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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.	)	

STATE DEFENDANTS' RESPONSE IN OPPOSITION TO
MCEWEN PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION

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"), oppose the Motion for Temporary Injunction filed by Plaintiffs Roxanne McEwen, David P. Bichell, Terry Jo Bichell, Lisa Mingrone, Claudia Russell, Inez Williams, Heather Kenny, Elise McIntosh, and Apryle Young. After their strongest claim failed before the Tennessee Supreme Court, Plaintiffs now seek extraordinary relief on a more tenuous claim. The Court should deny their request for a temporary injunction.

STATEMENT OF THE CASE

The Tennessee Education Savings Account Pilot Program, Tenn. Code Ann. §§ 49-6-2601 to -2612, ("ESA Pilot Program"), enacted by the General Assembly in 2019, offers alternative educational opportunities to the children of low-income families in Tennessee's chronically poorest-performing public school districts. Yet more than three years later, the ESA Pilot Program has not been fully implemented due to this litigation.

On March 2, 2020, Roxanne McEwen, David P. Bichell, Terry Jo Bichell, Lisa Mingrone, Claudia Russell, Inez Williams, Heather Kenny, Elise McIntosh, and Apryle Young (collectively referred to as "Plaintiffs"), filed this action against the State Defendants to obtain a declaratory judgment that the ESA Pilot Program is unconstitutional and to enjoin against its implementation. (Compl., 32 –33.) Plaintiffs' complaint asserts five separate causes of action: (Count I) violation of the Home Rule Amendment to the Tennessee Constitution, Tenn. Const. art. XI, § 9; (Count II) violation of the Education and Equal Protection Clauses of the Tennessee Constitution, Tenn. Const. art. I, § 8, Tenn. Const. art. XI, § 8, and Tenn. Const. art. XI, § 12; (Count III) violation of

the Education Clause of the Tennessee Constitution, Tenn. Const. art. XI, § 12; (Count IV) violation of the Basic Education Program, Tenn. Code Ann. §§ 49-3-351, *et seq.*; and (Count V) violation of the Appropriations Clause of the Tennessee Constitution, Tenn. Const. art. II, § 24. (*Id.* at 26-31.)

On April 3, 2020, Plaintiffs filed a motion for temporary injunction pursuant to Tenn. R. Civ. P. 65.04 on two of their five claims: Count I regarding the Home Rule Amendment, and Count V regarding the Appropriations for the ESA Act. (Pl. Mot. for Temp. Inj.). The 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.

On May 4, 2020, the Court denied Plaintiffs' motion as moot in light of its ruling in a separate action brought by Metropolitan Government of Nashville and Davidson County ("Metro") and the Shelby County Government ("Shelby County") that the ESA Pilot Program was unconstitutional under the Home Rule Amendment. The Court enjoined State Defendants from implementing the ESA Pilot Program in that separate litigation and thus explained that it had "granted the relief the [McEwen] Plaintiffs seek with their motion, albeit in the companion Metro case."

The Court's injunction remained in effect for more than two years while the State Defendants sought reversal through the appellate courts. On May 18, 2022, 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*."). Upon remand, on July 13, 2022, the Court vacated the injunction against implementation of the ESA Pilot Program.

[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.

More than 2,000 families have expressed their intent to participate; and more than 80 private schools are interested in enrolling their children. (Ex. 1, Aff. of Eve Carney). Plaintiffs previously asserted their best claim against the ESA Pilot Program and were unsuccessful. Now they again seek injunctive relief on a piecemeal basis—raising only one claim as grounds for an injunction—in a transparent attempt to forestall implementation of the ESA Program for as long as possible, whether or not they are ultimately successful. Plaintiffs' claim under the Education Clause fails as a matter of law.

TEMPORARY INJUNCTION STANDARD

Plaintiffs seek to enjoin implementation of the ESA Pilot Program during the pendency of this action pursuant to Tenn. R. Civ. P. 65.04, which states:

> A temporary injunction may be granted during the pendency of an action if it is clearly shown by verified complaint, affidavit or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual.

Tenn. R. Civ. P. 65.04.

Tennessee courts consider four factors in determining whether to issue a temporary injunction: "(1) the threat of irreparable harm to the plaintiff if the injunction is not granted; (2) the balance between this harm and the injury that granting the injunction would inflict on defendant; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest." *Moore v. Lee*, 644 S.W.3d 59, 63 (Tenn. 2022). The third factor—likelihood of success on the merits—is often determinative, and a party's "failure to show a likelihood of success on the merits is usually fatal." *Fisher v. Hargett*, 604 S.W.3d 381, 394 (Tenn. 2020).

In addition, injunctive relief will not be granted "unless the injury is threatened or imminent and, in all probability, about to be inflicted." *4215 Harding Rd. Homeowners Ass'n v. Harris*,

No. M2011-02763-COA-R3-CV, 2012 WL 6571040, at *2 (Tenn. Ct. App. Dec. 14, 2012) (quoting *State ex rel. Baird v. Wilson Cnty.*, 371 S.W.2d 434, 439 (Tenn. 1963)). While the decision to grant or deny a motion for injunctive relief is discretionary with the trial court, the Supreme Court recently observed that "'there is no power the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion or is more dangerous in a doubtful case' than the discretion of granting an injunction." *Moore v. Lee*, 644 S.W.3d 59, 63-64 (Tenn. 2022) (quoting *Mabry v. Ross*, 48 Tenn. 769, 774 (1870)).

ARGUMENT

I. Plaintiffs Are Unlikely to Succeed on the Merits.

Plaintiffs' motion for temporary injunctive relief must be denied because they are unlikely to succeed on the merits of their Education Clause claim. To start, they lack standing to challenge the ESA Pilot Program. But even if Plaintiffs had the requisite standing, their claim under the Education Clause is unlikely to succeed on the merits.

A. Plaintiffs Fail to Establish Standing.

Constitutional standing is a fundamental requirement that a party must establish to present a justiciable controversy. *City of Memphis v. Hargett*, 414 S.W.3d 88, 98 (Tenn. 2013) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). To establish constitutional 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. *Id.* Here, Plaintiffs cannot establish the first of those elements—a distinct and palpable injury.

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

Plaintiffs do not have standing because they have failed to demonstrate a distinct and palpable injury under the Education Clause. In general, Plaintiffs who are parents cannot show that they or their children have been harmed by the ESA Pilot Program. Plaintiff Russell, who does not claim to be a parent, cannot show a specific injury that is not commonly shared with other citizens. Plaintiffs simply allege an injury that they would share with all citizens—that the ESA Pilot Program allows for students to utilize state-appropriated funds to pay for private educational opportunities. (Compl. 28-30.) Plaintiffs thus fail to establish the first element of standing. As Parents and an Administrator, they fail to establish that the ESA Pilot Program has caused a distinct and palpable injury to their own rights under the Education Clause.

2. Plaintiffs fail to establish standing 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). "[W]ere such injuries sufficient to confer standing, 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.* A plaintiff must "first have notified appropriate officials of the illegality and given 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, in the discretion of the courts, be waived." *Metro. Gov't of Nashville & Davidson Cnty. v. Fulton*, 701 S.W.2d 597, 601 (Tenn. 1985). As asserted above, Plaintiffs have no special injury and thus lack taxpayer standing as to their Education Clause claim.

B. The ESA Program Does Not Violate the Education Clause's Requirement for a System of Free Public Schools.

1. The ESA Program Does Not Replace Tennessee's System of Free Public Schools.

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." C*ity of Humboldt v. McKnight*, No. M2002-02639-COA-R3CV, 2005 WL 2051284, at *14 (Tenn. Ct. App. Aug. 25, 2005) (citing *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 150-51 (Tenn. 1993) (hereinafter "*Small Schools I*")).

The General Assembly has established a statewide system of free public schools that is governed in accordance with state law and under the policies, standards, and guidelines of the State Board of Education. Tenn. Code Ann. § 49-1-102(a). "The system designed and maintained by the General Assembly is based upon direct delivery of educational services by" LEAs. *McKnight*, 2005 WL 2051284, at *14; *see also* Tenn. Code Ann. § 49-1-102(c).

The ESA Program does not replace the state system created by the legislature. The LEAs continue to provide educational services under the statutory framework provided in Title 49. And for students participating in the ESA Program, the LEAs are released from their obligation to educate those students. Tenn. Code Ann. § 49-6-2603(a)(1)-(3).

2. The Education Clause Does Not Prohibit Other Education Initiatives.

Plaintiffs urge the Court to apply the maxim *expressio unius est exclusio alterius* and to interpret the directive to "provide for the maintenance, support and eligibility standards of a system of free public schools" as prohibiting the General Assembly from promoting education outside of

the public school system. (Pl. Mem. at 17.) But doing so would be at odds with the longstanding principles that Tennessee courts apply when a statute is challenged as unconstitutional.

In evaluating the constitutionality of a statute, "the Court must be controlled by the fact that our Legislature may enact any law which our Constitution does not prohibit, and the Courts of this State cannot strike down one of its statutes unless it clearly appears that such statute does contravene some provision of the Constitution. *Willeford v. Klepper*, 597 S.W.3d 454, 465 (Tenn. 2020). The Court must therefore begin with the presumption that the statute is constitutional and "must indulge every presumption and resolve every doubt in favor of [its] constitutionality." *Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003) (citations omitted). It is an "established rule of statutory construction that where one reasonable interpretation would render a statute unconstitutional and another reasonable interpretation would render it valid, courts are to choose the construction which validates the statute." *Bailey v. Cnty. of Shelby*, 188 S.W.3d 539, 547 (Tenn.2006). Thus, a "heavy burden" is placed on one who attacks a statute. *Id.* Simply put, the Court must uphold the statute if at all possible. *See State v. McCoy*, 459 S.W.3d 1, 8 (Tenn. 2014) ("The Court must uphold the constitutionality of a statute wherever possible.").

Tennessee's Education Clause is plain and unambiguous. It requires the General Assembly to maintain and support a system of free public schools. But it does not preclude other legislative initiatives to promote the education of Tennessee's children, and Plaintiffs cite nothing to suggest that its voters or drafters intended such a proscription. Given those facts, it would be inappropriate to use a statutory maxim such as *expressio unius est exclusio alterius* to limit the General Assembly's authority in the realm of education.

Plaintiffs argue that other states have "enjoined voucher programs on these very grounds." (Pl. Mem. at 23.) But Tennessee's Education Clause and constitutional jurisprudence are unique

to Tennessee, as is the ESA Program. Decisions from other states are thus of limited use. And in any event, as shown below, the cases on which Plaintiffs rely are readily distinguishable.

To start, Plaintiffs cite the Florida Supreme Court's decision in *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006). In *Bush*, various groups challenged a Florida education choice program as unconstitutional under various provisions of that state's constitution, including provisions related to public education. *See* 919 So. 2d at 398. In pertinent part, the constitutional language at issue stated:

> It is . . . a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools[.]"

Id. at 403 (quoting Art. IX, § 1(a), Fla. Const.). In construing that language, the court noted that education provisions of the Florida Constitution had been amended numerous times specifically to limit the legislature's discretion in the realm of public education. *Id.* at 402-05. With that historical context in mind, the court read the uniform-schools clause narrowly and rejected the state's argument that the education clause established a "floor" of what the legislature could do to educate Florida's children. *Id.* at 408. The court instead concluded that Florida's education clause limits the legislature to "providing a uniform, high quality system of free public education, and does not authorize additional equivalent alternatives." *Id.* at 408. But the *Bush* court's decision rested on Florida's unique constitutional history and the qualifying language of its uniform-schools clause. Tennessee shares neither.

And in fact, Florida is an outlier even among those states with similarly qualified education clauses. The Supreme Courts of Nevada, Indiana, North Carolina, and Wisconsin have all upheld education choice programs under their state's uniform-school provisions. *See Schwartz v. Lopez*, 382 P.3d 886, 898 (Nev. 2016) (expressly rejecting *Bush* and holding that the "legislative duty 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) (expressly rejecting *Bush* and 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 Education Clause); *Hart v. State*, 774 S.E.2d 281, 289-90 (2015) (holding that a 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 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").

Moreover, the Ohio Supreme Court decision on which Plaintiffs rely actually upheld a school choice program "specifically targeting the Cleveland City School District" against a challenge under that state's education clause.[2] *Simmons-Harris v. Goff*, 711 N.E.2d 203, 214 (Ohio 1999). There, the Ohio Constitution required that the legislature to "make such provisions [as] will secure a thorough and efficient system of common schools throughout the State." *Id.* at 212 (quoting Ohio Const. art. VI, § 2)). The Ohio Supreme Court concluded that the limited program at issue did not violate that provision. *Id.* ("We fail to see how the School Voucher Program, at the current funding level, undermines the state's obligation to public education."). Although it acknowledged the possibility that a "greatly expanded" program might run afoul of

[2] The Ohio Supreme Court rejected the very argument that Plaintiffs cite it to support. *Compare* Pls. Mem. at 24 *to Simmons-Harris*, 711 N.E.2d at 212.

the state's education clause, the court explained that "[s]uch a program could be subject to a renewed constitutional challenge." *Id.* at n.2.

Finally, Plaintiffs cite the recent oral ruling of a trial court judge in West Virginia who stuck down that state's school choice program. (Pls. Mem. Ex. 5.) The hearing transcript reflects that the court's concern was primarily with the breadth of the program at issue, which would be the most expansive in the nation. (*Id.* at 16.) The West Virginia program provides families with state funds to be used for essentially any education-related expense. The State Board of Education conceded at argument that funds could be used to pay tuition at any private school or for homeschooling expenses with little oversight. (*Id.* at 32-33.) Significantly, the program is available to all West Virginia students, regardless of income, who are enrolled in a public school for 45 days at the time of their application or are eligible to enroll in kindergarten. (*Id.* at 17; *see also* W. Va. Code Ann. § 18-31-2.) The State Board of Education thus further conceded that even wealthy students who already attend private schools could participate in the program simply by enrolling in a public school for 45 days. (*Id.* at 26.)

The breadth of the West Virginia program readily distinguishes it from the ESA Program at issue here. The ESA Program is not applicable statewide but is available only to students who are zoned to attend Metro-Nashville Public Schools, Shelby County Schools, or schools in the Achievement School District. *See* Tenn. Code Ann. § 49-6-2602(3)(C). And even within those select areas, the ESA Program is further limited to low-income students, and there is a cap on the number of students who may participate. *See* Tenn. Code Ann. § 49-6-2604. Unlike the West Virginia program, the ESA Program is specifically targeted, and its potential impact is specifically limited. Other states have consistently upheld limited school choice programs in the face of similar education clause challenges. *See Simmons-Harris*, 711 N.E.2d at 214 (upholding a school choice

program available only to students in the Cleveland City School District); *Davis*, 480 N.W.2d at 473-74 (upholding a school choice program available only to students in the Milwaukee Public School system).

Tennessee's Education Clause expressly delegates the provision of public education to the General Assembly. That delegation of authority is not qualified in any way. So long as the General Assembly continues to maintain and support a system of free public schools, there is no basis for interference with its efforts to provide additional educational services beyond that baseline. Plaintiffs' claim under the Education Clause must fail.

II. The Remaining Factors Do Not Favor an Injunction.

A temporary injunction is appropriate only where it is "clearly shown" that the "the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action." Tenn. R. Civ. P. 65.04. Plaintiffs cannot show any such injury by implementation of the ESA Program. As explained above, the ESA Program does not replace or supplant the system of free public schools established by the General Assembly. And LEAs to which the ESA Prilot Program applies will receive an annual grant equal to the ESA amount for each participating student for the first three years of the program's existence. See Tenn. Code Ann. § 49-6-2605. There is no threat of immediate and irreparable harm to Plaintiffs or their schools. Injunctive relief is thus inappropriate.

CONCLUSION

For the reasons stated, Plaintiffs request for temporary injunctive relief must be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this Response has been forwarded by electronic mail (in lieu of U.S. Mail by agreement of the parties) and the electronic filing system on this 1st day of August, 2022, to:

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