E-FILED
3/6/2020 5:31 PM
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, METROPOLITAN NASHVILLE BOARD OF PUBLIC EDUCATION, and SHELBY COUNTY GOVERNMENT,

Plaintiffs,

v. No. 20-0143-II

TENNESSEE DEPARTMENT OF EDUCATION, PENNY SCHWINN, in her official capacity as Education Commissioner for the Tennessee Department of Education, and BILL LEE, in his official capacity as Governor for the state of Tennessee,

Defendants.

GREATER PRAISE CHRISTIAN ACADEMY; SENSATIONAL ENLIGHTENMENT ACADEMY INDEPENDENT SCHOOL; CIERA CALHOUN; ALEXANDRIA MEDLIN; AND DAVID WILSON, SR.'S MEMORANDUM OF LAW AND FACTS IN SUPPORT OF MOTION TO DISMISS UNDER RULE 12.02(8) AND 12.02(6)

INTRODUCTION

In May, 2019, the State of Tennessee enacted the Tennessee Education Savings Account ("ESA") Pilot Program to help low-income students in low-performing school districts. Tenn. Code Ann. § 49-6-2601 – § 49-6-2612. The ESA Pilot Program awards an ESA to qualifying students to attend a participating private school. Earlier this month, Plaintiffs filed this action against the state, arguing that the ESA Pilot Program is unconstitutional and that it should be enjoined from starting this August.

Greater Praise Christian Academy and Sensational Enlightenment Academy Independent

School (the "Schools") and Ciera Calhoun; Alexandria Medlin; and David Wilson, Sr., on behalf of themselves and their minor children (the "Parents"), moved to intervene in the case as Defendants. Attached to their Memorandum of Law and Facts in Support of their Motion to Intervene, they filed a Motion to Dismiss pursuant to Rules 12.02(8) and 12.02(6) of the Tennessee Rules of Civil Procedure, and they also attach this Memorandum of Law and Facts in Support of their Motion to Dismiss.

In support of this Memorandum, the Schools and Parents state the following. Plaintiff Metropolitan Nashville Board of Public Education should be dismissed as a party from the case, pursuant to Tenn. R. Civ. P. 12.02(8) and 9.01, because it is barred from bringing the lawsuit under the explicit terms of the ESA Pilot Program. Also, a motion to dismiss for failure to state a claim is the appropriate vehicle for deciding counts in a complaint when those claims are plainly foreclosed by existing law. *Gibson v. Solideal USA, Inc.*, 489 F. App'x 24, 30 (6th Cir. 2012) (construing cognate F.R.C.P. 12(b)(6)). Count 1 of the Complaint runs headlong into precedent interpreting the Tennessee Constitution's home rule clause. Count 2 cannot be justified under the generous rational basis review that Tennessee courts afford legislative decisions. Count 3 is directly contrary to existing Tennessee Supreme Court precedent interpreting the Tennessee Constitution's education clause. Therefore, the entire Complaint should be dismissed.

FACTUAL BACKGROUND

The ESA Pilot Program

The ESA Pilot Program "provides funding for access to additional educational options to students who reside in [public school districts] that have consistently and historically had the lowest performing schools." Tenn. Code. Ann. § 49-6-2611(a)(1). In particular, the pilot program is open to Kindergarten - 12th grade students whose annual household income is less than or

equal to twice the federal income eligibility guidelines for free lunch. Tenn. Code. Ann. § 49-6-2602(3).[1] The student must have attended a Tennessee public school the prior school year, must be entering Kindergarten for the first time, must have recently moved to Tennessee, or must have received an ESA the prior year. Tenn. Code. Ann. § 49-6-2602(3)(A). Finally, an eligible student must reside in a neighborhood zoned to attend a school in the Achievement School District, which runs the state's lowest performing schools, or reside in a school district with ten or more schools identified as priority schools in 2015, with ten or more schools among the bottom ten percent of schools in 2017, and with ten or more schools identified as priority schools in 2018. Tenn. Code. Ann. § 49-6-2602(3)(C).

The ESA provides each student with his or her per pupil expenditure of state funds from the Basic Education Program (BEP) as well as a portion of the local BEP funds to create an individualized education savings account. Tenn. Code. Ann. § 49-6-2605(a). The amount of the ESA will be approximately $7,100 for the school year beginning in August. *See* Education Savings Accounts Explained, available at https://www.schoolchoicetn.com/education-savings-accounts-explained/ (retrieved Feb. 19, 2020). The ESA can be used for a wide variety of educational services approved by the Department of Education: private school tuition, textbooks, computers, school uniforms, school transportation, tutoring, summer or afterschool educational programs, and college admission exams. Tenn. Code. Ann. § 49-6-2603(a)(4). The ESA is different from a school voucher, which can only be used for private school tuition, because of its flexibility in spending and because any unused funds in the individualized account roll over each

[1] The maximum eligible income is $43,966 for a household of two, and it increases with household size. *See* 84 Fed. Reg. 54 (Mar. 20, 2019), available at https://www.govinfo.gov/content/pkg/FR-2019-03-20/pdf/2019-05183.pdf (retrieved Feb. 19, 2020).

year. Tenn. Code. Ann. § 49-6-2603(l). Any unused ESA funds remaining after 12th grade may be rolled over into a college fund for tuition, fees, and textbooks at eligible colleges and universities, vocational, technical, or trade schools. Tenn. Code. Ann. § 49-6-2603(g).

A participating private school must be a Category I (approved by the Department of Education), Category II (approved by a private school accrediting agency), or Category III (regionally accredited) private school. Tenn. Code. Ann. § 49-6-2602(9). A participating private school also must administer the state end-of-year Tennessee Comprehensive Assessment Program (TCAP) tests for Math and English Language Arts for students with an ESA in grades 3-11 each year. Tenn. Code. Ann. § 49-6-2606(a).

In order to "assist the general assembly in evaluating the efficacy" of the ESA Pilot Program, "the office of research and education accountability (OREA), in the office of the comptroller of the treasury, shall provide a report to the general assembly" at the end of the third year of the pilot program and each year thereafter. Tenn. Code. Ann. § 49-6-2611(a)(2). The report will include participating student performance, graduation rates, parental satisfaction, audit reports, and recommendations for legislative action if the list of low-performing school districts changes based on the most recent data from the Department of Education. Tenn. Code. Ann. § 49-6-2606(c); Tenn. Code. Ann. § 49-6-2611(a)(2).

Finally, the ESA Pilot Program creates a school improvement fund to pay financially affected school districts for children that they no longer have to educate. Tenn. Code. Ann. § 49-6-2605(b)(2)(A). This ghost reimbursement lasts for three years after children have left the school system. *Id*. The ESA Pilot Program is capped at five thousand students in year one, rising to fifteen thousand students in year five. Tenn. Code. Ann. § 49-6-2604(c). Any leftover funds from the ghost reimbursement fund must be disbursed as an annual school improvement grant to

other school districts that have priority schools. Tenn. Code. Ann. § 49-6-2605(b)(2)(A). After the first three years, the school improvement fund will be disbursed as school improvement grants for programs to support priority schools throughout the state. *Id*.

The Complaint

On February 6, 2020, the Complaint in this case was filed by three Plaintiffs: 1) Metropolitan Government of Nashville and Davidson County, 2) Metropolitan Nashville Board of Public Education, and 3) Shelby County Government. The Complaint asserts that the ESA Pilot Program violates the Tennessee Constitution in three counts. Count I of the Complaint alleges a violation of Article XI, Section 9 of the Tennessee Constitution, which prohibits legislation that is local in effect without consent from the local legislature or electorate. Count II of the Complaint alleges a violation of the Tennessee Constitution's Equal Protection clauses in Article I, Section 8 and Article XI, Section 8, which prohibits classifications that are not rationally related to a legitimate state interest. Count III of the Complaint alleges a violation of Article XI, Section 12 of the Tennessee Constitution, which requires the General Assembly to establish and support a system of public education that provides substantially equal educational opportunities to all students.

ARGUMENT

Plaintiff Metropolitan Nashville Board of Public Education ("Metro Bd. of Ed.") should be dismissed as a party from the case, pursuant to Tenn. R. Civ. P. 12.02(8) and 9.01, because the party does not have the capacity to bring the lawsuit. Tenn. Code Ann. § 49-6-2611(d) specifically bars a "local board of education," which is a creature of the state, from challenging the legality of the Tennessee Education Savings Account ("ESA") Pilot Program, Tenn. Code Ann. § 49-6-2601 – § 49-6-2612.

Count I of the Complaint, alleged violation of Article XI, Section 9 of the Tennessee Constitution, should be dismissed because the ESA Pilot Program is not "applicable to a particular county or municipality," as required for a violation of that constitutional provision. Tenn. Const. Art. XI, Sec. 9.

Count II of the Complaint, alleged violation of the Tennessee Constitution's Equal Protection clauses in Article I, Section 8 and Article XI, Section 8, should be dismissed because the legislature expressed a rational basis to begin the ESA Pilot Program with "the LEAs that have consistently had the lowest performing schools on a historical basis." Tenn. Code Ann. § 49-6-2611(a)(1).

Count III of the Complaint, alleged violation of Article XI, Section 12 of the Tennessee Constitution, should be dismissed for three reasons. First, when school districts lose students, they may reduce their funding. *See* Opinion of Attorney General Robert E. Cooper, Jr., No. 08-194 (Dec. 29, 2008). Second, the education clause does not require equality of funding but quality and equality of education. *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 156 (Tenn. 1993). Third, the clause allows for innovation through pilot programs: "Given the very nature of education, an adequate system, by all reasonable standards, would include innovative and progressive features and programs." *Id; see also* Opinion of Attorney General Robert E. Cooper, Jr., No. 13-27, at *7-8 (March 26, 2013).

I. Metro Bd. of Ed. lacks the capacity to sue.

Legal capacity is a doctrine closely related to but distinct from standing; it asks whether a party has a "personal or official right to litigate the issues presented by the pleadings; . . . and is not dependent upon the character of any claim." *Knierim v. Leatherwood*, 542 S.W.2d 806, 808 (Tenn. 1976). Tennessee Rule of Civil Procedure 9.01 provides:

> When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or to be sued in a representative capacity, he or she shall do so by specific negative averment . . . .

Tenn. R. Civ. P. 9.01. Further, Tennessee Rule of Civil Procedure 12.02(8) permits a motion to dismiss based on "specific negative averments made pursuant to Rule 9.01." *Accord Byrn v. Metro. Bd. of Pub. Educ.*, Appeal No. 01-A-01-9003-CV-00124, 1991 Tenn. App. LEXIS 46, at *6 n.1 (Ct. App. Jan. 30, 1991), attached as Exhibit 1 (this very same party, the Metro Bd. of Ed., brings a motion to dismiss under Rule 12.02(8) asserting that it lacked the legal capacity to be sued in a dispute with its employees). Finally, Tennessee Rule of Civil Procedure 17.02 provides that "[t]he capacity of any party to sue or be sued shall be determined by the law of this state."

Defendant-Intervenors specifically negatively aver, pursuant to Rule 9.01, that the Metro Bd. of Ed. lacks the capacity to bring this suit, pursuant to the law of this state; therefore, the Metro Bd. of Ed. should be dismissed from the case, pursuant to Rule 12.02(8). The Metro Bd. of Ed. is a local board of education under Tennessee law. *See* Tenn. Code Ann. §§ 49-2-201 -- 49-2-213. As such, it exists and has its powers and authorities at the sufferance of the Legislature. *Hamblen Cty. v. Morristown*, 584 S.W.2d 673, 675 (Tenn. Ct. App. 1979). The Legislature may confer powers on local boards of education, and the Legislature may limit or withdraw powers for local boards of education. *Knox Cty. v. Knoxville*, Nos. 736, 737, 1987 Tenn. App. LEXIS 3225, at *27-28 (Tenn. Ct. App. Dec. 30, 1987), attached as Exhibit 2. *Accord Byrn v.* 1991 Tenn. App. LEXIS at *12.

The Legislature, in the exercise of its plenary power over public education, has decided to limit the authority of local boards of education to bring or fund legal challenges against the ESA Pilot Program. Tennessee Code Annotated § 49-6-2611(d) provides that, "A local board of

education does not have authority to assert a cause of action, intervene in any cause of action, or provide funding for any cause of action challenging the legality of this part," referring to the ESA Pilot Program at issue in this case. Because the Metro Bd. of Ed. is a local board of education, it lacks the legal capacity, or authority, to assert the cause of action in this case, and therefore, must be dismissed as a party.

II. The Home Rule clause only prohibits legislation targeting one specific county.

The Home Rule clause of the Tennessee Constitution provides:

> The General Assembly shall have no power to pass a special, local or private act having the effect of removing the incumbent from any municipal or county office or abridging the term or altering the salary prior to the end of the term for which such public officer was selected, and any act of the General Assembly private or local in form or effect applicable to a particular county or municipality either in its governmental or its proprietary capacity shall be void and of no effect unless the act by its terms either requires the approval of a two-thirds vote of the local legislative body of the municipality or county, or requires approval in an election by a majority of those voting in said election in the municipality or county affected.

Tenn. Const. Art. XI, § 9.

Plaintiffs allege that the ESA Pilot Program violates this provision because it currently affects only two counties. Compl. ¶¶ 175-188. However, this provision of the constitution only applies when a legislative act applies to a single ("particular") county. *See, e.g., Lawler v. McCanless*, 417 S.W.2d 548, 553 (Tenn. 1967); *Chattanooga-Hamilton Cty. Hosp. Auth. v. Chattanooga*, 580 S.W.2d 322, 328 (Tenn. 1979); *Farris v. Blanton*, 528 S.W.2d 549, 552 (Tenn. 1975); *First Util. Dist. v. Clark*, 834 S.W.2d 283, 287 (Tenn. 1992).

A law that applies to multiple counties, even if small in number, does not violate the Home Rule Clause. *Bozeman v. Barker*, 571 S.W.2d 279 (Tenn. 1978) (two counties); *Civil Serv. Merit Bd. v. Burson*, 816 S.W.2d 725, 730 (Tenn. 1991) (three counties); *Frazer v. Carr*, 360 S.W.2d 449 (Tenn. 1962) (four counties).

Additionally, the Legislature is free to use categories or classifications that may currently affect only a small number of counties but are flexible to change or add additional counties over time. *Cty. of Shelby v. McWherter*, 936 S.W.2d 923, 935-36 (Tenn. Ct. App. 1996) (law applicable to a population category that currently includes only one county does not violate home-rule clause); *Doyle v. Metro. Gov't of Nashville & Davidson Cty*., 471 S.W.2d 371, 373 (1971) (law applicable to a type of municipal government that at the time only included one municipality does not violate home-rule clause); *Metro. Gov't of Nashville & Davidson County v. Reynolds*, 512 S.W.2d 6, 9-10 (Tenn. 1974) (same). *See Burson*, 816 S.W.2d at 728-30 (discussing Legislature's prerogative of classification). *See also* Opinion of Attorney General Robert E. Cooper, Jr., No. 09-04, at *1-2 (Jan. 22, 2009) ("The fact that a law, at the time of its enactment, applies to one municipality only will not necessarily affect its validity. The test is whether the statue could potentially apply to any other municipality, even though, at the time of enactment, the statute applied to a single municipality. *Civil Service Merit Bd. v. Burson*, 816 S.W.2d 725, 729 (Tenn. 1991). If a statute could only ever apply to one county without further action of the General Assembly, it would then be in violation of Art. XI, § 9. *Farris v. Blanton*, 528 S.W.2d 549, 552-53 (Tenn. 1975).").

Plaintiffs rely in their complaint on two cases, *Farris v. Blanton*, 528 S.W.2d 549 (Tenn. 1975) and *Leech v. Wayne Cty*., 588 S.W.2d 270, 270 (Tenn. 1979). Compl. ¶¶ 177, 181, 182. Both cases are over forty years old. And both are inconsistent with the Supreme Court's later precedent, particularly *Burson.* In fact, *Burson* specifically cabins *Farris* to its unique situation, not applicable here, that "only Shelby County was affected by the statute at the time of passage and that no other county was potentially affected by it." 816 S.W.2d at 729. *Accord* A.G. Cooper, Opinion No. 09-04, at *2.

The ESA Pilot Program applies to a student who

> (i) Is zoned to attend a school in an LEA, excluding the achievement school district (ASD), with ten (10) or more schools: (a) Identified as priority schools in 2015, as defined by the state's accountability system pursuant to § 49-1-602; (b) Among the bottom ten percent (10%) of schools, as identified by the department in 2017 in accordance with § 49-1-602(b)(3); and (c) Identified as priority schools in 2018, as defined by the state's accountability system pursuant to § 49-1-602; or (ii) Is zoned to attend a school that is in the ASD on the effective date of this act.

Tenn. Code Ann. § 49-6-2602(3)(C).

This law obviously meets the constitutional standard for three reasons. One, it applies to a category of school districts (those with at least ten failing schools), not to particularly named districts. Two, it currently applies to more than one county: low-income students in both Davidson and Shelby counties will benefit from the pilot program. Three, its application to the Achievement School District (ASD) means that it could potentially affect any county in Tennessee. The Achievement School District has the authority to operate and oversee schools in the bottom 5% of schools statewide, regardless of where they are geographically located. Tenn. Code. Ann. §§ 49-1-602, 49-1-614. Therefore, the law affects more than one county.

III. The Legislature had a rational basis for starting its ESA Pilot Program in the three school districts with the most failing schools.

Tennessee's Equal Protection clauses, invoked by Plaintiffs' Complaint (¶¶ 190-209), "confer essentially the same protection upon the individuals subject to those provisions" as the Fourteenth Amendment to the U.S. Constitution. *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993). A recent case from the Tennessee Supreme Court recites the relevant law:

> This Court has concluded that Article I, section 8 and Article XI, section 8 of the Tennessee Constitution provide 'essentially the same protection' as the Equal Protection Clause of the United States Constitution. *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993). Moreover, when analyzing the merit of an equal protection challenge, this Court has utilized the three levels of scrutiny—strict scrutiny, heightened scrutiny, and reduced scrutiny, which applies

> a rational basis test—that are employed by the United States Supreme Court depending on the right that is asserted. *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994) (citations omitted). 'Strict scrutiny applies when the classification at issue: (1) operates to the peculiar disadvantage of a suspect class; or (2) interferes with the exercise of a fundamental right.' *Gallaher*, 104 S.W.3d at 460 (citation omitted). Heightened scrutiny applies to cases of state sponsored gender discrimination. *See United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982)); *Mitchell v. Mitchell*, 594 S.W.2d 699, 701 (Tenn. 1980). Reduced scrutiny, applying a rational basis test, applies to all other equal protection inquiries and examines 'whether the classifications have a reasonable relationship to a legitimate state interest.' *Tenn. Small Sch. Sys*., 851 S.W.2d at 153 (quoting *Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn. 1988)).

Hughes v. Tenn. Bd. of Prob. & Parole, 514 S.W.3d 707, 715-16 (Tenn. 2017). Plaintiffs' Complaint acknowledges that the rational-basis test is the appropriate test in this case. Compl. ¶ ¶ 198-201, 203, 205-209.

Rational basis review is a "generous" standard of scrutiny. *Chattanooga Metro. Airport Auth. v. Thompson*, C/A NO. 03A01-9610-CH-00319, 1997 Tenn. App. LEXIS 209, at *7 (Tenn. Ct. App. Mar. 24, 1997), attached as Exhibit 3. Courts will uphold the law "if some reasonable basis can be found for the classification, or if any state of facts may reasonably be conceived to justify it." *In re Estate of Combs*, No. M2011-01696-COA-R3-CV, 2012 Tenn. App. LEXIS 597, at *18 (Tenn. Ct. App. Aug. 28, 2012), attached as Exhibit 4.

The ESA Pilot Program has a clear rational basis for several reasons. First, courts recognize that legislatures may create geographically targeted pilot programs to test new public policy ideas. *Simmons-Harris v. Goff*, 711 N.E.2d 203, 214 (Ohio 1999) (state does not violate equal protection by using a classification which enacts reforms for one urban school district); *Harrisburg Sch. Dist. v. Zogby*, 828 A.2d 1079, 1087 (Pa. 2003) (same); *Welch v. Bd. of Educ.*, 477 F. Supp. 959, 965 (D. Md. 1979) ("The need for freedom of state legislatures to experiment with different techniques and schemes is one of the rational bases for differences..."). *See Davis*

v. Grover, 480 N.W.2d 460, 469 (Wis. 1992) (state justified in recognizing a "substantial distinction" between a single urban school district and all other districts in the state, such that reforms may apply to only that one district). *See also State v. Scott*, 96 Or. App. 451, 453, 773 P.2d 394, 395 (1989) (*citing McGlothen v. Dept. of Motor Vehicles*, 71 Cal App 3d 1005, (1977); *Dept. of Mot. Veh. v. Superior Ct., San Mateo Cty*., 58 Cal App 3d 936, (1976)) (geographically limited pilot program does not violate equal protection).

Second, stripped of the rhetoric, the Plaintiffs' Complaint basically comes down to two classifications: 1) the use of local education agency lines rather than individual schools and 2) the inclusion of two large education agencies and the Achievement School District to the exclusion of all others. Both have several conceivable rational bases.

The state may have chosen to apply the program based on performance of schools in an entire local educational agency rather than to individual schools for administrative convenience, as the agency is the state's standard local subunit for educational programs. *Strehlke v. Grosse Pointe Pub. Sch. Sys.*, 654 F. App'x 713, 721 (6th Cir. 2016). It may have done so to avoid confusion on the part of parents, since it is easier to communicate with parents based on broad, recognized geographic classifications rather than based on quixotic zone boundaries for individual schools. It may have done so to avoid splitting up siblings. In an individual school-based system, a younger sibling may attend a failing elementary school, while an older sibling may attend a non-failing middle school. In fact, this preference to keep siblings together was referenced in the text of the law. *See* Tenn. Code Ann. § 49-6-2604(e)(1). Under the agency-based line, both siblings could use an ESA to attend the same K-8 school.

The Legislature could have set the classification to only cover large urban school districts because these districts have unique challenges that demand policy responses different from those

in rural districts. *See Moore v. Detroit Sch. Reform Bd.,* 293 F.3d 352, 362 (6th Cir. 2002). Fayette and Madison counties, mentioned specifically in the Complaint (¶¶ 204-05), for instance, both have populations under 100,000. The Legislature may also have believed that there are fewer private schools in rural districts, such that it would make sense to limit the initial ESA Pilot Program to urban areas with heavy concentrations of alternative private schools. *See* Nat. Center for Ed. Statistics Geocoding, available at https://nces.ed.gov/programs/edge/Geographic/SchoolLocations. Or the Legislature may have believed that large urban districts were better able to absorb or spread out the fixed costs of buildings and pensions than small rural districts. Or the Legislature may have believed that large urban districts would see greater population growth over time than small rural districts, more promptly replacing students who chose to use the ESA to enroll in a private school.

"[A]s a legislative decision, the rational basis test is satisfied if there is a 'conceivable' or 'possible' reason for the [Legislature's] decision." *Cunningham v. Bedford Cty*., No. M2017-00519-COA-R3-CV, 2018 Tenn. App. LEXIS 632, at *10 (Tenn. Ct. App. Oct. 29, 2018), attached as Exhibit 5. *Accord* A.G. Cooper, Opinion No. 09-04, at *2 ("To uphold a statute under the rational basis test, all that is required is an articulable justification for its enactment."). The Legislature retains broad freedom to experiment and innovate, including by enacting geographically limited pilot programs. Here the Legislature drew lines based on size and agency that have conceivable, articulable justifications.

These justifications were clearly spelled out in the legislation, so there is no need for the Court to selectively pick through quotations in the Complaint from legislators who opposed the law and deliberately sprinkled the record with language for a court to strike it down. The law laid out its rational basis in clear, plain language, leaving no need to consult legislative history:

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

Tenn. Code Ann. § 49-6-2611(a)(1). Therefore, the rational basis test is obviously met, and the count must be dismissed.

IV. The Education Clause of the Tennessee Constitution does not prohibit creating a pilot program to fund low-income students to leave failing school districts for a better education.

The Education Clause of the Tennessee Constitution provides:

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

Tenn. Const., Art. XI, § 12. Plaintiffs allege the ESA Pilot Program violates this clause by limiting the pilot program to two counties, which will result in unequal educational opportunities because only these two counties will face an inequitable diversion of public funds from their local public schools. Compl. ¶¶ 210-18. In other words, school districts in every other county can hold on to their students and dollars, whereas these districts will have fewer dollars because of the ESAs.

This argument fails on several counts. First, the ESA Pilot Program is built on the simple principle that the dollars follow the child. If a student enrolls using an ESA rather than choosing a local education agency's school, that agency is excused from educating that child. Though the dollars go from the agency to the ESA, so too, does the responsibility for education. The agency does not have to pay for teaching, curriculum, services, supplies, or the numerous other costs that come with educating that child. And for those children who choose to remain in the system (or

are prevented from leaving by the enrollment caps built into the ESA program), the Plaintiffs will continue to receive the same full Basic Education Program (BEP) grants to provide their educations. *See* Opinion of Attorney General Robert E. Cooper, Jr., No. 08-194 (Dec. 29, 2008) (noting that under the Basic Education Program's maintenance-of-effort requirement, school districts may reduce their funding when student population decreases).

Moreover, a three-year special funding stream of $25 million annually to the affected agencies will ease the transition, recognizing that certain fixed costs like buildings and libraries must be covered. Marta W. Aldrich, "Tennessee governor huddles with school leaders in cities affected by his voucher proposal," Chalkbeat.org (April 16, 2019), available at https://chalkbeat.org/posts/tn/2019/04/16/tennessee-governor-huddles-with-school-leaders-in-cities-affected-by-his-voucher-proposal/.

Second, the Education Clause is not simply about quantity of dollars, but quality and opportunity. *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 156 (Tenn. 1993) ("The essential issues in this case are quality and equality of education. The issue is not, as insisted by the defendants and intervenors, equality of funding."). Even if the agencies must continue to bear certain fixed costs spread across a smaller student count than they had otherwise projected, this minimal cost would hardly prevent those agencies from providing students "the opportunity to acquire general knowledge, develop the powers of reasoning and judgment, and generally prepare students intellectually for a mature life." *Id*. at 150-51. As long as the agencies can continue to meet the state's constitutional requirement to provide an adequate basic education, the clause is met.[2] *Accord* Tenn. Att'y Gen. Opinion No. 05-078, at *2 (May 10, 2005)

[2] The Complaint focuses on inequitable and unequal funding between different counties; it does not allege that the local education agencies will force such drastic cuts systemwide that they will

(validating a pre-K system only available in certain school districts: "Equal protection does not require absolute equality. Nor does it mandate that everyone receive the same advantages.").

Third, the Tennessee Supreme Court has recognized that the clause gives the Legislature the elbow room it needs to explore alternatives and test pilot programs. "Given the very nature of education, an adequate system, by all reasonable standards, would include innovative and progressive features and programs." *McWherter I*, 851 S.W.2d at 156. When asked to opine on a similar bill providing private school options for parents of children in failing schools, Attorney General Robert E. Cooper, Jr. concluded:

> HB190 provides the parents of a limited number of Tennessee schoolchildren attending the public schools in the bottom five percent in terms of scholastic achievement the voluntary choice of utilizing a voucher program to attend a private school that is subject to state educational requirements. In light of the Tennessee Supreme Court's recognition of the General Assembly's constitutional flexibility in the field of education, the program created by HB190 should be defensible to a facial challenge based upon article XI, section 12, of the Tennessee Constitution.

Tenn. Att'y Gen. Opinion No. 13-27, at *7-8 (March 26, 2013). General Cooper also opined that the Legislature's "broad authority" and "plenary power" granted by the clause permitted another innovative option that had originally affected only students in large urban school districts: charter schools. Tenn. Att'y Gen. Opinion No. 12-68, at *2.

The creation of a pilot program, especially one to help disadvantaged students, is a rational basis for limiting a law's initial effect. *See* Opinion of Attorney General Robert E. Cooper, Jr., No. 07-60 (May 1, 2007). As the Attorney General noted in 2004, "a legislature is allowed to attack a perceived problem piecemeal. . . . Underinclusivity alone is not sufficient to state an equal protection claim." Tenn. Op. Att'y Gen. No. 04-087 (May 5, 2004) (quoting Tenn.

---

lack "adequate funding" to carry out their basic missions because of the program. *See Tenn. Small Sch. Sys. v. McWherter* (*McWherter II*), 894 S.W.2d 734, 738-39 (Tenn. 1995).

Op. Att'y Gen. No. 01-106 (June 27, 2001)) (quoting *Howard v. City of Garland*, 917 F.2d 898, 901 (5th Cir. 1990)) (quoting *Jackson Court Condominiums v. City of New Orleans*, 874 F. 2d 1070, 1079 (5th Cir. 1989)) (citing *City of New Orleans v. Dukes*, 427 U.S. 297 (1976)). *See also Opinion of the Justices*, 135 N.H. 549, 608 A.2d 874 (1992) (implementation of a pilot program in one part of the state does not violate equal protection).

Count 3 must also be dismissed. The Legislature has broad authority over education, including the right to test innovative and creative solutions to improve student achievement through a pilot program. The Education Clause of the state constitution concerns quality of opportunity, not quantity of dollars. Even if it did, Plaintiffs will continue to have adequate funds to educate the children who choose to remain in their systems because Plaintiffs will continue to receive the same per pupil Basic Education Program (BEP) dollars as before plus the ghost reimbursement for three years for those children who leave and their share of the $25 million school improvement fund. Tenn. Code. Ann. § 49-6-2605(b)(2)(A).

CONCLUSION

For the reasons stated above, Metro Bd. of Ed. must be dismissed as a Plaintiff in the lawsuit, and all three counts, being foreclosed by clear, on-point precedent, must be dismissed for failure to state a claim upon which relief can be granted.

Respectfully submitted,

/s/ Brian K. Kelsey
Brian K. Kelsey (TN B.P.R. #022874)
bkelsey@libertyjusticecenter.org
Local Counsel
Daniel R. Suhr (WI Bar No. 1056658)
dsuhr@libertyjusticecenter.org
Lead Counsel, Pro Hac Vice
Liberty Justice Center
190 S. LaSalle Street, Suite 1500
Chicago, Illinois 60603

Telephone: (312) 263-7668
Attorneys for Intervenor-Defendants
Greater Praise Christian Academy;
Sensational Enlightenment Academy Independent School;
Ciera Calhoun; Alexandria Medlin; and David Wilson, Sr.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been sent to the attorneys listed below via Davidson County Chancery Court E-filing R. 4.01 and TN S.Ct. R. 46A and via the electronic mail addresses below on this 6th day of March, 2020.

Robert E. Cooper, Jr., Esq., Director of Law
Lora Barkenbus Fox, Esq.
Allison L. Bussell, Esq.
Department of Law of the Metropolitan Government of Nashville and Davidson County
lora.fox@nashville.gov
allison.bussell@nashville.gov
Counsel for Plaintiffs Metropolitan Government of Nashville and Davidson County and Metropolitan Nashville Board of Public Education

Marlinee C. Iverson, Esq., Shelby County Attorney
E. Lee Whitwell, Esq.
Shelby County Attorney's Office
marlinee.iverson@shelbycountytn.gov
lee.whitwell@shelbycountytn.gov
Counsel for Plaintiff Shelby County Government

Herbert H. Slatery, III, Esq., Attorney General and Reporter
Stephanie A. Bergmeyer, Esq., Senior Assistant Attorney General
Office of Tennessee Attorney General
Stephanie.Bergmeyer@ag.tn.gov
Counsel for Defendants Tennessee Department of Education; Penny Schwinn, in her official capacity as Education Commissioner for the Tennessee Department of Education; and Bill Lee, in his official capacity as Governor for the state of Tennessee, Defendants

Jason I. Coleman, Esq.
jicoleman84@gmail.com
Arif Panju, Esq.
David Hodges, Esq.
Keith Neely, Esq.
Institute for Justice
apanju@ij.org
dhodges@ij.org
kneely@ij.org
Counsel for Intervenor-Defendants Natu Bah and Builguissa Diallo

Braden H. Boucek
Beacon Center
braden@beacontn.org
Counsel for Intervenor-Defendants Bria Davis and Star Brumfield

/s/ Brian K. Kelsey
Brian K. Kelsey