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

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al., Plaintiffs, vs. TENNESSEE DEPARTMENT OF EDUCATION, et al., Defendants, – and – NATU BAH, et al., Intervenor-Defendants.	Case No. 20-0143-II Chancellor Anne C. Martin, Chief Judge Judge Tammy M. Harrington Judge Valerie L. Smith **CONSOLIDATED**
ROXANNE McEWEN, et al., Plaintiffs, vs. BILL LEE, in His Official Capacity as Governor of the State of Tennessee, et al., Defendants, – and – NATU BAH, et al., Intervenor-Defendants.	Case No. 20-0242-II Chancellor Anne C. Martin, Chief Judge Judge Tammy M. Harrington Judge Valerie L. Smith

McEWEN PLAINTIFFS' CONSOLIDATED OPPOSITION TO: (I) STATE DEFENDANTS' MOTION TO DISMISS; (II) GREATER PRAISE INTERVENOR-DEFENDANTS' MOTION TO DISMISS; AND (III) PARENT INTERVENOR-DEFENDANTS' RENEWED MOTION FOR JUDGMENT ON THE PLEADINGS

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I. INTRODUCTION

Plaintiffs Roxanne McEwen, David P. Bichell, Terry Jo Bichell, Lisa Mingrone, Claudia Russell, Inez Williams, Heather Kenny, Elise McIntosh, and Apryle Young (collectively, "Plaintiffs") respectfully submit this consolidated response in opposition to: (i) State Defendants' Motion to Dismiss; (ii) Greater Praise Intervenor-Defendants' Motion to Dismiss; and (iii) Parent Intervenor-Defendants' Renewed Motion for Judgment on the Pleadings.

The Complaint, which sets forth six separate causes of action, alleges that the Tennessee Education Savings Account Pilot Program ("Voucher Law"), T.C.A. §49-6-2601, *et seq*., violates the Tennessee Constitution and state law by diverting taxpayer funds appropriated for public schools in Shelby and Davidson Counties to private schools.[1] The Complaint's six causes of actions are each adequately pled, and Defendants' motions should be denied in their entirety.

First, all Plaintiffs have standing to assert their claims. Plaintiffs are taxpayers challenging illegal governmental action that unlawfully diverts public funds, and Plaintiffs, as public school parents and taxpayers in Shelby and Davidson Counties, suffer a special injury from the Voucher Law that is not common to the public generally.

Second, the Complaint alleges the Voucher Law violates the Education and Equal Protection Clauses of the Tennessee Constitution. *Infra*, §IV.C. The Voucher Law further

[1] "Complaint" refers to McEwen Plaintiffs' Amended Complaint, filed August 3, 2022. All "¶_" and "¶¶_" references are to the Complaint unless otherwise noted. "Ex. _" references are to the Declaration of Christopher M. Wood in Support of Plaintiffs' Consolidated Opposition. Emphasis is added and internal citations are omitted throughout unless otherwise noted.

exacerbates underfunding in the Basic Education Program ("BEP"), the State's formula for funding its public schools, thus depriving students in the two targeted districts of resources essential to providing an adequate education; and "school improvement fund" grants, even if funded, will not make up the shortfall. In addition, the diversion of BEP funds treats public school students in Shelby County Schools and Metro Nashville Public Schools differently from other public school students across the State of Tennessee ("State"), violating the equity mandates of the Education and Equal Protection Clauses, and there is not even a rational basis for the State's disparate treatment of these students. The Voucher Law also unconstitutionally treats taxpayers in Davidson and Shelby Counties differently from taxpayers in every other county by imposing an additional burden on them without any rational basis. Moreover, these claims are ripe and justiciable. The Complaint involves a substantial controversy between parties having adverse interests of sufficient immediacy to warrant judicial resolution, and the Tennessee Supreme Court has expressly held that Plaintiffs' adequacy claims are justiciable, precluding any contention to the contrary.

Third, the Complaint alleges the Voucher Law violates the Education Clause, which requires the General Assembly to provide for the maintenance, support, and eligibility standards of "***a system*** of free ***public*** schools," by using public funds on private schools that are ***not*** part of Tennessee's system of free public schools and are not obligated to comply with the same standards and antidiscrimination requirements. Defendants' contention that funding private schools does not violate the mandate of the Education Clause cannot be reconciled with the plain text of the Education Clause and misrepresents the historical record regarding amendments thereto.

Fourth, the Complaint alleges the Voucher Law violates the BEP, the statutory formula by which the General Assembly determines and appropriates the funds required to maintain and support Tennessee's system of free public schools in the current school year. The Voucher Law diverts BEP funds appropriated by the General Assembly to maintain and support Shelby County Schools and Metro Nashville Public Schools to private schools and other private education expenses despite the fact the State was mandated by the Tennessee Supreme Court to remedy the BEP formula and prior constitutional funding violations by the General Assembly.

Fifth, the Complaint alleges the State Defendants are rushing to implement the Voucher Law in a way that violates the Voucher Law itself by failing to establish or maintain a separate education savings account ("ESA") for each participating student and failing to deposit funds into students' ESAs. Rather, the Tennessee Department of Education ("TDOE") is instructing participating private schools to directly fund the voucher students' expenses and send invoices to the State for reimbursement. Reimbursement is directly at odds with the statutory requirement that all expenses be "preapproved" by TDOE.

Sixth, the Complaint alleges State Defendants are violating the Uniform Administrative Procedures Act ("UAPA") because State Defendants' voucher funding scheme for the 2022-23 school year does not follow the rules previously promulgated by the State Board of Education. Rather, State Defendants have created an entirely new scheme to fund the voucher program by having private schools pay voucher students directly and then submit invoices to TDOE for reimbursement without following the proper

rulemaking process. This new scheme constitutes a rule under UAPA but was put in place without any of the required procedures.

Seventh, the Voucher Law violates the "Appropriation of Public Moneys" provisions of the Tennessee Constitution and T.C.A. §9-4-601 because an appropriation was not made for the Voucher Law's estimated first year's funding, the State expended resources to contract with a private company to undertake administration of the Voucher Law without appropriations authorized by law, and the State is now implementing the voucher program in a manner not authorized by statute. If there were an appropriation for the Voucher Law, it was not a meaningful estimate for the Voucher Law's first year's funding, and there was no lawful authority for TDOE to use funds appropriated for other programs to pay the contract at issue.

Because Plaintiffs' claims are all pled in compliance with the minimal pleading standards of Tenn. R. Civ. P. 8.01, Defendants' motions should be denied.

II. PROCEDURAL HISTORY

On March 2, 2020, Plaintiffs, who are taxpayers and public school parents in Shelby and Davidson Counties, filed this action in Davidson County Chancery Court challenging the legality of the Voucher Law passed in May 2019, codified at T.C.A. §49-6-2601, *et seq.*

In March 2020, the Beacon Center, Institute for Justice, and Liberty Justice Center each sought to intervene on behalf of parents and a private school who purportedly wanted to participate in the voucher program. The existing parties agreed to their limited

intervention, subject to the terms outlined in the Agreed Order issued by the Court after a hearing on March 20, 2020.[2]

In April 2020, Plaintiffs filed a Motion for a Temporary Injunction, arguing, *inter alia*, that the Voucher Law violated the "Home Rule" provision of the Tennessee Constitution. The Metropolitan Government of Nashville and Davidson County and Shelby County (collectively, the "Plaintiff Counties") filed a motion for summary judgment in their own case challenging the Voucher Law, also contending that it violated the Home Rule provision.

On May 4, 2020, this Court issued an Order denying Plaintiffs' motion for temporary injunction as moot because, in "the *Metro* case, the Court [had] entered a Memorandum and Order finding the ESA act unconstitutional based upon the Home Rule Amendment, one of the bases for Plaintiffs' injunction." The Court granted summary judgment in the *Metro. Gov't* case and enjoined Defendants from taking steps to implement the Voucher Law but also granted Defendants permission to seek immediate interlocutory relief from the Court of Appeals.

On September 29, 2020, the Court of Appeals issued an opinion affirming the Chancery Court's summary judgment order. *Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ*., 2020 WL 5807636 (Tenn. Ct. App. Sept. 29, 2020), *appeal granted*

[2] The Agreed Order mandates that all "Intervenor-Defendants shall consult with . . . the State Defendants prior to filing all briefs and motions to ***avoid duplicative briefing to the extent possible***." However, as in prior rounds of briefing, the motions to dismiss and for judgment on the pleadings filed by the State and Intervenor-Defendants here overlap on numerous points. This strongly suggests a lack of consultation to avoid duplicative briefing prior to the filing of their Motions in violation of the Agreed Order and is a waste of the parties' and the Court's resources.

(Feb. 4, 2021), *aff'd in part and rev'd in part*, 645 S.W.3d 141 (Tenn. 2022). Among the arguments rejected by the Court of Appeals were the State Defendants' contentions that the Home Rule provision did not apply to the Voucher Law "because education is a state function" and "'[t]he Tennessee General Assembly has exclusive authority under the Tennessee Constitution to make decisions regarding the provision of education.'" *Id.* at *4-*5. Rather, the Court of Appeals held that "the plenary authority derived from article XI, section 12 relates to ***public schools***, not private ones. When encouraging, assisting or benefiting private schools, the General Assembly is operating outside that plenary power." *Id.*

On May 18, 2022, the Tennessee Supreme Court issued an opinion affirming in part and reversing in part the judgment of the Court of Appeals. *Metro. Gov't,* 645 S.W.3d at 145. The Supreme Court held that, while the Plaintiff Counties had standing to bring their Home Rule claims, the Voucher Law did not implicate the Home Rule Amendment and therefore was not unconstitutional on that basis. *Id.* The Supreme Court remanded the case to the Chancery Court for "entry of a judgment dismissing [the Home Rule] claim, for further proceedings consistent with this opinion, and for consideration of Plaintiffs' remaining claims." *Id.* at 155.

Meanwhile, Plaintiffs' case had been stayed pursuant to Tennessee Supreme Court Rule 54. *McEwen*, Notice of Stay of Proceedings (Aug. 13, 2021). On May 18, 2022, the Supreme Court issued an Order appointing a three-judge panel. On July 13, 2022 the Court issued an Order in the *Metro. Gov't* action vacating the previously-issued injunction and

held a Status Conference on both cases. On July 18, 2022, this Court formally consolidated the *McEwen* and *Metro. Gov't* cases.

On July 22, 2022, Plaintiffs and Plaintiff Counties each filed a Motion for Temporary Injunction Pursuant to Tenn. R. Civ. P. 65.04. This Court held a hearing on August 5, 2022 and issued a Memorandum and Order later that day denying the motions for temporary injunction. In its Memorandum and Order, the Court stated: "the Plaintiffs' concerns at the rushed process, uncertain details of the ESA rollout and ***apparent lack of compliance with some of the ESA Act provisions*** are worthy of further consideration . . . ." Aug. 5, 2022 Memorandum and Order at 11.

On August 3, 2022, Plaintiffs filed the Complaint.. On August 19, 2022, the State and LJC Defendants each filed a Motion to Dismiss Plaintiffs' Amended Complaint. The same day, IJ Defendants filed a Renewed Motion for Judgment on the Pleadings.

III. LEGAL STANDARD

"Tennessee follows a liberal notice pleading standard . . . which recognizes that the primary purpose of pleadings is to provide notice of the issues presented to the opposing party and court." *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011). Tenn. R. Civ. P. 8.01 requires that a complaint "shall contain: (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief the pleader seeks." Rule 8.05(1) further provides: "[e]ach averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required."

Defendants' motions are brought pursuant to Tenn. R. Civ. P. 12.02(1), 12.02(6), and 12.03.

A motion to dismiss under Tenn. R. Civ. P. 12.02(1) challenges the court's subject matter jurisdiction to hear a case. *Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 445-46 (Tenn. 2012). When a defendant asserts a facial challenge to a court's subject matter jurisdiction, "the factual allegations in the plaintiff's complaint are presumed to be true." *Id.* "If a complaint attacked on its face competently alleges any facts which, if true, would establish grounds for subject matter jurisdiction, the court must uncritically accept those facts, end its inquiry, and deny the dismissal motion." *Staats v. McKinnon*, 206 S.W.3d 532, 542-43 (Tenn. Ct. App. 2006).

A motion to dismiss under Tenn. R. Civ. P. 12.02(6) "challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence." *Webb*, 346 S.W.3d at 426. The court "must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences." *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696 (Tenn. 2002). "A trial court should grant a motion to dismiss 'only when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.'" *Webb*, 346 S.W.3d at 426 (quoting *Crews v. Buckman Labs Int'l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002)).

Motions under Rule 12.02(6) of the Tennessee Rules of Civil Procedure are rarely appropriate in declaratory judgment actions. *Cannon Cnty. Bd. of Educ. v. Wade*, 178 S.W.3d 725, 730 (Tenn. Ct. App. 2005). "The prevailing rule is that when a party seeking a declaratory judgment alleges facts demonstrating the existence of an actual controversy

concerning a matter covered by the declaratory judgment statute, the court should not grant a Tenn. R. Civ. P. 12.02(6) motion to dismiss but, instead, proceed to render a declaratory judgment as the facts and law require." *Id.* (*citing Hudson v. Jones*, 278 S.W.2d 799, 804 (Mo. Ct. App. 1955)).

A motion for judgment on the pleadings under Tenn. R. Civ. P. 12.03 must be filed only after pleadings are closed and is resolved using "the same standard of review" governing motions to dismiss for failure to state a claim under Rule 12.02(6).[3] *Young v. Barrow*, 130 S.W.3d 59, 63 (Tenn. Ct. App. 2003).

IV. ARGUMENT

A. The Complaint Adequately Alleges the Voucher Law Violates the Education and Equal Protection Clauses of the Tennessee Constitution (Count I)

The Voucher Law violates Plaintiffs' children's right to an adequate and equitable public education under the Education and Equal Protection Clauses of the Tennessee Constitution. Contrary to the State's contentions, these claims are ripe for review, and it is well established under Tennessee law that they are justiciable. Because the Voucher Law diverts public education funding that is essential to the education rights of students in Metro Nashville Public Schools and Shelby County Schools, and does so without even a rational basis, the arguments advanced by Defendants do not affect the sufficiency of Plaintiffs' well pled cause of action under the Education and Equal Protection Clauses.

[3] While styled as a "motion for judgment on the pleadings," IJ Defendants' motion is deficient as a matter of law because Tenn. R. Civ. P. 12.03 only allows for such a motion "[a]fter the pleadings are closed." Here, no Defendant has filed an answer to the Complaint, and IJ Defendants are therefore not entitled to judgment on the pleadings as a matter of law.

Moreover, the Voucher Law violates the equal protection rights of Plaintiffs as taxpayers in the targeted counties.

1. Plaintiffs' Claims Are Ripe

State Defendants wrongly contend that the first cause of action – that the Voucher Law violates the Education and Equal Protection Clauses of the Tennessee Constitution – is not ripe for judicial determination. *See* State Mem.[4] at 11-12.

"The justiciability doctrine of ripeness 'requires a court to answer the question of "whether the dispute has matured to the point that it warrants a judicial decision."'" *State v. Price*, 579 S.W.3d 332, 338-39 (Tenn. 2019) (quoting *B & B Enters. of Wilson Cnty. v. City of Lebanon*, 318 S.W.3d 839, 848 (Tenn. 2010)). "Courts should engage in a two-pronged analysis in determining whether a particular case is ripe for review." *Id.*

First, "[a]n issue is not fit for judicial decision if it is based 'on hypothetical and contingent future events that may never occur.'" *Id.* "The ripeness doctrine, however, does not require the harm to have actually occurred." *Cent. W. Va. Energy Co. v. Wheeling-Pittsburgh Steel Corp.*, 245 F. App'x 415, 425 (6th Cir. 2007). Second, the Court should consider "'whether withholding adjudication . . . will impose any meaningful hardship on the parties.'" *Price*, 579 S.W. 3d at 338. Writing for a unanimous Supreme

[4] "State Mem." refers to the Memorandum of Law in Support of State Defendants' Motion to Dismiss McEwen Plaintiffs' Amended Complaint. "IJ Mem." refers to the Memorandum of Law in Support of Parent Intervenor-Defendants' Renewed Motion for Judgment on the Pleadings (McEwen). "LJC Mem." refers to Greater Praise Intervenor-Defendants' Memorandum of Law and Facts in Support of Motions to Dismiss the Counties' and the McEwen Plaintiffs' Amended Complaints.

Court in *Golden v. Zwickler*, 394 U.S. 103 (1969), Justice Brennan adopted the following test:

> "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy any reality to warrant the issuance of a declaratory judgment."

Id. at 108 (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co*., 312 U.S. 270, 273 (1941)).

Here, Plaintiffs' claims are ripe. The first cause of action alleges the Voucher Law violates the Education and Equal Protection Clauses of the Tennessee Constitution because: (a) the current funding provided by the General Assembly through the BEP is ***already*** insufficient "to provide Shelby County Schools and Metro Nashville Public School with sufficient resources – including teachers, guidance counselors, nurses, and interventions for high need students – essential to provide an adequate education to all students in the districts," ¶81; and (b) the Voucher Law ***will further*** deprive Shelby County Schools and Metro Nashville Public Schools of the funding required to provide their students with a constitutionally mandated adequate education while at the same time concentrating high need, more costly-to-educate students in the public schools. ¶¶82-89. These are not "'hypothetical and contingent future events that may never occur.'" *Price*, 579 S.W.3d at 338. Rather, the Complaint alleges the Voucher Law – which the State has now begun implementing for the 2022-23 school year – will exacerbate the underfunding

that is already occurring in Metro Nashville Public Schools and Shelby County Schools, making an already untenable situation even worse. ¶82.[5]

Withholding judgment on the legality of the Voucher Law will also impose a meaningful hardship on Plaintiffs. *Wheeling-Pittsburgh*, 245 F. App'x at 425. Delaying resolution of their claims will result in Plaintiffs' children's schools – which are already underfunded – being further deprived of educational resources. When this happens, Plaintiffs' children will further suffer. ¶¶81-82. While the State contends "the ESA Pilot Program has not been fully implemented," State Mem. at 9, "'[o]ne does not have to await the consummation of threatened injury to obtain preventive relief.'" *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983). Because the Complaint contains detailed factual allegations that the Voucher Law will exacerbate existing funding and resource deficiencies in Metro Nashville Public Schools and Shelby County Schools, Count I is ripe for adjudication.[6]

[5] The State's assertion about school improvement grants, State Mem. at 5, are inapposite as these grants may not be funded in a given year and, even if funded, cannot make up for the funding shortfall caused by the Voucher Law. *See infra* at 20.

[6] The State asserts in passing that Claim II is also not ripe. However, all of the State's argument on this point relates to Claim I and the constitutional adequacy and equity of funding levels for Tennessee's public schools under the Education and Equal Protection Clauses. Claim II asserts the Education Clause prohibits any funding of private schools because they are outside the single system of public education mandated by the Constitution. Because the State is currently implementing the Voucher Law, which directs public education funds to private schools, this claim is clearly ripe as well.

2. Adequacy Claims Under the Education Clause Are Justiciable

The Tennessee Supreme Court has ruled that adequacy claims under the Education Clause of the Tennessee Constitution are justiciable. *Tenn. Small Sch. Sys. v. McWherter* ("*Small Sch. Sys. I*"), 851 S.W.2d 139, 148 (Tenn. 1993) (holding it is the judiciary's "duty to consider the question of whether the legislature, in establishing the educational funding system" has violated the provisions of the Tennessee Constitution). The Court emphasized that to avoid deciding a case under the Education Clause simply because appropriating education funding is a legislative function would be "'a denigration of our own constitutional duty.'" *Id.* at 150-51 (rejecting State's argument that there is no judicially enforceable standard by which to judge educational adequacy). Thus, the State's contention that this case presents a non-justiciable political question, State Mem. at 12-13, contravenes binding, well established Tennessee Supreme Court precedent. In fact, the same argument regarding justiciability was rejected in an education adequacy case currently pending in the Chancery Court for Davidson County. In that case, *Shelby Cnty. Bd. of Educ. v. Haslam*, No. 15-1048-III, Order Denying Defendants' Motion to Dismiss (Davidson Cnty. Ch. Ct. July 24, 2018), the court held adequacy claims are justiciable in Tennessee, stating: "to rule that the review of an adequacy claim is non-justiciable would be changing the Supreme Court of Tennessee's rulings." *Id.* at 6.

In an attempt to disregard the *Shelby Cnty.* court's adequacy decision, the State relies on the same contentions it raised unsuccessfully in that case. As in the case at bar, the State in *Shelby Cnty.*, citing *Baker v. Carr*, 369 U.S. 186 (1962), argued the separation of powers somehow renders constitutional adequacy claims non-justiciable. The *Shelby*

Cnty. court expressly rejected the idea that *Baker* signals nonjusticiability of an adequacy claim under Tennessee's Education Clause. *Shelby Cnty.*, No. 15-1048-III, at 6 (concluding *Baker* "would allow the judiciary to exercise its judicial function to review Plaintiffs' adequacy claim"). As the Tennessee Supreme Court ruled, to leave interpretation of the Education Clause to the Legislature would be an abdication of the Court's inherent function. *Small Sch. Sys. I*, 851 S.W.2d at 148.

In its failed motion to dismiss in *Shelby Cnty.*, the State also raised the argument set forth here that educational adequacy claims are not justiciable because the Education Clause is not self-executing. That contention is flawed as well. The mere fact that the Education Clause is not self-executing does not preclude judicial review. Courts in Tennessee have repeatedly reviewed the constitutionality of non-self-executing provisions of the state constitution. *State ex rel. Maner v. Leech*, 588 S.W.2d 534, 541 (Tenn. 1979); *Biggs v. Beeler*, 173 S.W.2d 144, 150 (Tenn. 1943). Moreover, as explained above, the Tennessee Supreme Court has already ruled that educational adequacy and equity claims under the Education Clause are justiciable regardless of whether it is self-executing. *Small Sch. Sys. I*, 851 S.W.2d at 148; *see also Shelby Cnty.*, No. 15-1048-III, at 6 (concluding "the Education Clause contemplates that the judiciary would be called upon to interpret this clause and ensure that the clause was enforced").

Tennessee law is clear that adequacy claims under the Constitution's Education Clause are justiciable. In addition to the Tennessee Supreme Court, a majority of state courts have found adequacy claims justiciable under their state constitutions' education

clauses.[7] The State provides no reason to depart from this overwhelming precedent. The State's justiciability arguments must be rejected.

3. The Voucher Law Violates the Tennessee Constitution's Guarantee of an Adequate and Equitable Education

The Tennessee Constitution mandates that the General Assembly "provide for the maintenance, support and eligibility standards of a system of free public schools." Tenn. Const. art. XI, §12. The Tennessee Supreme Court has held that through this system of free public schools, the General Assembly must ensure adequate and equitable educational opportunities for all public school students. *Small Sch. Sys. I*, 851 S.W.2d 139; *Tenn. Small Sch. Sys. v. McWherter* ("*Small Sch. Sys. II*"), 894 S.W.2d 734 (Tenn. 1995); *Tenn. Small Sch. Sys. v. McWherter* ("*Small Sch. Sys. III*"), 91 S.W.3d 232 (Tenn. 2002). Currently, the General Assembly funds the State's public school system through the BEP.

[7] The rulings from sister states include: Arkansas, *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472 (Ark. 2002); Colorado, *Lobato v. Colorado*, 218 P.3d 358 (Colo. 2009); Connecticut, *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206 (Conn. 2010); Delaware, *Delawareans for Educ. Opportunity v. Carney*, 199 A.3d 109 (Del. Ch. 2018); Idaho, *Idaho Schs. for Equal Educ. Opportunity v. Idaho*, 976 P.2d 913 (Idaho 1998); Kansas, *Gannon v. Kansas*, 319 P.3d 1196 (Kan. 2014); Kentucky, *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); Maryland, *Hornbeck v. Somerset Cnty. Bd. of Educ.*, 458 A.2d 758 (Md. 1983); Massachusetts, *McDuffy v. Sec'y of Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); Minnesota, *Cruz-Guzman v. Minnesota*, 916 N.W.2d 1 (Minn. 2018); Montana, *Columbia Falls Elementary Sch. Dist. No. 6 v. Montana*, 109 P.3d 257 (Mont. 2005); New Hampshire, *Claremont Sch. Dist. v. Governor* ("*Claremont II*"), 703 A.2d 1353 (N.H. 1997); New Jersey, *Abbott ex rel. Abbott v. Burke*, 20 A.3d 1018 (N.J. 2011); New York, *Hussein v. New York*, 973 N.E.2d 752, (N.Y. 2012); North Carolina, *Leandro v. North Carolina*, 488 S.E.2d 249 (N.C. 1997); Ohio, *DeRolph v. Ohio*, 677 N.E.2d 733 (Ohio 1997); Pennsylvania, *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414 (Pa. 2017) Texas, *Neeley v. W. Orange-Cove Consol. lndep. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005); Vermont, *Brigham v. Vermont*, 889 A.2d 715 (Vt. 2005); Washington, *McCleary v. Washington*, 269 P.3d 227 (Wash. 2012); West Virginia, *Pauley v. Kelly*, 255 S.E.2d 859 (W.Va. 1979); Wisconsin, *Vincent v. Voight*, 614 N.W.2d 388 (Wis. 2000); and Wyoming, *Campbell Cnty. Sch. Dist. v. Wyoming*, 907 P.2d 1238 (Wyo. 1995).

The Supreme Court has recognized that the goal of the BEP is to address "both constitutional mandates imposed upon the State – the obligation to maintain and support a system of free public schools and the obligation that that system afford substantially equal educational opportunities." *Small Sch. Sys. II*, 894 S.W.2d at 738. Thus, the BEP is the vehicle through which the State provides students in each public school district with constitutionally adequate and equitable educational opportunities. The Voucher Law, by reducing state BEP funds for Shelby County Schools and Metro Nashville Public Schools – and by doing so in those districts but in no others – directly violates the guarantees of adequate and equitable educational opportunities under the Tennessee Constitution.

a. Plaintiffs Have Stated a Claim that the Voucher Law Violates the Right to an Adequate Education

The Complaint alleges the BEP is insufficient to cover the cost of all components essential to an adequate education. ¶¶80-81; *see, e.g.*, Basic Education Program Review Committee 2021 Annual Report (finding, for example, that it would cost an additional $657,000 to provide adequate counselors in Metro Nashville Public Schools, an additional $112,000 to provide adequate counselors in Shelby County Schools, and an additional $6 million to provide adequate nurses in Shelby County Schools).[8] According to the State's own reports, both Metro Nashville Public Schools and Shelby County Schools already receive inadequate BEP funding to meet students' educational needs, as well as state and federal educational requirements. ¶80. With the Voucher Law, the State has

[8] Tenn. State Bd. of Educ., "Basic Education Program Review Committee 2021 Annual Report," *available at* https://www.tn.gov/content/dam/tn/stateboardofeducation/documents/bepcommitteeactivities/2021/2021%20BEP%20Report_FINAL.pdf.

created a program that provides a monetary incentive to students to leave their public school districts, thus further reducing the districts' already inadequate state funding.

Both Metro Nashville Public Schools and Shelby County Schools serve significant populations of students who require additional academic and social supports in order to learn successfully. *See* ¶80. However, as alleged in the Complaint, the State does not provide the districts with adequate educational resources to meet these students' needs, such as teachers, guidance counselors, nurses, and interventions for high need students. ¶¶80-81. Diverting more BEP funds from the districts to pay for private schools will result in more cuts to educational services that are desperately needed by their students. Plaintiffs have proffered detailed factual allegations that the Voucher Law will exacerbate this inadequacy. ¶¶68-89.[9]

The BEP formula calculates the yearly BEP allocation for each district. *See* ¶32; T.C.A. §§49-3-302, 49-3-351, *et seq*. That allocation represents the state contribution plus the required local contribution, *i.e.*, what the State provides to the district and what the district is required by law to pay. ¶36. The Voucher Law mandates that the amount to be deducted from state BEP funds otherwise payable to each district, for each voucher student, equals "the per pupil state ***and*** local funds generated and required through the basic

[9] IJ Defendants erroneously contend that Plaintiffs are trying to litigate the adequacy of education funding but that such claims are misplaced because the voucher program simply provides additional educational options outside the public school system. IJ Mem. at 3-4. This contention misses the point that the Voucher Law substantially reduces public education funding in violation of the Tennessee Constitution's guarantees; this claim, despite being contested, is more than adequately pled to withstand a motion to dismiss. The allegations in the Complaint that public education funding in Tennessee is already inadequate under the BEP highlight the harm that will be caused by the Voucher Law's further erosion of public school funding in the two targeted counties.

education program (BEP) for the Local Education Agency ("LEA") in which the participating student resides, but must not exceed the combined statewide average of required state and local BEP allocations per pupil." T.C.A. §49-6-2605(a). Under the Voucher Law, an amount representing ***both the state and local contributions*** will be deducted from each district's ***state*** BEP funding. ¶65. Consequently, the State will deduct more in state BEP funding than it allocates to the district for each student.[10]

For example, in 2022-23, Metro Nashville Public Schools' per-pupil BEP amount is $9,163.75. *See* ¶71. The per-pupil state share – the portion funded by state dollars – is $3,791.62, and the per-pupil local share – funded by local taxpayer funds – is $5,372.13. *Id.* This year, for every student districted for Metro Nashville Public Schools who takes a voucher, Metro Nashville Public Schools will lose $8,192 in ***state*** funds – the voucher amount – which is more than twice what the district receives from the State for every student and more than twice what the district would lose in state funds if a student left the district for any other reason.

Similarly, this year, Shelby County Schools will lose more ***state*** education funds for every voucher student than the district receives from the State per pupil and more than the district would lose if a student left the district for any other reason. The district will lose $8,192 for every voucher student, which is more than the state BEP share of $5,934.26 per

[10] The Complaint alleges that, starting in the 2023-24 school year, the Tennessee Investment in Student Achievement Act, 2022 Tenn. Pub. Acts Ch. 966, to be codified at T.C.A. §§49-3-101, *et seq.* ("TISA"), will replace the BEP, and the Voucher Law will deduct the districts' TISA allocation, rather than their BEP allocations. ¶¶73-74. As with the BEP, the State will deduct both the state and local share of the districts' TISA allocations to fund the vouchers. ¶74.

pupil for the 2022-23 school year. ¶72. Thus, for every voucher student, both districts will lose more in per-pupil state funding than they receive, exacerbating the state funding inadequacy that the State's own reports have acknowledged prevents students in the two districts from receiving adequate educational resources.

The Complaint makes additional allegations that the Voucher Law will lead to inadequate educational resources in violation of the Education Clause, which Defendants fail to so much as address. These include: (i) the existence of substantial fixed costs preventing the districts from reducing expenses commensurate with the reduction in enrollment under the voucher program (¶88); (ii) the likelihood the voucher program will increase the concentration of more costly-to-educate students in the districts because private schools participating in the voucher program can deny enrollment to students with disabilities and others with increased needs (¶89); and (iii) the fact that BEP funds for students who return to the districts from the voucher program midyear will not revert to the districts. ¶86; T.C.A. §49-6-2603(e).[11]

[11] State law on "maintenance of effort" requires local school districts to maintain the same funding levels as the prior year unless enrollment decreases. T.C.A. §§49-2-203, 49-3-314. Under the Voucher Law, the two targeted counties must still count students who leave to take vouchers as enrolled in the district for maintenance-of-effort purposes. Thus, local taxpayers are required to make up the local share of the BEP deduction due to vouchers in the next year's budget. In essence, they are required to pay for the private school vouchers. This "counting" requirement applies to students who were enrolled in but left the district, as well as to student projections regarding kindergarten enrollment, so it neither includes recently arrived students who use a voucher nor applies to kindergarteners using a voucher who were not captured in the districts' projections. While the districts will ostensibly receive the local share for the "counted" students the following year, they still lose the state share of BEP funding. The Complaint alleges that the fixed costs, the increased concentration of higher-cost students, and the return of voucher students to the district more than offset any reduction in cost that may be occasioned by a student leaving the district to use a voucher. At most, any dispute regarding the scope of losses the district will suffer is an issue of fact not to be resolved on a motion to dismiss.

Contrary to the State's and LJC Defendants' contentions, State Mem. at 5, LJC Mem. at 8 – which contradict the Complaint's allegations and cannot be considered in the context of a motion to dismiss in any event – the school improvement fund grants that may be available under the Voucher Law will not compensate for the loss in funding resulting from the diversion of BEP funds to the voucher program. The Complaint sets forth in detail the uncertainty about whether these grants will be funded and the restrictions on their use, length, and students covered – all of which prevent these grants from compensating for the loss in BEP funding under the Voucher Law. ¶¶83-85. Nor is there any guarantee, after these school improvement fund grants expire, that any school improvement grants made available to low-performing schools in the State generally would be awarded to these districts or would compensate for the loss of funding from the Voucher Law. LJC Mem. at 18. Taking Plaintiffs' allegations as true, the Complaint states a claim for a violation of the adequacy guarantee under Article XI, §12 of the Tennessee Constitution.

b. Plaintiffs Have Stated a Claim that the Voucher Law Violates the Right to Equitable Educational Opportunities

The Complaint alleges the diversion of state BEP funds violates the equity mandate of the Education and Equal Protection Clauses by treating public school students in Shelby County Schools and Metro Nashville Public Schools differently from public school students across the State. ¶¶62, 65. The Voucher Law targets students in Shelby County Schools and Metro Nashville Public Schools only. ¶¶56-66. Moreover, as demonstrated above, the Complaint alleges the mechanism for funding the vouchers disproportionately impacts students in those districts.

First, the Voucher Law actively incentivizes the loss of state funding in these two districts only. Second, the Voucher Law deducts more state BEP funding per pupil for every voucher student than the districts receive from the State per pupil and more than for students leaving for any non-voucher reason. No district suffers a deduction of state funds in the amount of the state ***plus*** local share for students who leave the district other than Metro Nashville Public Schools and Shelby County Schools under the Voucher Law. ¶¶68-72. Moreover, in no other county are local taxpayers required to fill a funding hole in their public school budgets caused by the diversion of state funds to private schools specifically through the counting and maintenance-of-effort requirements explained above. Thus, there are more than sufficient allegations in the Complaint that students enrolled in Shelby County Schools and Metro Nashville Public Schools are disadvantaged *vis-a-vis* students in other districts across the State and that taxpayers in these counties are disadvantaged *vis-à-vis* those in the rest of the state. *See Small Sch. Sys. I*, 851 S.W.2d at 156 (holding there was an equity violation under the Education Article when students in different public school districts had disparate educational opportunities as a result of state funding).

Defendants advance two specious arguments that do not undermine the sufficiency of Plaintiffs' allegations. First, the State Defendants claim the districts will not lose funds under the Voucher Law and thus will not be disadvantaged as compared to other districts. State Mem. at 5. This contention fails to accept Plaintiffs' allegations as true; and, in any event, as Plaintiffs demonstrate *supra*, §IV.A.3.a., this contention is false. Second, IJ Defendants twist the equity argument by claiming there is equal opportunity to attend either a private or public school. IJ Mem. at 5. This assertion is irrelevant. The Tennessee

Constitution obligates the State to provide equality of educational opportunity in the statewide system of free ***public*** schools with no obligation – and indeed no authorization – to fund private schools. Because there is no constitutional obligation related to private school students, the educational opportunity for students in private schools is irrelevant to this case. Rather, the relevant inquiry is whether there is equality of opportunity among ***public*** school students throughout the state. By creating a system designed to reduce state funding and by deducting an amount larger than the state share of per-pupil BEP funding for every student who leaves the district to use a voucher in Metro Nashville Public Schools and Shelby County Schools only, the Voucher Law treats public school students in those two districts differently from public school students in other districts in the State. These contentions are adequately alleged in the Complaint.

4. There Is No Rational Basis Justifying the Classification in the Voucher Law

Plaintiffs agree with the Plaintiff Counties that education is a fundamental right under the Tennessee Constitution and strict scrutiny therefore applies in this matter. Plaintiffs incorporate by reference the Plaintiff Counties' arguments on this point contained in their separate Consolidated Response to Defendants' Motions to Dismiss and Motion for Judgment on the Pleadings. Here, however, Defendants fail to satisfy even the lowest level of scrutiny in an equal protection analysis. Thus, even if education were not a fundamental right, Plaintiffs have adequately stated a claim for an equal protection violation.

There is no rational basis to justify the disparate treatment of students in Metro Nashville Public Schools and Shelby County Schools versus public school students in the

rest of the State. Under Tennessee Law, there must be "some reasonable basis for the disparate state action." *Small Sch. Sys. I*, 851 S.W.2d at 153; *see also Small Sch. Sys. III*, 91 S.W.3d at 233 (finding no rational basis for excluding teacher salaries from the BEP); *State v. Tester*, 879 S.W.2d 823, 829 (Tenn. 1994) (finding no rational basis to limit a law to only three counties in the State). *In Small Sch. Sys. I*, the Tennessee Supreme Court rejected the State's contention that maintenance of local control satisfied the rational basis test, noting there was no proof of "a legitimate state interest justifying the granting to some citizens, educational opportunities that are denied to other citizens similarly situated." 851 S.W.2d at 156. Here, as discussed above, the Voucher Law diverts far more than the per-pupil share of state BEP funds for every student who leaves Metro Nashville Public Schools or Shelby County Schools to use a voucher. This disproportionate diversion disadvantages students in these public school districts versus those in the rest of the State, leaving them with fewer educational resources and fewer educational opportunities. As in *Small Sch. Sys. I,* Defendants cannot identify any legitimate state interest in denying children in Metro Nashville Public Schools and Shelby County Schools the educational funding and opportunities afforded to all other public school students in the state. *Id.*

First, Defendants cannot offer any rational basis to deprive Plaintiffs' children of equal educational opportunities in order to fund the voucher program because the State has ***no*** legitimate interest in funding private schools. IJ Defendants claim that, in establishing the voucher program, the General Assembly used its plenary power in the area of education. IJ Mem. at 7. However, as the Court of Appeals held in this very case, the plenary authority derived from Article XI, §12 of the Tennessee Constitution relates to

public schools. "When encouraging, assisting or benefiting private schools, the General Assembly is operating outside that plenary power." *Metro. Gov't*, 2020 WL 5807636, at *5; *see also S. Constructors, Inc. v. Loudon Cnty. Bd. of Educ.*, 58 S.W.3d 706, 715 (Tenn. 2001) (the State's function is to provide for the maintenance, support, and eligibility standards of a system of free public schools); *Cagle v. McCanless*, 285 S.W.2d 118 (Tenn. 1955) (public education rests upon the solid foundation of state authority); *City of Humboldt v. McKnight*, 2005 WL 2051284, at *13 (Tenn. Ct. App. Aug. 25, 2005) (Ex. A) (State's function is to fashion a statewide public school system that meets constitutional requirements). Because the State cannot claim it is advancing any legitimate state interest by funding private education, there can be no proof of any "legitimate state interest justifying the granting to some citizens, educational opportunities that are denied to other citizens similarly situated." *Small Sch. Sys. I*, 851 S.W.2d at 156. Accordingly, Defendants cannot satisfy the rational basis standard.

The Complaint alleges the Voucher Law does not require schools participating in the program to furnish any proof they provide an adequate level of education, let alone one superior to the schools in Metro Nashville Public Schools or Shelby County Schools. ¶¶102-114, 111. Moreover, none of the Defendants counters that the voucher program is designed to or would actually improve educational outcomes for students; they merely state the program will provide "additional" educational options. State Mem. at 3; LJC Mem. at 8; IJ Mem. at 4. In fact, the State concedes there is no evidence these schools provide a better education. State Mem. at 6. There is no rational basis to divert scarce school funding resources to a program lacking in even minimum standards and safeguards.

Defendants also attempt to claim the legitimate state interest in having the Voucher Law target students in these two districts was to provide additional educational opportunities to children in LEAs with the consistently lowest-performing schools. *See, e.g.*, State Mem. at 16. However, the Complaint's allegations, citing legislative history, belie this claim. Originally, five counties with the lowest-performing schools were targeted in the voucher bill: Davidson, Hamilton, Knox, Madison, and Shelby. ¶61. The other three counties were removed not for educational reasons but for political reasons: to secure the votes of legislators from those counties removed from the bill. *Id.*; *see also* Aug. 5, 2022 Memorandum and Order at 2 ("The qualifications were tailored, through multiple amendments, to only include those two school systems, and that bill sponsors could only secure passage from representatives against the bill if their district school systems were excluded."). Moreover, the Voucher Law enables students from ***any*** school in Metro Nashville Public Schools and Shelby County Schools to use a voucher, including numerous high-performing public schools. The failure to include other districts with the lowest-performing schools in the state, coupled with the failure to exclude high-performing schools in the targeted districts, is further evidence the Voucher Law is not designed to improve academic achievement and does not rest upon any rational basis.

IJ Defendants misrepresent Plaintiffs' claim as one seeking identical educational opportunities for public school students across the state. IJ Mem. at 3-4. That is false. The Tennessee Constitution allows tailored or innovative educational options or programs within the state system of ***public*** schools. However, the Constitution does not permit the state to fund ***private*** schools. In *Small Sch. Sys. I,* cited by IJ Defendants as supporting

innovation, the Tennessee Supreme Court made clear this innovation was to occur within "a public school system that provides substantially equal educational opportunities to the school children of Tennessee." 851 S.W.2d at 156. Indeed, the examples of innovative schools provided by IJ Defendants – charter schools and magnet schools – are ***public*** schools.[12]

The Complaint sufficiently alleges a violation of the Tennessee Constitution's guarantee of adequate and equitable educational opportunities in its public school system for Plaintiffs as public school parents in the targeted districts and a violation of the Tennessee Constitution's guarantee of equal protection for Plaintiffs as local taxpayers in the targeted counties.

B. The Complaint Adequately Alleges the Voucher Law Violates the Education Clause's Mandate of a Single System of Public Schools (Count II)

Count II of the Complaint adequately states a claim that the Voucher Law violates the Education Clause of the Tennessee Constitution because it contravenes the requirement that the State fulfill students' right to a publicly funded education by providing for the maintenance, support, and eligibility standards of "***a system*** of free ***public*** schools." ¶¶119-128. Tenn. Const. art. XI, §12. For at least 2022-23, the Voucher Law diverts BEP funds that have been appropriated by the General Assembly for the purpose of maintaining and supporting Tennessee public schools to instead pay for tuition at private schools that need

[12] LJC Defendants attempt to rely on an Attorney General opinion regarding a law that provided post-secondary school scholarships and after-school enrichment programs specifically authorized by Article XI, §5 of the Tennessee Constitution. LJC Mem at 25; Tenn. Op. Atty. Gen. No. 07-60 (2007). That example is clearly inapposite as this case involves funding private K-12 education, which the Tennessee Constitution only authorizes through public schools.

not comply with the requirements of the statewide system of public education.[13] The private schools participating in the voucher program are not and cannot be part of the State's system of public schools, as Defendants concede. Furthermore, they are not obligated to abide by myriad requirements imposed on the State's system of public schools, including academic, accountability, and nondiscrimination standards.

The well-established doctrine of *expressio unius est exclusio alterius* ("*expressio unius*") means the expression of one thing necessarily excludes another. Because the Education Clause specifically mandates a system of free public schools, it excludes a separate program of publicly funded private education.

Thus, the Legislature is prohibited from exceeding its constitutional mandate by funding private education outside the public school system. Defendants' motions to dismiss Count II should be denied.

1. The Tennessee Constitution Requires the State to Fulfill the Education Clause's Mandates Solely Through a System of Free Public Schools

a. The Plain Language of Tennessee's Constitution, as Interpreted Repeatedly by Its Courts, Contemplates *One* Statewide System of *Public* Schools

The plain language of the Education Clause mandates the State discharge its obligation thereunder by establishing and funding a single system of public education. Article XI, §12 states: "The General Assembly shall provide for the maintenance, support

[13] The State school funding formula, the BEP, was designed to fulfill the State's constitutional obligation to provide for the maintenance and support of its system of free public schools. *Small Sch. Sys. II*, 894 S.W.2d at 738. But as set forth herein, any use of public funds to support private education outside the system of free public schools would violate the Education Clause.

and eligibility standards of a system of free public schools." In interpreting the Tennessee Constitution, the plain language controls. *Gaskin v. Collins*, 661 S.W.2d 865, 867 (Tenn. 1983) ("When construing a constitutional provision we must give 'to its terms their ordinary and inherent meaning.'"). If the language used is clear and unambiguous, courts must ascertain the intent of the provision from the language itself. *Hatcher v. Bell*, 521 S.W.2d 799, 802 (Tenn. 1974). Pursuant to the plain language of Article XI, §12, the General Assembly must provide for a single system of public schools. Moreover, as the Tennessee Supreme Court has declared, the General Assembly enacted the State's school funding formula, the BEP, to fulfill its constitutional mandate to provide this system of public schools. *Small Sch. Sys. II*, 894 S.W.2d at 738. Thus, to divert BEP funding to schools outside the constitutionally mandated system of free public schools is unconstitutional.

Tennessee courts have long interpreted the Education Clause as requiring the General Assembly to support and maintain a single system of free schools, *i.e.*, the statewide public school system. In the landmark *Tenn. Small Sch. Sys.* line of cases, the Tennessee Supreme Court held the General Assembly's obligation under Article XI, §12 is twofold: "the obligation to maintain and support a system of free public schools and the obligation that that system afford substantially equal educational opportunities." *Small Sch. Sys. II*, 894 S.W.2d at 738; *see also Small Sch. Sys. III*, 91 S.W.3d at 241 ("We have now held on two occasions since 1988 that the legislature's constitutional mandate is to maintain and support a system of public education that affords substantially equal educational opportunities to all students.").

The Court made clear that the coherence of a single statewide system was essential to achieving the second obligation: ensuring substantially equal educational opportunities for all of Tennessee's children. For example, in reviewing the legislative history of the 1978 amendment to the Education Clause, the Court pointed to the discussion of the "'free hand'" the Legislature was given regarding the funding of public education programs. The Court made clear the "'free hand'" was with regard to funding public schools, not with regard to the educational program required, as it was mandated that the Legislature provide equal educational opportunities across the State. *Small Sch. I*, 851 S.W.2d at 151. In *Small Sch. Sys. II*, the Court observed the BEP consisted of integral components, including funding, governance, and accountability, with "final responsibility upon the State officials for an effective educational system throughout the State." 894 S.W.2d at 739. The Court noted: "[e]ach of these factors relating to funding and governance is an integral part of the plan and each is indispensable to its success." *Id.* The Court then ruled in both *Small Sch. Sys. II* and *Small Sch. Sys. III* that an earlier iteration of the BEP was unconstitutional because teachers' salaries, an essential component of the statewide system, were not equalized throughout Tennessee. *Small Sch. Sys. II*, 894 S.W.2d at 738; *Small Sch. Sys. III*, 91 S.W.3d at 233-34.

The *Small Sch. Sys.* decisions are consistent with a long line of Tennessee precedent. Tennessee courts have historically recognized that, in discharging its constitutional obligation to provide equal educational opportunity, the State's policy is to maintain and support a single statewide system of public education. *Bd. of Educ. of Memphis City Schs. v. Shelby Cnty.*, 339 S.W.2d 569, 578-79 (Tenn. 1960); *see also Richardson v. City of*

Chattanooga, 381 S.W.2d 1 (Tenn. 1964); *State v. Mayor & Aldermen of Dyersburg*, 235 S.W.2d 814, 818 (Tenn. 1951); *State v. City of Knoxville*, 90 S.W. 289, 293 (Tenn. 1905).

Subsequent precedent confirms the principles that the State's obligation is to maintain a single system of public schools and that any education outside or in addition to that is not part of this single constitutionally mandated system. In *Crites v. Smith*, 826 S.W.2d 459, 467 (Tenn. Ct. App. 1991), the Tennessee Court of Appeals, rejecting a challenge by homeschooling parents, upheld the authority of the State Commissioner of Education to set a strict deadline for notice to local school boards that a parent is withdrawing a child from the public school system. The Court reasoned the deadline was necessary so as not to disrupt the public school system. The Court noted: "[w]hile absolute freedom and flexibility to attend or not attend public school or home school at will may be desirable to some, it does not comport with the orderly conduct of a school system provided for all the children of the state." *Id.* Because home schooling occurred outside the public schools, it was clearly not part of the State's system of free schools.

Indeed, the State itself has recognized the Tennessee Constitution contemplates one system of public education. In a 2018 opinion responding to an inquiry about the relative powers of the State Board and local boards of education, the Tennessee Attorney General concluded:

> Pursuant to [the] constitutional mandate [of Article XI, §12], the legislature has established ***a system of public education***, *see* Tenn. Code Ann. §49-1-101, and has created a state Board of Education, *see id.* §49-1-301. The legislature has given the state Board a broad range of powers and duties, including the authority to set various guidelines and policies for public schools and to establish accreditation and licensing standards for teachers and other educators and administrators. *Id.* §49-1-302 (listing the powers of the Board).

Hon. Antonio Parkinson, Tenn. Op. Atty. Gen. No. 18-34 (2018), at 1. The Opinion continues: "In short, the legislature has created a state Board of Education composed of appointed individuals and has vested in that Board the ultimate authority to set the "'policies, standards, and guidelines' that govern ***the public school system*** in the State." *Id.* at 2. This captures the State's own understanding of the means required to fulfill its obligation under Article XI, §12.

Moreover, Tennessee courts have consistently ruled that maintaining and supporting a system of ***public*** schools, and public schools alone, is a State function under the Education Clause. Numerous decisions confirm that maintaining the public education system is a State function. *State ex rel. Weaver v. Ayers*, 756 S.W.2d 217, 221 (Tenn. 1988); *Shelby Cnty.*, 339 S.W.2d at 576; *Hamblen Cnty. v. City of Morristown*, 584 S.W.2d 673, 675 (Tenn. Ct. App. 1979). In contrast, as the Court of Appeals ruled in *Metro. Gov't*, maintaining and supporting ***private*** schools is not a state function.[14] *Metro. Gov't*, 2020 WL 5807636, at *5 ("[T]he plenary authority derived from article XI, section 12 relates to ***public schools***, not private ones. When encouraging, assisting or benefiting private schools, the General Assembly is operating outside that plenary power.") (emphasis in original). Thus, private schools cannot be part of the system of free public schools contemplated by Article XI, §12.[15] Diverting the funds intended to maintain and

[14] The Tennessee Supreme Court left the Court of Appeals' ruling on this point of law undisturbed.

[15] For these reasons, IJ Defendants' contentions to the contrary (IJ Mem. at 5-7) must be rejected.

support the public school system to schools outside that system both exceeds and undermines the State's Education Clause duty and is thus unconstitutional.

b. The Voucher Law Impermissibly Exceeds the State's Constitutional Mandate to Provide a System of Free *Public* Schools

Pursuant to the doctrine of *expressio unius*, the Constitution prohibits the Legislature from exceeding the Article XI, §12 mandate by publicly funding private education outside the system of free public schools.

Expressio unius is an axiomatic rule of interpretation in Tennessee. "[I]t is a rule of construction, well recognized by the courts, that the mention of one subject in an act means the exclusion of other subjects." *Southern v. Beeler*, 195 S.W.2d 857, 866 (Tenn. 1946). "Now since the statute mentions only one subject, *i.e.*, the division of elementary school funds, we are justified in concluding, inferentially, at least, that high school funds were excluded by this legislative direction." *Id.; see also, e.g., Penley v. Honda Motor Co.*, 31 S.W.3d 181, 185 (Tenn. 2000) ("It is a well-established canon of statutory construction that 'the mention of one subject in a statute means the exclusion of other subjects that are not mentioned.'") (quoting *Carver v. Citizen Utils. Co.*, 954 S.W.2d 34, 35 (Tenn. 1997)).

Article XI, §12 requires the General Assembly to fund a system of free public schools. Publicly funding private K-12 education impermissibly exceeds that mandate as the Education Clause explicitly requires a system of public schools and necessarily excludes a separate program of publicly funded private education. However, a publicly funded system of private education, separate and apart from the system of public schools, is exactly what the State is attempting to establish through the Voucher Law – with wholly

different, and minimal, standards regarding academic quality, accountability, and antidiscrimination protections. Moreover, the Voucher Law funds this separate system by diverting funding expressly intended to support and maintain the system of free public schools designated in Article XI, §12, thereby also frustrating the express mandate of the Education Clause. This separate program for funding private education is unconstitutional.

Other state courts have enjoined voucher programs on these very grounds. In *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), the Florida Supreme Court struck down a voucher statute under the *expressio unius* principle. The Florida Constitution mandates "a uniform, efficient, safe, secure, and high quality system of free public schools." Fla. Const. art. IX, §1(a). The Supreme Court held that the Legislature's constitutional mandate to provide free public schools prohibited it from creating a system of funding for nonpublic schools with different academic and antidiscrimination standards. *Bush*, 919 So. 2d at 407.

Recently, a West Virginia court invalidated that state's voucher program on *expressio unius* grounds. In *Beaver v. Moore*, No. 22-P-24 (W. Va. Cir. Ct. July 22, 2022), the court found the West Virginia Constitution's Education Clause requirement of a "thorough and efficient system of free schools" meant "the state of West Virginia cannot provide for nonpublic education or take any action which frustrates this obligation [to provide a system of public schools]." Ex. C at 13-16. The court further found private education is not a constitutional interest of the State. *Id.* at 16. Tennessee's Education Clause is even more explicit than West Virginia's in requiring the General Assembly to not only maintain and support a system of free schools but "a system of free ***public***

schools." Tenn. Const. art. XI, §12. Thus, funding private schools impermissibly exceeds the State's constitutional mandate.

Additional courts have acknowledged voucher programs that divert public education funds to private education uses are incompatible with Education Clause requirements that the legislature provide publicly funded education via a statewide system of public schools. In *Simmons-Harris v. Goff*, for example, the Ohio Supreme Court concluded the state constitution's requirement that the General Assembly provide "'a thorough and efficient system of common schools throughout the State,'" Ohio Const. art. VI, §2, supported the argument "that implicit within this obligation is a prohibition against the establishment of a system of uncommon (or nonpublic) schools financed by the state." 711 N.E.2d 203, 212 (Ohio 1999).[16]

Tennessee's Education Clause explicitly lays out the manner in which the State must fulfill its obligation to provide adequate and equitable educational opportunity to all Tennessee children. Interpreting the "plain meaning of Article XI, Section 12," the Tennessee Supreme Court has explained that the Education Clause "expressly recognizes ***the inherent value*** of education ***and then*** requires the General Assembly to 'provide for the maintenance, support and eligibility standards of a system of free public schools.'" *Small Sch. Sys. I*, 851 S.W.2d at 150 (second emphasis added). Similarly, in *Bush*, the

[16] Similarly, in *Cain v. Horne*, a challenge to two voucher programs, the Arizona Supreme Court concluded the state constitution's No Aid Clause, prohibiting the appropriation of public funds to private schools, "furthers th[e] goal" of its Education Clause that the state "'provide for the establishment and maintenance of a general and uniform public school system.'" 202 P.3d 1178, 1183 (Ariz. 2009) (quoting Ariz. Const. art. 11, §1).

Florida Supreme Court explained whereas "[t]he second sentence of [the Florida Education Clause] provides that it is the 'paramount duty of the state to make adequate provision for the education of all children residing within its borders,'" the next sentence "provides a restriction on the exercise of this mandate by specifying that the adequate provision required in the second sentence 'shall be made by law for a uniform, efficient, safe, secure and high quality system of ***free public schools***.'" 919 So. 2d at 407 (quoting Fla. Const. art. IX, §1(a)) (emphasis in original).

Likewise, in Tennessee's Education Clause, the generalized edict of the first sentence, providing: "[t]he State of Tennessee recognizes the inherent value of education and encourages its support," is defined and restricted by the more specific succeeding sentence, proclaiming: "[t]he General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools." Tenn. Const. art. XI, §12. Thus, attempting to provide publicly funded K-12 education through payment of private school tuition and expenses is a clear violation of the explicit mandates of Tennessee's Education Clause.

Defendants assert the Voucher Law does not conflict with the Education Clause because public schools still exist as an option for parents who choose them, implying the Voucher Law does not negatively impact the opportunity to receive a constitutionally adequate public school education. IJ Mem. at 8-9, 11; State Mem. at 16-17. As explained above, Plaintiffs allege the Voucher Law has significant negative effects on public schools in the two targeted counties, and these allegations must be accepted as true when evaluating motions to dismiss. However, this fact – that the Voucher Law violates the State's

constitutional obligation to maintain a single system of public schools – is not a necessary component of Count II. Use of public education funds for unaccountable private schools, ***in addition*** to the public school system, violates the constitutional requirement that the General Assembly maintain a single system of public education. Tenn. Const. art. XI, §12. As the Florida Supreme Court explained in *Bush*:

> Although parents certainly have the right to choose how to educate their children, [the Education Clause] ***does not***, as the Attorney General asserts, ***establish a "floor"*** of what the state can do to provide for the education of Florida's children. The provision mandates that the state's obligation is to provide for the education of Florida's children, specifies that the manner of fulfilling this obligation is by providing a uniform, high quality system of free public education, and does not authorize additional equivalent alternatives.

919 So. 2d at 408. Even if the Voucher Law had no effect on the provision of education in public schools – which the Complaint alleges it does, and which allegations must be accepted as true in ruling on the current motions – the State's establishment of, and use of public education funds to support, the private school voucher program is wholly sufficient to state a claim that the Voucher Law violates the Education Clause.

2. The Education Clause's Permissive Language on the Funding of Post-Secondary Education, and the History of Such Language, Demonstrate the Voucher Law Violates the Education Clause

Providing publicly funded K-12 education through payment of private school tuition and expenses is irreconcilable with the plain language and intent of Article XI, §12 because §12 specifically limits the State to supporting "free public schools" with respect to K-12 education yet provides no such limitation with respect to "post secondary educational institutions." Specifically, the provision of the Education Clause dealing with higher

education states: "The General Assembly may establish and support such post secondary educational institutions, including public institutions of higher learning, as it determines." *Id.* Clearly, the Constitution limited the General Assembly's permissible means of providing K-12 education to a system of public schools while permitting the support of public ***or other*** types of higher education institutions. Critically, Defendants have never once even attempted to explain how the three sentences of the Education Clause, read collectively as they must be, can possibly support the conclusion that funding private K-12 education is constitutionally permissible when such permission is spelled out in the post-secondary sentence but not in the K-12 sentence.

The history of the Education Clause only reinforces this conclusion. The Education Clause, in its current form, was drafted in connection with the 1978 amendments to the Tennessee Constitution. Prior to 1978, the Constitution explicitly mandated segregated schools, stating: "[n]o school established or aided under this section shall allow white and negro children to be received as scholars together in the same school." Tenn. Const. art. XI, §12. The intent of the amendments to the Education Clause was solely to excise this shameful vestige of the past and "eliminat[e] segregated schools," while modernizing and simplifying the Education Clause's language. Ex. B at 381-82, 467, 469.[17]

Fatal to Defendants' arguments, allowing for public funding of private schools would have been antithetical to the elimination of segregated schools that drove the 1978 amendments to the Education Clause as the delegates would have been acutely aware that

[17] The Tennessee Supreme Court has previously relied on the record of the 1977 convention in interpreting the Education Clause. *E.g., Small Sch. Sys. 1,* 851 S.W.2d at 151.

attempts to publicly fund private schools at that time were substantially synonymous with preserving segregation.

Following the U.S. Supreme Court's decision in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), prohibiting *de jure* segregation in public schools, states across the South resolved to defy the Court's order by funneling public dollars to private "segregation academies." In fact, private school vouchers have their roots in this segregationist history as they were "a popular tool for perpetuating the segregation the Court had ruled unconstitutional." Raymond Pierce, *The Racist History of "School Choice,"* Forbes (May 6, 2021), *available at* https://www.forbes.com/sites/raymondpierce/2021/05/06/the-racist-history-of-school-choice/?sh=48b1bdd56795. Prince Edward County, Virginia provides a prime example. In 1959, defying a Fourth Circuit order directing the County to "'take immediate steps'" toward integration, Prince Edward County chose to close its entire public school system and offer white students vouchers rather than operate integrated public schools.[18]

From 1954 to 1965, Southern states enacted approximately 450 laws to evade or block desegregation, many of which facilitated the diversion of public education resources

[18] Chris Ford, et al., *The Racist Origins of Private School Vouchers*, Ctr. for Am. Progress, at 8 (July 12, 2017), *available at* https://cdn.americanprogress.org/content/uploads/2017/07/12184850/VoucherSegregation-brief2.pdf?_ga=2.51746729.1076406111.1631119616-582938564.1629714016. Instead of levying taxes for public schools, Prince Edward County adopted a "tuition grant program" providing public funds for students to use to attend either a local public or private school. *Id*. Residents raised money to establish a whites-only private school; when the public school system closed down, whites attended the segregated Prince Edward Academy. The U.S. Supreme Court eventually held the County's program violated the Fourteenth Amendment's Equal Protection Clause and directed the district court to enter an order that the public schools reopen. *Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty*., 377 U.S. 218, 232-33 (1964).

to private schools. Steve Suitts, *Overturning Brown: The Segregationist Legacy of the Modern School Choice Movement*, at 13 (2020). By 1965, seven states maintained voucher programs that had the practical effect of incentivizing white flight from newly desegregated public schools. *Id*. at 17; Jerome C. Hafter & Peter M. Hoffman, Note, *Segregation Academies and State Action*, 82 Yale L. J. 1436, 1440 & n.32 (1973). Such tactics were well known at this time, and federal courts struck down these private school voucher programs throughout the 1960s. *Coffey v. State Educ. Fin. Comm'n*, 296 F. Supp. 1389, 1392 (S.D. Miss. 1969); *Poindexter v. La. Fin. Assistance Comm'n*, 275 F. Supp. 833 (E.D. 1967), *aff'd*, 389 U.S. 571 (1968).

Against the backdrop of the proliferation of segregation academies across the South, restricting State support of K-12 education to public schools was a necessary element in ensuring that Tennessee's goal of rejecting school desegregation would be accomplished. Allowing state funds to support private schools, which had been used to avoid integration in the immediately preceding years, would directly undermine this goal. Any suggestion that the Education Clause's use or omission of the word "public" was done with anything but the most serious understanding of its implications and limitations is a shameful attempt to rewrite the history of desegregation efforts in Tennessee and around the country.

Moreover, the transcripts of the 1977 Constitutional Convention make clear Defendants' reinterpretation of the Education Clause has no basis in fact whatsoever. While debating the new proposed language of §12, Delegate Pleasant introduced an amendment that would have inserted the word "public" between the words "such other" and "post-secondary." Ex. B at 408 (*i.e.*, "The General Assembly may establish and

support such other [public] postsecondary educational institutions . . . .”). Delegate Pleasant’s amendment was roundly rejected by a vote of 3-80 precisely because delegates recognized that inclusion of the word “public” would ***preclude the State from funding private postsecondary education institutions***:

> MR. WILDER: If we insert the word as the amendment has suggested, “public”, in both of those places, this would preclude any type of aid to students to get education where they can. For instance, take Meharry Medical College, which is one of the great medical colleges of our country that has done work and performed great services for the black constituency; not only of Tennessee, but of the South, and of the nation, having produced a majority of the present black physicians in our country. This institution, which we did, as you know now, the State of Tennessee does support students attending Meharry, which is a private institution. . . . I believe it would be extremely important for us not to include this language in the Committee’s report.

Id. at 409. Delegate Rowe made the same observation, stating that inclusion of the word “public” would mean “the State’s encouragement and support is ***going to be confined to merely the public***” and if the State were going to “restrict[] the encouragement of the private sector of [postsecondary] education” through the addition of the word “public,” he would actively work to defeat the amendments to the constitution on that basis alone. *Id.* at 411. Thus, the drafters of the 1978 amendments plainly understood that including the word “public” necessarily meant excluding private schools from state support.

Feebly, IJ Defendants nevertheless attempt to shoehorn private school vouchers into the first clause of §12, which provides: the State of “Tennessee recognizes the inherent value of education and encourages its support.” IJ Mem. at 11-13. To be sure, this interpretation would have shocked Delegate Helms, who presented the Education

Committee's Report at the convention and, when expressly asked about the meaning of this clause, responded that it was largely a historical anachronism:

> MR. HELMS: Let me give you a little background on that. I believe it will clear it up, Delegate Hyder. Education came into the Constitution almost as a memorial. The precedent was set in the ordinances of 1785 and 1787 at the time the Northwest Territory was opened up. One of the conditions for becoming a state of the three conditions at that particular time, was to make some provision for education, to have a judiciary and to have a certain number of people, about 60,000. So, it came to be written into the Constitutions of that day, some type of memorializing statement, indicating that you would consider education and give education a place in the state. Constitutions following the Northwest Ordinance precedent, put this in their constitutions. The State Constitution of 1796, first one for Tennessee, did not include such memorializing statements simply because we organized under an ordinance other than the Northwest Ordinance. We did, in the next Constitution in 1834, include this short title, Education is to be Cherished. It is a tribute or memorial to education. We have shortened that memorial by saying that there is an inherent value in education. In other words, it is a good that should be supported by the State. That is the reason, Delegate Hyder, for including that. It is a historical sort of precedent.

Ex. B at 383. Defendants' contention is also irreconcilable with *Small Sch. Sys. 1*, 851 S.W.2d at 151, which similarly held: "defendants' argument overlooks the plain meaning of Article XI, Section 12. That provision expressly recognizes the ***inherent value*** of education ***and then*** requires the General Assembly to 'provide for the maintenance, support and eligibility standards of a system of free public schools.'"

Because Defendants' contention – that §12 does not prohibit the funding of K-12 education through payment of private school tuition and expenses – is irreconcilable with a plain reading of §12, as well as the history of §12's drafting, it should be rejected.

3. The State Cannot Fulfill Its Education Clause Obligation Through Private School Vouchers Precisely Because They Are Private and Unaccountable

It is uncontested that the Voucher Law diverts taxpayer funds to private schools that do not comply with the same standards as Tennessee's public schools and can openly discriminate in admissions and in the provision of educational services. ¶¶99-111. These private schools need not comply with the same academic, accountability, or governance standards as the State's public schools. ¶¶99-104. They can also discriminate against students based on characteristics such as disability, religion, and sexual orientation or gender identity. ¶¶105-111. Additionally, they can refuse to provide essential educational services, such as special education programs for students with disabilities. ¶¶108, 111.

Contrary to Defendants' contentions, Plaintiffs' claim does not rest on the premise that entities participating in the voucher program become public schools. IJ Mem. at 12. To the contrary, the operative fact is the voucher program's use of ***public*** funds on ***private*** education providers that are not part of the single constitutionally authorized system of public education. *See, e.g.*, *Dyersburg*, 235 S.W.2d at 818 (discussing the "single state system so essential to the preservation and improvement of the means of educating our youth"). The Voucher Law expressly gives participating private schools "maximum freedom to provide for the educational needs of participating students without governmental control." T.C.A. §49-6-2609(c). The Voucher Law also states that it does not give TDOE authority to "impose any additional regulation of participating schools or providers," T.C.A. §49-6-2609(b), and explicitly affirms "[a] participating school or provider is autonomous and not an agent of this state." T.C.A. §49-6-2609(a).

It is precisely because private schools participating in the voucher program "remain private," as Defendants have emphasized – and thus outside the reach of legal requirements regarding academic standards, accountability, and non-discrimination that govern the statewide system of public schools – that a voucher program funded with public education dollars violates the Education Clause of the Tennessee Constitution.

4. Defendants' Remaining Contentions for Dismissal Fail

State Defendants contend the Education Clause does not prohibit the State from funding private K-12 education, citing ***solely*** opinions from other states examining separate state constitutions. State Mem. at 16-17. Having failed to even attempt to examine the Education Clause in the context of Tennessee law, their contentions should be rejected out of hand.

IJ Defendants' contentions fare no better. First, the fact that courts in certain other states have reached differing decisions on similar questions does not suggest the Tennessee Constitution's Education Clause can be read to permit the funding of private K-12 education. *See* IJ Mem. at 9-10. As set forth above, and contrary to IJ Defendants' contentions, *Bush* is not an outlier; in fact, as explained below, the most recent court to consider an *expressio unius* claim against a voucher program sided with the plaintiffs. Nor do IJ Defendants explain how the Florida Constitution's "paramount duty" language in any way suggests the reasoning in *Bush* is not firmly applicable here.

Second, IJ Defendants' contention that the Education Clause "urges innovation," IJ Mem. at 11-13, is wrong to the extent it contends such "innovation" can include funding private K-12 education, especially with funds explicitly intended for public education.

Again, as set forth above, while the Education Clause allows such flexibility with respect to post-secondary education, no such discretion is provided with respect to K-12 education.

LJC Defendants, for their part, contend that the Convention Committee on Education expressly declined to adopt a version of the Education Clause prohibiting the public funding of private K-12 schools, that prior versions of the Education Clause included such a prohibition, and that such comparison shows there was no intent to prohibit the funding of private K-12 education. LJC Mem. at 28-30. These contentions fails.

First, to the extent "comparison" is a "highly useful tool of construction," *id.* at 29, the LJC Defendants ignore that the intent of the 1978 amendments was ***not*** to change the function of the Education Clause but merely to: (i) remove unconstitutional language regarding state-mandated segregation in schools; and (ii) simplify and modernize the text. Ex. B at 381-82, 467, 469. The inference urged by LJC Defendants– that the framers intended to radically alter the Education Clause by removing a prior bar on funding private K-12 education – is utterly irreconcilable with the explicit purposes of the amendment and is not remotely credible.

Second, LJC Defendants' contentions regarding Delegate Pleasant's comments are plainly taken out of context. *See* LJC Mem. at 30. Those comments were referring to the several discussions regarding whether the Education Clause would permit the funding of private ***post-secondary*** education, not K-12 education. As set forth above, the Education Clause's language permitting the funding of private post-secondary education dispositively demonstrates funding private K-12 education was recognized to be impermissible.

Finally, LJC Defendants fail to articulate a plausible rationale why *expressio unius* is not fully applicable here.[19] *Expressio unius* is a well-known principle of law and is ubiquitous in Tennessee jurisprudence, with courts applying it in a variety of contexts, including education. *Blount Cnty. Bd. of Educ. v. City of Maryville*, 574 S.W.3d 849, 854 (Tenn. 2019) (distribution of public school funds); *Beeler*, 195 S.W.2d at 867 (distribution of public school funds); *see also Coffman v. Armstrong Int'l, Inc.*, 615 S.W.3d 888 (Tenn. 2021) (products liability); *Effler v. Purdue Pharma L.P.*, 614 S.W.3d 681 (Tenn. 2020) (standing under drug dealer liability act); *Amos v. Metro. Gov't of Nashville & Davidson Cnty.*, 259 S.W.3d 705, 715 (Tenn. 2008) (employee benefits); *Rich v. Tenn. Bd. of Med. Exam'rs*, 350 S.W.3d 919, 927 (Tenn. 2011) (medical license); *State v. Lewis*, 958 S.W.2d 736 (Tenn. 1997) (criminal law).

Defendants assert the Voucher Law is constitutional because the public school system mandated by the Education Clause is left in place, thus ignoring the proper interpretation of this provision as prohibiting actions that exceed its express mandate. However, Defendants' argument is irrelevant – the Voucher Law violates the plain text of the Education Clause regardless of whether it has any effect on the public school system because, as explained above, the plain text of the Constitution allows only for a system of public schools.

[19] Contrary to LJC Defendants' contentions, the correct application of *exressio unius* would not invalidate "charter schools" or the Achievement School District, which are public schools. LJC Mem. at 31. Their contention that Hope Scholarships would be banned, *id.*, is even further off base, unlike the Education Clause's language regarding K-12 education, as the Education Clause ***does not*** limit the funding of post-secondary education.

The Florida Supreme Court rejected the very argument Defendants advance here: that the State "could fund a private school system of indefinite size and scope as long as the state also continued to fund the public schools at a level that kept them" otherwise compliant with the constitutional requirements that they be "'uniform, efficient, safe, secure, and high quality.'" *Bush*, 919 So. 2d at 409 (quoting Fla. Const. art. IX, §1(a)). The Court held: "because voucher payments reduce funding for the public education system, the [voucher program] ***by its very nature*** undermines the system of 'high quality' free public schools that are the sole authorized means of fulfilling the constitutional mandate to provide for the education of all children residing in Florida." *Id.* The Florida Supreme Court likewise rejected the argument, also asserted by Defendants in the instant case, that the voucher program merely "supplement[s] the public education system," holding that it "[i]nstead . . . diverts funds that would otherwise be provided to the system of free public schools that is the exclusive means set out in the Constitution for the Legislature to make adequate provision for the education of children." *Id.* at 408-09. This mirrors the Tennessee Voucher Law precisely.

Moreover, despite Defendants' attempts to paint the sister court decisions supporting Plaintiffs' position as outliers or stale authority, the most recent court to consider an *expressio unius* challenge to a voucher law, taking into consideration all the precedent Defendants cite, emphatically agreed with the plaintiffs challenging the voucher statute. In *Beaver*, the West Virginia Circuit Court permanently enjoined that state's private school voucher law on the basis of *expressio unius* in addition to other constitutional violations. *Beaver*, No. 22-P-24, Final Order Granting Pltfs.' Mem. for

Prelim. & Permanent Injunctive Relief & Declaratory Judgment & Ruling on Various Other Mtns. (W. Va. Cir. Ct. July 22, 2022) (Ex. C) at 2.[20] West Virginia's Education Clause says: "The Legislature shall provide, by general law, for a thorough and efficient system of free schools." W. Va. Const. art. XII, §1. Applying the doctrine of *expressio unius,* the *Beaver* court ruled the voucher law impermissibly exceeded the state's Education Clause by "authorizing a separate system of education" funded by West Virginia taxpayer dollars. Ex. C at 14. The court further ruled the voucher law frustrated the purpose of the education clause for several reasons, including that it incentivized decreased public school enrollment, and thus decreased funding, and increased the concentration of high need students in public schools. *Id.* As the Complaint alleges, the Tennessee Voucher Law exceeds and frustrates the Tennessee Education Clause for similar reasons.

C. The Complaint Adequately Alleges the Voucher Law Violates the BEP (Count III)

The Complaint alleges the Voucher Law violates the constitutionally mandated public education funding system enshrined in the BEP statute. ¶¶129-132. The BEP was created by the General Assembly after the Tennessee Supreme Court struck down the Legislature's previous funding structure as violating the State's Equal Protection Clause. *See Small Sch. Sys. I,* 851 S.W.2d 139. When the Small School Systems again challenged the General Assembly's funding scheme – the newly created BEP – the Supreme Court wrote: "the BEP addresses both constitutional mandates imposed upon the State – the

[20] On August 2, 2022, the West Virginia Intermediate Court of Appeals denied Defendants' motions to stay the injunction. Ex. D. On August 18, 2022, the Supreme Court of Appeals did the same. *Id.*, Ex. E.

obligation to maintain and support a system of free public schools and the obligation that that system afford substantially equal educational opportunities." *Small Sch. Sys. II*, 894 S.W.2d at 738 (upholding BEP formula with modification to include teachers' salaries). The Voucher Law diverts BEP funding explicitly intended to maintain and support a system of free public schools, as mandated by the Constitution, to private schools and other private education expenses.

Defendants deny the explicit conflict between the BEP and the Voucher Law. They also suggest the Court interpret the Voucher Law as modifying the BEP statute. However, such an interpretation would cause a constitutional conflict to arise. Namely, BEP funds issued by the General Assembly in furtherance of its duties under the Education and Equal Protection Clauses, as affirmed by the Supreme Court in the *Small Sch. Sys.* litigation, would be expended to unconstitutional ends. *See* Tenn. Const. art. I, §8; art. XI, §§8, 12. "It is the duty of th[e] Court to adopt a construction which will sustain a statute and avoid constitutional conflict if its recitation permits such a construction." *See State v. Lyons*, 802 S.W.2d 590, 592 (Tenn. 1990). Here, treating the Voucher Law as a later-in-time or more specific amendment to the BEP statute, State Mem. at 20, LJC Mem. at 34, IJ Mem. at 15, renders the entire BEP funding scheme unconstitutional in light of its role in effectuating the Education and Equal Protection Clauses.[21]

[21] LJC Defendants' assertion that Plaintiffs' BEP claim is moot due to the enactment of TISA, LJC Mem. at 34, is incorrect. First, TISA, like the BEP, is a statutory mechanism to fund the state's public schools. ¶¶41-43. Second, as LJC Defendants acknowledge, TISA does not replace the BEP as the operative school funding statute until next year, meaning Plaintiffs' Claim III is undisputedly alleged for at least the entire 2022-23 school year that began only a few weeks ago.

1. The BEP Statute and the Voucher Law Conflict

The General Assembly funds public K-12 schools using the BEP, a statutory formula that determines the "funding necessary for our schools to succeed." T.C.A. §49-3-302(3); *see also* T.C.A. §49-3-351, *et seq*. The BEP's statutory provisions provide for the determination, allocation, and apportionment of BEP funds to public school districts only. T.C.A. §49-3-351, *et seq*.

The Voucher Law conflicts with the BEP statute in at least two ways. First, the Voucher Law directs TDOE to subtract an amount representing both the state and local shares of an LEA's per-pupil BEP allocation from the state BEP funds otherwise payable to Shelby County Schools and Metro Nashville Public Schools and to deposit those funds in an account to be used for private school tuition or other private education costs. T.C.A. §§49-6-2605(a)-(b)(1). Second, the Voucher Law mandates that when an ESA is closed for any number of reasons, the remaining funds are returned to the State's BEP account rather than to the district – even if the former voucher student re-enrolls in that district. T.C.A. §49-6-2603(e). Thus, the law diverts funding "necessary for our schools to succeed" away from public schools and redirects those funds to the State even if the student re-enrolls in a public school operated by the district.

IJ Defendants attempt to elide these specific conflicts between the statutes by arguing the ultimate purpose of the BEP is to fund students individually, and the "legislature determined that the ESA Program could serve that same end by distributing those funds directly to students." IJ Mem. at 14. However, the Voucher Law cannot be squared with the express constitutional purpose of the BEP, which is to maintain and

support Tennessee's system of free public schools, or the specific provisions of the BEP statute, which direct BEP funding only to public schools. As all of the Defendants acknowledge, the courts must give effect to the express meaning and purpose of a statute. The Legislature's desire to fund the voucher program cannot change the plain meaning and express function of the BEP, which are contradicted by the Voucher Law.[22]

2. Implied Amendment of the BEP Statute by the Voucher Law Would Create an Unconstitutional Result

As a general rule, when "'two acts conflict and cannot be reconciled, the prior act will be repealed or amended by implication to the extent of the inconsistency between the two.'" *Hayes v. Gibson Cnty*., 288 S.W.3d 334, 337 (Tenn. 2009) (quoting *Cronin v. Howe*, 906 S.W.2d 910, 912 (Tenn. 1995)). However, as the State highlights, when construing a statute the Court must "'reconcile inconsistent or repugnant provisions'" and also "'construe a statute so that no part will be inoperative, superfluous, void or insignificant, ***and the one section will not destroy another***.'" *State v. Miller*, 575 S.W.3d 807, 811 (Tenn. 2019) (citing *Tidwell v. Collins*, 522 S.W.2d 674, 676-77 (Tenn. 1975)). In the specific context of determining the constitutionality of a statute, it is the court's duty to "'adopt a construction which will sustain a statute and avoid constitutional conflict if any reasonable construction exists that satisfies the requirement of the Constitution.'" *In*

[22] Contrary to the State's contention, State Mem. at 18 n.7, the Complaint alleges the Voucher Law conflicts both with the overall purpose of the BEP as confirmed by the Supreme Court, which is to fund Tennessee's public schools, and with its specific provisions, which refer only to the funding of ***public*** schools. ¶¶31-40, 129-132.

re Bentley D., 537 S.W.3d 907, 910 (Tenn. 2017) (quoting *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 529 (Tenn. 1993)).

Construing the Voucher Law and BEP statute together effectively creates an amendment to the BEP that destroys the constitutional purpose of the statute. *See Miller*, 575 S.W.3d at 811. The BEP was created to be, and has been upheld by the Supreme Court as, the mechanism by which the General Assembly meets its constitutional obligations to maintain and support a system of free public schools and to afford substantially equal educational opportunities to all public school students. *Small Sch. Sys. II*, 894 S.W.2d at 738. It works to carry out the State's constitutional obligations by directing public taxpayer money to the public school system. The Voucher Law does the opposite: it directs taxpayer money away from the public school system and diminishes the constitutional function of the BEP in violation of the Education and Equal Protection Clauses, as argued above. Therefore, the Voucher Law does not merely "amend" the BEP statute but alters it fundamentally, jeopardizing the constitutionality of the State's public school funding scheme. Thus, Plaintiffs have alleged a violation of the BEP sufficient to withstand a motion to dismiss.

D. The Complaint Adequately Alleges the State is Violating the Voucher Law (Count IV)

Contrary to Defendants' assertions, Plaintiffs have sufficiently pled TDOE is illegally implementing the voucher program for the 2022-23 school year by violating several provisions of the Voucher Law itself. ¶¶90-96, 113-139. Under well-established Tennessee law, "[w]hen statutory language is clear and unambiguous, [courts] must apply its plain meaning in its normal and accepted use, without a forced interpretation that would

extend the meaning of the language . . . ." *State v. Welch*, 595 S.W.3d 615, 621 (Tenn. 2020) (quoting *Carter v. Bell*, 279 S.W.3d 560, 564 (Tenn. 2009)). Moreover, a court must "'construe a statute so that no part will be inoperative, superfluous, void or insignificant, and the one section will not destroy another.'" *State v. Miller*, 575 S.W.3d at 811. Plaintiffs have alleged TDOE's current plans for implementing the Voucher Law in fall 2022, which TDOE has already set in motion, violate the plain language of the Voucher Law. First, TDOE's current voucher fundingi scheme violates the provisions of the statute governing the distribution and use of the voucher funds specifically through a separate ESA for each voucher student. T.C.A. §49-6-2607. Moreover, it renders the provisions of the law permitting use of voucher funds on expenses other than tuition, T.C.A. §49-6-2603(a)(4), inoperative, void, and superfluous. Finally, it contradicts and renders inoperative the statutory requirement that TDOE preapprove voucher expenses. T.C.A. §49-6-2607(b). Thus, the Complaint's allegations that TDOE's current implementation of the Voucher Law is illegal are sufficient to withstand a motion to dismiss.

The plain language of the Voucher Law mandates TDOE "***shall establish and maintain separate ESAs for each participating student*** and shall verify that the uses of ESA funds are permitted . . . and institute fraud protection measures." T.C.A. §49-6-2607(b). In direct contravention of this provision, TDOE is currently requiring private schools to directly fund voucher students' expenses and then submit invoices to TDOE for reimbursement. ¶96. TDOE's plan for the 2022-23 school year does not include establishing or maintaining separate ESAs for each participating student, as mandated by

the plain language of T.C.A. §49-6-2607, nor does the plan contemplate depositing funds into students' ESAs, as also mandated by this section. Further, as discussed *infra,* §IV.E., TDOE's implementation conflicts with its own interpretation of the statute, as set forth in TDOE's rules governing account holders. For example, Rule 0520-01-16-.02 defines the "account holder as either the parent or the student who has reached the age of 18 years"; and Rule 0520-01-16-.04(9) mandates that these account holders, not private schools, submit expense reports to TDOE. Given the direct conflict between TDOE's implementation of the Voucher Law and the express provisions of the statute, Plaintiffs have alleged sufficient facts to state a claim in Count IV.

Moreover, TDOE's implementation renders it impossible for students to use ESA funds for other allowable uses under the Voucher Law besides private school tuition and fees. These other allowable uses under the statute include: tutoring services, post-secondary courses, examinations required for college admissions, education therapy services, and other uses not provided by private schools themselves. T.C.A. §49-6-2603(a)(4). The State has put forward no process whatsoever for using voucher funds for these expenses. State Defendants' interpretation of the law thus impermissibly renders core provisions of the statute void or inoperable, demonstrating the interpretation necessary to uphold the current funding scheme is directly at odds with the Voucher Law itself.

Finally, TDOE's current scheme for implementing the Voucher Law makes preapproval of expenses, as explicitly required by the Voucher Law, impossible. Under the statute, any voucher funds expended on tuition, fees, and related expenses "must be

preapproved by the [TDOE]." T.S.A. §49-6-2607(b). Additionally, "[p]reapproval shall be requested by completing and submitting the department's preapproval form." *Id.* Defendants offer no explanation for how TDOE could preapprove expenses for which it is requesting *post-facto* reimbursement requests.

In fact, this Court, in its ruling denying Plaintiffs' temporary injunction motions, noted the "apparent lack of compliance with some of the ESA Act provisions" and concluded they were "worthy of further consideration." *Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ.*, 20-0143, Memorandum and Order (Davidson Cnty. Ch. Ct. Aug. 5, 2022).

State Defendants attempt to defend their illegal actions by erroneously claiming T.C.A. §49-6-2607(b) gives TDOE the power to "establish and maintain accounts for participating students, . . . to verify that the funds are used for permissible expenses" and "to develop its own processes to effectuate the same," as well as the ability to decide the process through which the funds are paid and verified. State Mem. at 23. These claims are a blatant misreading of that very section of the statute. T.C.A. §49-6-2607(b) does not empower the State to do whatever it wants but rather sets forth specific obligations the State ***must*** carry out, *e.g.*, "[t]he department ***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." T.C.A. §49-6-2607(b) further mandates that TDOE preapprove expenses. The section then obligates the State to carry out the specific duties enumerated in the previous clause: "The department ***shall*** develop processes to effectuate this subsection (b)." T.C.A. §49-6-2607(b). Rather than

giving TDOE freedom, the statute directs TDOE to perform specific functions to effectuate the voucher program. State Defendants' reimbursement plan fails to comport with the statutory requirement for depositing funds into ESAs or with the preapproval requirements.

LJC Defendants attempt to minimize the illegality of the State's current voucher funding scheme by claiming that the express language of the statute – that TDOE must "create separate ESAs for each participating student" and all fees and expenses must be "preapproved by [TDOE]" – does not really mean that separate accounts must be set up for each student or TDOE must preapprove the expenses. Rather, LJC Defendants claim it is permissible to stretch the language of the statute to mean that payment directly to private schools after the expenses are incurred, without preapproval, is permitted, arguing that "[a]n 'account' is not a physical depository of dollar bills. It is a writing on a ledger, or a 'detailed statement of the debits and credits between parties to a contract or to a fiduciary relationship.'" LJC Mem. at 35-36. To quote LJC Defendants, this tortured interpretation "finds no support in the plain language" of the statute. *Id.* at 28. Not only is the language of the statute unambiguous that TDOE must establish a separate account for each student, but LJC Defendants' twisted explanation impermissibly renders the rest of the statute void, inoperative, and superfluous. If TDOE's implementation were permissible, it would preclude statutorily mandated preapproval expenses and allowable uses by students of voucher funds that private schools do not provide. T.C.A. §§49-6-2607(b), 49-6-2603(4)(B)-(L).

Similarly, IJ Defendants ask the Court to disregard the plain language of T.C.A. §49-6-2607(b) and render it meaningless. They contend that the language of

T.C.A. §49-6-2607(b) does not really mean separate accounts need to be established because, under T.C.A. §49-6-2605(b)(1), "[a]ny funds awarded under this part are the entitlement of the participating student or legacy student under the supervision of the participating student's or legacy student's parent if the participating student or legacy student is seventeen (17) years of age or younger." IJ Mem. at 21. However, the rules of statutory construction preclude IJ Defendants' reading of T.C.A. §49-6-2605(b)(1) because it would mean the establishment of separate accounts under T.C.A. §49-6-2607(b) is unnecessary. In other words, IJ Defendants' interpretation of T.C.A. §§49-6-2605(b)(1) renders T.C.A. §49-6-2607(b) superfluous. *State v. Miller*, 575 S.W.3d at 811. A proper reading of the two provisions is that separate accounts, pursuant to T.C.A. §49-6-2607(b), are necessary precisely ***because*** the funds awarded are the entitlement of the participating student or parent, pursuant to T.C.A. §49-6-2605(b)(1), and ***not*** the entitlement of a private school. Moreover, IJ Defendants' interpretation renders meaningless the preceding sentence of T.C.A. §46-6-2605(b)(1), which states: "***The department shall remit funds to a participating student's ESA*** on at least a quarterly basis . . . . Any funds awarded under this part are the entitlement of the participating student or legacy student . . . ." *Id.* Clearly, the statute contemplates that TDOE will remit funds to the student's ESA, not to participating schools.

Lacking legal support, LJC Defendants urge this Court to adopt a standard they have invented. They tell this court that TDOE's rollout is a "reasonable effort," TDOE is doing "the best job it can to do right by parents and students who need this program," and the General Assembly intended the program to be in place this year. LJC Mem. at 35-36. IJ

Defendants similarly argue Plaintiffs make too much hay out of the reimbursement mechanism because "functionally, this is a distinction without a difference." IJ Mem. at 21. The rules of statutory construction do not permit the Court to ignore the plain language of the statute or render several provisions void, inoperative, and superfluous because, in some people's opinions, the lawbreaker is making a "reasonable effort."[23]

Plaintiffs have sufficiently pled a violation of the voucher statute.

E. The Complaint Adequately Alleges the State Is Violating UAPA (Count V)

The Complaint alleges the State has engaged in rulemaking that violates the provisions of UAPA. ¶¶140-145; *see* T.C.A. §4-5-101, *et seq.* Plaintiffs have adequately pled facts establishing TDOE (not the State Board of Education) has promulgated a funding scheme for the 2022-23 school year that drastically amends existing State Board Rules and is a rule itself, put in place without notice or comment and in nonconformity with other UAPA procedural requirements. ¶¶90-96.

1. Plaintiffs Should Not Be Required to Pursue Administrative Review

LJC Defendants are correct that, under T.C.A. §4-5-225(b): "[a] declaratory judgment shall not be rendered concerning the validity or applicability of a ***statute, rule or order*** unless the complainant has petitioned the agency for a declaratory order and the agency has refused to issue a declaratory order." However, TDOE has not issued a rule

[23] LJC Defendants and IJ Defendants also claim Plaintiffs lack standing to challenge the illegality of TDOE's implementation of the Voucher Law. LJC Mem. at 36; IJ Mem. at 20. As discussed *infra,* §IV.G., that claim lacks merit. Plaintiffs have standing as taxpayers to challenge the illegal expenditure of public dollars and as public school parents to challenge the diversion of education funding intended for their children's school districts.

that could be subjected to administrative review; instead, TDOE has announced a new funding scheme, called it "policy" not subject to review, and bypassed any rulemaking procedures. Plaintiffs, with no rule or order to contest, could not seek a declaratory order from the agency. *Cf. Occupy Nashville v. Haslam*, 949 F. Supp. 2d 777, 797 (M.D. Tenn. 2013), *rev'd on other grounds*, 769 F.3d 434 (6th Cir. 2014) (not requiring administrative exhaustion in claim that agency "policy" was actually a rule and issued in violation of UAPA).

In addition, the Voucher Law empowers the ***State Board of Education*** to promulgate rules effectuating the statute. *See* T.C.A. §49-6-2610. However, it does not appear the State Board of Education is the agency creating and enforcing the new voucher funding scheme. ¶¶90-96. TDOE, or else the State generally, appears to be the creator of the new funding plan. *Id.* Given this confusion, Plaintiffs should not be required to pursue administrative review before an agency either acting outside the scope of its statutory authority (TDOE) or not the promulgator of the proposed rule (State Board of Education).

Moreover, "the law will not require pursuit of an administrative relief if such pursuit would be useless." *Canady v. Meharry Med. Coll.*, 811 S.W.2d 902, 907 (Tenn. Ct. App. 1991) (citing *State v. Yoakum*, 297 S.W.2d 635, 642 (Tenn. 1956)). Here, pursuit of administrative review would be an exercise in futility: clearly, as pled in State Defendants' Motion to Dismiss, TDOE does not consider the new voucher funding scheme to be a rule, subject to UAPA, or a violation of the Tennessee Constitution. *See* State Mem. at 23-24. There is no plausible world in which Plaintiffs could obtain meaningful administrative review or relief where the agency has, in pleadings in the same litigation, denied said relief

is appropriate. *See Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 847 (Tenn. 2008) ("We acknowledge, however, that one of the exceptions to the exhaustion of administrative remedies doctrine is 'when the administrative body is shown to be biased or has otherwise predetermined the issue before it.'") (quoting *McCarthy v. Madigan*, 503 U.S. 140, 148-49 (1992)).

Even assuming *arguendo* that challenges to the new funding scheme are subject to administrative exhaustion, "any provision requiring administrative review prior to a direct challenge to the [constitutional] facial validity of a statute violates our state constitution." *Colonial Pipeline*, 263 S.W.3d at 844-45 (finding questions of constitutional validity of a statute need not be submitted to agency for petition for declaratory order under T.C.A. §4-5-225(b) before suit can be brought in Chancery Court). Here, Plaintiffs allege the Voucher Law is facially unconstitutional; thus, Plaintiffs' claim regarding the schemes implementing the facially unconstitutional statute should not be subject to administrative review. *See also Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 455 (Tenn. 1995) ("To vest an agency with the authority to determine the constitutionality of the legislation empowering the agency to act would violate the doctrine of the separation of powers.").

2. TDOE Is Engaging in Rulemaking Without Proper Procedure

TDOE's new scheme allowing for direct payment of private schools in lieu of creating actual voucher accounts constitutes a "'rule.'" Under UAPA, a "'rule'" means:

> [A]ny agency regulation, standard, statement, or document of general applicability that is not a policy as defined in subdivision (10) that:
>
> (A) Describes the procedure or practice requirements of an agency; or

> (B) Implements, prescribes, or interprets an enactment of the general assembly or congress or a regulation adopted by a federal agency. "Rule" includes the establishment of a fee and the amendment or repeal of a prior rule.

T.C.A. §4-5-102(12). To emphasize: a rule, by definition, includes the ***amendment or repeal of a prior rule***. *Id.*; *see also* Tenn. Op. Atty. Gen. No. 11-63 (2011).

The State Board of Education previously issued detailed rules concerning the creation of individual ESAs. *See* Tenn. Comp. R. & Regs. §0520-01-16. Together, these Rules clearly create a system in which the "Account Holder," that is, the parent or adult student – not the participating private schools – controls the ESA funds. First, Rule 0520-01-16-.02(1) defines the "account holder" as either the parent or the student who has reached the age of 18 years. Rule 0520-01-16-.04(9) states: "After the initial and each subsequent payment to the ESA, the ***Account Holder*** shall submit expense reports and receipts for all ESA funds expended in accordance with the procedures set by the Department before the next ESA payment is disbursed." This Rule is directly contrary to the new scheme, which mandates participating schools to submit invoices to TDOE for reimbursement. *See* ¶¶95-96. Multiple provisions of the existing voucher Rules mention the funds "deposited" into the Account Holders' account, *see* Rules 0520-01-16-.04(11); 0520-01-16-.05(1); 0520-01-16-.05(1)(l), yet the new funding scheme neither actually creates individual accounts nor allows for funds to be deposited into accounts. Moreover, participating schools, under the original Rules, are only required to submit receipts for expenses to Account Holders. *See* Tenn. Comp. R & Regs. §0520-01-16-.09. They are not instructed to submit receipts to TDOE by any of the Rules. Thus, the new funding scheme, at a minimum, amends or else repeals prior Rules and is therefore a rule under

UAPA. *See* T.C.A. §4-5-102(12). These drastic amendments to Tenn. Comp. R & Regs. §0520-01-16 occurred without notice, hearing, or other procedural requirements of UAPA. *See* T.C.A. §4-5-201, *et seq.* UAPA makes clear that "[a]ny agency rule not adopted in compliance with this chapter shall be void and of no effect and shall not be effective against any person or party nor shall it be invoked by the agency for any purpose." *See* T.C.A. §4-5-216."[24]

State Defendants and IJ Defendants argue TDOE is merely issuing a policy. *See* State Mem. at 42; IJ Mem. at 21. However, a "'policy'" by definition does not "affect private rights, privileges, or procedures available to the public." T.C.A. §4-5-102(10). The new funding scheme clearly affects, at a minimum, the procedures of the voucher program available to the public: account holders no longer control the funds in the ESA as there are no funds deposited in the ESAs contrary to the existing rules. There are no ESAs at all.

LJC Defendants also argue that even if a rule was created, it is exempt from notice and hearing requirements as an emergency rule. LJC Mem. at 37-38. However, State Defendants have not issued an emergency rule, and no emergency rules have been posted to the administrative register website.[25] Even for emergency rules, proper procedure is required. "The emergency rule shall become effective immediately, unless otherwise

[24] If the new funding scheme is not a rule, TDOE is in violation of existing rules. *See* Tenn. Op. Atty. Gen. No. 10-09 (Jan. 26, 2010) ("[I]t is a generally accepted principle of law that a state administrative agency is bound by and must follow its own regulations . . . . To allow an administrative agency to violate its own rules and regulations with impunity would in practical effect render the rules meaningless.").

[25] *See* Tenn. Dept. of State, Emergency Rules, *available at* https://tnsos.org/rules/EmergencyRules.php (last visited August 31, 2022).

stated in the rule, upon a copy of the rule and a copy of the written statement of the reasons for the rule being filed with the secretary of state." T.C.A. §4-5-208(b). Additionally, "[t]he secretary of state shall post the emergency rule filing to the administrative register website within four (4) days of filing." *Id.* at. §4-5-208(c). None of these actions has been taken by State Defendants.

3. Plaintiffs' UAPA Claim Is Not Moot

Finally, LJC Defendants argue Plaintiffs' UAPA claim is "moot" because it does not "survive[] the end of this school year." LJC Mem. at 38. "A moot case is one that has lost its justiciability either by court decision, acts of the parties, or some other reason occurring after commencement of the case." *Norma Faye Pyles Lynch Fam. Purpose LLC v. Putnam Cnty.*, 301 S.W.3d 196, 204 (Tenn. 2009). The Court has not enjoined the illegal funding scheme, nor have State Defendants ceased their actions. The new funding scheme is in effect now and will remain in effect indefinitely. ¶96. "A case will be considered moot if it no longer serves as a means to provide some sort of judicial relief to the prevailing party." *Putnam*, 301 S.W.3d at 204. The harm to Plaintiffs is presently ongoing and clearly redressable by this Court.

Thus, Plaintiffs have sufficiently pled a violation of UAPA, and the motions to dismiss this count should be denied.

F. The Complaint Adequately Alleges the Voucher Law Violates the Tennessee Constitution's Appropriation of Public Moneys Provision (Count VI)

The Complaint alleges the Voucher Law violates the "Appropriation of Public Moneys" provision of the Tennessee Constitution, and contracts made pursuant to its

implementation are unconstitutional under the same provision. ¶¶146-155. There was no appropriation made for the estimated first year's funding of the voucher program. Even if the Court finds an appropriation was made, the appropriation that was supposed to represent an "estimate" of the first year's funding of the Voucher Law was effectively meaningless under the Constitution. Moreover, TDOE entered into contracts with vendors to implement the Voucher Law using money legislatively appropriated to another, unrelated, program. The misuse of those public funds is unconstitutional under the mandate that "[n]o public money shall be expended except pursuant to appropriations made by law." Tenn. Const. art. II, §24. Finally, as discussed *supra*, §IV.D., the expenditures TDOE is currently making and is planning to make in implementing the voucher program for fall 2022 directly violate the plain language and intent of the Voucher Law. Consequently, those expenditures also violate the Appropriation of Public Moneys provision of the Tennessee Constitution as they are not made "pursuant to appropriations made by law."

1. The Voucher Law Is Null and Void Because It Did Not Receive an Appropriation for Its Estimated First Year's Funding

The Complaint alleges the Voucher Law did not receive an appropriation for its estimated first year's funding and is therefore null and void. ¶151. Defendants all argue, duplicatively, that an appropriation was made for the estimated first year's funding of the Voucher Law. *See* State Mem. at 20-23; IJ Mem. at 16-20; LJC Mem. at 39-40. These assertions are incorrect. In the entire 2019-20 appropriations bill, Pub. Ch. 405 (H.B. 1508), 111th Gen. Assemb., Reg. Sess. (Tenn. 2019), the Voucher Law is mentioned

only once at page 100. On that page, the text indicates the appropriation for the Voucher Law is $0.

Defendants argue that form language found in the appropriations bill transforms the Governor's Proposed Budget into law. State Mem. at 20-23; IJ Mem. at 16-20; LJC Mem. at 39-40. However, the language to which they refer is vague, and no party offers any evidence indicating the appropriations bill is not the final authority for appropriations made in the State of Tennessee. At the very least, the dispute over the status of the Governor's Proposed Budget presents an issue of fact that must be construed in favor of the nonmoving party at this stage of the proceedings. *See Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997) ("In considering a motion to dismiss, courts should construe the complaint liberally in favor of the plaintiff, taking all allegations of fact as true, and deny the motion unless it appears that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief."); *Davis v. Barr*, 646 S.W.2d 914, 918 (Tenn. 1983) (reversing lower court's dismissal of case pursuant to motion for judgment on the pleadings because disputed factual issues existed in the pleadings that could only be resolved after full evidentiary hearing on the merits).

2. Even if There Were an Appropriation for the Voucher Law, the "Estimate" for Its First Year's Funding Was Meaningless Under the Constitution

Even if the Court finds the Governor's Proposed Budget was a valid appropriation, despite the absence of any appropriation for the Voucher Law in the appropriations bill at Pub. Ch. 405 (H.B. 1508), the Governor's Proposed Budget amount of $771,300 for the

"estimated first year's funding" of the Voucher Law was meaningless and violates the Constitution.

When the voucher bill was discussed in the Senate Education Committee, Defendant Commissioner Schwinn testified funding would be necessary to pay for voucher-related staff positions at TDOE and contracts with private vendors to administer and implement the voucher program. *See* Sen. Finance, Ways & Means Committee, 111th Gen. Assemb. (Tenn. Apr. 23, 2019) (Statements of Defendant Commissioner of Education). Commissioner Schwinn testified she anticipated needing about 20 staff members to oversee the rollout and administration of the Voucher Law. *Id*. Using the entire $771,300 in the Governor's Proposed Budget to pay for these 20 TDOE staff members, without factoring in contracts with private venders or ***any other*** cost of the program, there would be a total of, on average, only $38,565 annually to cover salary and benefits for each TDOE staff position.

At that same hearing, Defendant Commissioner Schwinn explained all of the investments that would need to be made in the first year of the program in order to implement and begin enforcing it. *See* Sen. Finance, Ways & Means Committee, 111th Gen. Assemb. (Tenn. Apr. 23, 2019) (Statement of Defendant Commissioner of Education):

> If this were to pass, then that would be for the full year preceding. So we would spend all of next year hiring staff and making sure that we have a detailed number of procedures in place and part of the things that we would put into place as the Department, is to also bring in external support to be able to do a checks and balances on our internal procedures to ensure that they are as robust as possible.

Id.[26]

Yet, less than two months after the Voucher Law passed, in July 2019, TDOE began discussions with ClassWallet, a private, for-profit company, about administering the voucher program. The cost of that contract alone was ***$2.5 million***. ¶152.

IJ Defendants argue the Appropriation of Public Moneys provision and related statutes are "balanced-budget" provisions, IJ Mem. at 16-17, intended to prevent deficit spending. Assuming this is true, the Constitution's mandate that "an appropriation [be] made for the estimated first year's funding" was violated. The $771,300 in the Governor's Proposed Budget was a meaningless underestimation of the first year's funding for the Voucher Law. If this provision of the Constitution is to have any meaningful purpose or interpretation, the "estimated first year's funding" must be a realistic estimate. This is especially true when dealing with funding for critical programs like public education.

3. TDOE's $2.5 Million Contract with ClassWallet Violates the Constitution Because It Was Paid with Funds Appropriated to the Career Ladder Program

TDOE entered into a $2.5 million contract with ClassWallet, a private, for-profit company, to administer the voucher program. ¶54.[27] In 2019, TDOE paid ClassWallet

[26] *Available at* http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17271 (at 1:58:08-1:58:48).

[27] LJC Defendants assert if the payment to ClassWallet violated the Constitution, only the contract and not the entire Voucher Statute is void. LJC Mem. at 41. This is incorrect because the payment to ClassWallet in 2019 goes directly to the heart of the claim that spending on the voucher program in the first year after the statute's passage was done without a lawful appropriation. The assertion that the ClassWallet contract is now null and void anyway, *id.*, likewise has no bearing on whether the constitutional appropriation requirements were violated, necessitating the invalidation of the Voucher Law.

approximately $1.2 million. ¶55. Because the Governor's Proposed Budget included only $771,300 and the appropriations bill appropriated nothing at all for the first year of the Voucher Law, TDOE paid for the contract with money appropriated to another, unrelated, program – the Career Ladder program – which was designed to incentivize public schoolteachers and public school administrators.

Article II, §24 of the Tennessee Constitution provides in relevant part: "No public money shall be expended except pursuant to appropriations made by law." By statute, "[n]o money shall be drawn from the state treasury except in accordance with appropriations duly authorized by law." T.C.A. §9-4-601(a)(1). The plain meaning of the text is clear: in order for public money to be spent, it must only be spent pursuant to a valid appropriation and for no other purpose.

Defendants emphasize that the Career Ladder program has been discontinued in order to distract from the relevant legal issues and imply that the misappropriation of these funds was inconsequential. It is true the Career Ladder program has been discontinued – meaning no additional participants will enter the program, though it is still being funded for remaining participants – but this point is irrelevant to the issue of unlawful appropriation and reallocation of public funds.

IJ Defendants also cite a ***portion*** of the appropriations bill, Pub. Ch. 405 (H.B. 1508) at 53, which they imply allows Career Ladder funding to be used to pay Voucher Law expenses: "if the head of any department . . . of the state government finds that there is a surplus . . . under such entity, and a deficiency in any other division . . . then in that event the head of such department . . . may transfer such portion of such funds as may be

necessary for the one division . . . where the surplus exists to the other." IJ Mem. at 19. LJC Defendants rely on that same ***portion*** of the statute.[28] LJC Mem. at 43.

However, the ***entire*** provision of that quoted text, including the sentence that LJC Defendants and IJ Defendants inexplicably omitted, reads:

> No part of the funds appropriated to any department, office, instrumentality, or agency of the state government shall be expended in any other such entity, but if the head of any department, office, commission or instrumentality of the state government finds that there is a surplus in any classification, division, or unit under such entity, and a deficiency in any other division, unit or classification, then in that event the head of such department, office, commission or instrumentality of the state government may transfer such portion of such funds as may be necessary for the one division, unit or classification where the surplus exists to the other, except as otherwise provided herein, provided such transfer is approved by the Commissioner of Finance and Administration. ***Such transfer of funds pursuant to this item shall be subject to the approval of a majority of a committee comprised of the Speaker of the Senate, the Speaker of the House and the Comptroller of the Treasury***.

Pub. Ch. 405 (H.B. 1508) at 53, §15, Item 1. The final sentence of that paragraph, omitted by both LJC Defendants and IJ Defendants, is crucial because it requires department heads to adhere to a process not followed by either Defendant TDOE or Defendant Commissioner Schwinn. As required by this provision of the statute, a transfer of funds must "be subject to the approval of a majority of a committee comprised of the Speaker of the Senate, the Speaker of the House and the Comptroller of the Treasury." It is undisputed that such a committee neither convened nor approved the diversion of Career Ladder funds to pay for Voucher Law expenses.

[28] Defendants rely on no text in support of their assertion that department heads can freely transfer money. State Mem. at 22-23.

State and LJC Defendants also attempt to justify the use of Career Ladder funds by referencing T.C.A. §9-4-5110(a), which governs budgeting by department heads. State Mem. at 22; LJC Mem. at 41. However, it is §(b) of that provision that governs budget revisions. Section (b) authorizes revisions only by certain officials, not including TDOE officials.

Furthermore, funds that are appropriated but unspent in a fiscal year ***are required to revert to the general fund*** for reappropriation by the General Assembly in the next fiscal year, subject to several noted exceptions. Pub. Ch. 405 (H.B. 1508), §36, at 73-81. TDOE's Career Ladder program is not included in the noted exceptions. *Id*. Thus, TDOE was required to allow the unspent Career Ladder funds to revert to the general fund.

4. TDOE's Plan to Pay Private Schools Directly Violates the Appropriations Provision of the Tennessee Constitution

As discussed *supra*, §IV.D., the Complaint alleges TDOE's current implementation plan violates the Voucher Law itself. The Voucher Law mandates that TDOE establish and maintain separate ESAs for each participating student, that the voucher funds be deposited into each student's ESA, and that any expenses be preapproved by TDOE. T.C.A. §49-6-2607(b). Thus, paying private schools directly is clearly not authorized by this law. None of the Defendants can point to any other law authorizing this expenditure. Therefore, TDOE's plan to pay private schools directly is not an expenditure "pursuant to appropriations made by law." Plaintiffs' allegations sufficiently state a claim for several violations of the Appropriation of Public Moneys provisions of the Tennessee Constitution and related statutory requirements.

G. Plaintiffs Have Standing to Bring Their Claims

"Standing is a judge-made doctrine" asking whether the party bringing a claim is "properly situated to prosecute the action." *Knierim v. Leatherwood*, 542 S.W.2d 806, 808 (Tenn. 1976). "The primary focus of a standing inquiry is on the party, not on the merits of the claims." *Mayhew v. Wilder*, 46 S.W.3d 760, 767 (Tenn. Ct. App. 2001) (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982); *Flast v. Cohen*, 392 U.S. 83, 99 (1968)). To establish constitutional standing in Tennessee, a plaintiff must show: (1) a distinct and palpable injury; (2) the injury was caused by the challenged conduct; and (3) the injury is one that can be addressed by a remedy that the court is empowered to give. *City of Chattanooga v. Davis*, 54 S.W.3d 248, 280 (Tenn. 2001); *In re Youngblood*, 895 S.W.2d 322, 326 (Tenn. 1995).

"The plaintiff bears the burden of establishing these elements '"by the same degree of evidence" as other matters on which the plaintiff bears the burden of proof.'" *Metro. Gov't*, 645 S.W.3d at 149. When "challeng[ing] standing through a motion to dismiss," as Defendants have done here, "Plaintiffs' factual allegations are presumed to be true and are construed in their favor." *Id.*

Plaintiffs, as taxpayers and parents of children enrolled in public schools operated by Metro Nashville Public Schools and Shelby County Schools, have standing to bring this lawsuit. First, Plaintiffs are taxpayers alleging illegal governmental action that unlawfully diverts public funds. Second, Plaintiffs allege a special injury from the Voucher Law that is not common to the public generally.

1. Plaintiffs Have Standing as Taxpayers to Challenge the Voucher Law as an Illegal Expenditure of Public Funds

Tennessee courts allow taxpayers to challenge illegal governmental action and the misuse or unlawful diversion of public funds from their stated purpose if three elements exist: "(1) the plaintiff/taxpayers have taxpayer status; (2) the taxpayers allege a specific illegality in the expenditure of public funds; and (3) the taxpayers have made a prior demand on the governmental entity asking it to correct the alleged illegality." *City of New Johnsonville v. Handley*, 2005 WL 1981810, at *13 (Tenn. Ct. App. Aug. 16, 2005) (citing *Cobb v. Shelby Cnty Bd. of Comm'rs*, 771 S.W.2d 124, 126 (Tenn. 1989)) (Ex. F). As to the third element, a demand is not required where "the status and relation of the involved officials to the transaction in question is such that any demand would be a formality." *Badgett v. Rogers*, 436 S.W.2d 292, 295 (Tenn. 1968).

In the present case, these three elements are easily satisfied. First, Plaintiffs are taxpayers who pay state and local taxes. *See City of New Johnsonville*, 2005 WL 1981810 at *13 (Ex. F) (affirming trial court's ruling that "'there is no material dispute of fact that some of the plaintiffs are taxpayers of the City of New Johnsonville'").

Second, Plaintiffs allege the Voucher Law is an illegal expenditure of public funds. Specifically, Plaintiffs allege the Voucher Law violates multiple provisions of the Tennessee Constitution and state law. *See Pope v. Dykes*, 93 S.W. 85, 88 (Tenn. 1905) (holding taxpayers had standing to challenge the building of a road not authorized by law, "which will result in irreparable injury to the county and taxpayers"); *Lacefield v. Blount*, 304 S.W.2d 515, 522-23 (Tenn. Ct. App. 1957) (taxpayer citizen permitted to challenge appropriation made by county); *Stuart v. Bair*, 67 Tenn. 141, 147 (1874) (taxpayer citizens

permitted to challenge government action that would have required the payment of taxes and the removal of the seat of justice, its records, and its officers).

The State argues that only one of Plaintiffs' causes of action, Count VI, "alleges illegality in the expenditure of funds." State Mem. at 10. This assertion mischaracterizes Plaintiffs' claims. All of Plaintiffs' causes of action allege the need to strike down the Voucher Law, which is an illegal expenditure of public funds. For each of Plaintiffs' causes of action, Plaintiffs have "allege[d] a specific illegality in the expenditure of public funds," as required by Tennessee courts. These specific illegalities are based on violations of the Education, Equal Protection, and Appropriation of Public Moneys provisions of the Tennessee Constitution, as well as the BEP and appropriations statutes. Plaintiffs also allege illegal expenditures in violation of the Voucher Law itself and UAPA. To suggest that any of Plaintiffs' claims does not allege a specific illegality in the expenditure of public funds is simply incorrect.[29]

Third, Plaintiffs were not required to make a prior demand of governmental officials to remedy this illegal law because such a demand would have been a mere formality and a futile gesture. A plaintiff need not make a demand "where the status and relation of the involved officials to the transaction in question is such that any demand would be a formality." *Badgett*, 436 S.W.2d at 295; *Ragsdale v. City of Memphis*, 70 S.W.3d 56, 63

[29] LJC Defendants confuse the test for a ***rule*** under UAPA (*i.e.*, whether it directly impacts the "private rights and privileges" of the public) with the standard for injury to establish standing. LJC Mem. at 37. Plaintiffs have standing to allege a violation of UAPA as stated above, but Plaintiffs argue the "rights and privileges" afforded to participating families are diminished under the new funding scheme merely to illustrate that the new scheme is in fact a rule and not merely a policy. *See* ¶144; *see also* T.C.A. §4-5-102 (defining "'policy'" and "'rule'").

(Tenn. Ct. App. 2001). Defendant Governor Lee signed the voucher bill into law. ¶50. Defendant Education Commissioner Schwinn – who oversees the state system of public schools, administers TDOE, and is responsible for implementing the Voucher Law – moved as quickly as possible to implement the Voucher Law when it was first passed (and the State now has implemented an extremely rushed process so that vouchers could be used in the current school year). *See* ¶¶6, 95-96. Defendant members of the State Board of Education, who are statutorily charged with overseeing the State's system of public schools, adopted administrative rules in November 2019 to effectuate the Voucher Law. ¶64. Defendant TDOE, which is also responsible for overseeing the State's system of public schools, is responsible for the administration and implementation of the Voucher Law. ¶21. TDOE executed a $2.5 million contract with a private vendor – and has paid $1.2 million under this contract to date – to oversee online applications and payment systems for the voucher program. ¶¶54-55. Former House Speaker Glen Casada also went to extraordinary efforts to secure the passage of the voucher bill, including holding the floor vote open for 38 minutes while having a private conversation on the House balcony with Representative Jason Zachary, who subsequently switched his vote, ensuring passage of the bill. ¶63. A demand to any of these governmental officials to remedy this illegal law would have been a futile formality, and Defendants cannot credibly assert otherwise.

LJC Defendants erroneously contend that, in order to claim futility, Plaintiffs' Complaint was required to allege a public official would gain personally. LJC Mem. at 52. In *Ragsdale,* 70 S.W.3d at 63, futility was established with the allegations that the officials took part in the negotiations and signed the relevant legislation. *See also Badgett*, 436

S.W.2d at 295 ("In the instant case, no demand upon the city was alleged; but, in this case, its absence does not undermine the standing of complainant to sue. The Mayor and Finance Director patently have interests contrary to this action. Demand upon them would have been a vain formality."); *Burns v. Nashville*, 221 S.W. 828, 837 (Tenn. 1920) (finding a demand on the commissioners would have been a "useless formality" when one of the remedies sought was against the commissioners); *Malone v. Peay*, 7 S.W.2d 40, 41-42 (Tenn. 1928) (assuming because the transaction being challenged was approved by the Attorney General, taxpayers could sue because the officers of the state who would ordinarily bring this suit had "interests antagonistic thereto and would be embarrassed by its maintenance"). As set forth above, the Complaint makes similar allegations – that Defendants were actively involved in the passage and implementation of the Voucher Law. A demand to any of these government officials to remedy this unconstitutional law would have been a futile gesture and a vain formality.

Thus, Plaintiffs, as taxpayers, have standing to challenge this illegal governmental action that unlawfully diverts public funds.

2. Plaintiffs, as Parents of Children Enrolled in Metro Nashville Public Schools and Shelby County Schools, Have Standing Because They Suffer a Special Injury Not Common to the Public Generally

a. As Parents, Plaintiffs Suffer a Distinct and Palpable Special Injury Caused by the Voucher Law that Will Be Redressed When the Law Is Struck Down

Plaintiffs also have standing to challenge the Voucher Law as parents of children who attend public school in the two targeted counties. Individual citizens and taxpayers in Tennessee may challenge governmental actions when they allege a special injury, status,

or relation that is not common to the body of citizens as a whole. *Badgett*, 436 S.W.2d at 294; *see also State ex rel. Baird v. Wilson Cnty.*, 371 S.W.2d 434, 439 (Tenn. 1963); *Patten v. City of Chattanooga*, 65 S.W. 414, 420 (Tenn. 1901) (holding standing requires "the payment of a tax to increase [plaintiffs'] tax burdens, or otherwise inflict an injury not common to the body of the citizens"); *Town of Erwin v. Unicoi Cnty*., 1992 WL 74569, at *1 (Tenn. Ct. App. 1992) (citing *City of Greenfield v. Butts*, 582 S.W.2d 80 (Tenn. Ct. App. 1979)) (Ex. G); *Curve Elementary Sch. Parent & Teacher's Org. v. Lauderdale Cnty. Sch. Bd*., 608 S.W.2d 855, 859 (Tenn. Ct. App. 1980) (finding parents who have children in school affected by allegedly unlawful acts had standing because the parents and their children may suffer damages and injustices different from those suffered by citizens at large); *Bd. of Educ. of Shelby Cnty. v. Memphis Cnty. Bd. of Educ.*, 911 F. Supp. 2d 631, 645-46 (W.D. Tenn. 2012) (recognizing school children in targeted county have right to challenge education-related law).

In the education context, in a case where a school board decided to close an elementary school, the Tennessee Court of Appeals explained:

> [T]he parent members of the Association who have children attending the Curve Elementary School had standing to individually institute this lawsuit [because] the allegations of the complaint place these parents and their children in a position of possibly suffering damages and injustices of a different character or kind from those suffered by the citizens at large due to the allegedly unlawful acts of the Board.

Curve Elementary Sch. Parent & Teacher's Org., 608 S.W.2d at 859. *See also Bd. of Educ. of Shelby Cnty.*, 911 F. Supp. 2d at 645-46 (allowing county commissioners to challenge law on behalf of schoolchildren in targeted county who "face hindrances in pursuing their own claims" and would be unable to vindicate "their" rights in court).

Here, Plaintiffs allege a special injury that is distinct and palpable and not common to the public generally. Plaintiffs' injury is caused by the Voucher Law and can only be redressed when the law is struck down. In terms of special injury, Plaintiffs have alleged they suffer damages and injustices of a different character and kind from those suffered by citizens at large due to the illegal Voucher Law.

Plaintiffs include parents of children enrolled in public schools operated by Metro Nashville Public Schools and Shelby County Schools. In Davidson and Shelby Counties – and in no other county in the State – BEP funds, which are public funds the General Assembly appropriates to fund public K-12 schools, will be used to fund private schools not accountable to the public. Over the first five years of the program, hundreds of millions of dollars in BEP – and later TISA – funds will be diverted from these two school districts to private schools. *See* ¶¶78, 82. When this diversion of funds occurs, Plaintiffs – unlike parents of public school children in ***every*** other county in the State – will be forced to send their children to schools that have been deprived of critical resources needed to provide educational opportunities due to the diversion of state funds by the Voucher Law. Additionally, to make up for this funding shortfall, Plaintiffs will have to pay increased local taxes. Under both these scenarios, Plaintiffs suffer a special injury different from the public generally and from parents in the 93 other counties in Tennessee. Moreover, Plaintiffs' injury is also unlike other citizens in the two targeted counties who either do not have children or who have children who are not enrolled in public schools. As a result, Plaintiffs suffer a distinct special injury as a result of the Voucher Law of a different character and kind from that suffered by the public generally.

b. As Parents, Plaintiffs Have Standing to Bring Each of the Five Claims in Their Complaint Despite Defendants' Unpersuasive Arguments to the Contrary

Defendants incorrectly argue that Plaintiffs, as parents of schoolchildren enrolled in Metro Nashville Public Schools and Shelby County Schools, do not suffer a distinct injury as a result of the Voucher Law. State Mem. at 9-10; LJC Mem. at 48-50. These contentions are baseless because they simply ignore, or refuse to accept as true, the Complaint's detailed allegations regarding Plaintiffs' harm.

Plaintiffs' children, unlike the children of Tennessee parents in every other county in the State, are enrolled in school districts that will be deprived of state funds for their education because those funds will be diverted to private schools. As a result, Metro Nashville Public Schools and Shelby County Schools – where Plaintiffs' children are enrolled – will have less funding to support the teachers, staff, programs, and other expenditures essential to their education. ¶¶78-82. Losing hundreds of millions of dollars in funding during the next five years will have a devastating impact on the resources available to educate Plaintiffs' children. *Id.* If a financial loss of this magnitude does not qualify as "special injury" in the context of educating children, it is difficult to imagine a loss that would qualify.

Thus, Plaintiffs, as parents of public school students enrolled in the two counties targeted by the Voucher Law, suffer a special injury not common to the public generally. Therefore, Plaintiffs have standing to bring their claims.

Plaintiffs have standing to raise their UAPA and *ultra vires* claims for the same two reasons they have standing to raise other claims. First, Plaintiffs are taxpayers challenging

illegal government action that unlawfully diverts public funds. Second, Plaintiffs suffer a special injury from the illegal expenditure of voucher funds that is not common to the public generally, namely, that Plaintiffs, as parents of students in Metro Nashville Public Schools and Shelby County Schools, will suffer injury from the diversion of public funds away from their students' schools directly to private schools. The expenditure of taxpayer funds for this unconstitutional program constitutes injury. That the illegal expenditure is occurring in an additional illegal way, in violation of UAPA and in violation of the Voucher Law itself, is further injury.

V. CONCLUSION

Defendants' Motions should be denied in their entirety.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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