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

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,	)	
Plaintiffs,	)	
v.	)	No. 20-0143-II
TENNESSEE DEPARTMENT OF EDUCATION, et al.,	)	Chancellor Anne C. Martin, Chief Judge Judge Tammy M. Harrington Judge Valerie L. Smith
Defendants,	)	
and	)	
NATU BAH, et al.,	)	
Intervenor-Defendants.	)	**CONSOLIDATED**

ROXANNE McEWEN, et al.,	)	
Plaintiffs,	)	
v.	)	No. 20-0242-II
BILL LEE, in his official capacity as Governor of the State of Tennessee, et al.,	)	Chancellor Anne C. Martin, Chief Judge Judge Tammy M. Harrington Judge Valerie L. Smith
Defendants,	)	
and	)	
NATU BAH, et al.,	)	
Intervenor-Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS MCEWEN PLAINTIFFS'AMENDED COMPLAINT

Defendants Governor Bill Lee, Tennessee Department of Education Commissioner Penny Schwinn, and members of the State Board of Education (Chair Member Hartgrove, Vice Chair Member Eby, and Members Darnell, Edwards, Ferguson, Kim, Morrow, Jensen, Cobbins, and Krause), in their official capacities, ("State Defendants"), submit this memorandum of law in support of their Motion to Dismiss the Amended Complaint. The Court should grant State Defendants' motion because Plaintiffs' claims are not justiciable, and they fail to state a claim upon which relief can be granted.

STATEMENT OF THE CASE

In 2019, the General Assembly enacted the Tennessee Education Savings Account Pilot Program ("ESA Pilot Program") to improve educational opportunities available to children of low-income families who reside in public school districts that have "consistently had the lowest performing schools on a historical basis." Tenn. Code Ann. §§ 49-6-2601 to -2612. Yet more than three years after its enactment, the ESA Pilot Program has not benefitted a single student due to pending litigation.

Plaintiffs filed this action seeking declaratory and injunctive relief to prevent State Defendants from implementing the ESA Pilot Program. Approximately one month later, Plaintiffs filed a motion for temporary injunction. (Pl.s' Mot. for Temp. Inj.) Although the Complaint contained five counts, Plaintiffs moved for an injunction on only two counts—the Home Rule Amendment and appropriations provisions of the Tennessee Constitution. (*Id.*)

State Defendants moved to dismiss the complaint under Tenn. R. Civ. P. 12.02(6). (Def.s' Mot. to Dismiss.) Intervenor-Defendants[1] also filed dispositive motions.

[1] "Intervenor-Defendants" are Natu Bah, Builguissa Diallo, Star Brumfield, Greater Praise Christian Academy; Sensational Enlightenment Academy Independent School; Ciera Calhoun; Alexandria Medlin; and David Wilson, Sr.

The Court denied Plaintiffs' motion for temporary injunction as moot because of its rulings in the *Metro. Gov't* case and took the dispositive motions under advisement. (Order, May 4, 2020.) Ultimately, the Tennessee Supreme Court concluded that the ESA Pilot Program is not rendered unconstitutional pursuant to the Home Rule Amendment and vacated the Court's judgment. *Metro. Gov't of Nashville & Davidson Cnty. v. Tennessee Dep't of Educ.*, 645 S.W.3d 141, 154–155 (Tenn. 2022) (hereinafter "*Metro v. TDOE*"). The Supreme Court also entered orders in this case and *Metro Gov't* case No. 20-0143-II designating a special three-judge panel.

After the Court vacated the permanent injunction on the ESA Pilot Program in the *Metro Gov't* case (Order July 13, 2022), Plaintiffs moved again for a temporary injunction. This time, Plaintiffs alleged violation of the Education Clause of the Tennessee Constitution. In its order denying Plaintiffs' motion, the Court stated that "in light of the complex legal issues in this case, and the uncertain impact on the Plaintiffs, the Court cannot find, based upon this limited record, that the Plaintiffs are likely to succeed on the merits of their claims at this time." (Mem. and Order Aug. 5, 2022.)

ESA PILOT PROGRAM

The ESA Pilot Program was enacted to provide additional educational opportunities for children otherwise relegated to the State's "consistently … lowest performing school [districts] on a historical basis." Tenn. Code Ann. § 49-6-2611(a)(1). It is designed to benefit those children by offering them educational choices that are available to children of affluent and even middle-class families. The express intent of the General Assembly in enacting the statute is to create a pilot program to benefit disadvantaged students by giving them additional education options and incentivizing educational improvement in under-performing school districts (referred to as "local education agencies" or "LEAs" in the ESA Pilot Program statutes). *Id.*

As its title connotes,[2] the ESA Pilot Program is a feasibility study or experimental trial on a small scale designed to provide guidance for potential implementation on a larger scale. Under the ESA Pilot Program, an eligible student may elect to attend a "participating school"—i.e., a private school that meets certain state requirements, *id.* § 49-6-2602(9)—instead of the public school to which the student is zoned. A student who is accepted into the ESA Pilot Program will be given a scholarship fund towards payment of qualified private-school expenses that are otherwise out of reach for the student—e.g., private school tuition, textbooks, computers, school uniforms, school transportation, and tutoring. *Id.* §§ 49-6-2602(4), -2603(i)(1).

Each participating student's allotment of scholarship funds constitutes that student's "education savings account." *Id.* § 49-6-2602(4). The funds of the student's education savings account "must be equal to the amount representing the per pupil state and local funds generated and required through the basic education program ("BEP") for the LEA in which the participating student resides" and must not exceed the statewide average of BEP funds per pupil. *Id.* § 49-6-2605(a).

"For the purpose of funding calculations, each participating student must be counted in the enrollment figures for the LEA in which the participating student resides."[3] *Id.* § 49-6-2605(b)(1). In lieu of the local share being paid to the State, the Program provides that "[t]he ESA funds for participating students must be subtracted from the state BEP funds otherwise payable to the LEA." *Id.*

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[2] The dictionary definition of "pilot program" is an activity "serving as an experiment or trial undertaking prior to full-scale operation or use." *Random House Dictionary of the English Language* under "pilot."

[3] Under the BEP, both the local government and the State must provide BEP funds based on LEA enrollment numbers. Tenn. Code Ann. §§ 49-3-307(a)(1)(B), -351(a), -356(a).

In short, a portion of the funds that the particular LEA would have received to educate a participating student will instead be used for qualified expenses under the ESA Pilot Program. In return, the LEA is released "from all obligations to educate the participating student." *Id.* § 49-6-2603(a)(1)-(3).

Despite having no obligation to educate a student who participates in the ESA Pilot Program, the LEA will still benefit financially in at least two ways. First, the LEA will receive an annual state grant *equal* to the student's ESA amount in each of the initial three fiscal years of the ESA Pilot Program. *Id.* § 49-6-2605(b)(2) (establishing the school improvement fund which, subject to appropriation, the Department of Education "shall disburse . . . to each LEA . . . in an amount equal to the ESA amount for participating students. . .."). There is no statutory limit on how the LEA may use the school improvement fund. Second, any balance remaining in the school improvement fund after the first three years does not revert to the general fund "but is carried forward for expenditure in subsequent years." *Id.* § 49-6-2605(b)(3). That is, the LEA retains "remainder funds" for each student who participates in the ESA Pilot Program.[4] *Id.* § 49-6-2605(a).

The ESA Pilot Program currently applies only to LEAs in Davidson and Shelby counties because only students in those LEAs come within the current statutory definition of "eligible student."[5] But clearly on the face of the statute, it is the intent of the Legislature that this ESA

[4] Moreover, after the first three years, any appropriations to the school improvement fund must be disbursed in the form of "school improvement grants for programs to support schools identified as priority schools" throughout the State. Tenn. Code. Ann. § 49-6-2605(b)(2)(B)(ii). "Priority schools" are chronically low-performing schools. *See id.* § 49-1-602(b)(2).

[5] An "eligible student" is a Tennessee resident who, among other things:

(i) Is zoned to attend a school in an LEA, 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;

legislation—if proven successful after three years of implementation as a pilot program in LEAs in the State's two most populous counties with the State's poorest-performing schools—is subject to future expansion to other LEAs state-wide. *See id.* § 49-6-2611.

To focus on expanded application, the Legislature has charged the office of research education accountability (OREA) in the Tennessee Comptroller of the Treasury "to assist the general assembly in evaluating the efficacy of the program" each year after an initial three-year trial period. *Id.* § 49-6-2611(a)(2). The OREA is required to provide a report to the General Assembly on participating student academic performance, graduation rates, parental satisfaction, audit reports, and—key to the Pilot Program—to provide a list of all the LEAs in the State that are described in the definition of "eligible student" (*see* footnote 5, above) if measured in terms of "*the most recent year* in which the department collected such information." *Id.* §§ 49-6-2606(c), -2611(a)(2)(A)(i)-(iv) (emphasis added). The OREA report must also make recommendations for legislative action if the list of low-performing school districts changes based on the most recent available data from the Department of Education. *Id.* § 49-6-2611(a)(2).

The statutory charges to the OREA to identify additional LEAs that would come within the ESA Pilot Program and to recommend legislative action are clearly aimed at expanding the Pilot Program to include LEAs—in addition to those in Davidson and Shelby Counties—from which students would be eligible to participate in the future. And the General Assembly expressly contemplates taking legislative action to expand the program, if it is successful, with the goal of

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(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 May 24, 2019.

Tenn. Code Ann. § 49-6-2602(3)(C).

providing "access to additional educational options to students who reside in LEAs that have consistently and historically had the lowest performing schools." *Id.* § 49-6-2611(a)(2)(A)(v). In short, the ESA Pilot Program is not a "pilot program" in name only; it is a pilot program in substance.

STATEMENT OF FACTS

Plaintiffs are: (1) parents or legal guardians of children zoned to attend either Metro. Nashville Public Schools or Shelby County Schools; or (2) residents of Davidson or Shelby Counties who pay property taxes. (Am. Compl. 3–5.) Plaintiff Claudia Russell is a retired public-school administrator who pays property taxes in Davidson County. (*Id.* at ¶ 14.) Plaintiffs McEwen, Williams, Kenny, McIntosh, and Young have school-aged children who attend either Metro Nashville Public Schools or Shelby County Schools and pay car registration and renewal taxes but not property taxes. (*Id.* at ¶¶ 11, 15–18.)

STANDARD OF REVIEW

A motion to dismiss for failure to state a claim pursuant to Tenn. R. Civ. P. 12.02(6) tests the sufficiency of the complaint. *Willis v. Tenn. Dep't of Corr.*, 113 S.W.3d 706, 710 (Tenn. 2003). The reviewing court must accept the allegations in the complaint as true. *Id.* The court should grant the motion if "it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Id.*

A court's "charge is to uphold the constitutionality of a statute wherever possible." *Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009). Evaluation "begin[s] with the presumption that an act of the General Assembly is constitutional." *Id.* (internal quotations omitted). A court must "indulge every presumption and resolve every doubt in favor of the statute's constitutionality." *Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003). Further, "[t]he presumption of

constitutionality applies with even greater force when a party brings a facial challenge to the validity of a statute." *Waters*, 291 S.W.3d at 882. In a facial challenge, "the challenger must establish that no set of circumstances exists under which the statute, as written, would be valid." *Id.*

ARGUMENT

I. Plaintiffs' Claims Are Not Justiciable.

A. Plaintiffs lack standing to challenge the constitutionality of the ESA Pilot Program.

Standing is one of several jurisprudential doctrines used to be sure that a party is entitled to have a case decided on the merits. *ACLU v. Darnell*, 195 S.W.3d 612, 619 (Tenn. 2006). It is designed to preclude courts from adjudicating "an action at the instance of one whose rights have not been invaded or infringed." *Id.* at 619-20 (citation omitted). "The doctrine of standing restricts '[t]he exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, ... to litigants who can show 'injury in fact' resulting from the action which they seek to have the court adjudicate.'" *Id.* (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982)). To establish standing, a plaintiff must establish three elements: (1) an injury that is distinct and palpable; (2) a causal connection between the alleged injury and the challenged conduct; and (3) injury capable of being redressed by a favorable decision. *City of Memphis v. Hargett*, 414 S.W.3d 88, 98 (Tenn. 2013).

The proper focus of a standing inquiry is a party's right to bring a particular cause of action. *Fisher v. Hargett*, 604 S.W.3d 381, 396 (Tenn. 2020). Parties that assert multiple causes of action must establish standing as to each claim. *See id.* A court must carefully examine "a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *ACLU*, 195 S.W.3d at 620.

1. Plaintiffs fail to establish standing in their roles as parents or administrators.

Plaintiffs do not have standing because they have failed to demonstrate a distinct and palpable injury regarding each count of the Amended Complaint. Plaintiffs who are parents cannot show that they or their children have been, or will be, harmed by the ESA Pilot Program. And Plaintiff Russell, a former school administrator who does not claim to be a parent, cannot demonstrate a specific injury that is not commonly shared with other citizens.

In Count I, Plaintiffs allege that the ESA Pilot Program removes funding from LEAs serving Davidson and Shelby counties which will result in providing inadequate education to children enrolled in those LEAs. (Am. Compl. 31-32.) That alleged injury is too conjectural and hypothetical to demonstrate standing. The ESA Pilot Program does not injure LEAs in Davidson and Shelby counties; rather, LEAs in those counties are likely to benefit from its implementation. Indeed, for the first three years, the LEAs will continue to receive funds for students that they have no obligation to educate. Tenn. Code Ann. § 49-6-2605(b)(2). Thus, Plaintiffs cannot establish that the ESA Pilot Program causes a distinct and palpable injury to LEAs, let alone their own rights.

For their remaining claims, Plaintiffs cannot demonstrate a distinct and palpable injury that they do not share with all citizens in Tennessee. In Counts II and III, Plaintiffs allege that the ESA Pilot Program allows for students to utilize state-appropriated funds to pay for private educational opportunities. (Am. Compl. 32-34.) There is no specific harm to Plaintiffs established by their claims that State Defendants are improperly implementing the ESA Pilot Program (Counts IV and V). Likewise, the injury in Count VI is premised generally on alleged invalid appropriation of funds; any interest Plaintiffs have in the state's appropriation and utilization of funds is one they have in common with every citizen in the state. (Am. Compl. 37-38.)

For these reasons, Plaintiffs fail to establish the first element of standing. As parents and as an administrator, they fail to establish that the ESA Pilot Program has caused a distinct and palpable injury to their own rights.

2. Plaintiffs fail to establish standing in their role as taxpayers.

To establish taxpayer standing, Plaintiffs must allege a "special interest or special injury not common to the public generally." *Fannon v. City of LaFollette*, 329 S.W.3d 418, 427 (Tenn. 2010). Otherwise, "the State would be required to defend against a profusion of lawsuits from taxpayers." *Id.* (citation and quotation omitted).

Although an exception exists to this general rule, it requires the complaint to allege "a specific illegality in the expenditure of public funds" and that the plaintiff "has made a prior demand on the governmental entity asking it to correct the alleged illegality." *Id.* That is, the plaintiff must "first . . . notif[y the] appropriate officials of the illegality and give[] them an opportunity to take corrective action short of litigation." *Id.* (quoting *Cobb v. Shelby Cnty. Bd. of Comm'rs*, 771 S.W.2d 124, 126 (Tenn. 1989)). "Only in very exceptional circumstances will that prerequisite . . . be waived." *Metro. Gov't of Nashville & Davidson Cnty. v. Fulton*, 701 S.W.2d 597, 601 (Tenn. 1985).

Plaintiffs do not allege a specific illegality in the expenditure of public funds for Counts I–V. Moreover, as argued above (9–10), Plaintiffs have neither a special interest nor injury and thus lack taxpayer standing as to Counts I–V.

The only count that alleges illegality in the expenditure of funds is Count VI. As to Count VI, assuming *arguendo* that there is standing, Plaintiffs fail to state a claim and it should likewise be dismissed.

In sum, Plaintiffs do not have standing to challenge the constitutionality of the ESA Pilot Program because they have no injury in fact—no actual, palpable injury.

B. Plaintiffs raise claims under the Equal Protection and Education Clauses that are not ripe.

Like the doctrine of standing, the doctrine of ripeness is concerned with justiciability. It requires the court to determine whether the claimed injury "has matured sufficiently to warrant judicial intervention." *ACLU*, 195 S.W.3d at 620 n.7 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975)). A case is not ripe for adjudication if it "involves uncertain or contingent future events that may or may not occur as anticipated or, indeed, may not occur at all." *B & B Enters. of Wilson Cnty., LLC v. City of Lebanon*, 318 S.W.3d 839, 848 (Tenn. 2010) (citation omitted). When a claim is not ripe, the court will decline to act as long as dismissal of the claim will not prevent the parties from asserting it at a more appropriate juncture. *Id.* (citations omitted).

Plaintiffs' equal protection and education clause claims (Counts I and II), premised on alleged inequitable distribution of funds or inequality in education due to funding, are unripe. (*See* Am. Compl. 30–34.) Until the ESA Pilot Program is implemented, it is impossible to know what, if any, fiscal impact it will have on LEAs. Plaintiffs have not shown—nor could they—that loss of funding is an actual risk to LEAs.

The LEA will keep some BEP funds associated with a participating student[6] without the corresponding obligation to educate the student. *See* Tenn. Code Ann. § 49-6-2605(a). Moreover, for the first three years, an annual grant in an amount equal to the ESA account amount shall be disbursed to the LEA for school improvement. Tenn. Code Ann. § 49-6-2605(b)(2)(A). Therefore, the ESA Pilot Program will likely result in a windfall to the LEAs and their students; the LEAs

[6] The funds above the statewide average of BEP funds per pupil will remain with the LEA. *See* Tenn. Code Ann. § 49-6-2605(a).

can expect to receive *more* money per student they are educating than they would in the absence of the ESA Pilot Program.

Therefore, there is no hardship to Plaintiffs if the ESA Pilot Program proceeds at this time. Indeed, the ESA Pilot Program has not been fully implemented. Any allegation that the LEAs or their students will be negatively impacted is speculative and not ripe for review. Counts I and II should be dismissed.

C. Any adequacy claim raised by Plaintiffs is a nonjusticiable political question.

To the extent Plaintiffs' claims are construed as challenging the adequacy of state funding—whether the legislature has appropriated enough money for education—the Court does not have jurisdiction over such claim. The political-question doctrine "is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government." *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990). It is "primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962). The political-question doctrine, like other justiciability doctrines, is "based on the judiciary's understanding of the intrinsic role of judicial power, as well as its respect for the separation of powers doctrine in Article II, Sections 1 and 2 of the Constitution of Tennessee." *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Cnty.*, 301 S.W.3d 196, 202-03 (Tenn. 2009).

The Tennessee Constitution gives the General Assembly sole authority to make decisions regarding the appropriation of state funds and the provision of public education. Tenn. Const. art. II, § 24; Tenn. Const. art. XI, § 12. Thus, the level of funding for Tennessee's public schools is expressly committed to the legislative branch of government.

Moreover, the Education Clause is not a self-executing provision. *Parks v. Alexander*, 608 S.W.2d 881, 892 (Tenn. Ct. App. 1980). There is no judicially manageable standard for

determining the proper level of funding for educational opportunities in the state. Therefore, the Court should not allow Claim I to survive this motion to dismiss based on Plaintiffs' allegation that the current funding through the BEP statute is inadequate and the ESA Pilot Program further deprives students of funding required for constitutionally-mandated adequate education. (Am. Compl. 31-32, ¶ 117.) Any adequacy claim couched in the Amended Complaint should be dismissed because it is non-justiciable.

II. The ESA Pilot Program Does Not Violate the Equal Protection and Education Clauses of the Tennessee Constitution.

Even if the Plaintiffs withstand the Court's justiciability review, their claims fail as a matter of law. Under rational basis review—the appropriate standard for Plaintiffs' claims—the ESA Pilot Program is constitutional because it reasonably relates to its legislative goals.

A. Rational basis scrutiny applies for review of the ESA Pilot Program.

The Tennessee Constitution's equal protection clauses confer the same protections as the Fourteenth Amendment to the United States Constitution. *Gallaher*, 104 S.W.3d at 460 (citing *State v. Tester*, 879 S.W.3d 823, 827 (Tenn. 1994)). That is, they guarantee that "all persons similarly situated shall be treated alike." *Tenn. Small Sch. Sys. v. McWherter (Small Schools I)*, 851 S.W.2d 139, 153 (Tenn. 1993). Conversely, things that "are different in fact or opinion are not required by either constitution to be treated the same." *Id.*

Tennessee has likewise adopted the United States Supreme Court's framework for analyzing equal protection claims. *See State v. Robinson*, 29 S.W.3d 476, 481 (Tenn. 2000). Depending on the nature of the right asserted, courts apply one of three levels of review: (1) strict scrutiny, (2) heightened scrutiny, or (3) reduced scrutiny, *i.e.* the rational basis test. *Gallaher*, 104 S.W.3d at 460. Strict scrutiny applies only when the legislative classification at issue operates to the disadvantage of a suspect class or interferes with the exercise of a fundamental right. *Id.*

Heightened scrutiny applies to classifications involving a quasi-suspect class, such as gender or illegitimacy. *Id.* at 462. "[W]here neither fundamental rights nor suspect classifications are at issue, rational basis scrutiny applies." *Calaway ex rel. Calaway v. Schucker*, 193 S.W.3d 509, 518 (Tenn. 2005). Under the rational basis test, "a statute will survive a constitutional challenge if any reasonably conceivable state of facts could provide a rational basis for its application of the statute." *Fisher*, 604 S.W.3d at 399.

Because this case does not involve a fundamental right, suspect class, or a quasi-suspect class, the Court must employ rational basis review to analyze Plaintiffs' equal protection claim.

B. The ESA Pilot Program has a rational basis.

"Equal protection does not require absolute equality." *Brown v. Campbell Cnty. Bd. of Educ.*, 915 S.W.2d 407, 414 (Tenn. 1995). A statute—or statutory scheme—"is not unconstitutional merely because it results in some inequality." *Small Schools I*, 851 S.W.2d 153. A challenged statute withstands rational basis scrutiny so long as "a reasonable basis exists for the difference in treatment under the statute, or if any set of facts can reasonably be conceived to justify it, the statute is constitutional." *Brown*, 915 S.W.2d at 414.

Rational basis review is a "relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary." *Harrison v. Schrader*, 569 S.W.2d 822, 825 (Tenn. 1978) (quoting *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976)); *see also Kimel v. Fla Bd. of Regents*, 528 U.S. 62, 84 (2000) ("Where rationality is the test, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.") (alteration, quotation marks, and citation omitted).

Significantly, the basis for the challenged classification need not be derived from the statute's text or legislative history. "Because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Beal v. Benton Cnty.*, No. W2013-01290-COA-R3-CV, 2014 WL 287607, at *10 (Tenn. Ct. App. Jan. 27, 2014) (no perm. app. filed) ("*Beal*") (quoting *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)) (no perm. app. filed). Because duly enacted legislation bears a strong presumption of validity, a party challenging the rationality of a legislative classification has the burden of negating every conceivable basis that might support it. *Beal*, 2014 WL 287607, at *10 (quoting *Beach Commc'ns*, 508 U.S. 307, 314-15).

Under rational-basis review, the policy choices of the political branches are "not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *See* Beach Commc'ns, Inc., 508 U.S. at 315. Equal protection "does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams*, 397 U.S. 471, 486–87 (1970).

Plaintiffs assert that the ESA Pilot Program will take away substantially equal education opportunities because it will deprive students in Shelby County Schools and Metro Nashville Public Schools of BEP funds. (Am. Compl. 31-32, ¶¶ 115-118.) Plaintiffs' argument fundamentally fails because it assumes that they have a right to BEP funds for students who are *not* enrolled and receiving an education in the LEA. An LEA's BEP funding allocation is determined by utilizing student enrollment numbers, and changes when a student enters or exits an LEA. *See* Tenn. Code Ann. § 49-3-307(a)(1)(B), (a)(11). Akin to the instance of a student who moves away from an LEA's district apart from the ESA Pilot Program, the ESA Pilot Program

does not cause inequity in the public school system. Students who participate in the ESA Pilot Program agree to not enroll in public schools within their LEA and to release the LEA from all obligations of education. Tenn. Code Ann. § 49-6-2603(a)(2)-(3). Thus, the LEAs in Shelby and Davidson counties will receive the same per-pupil funding for students enrolled and receiving an education in their schools. Moreover, LEAs with BEP allocations above the statewide per pupil average will keep additional funds under the ESA Pilot Program for students they no longer have the obligation to educate. Therefore, the ESA Pilot Program does not result in any inequity.

Notably, there is more than one conceivable reason for implementing the ESA Pilot Program. *See Fisher*, 604 S.W.3d at 399. The State has a legitimate interest in the continual improvement of educational services to children in the state. *See* Tenn. Code Ann. § 49-6-2611. Providing additional educational opportunities for some children enrolled in historically low-performing LEAs may create incentives for those districts and other districts that similarly under-perform to strive to improve educational services to their students who attend schools serviced by those LEAs.

Plaintiffs' challenge under the Equal Protection and Education Clauses fails as a matter of law. Disagreement with the state's chosen option to improve educational services does not constitute a showing that there is no rational basis for the ESA Pilot Program.

III. The ESA Pilot Program Does Not Violate the Education Clause.

Tennessee's Education Clause directs that "[t]he General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools." Tenn. Const. art. XI, § 12. "Under this clause, the General Assembly has extensive power and discretion regarding the methods and means used to provide the public school system." *City of Humboldt v.*

McKnight, No. M2002-02639-COA-R3-CV, 2005 WL 2051284, at *14 (Tenn. Ct. App. Aug. 25, 2005) (citing *Small Schools I*, 851 S.W.2d at 150-51), *perm. app. denied* (Tenn. Feb. 21, 2006).

Tennessee's Education Clause's plain language requires the General Assembly to maintain and support a system of free public schools. It does not preclude additional programs and educational opportunities to children in the state. *See, e.g.*, *Schwartz v. Lopez*, 382 P.3d 886, 898 (Nev. 2016) (holding that the "legislative duty (imposed by the Nevada state constitution) to maintain a uniform public school system is not a ceiling but a floor upon which the legislature can build additional opportunities for school children"); *Meredith v. Pence*, 984 N.E.2d 1213, 1223 (Ind. 2013) (holding that even if 60% of Indiana's school children elected to participate in the state's voucher program, "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 by the [Indiana] Education Clause"); *Hart v. State*, 774 S.E.2d 281, 289-90 (N.C. 2015) (holding that a state constitutional requirement of uniform public schools throughout the state does not prevent the legislature from funding educational initiatives outside that system); *Davis v. Grover*, 480 N.W.2d 460, 473-74 (Wis. 1992) (holding that the uniformity clause in the Wisconsin state constitution requires the legislature to provide the state's children with the opportunity to receive a free, uniform, basic education, and a school choice program applicable only in Milwaukee "merely reflects a legislative desire to do more than that which is constitutionally mandated").

The ESA Pilot Program does not replace the state school system created by the legislature. LEAs continue to provide educational services under the statutory framework provided in Title 49, which means students continue to benefit from a system of free, public schools. And participating students in the ESA Pilot Program obtain a better educational fit from a participating school. Tenn. Code Ann. § 49-6-2603(a)(1)-(3).

IV. The ESA Pilot Program Does Not Violate or Conflict with the BEP.

The BEP is the general mechanism through which the General Assembly provides funding for K-12 education in Tennessee. *See* Tenn. Code Ann. § 49-3-351(a).[7] The BEP formula is "student-based such that each student entering or exiting an LEA shall impact generated funding." *Id*. § 49-3-307(a)(11). The state shall provide funds generated by the BEP formula and the local government shall provide the local share of the BEP. *Id*. § 49-3-356(a).

The ESA Pilot Program specifically addresses its interrelation with the BEP. Funds for participating students in the ESA Pilot Program are subtracted from state BEP funds otherwise payable to the LEA and remitted to the participating student's ESA account:[8]

For the purpose of funding calculations, each participating student must be counted in the enrollment figures for the LEA in which the participating student resides. The ESA Pilot Program funds for participating students must be subtracted from the state BEP funds otherwise payable to the LEA. Tenn. Code Ann. § 49-6-2605(b)(1).

"The BEP is designed to accomplish two significant objectives—provide an excellent education program for all K thru 12 students throughout the State and provide substantially equal educational opportunities for those students." *Small Schools I*, 894 S.W.2d at 738. The means whereby this objective is accomplished "is a legislative prerogative." *Id.* at 141. The ESA Pilot

[7] Although Plaintiffs allege that the ESA Pilot Program violates the BEP statute, they do not identify the provisions of the ESA Pilot Program and BEP's statutory provisions that allegedly are in conflict. (Am. Compl. 34.) The Tennessee Investment in Student Achievement Act ("TISA"), 2022 Tenn. Pub. Acts Ch. 966 (to be codified at Tenn. Code Ann. §§ 49-3-101, *et seq.*) takes effect July 1, 2023, and replaces the BEP funding structure on that date. In the ESA Pilot Program, the only relevant change is to replace BEP with TISA. Akin to the BEP, there is no conflict with TISA and the ESA Pilot Program.

[8] Funds are limited to the per pupil BEP funds for the LEA in which the student resides, but not to exceed the statewide average of per pupil BEP funds. Tenn. Code Ann. § 49-6-2605(a).

Program seeks to provide additional educational opportunities for students in LEAs with "the lowest performing schools on a historical basis." *See* Tenn. Code Ann. § 49-6-2611(a)(1).

The overriding purpose of a court in construing a statute is to ascertain and effectuate the legislative intent, without either expanding or contracting the statute's intended scope. *State v. Miller*, 575 S.W.3d 807, 810 (Tenn. 2019); *Ray v. Madison Cnty., Tenn.*, 536 S.W.3d 824, 831 (Tenn. 2017). Legislative intent is first and foremost reflected in the language of the statute. *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 526 (Tenn. 2010). "We presume that the Legislature intended each word in a statute to have a specific purpose and meaning." *Arden v. Kozawa*, 466 S.W.3d 758, 764 (Tenn. 2015). The words used in a statute are to be given their natural and ordinary meaning, and, because "words are known by the company they keep," courts construe them in the context in which they appear and in light of the general purpose of the statute. *Lee Med.*, 312 S.W.3d at 526; *Ray*, 536 S.W.3d at 831.

Courts avoid constructions that place one statute in conflict with another and endeavor to resolve any possible conflict between statutes to provide for a harmonious operation of the laws. *Lovlace v. Copley*, 418 S.W.3d 1, 20 (Tenn. 2013). "Where a conflict is presented between two statutes, a more specific statutory provision takes precedence over a more general provision." *Id.* (quoting *Graham v. Caples*, 325 S.W.3d 578, 582 (Tenn. 2010)). It is the duty of a court to reconcile inconsistent or repugnant provisions; to place a construction thereon which will not be prejudicial to the public interest; to construe a statute so that no part will be inoperative, superfluous, void, or insignificant, and that one section will not destroy another; and further to give effect to every word, phrase, clause and sentence of the act in order to carry out the legislative intent. *See Miller*, 575 S.W.3d at 811 (citing *Tidwell v. Collins*, 522 S.W.2d 674, 676-77 (Tenn. 1975)).

First, there is no conflict between the ESA Pilot Program and BEP. Under the ESA Pilot Program, the funds for a participating student—who has released the LEA from all educational obligations—leave the LEA and follow the child. Tenn. Code Ann. §§ 49-6-2603(a)(1)-(3), -2605(a)-(b). The student may then utilize the funds towards specified educational expenses as approved under the ESA Pilot Program. *Id*. § 49-6-2603(a)(4). The funding provisions of the ESA Pilot Program operate harmoniously with the BEP fund provisions.

Even if there were a conflict between the two, the more specific ESA Pilot Program provisions must take precedence. *See Lovlace*, 418 S.W.3d at 20. While the BEP funds most K-12 education in the state, the ESA Pilot Program 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). The ESA Pilot Program's funding provisions are narrower in scope and take precedence over the more general provisions of the BEP. *See Lovlace*, 418 S.W.3d at 20. And the general provisions of BEP funds can continue to operate for students not participating in the ESA Pilot Program.

Plaintiffs fail to state a claim for violation of the BEP statute. This Court should dismiss Count III of the Complaint.

V. The ESA Pilot Program Does Not Violate the Appropriation Provisions of the Tennessee Constitution or Statutes.

There are constitutional and statutory provisions requiring that the legislature appropriate funds for state expenditures. "The fundamental purpose in construing a constitutional provision is to ascertain and give effect to the intent and purpose of those who adopted it." *Barrett v. Tenn. Occupational Safety & Health Review Comm'n*, 284 S.W.3d 784, 787 (Tenn. 2009) (quotation and citation omitted). A court gives "the terms contained in constitutional provisions their ordinary and inherent meaning." *Id*. "Furthermore, because constitutions are adopted as a whole 'it is a

proper rule of construction that the whole [instrument] is to be examined with a view to arriving at the true intent of each part.'" *Id*.

By statute, "[n]o money shall be drawn from the state treasury except in accordance with appropriations duly authorized by law." Tenn. Code Ann. § 9-4-601(a)(1). The Tennessee Constitution provides that "[n]o public money shall be expended except pursuant to appropriations made by law. Tenn. Const. art. II, § 24. The Constitution further states:

> Any 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.

Id.

"Collectively, these provisions were intended to prevent deficit spending and to force the legislature to fund any new programs that it implements." Tenn. Op. Atty. Gen. 04-142, 2004 WL 2326699, at *2 (Sept. 1, 2004) (citing *Journal and Debates of the 1977 Limited Constitutional Convention*, 1112-13 (Report of the Limitations on State Spending Committee, remarks by Mr. Burson)). Construing the constitutional provisions as a whole, the first-year appropriation provision "does not apply if funding is not necessary in the first year after the act's passage, or if the law is implemented with an agency's existing appropriated funds." *Id*.

The General Assembly appropriated funds for the ESA Pilot Program's first year. The Court need not accept Plaintiffs' legal conclusions to the contrary. (*See* Am. Compl. 37, ¶ 151); *cf*. *Webb v. Nashville Area Habitat for Humanity*, 346 S.W.3d 422, 427 (Tenn. 2011) ("Moreover, courts are not required to accept as true assertions that are merely legal arguments or 'legal conclusions' couched as facts."). The estimated first year's funding for the ESA Pilot Program was $771,300. Staff of J. Fiscal Review Comm., 2019 Cumulative Fiscal Note, 111th Gen.

Assemb., at 56 (2019), ("$771,300/FY 19-20").[9] That same amount of funds was appropriated by the General Assembly. *See* Tenn. Pub. Acts, ch. 405, § 12, item 4 at 52 (incorporating State of Tennessee, The Budget Document FY 2019-20, at A-37 and B-78)[10]; Tenn. Pub. Acts, ch. 405, § 57, item 1, ¶ 5 at 100:[11]

Initial appropriation	$25,450,000.00	Tenn. Pub. Acts, ch. 405, § 12, item 4 at 52
Amendment	($24,678,700.00)	Tenn. Pub. Acts, ch. 405, § 57, item 1, ¶ 5 at 100
Final Appropriation	$771,300.00	*See* Pub. Acts, ch. 405

Therefore, the ESA Pilot Program meets the constitutional requirement for first-year appropriation of funding.

In addition, the ESA Pilot Program was funded with appropriations duly authorized by law. The General Assembly stated that "[t]he program shall begin enrolling participating students *no later than* the 2021-2022 school year." Tenn. Code Ann. § 49-6-2604(b) (emphasis added). When the Department looked to enroll students in the 2020-2021 school year, it was able to accomplish this task because there were surplus funds available from appropriations to the Department. The legislature allows for a department to reallocate its work program if it does not exceed the total appropriations made to the department for that fiscal year. Tenn. Code Ann. § 9-4-5110. The Deputy Commissioner testified before the General Assembly that the Department utilized funds

[9] http://www.capitol.tn.gov/Archives/Joint/committees/fiscal-review/reports/2019%20Cumulative%20Fiscal%20Note%20-%20111th.pdf

[10] https://www.tn.gov/content/dam/tn/finance/budget/documents/2020BudgetDocumentVol1.pdf

[11] https://publications.tnsosfiles.com/acts/111/pub/pc0405.pdf

appropriated to it from the Career Ladder Program to fund the ESA Pilot Program. (Am. Compl. 14, ¶ 55.) The General Assembly appropriated $18,900,000.00 for the Career Ladder Program[12], Tenn. Pub. Acts, ch. 405, § 1, at 5, and the Department was able to utilize surplus funds to implement the ESA Pilot Program. No deficit spending occurred, and all monies spent were duly appropriated to the Department during that fiscal year.

Therefore, the ESA Pilot Program expenditures did not violate any constitutional or statutory provisions. Plaintiffs fail to state a claim under either the constitutional or statutory provisions regarding appropriations.

VI. The Tennessee Department of Education is Legally Implementing the ESA Pilot Program.

The Department of Education has the authority to establish and maintain accounts for participating students, and to verify that the funds are used for permissible expenses. Tenn. Code Ann. § 49-6-2607(b). It also has the power to develop its own processes to effectuate the same. *Id*.

Accordingly, the Department of Education is neither acting outside its authority nor contrary to the manner prescribed by statute in its implementation of the ESA Pilot Program. The statutes expressly give the Department of Education the ability to maintain accounts and decide the process through which the funds will be paid and verified. Therefore, Plaintiffs fail to state an *ultra vires* claim as to implementation of the ESA Pilot Program.

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[12] "The career ladder program was discontinued in 1997; however, supplements continued to be paid to any teacher with an active license who earned a career ladder endorsement prior to discontinuation of the program." Tenn. Comp. R. & Regs. 0520-02-02-.01. Teachers are eligible so long as they remain in positions in the public schools that qualify for such supplements. Tenn. Code Ann. § 49-1-302(n). Thus, a teacher's change in positions or separation from service could result in the presence of surplus funds.

Moreover, the Department of Education's actions are not the equivalent to rulemaking under the Uniform Administrative Procedures Act ("UAPA") and do not conflict with that statutory scheme. A participating school requesting reimbursement for expenses is nothing new; a participating school is required to provide a receipt for all expenses. Tenn. Code Ann. § 49-6-2607(c). The obligations remain for the participating student to only use funds as authorized by statute, *id*. § 49-6-2603, and for the Department of Education to verify that uses are permissible and to institute fraud protection measures, *id.* § 49-6-2607. Plaintiffs fail to state any claim that implementation of the ESA Pilot Program violates its own provisions or the UAPA.

CONCLUSION

For the reasons stated, Plaintiffs' Amended Complaint should be dismissed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this Memorandum has been forwarded by electronic mail (in lieu of U.S. Mail by agreement of the parties) and the electronic filing system on this 19th day of August, 2022, to:

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