

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.) Case No. 20-0143-II
) Chancellor Anne C. Martin, Chief Judge
TENNESSEE DEPARTMENT OF) Judge Tammy M. Harrington
EDUCATION, *et al.*,) Judge Valerie L. Smith
)
Defendants,)
)
and)
)
NATU BAH, *et al.*,)
)
Intervenor-Defendants.) **CONSOLIDATED**

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

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, the Metropolitan Government of Nashville and Davidson County (“Metropolitan Government”) and the Shelby County Government (“Shelby County”), (collectively, “Plaintiff Counties”), seek a declaratory judgment and injunctive relief from the

“Tennessee Education Savings Account Pilot Program,” Public Chapter 506, Tenn. Code Ann. §§ 49-6-2601, *et seq.* (“ESA Act”), which the Tennessee General Assembly passed and the Governor signed during the 2019 legislative session, and which the General Assembly amended via its passage of the Tennessee Investment in Student Achievement, Public Chapter 966, codified at Tenn. Code Ann. §§ 49-3-101, *et seq.* (“TISA”). The controversial ESA Act transfers critical state and local funding from struggling public schools to private schools. It was so unpopular that it garnered a bare majority of support in the General Assembly in 2019 only by exempting from its scope every local education agency in the state except those in Davidson and Shelby. Davidson and Shelby counties alone bear the bill’s financial burdens.

The ESA Act’s disparate and arbitrary treatment of the school districts in Davidson and Shelby counties is not rationally related to any legitimate governmental interest, much less narrowly tailored to a compelling governmental interest. Thus, it violates the Tennessee Constitution’s equal protection guarantees in Article I, Section 8, and Article XI, Section 8. Furthermore, by imposing a heavy financial and operational burden solely on the Plaintiff Counties and their school districts, the legislation violates the constitutional requirements of Article XI, Section 12, which requires the State to “provide for the maintenance, support and eligibility standards of a system of free public schools.”

Finally, the TDOE’s proposed launch of the program, which proposes direct payments to participating private schools for the 2022-23 school year, constitutes ultra vires action not authorized by the ESA Act itself.

For these reasons, the Court should declare the ESA Act unconstitutional and enjoin its enforcement.

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over this action pursuant to Tenn. Code. Ann. § 16-11-102.

2. This Court has the power to enter a declaratory judgment and issue injunctive relief pursuant to Tenn. Code Ann. § 1-3-121, Tenn. Code Ann. § 29-1-101, Tenn. Code Ann. §§ 29-14-102 and -103, and Tenn. R. Civ. P. 65.

3. This Court has personal jurisdiction over Defendants pursuant to Tenn. Code Ann. §§ 20-2-222 and -223.

4. Venue is proper in this judicial district pursuant to Tenn. Code Ann. §§ 4-4-104 and 20-4-101(a), as this cause of action arose in Davidson County, Tennessee.

PARTIES

5. Plaintiff Metropolitan Government is a consolidated city and county government formed by the City of Nashville and Davidson County and incorporated pursuant to Tenn. Code Ann. §§ 7-1-101, *et seq.* The Metropolitan Government is responsible for adopting a budget for and funding its public schools and administering the schools through its Metropolitan Board of Public Education. Metropolitan Charter §§ 9.01, 9.03. The Metropolitan Government's school system is commonly referred to as Metropolitan Nashville Public Schools ("MNPS").

6. Plaintiff Shelby County Government is a home charter local government in Tennessee. Shelby County Government is responsible for adopting a budget for its public schools and administering Shelby County Schools ("SCS") through the Shelby County School Board.

7. Defendant Tennessee Department of Education ("TDOE") is the State of Tennessee's education agency. The TDOE is responsible for the enforcement and administration of the ESA Act. The TDOE is located at 710 James Robertson Parkway, Nashville, Tennessee 37243.

8. Defendant Dr. Penny Schwinn is the Education Commissioner for the TDOE. Dr. Schwinn is sued in her official capacity and has an office at 710 James Robertson Parkway, Nashville, Tennessee 37243.

9. Defendant Bill Lee is the Governor of the State of Tennessee. The Tennessee Constitution vests the Governor with “the supreme executive power of this state.” TENN. CONST., art. III, § 1. As the Chief Executive for the State of Tennessee, Governor Lee has a constitutional obligation to “take care that the laws be faithfully executed.” *Id.* As the Chief Executive, Governor Lee has the obligation to ensure that laws be executed consistent with the mandates of the Tennessee Constitution. Governor Lee is sued in his official capacity and has an office at State Capitol, 1st Floor, 600 Dr. Martin Luther King, Jr. Blvd., Nashville, Tennessee 37243.

FACTS

I. THE ESA ACT, WHICH APPLIES ONLY TO LOCAL EDUCATION AGENCIES IN DAVIDSON AND SHELBY COUNTIES, DIVERTS SCHOOL FUNDING FROM THE LEAS TO ESAS, WHILE STILL REQUIRING PLAINTIFF COUNTIES TO FUND THE LEAS FOR ESA STUDENTS.

10. In May 2019, the Tennessee General Assembly passed the ESA Act, Public Chapter 506, establishing the “Tennessee Education Savings Account Pilot Program.” Tenn. Code Ann. §§ 49-6-2601, *et seq.*

11. Under the ESA Act, a participating student will receive an education savings account to pay tuition, fees, and other expenses related to attending a participating private school. As originally drafted, the ESA Act provides that a participating student’s account is funded by diverting 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. §§ 49-6-2603(a)(4), -2605(a), -2607(a).

12. On April 28, 2022, the General Assembly passed the TISA, which Gov. Lee signed into law on May 2, 2022. Section 101 of the TISA states: “For purposes of promulgating rules, establishing and evaluating the fiscal capacity calculation, determining fiscal capacities, determining equalization values, determining local contributions, creating and publishing the TISA guide, creating or procuring a professional development series on the TISA, and producing accountability reports for the 2023-2024 school year, this act takes effect upon becoming a law, the public welfare requiring it. For all other purposes, this act takes effect July 1, 2023, the public welfare requiring it.”

13. As a result of TISA’s passage, the General Assembly also amended several provisions of the ESA Act: Tenn. Code Ann. §§ 49-6-2603, -2605(a), and -2608(e).

14. As a result of these amendments, in the 2023-24 school year, the TISA will replace the BEP as the funding formula for Tennessee’s public schools. The TISA will also replace the BEP in 2023-24 as the formula on which ESA funding will be calculated.

15. More specifically, beginning in the 2023-24 school year, under Tenn. Code Ann. § 49-6-2605(a), “[t]he maximum amount annual amount to which a participating student is entitled under the program must be equal to the amount representing the per pupil state and local funds generated and required through the TISA for the LEA in which the participating student resides, but must not exceed the combined statewide average of required state and local TISA allocations per pupil.” *Id.*

16. The TISA is a student-based funding formula that includes a “base funding amount,” “weighted allocations” where a student satisfies certain criteria (including but not limited to economic disadvantage, concentrated poverty, and unique learning needs), and “direct allocations,” where a student satisfies certain criteria (including but not limited to being assigned to career and technical program, being a K-3 student, and attending a public charter school). Public Ch. 966 at Section 1, codified at Tenn. Code Ann. §§ 49-3-104, -105.

17. Rulemaking is underway for the TISA, so LEAs do not yet know the precise funding figures for their districts. Under preliminary figures published by the TDOE, for example, MNPS will receive only 2% of the proposed new education investment, will shoulder more than 17% of the \$2.5 billion in required local matches across the state, and educate more than 8% of the State's student population.

18. The TDOE has not issued guidance on its interpretation of whether "the amount representing the per pupil state and local funds generated and required through the TISA for the LEA in which the participating student resides" in Tenn. Code Ann. § 49-6-2605(a) means the student-specific funding amount required under the TISA for an individual participating student or the average funding amount for all students in the LEA.

19. To the extent ESAs will be funded based on the student-specific per-pupil amount required under the TISA for an individual participating student, such amount may be lower than the statewide average. TISA funds students at a "base funding amount" and weighted allocations. The weighted allocations are a percentage of the base funding based on students that meet the definitions for economically disadvantaged, concentrated poverty, residence in a small district, residence in a sparse district, or having a unique learning need. A district would receive the base funding amount of \$6,860 for a student that did not generate any additional funding based on the weighted allocations. Because the statewide average funding amount will include students whose funding is "weighted," it will necessarily be higher than the base amount.

20. The passage of the TISA does not alter the ESA Act's requirement that participating students be counted in the LEAs' enrollments despite their attendance at private schools, nor does it alter Plaintiff Counties' responsibility to provide funding to MNPS and SCS based on their phantom enrollment.

21. Thus, while the specific amount of funding that MNPS and SCS will lose will likely be different under the TISA than it is under the BEP, the fact that Plaintiff Counties must fund the program remains true under the TISA.

22. This requirement—that students attending private school with the use of public funds through the ESA Program be counted in their zoned LEAs’ enrollments, Tenn. Code Ann. § 49-6-2605(b)(1)—applies in no counties other than Davidson and Shelby and is precisely the mechanism that the General Assembly implemented to shift the cost of funding the ESA Program to Plaintiff Counties.

23. The Tennessee Code refers to public-school systems as “local education agencies” or “LEAs.” Tenn. Code Ann. § 49-1-103(2). The definition of LEA includes but is not limited to a “metropolitan school system” and a “county school system.” MNPS is a metropolitan school system. SCS is a county school system.

24. The ESA Act strictly limits the pool of public-school students eligible to receive education savings accounts to two LEAs: MNPS and SCS.

25. The ESA Act defines “eligible student” as a student from a family with annual household income not exceeding twice the federal income eligibility guidelines for free lunch and who meets the following geographic restrictions:

“(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;

(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).

26. “Priority” and “bottom ten percent” schools referred to in Section 49-6-2602(3)(C) are described in the relevant code sections as follows:

- a. Tenn. Code Ann. § 49-1-602(b)(1) states that, 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.”
- b. Tenn. Code Ann. § 49-1-602(b)(2) states that “[s]chools 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.”
- c. Tenn. Code Ann. § 49-1-602(b)(3) states, “By 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.”

27. The “achievement school district (ASD)” referred to in Section 49-6-2602(3)(C) is “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). Schools assigned to the ASD after June 1, 2017, are limited to “priority schools.” *Id.* § 49-1-614(c)(1).

28. The “eligible student” definition in the ESA Act is based on the number of schools on the priority lists for 2015 and 2018 (the two priority school lists that immediately preceded the ESA Act’s passage) and the bottom 10% list in 2017, and on schools in the ASD as of May 24, 2019, the ESA Act’s effective date.

29. Even though 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. Any income-eligible families in those school districts are eligible for an ESA, whether their children attend a low-performing school or not.

30. In 2015, 83 schools comprised the priority list. Seventy-one of those schools came from five LEAs, and the other twelve schools were in the ASD.

31. In 2015, 15 out of 151 Davidson County schools (9.9%) and 45 out of 217 Shelby County schools (20.7%) were in a priority status. The same year, 5 out of 78 Hamilton County schools (6.4%), 4 out of 89 Knox County schools (4.5%), and 2 out of 27 Madison County schools (7.4%) were in a priority status.

32. A true and correct list of the schools that the TDOE identified as priority schools in 2015 is available at <https://www.tn.gov/education/data/accountability/2015-school-accountability.html> and attached as Exhibit A.

33. In 2017, the TDOE identified 168 (later reduced to 166) schools from 14 LEAs as bottom 10% schools. Caroline Bauman, *Is your school in Tennessee’s bottom 10 percent? Here’s a list of 166 schools the state says need to improve*, CHALKBEAT, Feb. 8, 2018, <https://chalkbeat.org/posts/tn/2018/02/08/is-your-school-in-tennessees-bottom-10-percent-heres-a-list-of-166-schools-that-need-to-improve-academically/>. A complete list of the 168 schools originally identified is attached as Exhibit B.

34. In 2017, 41 out of 163 Davidson County schools (25.2%) and 65 out of 206 Shelby County schools (31.6%) were on the bottom 10% list. The same year, 2 out of 7 Fayette County schools (28.6%), 13 out of 78 Hamilton County schools (16.7%), 7 out of 90 Knox County schools (7.8%), and 8 out of 23 Madison County schools (34.8%) were on the bottom 10% list.

35. In 2018, 82 schools comprised the priority list. Sixty-four of those schools came from seven LEAs, with the other eighteen schools in the ASD.

36. In 2018, 21 out of 159 Davidson County schools (13.2%) and 27 out of 200 Shelby County schools (13.5%) were in a priority status. The same year, 1 out of 7 Fayette County Schools (14.3%), 9 out of 78 Hamilton County schools (11.5%), and 4 out of 21 Madison County schools (19.0%) were in a priority status. Knox County had no priority schools in 2018.

37. Hamilton and Madison counties' LEAs experienced a significant downgrade in 2018 from their priority school listings in 2015. Madison County's LEA had a significantly higher concentration of priority schools than the LEAs in Davidson and Shelby counties in 2018—5.5% greater than in Shelby County and nearly 6% greater than in Davidson. Fayette County's LEA likewise had a higher concentration of priority schools than the LEAs in Davidson and Shelby counties in 2018.

38. In 2018, the concentration of priority schools in Hamilton County's LEA was only 2% less than in Shelby County and only 1.7% less than in Davidson County.

39. A true and correct list of the schools that the TDOE identified as priority schools in 2018 is available at <https://www.tn.gov/education/data/accountability/2018-school-accountability.html> and attached as Exhibit C.

40. Based on the dates and number of schools used to identify the LEAs subject to the ESA Act, only the LEAs in Davidson and Shelby counties met the requirements of having

ten or more schools that were identified as priority schools in 2015, were among the bottom 10% of schools in 2017, and were identified as priority schools in 2018.

41. All schools in the ASD as of the ESA Act's effective date of May 24, 2019, were in Davidson County or Shelby County.

II. THE STATE DEFENDANTS INTEND TO LAUNCH THE ESA PROGRAM IN THE 2022-23 SCHOOL YEAR.

42. On July 13, 2022, Governor Lee issued a press release declaring that the State would “work to help eligible parents enroll [in the ESA program] *this school year*.” (July 13, 2022, Press Release (emphasis added), attached as Exhibit D.)

43. On July 20, 2022, Governor Lee issued a press release with a link to “[a]n open letter to parents of K-12 children in Shelby County, Metro Nashville Public Schools, and the Achievement School District” promising that private schools (called “independent schools” in the letter) in Nashville and Memphis would have seats available for ESA students this school year. See “Tennessee Schools Pledge Robust Support for ESA Implementation This School Year,” available at <https://www.tn.gov/governor/news/2022/7/20/tennessee-schools-pledge-robust-support-for-esa-implementation-this-school-year.html>. (Open Letter at 1, attached as Exhibit E.) The letter also noted that the “core mission of the ESA program is for students to be in the most academically tailored and supportive environment possible.” (*Id.* at 1.)

44. Also during the week of July 18-22, 2022, the TDOE began updating the website devoted to the ESA Act. See “Tennessee Education Savings Account Program,” available at <https://esa.tnedu.gov/> (“ESA Program Website”).

45. As recently as July 20, 2022, the ESA Program Website included a link to an “Intent to Enroll Form” on which families could indicate their intent to enroll in the ESA Program in August 2022, January 2023, or August 2023. The form, which is also referenced in a short video about the ESA Program posted at the ESA Program Website,

<https://www.youtube.com/watch?v=Gi0o20Ar1rQ>, has been removed from the ESA Program Website. Before it was removed, it provided as follows:

Enrollment Options:*

August 2022 (22-23 school year)

January 2023 (mid-year enrollment)

August 2023 (23-24 school year)

Please select the enrollment date you are interested in applying for.

46. The ESA Program Website also contains a link to a Frequently Asked Questions booklet that is labeled for the “2022-23 School Year” and is available for download. (“FAQs Booklet,” attached as Exhibit F.)

47. The FAQs Booklet contains a link for families to submit an application for a student to participate in the ESA Program. (FAQs Booklet at 9 (referencing <https://familymembers.esa.tnedu.gov/apply-now/>), Ex. F.) That hyperlink, which is also referenced in the ESA Application Checklist linked at the ESA Program Website, https://esa.tnedu.gov/wp-content/uploads/2022/07/ESA-Application-Checklist-22-23_2.pdf, is also disabled.

48. During the week of July 18-22, 2022, the ESA Program Website also included a link to an “Intent to Participate” form that interested private schools could complete. The link to the Intent to Participate form is disabled. See https://stateoftennessee.formstack.com/forms/esa_intent_to_participate.

49. The TDOE’s FAQs posted on the ESA Program Website and available for download state that in 2022-23, ESA funding will be distributed via requests for reimbursement from participating private schools to the TDOE as opposed to via deposits into participating students’ ESAs. FAQs Booklet at 12, Ex. F.

50. The FAQs suggest that this is because the State Defendants still must procure contracts for the operational platform that will be utilized for the ESA accounts themselves. The FAQs state:

How will ESA funds be distributed in year one?

For the 2022-23 school year, participating non-public schools will be required to fund the student expenses (tuition, fees, computers, etc.) and then submit an invoice to the department for reimbursement. The department will be competitively procuring an application and wallet platform that will be operational beginning in the 2023-23 school year.

51. The ESA Act does not permit direct reimbursements to participating schools. Rather, the Act contemplates “ESAs” or “education savings accounts” to be created for each participating student, for all ESA funding to be deposited into those accounts, and for participating families to seek reimbursement from the accounts. Tenn. Code Ann. §§ 49-6-2602(4), -2602(11), -2605(a), -2605(b)(1), -2607(a), -2607(c).

52. In a rush to implement the ESA Act, the TDOE is willing to ignore these plain language requirements in the ESA Act.

III. THE LEGISLATIVE HISTORY OF THE ESA ACT SHOWS THAT THE GENERAL ASSEMBLY INTENTIONALLY DRAFTED THE ACT TO APPLY ONLY TO LEAS IN DAVIDSON AND SHELBY COUNTIES, AND TO “PROTECT” ALL OTHER TENNESSEE COUNTIES FROM THE ACT’S HARMFUL CONSEQUENCES.

A. House Bill No. 939 Moves Through Committees

53. House Majority Leader William Lamberth (R-Portland) filed House Bill No. 939 on February 7, 2019, as a “caption bill.” A caption bill contains a non-substantive amendment to existing law intended to meet the deadline for filing legislation without revealing the real purpose of the legislation. Under House rules, caption bills are held on the House clerk’s desk and not allowed to proceed through committees until an amendment is filed that “makes” the bill and contains the substance of the legislation.

54. House Bill No. 939 proceeded to the House Curriculum, Testing, & Innovation Subcommittee on March 19, 2019, after Amendment No. 1 (HA0188) to the bill was filed by

Rep. Mark White (R-Memphis). Rep. White represents significant portions of the cities of Germantown and Collierville in Shelby County.

55. Amendment No. 1 sought to add a new part to Title 49, Chapter 6 of the Tennessee Code to be known as the “Tennessee Education Savings Account Act.”

56. Amendment No. 1 placed several restrictions on eligibility for an ESA. Most significantly for this litigation, the amendment defined “eligible student” in Section 49-6-2602(3)(C) to be a student “zoned to attend a school in an LEA with three (3) or more schools among the bottom ten percent (10%) of schools in accordance with § 49-1-602(b)(3).”

57. When Amendment No. 1 was filed, 2017 was the most recent year in which TDOE notified LEAs of any schools in their districts that were in the bottom 10% of schools in Tennessee. Based on that data, only six school districts had three or more schools in the bottom 10%: those in Davidson, Hamilton, Knox, Madison, and Shelby counties and the ASD. These were the only school systems to which Amendment No. 1 applied. The Germantown and Collierville school districts, which Rep. White represented, were not covered by the Amendment.

58. The House Curriculum, Testing, & Innovation Subcommittee recommended the bill for passage if amended as set forth in Amendment No. 1. The House Education Committee Government Operations Committee; Finance, Ways, & Means Subcommittee; and Finance, Ways, & Means Committee also recommended the bill for passage if amended as set forth in Amendment No. 1.

59. In the House Finance, Ways, & Means Committee hearing on April 17, 2019, Rep. Matthew Hill (R-Jonesborough) referred to the bill as a “four-county pilot ESA program.” When asked by Rep. Jason Zachary (R-Knoxville) to define “pilot program,” Rep. Hill responded that it was a pilot program because it “limits it down to just four counties” and

“will stay in those four counties unless the legislature were to ever choose in the future to revisit the issue.”

B. House Bill No. 939 Is Debated on the House Floor

60. Rep. White withdrew Amendment No. 1 when House Bill No. 939 was considered on the House floor for third and final reading on April 23, 2019. The House then approved Amendment No. 2 (HA0445), which Rep. Susan Lynn (R-Mt. Juliet) sponsored.

61. Amendment No. 2 made multiple changes to the Act. Most significantly, it placed even more limits on the number of LEAs subject to the Act.

62. Amendment No. 2 changed the definition of “eligible student” to be a student who, among other requirements “[i]s zoned to attend a school in an LEA that had three (3) or more schools identified as priority schools in 2015 in accordance with § 49-1-602(b) and that had three (3) or more schools among the bottom ten percent (10%) of schools as identified by the department in 2017 in accordance with § 49-1-602(b)(3).”

63. Amendment No. 2 applied the Act only to LEAs with three or more schools among the bottom 10% based on 2017 data *and* three or more schools identified as priority schools based on 2015 data.

64. The LEAs with three or more priority schools in 2015 were in Davidson, Hamilton, Knox, and Shelby counties. The LEAs with three or more schools among the bottom 10% of Tennessee schools in 2017 were in Davidson, Hamilton, Knox, Madison, and Shelby counties.

65. Because all criteria for defining an “eligible student” were tied to specific years in Amendment No. 2, no new LEAs could ever be added to or removed from the definition without action by the General Assembly. The Act as amended by Amendment No. 2 would have applied in perpetuity, unless amended, only to LEAs in Davidson, Hamilton, Knox, and Shelby counties.

66. The LEAs represented by Rep. Lynn, the sponsor of Amendment No. 2, were not included in her proposed amendment.

67. Rep. Jason Powell (D-Nashville) stated on the House Floor that the entire Davidson County delegation was opposed to this bill. Rep. Powell sought to exclude Davidson County from the bill by filing Amendment No. 5 (HA0451). The House voted to table Amendment No. 5.

68. Rep. Dwayne Thompson (D-Cordova), whose district was also affected, challenged the constitutionality of the bill's limited application and sought to exclude Shelby County from the bill by filing Amendment No. 6 (HA0452). The House voted to table Amendment No. 6.

69. Rep. John Ray Clemmons (D-Nashville) stated on the House floor "[w]e all know why the language is the way it is, it seeks to single out Davidson and Shelby counties unconstitutionally."

70. Rep. Clemmons sought to make the bill an act of general application by filing Amendment No. 13 (HA0462) to include within the Act any LEA that had three or more schools identified as priority schools in the immediately preceding priority cycle and had three or more schools among the bottom 10% of schools for the most recent year in which the Department identified such schools. The House voted to table Amendment No. 13.

71. Even after the scope of House Bill No. 939 was narrowed by Amendment No. 2, it received the bare majority of votes required by the Tennessee Constitution to pass legislation, with 50 ayes and 48 nays, on April 23, 2019.

72. This passage came after the vote was held open for 40 minutes with the House deadlocked at 49 ayes and 49 nays.

73. Rep. Jason Zachary (R-Knoxville) changed his vote from nay to aye to break the tie, later telling reporters on camera that he had received assurances from then-House

Speaker Glen Casada (R-Franklin) that Knox County would be excluded and “held harmless” from the Senate version of the bill. Rep. Zachary further stated, “I support the ESAs and I support the premise of ESA, but I couldn’t do it unless Knox County was taken out.” Joel Ebert, Jason Gonzales, and Natalie Allison, *Bill giving parents public money for private school narrowly passes House in historic vote*, THE TENNESSEAN, Apr. 23, 2019, video statements from Rep. Zachary and Then-House Speaker Casada available at <https://www.tennessean.com/story/news/politics/2019/04/23/tennessee-school-vouchers-bill-lee-education-savings-accounts-house-vote/3548033002/>.

74. Then-House Speaker Casada confirmed Rep. Zachary’s statements, stating on camera: “Knoxville, Knox County will be taken out.” *Bill giving parents public money for private school narrowly passes House in historic vote*, THE TENNESSEAN, Apr. 23, 2019, video statements from Rep. Zachary and Then-House Speaker Casada available at <https://www.tennessean.com/story/news/politics/2019/04/23/tennessee-school-vouchers-bill-lee-education-savings-accounts-house-vote/3548033002/>.

75. Rep. Hill summarized the House majority’s dual motives of unilaterally imposing the ESA Act on the LEAs in Davidson and Shelby counties while “protecting” every other school district from the bill when he stated on the House Floor: “Today, on this Floor, the House is leading. We are leading the way to protect LEAs, while also ensuring that our poorest children in those deep blue metropolitan areas have a fighting chance at a quality education.”

76. Recognizing that the severe limits on applicability made the Act constitutionally vulnerable, Amendment No. 2 added a new Section 49-6-2611(c) purporting to deprive local boards of education of “authority to assert a cause of action, or intervene in any cause of action, challenging the legality of this part.”

C. Senate Bill No. 795 Moves Through Committees

77. Senate Majority Leader Jack Johnson (R-Franklin) filed Senate Bill No. 795, the Senate companion to House Bill No. 939, on February 5, 2019.

78. On April 10, 2019, the Senate Education Committee recommended Senate Bill No. 795 for passage with Amendment No. 1 (SA0312) by Sen. Dolores Gresham (R-Somerville).

79. This amendment was identical to Amendment No. 1 (HA0188) to House Bill No. 939, applying the Act to five counties—Davidson, Hamilton, Knox, Madison, and Shelby—with the potential to automatically include or drop counties in the future.

80. Amendment No. 1 did not apply to Sen. Gresham’s home county of Fayette County or to any of the other six counties in Sen. Gresham’s district, despite Fayette County having two out of seven schools (28.6%) on the 2017 bottom 10% list and one out of seven schools (14.3%) on the 2018 list of priority schools.

D. Senate Bill No. 795 Is Debated on the Senate Floor

81. When Senate Bill No. 795 reached the Senate Floor, Sen. Gresham withdrew Amendment No. 1, and the Senate voted to substitute House Bill No. 939 as adopted by the House (House Amendment No. 2) as the companion Senate bill. The House version applied the Act to LEAs in four counties: Davidson, Hamilton, Knox, and Shelby.

82. Immediately thereafter, the Senate adopted Senate Amendment No. 5 (SA0417) by Sen. Bo Watson (R-Chattanooga), which stripped the language from House Bill No. 939 and substituted new language.

83. The language in Senate Amendment No. 5 further narrowed the definition of “eligible student” in Section 49-6-2602(3)(C) and further narrowed the number of counties with LEAs covered by the bill.

84. The new language increased from three to ten the number of schools that had to be identified as priority schools in 2015 and 2018 and increased from three to ten the number of schools that had to be among the bottom 10% of schools in the state in 2017.

85. The new language also included within the definition of “eligible student” a student zoned to attend a school in the state’s ASD on the act’s effective date.

86. By narrowing the definition of “eligible student” in this manner, Amendment No. 5 removed the LEAs in Knox County and Hamilton County, Sen. Watson’s home county, from the bill’s application. Knox County’s LEA had four priority schools in 2015 and none in 2018. Hamilton County had five priority schools in 2015 and nine in 2018.

87. The General Assembly utilized the 2018 priority schools list to define “eligible student,” even though the 2018 list was based on unreliable TNReady test results for the 2017-18 school year. The General Assembly had previously passed legislation precluding any school from being identified as a priority school, any school from being assigned to the ASD, and any state report card “letter grade” from being assigned to a district based on “student performance and student growth data from the TNReady assessments administered in the 2017-2018 school year.” Tenn. Code Ann. § 49-1-602(a)(4); Tenn. Code Ann. § 49-1-228(e). The General Assembly passed this legislation following a disruptive breakdown in the TNReady assessment process during the 2017-18 school year.

88. The only LEAs encompassed by the new definition of “eligible student” in Amendment No. 5 were those in Davidson and Shelby counties.

89. All criteria for defining an “eligible student” in Amendment No. 5 were based on specific years; therefore, no LEAs could ever be added to or removed from the definition without action by the General Assembly.

90. Senate Amendment 5, which would later become the version recommended by the Conference Committee Report, also introduced the term “pilot” into the bill for the first time.

91. Sen. Steven Dickerson (R-Nashville) stated on the Senate floor that when the bill was first proposed, it “was more expansive, covered more counties, and in order to keep it alive and it keep votes going, it shrunk down in scope.”

92. Sen. Dickerson had introduced Amendment No. 3 to make the Act apply “statewide” to all LEAs by deleting the language in Section 49-6-2602(3)(C), thereby removing the requirements related to priority schools and lowest-performing schools. Sen. Dickerson also introduced Amendment No. 4 that, in the alternative, would expand the number of LEAs covered by Section 49-6-2602(3)(C) to include any LEA with at least three priority schools in 2015 and at least three schools in the bottom 10% in 2017 and schools in the ASD.

93. Sen. Dickerson expressed concerned about the “unfair” process, noting that House votes were acquired based on promises to exclude certain counties from the bill:

So, for this bill to really be fair, I think it needs to apply to every child in Tennessee. There are members in this chamber who have said that they will vote for this bill because it does not apply to their county. It’s an okay bill, so long as it does not apply to their county. I think if it’s a good bill, we should embrace it for every county. And not to cut with too fine a point here, but in the, our, our chamber down the hall, the 50th vote came with the specific stipulation that this bill would not apply to the 50th vote’s county. It also came with a significant financial reward for that individual’s county, if reports are to be believed. And I really worry that this is very unfair, and this is not the way that we should be doing our business. I think this comes down to a victory at any cost.

94. Sen. Dickerson withdrew Amendment No. 3 and Amendment No. 4 when it became clear they would be defeated.

95. The Senate adopted House Bill No. 939, as amended, with 20 ayes and 13 nays, on April 25, 2019.

E. Conference Committee Report and Final Passage

96. When the Senate’s version of the bill was transmitted to the House, the House non-concurred in the amendments to the bill adopted by the House. The Senate refused to recede from the amendments. The House refused to recede from its non-concurrence.

97. On April 30, 2019, the House and Senate speakers appointed members to a conference committee to resolve the differences between the two bills. On May 1, the conference committee submitted its report to both chambers.

98. The conference committee bill retained the definition of “eligible student” in the bill as adopted by the Senate, which limited the bill’s application to LEAs in Davidson and Shelby counties and ensured that the bill could never apply in any other county.

99. Rep. Patsy Hazelwood (R-Signal Mountain), a resident of Hamilton County, voted against the bill when it passed the House on April 23, 2019, but she voted for the conference committee report.

100. Rep. Hazelwood explained on the House floor on May 1 why she changed her vote: “I committed to vote for ESAs if the Hamilton County was excluded from the program. The language that’s in this conference report here today does that. As a result, I’m going to be keeping my commitment and I’m going to vote for this bill.”

101. Sen. Joey Hensley (R-Hohenwald), speaking on the Senate floor on May 1, asked the bill’s sponsor to confirm that the bill only applied to two counties, with no exceptions, saying, “[I] just want it to be on the record and assured that this conference report continues to prevent any future LEAs from being included in this.”

102. Sen. Hensley wanted to confirm that “no other LEA will be able to grow into the program over the years.”

103. Bill sponsor Sen. Dolores Gresham (R-Somerville) responded to Sen. Hensley, “That’s the intent of the General Assembly today.”

104. The Conference Committee Report also maintained the reference from Senate Amendment 5 to the bill as a “pilot program” and stated that its intent was to provide “funding for access to additional educational options to students who reside in LEAs that have consistently and historically had the lowest performing schools.”

105. Sen. Yarbro (D-Nashville) speaking on the Senate floor on April 25, 2019, called references to a “pilot project” a “false premise.” He noted that the bill, unlike true pilot projects, did not have a “sunset” provision. Rather, he said, the bill created a permanent \$110 million state program for 15,000 students in only two counties.

106. The Conference Committee report included an unusual exception to the standard severability clause, stating that if any provision of the act were held invalid, that invalidity “shall not expand the application” of the act to eligible students other than those identified in Section 2602(3), *i.e.*, students in Davidson and Shelby counties’ LEAs. In effect, this is a “reverse severability clause” because it provides that if the provisions that limit the ESA Act’s scope to the LEAs in Davidson and Shelby counties are struck down, then the entire Act fails.

107. The Conference Committee report reinstated the language from House Bill No. 939 that a local board of education does not have authority to assert a cause of action challenging the Act.

108. Both the House and Senate adopted the Conference Committee report on May 1, 2019, the House by 51 ayes and 46 nays, and the Senate by 19 ayes and 14 nays.

F. IMPLEMENTATION OF THE ESA ACT CONFIRMS THAT THE ACT APPLIES ONLY TO TWO COUNTIES

109. The ESA Act charges the TDOE with implementation of the Act. Tenn. Code Ann. §§ 49-6-2604, -2605, -2606, -2607, -2608.

110. The State Board of Education is authorized to promulgate rules “to effectuate the purposes” of the ESA Act. Tenn. Code Ann. §§ 49-6-2603(l), -2605(a), -2608(f), -2610. The State Board filed a Notice of Rulemaking Hearing containing proposed rules to effectuate the ESA Act with the Tennessee Secretary of State on August 11, 2019. Those rules were posted for public comment, and a public hearing was held on October 1, 2019.

111. Following the Rulemaking Hearing, the State Board filed a Rulemaking Hearing Rule(s) Filing Form on November 27, 2019.

112. The General Assembly’s Joint Government Operations Committee met on January 27, 2020, to consider the State Board’s proposed ESA Program rules. The Committee voted to make a “positive recommendation” of the rules over objections by Committee members from Davidson and Shelby counties.

113. The rules became effective on February 25, 2020, and are available at <https://publications.tnsosfiles.com/rules/0520/0520-01/0520-01-16.20200225.pdf>.

114. The ESA Act’s definition of an “eligible student” does not identify Shelby County, Davidson County, or their LEAs by name, instead relying on the number of priority and low-performing schools in the counties’ LEAs to eliminate all other school districts from its application. Tenn. Code Ann. § 49-6-2602(3)(C).

115. In contrast, the State Board’s rules for ESAs define an eligible student as one who, among other requirements, is “zoned to attend a school in Shelby County Schools, Metropolitan Nashville Public Schools, or is zoned to attend a school that was in the Achievement School District on May 24, 2019.” Rule 0520-01-16-.02(11)(b).

116. The FAQs Booklet further confirms that only students zoned to attend school in Davidson County, Shelby County, or the ASD are eligible to apply for the ESA Program. FAQs Booklet at 5, Ex. F.

IV. THE ESA ACT WILL HAVE A DETRIMENTAL IMPACT ON THE METROPOLITAN GOVERNMENT AND SHELBY COUNTY GOVERNMENT'S BUDGETS AND ON MNPS AND SCS OPERATIONS AND FINANCE.

A. The ESA Act's Impact on Plaintiff Counties' Revenues

117. 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.

118. The BEP includes a state share of funding and a local share of funding. Tenn. Code Ann. § 49-3-356. “From the local portion of such revenues, there shall be a distribution of funds for equalization purposes pursuant to a formula adopted by the state board” *Id.* The formula is intended to account for the local jurisdiction’s ability to raise revenue from property taxes. Tenn. Code Ann. § 49-3-307(a)(10); *see also* TDOE, “The Basic Education Program,” General Overview of the BEP, <https://www.tn.gov/sbe/committees-and-initiatives/the-basic-education-program.html>.

119. The same is true under the TISA, which also accounts for fiscal capacity and includes a local and state contribution requirement. Tenn. Code Ann. § 49-3-109(a)–(e).

120. The BEP appropriation for each LEA is calculated to include four components: instructional salaries and wages, instructional benefits, classroom, and nonclassroom. Tenn. Code Ann. § 49-3-307(a)(2)(A). All BEP funds “shall be spent on BEP components.” Tenn. Code Ann. § 49-3-351(c).

121. The BEP formula is “student-based such that each student entering or exiting an LEA shall impact generated funding.” Tenn. Code Ann. § 49-3-307(a)(11).

122. The Metropolitan Government is responsible for adopting a budget for MNPS. Tenn. Code Ann. §§ 49-2-101, *et seq.*

123. The total MNPS operating budget for the current fiscal year 2022-23 is \$1,105,502,500.

124. To calculate enrollment for funding purposes, the TDOE uses an enrollment measure called the average daily membership (“ADM”) for the prior year. Tenn. Code Ann. § 49-3-351(d).¹

125. Based on July 2022 BEP estimates, the total State portion of the BEP funding allocation is \$297,722,000. The amounts representing “Capital Outlay Reserved for Charters Schools” (\$3,096,000) and “Funding Reserved for ASD and Public Charter Commission” (\$35,280,000) are removed before funds are sent to local districts. After the Capital Outlay Reserved for Charter Schools and Funding Reserved for ASD and Public Charter Commission are removed, MNPS expects to receive \$259,346,000 in state funding for the current fiscal year. MNPS FY23 BEP July Final Allocation, attached as Exhibit G.

126. MNPS’s ADM for the 2021-2022 school year was 78,521. *Id.* Accordingly, the per-pupil amount of State BEP funds is \$3,791.62 per pupil.

127. For the 2022-23 fiscal year, the BEP requires the Metropolitan Government to contribute a local match of \$421,825,000, which averages to \$5,372.13 per pupil. *Id.*

128. MNPS’s combined per-pupil amount (state and local) is \$9,163.75.

129. The Metropolitan Government’s local share of funding under the BEP formula is substantially larger than the state’s share of that funding for MNPS. Furthermore, the Metropolitan Government contributes significantly more funding to MNPS than the BEP

¹ Tennessee law defines “average daily membership” or “ADM” as “the sum of the total number of days enrolled divided by the number of days school is in session during this period as provided in the rules and regulations of the state board.” Tenn. Code Ann. § 49-3-302(2).

requires. The Metropolitan Government's total local contribution (inclusive of the local match) to the MNPS budget is \$847,759,500, which averages to \$11,050 per pupil.

130. The Shelby County Government is responsible for adopting a budget for SCS.

131. The total SCS operating budget for the current 2022-23 fiscal year is \$2,089,210,507.

132. Based on July 2022 BEP estimates, the total State portion of the BEP funding allocation for SCS is \$651,789,000. The amounts representing "Capital Outlay Reserved for Charters Schools" (\$9,800,000) and "Funding Reserved for ASD and Public Charter Commission" (\$73,297,000) are removed before funds are sent to local districts. Thus, SCS expects to receive \$568,692,000 in state funding for the current fiscal year. SCS FY23 BEP July Final Allocation, attached as Exhibit H.

133. SCS's ADM for the 2021-2022 school year was 109,835. *Id.* Accordingly, the per-pupil amount of State BEP funds is \$5,934.26.

134. For the current fiscal year, the BEP requires Shelby County Government to contribute a local match of \$283,036,000, which averages to \$2,576.92 per pupil. *Id.*

135. SCS's combined per-pupil amount (state and local) for 2022-23 is \$8,511.18.

136. As outlined in the ESA Act and proposed rules, the maximum annual amount that MNPS or SCS must contribute to each participating student's ESA is the per-pupil state and local funding required by the BEP for each LEA or the combined statewide per-pupil average of BEP funding, whichever is less. Tenn. Code Ann. § 49-6-2605(a).

137. The combined statewide BEP average is calculated by dividing the total state and local dollars required and allocated statewide through the BEP for the school year at issue by the statewide ADM to get a per-pupil amount. *See* Tennessee Comptroller of the Treasury, Research and Education Accountability, "Basic Education Program: BEP Quick Facts," Fiscal Year 2019-20, <https://comptroller.tn.gov/office-functions/research-and->

education-accountability/interactive-tools/bep.html. On the BEP Quick Facts page, the Comptroller's Office uses the 2019-20 school year to illustrate, by dividing the total BEP allocation of \$7,354,055,000 by the statewide ADM of 968,581 to equal \$7,593 per pupil.

138. Neither the TDOE nor the Comptroller have released the statewide BEP average for any year following 2020, the original year that the TDOE anticipated launching the ESA Program. But the TDOE has issued the projected ESA amount per-pupil for 2022-23 as "approximately \$8,192." FAQs Booklet at 6, Ex. F.

139. The TDOE has projected that this ESA amount will be the same for students in both LEAs. Because the per-pupil combined state and local BEP contributions for MNPS and SCS for fiscal year 2022-23 are different, then the TDOE's projected ESA funding amount must have been derived from the statewide average.

140. For MNPS and SCS's ESA payments to be based on their per-pupil combined state and local BEP contributions for fiscal year 2022-23, those per-pupil amounts would have to be lower than the combined statewide BEP average.

141. While the TDOE's projected per-pupil ESA funding amount is \$8,192, the amount of lost BEP funding to the LEAs will be more than that. This is because the TDOE will assess a 6% administrative fee on the amount of funds it deducts from the funds otherwise payable to the LEAs before distributing those amounts to ESAs. In other words, the LEAs will lose 6% more than the ESA participating students will receive.

142. This is illustrated in a Legislative Brief that the Tennessee Comptroller of the Treasury issued in advance of the ESA Program's original 2020 launch. ("Understanding Public Chapter 506: Education Savings Accounts") (updated May 2020) (hereinafter "Comptroller Brief"), attached as Exhibit I.) The Comptroller Brief identified the ESA funding amount as \$7,117 for the 2020-2021 school year and the statewide average as \$7,572—a difference of 6%.

143. Applying the rationale from the Comptroller Brief, MNPS and SCS will lose BEP funding of approximately \$8,684 for every participating student—the ESA estimate of \$8,192 plus a 6% administrative fee. Applying the same rationale, given the TDOE’s projected ESA amount of approximately \$8,192, the combined statewide BEP average must be 6% more, approximately \$8,684.

144. MNPS’s combined per-pupil BEP amount (state and local) for 2022-23 is \$9,163.75. SCS’s combined per-pupil BEP amount (state and local) for 2022-23 is \$8,511.18.

145. ESAs should be funded at the *lower* of the combined statewide BEP average or the per-pupil combined state and local BEP contributions for MNPS and SCS for fiscal year 2022-23. Tenn. Code Ann. § 49-6-2605(a). SCS’s per-pupil amount of BEP funding is \$8,511.18, which is less than the combined statewide BEP average of \$8,684. Nevertheless, the TDOE intends to award ESAs based on the statewide average to students in Shelby County.

146. With \$8,684 per ESA being deducted from MNPS and SCS BEP payments, if 5,000 students participate in year one, there will be an immediate loss of \$43,420,000 between the two LEAs.

147. Using MNPS and SCS’s ADM for the 2021-22 school year, MNPS has approximately 41% of the combined student population of MNPS and SCS, and SCS has 59%.

148. The number of participating students enrolled in the ESA Program cannot exceed 5,000 for the first school year of operation; 7,500 for the second school year; 10,000 for the third school year; 12,500 for the fourth school year; and 15,000 for the fifth and subsequent years.

149. If MNPS and SCS split the total number of participating students in proportion to their current student populations, then the number of participating students from MNPS

in 2022-23 would be 41% of 5,000 students, which equals 2,050 students. The number of participating students in the first year from SCS would be 59%, or 2,950.

150. Enrollment in the ESA Program increases by 2,500 students annually until the program's fifth year, when student participation reaches a maximum of 15,000. Assuming the number of MNPS's participating students is 41% of total participation, and assuming the amount allotted to each Davidson County participating student equals the current statewide average, MNPS would lose combined local and state funding under the Act each year as follows:

First year (2022-2023)	$2,050 \times \$8,192 = \16.8 million
Second year (2023-2024)	$3,075 \times \$8,192 = \25.2 million
Third year (2024-2025)	$4,100 \times \$8,192 = \33.6 million
Fourth year (2025-2026)	$5,125 \times \$8,192 = \42.0 million
Fifth & subsequent years (2026-)	$6,150 \times \$8,192 = \50.4 million

MNPS's total funding loss over five years would be at least \$168 million over the ESA Program's first five years and would increase by at least \$50.4 million annually in each succeeding year. The actual funding loss would likely be significantly higher, as the BEP per-pupil funding (whether MNPS's or the combined statewide average) will undoubtedly increase over time. More than half of this funding loss will consist of local funds generated from local taxpayers who have had no input into the state's decision to implement the ESA Program.

151. Assuming the number of SCS's participating students is 59% of total participation, and assuming the amount allotted to each Shelby County participating student equals the current combined statewide BEP average, SCS would lose funding under the Act each year as follows:

First year (2022-2023)	$2,950 \times \$8,192 = \24.2 million
------------------------	---

Second year (2023-2024)	4,425 x \$8,192 = \$36.3 million
Third year (2024-2025)	5,900 x \$8,192 = \$48.3 million
Fourth year (2025-2026)	7,375 x \$8,192 = \$60.4 million
Fifth & subsequent years (2026-)	8,850 x \$8,192 = \$73.0 million

SCS’s total funding loss over five years would be at least \$242 million over the ESA Program’s first five years and would increase by at least \$73 million annually in each succeeding year. The actual funding loss would likely be significantly higher, as the BEP per-pupil funding (whether SCS’s or the combined statewide average) will undoubtedly increase over time.

152. By contrast, when the ESA Act was originally passed, the Tennessee General Assembly Fiscal Review Committee estimated that the ESA Act would result in a program-wide “shift in BEP funding amongst [LEAs]” (*i.e.*, those in Davidson and Shelby counties) of \$36,881,150 in year one of implementation; \$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. Tennessee General Assembly Fiscal Review Committee, Corrected Fiscal Memorandum HB 939 – SB 795 at 4 (May 1, 2019) (Summary of Amendment (009043) (conference committee report)) (hereinafter “Fiscal Memorandum”), attached as Exhibit J. These figures, which assumed a BEP amount of \$7,376.23 per pupil, underestimate the actual BEP funding loss because the combined statewide BEP average has increased since the bill’s passage as reflected above.

153. The Fiscal Review Committee also recognized that the costs for the LEAs in Davidson and Shelby counties 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”), would likely increase under the ESA Act.

154. As the Fiscal Review Committee noted:

If a student enrolling in the ESA Program is in a Title I LEA and attends a private school that participates in federal grants, the LEA's equitable services cost would increase for that student because the equitable services funds that LEAs have to pass along is based on the number of students in private schools. However, the LEA's federal funding will not increase, so they will have to pay out more funding, but not receive any additional funding.

(Fiscal Memorandum at 4, Ex. J.)

155. The Fiscal Memorandum further states that while “[t]he amount of additional funding that will be passed along to private schools cannot be reasonably determined,” “if 5,000 students attended participating private schools, the potential maximum amount would be: \$4,000,000 from Title I; \$200,000 for Title II; and \$185,000 for Title IV (spread across the districts involved and their surrounding districts).” *Id.* The Fiscal Memorandum does not specify the time period for these losses or the basis for the figures.

B. Insufficient Relief Through the ESA Act's Potential Grant Program

156. In an inadequate recognition of the loss in BEP funding that the Davidson County and Shelby County school systems will suffer under the ESA Act, the Act includes a three-year unfunded grant program to be paid from a “school improvement fund.” Tenn. Code Ann. § 49-6-2605(b)(2)(A).

157. Disbursements from the school improvement fund, if fully funded, would provide an annual grant over the next three years to the LEAs in Davidson and Shelby counties “to be used for school improvement in an amount equal to the ESA amount for participating students under the program.” Tenn. Code Ann. § 49-6-2605(b)(2)(A).

158. The grant program is “subject to appropriation” and is not a condition precedent to implementation of the ESA Act. *Id.*

159. As a result, the grant program provides no assurance that it will offset the fiscal damage that Davidson and Shelby counties' LEAs will suffer under the ESA Program.

160. Governor Lee’s proposed budget for the 2022-23 fiscal year (“Budget Book”) proposed \$29,022,600 in funding, \$2,464,000 of which is dedicated to “Payroll,” for the ESA Program, which is described in the Budget Book as Non-Public Education Choice Programs. The General Assembly appropriated the full \$29,022,600 amount that the Governor proposed.

161. The grant program, even if fully funded, only lasts three years. As a result, it will not permanently offset the fiscal damage to the Davidson and Shelby counties’ LEAs. And as reflected above, it certainly will not cover MNPS and SCS’s immediate collective funding loss of \$43,420,000 if all 5,000 students participate. Nor will it not cover any of MNPS and SCS’s respective funding losses of at least \$42.0 million and \$60.4 million in years four and beyond.

162. Even if fully funded, funds from the ESA grant program are only “to be used for school improvement.” Tenn. Code Ann. § 49-6-2605(b)(2)(A). The ESA Act does not define what specific conditions will be placed on this “school improvement” grant funding. The TDOE issued a letter on August 1, 2022, to MNPS and SCS indicating that “the TDOE will structure the grants allocated under this program to be commensurate in the level of flexibility as the student’s state funding.” (Aug. 1, 2022, Ltrs from TDOE to Dr. Battle and Dr. Ray, attached as collective Exhibit K.)

163. In addition, the ESA grant program only provides funds to MNPS and SCS for students who attended an MNPS or SCS school for one full school year before the student joins the ESA Program. Tenn. Code Ann. § 2605(b)(2)(A)(i).

164. Despite having to plan, budget, and prepare buildings, staff, and curriculum for new incoming students, MNPS and SCS will receive no grant funds for students who would otherwise be entering kindergarten but elect to use ESA funds instead.

165. The August 1, 2022, letters likewise do not indicate when the LEAs will receive grant funding or how long it will take to process requests. (Aug. 1, 2022, Letter, Ex. K.) The letters merely note that “[o]nce student applications open and families are able to begin enrolling in the ESA program, TDOE will send a detailed communication on the specific steps [the] district[s] will need to take to receive those funds.” (*Id.*) That will include “completing an application and budget in ePlan,” as is the case with most other grants.

166. Nor do the letters indicate whether the 2,185 families who completed “Intent to Enroll” forms are the only families that will be permitted to complete applications to participate in the program. The letters also would suggest that grant funding is not available for all students who may ultimately participate. Despite the TDOE having received 2,185 “Intent to Enroll” forms, only 1,372 of those students are enrolled in Shelby County Schools, and only 499 are enrolled in MNPS, for a total of 1,871. (*Id.*) If the remaining 314 are students entering kindergarten or moving into SCS or MNPS, then the LEAs would not receive grant funds for those students but would lose BEP funding for them.

167. Unused ESA funds do not revert to the LEA from which the BEP funds were diverted, even if the student returns to that LEA and the LEA resumes responsibility for educating the student. Tenn. Code Ann. § 49-6-2603(e). Any funds remaining in an ESA account that is closed, regardless of the reason for the account being closed, are deposited in the State of Tennessee’s BEP account. Tenn. Code Ann. §§ 49-6-2603(e), -2608(e).

C. ESA Act’s Impact on Current Expenses

168. The MNPS budget is used to educate 80,000 students. For the 2021-2022 school year, MNPS had 159 schools in its system: four early learning centers, 70 elementary schools, 29 middle schools, 23 high schools, 27 charter schools, three alternative learning centers, and three special education schools. MNPS employs more than 6,800 certificated staff and more than 4,100 support staff.

169. Davidson County's diverse population creates unique educational demands. MNPS's students speak 126 different languages. Over 21% of the district's students are English language learners, and over 12% receive exceptional education services.

170. SCS is Tennessee's largest public-school district and serves more than 110,000 students. SCS has more than 214 schools in its system: 77 elementary schools, 26 middle schools, 10 K-8 schools, 27 high schools, nine alternative schools, four career technology centers, two special schools, one adult school, one early learning school, one virtual school, and 56 charter schools. SCS employs nearly 14,000 employees, 6,000 of whom are classroom teachers.

171. Shelby County's population is also highly diverse, which creates challenging educational demands. Approximately 10,500 SCS students are English language learners, and approximately 13,000 SCS students live with a disability.

172. The current BEP formula already fails to account for the actual cost of educating students. The formula's arbitrary inputs have resulted in systematic inadequate funding of MNPS and SCS schools, which is the subject of a constitutional challenge in *Shelby County Bd. of Educ., et al. v. Haslam, et al.*, Case No. 15-1048-III, pending in Davidson County Chancery Court. Tennessee consistently ranks among the lowest in the nation in state funding of public education.

173. It remains to be seen whether the State's new education funding formula will address the myriad problems that flow from a persistently underfunded public school system. While preliminary TISA figures reflect that all LEAs will experience an increase in State funding, MNPS will receive a significantly smaller percentage increase than other school districts in Tennessee.

174. When students residing in Davidson County or Shelby County elect to participate in the ESA Program, the amount of money required to operate MNPS or SCS schools will not decrease by the same amount as the lost BEP funding.

175. Many of MNPS and SCS's costs are largely unaffected by movement of students between schools or even out of the system, including facility maintenance, technology costs, food services, transportation, facility operations, long-term contracts, and post-employment benefits such as pension and insurance.

176. For example, a student's departure from MNPS or SCS to use ESA funds for education expenses outside the public-school system will not relieve MNPS or SCS of the cost of heating and cooling that student's previous school and staffing the student's previous classrooms, despite the LEA losing all BEP funding for that student.

177. Staff, educator, and administrator salaries and fringe benefits will not decrease in proportion to the numbers of students leaving the system.

178. To illustrate, each classroom has various state-imposed ratios, such as student-teacher ratios, at which the school must operate. For MNPS and SCS to operate cost-effectively, classrooms, buses, and schools must be as full as possible.

179. Losing a relatively small number of students from each MNPS or SCS bus that transports students would not eliminate the need for any of those buses.

180. Losing a relatively small number of students from each MNPS or SCS classroom or school would not eliminate the need for any teachers, staff members, or buildings.

181. Even where enrollments decrease, many buildings must continue to operate with the same amount of technology, food service staff, and administrative staff, despite the significant loss of BEP funding that accompanies a loss of students.

182. Notwithstanding the number of students in a school, the school must be staffed with a principal, librarian, bookkeeper, literacy coach, secretary, counselor, and a half-time advanced academics instructor. With each decrease in enrollment in a school, the per-pupil cost to staff these positions increases.

183. 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.

D. ESA Act's Imposition of Additional TCAP Testing Expenses

184. Tennessee's state testing program, known as the Tennessee Comprehensive Assessment Program ("TCAP"), currently "includes TNReady assessments in math, English language arts, social studies, and science, as well as alternative assessments, like MSAA and TCAP-Alt, for students with special needs." See <https://www.tn.gov/education/assessment/testing-overview.html>. Tennessee LEAs have various statutory responsibilities relating to the state's testing requirements, including administering the tests and providing notice to parents of what tests will be administered. See generally Tenn. Code Ann. § 49-6-408; Tenn. Code Ann. §§ 49-1-602, *et seq.*; Tenn. Code Ann. §§ 49-6-6001(b), -6007.

185. The ESA Act requires "participating students in grades three through eleven (3-11) [to] be annually administered the [TCAP] tests for math and English language arts, or successor tests authorized by the state board of education for math and English language arts." Tenn. Code Ann. § 49-6-2606(a)(1).

186. For students attending participating schools under the ESA Program, the participating school is responsible for administering the tests. Tenn. Code Ann. § 49-6-2606(a)(2). For participating students not enrolled in a participating school, the participating

student's parent bears the responsibility for ensuring the student is administered the test annually. Tenn. Code Ann. § 49-6-2606(a)(3).

187. The Fiscal Memorandum for the ESA Act contemplates the student's LEA bearing the cost of standardized testing for participating students not attending a participating school. (Fiscal Memorandum at 4, Ex. J. The Fiscal Memorandum estimates the cost of that testing process on the LEA to be \$73.24 per student. *Id.*

188. The Fiscal Memorandum also estimates that 70% of the students participating in the ESA Program will attend non-participating schools. *Id.* Based on this estimate, and assuming participating students are distributed between the two affected counties equal in proportion to the LEAs' overall student enrollment, then 1,505 students will return to MNPS for testing in year one; 2,258 students in year two; 3,010 students in year three; 3,763 students in year four; and 4,515 students in years five and later. This will cost MNPS \$110,226.20 in year one; \$165,375.92 in year two; \$220,452.40 in year three; \$275,602.12 in year four; and \$330,678.60 in years five and later. This equals a total testing cost of approximately \$1.1 million for the first five years of implementation.

189. Based on these same projections, 1,995 students will return to SCS for testing in year one; 2,993 students in year two; 3,990 students in year three; 4,988 students in year four; and 5,985 students in years five and later. The testing cost to SCS, assuming participating students are distributed between the LEAs in Davidson and Shelby counties equal in proportion to their overall student enrollment, will be \$146,113.80 in year one; \$219,207.32 in year two; \$292,227.60 in year three; \$365,321.12 in year four; and \$438,341.40 in years five and later, for a total of approximately \$1.5 million for the first five years.

190. These estimates are consistent with the cost estimate reflected in the Fiscal Memorandum for all participating students: "The mandatory recurring increase [in] local

expenditures is estimated to exceed \$192,475 (2,628 x \$73.24) in 2021-22 and subsequent years with an additional increase each year reflecting the increase in students.” *Id.*

191. In addition, for standardized tests to be distributed from the TDOE to each LEA administering the tests, TDOE must have updated records concerning all test-taking students’ current course load, grade level, and school.

192. The proposed rules to effectuate the ESA Act do not explain who bears the responsibility for managing data for a participating student residing in an LEA: the LEA or the private school the participating student attends.

193. MNPS pays for student data management on a per-pupil basis. If MNPS must retain student data for participating students no longer attending MNPS schools, it will bear additional financial and administrative costs not addressed in the ESA Act.

E. Uncertainty Concerning the ESA Act’s Implementation Processes

194. TDOE has not provided any clarity to MNPS or SCS on how the ESA Program’s implementation will create an administrative burden on MNPS and SCS, but the burden will unquestionably be significant.

195. Students may begin attending private school classes using ESA funds as soon as the State is given the go-ahead to award ESAs. The TDOE has already expressed a desire to implement the program during the 2022-23 school year. Despite that short turnaround time, MNPS and SCS have received no information from TDOE concerning what role, if any, MNPS and SCS will play in the ESA Program’s execution. All that the districts have been told is that they will receive \$8,192 for each participating student already enrolled in their LEAs. (Aug. 1, 2022, Letter, Ex. K.)

196. TDOE has not informed MNPS and SCS what student data, if any, it must maintain for students residing in Davidson or Shelby counties but withdrawing from MNPS and SCS to use ESA funds.

197. TDOE has not informed MNPS or SCS what role, if any, MNPS or SCS will play in standardized testing for former MNPS or SCS students who elect to participate in the ESA Program.

198. MNPS utilizes a student-based budgeting method. An individual school's funding allotment is determined by the enrollment projections for that school. Individual school budgets are then developed in the spring to provide sufficient time to make final adjustments over the summer.

199. Enrollment projections also help determine hiring needs for new teachers. Competition for highly qualified teachers is strong. Teacher hirings ideally begin occurring in March, before the pool of highly qualified new teacher applicants dwindles after those candidates graduate.

200. MNPS's Boundary Planning office typically releases student enrollment projections in February for the upcoming school year.

201. The school-based budget allotments are prepared after those projections are released.

202. The later MNPS learns what actual enrollments will be at each school, the more complex and/or expensive the ability to adjust becomes, and the more disruption any adjustment will cause on individuals and departments.

203. Last-minute adjustments to enrollment will affect teacher and other staff moves, technology services availability, transportation routes, nutrition services, and other operational services, requiring shifts at schools across the affected districts. These last-minute operational changes will adversely affect not only MNPS and SCS teachers and staff but also the quality of services delivered to students who remain enrolled at the affected schools.

204. If shifts cannot be made because of the resulting ratios of students to staff or students to equipment, then various MNPS and SCS schools must operate under-enrolled, which has a direct, negative financial impact on the district.

205. The increase in testing expenses, loss of BEP funding, increased operational and administrative expenses, and increase in planning efforts to prepare for the program's impact on MNPS and SCS constitute irreparable harm. These tangible and intangible costs cannot be fully recaptured, and the LEAs cannot be made whole if the Act is later found to be unconstitutional.

CAUSES OF ACTION

COUNT I

THE ESA ACT VIOLATES THE TENNESSEE CONSTITUTION'S EQUAL PROTECTION CLAUSES IN ARTICLE I, SECTION 8 AND ARTICLE XI, SECTION 8, WHICH PROHIBIT CLASSIFICATIONS THAT TREAT SIMILARLY-SITUATED GROUPS DIFFERENTLY.

206. Plaintiff Counties adopt and incorporate all allegations in the preceding paragraphs as if fully set forth herein.

207. Two provisions in the Tennessee Constitution guarantee equal protection of the law.

208. Article I, Section 8, states: "That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land."

209. Article XI, Section 8, states, in relevant part, the following:

The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie[s], or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.

210. The Tennessee Supreme Court has described Tennessee’s equal protection standard as follows:

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

State v. Tester, 879 S.W.2d 823, 829 (Tenn. 1994) (quoting *State v. Nashville, C. & St. L. Ry. Co.*, 135 S.W. 773, 775 (Tenn. 1911) (emphasis added)).

211. In *Tester*, the Tennessee Supreme Court further stated, “Equal protection analysis requires strict scrutiny of a legislative classification only when the classification interferes with the exercise of a ‘fundamental right’ (e.g., right to vote, right of privacy)” 879 S.W.2d at 828. For purposes of the Tennessee Constitution, a right is “fundamental” when it is “either implicitly or explicitly protected by a constitutional provision.” *Id.* (citing *Small Schools I*, 851 S.Wd.2d at 152).

212. As the Tennessee Supreme Court has recognized, “[t]he core concern expressed in [Article I, Section 8 of the Tennessee Constitution] is that legislative classification, to the extent that it exists, not be unreasonable or unfair.” *Civil Serv. Merit Bd. of City of Knoxville v. Burson*, 816 S.W.2d 725, 731 (Tenn. 1991). “[T]he provisions of Article I, Section 8, protect cities and counties as well as individuals.” *Id.*

213. “Equal protection analysis requires strict scrutiny of a legislative classification only when the classification interferes with the exercise of a ‘fundamental right’ (e.g., right to vote, right of privacy), or operates to the peculiar disadvantage of a “suspect class” (e.g., alienage or race).” *Tester*, 879 S.W.2d at 828. For purposes of the Tennessee Constitution, a

right is “fundamental” when it is “either implicitly or explicitly protected by a constitutional provision.” *Id.* (citing *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993) (“*Small Schools I*”).

214. Under the strict scrutiny test, the State has the “burden to show that the regulation is justified by a compelling state interest and narrowly tailored to achieve that interest.” *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 18 (Tenn. 2000). “A regulation cannot qualify as narrowly tailored if there are alternative means of achieving the state interest that would be less intrusive and comparably effective.” *City of Memphis v. Hargett*, 414 S.W.3d 88, 102-03 (Tenn. 2013).

215. The Tennessee Supreme Court recognized in *Small Schools I* that “disparities in resources available” in various school districts can “result in significantly different educational opportunities for the students of the state.” 851 S.W.2d at 145. 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.

216. A classification with “no reasonable or natural relation to the legislative objective” does not satisfy the rational-basis test under the equal protection clauses. *Harrison v. Schrader*, 569 S.W.2d 822, 826 (Tenn. 1978).

217. ESA Program eligibility is not limited to qualifying students in **low-performing schools** across the state. It is limited to students zoned to LEAs in only **two counties**, even if the students are zoned to high-performing schools in affluent neighborhoods. Students zoned to low-performing schools in Hamilton County, for example, are not eligible for ESA funds, while students zoned to high-performing schools in Davidson County are eligible. Students zoned to low-performing or “priority” schools in Fayette County

are not eligible for ESA funds, while students residing just across the Shelby County line zoned to attend high-performing schools are eligible.

218. The ESA Act states:

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

Id. § 49-6-2611(a)(1) (emphasis added).

219. Stated differently, the ESA Act attempts to further the State's interest of improving what the State purports to be the "the LEAs that have consistently had the lowest performing schools on a historical basis" by providing students in those LEAs funding to *leave those LEAs*. It provides such funding to any student in the LEA who meets certain financial criteria, even if the student is the highest performing student in the school or if the student attends the highest performing school in the LEA.

220. There is no rational relationship, much less a narrowly-tailored one, between the ESA Act's stated interest of improving LEAs with historically low performing schools and requiring the Counties that fund them to provide private school funding for high-performing students in high-performing schools in the LEAs to leave the public school system.

221. There is no rational relationship, much less a narrowly-tailored one, between the ESA Act's exclusion of qualifying students in low-performing schools in Tennessee outside of Davidson and Shelby counties and any purported desire to provide better educational opportunity for students zoned to low-performing schools.

222. There is no rational basis, much less a compelling one, for the ESA Act's inclusion of all qualifying students in Davidson and Shelby counties' LEAs, whether they

attend a low-performing school or not, while excluding qualifying students in other Tennessee counties zoned to low-performing schools.

223. There is no rational relationship, much less a narrowly-tailored one, between the ESA Act’s inclusion of all qualifying students in Davidson and Shelby counties’ LEAs, even those zoned to high-performing schools, and any purported desire to provide better educational opportunity for students zoned to low-performing schools.

224. There is no rational basis, much less a compelling one, for diluting public-school funding through the ESA Program for students in Davidson and Shelby counties’ LEAs without doing the same in other Tennessee counties.

225. In defining eligibility for the ESA Act to include LEAs in only two counties, the General Assembly intended to “protect” those non-participating LEAs and the counties that fund them from the negative and inevitable consequences of losing BEP funds.

226. There is no rational basis, much less a compelling one, for excluding students in Fayette, Hamilton, and Madison counties’ LEAs—districts with a comparable or greater concentration of poorly-performing schools—from the ESA Act, while including the LEAs in Davidson and Shelby counties.

227. The LEAs in Davidson and Shelby counties have a greater *number* of schools than all other Tennessee counties. But the LEAs in Fayette, Hamilton, and Madison counties had a comparable or greater *percentage* of low-performing schools than the LEAs in Shelby and Davidson counties in 2018, the year immediately preceding the ESA Act’s passage.

228. The “eligible student” definition was purposefully drafted to omit LEAs in Fayette, Hamilton, and Madison counties.

229. There is no rational basis, much less a compelling one, for the General Assembly imposing the ESA Act on LEAs in Davidson and Shelby counties while seeking to

protect equally poorly performing LEAs, such as those in Fayette, Hamilton, and Madison counties, from the ESA Program's inevitable and negative consequences.

230. The partisanship underlying the General Assembly's decision to exclude the LEAs in all counties except Davidson and Shelby from the ESA Act's application does not constitute a rational basis for such classification.

231. The ESA Act's application to LEAs in only two counties constitutes an inequitable distribution of funds in violation of the equal protection clauses, as outlined in *Small Schools I*.

232. There is no rational relationship, much less a narrowly-tailored one, between the ESA Act's application to LEAs in only Davidson and Shelby counties and any legitimate or compelling state interest.

233. The ESA Act constitutes an unreasonable and arbitrary classification, with no rational, much less compelling basis, in violation of the equal protection clauses of the Tennessee Constitution, at Article I, Section 8, and Article XI, Section 8.

234. Plaintiff Counties are entitled to a declaratory judgment that the ESA Act is unconstitutional, unlawful, and unenforceable, as well as a temporary and permanent injunction against its enforcement.

COUNT II

(EDUCATION CLAUSE VIOLATION)

THE ESA ACT VIOLATES ARTICLE XI, SECTION 12 OF THE TENNESSEE CONSTITUTION, WHICH GIVES THE TENNESSEE GENERAL ASSEMBLY RESPONSIBILITY FOR ESTABLISHING AND SUPPORTING A SYSTEM OF PUBLIC EDUCATION THAT PROVIDES SUBSTANTIALLY EQUAL EDUCATIONAL OPPORTUNITIES TO ALL STUDENTS.

235. Plaintiff Counties adopt and incorporate all allegations in the preceding paragraphs as if fully set forth herein.

236. The Tennessee Constitution places responsibility for public education with the General Assembly:

The State of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools. The General Assembly may establish and support such postsecondary educational institutions, including public institutions of higher learning, as it determines.

TENN. CONST., art. XI, § 12.

237. In *Small Schools I*, the Tennessee Supreme Court determined that it had the duty to ensure that this special responsibility was met: “[I]t is our duty to consider the question of whether the legislature, in establishing the educational funding system, has ‘disregarded, transgressed and defeated, either directly or indirectly,’ the provisions of the Tennessee Constitution.” 851 S.W.2d at 148 (quoting *Biggs v. Beeler*, 173 S.W.2d 946, 948 (Tenn. 1943)).

238. *Small Schools I* also held that this constitutional provision, commonly referred to as the Education Clause, embodies an enforceable standard “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. . . . [T]his is an enforceable standard for assessing the educational opportunities provided in the several districts throughout the state.” *Id.* at 150-51.

239. Under the Education Clause, the General Assembly has an “obligation to maintain and support a system of public schools that affords substantially equal educational opportunities to all students” in the state. *Small Schools I*, 851 S.W.2d at 140-41.

240. By limiting the ESA Program to Davidson County and Shelby County, which the General Assembly recognizes will have a negative impact on Davidson and Shelby

counties' LEAs, Defendants fail to provide a substantially equal educational opportunity to all students in Tennessee.

241. Rather, the ESA Act unlawfully targets Davidson County and Shelby County by diverting public funds from their LEAs while protecting all other counties and LEAs from the burdens of the program.

242. The ESA Act's application to LEAs in only two counties constitutes an inequitable distribution of funds in violation of the Education Clause.

243. The ESA Act violates the Education Clause by failing to afford "substantially equal educational opportunities to all students" in the state. *Small Schools I*, 851 S.W.2d at 140-41.

244. Plaintiff Counties are entitled to a declaratory judgment that the ESA Act is unconstitutional, unlawful, and unenforceable and a temporary and permanent injunction against its enforcement.

COUNT III

(ULTRA VIRES IMPLEMENTATION)

THE ESA ACT PERMITS ESA FUNDING ONLY THROUGH PARTICIPATING STUDENTS' ACCOUNTS, NOT DIRECT PAYMENTS TO PARTICIPATING SCHOOLS; THUS, TDOE'S 2022-23 IMPLEMENTATION VIA DIRECT REIMBURSEMENTS TO PRIVATE SCHOOLS IS *ULTRA VIRES* AND UNAUTHORIZED UNDER THE ESA ACT ITSELF.

245. Plaintiff Counties adopt and incorporate all allegations in the preceding paragraphs as if fully set forth herein.

246. The ESA Act creates a statutory scheme by which ESAs—actual "accounts"—are created and into which the State deposits money to be used by participating students and families.

247. "Program" as used in the Act "means the *education savings account program* created in this part." Tenn. Code Ann. § 49-6-2602(11) (emphasis added).

248. The eligible student definition incorporates the concept of a participating student “receiv[ing] an education savings account.” *Id.* § 49-6-2602(4).

249. The ESA Act mandates that the TDOE “*shall establish and maintain separate ESAs for each participating student* and shall verify that the uses of ESA funds are permitted under § 49-6-2603(a)(4) and institute fraud protection measures.” *Id.* § 49-6-2607(a)(emphasis added).

250. The ESA Act mandates that the TDOE “shall remit funds *to a participating student’s ESA* on at least a quarterly basis.” *Id.* § 49-6-2605(b)(1)(emphasis added).

251. The ESA Act does not contemplate the TDOE making direct payments to participating *schools*; instead, it contemplates participating families paying for education expenses and seeking reimbursement. *Id.* § 49-6-2607(c) (“ . . . participating schools, providers, and eligible postsecondary institutions shall provide *parents of participating students or participating students*, as applicable, with a receipt *for all expenses paid to the participating school, provider, or eligible postsecondary institution using ESA funds*” (emphasis added)).

252. The TDOE’s FAQs posted on the ESA Program Website and available for download state that in 2022-23, ESA funding will be distributed via requests for reimbursement from participating private schools to the TDOE as opposed to via deposits into participating students’ ESAs. FAQs Booklet at 12, Ex. F.

253. This is because the State Defendants still must procure contracts for the operational platform that will be utilized for the ESA accounts themselves.

254. Plaintiff Counties are entitled to a declaratory judgment that the TDOE’s actions to implement the ESA Act through direct payments to participating schools during the 2022-23 school year rather than into participating students’ ESAs as the Act

contemplates is illegal, *ultra vires*, beyond the scope of the TDOE's statutory authority, and constitutes improper rulemaking outside the required notice and comment period. Plaintiff Counties are further entitled to a temporary and permanent injunction against this *ultra vires* implementation of the ESA Act.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Counties demand judgment against Defendants and pray that the Court award the following relief:

1. A judgment and order declaring the ESA Act unconstitutional, unlawful, and unenforceable;
2. A temporary and permanent injunction preventing state officials from implementing and enforcing the ESA Act;
3. Plaintiff Counties' costs and expenses incurred in bringing this action; and
4. Such further and general relief as the Court deems appropriate.

Respectfully submitted,

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
WALLACE W. DIETZ (#9949)
DIRECTOR OF LAW

/s/ Allison L. Bussell

ALLISON L. BUSSELL (#23538)
LORA BARKENBUS FOX (#17243)
MELISSA ROBERGE (#26230)
Metropolitan Courthouse, Suite 108
P.O. Box 196300
Nashville, Tennessee 37219
(615) 862-6341
allison.bussell@nashville.gov
lora.fox@nashville.gov
melissa.roberge@nashville.gov

*Counsel for Metropolitan Gov't of Nashville and
Davidson County*

SHELBY COUNTY ATTORNEY'S OFFICE

MARLINEE C. IVERSON (#18591)

SHELBY COUNTY ATTORNEY

/s/ E. Lee Whitwell

E. LEE WHITWELL (#33622)

160 North Main Street, Suite 950

Memphis, TN 38103

(901) 222-2100

marlinee.iverson@shelbycountyttn.gov

lee.whitwell@shelbycountyttn.gov

Counsel for Shelby County Government

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been forwarded via electronic mail (in lieu of U.S. mail by agreement of the parties) and the electronic filing system to the following:

Stephanie A. Bergmeyer
Jim Newson
Office of Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202-0207
stephanie.bergmeyer@ag.tn.gov

Meggan S. DeWitt
Beacon Center of Tennessee
1200 Clinton Street, Suite 205
Nashville, TN 37203
meggan@beacontn.org

David Hodges
Keith Neely
Institute for Justice
901 N. Glebe Road, Suite 900
Arlington, VA 22203
dhodges@ij.org
kneely@ij.org

Brian Kelsey
Daniel R. Suhr
Liberty Justice Center
190 LaSalle Street, Suite 1500
Chicago, IL 60603
bkelsey@libertyjusticecenter.org
dsuhr@libertyjusticecenter.org

Arif Panju
Institute for Justice
816 Congress Avenue, Suite 960
Austin, TX 78701
apanju@ij.org

Christopher M. Wood
Robbins Geller Rudman & Dowd, LLP
414 Union Street, Suite 900
Nashville, TN 37219
cwood@rgrdlaw.com

Stella Yarbrough
ACLU Foundation of Tennessee
P.O. Box 120160
Nashville, TN 37212
syarbrough@aclu-tn.org

Sophia Mire Hill
Southern Poverty Law Center
111 East Capitol Street, Suite 280
Jackson, MS 39201
sophia.mire@splcenter.org

David G. Sciarra
Wendy Lecker
Jessica Levin
Education Law Center
60 Park Place, Suite 300
Newark, NJ 07102
dsciarra@edlawcenter.org
wlecker@edlawcenter.org
jlevin@edlawcenter.org

on this the 3rd day of August, 2022.

/s/ Allison L. Bussell _____
Allison L. Bussell