IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

THE METROPOLITAN GOVERNMENT
OF NASHVILLE AND DAVIDSON COUNTY et al.,

Plaintiffs,

v.

TENNESSEE DEPARTMENT OF EDUCATION et al., No. 20-0143-II

Defendants

and

NATU BAH et al.,

Intervenor-Defendants.

GREATER PRAISE CHRISTIAN ACADEMY; SENSATIONAL ENLIGHTENMENT ACADEMY INDEPENDENT SCHOOL; CIERA CALHOUN; ALEXANDRIA MEDLIN; AND DAVID WILSON, SR.'S REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

Intervenor-Defendants have moved to dismiss all three of the counts brought by Plaintiffs. For the reasons set forth below and in their original memorandum, their motion should be granted.

ARGUMENT

I. The Board of Education lacks the *capacity* to bring this suit.

The Intervenor-Defendants do not challenge the School Board's *standing* but its *capacity*. *See* Motion to Dismiss Memorandum at 5-7.

> The capacity to sue is something entirely different from standing to sue. The former is recognized specifically in the Rules of Civil Procedure; the latter is controlled by case law, with no reference being made thereto in the Rules. Capacity, as used in Rule 9.01, relates to a party's personal or official right to litigate the issues presented by the pleadings; is governed by Rules 17.02 and 17.03; and is not dependent upon the character of the claim.

Knierim v. Leatherwood, 542 S.W.2d 806, 808 (Tenn. 1976).

Tennessee Rule of Civil Procedure 17.02(1) is clear: "The capacity of any party to sue or be sued shall be determined by the law of this state." The law of this state is equally clear: the board lacks the power (i.e., capacity) to sue to challenge this law. T.C.A. § 49-6-2611(d).

In an analogous case, the Tennessee Supreme Court applied the rule finding a party lacked capacity, even though an amendment to the pleadings could easily cure the defect in that instance. *Goss v. Hutchins*, 751 S.W.2d 821, 826 (Tenn. 1988) ("To raise the issue of lack of legal existence or capacity in this case, it was necessary that defendant answering on behalf of the representative of the decedent's estate, assert in clear and unmistakable English, that has a single meaning, to-wit: that no party having the legal capacity to represent the decedent has been sued or served with process. The fact that such a specific negative averment will likely result in a prompt curative amendment by plaintiff does not reduce the stringency of the rule."). The rule

should be applied equally stringently here, and the Board dismissed from the case for lack of capacity.

Second, even if the Court considered this a question of standing, it should still proceed to dismiss the Board for its lack of standing. *Thiebaut v. Colo. Springs Utils*., 455 F. App'x 795, 802 (10th Cir. 2011) ("[N]othing in the cases addressing this [one-plaintiff] principle suggests that a court must permit a plaintiff that lacks standing to remain in a case whenever it determines that a co-plaintiff has standing. Instead, courts retain discretion to analyze the standing of all plaintiffs in a case and to dismiss those plaintiffs that lack standing."); *We Are Am./Somos Am., Coal. of Ariz. v. Maricopa Cty. Bd. of Supervisors*, 809 F. Supp. 2d 1084, 1091 (D. Ariz. 2011) ("[The one-plaintiff] rule does not strictly prohibit a district court, in a multiple plaintiff case such as this, from considering the standing of the other plaintiffs even if it finds that one plaintiff has standing."). The Court should exercise its discretion here to dismiss the Board from the suit out of respect for the General Assembly's express will in this regard. The alternative is to allow any plaintiff to ignore its lack of capacity or standing as long as it can join a lawsuit with a party that does have standing.

II. The Complaint does not state a viable claim under the Home Rule clause.

This Court has multiple paths before it to resolve the home-rule claim. It could follow the State's argument that shows why, under existing precedent, the Legislature has flexibility to do as it did. It could follow the IJ/Beacon Intervenors' argument, which shows that education is a state function, rather than a local function, and that the counties lack the ability to assert a home-rule claim on education policy. Or it could follow the plain meaning of the clause as set forth by the briefs of the Greater Praise Intervenors, which follow the very simple principle that the singular form means the clause applies when legislation affects one, and only one, county.

In its response, Metro Government relies chiefly on *Leech v. Wayne County*, 588 S.W.2d 270, 274 (Tenn. 1979) and *Farris v. Blanton*, 528 S.W.2d 549, 551 (Tenn. 1975), Metro Gov't Response at 12-13, which struck down statutes with population brackets applying only to two counties at the time they were adopted. First, those holdings are in tension with more recent cases from the Supreme Court and Court of Appeals, respectively, both of which *upheld* statutes where only one or three counties were covered by a population bracket at the time of adoption. *Civil Serv. Merit Bd. of the City of Knoxville v. Burson*, 816 S.W.2d 725, 729-30 (Tenn. 1991); *County of Shelby v. McWherter*, 936 S.W.2d 923, 935-36 (Tenn. Ct. App. 1996).

Second, and more importantly for this case, the ESA Pilot Program does not use a population bracket gimmick to target certain counties and not others. Defending the rational basis for targeting two counties with a population of say, between 20,000 and 20,100 as well as between 40,000 and 40,100 people in the most recent census is hard, if not impossible to do. However, targeting a pilot program at the three school districts with the most failing public schools in three of the last four years is eminently rational. See pp. 7-10 below. These are the students who need the most help and most options for success.

Third, the more appropriate cases to analyze in this case are the private act cases, which concern legislation that affects specific counties and also lack population brackets. Legislation is a private act only when it "confer[s] special benefits and impose[s] special burdens on the citizens of **one county**." *Sons of Confederate Veterans Nathan Bedford Forrest Camp #215 v. City of Memphis*, No. W2017-00665-COA-R3-CV, 2017 Tenn. App. LEXIS 711, at *29 (Ct. App. Oct. 24, 2017) (quoting *Sandford v. Pearson*, 231 S.W.2d 336, 338 (Tenn. 1950)) (emphasis added). Because this legislation specifies its effect on multiple counties, the Home Rule clause does not apply.

III. The Complaint does not state a viable claim under the Equal Protection clause.

A. Strict scrutiny does not apply to this case.

Having used the term "rational basis" throughout their Complaint, Plaintiffs now believe that strict scrutiny should apply to this claim because education is a fundamental right. Metro Gov't Response at 18. Plaintiffs' citation for this proposition requires a radical misreading of *Heyne v. Metropolitan Nashville Board of Public Education,* 380 S.W.3d 715 (Tenn. 2012). The quoted passage characterizes the education clause as a "constitutional imperative" for the General Assembly to fulfill, and on this basis "the General Assembly has created a **statutory right** to a public education that benefits all school-age children in Tennessee." *Heyne*, 380 S.W.3d at 731-32 (emphasis added). It is only because the Legislature has created a **statutory** right that Mr. Heyne had due process protection to legal review of the revocation of his statutory right thru the school's internal disciplinary system.

Rather that accepting Plaintiffs' invitation to substitute "constitutional" for "statutory" before "right," this Court should follow the square holding of the Tennessee Court of Appeals that Education Clause challenges do not receive strict scrutiny because the Tennessee Supreme Court has declined to recognize public education as an individual, fundamental right. *C.S.C. v. Knox Cty. Bd. of Educ.*, No. E2006-00087-COA-R3-CV, 2006 Tenn. App. LEXIS 802, at *39-40 (Ct. App. Dec. 19, 2006) ("[A]lthough our Supreme Court acknowledges that Article XI, Section 12 of the Tennessee Constitution guarantees the school children of this state the right to a free public education, our courts have not held, to date, that education in Tennessee is a fundamental right. *See Tennessee Small Sch. Sys*., 851 S.W.2d at 155. Strict scrutiny, therefore, does not apply.").

To hold otherwise is to conflate a legislative responsibility with an individual right. Article I of the Tennessee Constitution sets forth the "Declaration of Rights" that functions as Tennessee's Bill of Rights with the vast majority of personal, fundamental rights. To illustrate the difference, compare Section 12 of article XI, Miscellaneous Provisions, with Section 13. Section 12 provides, regarding education:

> 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 post-secondary educational institutions, including public institutions of higher learning, as it determines.

Section 13 provides:

> The General Assembly shall have the power to enact laws for the protection and preservation of game and fish, within the state, and such laws may be enacted for and applied and enforced in particular counties or geographical districts, designated by the General Assembly. The citizens of this state shall have the personal right to hunt and fish, subject to reasonable regulations and restrictions prescribed by law. The recognition of this right does not abrogate any private or public property rights, nor does it limit the state's power to regulate commercial activity. Traditional manners and means may be used to take non-threatened species.

Section 12 has one part: it requires the General Assembly to provide for a system of free public schools. Section 13, by contrast, has two parts. First, it empowers the General Assembly to enact laws to protect game and fish. Second, it creates a specific "personal right" for the "citizens of this state" to hunt and fish. The lack of any "rights" language in Section 12 is why the Supreme Court has never recognized an individual student's fundamental right to an education. Otherwise every clause in the constitution empowering the General Assembly to act would have to be read as creating a fundamental right. Must laws affecting a citizen's right to live under a particular form of county government be subject to strict scrutiny? Art. 8, Sec. 1. Or laws affecting annual charitable lotteries? Art. XI, Sec. 5. Or laws regarding the interest rate

charged on loans? Art. XI, Sec. 7? Clearly not. Nor does the same language create an individual, fundamental right here. Because of that, only rational-basis scrutiny applies.

B. The statute has multiple rational bases, so this claim must be dismissed.

The Plaintiffs ask the Court to go on a fishing expedition into various legislator's motives for drawing the lines embodied in the act. But that is not the role of this Court: "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Renton v. Playtime Theatres*, 475 U.S. 41, 48 (1986).

Rather, this Court should bear in mind its extremely limited role in reviewing a statute on rational basis: "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Heller v. Doe*, 509 U.S. 312, 321 (1993). *Accord* Tenn. Atty. Gen. Op. 01-106, at *14-15 ("[A] legislature is allowed to attack a perceived problem piecemeal . . .. Underinclusivity alone is not sufficient to state an equal protection claim."). *Accord Jones v. Michigan*, 705 F.2d 454 (6th Cir. 1982) (regarding equal protection: "It is not unconstitutional to legislate in a piecemeal fashion."); *Thurmond v. Block*, 640 F. Supp. 588, 594 (W.D. Tenn. 1986) ("The right to equal protection is not violated merely by classifications in a statute that are imperfect. Nor is it unconstitutional to gradually attack a problem when the problem is far reaching and suspect classes or fundamental rights are not implicated." Internal citations/quotations omitted).

Tennessee's own courts follow a similarly forgiving standard: "so patently arbitrary as lacking any rational basis." *Wyatt v. A-Best Prods. Co*., 924 S.W.2d 98, 106 (Tenn. Ct. App.

1995). This Court's job is not to write or require what the court believes would be a "better or more effective" statute." *Id*. In fact, "the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others. . ." *Id*. (quoting *Swain v. State*, 527 S.W.2d 119, 121 (Tenn. 1975)). Finally, particularly to the other counties with low-performing schools, the Court should bear in mind "[t]he Supreme Court's oft-quoted statement that 'it is no requirement of equal protection that all evils of the same genus be eradicated or none at all.'" *Id*. (quoting *Railway Express Agency v. People of New York*, 336 U.S. 106, 110 (1948)). There are certainly low-performing schools in counties across Tennessee. The Legislature chose to start with a pilot program in the state's two counties with the highest concentrations of failing schools and highest concentrations of existing alternative private schools. That is a rational starting point for a major education reform initiative. *See Derry v. Marion Cmty. Schs*., 790 F. Supp. 2d 839, 851 (N.D. Ind. 2008) (rejecting an equal-protection challenge to a school-uniform policy applicable in only one school in a district by finding the district had a legitimate interest "to experiment with a pilot program to assess whether such a policy makes a difference in student discipline, academic performance, and gang-related activity.")

SCS and MNPS throughout their brief look at data and list counties from the criteria years specified in statute. However, this focus on the trees loses the forest—the General Assembly took a broad view in choosing the districts for the pilot program. As the law states, "The general assembly recognizes this state's legitimate interest in the continual improvement of all LEAs and particularly the LEAs that have consistently had the lowest performing schools on

a historical basis. Accordingly, it is the intent of this part to establish a pilot program that provides funding for access to additional educational options to students who reside in LEAs that have consistently and historically had the lowest performing schools." T.C.A. § 49-6-2611(a)(1). The relevant timeline for the legislature's classification, then, is not frozen in individual years but takes a broad view of LEAs "consistently and historically" having the lowest performing schools.

Finally, that there are other counties that also have failing schools or existing private schools does not mean this Court can strike down the classification as irrational. If that were the case, the Achievement School District, itself, would be unconstitutional. It has the statutory authority to take control of any school that is performing in the bottom five percent in the state, but it has chosen to do so only in Shelby and Davidson counties because that is where clusters of failing schools exist, and the same students can be targeted from failing elementary to failing middle to failing high schools.

Several years ago, the General Assembly proposed a similar law targeting additional opportunities to students in troubled schools but doing so in such a way that "this mechanism does not provide a perfect fit for the stated legislative aim of assisting economically disadvantaged students." Though the legislation set a scope that was "not the most precise manner in which to target economically disadvantaged students," it was, nonetheless, "a reasonable method to target groups of students who are *more likely* to be economically disadvantaged" and thus "would survive the low level of constitutional scrutiny required by a rational basis analysis, the applicable standard for legislation such as the Act." Opinion of Attorney General Robert E. Cooper, Jr., No. 07-60 (May 1, 2007), at *3-5 (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 662-223, (2002) (holding that an Ohio private school scholarship

program enacted for the valid purpose of aiding economically disadvantaged children in a failing public school system was constitutional). The same should be true here: even if the fit is not perfect or precise, it is a reasonable starting point for a pilot project, and therefore constitutional.

C. No legal principle requires that a pilot program be time-limited by statute.

Plaintiffs may be right that pilot programs are often time-limited by statute, but that observation is no legal principle empowering this Court to strike down this pilot program for lack of such a time limit. The Legislature may have had multiple rational bases for not including a specific time limit to the ESA Pilot Program. If the data were to show the program was an utter disaster after three years, the Legislature would not want to have to wait out a statutory six-year window before its expiration. If the legislation had set a three-year window, and the data after three years was mixed, the Legislature may have preferred to let it run six years to gather additional information before making a decision on its permanence or expansion. Perhaps after three years it will be a total success, and the Legislature did not want to spend valuable time reauthorizing it in that case. Just because the Plaintiffs can cite other programs where a pilot program included a statutory expiration date does not mean that such a provision is somehow constitutionally required by equal protection.

The Plaintiffs cite three Tennessee cases where Westlaw returned both "pilot program" and some word suggesting a time limit. One involves a case where the pilot program did in fact expire. *Easterly v. Harmon*, No. 01A01-9609-CH-00446, 1997 Tenn. App. LEXIS 820, at *3 (Tenn. Ct. App. Nov. 19, 1997). In the second case, the relevant paragraph, when read in full, shows that only the programming offered lasted ten weeks, not that the rule authorizing a pilot program expired after ten weeks. *Smith v. Bd. of Prof'l Responsibility of the Supreme Court of Tenn.*, 551 S.W.3d 712, 715 (Tenn. 2018) ("After his release from prison, Attorney participated

in a specialized sex offender treatment program through Counseling Resources of America. The entire program consisted of four phases, all of which he had completed by the time of the hearing. Attorney stated that it took him approximately two and one-half years to complete the program. The first phase consisted of weekly meetings, with the latter phases requiring meetings every other week. Following this program, Attorney completed a ten-week pilot program involving cognitive behavior that was led by his probation officer.").

In the third case, there was no expiration of the pilot project. The Plaintiffs quote the court's description of testimony from a Tennessee Board of Probation and Parole employee: "On redirect examination, Parker testified that the Defendant would have to wear his GPS monitor as long as the pilot program is enacted, and then it would be up to the Legislature to determine whether the program would continue." *State v. Matlock*, No. M2006-01141-CCA-R3-CD, 2007 Tenn. Crim. App. LEXIS 382, at *6 (Crim. App. May 9, 2007). Parker could not know how long the pilot program would be enacted because though the Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act authorized a minimum period of operation for the "pilot project," it did not authorize a maximum period or expiration date ("the purpose of the pilot project is to collect *at least* twelve (12) months of data on the experience of such a monitoring and tracking system in this state." Acts 2004, ch. 899, § 2 (emphasis added)). *Accord* Tenn. Code Ann. § 7-52-601 (authorizing a pilot project for municipal electric systems with no specific expiration date, but only mandating a report to the General Assembly by a certain date). The pilot project for the ESA Pilot Program is identical. It mandates a report to the General Assembly after three years and each year thereafter, and such report shall include a recommendation from the Comptroller Office of Research and Education Accountability 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. § 49-6-2611(a)(2).

Finally, in an example with which this Court is personally familiar, the Tennessee Supreme Court's own Davidson County Business Court Pilot Program originally had an end date, but the Phase Two order does not have an expiration date. *See* Tenn. S.Ct. ADM2017-00638. Leaving off an expiration date does not render a pilot program unconstitutional.

IV. The Complaint does not state a viable claim under the Education clause.

The Plaintiffs struggle to annunciate a clear legal theory under the Education clause, which should be no surprise because they are trying to shoehorn a claim into a clause and case (*McWherter*) where it does not fit. Their specious claim can be summarized as follows: SCS and MNPS are already underfunded by the state and unconstitutional under the Education clause; therefore, the ESA Pilot Program will make this unconstitutionality more unconstitutional.

First, as the State and the Greater Praise Intervenor-Defendants have shown, this claim is at best unripe and at worst inaccurate. The ESA Pilot Program will not exacerbate the state's underfunding until at least three years from now, when the ghost reimbursement ends (hence the claim's lack of ripeness). And even then, the General Assembly has provided a school improvement fund with additional dollars for SCS and MNPS. Plus, because of the rates at which SCS and MNPS level local taxes, per-pupil spending will actually increase at SCS and MNPS under the ESA Pilot Program. (For a fuller explanation, see Greater Praise Intervenors' brief in opposition to the McEwen Plaintiffs' motion for a preliminary injunction at 10-11 and their Reply on motion to dismiss in the McEwen case, filed concurrently herewith).

The first of the three-year "ghost reimbursement" for SCS and MNPS was fully funded in the most recent state appropriations act, passed last month. *See* Public Chapter 651 of the 111th

General Assembly, Sec. 1, Title III-9. 2.1 k., Page 5 (appropriating $41,880,100 to Non-Public Education Choice Programs)[1]; Marta W. Aldrich, "Tennessee legislature passes emergency budget as attempt to yank school vouchers fails," Chalkbeat.org (March 19, 2020)[2] ("Rep. Matthew Hill, a Jonesborough Republican who worked to pass the voucher law, countered that most of the $41 million will reimburse public school districts in Memphis and Nashville that are expected to lose students and per-pupil funding to private schools through Lee's education savings account program.").

Second, this Court should take judicial notice of the fact that Hamilton County's board of education recently voted to end its educational adequacy suit because of the significant increases in public education spending made by the Governor and General Assembly in the last few years. Meghan Mangrum, "Hamilton County Schools' funding lawsuit against Tennessee dismissed in court," Times Free Press (Jan. 10, 2020).[3] According to the Center for Educational Equity at Columbia University Teachers College (Jan. 28, 2020), "The Board voted unanimously to dismiss the case, based on advice from the board's legal counsel and because of what they described as substantial increases in state funding in recent years and the work state legislators

[1] Available at https://publications.tnsosfiles.com/acts/111/pub/pc0651.pdf (retrieved April 21, 2020).

[2] Available at https://tn.chalkbeat.org/2020/3/19/21196084/tennessee-legislature-passes-emergency-budget-as-attempt-to-yank-school-vouchers-fails (retrieved April 27, 2020).

[3] Available at https://www.timesfreepress.com/news/local/story/2020/jan/10/case-dismissedhamiltcounty-schools-funding-la/512694/ (retrieved April 27, 2020).

have done to improve the state's school funding formula, known as the Basic Education Plan (BEP)."[4]

The Court should also recognize in the recent appropriations act law cited above that, even since the filing of this lawsuit, the most recent state appropriations act included full funding of the BEP and an additional two percent increase (over $53 million) for teacher salary raises. Natalie Allison and Joel Ebert, "Gov. Bill Lee calls for new $150M coronavirus fund, massive deposit into Tennessee's rainy day fund," *Tennessean* (March 18, 2020).[5] This full funding of the BEP, even in the midst of an unprecedented economic crisis, shows the state's commitment to the BEP and education generally.

CONCLUSION

For the reasons stated above, the motion to dismiss should be granted on all three counts.

Respectfully Submitted,

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[4] Available at http://schoolfunding.info/news/hamilton-co-drops-tennessee-adequacy-suit-but-nashville-and-shelby-county-continue-to-litigate/ (retrieved April 27, 2020).

[5] Available at https://www.tennessean.com/story/news/politics/2020/03/18/tennessee-gov-bill-lee-calls-new-150-m-coronavirus-healthcare-fund-rainy-day-boost/5073763002/ (retrieved April 27, 2020).

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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 27th day of April, 2020.

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