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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 FOR JUDGMENT ON THE PLEADINGS BY INTERVENOR-DEFENDANTS NATE BAH, *ET AL.*

The Court should deny the motion for judgment on the pleadings filed by Intervenor-Defendants Natu Bah, Builguissa Diallo, Bria Davis, and Star Brumfield ("Intervenor-Defendants"). The motion fails for the following reasons:

- Count I of the Complaint states a viable claim for a Home Rule Amendment violation because the ESA Act is local in form or effect, applies to "particular" counties, and affects Plaintiffs' governmental function of serving as partners with the State in local education.
- 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 purpose of improving school performance in the Davidson and Shelby County school systems.
- 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 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 for judgment on the pleadings, 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:

[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).

(*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]

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).

[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 and Shelby counties.

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 to MNPS and Shelby County Schools, 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.) 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

[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."

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 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

[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.)

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. ¶¶ 131-21.) 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 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.

STANDARD OF REVIEW

Like a motion filed under Rule 12.02(6) of the Tennessee Rules of Civil Procedure, a motion for judgment on the pleadings under Rule 12.03 tests the legal sufficiency of a complaint, not the strength of the plaintiff's proof. *Timmons v. Lindsey*, 310 S.W.3d 834, 838 (Tenn. 2000). "[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). "Such a motion admits the truth of all relevant and material averments in the complaint but asserts that such facts cannot constitute a cause of action." *Id.* Thus, the Court may grant the Intervenor-Defendants' motion 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 accept as true 'all well-pleaded facts and all reasonable inferences drawn therefrom' alleged by the party opposing the motion." *Timmins*, 310 S.W.3d at 838.

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).

LEGAL ARGUMENT

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

A. Because the ESA Affects Only Two Counties in Their Governmental Capacity, It Must Comply With the Home Rule Amendment Notwithstanding the Act's Reference to an LEA Rather than a County.

In support of their motion for judgment on the Home Rule Amendment claim, Intervenor-Defendants reiterate two of the State Defendants' arguments in favor of dismissal: that the ESA Act is not "local in form or effect" and that the Home Rule Amendment applies to counties, while the ESA Act applies to LEAs, which are distinct entities. (Intervenor-Defs.' Mem. L. at 4-7.) Intervenor-Defendants' brief, however, offers no new insight into these issues and cites no applicable legal authority beyond that on which the State relied.[6] Thus, for the sake of judicial economy, Plaintiffs rest upon and incorporate by reference their arguments opposing the State Defendants' motion to dismiss on these issues. To summarize, if an act, such as the ESA Act, affects only one or two counties in their governmental capacity, then the Home Rule Amendment applies—regardless of whether the act relates to a plenary power of the State and regardless of whether it speaks in terms of an LEA rather than the county itself.

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[6] Intervenor-Defendants cite several out-of-state cases for the proposition that "Tennessee is not alone in refusing to apply its Home Rule Amendment to school districts" and that school districts are separate legal entities from counties. (Intervenor-Defs.' Mem. L. at 7 (citing *State v. Milwaukee*, 206 N.W. 210, 213 (Wis. 1925); *Barth v. Sch. Dist. of Philadelphia*, 143 A.2d 909, 911 (Pa. 1958); *Gurba v. Cmty. High Sch. Dist. No. 155*, 18 N.E.3d 149, 156 (Ill. App. Ct. 2014)).) Of course, a Wisconsin court's interpretation of its own "Home Rule Amendment" says nothing of whether Tennessee's Home Rule Amendment applies in this case. Moreover, insofar as *City of Milwaukee* could be read to preclude application of the Home Rule Amendment to any legislation that concerns the State's plenary power, 206 N.W. at 212-13, the decision plainly conflicts with *Lawler v. McCanless*, 417 S.W.2d 548 (Tenn. 1967). (*See* discussion in Pls.' Resp. in Opposition to State Defs.' Mot. to Dismiss at Section III.A.2.) Pennsylvania and Illinois courts' interpretation of their own state law on the separate nature of school districts and counties likewise has no bearing on the issues before this court. As the Tennessee Supreme Court has recognized, decisions of other states' courts about other states' constitutional provisions "provide little guidance" in construing the Tennessee Constitution "because the decisions by the courts of other states are necessarily controlled in large measure by the particular wording of the constitutional provisions of those state charters." *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 148 (Tenn. 1993) ("*Small Schools I*").

B. Whether a County Has "Control" Over a Local School District Is Irrelevant to Whether the Home Rule Amendment Applies.

Intervenor-Defendants' motion for judgment on the pleadings raises only one argument not raised in the State Defendants' motion: Because the Metropolitan Government and Shelby County charters do not give the counties "control" over the local school systems they fund, the Home Rule Amendment does not apply. (Intervenor-Defs.' Mem. L. at 8-9.) Conspicuously absent from Intervenor-Defendants' brief is any case citation establishing that such "control" is a precondition to application of the Home Rule Amendment. This argument is merely an extension of their argument that the ESA Act applies to LEAs, not counties, and the argument fails for the same reason.

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*." Tenn. Const., art. XI, § 9 (emphasis added). Tennessee law establishes that where a legislation "affects" a county, the Home Rule amendment applies. *Chattanooga-Hamilton Cty. Hosp. Auth. v. City of Chattanooga*, 580 S.W.2d 322, 324-25, 328 (Tenn. 1979). (*See* Pls.' Resp. in Opposition to State Defs.' Mot. to Dismiss at Section III.B.1.) Intervenor-Defendants do not dispute that the Plaintiffs' funding of their local school districts is a governmental function. And Intervenor-Defendants identify no basis for their purported exception to legislation being "applicable to a particular county" in its "governmental" capacity merely because the county shares responsibility with another county governmental entity. *See State ex rel. Boles v. Groce*, 280 S.W. 27, 28 (Tenn. 1926) (members of the county board of education "are county officers"); *State ex rel. Milligan v. Jones*, 224 S.W. 1041, 1042 (Tenn. 1920) (school director "is a county official"). That issue simply has no bearing on the Home Rule Amendment, and Intervenor-Defendants cite no authority to establish otherwise.

Counties are in a "partnership" with the state "to provide adequate educational opportunities in Tennessee." *State ex rel. Weaver v. Ayers*, 756 S.W.2d 217, 221 (Tenn. 1988). This

partnership relies on the counties' fiscal well-being, which "is entrusted to the [county] board of commissioners, as that body is ultimately responsible for maintaining the necessary revenue to fund the county board of education's programs as well as the other services provided by the county." *Id*. at 223; *see also Davidson Cty. v. City of Nashville*, 228 S.W.2d 89, 90 (Tenn. 1950) ("The Private Act of 1929 affected Shelby County in its governmental capacity since it was dealing with schools and a division of school funds."). Moreover, the responsibility for operating a local education system does not fall exclusively to the local board of education: The State has "divided the responsibilities allocated to the counties" between boards of education and county legislative bodies. *Ayers*, 756 S.W.2d at 221.

Tennessee law requires counties, including Davidson and Shelby, to fund their school districts. The duties of a county legislative body include adopting a budget for the operation of county schools and levying taxes necessary to meet the budgets. Tenn. Code Ann. § 49-2-101; *see also id.* § 5-9-401 ("All funds from whatever source . . . that are to be used in the operation . . . of county governments shall be appropriated to such use by the county legislative bodies."); *cf.* Metropolitan Charter §§ 9.01, 9.03. In connection with this fundamental governmental function, county school boards by law are considered agencies of the county. *See* Tenn. Code Ann. § 5-9-402(a) ("The county board of education . . . and each of the other operating departments, commissions, institutions, boards, offices and agencies of county government that expend county funds" must file annual budgets with the county mayor for study and submission to the county legislative body).

The counties' role as a partner in local education constitutes a governmental function under the Home Rule Amendment. *See Brentwood Liquors Corp. of Williamson Cty. v. Fox*, 496 S.W.2d 454, 457 (Tenn. 1973) ("Education is a governmental function and in the exercise of that function the county acts in a governmental capacity."). The ESA Act directly affects this governmental function by diverting BEP funding to education savings account to pay private

school tuition. Regardless of whether local school boards or LEAs[7] perform different functions from county legislative bodies, and even if county legislative bodies do not "control" school boards, the ESA Act affects the counties in their governmental capacities. That question, which Intervenor-Defendants' argument ignores, is the relevant question for purposes of the Home Rule Amendment.

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

Intervenor-Defendants incorrectly argue that Plaintiffs' equal protection claim "rests upon the Tennessee Supreme Court's decision" in *Tennessee Small School Systems v. McWherter* ("*Small Schools I*"), 851 S.W.2d 139 (Tenn. 1993), which Intervenor-Defendants contend Plaintiffs have misconstrued, as well as a "recasting" of Plaintiffs' Home Rule Amendment claim. (Intervenor-Defs.' Mem. L. at 9-10.) For the sake of judicial economy, where appropriate, this section incorporates by reference several arguments already presented at length in Plaintiffs' response to the State Defendants' motion to dismiss.

A. Plaintiffs' Equal Protection Claim Is Grounded in The ESA Act's Arbitrary Classifications.

Plaintiffs' equal protection claim is grounded in the ESA Act's failure to satisfy even the *most basic level of scrutiny* under the Tennessee Constitution's Equal Protection Clauses. (Compl. ¶¶ 190-209.) Because there is no rational basis for the General Assembly imposing the ESA Act on Davidson and Shelby counties while seeking to "protect" equally-poorly performing LEAs, such as Fayette, Hamilton, and Madison counties, from the program's inevitable and negative consequences, the Act necessarily fails under the strict scrutiny standard that applies to the Act. (*See* Pls.' Resp. in Opposition to State Defs.' Mot. to Dismiss at Section III.B.1, incorporated by reference.) Contrary to Intervenor-Defendants' assertion, Plaintiffs' Complaint in no way asserts that "every student in Tennessee must be treated exactly the same." (Intervenor-Defs.' Mem. L.

[7] In addition, as argued in response to the State Defendants' motion to dismiss, MNPS is not a separate legal entity from the Metropolitan Government itself. (Pls.' Resp. in Opposition to State Defs.' Mot. to Dismiss at Section III.B.2.)

at 9.) Rather, the Complaint asserts, as the law requires, that "'[t]here 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.'" (Compl. ¶ 196 (quoting *State v. Tester*, 879 S.W.2d 823, 829 (Tenn. 1994)).)

Intervenor-Defendants' claim that Plaintiffs' equal protection argument merely "recasts" the Home Rule Amendment claim is likewise baseless. (Intervenor-Defs.' Mem. L. at 12.) Plaintiffs' equal protection claim is grounded in facts that are not material to Plaintiffs' Home Rule Amendment claim, specifically relating to the poor performance of school districts not included in the ESA Act's scope and for which there is *no relevant distinction* justifying their differential treatment. The Complaint alleges that Hamilton County students attend school in a district with **16.7%** of its schools on the 2017 bottom 10% list and **11.5%** of its schools on the 2018 priority list. (Compl. ¶¶ 27, 29.) Fayette County students attend school in a district with **28.6%** of its schools on the 2017 bottom 10% list and **14.3%** of its schools on the 2018 priority list. (*Id.*) Madison County students attend school in a district with **34.8%** of its schools on the 2017 bottom 10% list and **17.4%** of its schools on the 2018 priority list. (*Id.*) In addition, Hamilton and Madison counties' 2018 priority list ratings constituted a significant downgrade from their 2015 listings. (*Id.* ¶ 30.) In 2017, 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, Madison and Fayette counties had a higher concentration of priority schools than Davidson or Shelby County, and Hamilton County's concentration was only slightly lower. (*Id.*)

Despite students in these districts having access to myriad private schools either in their county or a neighboring county, as a simple Google search reveals, these counties were "protected" from the ESA Act—at the expense of students in "deep blue" Davidson and Shelby counties. (*Id.* ¶¶ 57, 82-84, 202.) The ESA Act imposes significant financial burdens on only two counties, which will impair their LEAs' ability to educate the students remaining in the system. These facts and

the inferences to be drawn from them, which are presumed true for purposes of this motion, form the basis for Plaintiffs' equal protection claim—not the Home Rule Amendment claim.[8] Equal protection requires individuals in like categories to be treated alike. The ESA Act comes nowhere close to doing that.

B. Intervenor-Defendants Misconstrue Plaintiffs' Equal Protection Argument and the Well-Pled Facts That Support It.

In arguing that Plaintiffs' Complaint misconstrues the Tennessee Supreme Court's decision in *Small Schools I*, Intervenor-Defendants misconstrue the Complaint. Intervenor-Defendants claim that "Plaintiffs' Complaint attempts to recast [*Small Schools I*] as requiring that every student in Tennessee must be treated exactly the same—and that an additional opportunity for some students necessarily creates 'disparities' for others." (Intervenor-Defs.' Mem. L. at 10.) Contrasting that with the *actual language* in Plaintiffs' Complaint, Count II states—quotes, in fact—the following from the *Small Schools I* decision:

> As the Tennessee Supreme Court recognized in *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139 (Tenn. 1993) (*Small Schools I*), "disparities in resources available" in various school districts can "result in significantly different educational opportunities for the students of the state." *Id.* at 145. And 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.
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> . . . .
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> The ESA Act's application to only two counties constitutes an inequitable distribution of funds in violation of the equal protection clauses, as outlined in *Small Schools I.*

(Compl. ¶¶ 194, 207.) Intervenor-Defendants' assertion that Plaintiffs' claim rests on a belief that the "substantially equal educational opportunities" mandated by *Small Schools I* requires identical opportunities for every student in Tennessee with identical amounts of money is a strawman that the Court should disregard.

[8] Granting Plaintiffs' motion for summary judgment on Count I, however, would alleviate the need for discovery on the claims arising under the Equal Protection and Education Clauses.

On the other hand, *Small Schools I* and general equal protection principles *do require* that similarly-situated groups of people be treated similarly. *Small Schools I*, 851 S.W.2d at 153 (citing *F.S. Royster Guano Co. v. Va.*, 253 U.S. 412 (1920)); *Burson*, 816 S.W.2d at 731 ("The core concern expressed in this constitutional provision is that legislative classification, to the extent that it exists, not be unreasonable or unfair."). As discussed above and in response to the State Defendants' motion to dismiss, the ESA Act falls far short of this requirement.[9] The General Assembly is free to innovate in matters relating to education, but only "within constitutional limits." *Small Schools I*, 851 S.W.2d at 156. When the General Assembly diverts BEP dollars from public schools to private schools only in certain counties, and not in others that are similarly-situated in all relevant respects, that action reeks of the same inequality that the court found unconstitutional in *Small Schools I*. *See Small Schools*, 851 S.W.2d at 156 ("The proof before us fails to show a legitimate state interest justifying the granting to some citizens, educational opportunities that are denied to other citizens similarly situated, and, thus, fails to satisfy even the 'rational basis' test applied in equal protection cases.").

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

In Count III, Plaintiffs seek relief because the ESA Act violates the Education Clause in Article XI, Section 12, of the Tennessee Constitution. 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.

The Education Clause "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. The Education Clause operates as a mandate that requires the General Assembly to maintain and support a system of free public

[9] This is particularly true, given that strict scrutiny applies to the ESA Act. (*See* Pls.' Resp. in Opposition to State Defs.' Mot. to Dismiss at Section III.B.1.) Intervenor-Defendants' brief, however, contains no argument addressing how the act meets any level of scrutiny that may apply.

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. "[T]his is an enforceable standard for assessing the educational opportunities provided in the several districts throughout the state." *Id*. at 151.

Plaintiffs allege in Count III of the Complaint that by limiting the ESA program to Davidson and Shelby counties, the State Defendants have failed to provide a substantially equal educational opportunity to all students in Tennessee. The current BEP formula already results in systematic inadequate funding of the Davidson County and Shelby County public schools. (Compl. ¶ 140.) The ESA Act expressly authorizes the diversion of public funds from the Davidson and Shelby County public school systems to private schools, while protecting all other counties and LEAs from the financial burdens of the ESA program. The result, according to allegations which must be taken as true, will be financially and programmatically adverse, as the costs of operations do not decrease in proportion to enrollment reductions. (*Id.* ¶¶ 103-123, 136-150.) 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." (*Id.* ¶ 150.)

For these reasons, described in more detail to follow, the Complaint states a claim upon which relief can be granted under the Education Clause.

A. The *Small Schools* Decisions Support Plaintiffs' Claims.

Intervenor-Defendants' argument that the Plaintiffs have failed to state a claim under the Education Clause contains barely a mention of the *Small Schools* decisions. (Intervenor-Defs.' Mem. L. at 12-16.) In their equal protection argument, however, they claim that Plaintiffs' construction of *Small Schools I* conflicts with the Education Clause's actual mandates. (*Id.* at 11.) Intervenor-Defendants are incorrect.

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 under the Education Clause and Equal Protection Clauses in the Tennessee Constitution to the State's system of funding public schools. While the case 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." *Tennessee Small School Systems v. McWherter*, 91 S.W.3d 232, 243 (Tenn. 2002) ("*Small Schools III*"). Funding was a critical element, though, because there was "a direct correlation between dollars expended and the quality of education a student receives." *Small Schools I*, 851 S.W.2d at 144.

The funding scheme at issue was the Tennessee Foundation Program (TFP), the pre-1992 system of funding public education. *Tennessee Small School Systems 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*. 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 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.

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 and was "quite different from the TFP in concept." *Small Schools II*, 894 S.W.2d at 735-36.[10] The TFP was based mainly on the average daily attendance

[10] 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.

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.*[11] 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.*

The Court in *Small Schools I* ultimately deemed it unnecessary to decide the precise level of education mandated by the Education Clause or the extent to which the funding system at issue did not comport with the Education Clause, because the Court determined that the funding scheme violated the Equal Protection Clauses. *Small Schools I*, 851 S.W.2d at 152. But the Court certainly held that the Education Clause establishes an "enforceable standard" and that funding is an important element of the delivery of educational services. *Id.* at 151-52. The Court also stated unequivocally that the Equal Protection Clauses in the Tennessee Constitution "assure the nondiscriminatory performance of the duty created by Article XI, Section 12 [the Education Clause]." *Id.* at 153. Intervenor-Defendants' argument ignores this language altogether.

B. Intervenor-Defendants Have Distorted Plaintiffs' Claim To Fit Their Policy Argument.

Intervenor-Defendants also contend that Plaintiffs "wrongly assume that the protections in the [Education] Clause belong to school districts, rather than to the parents and children those school districts exist to serve." (Intervenor-Defs.' Mem. L. at 13.) They mischaracterize Plaintiffs' claim as one asking the Court to "apply the Tennessee Constitution in a manner that treats

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[11] 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.

children as mere conduits for the flow of money into Tennessee's public school system, declaring: "The Framers could have easily replaced the word 'education' with 'free public schools' if it [sic] wanted to elevate public school districts above Tennessee children and their education—but they chose not to." (*Id.*)

There are two relevant sentences in the Education Clause, and Plaintiffs recognize their *co*-existence. The first is a declaration that the State recognizes the inherent value of education and encourages its support. The second mandates that the General Assembly provide for the maintenance, support, and eligibility standards of a system of "free public schools." In the context of this case, as in the *Small Schools* litigation, these two sentences, when read together, explain the State's constitutional obligation under the Education Clause.

In *Small Schools I*, the court recognized the critical need to read the first two sentences in Article XI, Section 12 *in pari materia*. 851 S.W.2d at 150-51. After considering the general definition of "education," the Tennessee Supreme Court spoke of "the eloquence and certainty of the constitutional mandate: that the General Assembly shall maintain and support a system of *free public schools* that provides, at least, the opportunity to acquire general knowledge, develop the powers of reasoning and judgment, and generally prepare students intellectually for a mature life." *Id.* In other words, the Supreme Court construed the two operative sentences in the Education Clause together, as establishing a mandate on the legislature to provide and support a system of "free public schools" in which to deliver the mandatory "education."

It is the combination of "education" and "free public schools," not each one separately, that the mandate in the Education Clause of the Tennessee Constitution concerns. And under *Small Schools I*, the Education Clause and the Equal Protection Clauses of the Tennessee Constitution combine to require that the educational opportunities in the various local "free public school" systems throughout Tennessee must be substantially equal. *Id.* at 153 (stating that the Equal Protection Clauses in the Tennessee Constitution "assure the nondiscriminatory performance of the duty created by Article XI, Section 12 [the Education Clause]").

After *Small Schools I* deemed the TFP funding scheme unconstitutional, the BEP funding formula became the means by which the constitutional mandate of the Education Clause is provided. Through that formula, the State and local governments share the financial obligation for "free public schools" to provide the educational opportunities that satisfy the constitutional mandate. School children are indeed the beneficiaries of the Education Clause's constitutional mandate. But the system of "free public schools" is the vehicle through which the mandate is satisfied.

To that end, the diversion of tens of millions of dollars annually in Davidson and Shelby counties from of the funding formula that is designed to satisfy this mandate will impair MNPS and Shelby County Schools' abilities to deliver the constitutionally required educational opportunities to the children who remain enrolled in their schools. "There is a direct correlation between dollars expended and the quality of education a student receives." *Small Schools I*, 851 S.W.2d at 141. And these counties' costs do not decrease merely because their enrollments do. (Compl. ¶¶ 142-49.) Such funding decreases will "detrimentally affect" the LEAs' abilities to operate, which will necessarily affect their abilities to educate the students that remain. (*Id.* ¶ 150.) The extent of impairment of educational opportunities that the students in Davidson and Shelby county will suffer is to be proved at trial, just as it was proved at trial in this same court in the *Small Schools* litigation. *Id.* at 142.

C. The ESA Act Is Not "In Harmony With" the Education Clause.

Knocking down yet another strawman, Intervenor-Defendants argue that accepting Plaintiffs' argument in Count III requires reading the Education Clause to support exclusively a system of free public schools. (Intervenor-Defs.' Mem. L. at 14.) Intervenor-Defendants contend that the proper reading of the Education Clause is that it allows the legislature to provide Tennessee children with educational options in addition to a system of free public schools. (*Id.*)

Setting aside Intervenor-Defendants' hyperbole, the Education Clause does not speak one way or another to "educational options in addition to a system of free public schools." The mandate

of the Education Clause is that the Legislature maintain a system of "free public schools." The Education Clause is silent regarding "educational options." There is nothing about public funding of private school tuition (and other related costs) that is "in harmony" with the Education Clause. It does not address private school attendance or costs at all.

In addition, Intervenor-Defendants' reference to out-of-state decisions wherein other state supreme courts have rejected "exclusivity" claims provides no support for their position. (Intervenor-Defs.' Mem. L. at 15 n.8.) Beyond not having interpreted the Tennessee Constitution's Education Clause, the cases are inapposite for myriad other reasons. In none of the cases was there any suggestion that vouchers were funded by diverting funds away from certain public school systems.[12] In none of the cases was there any apparent showing that the funding for vouchers resulted in damage to the ability of the public schools to accomplish the State's constitutional mandate.[13] In none of those cases was there precedent, as there is here with *Small Schools I*, holding that the two key clauses of the states' education clauses were to be construed *in pari materia.*[14] These sorts of differences are why the Tennessee Supreme Court found that

[12] In *Hart v. State*, 774 S.E.2d 281 (N.C. 2015), the court recognized that under Article IX, Section 6 of the North Carolina constitution, funds appropriated for public education had to be used for those purposes. In other words, while the State could appropriate general revenue to fund educational initiatives, it was constitutionally prohibited from depleting public education funds for that purpose. *Id*. at 288-289. The program was upheld in *Hart* because the funds were in addition to the protected "State school fund." *Id*. Here, it is indeed the depletion of public education funds to Davidson and Shelby counties under the BEP formula that gives rise to the constitutional infirmity with which the North Carolina court, applying its own reasoning, likely would have agreed under similar facts.

[13] In *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999), the court held that the voucher program at issue did not undermine the state's obligation to public education and therefore did not violate the Ohio education clause. *Id*. at 212. Before making that determination, however, the court acknowledged that private school "success should not come at the expense of our public education system or our public school teachers." *Id*. Then, in the footnote cited by Intervenor-Defendants, the court acknowledged that a greatly expanded voucher program could indeed damage public education, making it subject to a renewed challenge under Ohio's education clause. *Id*. at 212 n.2.

[14] The Indiana court in *Meredith v. Pence*, 984 N.E.2d 1213 (Ind. 2013), recognized that different states' constitutional provisions about education might call for different results. While upholding a school voucher program under the Indiana constitution, the court acknowledged that a similar program was struck down in Florida because the Florida constitutional provisions promoting education and calling for support of public schools were read *in pari materia*. *Id*. at 1223 (citing *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006)).

decisions by courts in other states "provide little guidance in construing the reach of the education clause of the Tennessee Constitution." *Small Schools I*, 851 S.W.2d at 148.

The Education Clause issue in this case does not appear on a blank slate. Established Tennessee Supreme Court precedent instructs that the two relevant sentences in the Education Clause should be read *in pari materia*, with the first "recogniz[ing] the inherent value of education" and the second requiring the General Assembly's maintenance and support of a system of "free public schools." Tenn. Const., art. XI, § 12. These sentences together mandate "that the General Assembly shall maintain and support a system of free public schools that provides, at least, the opportunity to acquire general knowledge, develop the powers of reasoning and judgment, and generally prepare students intellectually for a mature life." *Small Schools I*, 851 S.W.2d at 150-151. This is an "enforceable standard" for assessing the educational opportunities provided in the State's public school districts. *Id*. at 151.

The ESA Act undermines the State's satisfaction of this constitutional obligation to the students who remain in Davidson County and Shelby County public schools because it diverts funding in ways that adversely affect the delivery of educational services to those students. Plaintiffs' Education Clause claim is supported by the facts pled in the Complaint, which must be taken as true, and by the reasonable inferences to be drawn from those facts—not Intervenor-Defendants' mischaracterization of the claim. The claim should be tried on its merits.

CONCLUSION

For the foregoing reasons, Intervenor-Defendants' motion for judgment on the pleadings should be denied.