs on its list of bottom 10% schools. (*Id.* ¶ 26.) In 2017, 41 out of 163 Davidson County schools (25.2%) and 65 out of 206 Shelby County schools (31.6%) were on the bottom 10% list. The same year, 2 out of 7

Fayette County schools (28.6%), 13 out of 78 Hamilton County schools (16.7%), 7 out of 90 Knox County schools (7.8%), and 8 out of 23 Madison County schools (34.8%) were on the bottom 10% list. (*Id.* ¶ 27.) Stated differently, Fayette County had a higher concentration of bottom 10% schools than Davidson County, and Madison County had a higher concentration than Davidson or Shelby counties. (*Id.*)

In 2018, 82 schools comprised the priority list. (*Id.* ¶ 28.) Sixty-four of those schools came from seven LEAs, with the other eighteen schools in the ASD. (*Id.*) In 2018, 21 out of 163 Davidson County schools (12.9%) and 27 out of 206 Shelby County schools (13.1%) were in a priority status. (*Id.* ¶ 29.) The same year, 1 out of 7 Fayette County Schools (14.3%), 9 out of 78 Hamilton County schools (11.5%), and 4 out of 23 Madison County schools (17.4%) were in a priority status. (*Id.*) In addition, Hamilton and Madison counties experienced a significant downgrade in 2018 from their previous priority school listings in 2015. (*Id.* ¶ 30.) In other words, Madison and Fayette counties had a higher concentration of priority schools on the 2018 priority list than Davidson or Shelby County, and Hamilton County's concentration was only slightly lower. (*Id.*)

These counties were omitted from the ESA Act's application, not because their districts were performing well, but because the bill would not pass without removing them. (*Id.* ¶¶ 55-56, 80-81.) In fact, every county other than Davidson and Shelby was removed from the legislation because that was the intent of the General Assembly: to "protect" all other counties while imposing the Act's inevitable and negative consequences in the "deep blue" counties. (*Id.* ¶¶ 57, 82-84, 202.) This type of partisanship falls far short of the narrow tailoring to a compelling government interest that the strict scrutiny standard requires. Because the General Assembly could have—and should have—taken myriad other steps to help low-performing districts or low-performing students improve, the ESA Act is not narrowly-tailored to its purported interest, or any compelling state interest. Instead, the General Assembly elected to target two counties, by diverting their BEP funding to private schools, despite those LEAs having the highest number of schools and students in the state to educate, and despite those LEAs performing no worse than

three other counties that were "protected" from the bill. These political tactics hardly satisfy the rigorous strict scrutiny standard.

C. Even if Rational-Basis Scrutiny Applies, the ESA Act Is Not Rationally-Related to a Legitimate State Interest.

Even if the Intervenor-Defendants were correct that rational-basis scrutiny applies here, the ESA Act nonetheless violates equal protection. As the Tennessee Supreme Court recognized in *Small Schools I*, "disparities in resources available" in various school districts can "result in significantly different educational opportunities for the students of the state." 851 S.W.2d at 145. Where there is no "legitimate state interest justifying the granting to some citizens, educational opportunities that are denied to other citizens similarly situated," the classification "fails to satisfy even the 'rational basis' test applied in equal protection cases." *Id.* at 156. In addition, a classification with "no reasonable or natural relation to the legislative objective" does not satisfy the rational-basis test under the equal protection clauses. *Harrison v. Schrader*, 569 S.W.2d 822, 826 (Tenn. 1978).

"The core concern expressed in this constitutional provision is that legislative classification, to the extent that it exists, not be unreasonable or unfair." *Burson*, 816 S.W.2d at 731. As the Tennessee Supreme Court has described:

> [A] classification must not be mere arbitrary selection. It must have some basis which bears a natural and reasonable relation to the object sought to be accomplished, and there must be some good and valid reason why the particular individual or class upon whom the benefit is conferred, or who are subject to the burden imposed, not given to or imposed upon others should be so preferred or discriminated against. There must be reasonable and substantial differences in the situation and circumstances of the persons placed in different classes which disclose the propriety and necessity of the classification.

Tester, 879 S.W.2d at 829 (quoting *State v. Nashville, C. & St. L. Ry. Co.*, 135 S.W. 773, 775 (Tenn. 1911)).

The ESA does not meet this standard. As outlined above, there is no logical connection between the State's purported "legitimate interest in the continual improvement of all LEAs and particularly the LEAs that have consistently had the lowest performing schools on a historical

basis" and the ESA Act's method of purportedly accomplishing that goal. Tenn. Code Ann. § 49-6-2611(a)(1). If the General Assembly had *any interest* in improving school performance in Davidson or Shelby counties, it would not have removed funding and students from those LEAs via the ESA Act.

But even if the Court ignores the purported "legitimate interest" that the State claims to have in this legislation, the Act fares no better. The Tennessee Supreme Court declared unequivocally in *Small Schools I* that there was no proof of a "legitimate state interest justifying the granting to some citizens, educational opportunities that are denied to other citizens similarly situated." 851 S.W.2d at 156. This case is no different. The Fayette, Hamilton, and Madison County LEAs, and the students in them, do not risk loss of funding in their poorly-performing schools; only Davidson and Shelby counties do. Fayette, Hamilton, and Madison counties are, in the words of Representative Matthew Hill, "protected" from the Act's negative consequences. He summarized the General Assembly's actual intent well: "Today, on this Floor, the House is leading. We are leading the way to protect LEAs, while also ensuring that our poorest children in those deep blue metropolitan areas have a fighting chance at a quality education." (Compl. ¶ 57.)

To reiterate, the ESA Program eligibility is not limited to qualifying students in low-performing schools across the state. Certainly Fayette, Hamilton, and Madison counties would be included if that were the case. There is no rational basis for the ESA Act's inclusion of all qualifying students in Davidson and Shelby counties, even those attending high-performing schools in affluent neighborhoods, while excluding qualifying students in other Tennessee counties zoned to low-performing schools. And there is no rational relationship between the ESA Act's exclusion of qualifying students in low-performing schools in Tennessee outside of Davidson and Shelby counties and any purported desire to provide better educational opportunity to students in low-performing school systems.

Intervenor-Defendants' argument that the legislature rationally applied the ESA Act only to urban school districts also misses the mark. (Intervenor-Defs.' Mem. L. at 11-12.) The question

for equal protection purposes is not whether there is *any* difference between the groups to which the Act applies and the ones to which it doesn't. The question is whether there is any distinction to *justify treating the groups differently*. *Tester*, 879 S.W.2d at 829 ("[A] classification . . . must have some basis which bears a natural and reasonable relation to the object sought to be accomplished, and there must be some good and valid reason why the particular individual or class upon whom the benefit is conferred, or who are subject to the burden imposed, not given to or imposed upon others should be so preferred or discriminated against.") A simple Google search reveals myriad private schools in Hamilton and Madison counties, and Fayette County is just across the county line from Shelby County. The fact that these counties are smaller is a distinction without a difference.

The partisanship underlying the General Assembly's decision to exclude all counties except Davidson and Shelby, which have Democratic majorities among their voters and members of their state legislative delegations, from the ESA Act's application does not constitute a rational basis for such classification. Equal protection "guarantees that 'all persons similarly circumstanced shall be treated alike.'" *Norris*, 751 S.W.2d at 841 (quoting *F.S. Royster Guano Co.*, 253 U.S. at 415). The ESA Act comes nowhere near that. There is no identifiable, rational basis for the ESA Act's application to only Davidson and Shelby counties. Accordingly, Intervenor-Defendants' motion to dismiss should be denied.

D. <u>The ESA Act Is Not a Pilot Program.</u>

Intervenor-Defendants' final argument purportedly justifying the exclusion of all counties but Davidson and Shelby—that the ESA Act is an experimental "pilot" program—also falls flat. (Intervenor Defs.' Mem. L. at 10-11.) The ESA Act is not a pilot program. There was no mention of the term "pilot program" or "pilot project" in either the House or Senate versions of the Act. Not until the conference committee report did the word "pilot" first appear. (Compl. ¶ 85.) And unlike true pilot programs, which do not exist in perpetuity, the ESA Act will remain law and apply only in Davidson and Shelby counties unless and until the General Assembly passes new

legislation. *See Easterly v. Harmon*, No. 01A01-9609-CH-00446, 1997 WL 718430, at *1 (Tenn. Ct. App. Nov. 19, 1997) ("As part of this pilot program, the state paid for an additional part-time employee to work in the County Clerk's office *for a short period of time. When the period of time for the pilot program expired*, Easterly maintains that she received the approval of the Commission's budget committee to hire the temporary part-time employee as a permanent full-time employee." (emphasis added)); *State v. Matlock*, No. M200601141CCAR3CD, 2007 WL 1364650, at *2 (Tenn. Crim. App. May 9, 2007) ("On redirect examination, Parker testified that the Defendant would have to wear his GPS monitor *as long as the pilot program is enacted*, and then it would be up to the Legislature to determine whether the program would continue." (emphasis added)); *Smith v. Bd. of Prof'l Responsibility of Sup. Ct. of Tenn.*, 551 S.W.3d 712, 715 (Tenn. 2018) ("Following this program, Attorney completed a *ten-week pilot program* involving cognitive behavior that was led by his probation officer." (emphasis added)).

In the House Finance, Ways, & Means Committee hearing on April 17, 2019, then-Deputy House Speaker Matthew Hill (R-Jonesborough) referred to the bill as a "four-county pilot ESA program." (Compl. ¶ 14.) When asked by Rep. Jason Zachary (R-Knoxville) to define "pilot program," Rep. Hill responded that it was a pilot program because it "limits it down to just four counties" and "will stay in those four counties unless the legislature were to ever choose in the future to revisit the issue." (*Id.*) Sen. Jeff Yarbro (D-Nashville) speaking on the Senate floor on April 25, 2019, called these references to a "pilot project" a "false premise." (*Id.* ¶ 86.) He noted that the bill, unlike true pilot projects, did not have a "sunset" provision. (*Id.*) Instead, the bill created a permanent $110 million state program for 15,000 students in only two counties. (*Id.*)

When the conference committee report was considered on the Senate floor, an exchange between Sen. Hensley and co-sponsor Sen. Gresham revealed the deception of the "pilot program" reference. Sen. Hensley asked for assurance on the record that "no other LEA will be able to grow into the program over the years." (Compl. ¶ 83.) Sen. Gresham gave him that assurance, saying, "That's the intent of the General Assembly today." (*Id.* ¶ 84) The final version of the ESA Act even

included a "reverse severability clause" ensuring that no invalidity of any part of the Act could expand its application to income-eligible students other than those in Davidson County and Shelby County. Tenn. Code Ann. § 49-6-2611(c). With this provision, the Legislature achieved the House's objective, given voice by Rep. Hill, of limiting the ESA program to "deep blue" Davidson County and Shelby County while "protect[ing]" other LEAs. (Compl. ¶ 57.)

Regardless of whether a legislature has the right to experiment with programs on smaller scales, there must be a reasonable basis for any distinction between the groups to which the program applies. Here, the General Assembly's reference to the ESA Act as a "pilot program" was nothing but a last-ditch attempt to mask the partisanship that prevented the Act from passing unless all but two counties were dropped from its coverage. The ESA Act is not a pilot program, and there is no rational basis for excluding other counties, particularly a neighboring county, from its application. Thus, the Intervenor-Defendants' motion to dismiss should be denied.

IV. COUNT III OF THE COMPLAINT STATES A VIABLE EDUCATION CLAUSE CLAIM.

Defendant-Intervenors next assert that Plaintiffs' claim in Count III alleging a violation of the Education Clause in Article XI, Section 12 of the Tennessee Constitution should be dismissed. (Intervenor-Defs.' Mem. L. at 13-16.) Defendant-Intervenors' argument ignores the well-pled facts in the Complaint establishing that loss of BEP dollars will not result in a corresponding decrease in costs to operate the LEAs. Moreover, the argument ignores the general principles underlying the Tennessee Supreme Court's decision in the *Small Schools* litigation. Accordingly, Defendant-Intervenors' motion to dismiss the Education Clause claim should be rejected.

The Education Clause states, in pertinent part:

> 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.

Tenn. Const., art. XI, § 12. This constitutional provision "guarantees to all children of school age in the state the opportunity to obtain an education." *Small Schools I*, 851 S.W.2d at 140 (Tenn.

1993). The Education Clause operates as a mandate that the General Assembly maintain and support a system of free public schools that provides, at a minimum, the opportunity to acquire general knowledge, develop the powers of reasoning and judgment, and generally prepare students intellectually for a mature life. *Id*. at 150-51. In *Small Schools I*, the Tennessee Supreme Court held that the Education Clause, in conjunction with the provisions of the Tennessee Constitution guaranteeing equal protection of the laws, requires that the educational opportunities provided by the system of free public schools be substantially equal.

Plaintiffs allege in Count III of the Complaint that by limiting the ESA program to Davidson and Shelby counties, the Act fails to provide a substantially equal educational opportunity to all students in Tennessee. Instead, it expressly authorizes the diversion of public funds from the Davidson County and Shelby County school systems while protecting all other counties and LEAs from the financial burdens of the ESA program. By way of the Act, Defendants fail to satisfy the requirement of equal educational opportunity mandated by the Education Clause. Thus, the Complaint states a claim upon which relief can be granted under the Education Clause.

A. Intervenor-Defendants' Insistence That the Diversion of BEP Funds Will Be Accompanied By a Correlating Reduction in Plaintiffs' Expense Ignores the Complaint's Well-Pled Allegations.

Intervenor-Defendants' motion to dismiss the Education Clause claim is built on the false premise that when a student uses an ESA to enroll in private school at public expense, there is a correlating reduction in the Counties' expense. (Intervenor-Defs.' Mem. L. at 13.) For a student who uses an ESA, according to the Intervenor-Defendants, the school system "does not have to pay for teaching, curriculum, services, supplies, or the numerous other costs that come with educating that child." (*Id.*) Meanwhile, so the Intervenor-Defendants say, the school system will continue to receive "the same full [BEP] grants" for children who remain. (*Id.* at 13-14.) This simplistic analysis disregards the facts, which the Court must presume as true on this Rule 12.02(6) motion.

When students participate in the ESA program, both state and local BEP funds will be diverted to pay the students' cost to attend private school. The amount of money required to operate the MNPS and Shelby County Schools will not decrease by the same amount as the lost BEP funding. (Compl. ¶ 141.) Many of the costs of operating the public schools, including facility maintenance, technology costs, food services, transportation, facility operations, long-term contracts, and post-employment benefits such as pension and insurance are largely unaffected by movement of students out of the system. (*Id.* ¶ 142.) Staff, educator, and administrator salaries and fringe benefits—"a major item in every education budget," *Tenn. Small Sch. Sys. v. McWherter*, 91 S.W.3d 232, 240 (Tenn. 2002) ("*Small Schools III*")—will not decrease in proportion to the numbers of students leaving the system. (Compl. ¶ 144.) Even when enrollments decrease, many buildings must continue to operate with the same amount of technology and staff despite the significant loss of BEP funding. (*Id.* ¶ 148.) Because so many costs in the MNPS and Shelby County Schools' operational budgets remain unchanged by a reduction in the numbers of students in the systems, the anticipated loss of additional BEP funds that will result from implementation of the ESA Program will detrimentally affect their ability to operate and serve students. (*Id.* ¶ 150.) In addition, the school systems will continue to bear significant costs of standardized testing for students attending private school under the ESA program. (*Id.* ¶¶ 154-56.) As these facts establish, which Intervenor-Defendants ignore, when BEP funds are diverted from MNPS and Shelby County Schools to pay private school tuition under the ESA program, there is no corresponding reduction in the cost of operations for MNPS and Shelby County Schools as the Intervenor-Defendants wrongly assert.

B. The Intervenor-Defendants' Assertion that Dollars Follow the Child Under the ESA Act Admits of an Unconstitutional Statutory Scheme.

Intervenor-Defendants next assert that the ESA program "is built on the simple principle that the dollars follow the child." (Intervenor-Defs.' Mem. L. at 13-14.) This description effectively acknowledges that the program is unlawful. A "dollars follow the child" theory of education

funding harkens back to the funding program that was based on weighted average daily attendance and that was found unconstitutional in *Small Schools I* and supplanted by the BEP.

Small Schools I was the first of three reported decisions by the Tennessee Supreme Court in a case that originated in this Court before Chancellor C. Allen High. The case involved a challenge to the State's system of funding public schools under the Education and Equal Protection Clauses in the Tennessee Constitution. While the decisions focused on funding, the Supreme Court recognized "that many elements, of which funding is but one, must come together in order for Tennessee schools to succeed and for children in this State to receive a substantially equal educational opportunity." *Small Schools III*, 91 S.W.3d at 243.

The funding scheme that violated Tennessee's right to equal protection of the laws in the *Small Schools* litigation[12] was the Tennessee Foundation Program (TFP), the pre-1992 system of funding public education. *Tenn. Small Sch. Sys. v. McWherter*, 894 S.W.2d 734, 735-36 (Tenn. 1995) ("*Small Schools II*"). Funding under the TFP "was not related to the costs of providing programs and services by the several local school systems." *Id.* at 736. Instead, State funding for local school systems "was based primarily on average daily attendance of students." *Id.*[13] The Chairman of the State Board of Education admitted that the TFP did not relate appropriations to actual costs of delivering programs and services and that there was no link between changes

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[12] The *Small Schools* litigation also asserted a claim under the Education Clause. The decision in *Small Schools I* explained what the Education Clause requires but did not ultimately rule on whether the funding scheme at issue violated the Education Clause. The court elected to strike down the funding scheme on grounds that it did not satisfy rational-basis scrutiny under equal protection. *Small Schools I*, 851 S.W.2d at 151-52. But as described herein, the *Small Schools I* court made findings and conclusions that are critical to an understanding of the legislature's duty under the Education Clause and the Equal Protection Clauses. As the court explained, the Equal Protection Clauses of the Tennessee Constitution "assure the nondiscriminatory performance of the duty created by Article XI, Section 12 [Education Clause]." *Id.* at 153.

As in *Small Schools*, both Education Clause and equal protection claims are asserted here.

[13] While student counts certainly matter under the current funding system, the BEP formula is a regression formula involving more than forty substantive components. That regression formula is used to determine the respective state and local funding levels required to provide a common, basic level of service for all students.

in the costs of delivering programs and services at the local level and changes in appropriations. *Small Schools I*, 851 S.W.2d at 146. It was this funding system that the Supreme Court found, in *Small Schools I*, to have violated the Equal Protection Clauses in the Tennessee Constitution.

As the case was proceeding, the Legislature passed the Education Improvement Act of 1992 and, with it, the BEP. The BEP replaced the TFP as the funding system for the constitutionally required public schools.[14] The BEP was "quite different from the TFP in concept." *Small Schools II*, 894 S.W.2d at 736. The TFP was based mainly on the average daily attendance of students and not on the costs of providing programs and services. Unlike the TFP, the BEP was designed to "provide, when fully funded, the programs and services essential to a basic education for public school children in grades K through 12 throughout the State." *Id.*[15] The BEP did so by defining the essential elements of an effective education plan, consisting of more than forty specific components, and implementing that plan through organizational structure, disciplined management, and adequate funding. *Id.*

By building the ESA program "on the simple principle that the dollars follow the child," the Legislature has created a TFP-style exception to the BEP that is based on where the student attends school. The ESA Act disregards the cost of the programs and services the local school systems must continue to provide to its remaining students when BEP funds "follow the child" to

[14] The TFP funding scheme was used in the initial BEP solely for the purpose of determining the base amount of funds distributed by the State to each local system in 1990-91. This was to establish funding needed under a five-year equalization plan to transition to full funding of the BEP. *Small Schools II*, 894 S.W.2d at 737.

[15] The BEP is calculated based on the prior year average daily membership (ADM). Tenn. Code Ann. § 49-3-351(d). Funding is calculated, however, by component. There are more than forty components in the BEP, divided into four major categories (instructional salary components, instructional benefit components, classroom components, and non-classroom components). *See, e.g.*, 2019-2020 BEP Blue Book, https://www.tn.gov/content/dam/tn/stateboardofeducation/documents/bepcommitteeactivities/2019-bep/BEP_Blue_Book_FY20_FINAL.pdf. For many of the components, a reduction of a few students at a given school who leave to attend private school under the ESA program will not alter the need for the component or the needed level of funding to pay for that component.

a private school.[16] That disregard impairs the operation of the BEP funding program in two counties, Davidson and Shelby, and nowhere else. The implementation of the ESA Act in Davidson County and Shelby County undermines the program-based operation of the BEP that was essential to the Supreme Court's conclusion in the *Small Schools* cases that the BEP was a constitutional alternative to the TFP. For that reason, the ESA Act does not satisfy the State's constitutional obligations under the Education Clause.

C. The Complaint Alleges That the ESA Act, When Implemented, Will Impair Plaintiffs' Ability To Provide a Quality Public Education Program to Their Remaining Students.

Intervenor-Defendants contend that the Education Clause is not simply about quantity of dollars but rather about quality and opportunity. (Intervenor-Defs.' Mem. L. at 14.) They contend, without evidence at this stage of the case and ignoring the well-pled facts in the Complaint, that the fixed costs MNPS and Shelby County Schools must bear while losing BEP funds "would hardly prevent" the school systems from providing the educational opportunity and quality the Education Clause mandates. (*Id.*) According to Intervenor-Defendants, "[a]s long as the agencies can continue to meet the state's constitutional requirement to provide an adequate basic education, the clause is met." (*Id.*)

In making these assertions, Intervenors-Defendants ignore the holding in *Small Schools I* that the *statutory funding scheme* resulted in disparities in educational opportunities that rendered it unconstitutional. *Small Schools I*, 851 S.W.2d at 156. In other words, while the issue in *Small Schools I* was not *equality* of funding, the Court certainly recognized that funding was a substantial element of providing the constitutionally required equal educational opportunity.

Intervenor-Defendants also ignore Plaintiffs' allegations, which must be taken as true, about the financial and programmatic impact they will incur from this dramatic reduction in BEP funding because of the continuing costs of operations that are unaffected by student enrollment

[16] The ESA Act also effectively provides BEP funding for private schools without reference to the forty-six components of a basic education in the BEP formula.

reductions. (Compl. ¶¶ 103-23, 136-50.) The current BEP formula already results in systematic inadequate funding of MNPS and Shelby County Schools. (*Id.* ¶ 140.)[17] As Plaintiffs allege: "Because so many costs that comprise the MNPS and SCS operational budgets remain unchanged by a reduction in the numbers of students in the system, the anticipated loss of additional BEP funds that will result from implementation of the ESA Program will detrimentally affect MNPS and SCS's ability to operate." (Compl. ¶ 150.)

In addition, Intervenor-Defendants ignore that their motion is a Rule 12.02(6) motion to dismiss. In considering the motion, the Court must treat the factual allegations in the Complaint as true and must draw all reasonable inferences in favor of the Plaintiffs. There is nothing in those facts or the inferences favorable to Plaintiffs to be drawn therefrom to suggest that losing tens of millions of dollars annually in state and local funding while maintaining most static costs

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[17] The State in general has been slow to fund the BEP. For example, in 2011, the Tennessee Comptroller of the Treasury disclosed that BEP insurance premiums were funded only for ten months and not twelve months. For the next three years, the BEP Review Committee made funding of twelve months of insurance premiums its number one recommendation. In 2015-16 the legislature finally added an 11th month to the BEP formula. *See* BEP Review Committee 2015 Annual Report, https://www.tn.gov/content/dam/tn/stateboardofeducation/documents/bepcommitteeactivities/2015_BEP_Report_(Official).pdf.

The State also has been slow to accommodate the BEP formula to changes in public education, resulting in added costs to LEAs for which they have received no State assistance. For example, RTI (Response to Instruction and Intervention), which was adopted in 2013, is a multi-tier approach to the early identification and support of students with learning and behavior needs. As of July 1, 2014, RTI became the sole criterion by which a student may be identified as having a specific learning disability. But it was not until the adoption of the 2018-19 state budget that RTI was added to the BEP funding formula.

The State also has failed to adapt the BEP formula to long-standing realties that have masked shortcomings in the funding system. In a January 2017 report, the Office of Research and Education Accountability for the Tennessee Comptroller of the Treasury found that, statewide, LEAs employed about 10,700 (17%) more instructional staff than the BEP formula accounted for. Part of this differential resulted from the fact that the BEP calculates the number of positions needed based on student enrollment for the district as a whole, while LEAs are required to meet state class size limits within each school building. Thus, the LEAs must generally hire more classroom teachers than the BEP calculates. *See* Tenn. Comptroller of the Treasury, *School Staffing Costs: From the BEP Formula to Paying Teachers in the Classroom*, available at https://comptroller.tn.gov/content/dam/cot/orea/documents/orea-reports-2016/2016_OREA_SchoolStaffCosts.pdf.

These realities further illustrate why local taxpayers in Davidson and Shelby counties actually pay far more than their share of the BEP formula for public education.

of operations "would hardly prevent" the Plaintiffs from providing quality education services to their remaining students. In the context of their Rule 12.02(6) motion, Intervenor-Defendants do not enjoy the privilege of asserting their own set of unproven facts. Applying Rule 12.02(6) standards, the Court should infer the opposite of what Intervenor-Defendants assert: that the ESA Act will have a detrimental impact on the Metropolitan Government and Shelby County Government's budgets and MNPS and Shelby County Schools' operations, which will impair delivery of educational services to students. (*See* Compl. ¶¶ 98-174.) The trial on the merits (as in *Small Schools I*), and not a Rule 12.02(6) motion, is the appropriate place for Defendants to challenge these allegations and inferences.

Intervenor-Defendants next argue that the Education Clause claim fails because the ESA Act is a "pilot program" and that the General Assembly is free to explore alternatives and test pilot programs. (Intervenor-Defs.' Mem. L. at 15.) This argument fails for the same reasons outlined in Section III.D. above. The ESA Act contains no sunset provision as is customarily found in pilot programs. More importantly, the Act was deliberately written so that its provisions could never extend to any of Tennessee's other ninety-three counties. Tenn. Code Ann. § 49-6-2602(3)(C). In no other county will any student ever be able to satisfy the ESA Act's three historical requirements for eligibility. (*Id.*) The final version of the ESA Act even includes a "reverse severability clause" ensuring that the invalidity of any part of the Act cannot expand the Act's application to income-eligible students other than those in Davidson and Shelby counties. Tenn. Code Ann. § 49-6-2611(c). With this provision, the Legislature achieved the House's objective, given voice by Rep. Hill, of limiting the ESA program to "deep blue" Davidson and Shelby counties while "protect[ing]" other LEAs. (Compl. ¶ 57.)[18]

[18] While the BEP formula is designed for the State to assume a majority of the costs of the program on a statewide basis, the State's share varies among LEAs depending on local capacity. In Davidson County, local taxpayers fund substantially more of the BEP formula costs than the State funds. (Compl. ¶¶ 104-05.) In other words, while the House was "leading the way to protect" other LEAs, it was imposing upon the taxpayers of "deep blue" Metropolitan Nashville more than half the cost for students choosing to attend private schools under the ESA Act.

Intervenor-Defendants' reliance on a 2013 Tennessee Attorney General Opinion is likewise disingenuous. (Intervenor-Defs.' Mem. L. at 15.) In Tennessee Attorney General Opinion 13-27 (March 26, 2013), the Attorney General opined about the constitutionality of HB190, which would have made private school vouchers available to schoolchildren attending public schools in the bottom five percent in terms of scholastic achievement. The Attorney General opined that the voucher bill would not run afoul of the Education Clause. Unlike the ESA Act, however, HB190 did not arbitrarily limit its application to students in "deep blue" Davidson and Shelby counties. The focus of HB190 was on students attending poorly performing public schools. The ESA Act, on the other hand, makes the equivalent of taxpayer-funded private school vouchers available to any income-eligible student in Davidson County or Shelby County, even if that student is enrolled at a high-performing public school.[19]

Finally, the Intervenor-Defendants wrongly assume that their "pilot program" defense may be raised in the context of a rational-basis test. (Intervenor-Defs.' Mem. L. at 15.) As discussed in Section III.A. above, education is a fundamental right under the Tennessee Constitution. Thus, Plaintiffs' equal protection claim implicating that fundamental right must be analyzed by strict scrutiny—a standard that places the burden on the State. And for the reasons outlined above, the State comes nowhere near establishing that heavy burden.

CONCLUSION

For the foregoing reasons, Intervenor-Defendants' motion to dismiss should be denied.

[19] Again, if the concern behind the ESA Act were truly pedagogical, there would be no reason to make the program available to *all* income-eligible students in MNPS and Shelby County Schools—even those attending high performing schools—while barring income-eligible students in adjoining counties.