IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

CASE NO. M2020-00683-COA-R9-CV

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY *et al.*,
Plaintiffs / Appellees,

v.

TENNESSEE DEPARTMENT OF EDUCATION *et al.*,
Defendants / Appellants,

and

NATU BAH *et al.*,
Intervenor-Defendants / Appellants.

On Expedited, Interlocutory Appeal Pursuant to Tenn. R. App. P. 9
Oral Argument Requested and Scheduled August 5, 2020 at 1:00 P.M.

APPENDIX TO INTERVENOR-DEFENDANTS / APPELLANTS GREATER PRAISE CHRISTIAN ACADEMY; SENSATIONAL ENLIGHTENMENT ACADEMY INDEPENDENT SCHOOL; CIERA CALHOUN; ALEXANDRIA MEDLIN; AND DAVID WILSON, SR.'S OPENING BRIEF

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[1] Available at https://comptroller.tn.gov/content/dam/cot/orea/documents/orea-reports-2020/ESA2020Website.pdf (updated May 2020) (retrieved May 14, 2020).

[2] Available at http://www.capitol.tn.gov/bills/111/Senate/Journals/05012019rd34.pdf (retrieved June 17, 2020).

TENNESSEE COMPTROLLER OF THE TREASURY

LEGISLATIVE BRIEF

Understanding Public Chapter 506: Education Savings Accounts

Tara Bergfeld | *Principal Legislative Research Analyst*
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Updated May 2020

Public Chapter 506 (2019) creates the Tennessee Education Savings Account (ESA) program, which allows eligible students in Shelby and Davidson counties to use state and local BEP funds toward expenses, such as tutoring services, fees for early postsecondary opportunity courses and examinations, and tuition, fees, and textbooks at approved private schools. This legislative brief answers questions about eligibility, allowable expenses, funding, and accountability for the new program, with updated data where available.

Who is eligible to receive an Education Savings Account (ESA)?

An eligible K-12 student must be a resident of Tennessee who:

- was previously enrolled in and attended a Tennessee public school for one full school year immediately preceding the school year for which a student receives an ESA,
- is eligible for the first time to enroll in a Tennessee school (e.g., kindergarten student or a student that moved to Tennessee from out of state), or
- received an ESA the previous year.

Homeschool students are not eligible to receive ESA dollars.

Income eligibility and verification

ESA-eligible students will come from households with an annual income that is no more than twice the annual income eligibility guidelines for the federal free lunch program. The Tennessee Department of Education's (TDOE) application materials for the 2020-21 school year used the 2019-20 federal income thresholds.

Household Size	Federal Annual Income Eligibility	ESA Income Limit
2	$21,983	$43,966
3	$27,729	$55,458
4	$33,475	$66,950
5	$39,221	$78,442
6	$44,967	$89,934
7	$50,713	$101,426

Source: Tennessee Department of Education, Tennessee Education Savings Account Program – Frequently Asked Questions for Participating Families, 2020-21 School Year, p. 9.

Parents of students applying for an ESA and student applicants over the age of 18 must provide a federal income tax return from the previous year or proof that the parent of an eligible student is qualified to enroll in the state's

Temporary Assistance for Needy Families (TANF) program. TANF eligibility stipulates that an applicant must either:

- have a child living in the home of a parent or certain relative who is within a specified degree of relationship to the child, and the child must be under age 19 or complete high school before his or her 19th birthday. The child must be deprived of parental support due to absence, death, incapacity, or unemployment of one or both parents; or
- be a pregnant woman in her third trimester.

All TANF applicants must reside in Tennessee and be a citizen or non-citizen lawfully admitted to the United States, be willing to cooperate with child support, and meet the gross monthly income standard.

The law does not explicitly prohibit non-U.S. citizens from participating in the program.

Zoning and residence requirements

Eligible students must be zoned to attend a school in a school district with 10 or more schools:

- identified as priority schools in 2015;[A]
- among the bottom 10 percent of schools in 2017; and
- identified as priority schools in 2018.

Students zoned to attend a school that is in the Achievement School District (ASD) as of the effective date of this law are also eligible to apply for an ESA.

The three school districts that meet these criteria are the ASD, Metro Nashville, and Shelby County.

Students are required to maintain residency in their original school district (i.e., Davidson County or Shelby County) to maintain eligibility for the ESA program.

How many students are eligible to receive an ESA?

During the program's first year, 5,000 students may use an ESA, increasing by 2,500 each subsequent year to a maximum cap of 15,000.[B] Total annual participation caps are based on statewide totals, and there is not a minimum or maximum enrollment level for any eligible district.

School Year	ESA Enrollment
Year one	5,000 students
Year two	7,500 students
Year three	10,000 students
Year four	12,500 students
Year five and every year thereafter	15,000 students

[A] Schools are identified as priority for one of two reasons: (1) being in the bottom 5 percent in 2015-16 and 2016-17 and not meeting the TVAAS safe harbor, which allows schools to not be identified if they are showing high growth, or (2) having a graduation rate of less than 67 percent in 2017-18.

[B] *Tennessee Code Annotated* 49-6-2604(b) requires the ESA program to begin no later than the 2021-22 school year.

It is not possible to determine exactly how many students in the ASD, Metro Nashville, and Shelby County are eligible for the ESA based on the income levels for free or reduced price lunch status because districts no longer collect household income information related to free or reduced price lunch programs due to changes in federal reporting requirements.

In 2017-18 (the most recent data available), a total of 107,419 students from the ASD, Metro Nashville, and Shelby County were classified as economically disadvantaged or direct-certified, meaning the students were participating in a state or federal assistance program, such as the Supplemental Nutrition Assistance Program (SNAP), TANF, and Head Start. Direct certification generally results in a lower count of students who are economically disadvantaged than the counts previously seen when using free or reduced price lunch status to determine the number of such students because not all low-income students apply for state and federal aid programs. Therefore, the economically disadvantaged figure is a low estimate of students eligible for the ESA program; more students may be eligible for the ESA program based on actual income rather than their status as economically disadvantaged.

District	Economically Disadvantaged (#)	Economically Disadvantaged (%)
Metro Nashville	38,636	46.9%
Shelby County	60,521	56.9%
Achievement School District	8,262	75.3%

Source: Tennessee Department of Education, School District Profiles, 2017-18, columns I and J.

How can families use the ESA funds toward their children's educational expenses?

Funds for an ESA may be used for one or more of the following expenses:

- tuition, fees, textbooks, and school uniforms at a participating Category I, II, or III private school;
- tutoring services provided by a tutor or tutoring facility;
- fees for transportation to and from a participating school or educational provider paid to a fee-for-service transportation provider;
- fees for early postsecondary opportunity courses and examinations required for college admission;
- computer hardware, technological devices, or other technology fees if the item is used for the student's needs and is purchased through a participating school, private school, or provider;
- tuition and fees for summer education programs and specialized afterschool education programs, not including afterschool childcare;
- tuition, fees, and textbooks at an eligible postsecondary institution;
- educational therapy services provided by therapists; or
- fees for the management of the ESA by a private or nonprofit financial management organization, as approved by TDOE. Fees cannot exceed 2 percent of the student's annual ESA allocation each year.

Students participating in the ESA program must be enrolled in an approved private school (Category I, II, or III); however, some private schools may not participate in the ESA program. In cases where a participating student attends a nonparticipating school, the student cannot use ESA funds for tuition, fees, textbooks, or school uniforms at the nonparticipating school, but may use the funds for other eligible expenses, such as tutoring services.

How much funding will students receive for an ESA?

Students in ESA-eligible districts will receive approximately $7,117 for the 2020-21 school year. School districts are funded through the Basic Education Program (BEP), a formula that determines how much state money each district receives. The BEP also requires districts to match a certain amount of local money from local funding sources, such as the local option sales tax or local property taxes.

Students with ESAs will receive their proportionate "share" of their district's state and local BEP funding, or the amount of BEP money generated for each student in the district. State law caps this per-pupil amount at the average state and local funding for all students across the state. Because Metro Nashville and Shelby County both generate more BEP funding per student than average, next year's ESA students will receive the lower statewide amount of $7,572 each, compared to $8,324 in Nashville and $7,923 in Shelby County.[C]

State law also allows TDOE to hold back 6 percent of the amount given to students as an administrative fee. This fee will help cover the department's costs of running the program and works out to about $454 per student. After the fee is deducted, each student will receive roughly $7,117 to put toward private school tuition or related expenses.

District	Per-Pupil Expenditures*	State BEP Per-Pupil Funding**	Local BEP Required Per-Pupil Funding*	Total State + Local BEP	State Administration Fee (6%)
State Average	**$10,026**	**$4,981**	**$2,591**	**$7,572**	**($454)**
Metro Nashville	$12,895	$3,618	$4,705	$8,324	**($499)**
Shelby County	$11,976	$5,562	$2,361	$7,923	**($475)**

*Figures based on FY2019 expenditures.
** Figures based on FY 2020 BEP allocations. Actual contribution amounts will be higher if BEP allocations increase in future years due to increases in ADM or increases to the BEP formula.

Two methods of calculating per-pupil expenditures

The per-pupil expenditures included in this report are lower than the figures found on TDOE's annual State Report Card because of differences in how students are counted and which expenditures are included.

TDOE counts students based on average daily attendance when calculating per-pupil expenditures for the State Report Card. Since not all enrolled students may be present when attendance is taken, a lower count of students usually results. TDOE also includes expenditures for USDA commodities and state-level program and administrative costs in addition to current operating expenditures at the district level when calculating per-pupil expenditures. Taken together, the lower count of students and the inclusion of commodities and state-level costs results in a higher per-pupil expenditure figure.

In contrast, the per-pupil expenditures included in this OREA report are calculated based on student enrollment (average daily membership), not attendance, and only current operating expenditures at the district level are used. This method results in lower per-pupil expenditure figures than those found on TDOE's annual State Report Card since a higher count of students and a smaller expenditure amount is used in the calculation.

Capital expenditures and debt service are not included in either calculation of per-pupil expenditures.

For more information on attendance counts, expenditure classifications, and per-pupil calculations, see OREA's 2016 infographic "How much do we spend on education?"

[C] The local portion of the BEP per-pupil funding is based on the local required match amount as calculated in the BEP formula; any additional local funding beyond the required BEP local match will not be included in ESA funding calculations.

What funding mechanisms are in place for districts with students participating in the ESA?

For the first three years of the program, the state will reimburse Metro Nashville and Shelby County for losing students.[D] This BEP funding that is given to ESA students will be made up for through a school improvement grant from the state. In the upcoming fiscal year 2020-21, the state budgeted almost $38 million for reimbursements – enough to cover 5,000 students participating in the ESA program at a cost of $7,572 each. As the cap on ESA student enrollment rises in subsequent years (e.g., 7,500 students in year two, 10,000 students in year three), the state will increase the amount budgeted to reimburse Metro Nashville and Shelby County to cover the additional students.

During the first three years of the program, any reimbursement money that is left over will be given to school districts with priority schools that do not meet the eligibility criteria for the ESA program. For example, if fewer than 5,000 students enroll in the first year of the program, and money is left over, the state will give the leftover funding to districts with priority schools other than Metro Nashville and Shelby County. As of 2018, this includes Campbell County, Fayette County, Hamilton County, Madison County, and Maury County.

Beginning in year four of the ESA program, the state will stop reimbursing Metro Nashville and Shelby County for losing students. Instead, the state will give grants to all districts with priority schools, including Metro Nashville and Shelby County. The State Board of Education (SBE) and TDOE will be responsible for establishing the rules and administration for distributing such funds to districts in the form of annual school improvement grants, including how the funding will make its way from the state to the local level.

Which private schools are eligible to participate in the ESA program?

Category I, II, or III private schools may apply to TDOE to become a participating school in the ESA program. As of May 2020, TDOE has approved 61 private schools to accept students through the ESA program.

- Category I: schools approved by TDOE
- Category II: schools approved by a private school accrediting agency which has been approved by SBE Currently, the following agencies have been approved by SBE:
    - ◊ Association of Classical and Christian Schools, Inc.
    - ◊ Association of Christian Schools International (ACSI)
    - ◊ Christian Schools International Accreditation Services
    - ◊ Diocese of Nashville Catholic Schools Office
    - ◊ Mississippi Association of Independent Schools
    - ◊ National Lutheran School Accreditation
    - ◊ Southern Union Conference of Seventh-day Adventists
    - ◊ Tennessee Association of Non-Public Academic Schools
    - ◊ Tennessee Association of Christian Schools (TACS)
- Category III: schools that are regionally accredited (by, for example, the Southern Association of Colleges and Schools)

What happens if a student exits the ESA program?

Students may return to their zoned school district at any time after enrolling in the program. Any remaining funds in a student's ESA must be returned to the state to be used for the BEP funding that goes to districts.

[D] Students in the ESA program will continue to be counted in the enrollment figures for the school district in which the student resides. For example, if 200 students participate in the ESA program, those 200 students will count toward the district's total ADM figure used for calculating state and local BEP funding amounts. Any additional local funding beyond the required BEP local match will not be included in ESA funding calculations, but districts must continue to budget sufficient funds to meet maintenance of effort requirements set by the state.

Do students participating in the ESA have to take TN Ready?

Schools that accept ESA students must administer the Tennessee Comprehensive Assessment Program (TCAP), also known as TN Ready tests, for math and English language arts in grades 3-11 each year. If a student is not enrolled full time in a participating school, the parent (or eligible student over 18) is responsible for ensuring the student is administered the tests.

Data from the TCAP tests will be used to determine student achievement growth through the Tennessee Value-Added Assessment System (TVAAS) for private schools participating in the ESA program.

What accountability measures are in place to prevent fraud and measure student success?

TDOE is required to maintain separate ESAs for each participating student and verify that the uses of the funds are permitted by Public Chapter 506. TDOE must also institute fraud protection measures, and some purchases, such as tuition and fees, computer hardware or other technological devices, and tutoring services, must be preapproved by TDOE. Participating schools, providers, and eligible postsecondary institutions must provide parents with receipts for all expenses paid using ESA funds. TDOE may suspend or terminate the participation of a student, school, or provider for failure to comply with any of the measures outlined in the law. Any person that knowingly uses ESA funds with the intent to defraud the program may be subject to criminal prosecution.

The ESA program is subject to annual audit by the Comptroller of the Treasury. The audit may include a sample of ESAs to evaluate the eligibility of the participating students, the funds deposited in the ESAs, and whether ESA funds are being used for authorized expenditures. The audit may also include an analysis of TDOE's ESA monitoring process and the sufficiency of the department's fraud protection measures.

The Comptroller's Office of Research and Education Accountability (OREA) is required to evaluate the success of the ESA program after the third year in which the program enrolls participating students and every year thereafter.

Office of Research and Education Accountability

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IN REPLY REFER TO
FILE NO.

July 10, 1953

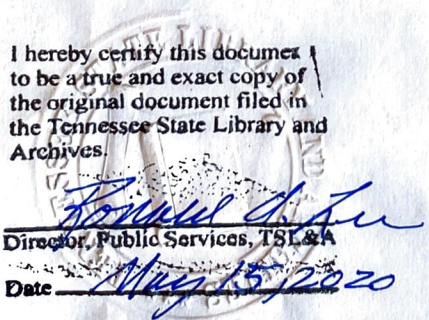
Hon. Lewis Pope, Chairman
Editing Committee
Constitutional Convention
Room 309
Hermitage Hotel
Nashville, Tennessee

Dear Mr. Pope:

I have given considerable thought to the Resolution which was adopted on local legislation and I enclose two drafts for rewriting the Resolution, for your consideration and for the consideration of your Committee. I would like to have gotten this to you sooner but I have not had time to give much thought to it until recently.

The two drafts are identical except that one draft contains and one omits the paragraph prohibiting the passage of any act removing the incumbent from any municipal or county office or altering his salary.

It is my thought that you might want to consider omitting this paragraph for two reasons. First, because it would not seem to be necessary since all private legislation of any character will have to be approved locally. Secondly, the prohibition would appear to place too much of a restraint in cases where it may be highly important to change the form of government of a municipality, or to change the structure of some local board or agency. If this prohibition is left in, I feel that it would prevent this being done without waiting until all existing officers had served out their terms, which in some cases



might be a long time.

But aside from this, there are other points in connection with the Resolution which should be clarified. Some of these points are as follows:

1. The Resolution does not make it altogether clear that local approval must come after the passage of the Act and not before.

2. It provides for a two-thirds vote of the local governing body but it does not specify that the local body is the body which governs a county or city. It conceivably could be the governing body of a quasi-municipal corporation such as a utility district.

3. It provides that approval must be by a two-thirds vote of the governing body, but it leaves open the question whether this must be a two-thirds vote of all members of such body or merely a two-thirds vote of a quorum of said body.

4. The Resolution as adopted applies to all local legislation but it seems that it should be limited to local legislation affecting a county or municipality.

5. The Resolution stipulates that the approval must be by two-thirds of the governing body, but it does not make clear whether the action of the governing body would be subject to the veto power of the mayor, which he has in some cities. It should provide that the approval must be by resolution of the governing body.

6. With respect to a referendum vote the Resolution does not specify whether the approval must be by a majority voting in the election or whether the approval may be simply by a majority of those voting on the question of approval or disapproval.

7. There is no provision in the Resolution which would prohibit the Legislature from providing for more than one submission of the same act, or which would prohibit a local governing

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Director, Public Services, TSL&A

Date May 12, 2020

body from first approving the Act and then later disapproving it or vice versa.

8. The Resolution also requires that the referendum must be provided for by general law, but it would seem that such a requirement is unduly restrictive and might lead to serious confusion. I personally do not see any reason why there should have to be a general law when the private Act concerns only one municipality or county.

9. The Resolution makes no provision for certification of the result to the Secretary of State and it would seem that this should be included together with a definite statement that there can only be one submission of the same Act and that the result of any one submission shall be final.

I am calling these matters to your attention for the reason that I know you are interested in getting all of the views which you can, and for the further reason that we all want to have the final work of the Convention as free from defects as possible.

I do not know that the drafts which I enclose are by any means perfect but they are submitted for your careful thought and study and only as suggestions for your consideration.

With highest personal regards I am,

Yours very truly,

William E. Miller

WEM:mm
Enclosures
CC: Honorable Prentice Cooper
President Constitutional Convention
Hermitage Hotel
Nashville, Tennessee

CC: Mr. Maynard Tipps
Member Editing Committee
Hermitage Hotel
Nashville, Tennessee

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Director, Public Services, TSL&A

Date May 13, 2020

M O T I O N

Motion is made to reconsider and revoke the Resolution adopted by the Convention relative to local legislation, and to substitute in lieu thereof the following:

BE IT RESOLVED, that Article XI, Section 9 of the Constitution of the State of Tennessee be amended by adding to said Section as it now reads the following:

The General Assembly shall have no power to pass an Act which is in terms or effect a special, local or private Act, having the effect of removing the incumbent from any municipal or county office, or having the effect of abridging the term or altering the salary of such officer prior to the end of the term for which he was selected; and

No Act of the General Assembly which is in terms or effect a special, local or private Act, affecting a municipality or county, shall be operative unless it is approved after its passage by resolution of the governing body of such municipality or county, which resolution shall be adopted by a two-thirds vote of its members, or unless such Act is approved after its passage by a majority of the qualified voters of such municipality or county voting thereon.

Any such Act shall provide for its submission either to the governing body or to the voters of the municipality or county concerned, and for the certification of its approval or disapproval to the Secretary of State, provided that there shall be with respect to any Act only one submission the result of which shall be final.

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Director, Public Services, TSL&A

Date May 13, 2020

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Any such Act shall provide for its submission either to the governing body or to the voters of the municipality or county concerned, and for the certification of its approval or disapproval to the Secretary of State, provided that there shall be with respect to any Act only one submission the result of which shall be final.

Amendment # 2
By Pope

MO 124 ~~Resolved that the bill~~ resolution be amended by striking ~~the and~~ in lines 6 to 9 the words "hereafter affecting private & local affairs that is not applicable to every county or municipal corporation in the entire State" & substitute the words "private or local form ~~or~~ effect" therefor.

Adopted
6-4-53

No. 124

BE IT RESOLVED, That Article XI, Section 9, of the Constitution of the State of Tennessee be amended by adding at the end of said Section as it now reads the following:

The Legislature 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 Legislature hereafter affecting private and local affairs that is not applicable to every county or municipal corporation in the entire State shall be void and of no effect unless the act by its terms requires the approval by a two-thirds vote of the local governing body or is subject to an optional referendum to be submitted to the voters of the county or municipal corporation affected which referendum shall have been provided for in a general statute of state-wide application.

Hubert T. Holman
Clyde S. Jones
J. P. Matthews
Prentice Cooper
Alan M. Prewitt, Jr.
[illegible]
Sam Chandler
[illegible]
Sam H. Pearson Jr.
W. B. Parks
Robert Lee Johnson
Ernest F. (Jess) Smith
J. D. Lee
J. Frank Taylor

Majority Municipal Home Rule

RESOLUTION NO._____

BE IT RESOLVED, That the Constitution of Tennessee is hereby amended by adding thereto an article to be known as Article XII, which shall be as follows:

ARTICLE XII

Section 1. The General Assembly shall act with respect to municipalities only by laws which are general in terms and effect and which apply alike to all municipalities or to all municipalities in a particular population class containing not less than four municipalities.

Section 2. The General Assembly shall provide by general law the exclusive methods by which municipalities may be created, merged, consolidated and dissolved, and by which municipal boundaries may be altered.

Section 3. Any municipality may adopt or amend a charter for its own organization and government in the following manner; upon publication of a proposed charter or amendment, either by the legislative body of a municipality or by a charter commission so authorized by act of the General Assembly, the municipality shall submit such proposal to its qualified voters at the first general state election which shall be held at least sixty days after such publication. Proposals submitted in reasonable conformity with the procedures herein outlined shall become effective sixty days after approval by a majority of the qualified voters voting thereon. Nothing in this section shall be construed to authorize or validate charter provisions inconsistent with any general act of the General Assembly.

Section 4. Nothing in this Article shall be construed to enlarge or increase the power of taxation of any municipality, nor to invalidate any provision of any municipal charter in existence ~~prior to~~ at the time of the adoption hereof.

Approved-
Cecil Sims
Harry Mansfield

I hereby certify this docume.
to be a true and exact copy of
the original document filed in
the Tennessee State Library and
Archives.

T. Hays

Director, Public Services, TSL&A

Date 5/29/2020

RG46, Constitutional Convention,
1834-1977, Box 7, folder 5

Senators voting no were: Akbari, Bailey, Briggs, Dickerson, Gardenhire, Gilmore, Kyle, Massey, Niceley, Robinson, Southerland, Swann, Yager and Yarbro--14.

A motion to reconsider was tabled.

STATEMENT OF SENATOR KELSEY
PURSUANT TO RULE 61

Remarks of Senator Brian Kelsey on House Bill No. 939 pursuant to Rule 61.

As the author of the Conference Committee Report on House Bill No. 939 (Senate Bill No. 795) (the "Report"), I am submitting this statement for the record both to explain my vote in favor of adoption of the Report and to explain my legislative intent in drafting the Report. The Report complies with Article XI, § 9 of the Tennessee Constitution; the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution; and all other constitutional provisions of the state and federal constitutions.

First, the Report complies with Article XI, § 9 of the Tennessee Constitution. Under that section, the General Assembly cannot pass an act "private or local in form or effect applicable to a particular county or municipality" unless it includes approval by the local legislative body or by popular referendum of the locality. This provision was intended to reduce the number of local acts passed and to prevent the misuse of local legislative power. Op. Tenn. A.G. 87-88 (May 14, 1987). S*ee Civil Serice. Merit Bd. v. Burson,* 816 S.W.2d 725, 729 (Tenn. 1991). As an elected official charged with upholding the Constitution, I read this provision in accordance with its original meaning to apply only to laws that affect one particular county or municipality.

The Report complies with Article XI, § 9 because it does not apply to only one county in the state. The "Tennessee Education Savings Account Pilot Program" is a pilot program that affects priority schools throughout the state. Priority schools are those schools which have failed to show educational progress of their students over multiple years of testing. They include "the bottom five percent (5%) of schools in performance, all public high schools failing to graduate one-third (1/3) or more of their students, and schools with chronically low-performing subgroups that have not improved after receiving additional targeted support." Tenn. Code Ann. § 49-1-602(b)(2). Their persistent failure provides the rational basis for passing a law that is concentrated on those schools. It is the same rational basis used for passing the "Tennessee First to the Top Act of 2010," Public Chapter No. 2 of the First Extraordinary Session of the 106th General Assembly, that created the Achievement School District ("ASD") and vested it with the authority to take from local school districts the administration of schools on the priority school list.

Under Article XI, § 9, the "sole constitutional test must be whether the legislative enactment, irrespective of its form, is local in effect and application," or "whether th[e] legislation was designed to apply to any other county in Tennessee." *Ferris v. Blanton*, 528 S.W.2d 549, 551-52 (Tenn. 1975). The operative question is whether the legislation "is potentially applicable throughout the state." *Civil Service. Merit Bd.,* 816 S.W.2d at 729. If it is, "it is not local in effect even though at the time of the passage it might have applied to [only one locality]." *Id*. "The test is not the outward, visible or facial indices, nor the designation, description or nomenclature employed by the Legislature. Such a criterion would emasculate the purpose of [this constitutional provision]." *Farris v. Blanton*, 528 S.W.2d 549, 551 (Tenn. 1975).

Farris established certain rules of interpretation. In determining applicability, "we must apply reasonable, rational and pragmatic rules as opposed to theoretical, illusory or merely possible considerations." *Id*. at 552. Judges believe they should consider legislative history "in an effort to

ascertain the legislative intent" *id*. at 555 and "determine whether … legislation was designed to apply to any other county in Tennessee." *Id*. at 552. Because I am the author of the Report, this Statement is the definitive statement on the legislative intent of the law.

In *Bd. of Educ. v. Memphis City Bd. of Educ.*, 911 F. Supp. 2d 631 (W.D. Tenn. 2012), the United States District Court for the Western District noted the "tension between 'any other county' and 'throughout the state'," two different phrases used by Tennessee courts when evaluating local laws. 911 F. Supp. at 656. On one hand, "any other county" could refer to any county greater than one. On the other hand, "throughout the state" could mean in every county in the state. *Id*. The District Court ruled that "Section 9 does not require that legislation apply to 'every part of' or 'everywhere' in Tennessee." *Id*. Relying on *Burson*, the District Court was able to reconcile the apparent tension in terms by interpreting "throughout the state" as "more appropriately understood as throughout the class created by the Tennessee General Assembly." *Id*. When only "one county can reasonably, rationally, and pragmatically be expected to fall within that class, the statute is void unless there is a provision for local approval." *Id*.

In *Memphis City Bd. of Educ.*, the District Court considered whether a law regulating a transition planning commission, a requirement before transitioning students to a new school system, could apply only when the transfer of administration of schools from a special school district to the county board of education would increase student enrollment within the county school system by 100 percent or more. *Id*. at 656-57. Because the challenged law did not have a provision for local approval, it had to be "potentially applicable to one or more" counties. *Id*. at 657.

Although eight counties potentially fell within that class, only one – Shelby – had taken steps to transfer administration of schools from a special school district to the county board of education. *Id*. Finding that, in the end, the challenged law had "no reasonable application, present or potential, to any other county," the District Court ruled it local in effect and thus void. *Id*. at 660.

The Report differs from the law struck down in *Memphis City Bd. of Educ.* because the Report applies to priority schools in multiple counties throughout the state. For students zoned to attend schools that are in the ASD at the time the statute becomes effective, the Report offers those students an Education Savings Account ("ESA") that can be used to receive the quality educational services that students deserve. For students not in the ASD, the Report offers ESAs to students in school districts, or local education agencies ("LEAs"), with 10 or more schools that: were identified as priority schools in 2015, were among the bottom ten percent of schools in 2017, and were identified as priority schools in 2018. These are school districts that clearly have a track record of failing to provide tens of thousands of students with a quality education, and they are deserving of special attention from the pilot program. Finally, for other school districts with a priority school, the Report provides them a share of a $25 million per year school improvement fund to help them correct the problems at their priority schools. Therefore, the Report applies not only to multiple school districts in year one of the pilot program, but it realistically potentially applies to all 95 counties, if they ever find themselves in the unenviable position of having a school on the priority list in the future. I drafted this provision of the Report without input from other legislators, and it differs from earlier drafts of the proposed law; therefore, the legislative intent of earlier versions should be ignored as irrelevant to this Report.

The Report is not a local law. It is plainly not limited to any single county. It is undisputed that, under the terms of the pilot program, ESAs will initially be offered to students in Shelby County, Davidson County, and the ASD. Thus, the ESA pilot program has a reasonable, present application "to any other county," 911 F. Supp. 2dd at 66, unlike the measure at issue in *Memphis City Bd. of Educ.*

In addition, those particular localities were not specifically targeted. Rather, they fell under the Report's ambit because they met the objective criteria in the statute for districts requiring special attention. ESAs would have been "potentially applicable" in any county that met that metric for struggling school districts that had a large concentration of consistently underperforming schools. Because the Report could have potentially applied to any school district that met this showing under a reasonable, rational, and pragmatic construction, it is not a local law.

Next, to the extent legislative history is considered, the legislative history demonstrates that the Report was not designed to apply to any one particular county. In Section 49-6-2611(a) of the Report, it states that, "[t]he 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." The affected counties were affected because they "consistently had the lowest performing schools on a historical basis." This is a neutral criterion that could have applied to any underperforming school district. In fact, the Report *will* apply to any underperforming school district under the terms of the school improvement fund.

Finally, the Report, unlike previous versions of the bill, creates a pilot program. The pilot program will receive rigorous review from the Comptroller's Office of Research and Education Accountability. The Report will also require the General Assembly to renew the program each year by funding the $25 million school improvement fund in the appropriations act. If the ESA pilot program is successful, it will be expanded. If it is unsuccessful, it will no longer be funded.

The creation of a pilot program, especially one to help disadvantaged students, is a rational basis for limiting a law's initial effect. *See* Tenn. Op. Att'y Gen. 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. 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).

Second, the Report complies with the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. Laws that do not implicate a fundamental right, or affect a suspect class are subject to rational basis review. *Gallaher v. Elam*, 104 S.W.3d 455, 463 (Tenn. 2003); *Riggs v. Burson*, 941 S.W.2d 44, 51-52 (Tenn. 1997). The rational basis test asks whether the government identifies a legitimate governmental interest that the legislative body could rationally conclude was served by the legislative act. *Parks Properties v. Maury County*, 70 S.W.3d 735, 744-45 (Tenn. Ct. App. 2001). The test, while deferential, is not toothless. *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir. 1998).

The rational basis test is a question of fact. *See State v. Whitehead*, 43 S.W.3d 921, 926 (Tenn. Crim. App. 2000). In *State ex. Rel Loser v. National Optical Stores*, the Tennessee Supreme Court indicated that an act is irrational if it fails to further the public safety, health, or morals. 225 S.W.2d 263, 269 (Tenn. 1949) ("In determining whether such act is reasonable the courts decide merely whether it has any real tendency to carry into effect the purposes designed, that is, the protection of the public safety, the public health, or the public morals."). Likewise, the Tennessee

Supreme Court noted that its role "is to determine whether the legislation is so unconnected to its purpose as to constitute a manifest abuse of discretion." *Pack v. Southern Bell Telephone & Telegraph Co.*, 387 S.W.2d 789, 793 (Tenn. 1965).

Receipt of the ESA in the Report was designated to be a public benefit. It requires verification of a specified household income limit. Federal income tax returns represent one of the two specified methods of verification. The other is documentation that would be acceptable to provide proof of eligibility in the state's temporary assistance for needy families (TANF) program.

The Report's verification will be reviewed under rational basis. Public education is not a fundamental right. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33-36 (1973). Moreover, the Supreme Court has "rejected the suggestion that statutes having different effects on the wealthy and the poor should on that account alone be subject to strict scrutiny." *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 458 (1988). Public benefits are entitlements, not rights, and while their termination for a recipient may trigger procedural due process concerns, *see Goldberg v. Kelley*, 397 U.S. 254, 263 (1970), a public benefit is itself not a fundamental right.

Income verification in the Report satisfies rational basis. The state has a legitimate, even laudable, interest in providing an education to the neediest children in persistently struggling school districts. That is why I have included limitations to low-income students in every school choice bill I have introduced since the first one, House Bill No. 1227 in the 105th General Assembly. The state also has an interest in ensuring that it is not defrauded in its efforts to provide solutions to those children. Income verification is a way of achieving both of those interests. It is, simply stated, rationally related to achieving a legitimate state purpose.

The income verification measure in the Report is not like the circumstances in *Plyler v. Doe*, 457 U.S. 202, 217-18 (1982). In *Plyler*, the U.S. Supreme Court used intermediate scrutiny to strike down a Texas law that denied access to public schools to the children of illegal aliens. In *Plyler*, the State of Texas had proposed to deny an education to this class of children all together, and the Court was concerned about creating a "subclass of illiterates within our boundaries." *Kadrmas*, 487 U.S. at 459 (quoting *Plyler*, 457 U.S. at 230). Such a drastic proposal has not been made since, and the Supreme Court has "not extended this holding beyond the 'unique circumstances.'" *Kadrmas*, 487 U.S. at 459.

By contrast, the verification law in the Report ensures that the economically disadvantaged will be uniquely privileged in accessing a special benefit. Any person who cannot meet this test for verification will not be denied access to education but will be given the same access to public education that they have received for years.

Legislative discussion of the *Plyler* case involved discussion of an earlier version of the bill that passed the House of Representatives. That version of the bill had required parents of students, before receiving an ESA, to provide proof of legal employment in the United States found in Tenn. Code Ann. § 50-1-703(a)(1)(A)(i)-(xi). I intentionally deleted that requirement from the Report. Any reference to legislative intent on this subject, whether made before or after the drafting of this Report, was incorrectly referencing that provision of the House bill, which did not become law.

Third and finally, the Report complies with all other provisions of the Tennessee and U.S. Constitution. It is perfectly reasonable, for example, for the General Assembly to prohibit the use of taxpayer dollars by local school districts, which are creatures of the state, to fund litigation against the state regarding this Report because the General Assembly believes those dollars should instead be used to educate children. The standard challenges that are made to school choice bills in other

states were raised and addressed by the Legislature years ago. *See* Tenn. Op. Att'y Gen. No. 13-27 (Mar. 26, 2013). Because Tennessee does not have a Blaine Amendment, such challenges fail. *Id.*; *see also C.M. v. Bentley*, 13 F. Supp. 3d 1188, 1192 (M.D. Ala. 2014).

As an elected official, I take seriously my oath of office to uphold the Tennessee and U.S. Constitutions. No provision that I drafted in this Report in any way violates either constitution. Instead, the Conference Committee Report, when signed into law by the governor, will create a pilot program that will provide new and, hopefully, better educational choices to some of the neediest children in Tennessee. May God bless its results, and may God bless the children of Tennessee.

NOTICES

MESSAGE FROM THE HOUSE
May 1, 2019

MR. SPEAKER: I am directed to transmit to the Senate, House Bill No. 632. The House nonconcurred in Senate Amendment No. 1.

TAMMY LETZLER
Chief Clerk

MESSAGE FROM THE HOUSE
May 1, 2019

MR. SPEAKER: I am directed to return House Bill No. 167, for further consideration.

TAMMY LETZLER
Chief Clerk

MESSAGE FROM THE HOUSE
May 1, 2019

MR. SPEAKER: I am directed to return to the Senate, Senate Bill No. 185, substituted for House Bill on same subject, amended, and passed by the House.

TAMMY LETZLER
Chief Clerk

MESSAGE FROM THE HOUSE
May 1, 2019

MR. SPEAKER: I am directed to return to the Senate, Senate Bill No. 442, substituted for House Bill on same subject, amended, and passed by the House.

TAMMY LETZLER
Chief Clerk

MESSAGE FROM THE HOUSE
May 1, 2019

MR. SPEAKER: I am directed to return to the Senate, Senate Bill No. 1530, substituted for House Bill on same subject, amended, and passed by the House.

TAMMY LETZLER
Chief Clerk

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CLERK & MASTER
DAVIDSON CO. CHANCERY CT.

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

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,	)	
Plaintiffs,	)	
v.	)	**Case No. 20-0143-II**
TENNESSEE DEPARTMENT OF EDUCATION, et al.,	)	
Defendants.	)	
and	)	
NATU BAH, et al.,	)	
Intervenor-Defendants.	)	

MEMORANDUM AND ORDER

This case regards a challenge to the Tennessee Education Savings Account Pilot Program, codified at Tenn. Code Ann. §§ 49-6-2601, *et seq.* ("the ESA Act"). The ESA Act was passed at the 2019 Session of the 111th Tennessee General Assembly as 2019 Public Acts, c. 506, § 1, and signed into law by Governor Bill Lee on May 24, 2019. The ESA Act establishes a program allowing a limited number of eligible students to directly receive their share of the state and local funding that otherwise would be provided to the school system, to pay for private school education and associated expenses ("the ESA Program"). The number of eligible students increases over a five year period, and funds are to be allocated to the participating districts for the first three years to replace the lost dollars that the State previously allocated to their public school systems, which are now redirected to private schools along with the participating students.

The Plaintiffs are the two county governments that are the only ones who meet the definition of eligibility under the ESA Act, the Metropolitan Government of Nashville and Davidson County ("Metro") and Shelby County Government ("Shelby County Government"), as well as the school board that operates the system of one of them, the Metropolitan Nashville Board of Public Education ("Metro School Board"). The Plaintiffs challenge the ESA Act as violating the Tennessee Constitution on three grounds: Count I, as a violation of the Home Rule Amendment in Article XI, Section 9; Count II, as a violation of the Equal Protection Clauses in Article I, Section 8 and Article XI, Section 8; and Count III, as a violation of the Article XI, Section 12 requirement that the General Assembly establish a system of public education providing substantially equal educational opportunities to all students. The Plaintiffs seek declaratory and injunctive relief regarding the constitutionality and implementation of the ESA Act.

The original defendants in this action were Governor Lee, Tennessee Department of Education Commissioner Penny Schwinn, and the Tennessee Department of Education (collectively "the State Defendants"). Permission was granted for three sets of intervenors to become party-defendants to this action, comprised of parents of public school children in Davidson and Shelby Counties, and two independent schools wishing to accept eligible students ("the Intervenor Defendants" or "these Intervenor Defendants" as particular pleadings or combinations are referenced).

Consideration of this matter and an expedited determination regarding the relief the Plaintiffs request is necessary because the State Defendants intend to implement the ESA Program for the 2020-2021 school year. The State has begun taking applications and must notify parents of students' acceptance by mid-May, so that the parents can make educational decisions based upon the grant or denial of ESA funds. Likewise, it is agreed that the independent schools

participating in the ESA Program need to make decisions about student enrollment on or about June 1, 2020.

Additionally, a group of Davidson and Shelby County parents and taxpayers filed a similar lawsuit, seeking the same and additional relief, on March 2, 2020. *McEwen, et al. v. Lee, et al.*, Davidson County Chancery Court Case no. 20-242-II ("the *McEwen* case"). The *McEwen* Case involves essentially the same State Defendants and Intervenor Defendants. The last status conference and motion hearing included both cases and motions pending in both cases. The *McEwen* Case Plaintiffs had filed a motion for a temporary injunction, seeking to enjoin the State Defendants from moving forward with the ESA Program for the 2020-2021 school year. The Court is entering an Order in that case simultaneously with the issuance of this Memorandum and Order.

THE PENDING MOTIONS

The Court has pending before it the following motions in this case:

- Plaintiffs' Motion for Summary Judgment on Count I of the Complaint, filed March 27, 2020
- Greater Praise Christian Academy Intervenor Defendants' Motion to Dismiss, filed March 6, 2020;
- State Defendants' Motion to Dismiss, filed March 11, 2020;
- Bah, Diallo, Davis and Brumfield Intervenor Defendants' Motion for Judgment on the Pleadings, filed April 15, 2020; and
- State Defendants' Motion to Consolidate with the *McEwen* Case, filed April 15, 2020.

The Court heard all of these motions, except for the Motion to Consolidate, on April 29, 2020.[1] The Court considered voluminous materials in relation to these motions, including legal memoranda, declarations, and legislative history materials. In this Memorandum and Order, the Court dismissed the Metro School Board as a plaintiff, grants Metro's and Shelby County Government's motion for summary judgment regarding Count I of the complaint, declaring the ESA Act unconstitutional pursuant to the Home Rule Amendment, and enjoins the State Defendants from its implementation. The Court defers ruling on the other motions, except for those challenging the Plaintiffs' standing to bring or the failure to properly plead Count I, which the Court necessarily rules on in this decision. Additionally, the Court grants the parties the right to pursue immediate interlocutory relief with the Court of Appeals, without limiting their right to seek other applicable relief from the Supreme Court as is available and granted by that court.

FINDINGS OF FACT

It is undisputed that, based upon the definition of "eligible student" in the ESA Act, it is only applicable to schools in Davidson and Shelby Counties[2]. It also cannot credibly be disputed that the school systems which would be affected was discussed at length in the General Assembly when the ESA Act was being debated and finalized for enactment. Further, there is no dispute that 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

[1] The Motion to Consolidate, though set for hearing, was reserved for hearing on another date because it is not time sensitive, and is more appropriately decided after the resolution of the pending dispositive motions and any related interlocutory appeals.

[2] Although there is some back and forth in the briefing about Plaintiffs' source for this assertion, and the certified nature (or lack thereof) of their source material, the State's promulgated rules for the ESA Act, at Tenn. Rule & Reg. 0520-01-16-.02(11) (2020), define "eligible student" as "zoned to attend a school in Shelby County Schools, Metropolitan Nashville Public Schools, or is zoned to attend a school that was in the Achievement School District on May 24, 2019[.]" The Court will address inclusion of the Achievement School District herein, but it is not a county or municipal school system. The only two eligible school systems affected, as confirmed by the rules, are Shelby County Schools and Metro Nashville Public Schools.

their district school systems were excluded. This legislative history not dispositive to the Court's ruling, but it is relevant and appropriate for consideration in the context of this constitutional challenge.

The ESA Act's Applicability

In addition to making the ESA Program available to students who are eligible to attend school in Tennessee for the first time, i.e., newly age eligible for public school or a new resident of the state, the ESA Act defines eligible student as current public school students who:

> (i) [Are] zoned to attend a school in an LEA[3], excluding the achievement school district (ASD)[4], 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

Tenn. Code Ann. § 49-6-2602(3)(C)(i).

In 2015, the only LEAs with ten or more schools on the priority list were Metropolitan Nashville Public Schools ("MNPS") in Nashville, Shelby County Schools ("SCS") in Memphis, and the ASD. In 2017, the only LEAs with ten or more schools on the 2017 Bottom 10% list were

[3] "LEA" is a "local education agency" as defined at Tenn. Code Ann. § 49-1-103(2), which includes the state's statutory scheme for the maintenance and operation of the public school system. The statute defines LEA the same as "school system," "public school system," "local school system," "school district," or "local school district" and "means any county school system, city school system, special school district, unified school system, metropolitan school system or any other local public school system or school district created or authorized by the general assembly."

[4] The achievement school district ("ASD") was created by the General Assembly in 2010 as a Tennessee-wide district comprised of the lowest performing schools in the state, with the goal of increasing student achievement in those schools from the bottom 5% to the top 25%. Tenn. Code Ann. § 49-1-614. It is an "organizational unit of the department of education" and not associated with any county or municipality. *Id.* It falls within the definition of LEA as a "school district created and authorized by the general assembly" and is, by design, comprised of low performing schools. Tenn. Code Ann. § 49-1-103(2)

MNPS, SCS, Hamilton County Schools, and the ASD. In 2018, the only LEAs with ten or more schools on the priority list were MNPS, SCS, and the ASD.

The General Assembly's stated purpose for the ESA Act was to improve educational opportunities for children in the state who reside in LEAs that have "consistently had the lowest performing schools on a historical basis." Tenn. Code Ann. § 49-6-2611(a)(1).

Legislative History of the ESA Act

House Bill No. 939

House Majority Leader William Lamberth filed House Bill No. 939 on February 7, 2019, as a "caption bill" to be held on the House desk. The bill proceeded to the House Curriculum, Testing, & Innovation Subcommittee on March 19, 2019, after Rep. Mark White of Memphis filed Amendment No. 1 (HA0188). Amendment No. 1 sought to place several restrictions on eligibility for an ESA, including to define "eligible student" in Section 49-6-2602(3)(C) to be a student "zoned to attend a school in an LEA with three (3) or more schools among the bottom ten percent (10%) of schools in accordance with § 49-1-602(b)(3)." Under that definition, based upon the most recent (2017) performance numbers, eligible students would have come from Davidson, Hamilton, Knox, Madison, and Shelby Counties, or the ASD.[5]

The House Curriculum, Testing, & Innovation Subcommittee recommended the bill for passage if amended as set forth in Amendment No. 1, as did the other House committees and

[5] The State Defendants question the reliability of the 2017 Bottom 10% List relied upon by the Plaintiffs. The Tennessee Department of Education is required to track school performance and has established an accountability system, set out in Tenn. Code Ann. § 49-1-601, *et seq.*, for schools. This obligation includes identifying focus schools, or those in the bottom 10% of schools in overall achievement. Tenn. Code Ann. § 49-1-602(b). Tenn. R. Civ. P. 56.03 obligates the State Defendants to agree a proposed fact is undisputed, agree it is undisputed for purposes of summary judgment only, or demonstrate it is disputed with specific citations to the record. The Court does not take the State Defendants' objection to the reference to the Plaintiffs' copy of the 2017 Bottom 10% List, based on the best evidence rule in T.R.E. 902, seriously given that it has the statutory obligation to make public identification of focus schools on an annual basis and has not substantively challenged the factual assertion of what that list shows for 2017, that is, that the identified counties and the ASD are the only LEAs with three or more schools on the list.

subcommittees considering it at the time.[6] In the House Finance, Ways, & Means Committee hearing on April 17, 2019, then-Deputy House Speaker Matthew Hill of Jonesborough referred to the bill as a "four-county ESA pilot program," which he explained was a pilot because it "limits it down to . . . just four counties" and "because we're putting it in statute, it will stay in those four counties unless the legislature were to ever choose in the future to revisit the issue."[7]

Amendment No. 2 was introduced a few days later, on April 23, 2019, and changed the definition of "eligible student" to be a student who, among other requirements "[i]s zoned to attend a school in an LEA that had three (3) or more schools identified as priority schools in 2015 in accordance with § 49-1-602(b) and that had three (3) or more schools among the bottom ten percent (10%) of schools as identified by the department in 2017 in accordance with § 49-1-602(b)(3)." The LEAs with three or more priority schools in 2015 were the same as those included through Amendment No. 1, but excluded Madison County. The LEAs with three or more schools among the bottom 10% of schools in 2017 were the same, but included Madison County. Thus, the addition of this eligibility criteria effectively eliminated Madison County from the list, leaving it applicable to four counties and the ASD.

House Bill No. 939 received the minimum number of votes the Tennessee Constitution requires to pass legislation, with 50 ayes and 48 nays, on April 23, 2019. This passage came after the vote was held open for 40 minutes with the House deadlocked at 49 ayes and 49 nayes. Rep. Jason Zachary of Knoxville changed his vote from nay to aye to break the tie, later telling reporters on camera that he had received assurances from then-House Speaker Glen Casada that Knox

[6] Those were the House Education Committee; Government Operations Committee; Finance, Ways, & Means Subcommittee; and Finance, Ways, & Means Committee.

[7] This is confusing because, at the time, with Amendment 1 the proposed act would apply to five counties. Apparently Rep. Hill was referencing the leadership's intentions to further narrow the application of the proposed act to eliminate a county, as set out in Amendment 2.

County would be excluded from the Senate version of the bill. Rep. Zachary further stated, "I support the ESAs and I support the premise of ESA, but I couldn't do it unless Knox County was taken out." Then-House Speaker Casada confirmed Rep. Zachary's statements, stating on camera: "Knoxville, Knox County will be taken out of the bill."

In his remarks about the ESA Act on the House Floor before the vote was taken, then-Deputy House Speaker Hill summarized the House majority's motives as follows: "Ladies and gentlemen, today on this Floor, the House is leading. We are leading the way to protect LEAs, while also ensuring that our poorest children in those deep blue metropolitan areas have a fighting chance at a quality education."

Senate Bill No. 795

Senate Majority Leader Jack Johnson of Franklin filed Senate Bill No. 795, the Senate companion to House Bill No. 939, on February 5, 2019. The bill proceeded to the Senate Education Committee, which recommended it for passage on April 10, 2019 with Amendment No. 1 (SA0312). This amendment was identical to Amendment No. 1 (HA0188) to House Bill No. 939, applying the ESA Act to LEAs in five counties—Davidson, Hamilton, Knox, Madison, and Shelby—with the potential to include or drop counties automatically in the future.

When Senate Bill No. 795 reached the Senate Floor, two days after passage of House Bill No. 939, the Senate voted to substitute the House bill as the companion Senate bill. At the time, the House version applied the Act in four counties -- Davidson, Hamilton, Knox, and Shelby – which list was static based on the student eligibility criteria. Immediately thereafter, the Senate adopted Senate Amendment No. 5 (SA0417), introduced by Sen. Bo Watson of Chattanooga, which stripped the language from House Bill No. 939 and substituted new language narrowing the definition of "eligible student" in Section 49-6-2602(3)(C). The new language increased from

three to ten the number of schools that had to be identified as priority schools in 2015 and 2018, and increased from three to ten the number of schools that had to be among the bottom 10% of schools in the state in 2017 (i.e., focus schools). This effectively removed Knox County and Hamilton County from the ESA Program because Hamilton County had five priority schools in 2015 and nine in 2018, and Knox County had four priority schools in 2015 and none in 2018. The new language also included within the definition of "eligible student" a student zoned to attend a school in the state's ASD on the act's effective date. All criteria for defining an "eligible student" in Amendment No. 5 were based on specific years; thus, the list of affected LEAs became static, as in the House version.

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

Conference Committee Report and Final Passage

When the Senate's version of the bill was transmitted to the House, the House non-concurred in the Senate's amendments to the bill. Both the Senate and the House remained firm in their positions. Therefore, on April 30, 2019, the House and Senate speakers appointed members to a conference committee to resolve the differences between the two bills. On May 1, 2019, the conference committee submitted its report to both chambers. The conference committee bill retained the definition of "eligible student" as adopted by the Senate, which limited the bill's application to Davidson and Shelby counties and ensured that the bill could never apply to any other county. Rep. Patsy Hazelwood of Signal Mountain voted against the bill when it passed the House on April 23, 2019, but she voted for the conference committee report. She explained on the House floor on May 1 why she changed her vote: "I committed to vote for ESAs if Hamilton

County was excluded from the program. The language that's in this conference report here today does that. As a result, I'm going to be keeping my commitment and I will vote for this bill."

Both the House and Senate adopted the conference committee report on May 1, 2019, the House by 51 ayes and 46 nays, and the Senate by 19 ayes and 14 nays. Governor Lee signed the ESA Act on May 24, 2019.

ESA Act Implementation

The State Defendants have determined that the ESA Program will be implemented for the 2020-2021 school year, in Davidson and Shelby counties. The Tennessee State Board of Education's ("State Board") rules for implementing the ESA Act became effective on February 25, 2020, after proposed rules were issued in November of 2019.

The State Defendants are taking applications for the ESA Program, and have agreed to delay notifications to parents regarding acceptance until May 13, 2020 as set out in the Court's April 20, 2020 Order.[8]

The funds received by a student in the ESA Program equate to the amount of per-pupil state and local funds generated through the basic education program ("BEP") for the relevant LEA, not to exceed the statewide average of BEP funds per pupil. Tenn. Code Ann. § 49-6-2605; *see generally* Tenn. Code Ann. § 49-3-307. The ESA funds are paid directly to the participating students, who then use them for appropriate expenses, including tuition, for private school education. *Id.* The ESA Act, and the associated rules, include accountability and compliance provisions to monitor and ensure that the funds are used for appropriate expenditures. Tenn. Code

[8] At the April 14, 2020 status conference, in discussing the State's timetable for implementing the ESA Act and the reality of when participating schools and parents need to make decisions about ESA funds, June 1, 2020 was the date identified as a target deadline for a decision. The Court does not find anything in the record or relevant rules that establish June 1, 2020 as a published or mandatory deadline, but takes judicial notice that the date is reasonable in relation to the generally established school calendar.

Ann. §§ 49-6-2605(g) and 49-6-2607. The ESA Act also allows for up to 6% of the annual ESA award to be retained for oversight and administration of the program, and allows for contracting with a non-profit organization to perform some or all of those services. Tenn. Code Ann. § 49-6-2605(h) & (i).

The ESA Program is limited to 5,000 students the first year, and increases by 2,500 students per year, for a five year maximum of 15,000 students. Tenn. Code Ann. § 49-6-2604(c). The ESA Act does not distribute the ESA fund availability between Davidson and Shelby counties, thus it is unknown until the program is implemented and students selected how many will come from each county and the amount of associated BEP funds that will be involved. *Id.* The parties dispute among them how the math will work and the significance of the impact on MNPS and SCS, with varying assertions about purported significant shortages and resulting windfalls. The Court makes no findings regarding those issues in this Memorandum and Order, and they remain for determination, if needed, at a later date.

The Plaintiffs

Metro was established by charter on April 1, 1963 as a municipal corporation consolidating the local government and corporate functions of the City of Nashville and Davidson County, pursuant to the 1957 law establishing such entities. Tenn. Code Ann. §§ 7-1-101, *et seq.*; Metro Charter. Relevant to this matter, as required by state law, the Metro Charter establishes the MNPS, the Metro School Board and the membership thereof. Metro Charter, Art. 9; Tenn. Code Ann. § 7-2-108(a)(18). It defines the powers and duties conferred upon the Metro Board therein. *Id.*

Shelby County Government was created by the Shelby County Charter, approved by the voters of Shelby County on August 2, 1984, and became effective September 1, 1986. Tenn. Code Ann. § 5-1-201, *et seq.*; Shelby County Charter. The Shelby County Charter acts as a

"Constitutional Home Rule Charter" and empowers "the mayor, county commission, and elected county charter officers, except those powers reserved to the judiciary" with "all lawful powers." Shelby County Charter § 1.02. It "place[s] in the hands of the people of Shelby County the power to effectively operate its government without going to the state legislature in Nashville for changes." Shelby County Charter Intro. The Shelby County Charter explicitly prohibits its application to "county school funds or to the county board of education, or the county superintendent of education for any purpose[,]" except regarding certain residency and salary/expense requirements. *Id.* at § 6.02.

Article XI, Section 12 of the Tennessee Constitution provides as follows:

> 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.

Title 49 of the Tennessee Code establishes the system of public education in Tennessee, as enacted by the General Assembly pursuant to this constitutional charge. Among the extensive provisions in this section of the Code, it establishes a state Department and Board of Education, Tenn. Code Ann. §§ 49-1-101 – 1109, and a system for local administration of public schools, or LEAs, defining the roles of county legislative bodies, and providing for the establishment of local boards of education. Tenn. Code Ann. §§ 49-2-101 - 2101. County legislative bodies are responsible for budgeting and appropriating school funding, obtaining and reviewing quarterly reports from their school boards, auditing school expenditures, and issuing bonds and levying taxes for school funding. Tenn. Code Ann. § 49-2-101. School boards are comprised of elected officials whose job it is to manage and operate school systems or LEAs. Tenn. Code Ann. § 49-2-203; *see generally*, Tenn. Code Ann. §§ 5-9-402(a) and 49-2-201.

As set out above, the Metro Charter expressly established the MNPS and the Metro School Board, while the Shelby County Charter expressly does not apply to the SCS or the Shelby County School Board. They both are established consistent with the obligations on Metro and Shelby County Government pursuant to Tenn. Code Ann. §§ 49-2-101 and 7-2-108.

LEGAL ANALYSIS

Summary Judgment Standard

Tenn. R. Civ. P. 56.04 sets forth the summary judgment standard, which requires that summary judgment be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Tennessee law interpreting Rule 56 provides that the moving party shall prevail if the nonmoving party's evidence is insufficient to establish an essential element of her claim. Tenn. Code Ann. § 20-16-101; *Rye v. Women's Care Center of Memphis, MPLLC*, 477 S.W.3d 235, 261-62 (Tenn. 2015).

Plaintiffs' Standing[9]

The Defendants assert that the Metro School Board, which operates and maintains Metro's school system, does not have standing to sue on its own behalf. They further contend that Metro and Shelby County Government, who are responsible for funding MNPS and SCS, also do not have standing to sue. The Court agrees that the Metro School Board does not have standing, but finds that Metro and Shelby County Government do have standing and are the proper plaintiffs in this matter.

[9] The standing issue has a close relationship to, and is intertwined with, the legal issues the Court must consider in relation to the substantive Home Rule Amendment challenge. The Court addresses standing separately in this Memorandum and Order because it is important to determine early in this case. Considerations regarding Metro and Shelby County Government's relationships to their school boards, and the extent of their obligations to provide and help fund a public school system for their citizens, is integral to the Home Rule Amendment analysis and continues to be addressed throughout this opinion.

Federal courts construing Tennessee law have consistently found that the Metro School Board, as a subdivision of Metro, cannot itself sue or be sued because it was not granted that authority in the Metro Charter. *Wagner v. Haslam*, 112 F.Supp.3d 673, 698 (M.D.Tenn. 2015); *Blackman v. Metro Public Schools*, No. 3:14-1220, 2014 WL 4185219 (M.D.Tenn. Aug. 21, 2014); *Haines v. Metropolitan Gov't*, 32 F.Supp.2d 991, 994 (M.D.Tenn. 1998). In all of these cases, Metro sought and obtained dismissal of the Metro School Board as a defendant because it is a political subdivision of Metro. There are two Tennessee cases -- *Southern Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706 (Tenn. 2001) and *Byrn v. Metropolitan Bd. of Public Educ.*, No. 01-A-019003CV00124, 1991 WL 7806 (Tenn. Ct. App. Jan. 30, 1991) – in which courts found that the local boards of education were proper party defendants. In both cases, however, the issues involved the enforcement of a contract the board was specifically authorized to enter based upon the express grant of powers by the General Assembly to schools boards in Tenn. Code. Ann. § 49-2-203.

In *Southern Constructors*, the school board contracted for construction of a building, and when a dispute arose, attempted to enforce the contractually-agreed-upon arbitration clause. The contractor claimed that the school board did not have the authority to arbitrate as a stand-alone entity. In finding otherwise, the Court interpreted the authority to enforce construction contracts to be inferred from Tenn. Code. Ann. § 49-2-203, and specifically subpart (a)(4), "which confers upon county school boards the authority to '[p]urchase all supplies, furniture, fixtures and material of every kind through the executive committee.'" 58 S.W.3d at 716. The Court justified inserting an unwritten right because "the General Assembly can hardly be expected to specify in minute detail the incidents of power conferred upon local governments" and that "the power to arbitrate is fairly implied from the express power to contract in the first instance." *Id.* at 716.

In *Byrn*, a non-tenured teacher sued the Metro School Board for declaratory relief pursuant to his union contract, seeking a hearing before the school board about the decision not to renew his contract. The Metro School Board argued that it could not be a defendant because it did not have the capacity to be sued. 1991 WL 7806, at *2. The trial court agreed, dismissing the case. In overturning that decision, the Court of Appeals focused specifically upon the statutory authority conferred upon school boards to contract with their employees, as well as to recognize and bargain collectively with unions, the beneficiaries of which are teachers. *Id.* at *4 (citing Tenn. Code Ann. § 49-2-203(a)(1) (1990)). The Court then found as follows:

> State law does not specifically empower local boards to bring suit, nor does it specifically provide that local boards can be sued. Specific authority, however, is not required insofar as declaratory judgment actions seeking to construe collective bargaining agreements are concerned. In these cases, the combined effect of the Education Professional Negotiations Act and the declaratory judgment statutes is to permit these actions to be maintained.
>
> The local boards, not the counties, have the exclusive authority to negotiate and to enter into contracts with or for the benefit of their teachers. By necessary implication, the power to contract must be accompanied by the responsibility to perform the contract and the obligation to be held accountable for failure to perform. Any other conclusion would make a mockery of the contracting process.

Id. at *5 (footnote omitted).

In *Wagner,* a federal court finding no standing for the Metro School Board to sue acknowledged that the two Tennessee cases cited above could arguably be seen as inconsistent with its finding. The *Wagner* court distinguished the two cases based upon the specific, contract-related issues the courts considered in their analyses:

> Although this may be an issue of some complexity, the court finds no reason to construe *Southern Constructors* or *Byrn* as inconsistent with this court's reasoning in *Haines*. Both *Southern Constructors* and *Byrn* involve district-specific considerations related to the specific contract-related rights that Tennessee has conferred upon particular localities, not the considerations specific to the Metro Nashville Charter that this court scrutinized in *Haines*.

112 F.Supp.2d at 698.

The Court agrees with the analysis in *Wagner* and determines that the Metro School Board can only sue on its own behalf if it can demonstrate that its standing is implied through one of the enumerated duties conferred on it by the General Assembly or the Metro Charter.[10] The Court does not find any such duties exist in the Tennessee Code or the Metro Charter, and no persuasive authority stating otherwise has been provided by Metro or the Metro School Board. Indeed, their position in this case is diametrically opposed to the position they take in every case, of which this Court is aware, in which the Metro School Board has been sued. Reliance on the Metro School Board's obligation to "[m]anage and control all public schools established or that may be established under its jurisdiction" cannot, under this precedent, be read to confer standing in this matter. The Metro School Board does not have the capacity to be a plaintiff in this action and is therefore dismissed.[11]

Though the Metro School Board does not have standing as a plaintiff in this action, Metro and Shelby County Government do. As discussed above, "[t]he General Assembly has enacted a comprehensive and detailed statutory scheme concerning education in this State, compiled in Title 49 of the Tennessee Code and comprising an entire volume of that code." *Weaver v. Ayers*, 756 S.W.2d 217, 221 (Tenn. 1988). Although the concept is that local governments provide funding and limited oversight and the school systems or LEAs operate the schools, both entities are

[10] The federal district court in *Haines*, unlike the Courts in *Southern Constructors* and *Byrn*, did not look behind the powers and duties of the Metro School Board in finding that the absence of the authorization to sue or be sued, as compared to the specific inclusion of that power for Metro, barred suit against the Metro School Board. 32 F.Supp.2d at 994. This Court does not interpret its analysis as inconsistent with the analysis in that case, but does find that these two Tennessee cases instruct it to determine whether there is a related power or duty otherwise conferred that bootstraps in an ability to sue or be sued.

[11] The Court specifically does *not* make this finding based upon Section 2611(d) of the ESA Act. The constitutionality of the entire ESA Act, including this provision, is under review. Thus, a provision in the ESA Act barring school boards from suing under the Act is not a legally sufficient basis, or even a consideration for this Court, in reviewing the Metro School Board's standing.

responsible, in combination, to provide public education in a particular municipality or county. The Supreme Court discussed this further in *Weaver*:

> An examination of this statutory scheme clearly reveals that *a partnership has been established between the State and its political subdivisions to provide adequate educational opportunities in Tennessee.* At the county level, the State has divided the responsibilities allocated to the counties between the county board of education and the county legislative body. While the local board of education has exclusive control over many operational aspects of education policy, subject to the rules and regulations of the State Department of Education, the county legislative body has the authority to appropriate the funds necessary to carry out the county education program.

Id. at 221-222 (emphasis added). Both the government of the political subdivision, whether it be a consolidated city/county government like Metro or a constitutionally chartered home rule government like Shelby County Government, and its companion school board, have the responsibility for providing a public education to their school children. They are not mutually exclusive and one cannot exist without the other. "Tennessee law acknowledges that educating children is a collaboration between administrative and financial bodies." *Board of Educ. of Shelby County, Tenn. v. Memphis City Bd. of Educ.*, 911 F.Supp.2d 631, 645 (W.D.Tenn. 2012) (citing *Putnam Cnty. Educ. Ass'n v. Putnam Cnty. Comm'n*, No. M2003-04041-COA-R3-CV, 2005 WL 1812624, at *5 (Tenn. Ct. App. Aug. 1, 2005)).

The same cases the Defendants rely upon to dispute the Metro School Board's standing *support* the standing of Metro and Shelby County Government. For instance, in *Haines*, the Court allowed the plaintiff's challenge, pursuant to Title IX of the Education Act of 1972, to proceed against Metro, holding "[t]he fact that the Board lacks the capacity to be sued does not mean that it is free to disregard Title IX's prohibitions. It simply means that Plaintiffs' lawsuit must be directed towards the appropriate division of government. . . . Under Tennessee law, such capacity lies with the Metropolitan Government and not the Metropolitan Board of Public Education." 32

F.Supp.2d at 995-996. Indeed, in *Wagner*, even though the plaintiffs had not included Metro as a party-defendant, the Court found that to be "a nominal problem that is easily cured" and "construe[d] the claims as asserted against Metro Nashville itself." 112 F.Supp.2d at 698.

In *Southern Constructors,* the Supreme Court held that "while county boards of education are not part of the general county government in the sense that they derive their powers and duties from the county charter, they are in essence part of that local government, exclusively vested with statutory authority in all matters relating to public education." 58 S.W.3d at 715. This finding is consistent with what that Court said over ten years earlier in *Weaver*, and what the federal court determined a year later in *Board of Education of Shelby County* – local governments and their schools boards are in a partnership, with each having separate but indispensable responsibilities to provide a public school education for its citizens. They exist as separate legal entities, but are inexplicably intertwined in the General Assembly's statutory scheme for the education of Tennessee school children. Just because the Metro School Board has specific responsibilities to operate schools pursuant to the Tennessee Code and the Metro Charter, that does not minimize the importance of the local government's role within the school system. Tennessee courts and federal courts applying Tennessee law have consistently recognized the standing – usually as a defendant but sometimes as a plaintiff – for local governments to sue and be sued based upon a claim that is directed at the actions of their school systems. Metro and Shelby County Government are the proper plaintiffs in this action and the Court recognizes their standing to pursue their constitutional challenges to the ESA Act.

The Home Rule Amendment

Article 11, Section 9 of the Tennessee Constitution, known as the Home Rule Amendment, was enacted in 1953 and reads, in pertinent part, as follows:

> 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 by 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 (emphasis added). It requires the State, if the General Assembly passes an applicable private act, to obtain approval from the local legislative body or its electorate. Tenn. Code Ann. § 8-3-201 specifies that the Secretary of State be notified of such a private act and transmit a certified copy to the affected jurisdiction. The Tennessee Code then details the timing and effect of the certification process. The General Assembly's classification of an act as public or private, however, is irrelevant. "The sole constitutional test must be whether the legislative enactment, irrespective of its form, is local in effect and application." *Farris v. Blanton*, 528 S.W.2d 549, 551 (Tenn. 1975).

The enactment of the Home Rule Amendment illustrated a significant shift in Tennessee law to vest local governments with more authority and control, previously overwhelmingly exercised by the state government. Elijah Swiney, *John Forrest Dillon Goes to School: Dillon's Rule in Tennessee Ten Years After* Southern Constructors, 79 Tenn. L. Rev. 103 (Fall 2011). Dillon's Rule, which pre-dates the Home Rule Amendment as an applicable legal maxim in Tennessee, provides:

> It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the

declared objects and purposes of the corporation, - not simply convenient, but indispensable.

Id. at 106. Scholars have translated this to mean "a state's authority over its local governments `is supreme and transcendent: it may erect, change, divide, and even abolish, at pleasure, as it deems the public good to require.'" *Id.* (quoting Gerald E. Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1059, 1111-12, note 4 (1980)). Dillon's Rule was discussed at length by the Supreme Court in its 2001 decision in *Southern Constructors.* In that case the Court described it as "[M]unicipal governments in Tennessee derive the whole of their authority solely from the General Assembly and that courts may reasonably presume that the General Assembly 'has granted in clear and unmistakable terms all [power] that it has designed to grant.'" 58 S.W.3d at 710. This is consistent with Article II, section 3 of the Tennessee Constitution which "confers upon the General Assembly the whole of the state's legislative power, and with limited exception. . . the General Assembly has the sole and plenary authority to determine whether, and under what circumstances, portions of that power should be delegated to local governments." *Id.* at 711.

As discussed in the above cited law review article, and as further set out in *Southern Constructors*, this top-down delegation of power changed in Tennessee with the adoption of the Home Rule Amendment. The 1953 Tennessee Constitutional Convention "radically overhauled" the Tennessee Constitution, including the insertion of the Home Rule Amendment designed to "empower[] local governments." 79 Tenn. L. Rev. at 119. "The effect of the home rule amendments was to fundamentally change the relationship between the General Assembly and [home rule chartered] municipalities, because such entities now derive their power from sources other than the prerogative of the legislature" and Dillon's Rule is no longer applicable to them. *Southern Constructors, Inc.*, 58 S.W.3d at 714.

The Defendants ask the Court to construe the Home Rule Amendment as inapplicable to LEAs, or local school districts, because they are not counties or municipalities. The Court disagrees, and addresses the authority upon which they rely.

In two Tennessee cases cited by the Defendants, the courts have declined to apply the Home Rule Amendment to separately established entities. *See Perritt v. Carter*, 204 Tenn. 611, 325 S.W.2d 233 (1959); *Fountain City Sanitary Dist. v. Knox County Election Comm'n*, 203 Tenn. 26, 308 S.W.2d 482 (Tenn. 1957). In both of those cases, however, the quasi-governmental entity at issue was *not* operated or owned by a county or municipality: they were truly independent. The special school district in *Perritt* included a portion of Carroll County and the incorporated Town of Huntingdon. The Court found "a special school district does not come within the definition of a municipality as contemplated in said Home Rule Amendment." 325 S.W.2d at 233-34. The utility district in *Fountain City* also did not meet the definition, nor could conceivably so, of municipality. 308 S.W.2d at 484-485.[12]

Additionally, the Supreme Court declined to find a Home Rule Amendment violation in *Chattanooga-Hamilton County Hosp. Auth. v. City of Chattanooga,* 580 S.W.2d 322 (Tenn. 1979). That case is particularly distinguishable from the present one in that the statute at issue *was* passed as a private act and was thus referred to the affected county for a referendum vote. The county voted to approve the act that established a hospital authority, and the city located within the county sued, asserting the right to weigh in on the approval of the private act as well. The Court, in rejecting the city's challenge, did so because it was not substantially affected by the private act and thus was not entitled to approval. *Id.* at 328.

[12] The Court notes the *Fountain City* court's dicta, based on citation to a California case, that a school district is not the same as a city. *Id.* at 484. The Court does not view that reference as authority that a locally operated school system is not covered by the Home Rule Amendment, since it is wholly a function of the local government.

The Court also does not read *City of Humboldt v. McKnight* to stand for the proposition that the Home Rule Amendment is not applicable to LEAs. Case No. M2002-02639-COA-R3-CV, 2005 WL 2051284 (Tenn. Ct. App. Feb. 21, 2006). This was an equal protection case regarding the validity of a special school district and whether the county in which it resided had an obligation to maintain a public school system. The decision is not a commentary on whether a local school system is or can be a county or municipality for application of the Home Rule Act.

These cases separately, and as a whole, do not support the Defendants' position that a county or municipal school system cannot bring a challenge under the Home Rule Amendment to a law affecting that school system. Indeed, as just addressed in relation to standing, courts identify counties or municipalities and their school systems as the same, with inextricably intertwined interests. *See Board of Educ. of Shelby Co.*, 911 F.Supp.2d at 645 ("Tennessee law acknowledges that educating children is a collaboration between administrative and financial bodies. . .an injury to the purse is sufficient to establish a 'close relationship' between a school board and its students, the controller of that purse also has standing to protect the rights of students.").

The Home Rule Amendment Components

The three components of the Home Rule Amendment relevant for consideration in this constitutional challenge is whether the ESA Act is local in form and effect, whether it is applicable to a particular county, and whether it involves matters of local government proprietary capacity.

Local in Form and Effect

Plaintiffs assert that the ESA Act can only ever apply to Davidson and Shelby Counties, and that it is local in form and effect. Their position is that the localized nature of the law can be discerned from reviewing the criteria for eligible students, which was designed to only apply to their two school systems, and that intent and design is borne out by the legislative history.

The Defendants argue that the criteria for eligibility is neutral, and thus not locality specific – especially with the inclusion of the ASD. Further, they contend that education is a state, not local, responsibility and that the ESA Act is thus not "local" as that term is used in the Home Rule Amendment.

The Court has already analyzed the structure of the Tennessee education system, and the delegation of education responsibilities to local governments and boards of education by the General Assembly. Based on those concepts, the Court does not find education to be inherently non-local such that a law effecting it cannot be local in effect.

The Court is instructed to look at substance over form in determining whether the ESA Act is local in form *and* effect. *Board of Educ. of Shelby County*, 911 F.Supp.2d at 652; *Farris*, 528 S.W.2d at 551. This review may include a consideration of legislative history, but accords it limited weight - particularly stray comments by legislators that cannot be attributed to the entire body - with a presumption of good faith intentions. *Board of Educ. of Shelby County*, 911 F.Supp.2d at 653, 660; *Farris*, 528 S.W.2d at 555-56. The principal inquiry is whether the law actually is or was designed to be limited locally, and could not potentially be applicable to other localities or throughout the state. *Civil Service Merit Bd. of the City of Knoxville v. Burson*, 816 S.W.2d 725, 729 (Tenn. 1991) (quoting *Farris*, 528 S.W.2d at 552)). Just because a statute affects a particular county when passed is not dispositive as to constitutionality. If it is *potentially* applicable elsewhere, based upon the criteria used for applicability, then it is not local in form and effect. *Id.* at 729. This standard has been applied to defeat constitutional challenges to statutes that apply to particular forms of local government that, though utilized by few, are available to all, or population brackets that, by their nature, will apply to an expanding or contracting list of localities over time. *Id.* at 729-30 (citing *Doyle v. Metropolitan Gov't*, 225 Tenn. 496, 471 S.W.2d

371 (1971); *Metropolitan Gov't of Nashville & Davidson County v. Reynolds*, 512 S.W.2d 6, 9-10 (Tenn. 1974); *Bozeman v. Barker*, 571 S.W.2d 279, 280 (Tenn. 1978); *Frazer v. Carr*, 210 Tenn. 565, 360 S.W.2d 449 (1962)).

The State Defendants rely heavily on cases involving unsuccessful Home Rule Amendment challenges in which the subject statute's application could potentially broaden. For instance, in *Frazer*, the law specifying how metropolitan government charter commission members were selected only applied to counties in a certain population bracket. 360 S.W.2d 449. The only counties of that size *at that time* were Davidson, Hamilton, Knox and Shelby. *Id.* at 452. But because the law was "applicable to every county which falls within an admittedly reasonable classification," it did not violate the Home Rule Amendment. *Id.* In *Bozeman*, the law in question set minimum salaries for certain court officers in counties with populations of a certain size. 571 S.W.2d 279. The Court upheld the act as not violating the Home Rule Amendment because "[i]t presently applies to two populous counties. It can become applicable to many other counties depending on what population growth is reflected by any subsequent Federal Census." *Id.* at 282. Finally, in *Burson*, a law establishing uniform qualifications for civil service board members in counties over a certain size was unsuccessful because its limited current impact could broaden significantly as more counties grew in size and chose to have civil service systems. 816 S.W.2d at 729-730.

It is undisputed that the ESA Act, based upon the criteria for eligible students, can only *ever* apply to MNPS and SCS, because it is based upon classifications set in the past. In other words, performance data from 2015, 2017 and 2018 cannot change. Any improvements at MNPS

and SCS, or deterioration of systems in other parts of the state, will not change the fact that the ESA Act only applies to, and will continue to apply to, MNPS and SCS.[13]

Additionally, the legislative history of the General Assembly's consideration and passage of the ESA Act confirms that the Act was intended, and specifically designed, to apply to MNPS and SCS, and only MNPS and SCS. *See Board of Educ. of Shelby County*, 911 F.Supp.2d at 659-660; *Farris*, 528 S.W.2d at 555-556.

The Court finds, based upon the particular criteria in the ESA Act, and upon the legislative history detailing the extensive tweaking of the eligibility criteria in order to eliminate certain school districts to satisfy legislators (rather than tweaking to enhance the merits of the Act) that the legislation is local in form and effect. The three pronged criteria eventually settled upon by the General Assembly is "narrowly designed" to apply only to Davidson and Shelby Counties, and constitutes a "'group of conditions' . . . 'so unusual and particular' that 'only by the most singular coincidence could [it] be fitted to'" another locality. *Board of Educ. of Shelby County*, 911 F.Supp.2d at 658. The entire process of the General Assembly, including the amendments and "horse trading" associated with changing eligibility criteria to satisfy legislators who wanted their counties excluded, resulted in an act that, in form and effect, is local.

Applicable to a Particular County

The Defendants argue that the ESA Act does not apply to a county or municipality, but rather to LEAs, and thus it cannot violate the Home Rule Amendment. As discussed above, school systems (which are the same as LEAs) cannot be viewed as separate and distinct from the local

[13] If an argument were to be made that the General Assembly may choose to amend the ESA Act in the future to remove MNPS and/or SCS as a "reward" for improving its performance scores, or to add systems to "punish" them for poor performance, it would not be a consideration in the Home Rule Amendment analysis. As set out in *Farris*, "We cannot conjecture what the law may be in the future. We are not at liberty to speculate upon the future action of the General Assembly." 528 S.W.2d at 555. The same concept applies to any argument that the fact the ESA Act is a "pilot" has significance.

governments that fund them. They are truly in a partnership. The local government legislative bodies are elected to represent the people, including raising revenue and appropriating funds for local governmental purposes such as education. *Weaver*, 756 S.W.2d at 222.

Tennessee has a total of 95 counties. The ESA Act applies to, and can only ever apply to, two of those 95. In *Leech v. Wayne County*, the Supreme Court analyzed the Home Rule Amendment in relation to local election laws applicable to particular forms of local governments. 588 S.W.2d 270 (Tenn. 1979). In that instance, where the subject law would potentially affect two counties, the Court held that "[w]here . . . the General Assembly has made a permanent, general provision, applicable in nearly ninety of the counties, giving the local legislative bodies direction as to the method of election of their members, we do not think it could properly make different provisions in two of the counties." *Id.* at 274.

In *Burson,* although the challengers to the statute in question were unsuccessful in their Home Rule Amendment challenge, the Court applied the Home Rule Amendment analysis despite the fact three, and not one, county was affected by the law. 816 S.W.2d at 728-730; *see also, Bozeman*, 571 S.W.2d at 282.

Finally, as to this issue, the Court does not find the inclusion of the ASD as broadening the effect among municipalities or counties so as to defeat this prong of the challenge. The court in *City of Humboldt* found that a special school district was not the same as a municipality or county government. 2005 WL 2051284, at *16. Therefore, the inclusion of the ASD, a special school district that is an "organizational unit of the [state] department of education" cannot be considered a county or municipal entity.

The Court does not find that the Home Rule Amendment is only applicable to laws that affect one county or municipality. There has not been a bright line established regarding how

many counties or municipalities is too many for it to be considered a potential Home Rule Amendment violation, but the Court is confident that a law only affecting, and ever being able to affect, two counties or municipalities is potentially unconstitutional.

Involves Government or Proprietary Capacity

"'Education is a governmental function and in the exercise of that function the county acts in a governmental capacity.'" *Brentwood Liquors Corp. of Williamson County v. Fox*, 496 S.W.2d 454, 457 (Tenn. 1973) (quoting *Baker v. Milam*, 231 S.W.2d 381 (1950)). The Defendants argue that education is not a *local* government function, but rather one for the State based upon its constitutional mandate. As discussed at length in this opinion, the State has shared that responsibility with local governments and made education a governmental function of counties and/or municipalities. The Defendants cannot colorably argue that Metro and Shelby County Government are not engaging in government functions in their proprietary capacities when operating their school systems.

The State Defendants' reliance on *City of Knoxville v. Dossett* to argue otherwise is not persuasive. 672 S.W.2d 193 (Tenn. 1984). In *Dossett*, the Court found that a law restricting the criminal jurisdiction of municipal courts in jurisdictions of a particular population size was not enacted in violation of the Home Rule Amendment. The basis of that decision was that the state judicial system, and particularly the jurisdiction of criminal offenses, was not local in nature. *Id.* at 195. "In many of the foregoing authorities and in numerous others it has been stated that cities and counties are arms of state government and exist for the convenience of the State for purposes of local government. These are given certain protection from interference by the General Assembly under the Home Rule Amendment with respect to local matters, but not with respect to the general judicial power of the state nor with respect to jurisdiction over violation of the state's

general criminal laws." *Id.* at 196. The Court understands *Dossett* to be specific to the State's authority over the courts, and particularly courts with criminal jurisdiction. This case is not applicable to locally operated school systems.

The Court finds that the State Defendants violated the Home Rule Amendment when they enacted the ESA Act because it is local in form and effect, not of general application but rather applicable and designed to be applicable to two particular counties, and involves matters of local government proprietary capacity. Metro and Shelby County Government's motion for summary judgment is granted and they are awarded a final judgment as to Count I of the complaint.

Plaintiffs' Remedies

Metro and Shelby County Government seek declaratory and injunctive relief pursuant to the Declaratory Judgment Act, Tenn. Code Ann. § 29-14-101, *et seq.*, and Tenn. Code Ann. § 1-3-121, which creates a cause of action "for any affected person who seeks declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a governmental action." The Court declares the ESA Act unconstitutional, unlawful, and unenforceable. The Court further orders a permanent injunction preventing state officials from implementing and enforcing the ESA Act. Quoting from the *Tennessee Small School Systems* case:

> With full recognition and respect ... for the distribution of powers in educational matters among the legislative, executive and judicial branches, it is nevertheless the responsibility of the courts to adjudicate contentions that actions taken by the Legislature and the executive fail to conform to the mandates of the Constitutions which constrain the activities of all three branches. That because of limited capabilities and competences the courts might encounter great difficulty in fashioning and then enforcing particularized remedies appropriate to repair unconstitutional action on the part of the Legislature or the executive is neither to be ignored on the one hand nor on the other to dictate judicial abstention in every case.

Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 148 (Tenn. 1993) (quoting *Board of Educ., Levittown Union Free School Dist. v. Nyquist*, 57 N.Y.2d 27, 39, 453 N.U.S.2d 643, 648, 439 N.E.2d 359, 363 (1982)).

THE OTHER PENDING MOTIONS

Greater Praise Christian Academy Intervenor Defendants' Motion to Dismiss

In their motion to dismiss, these Intervenor Defendants assert that Plaintiff MNPS does not have standing to bring any claims pursuant to the ESA Act's bar on a "local board of education" filing a lawsuit, at Tenn. Code Ann. § 49-6-2611(d), and that all claims of the other plaintiffs fail to state a claim upon which relief could be granted. Regarding the Metro School Board's standing, based upon the reasoning set forth above, the motion is granted. These Intervenor Defendants' motion to dismiss Count I regarding the Home Rule Amendment is denied. The Court is taking the remaining portion of the motion under advisement, declining to rule at this time pending further proceedings in this case based upon its grant of summary judgment, including declaratory and injunctive relief, on Count I.

State Defendants' Motion to Dismiss

In their motion to dismiss, the State Defendants assert that Plaintiffs do not have standing for any of their claims, that their Equal Protection and Education Clause claims (Counts II and II) are not ripe for determination, and that Counts I and II do not state a claim upon which relief can be granted. Regarding the Metro School Board's standing, based upon the reasoning set forth above, the motion is granted. The State Defendants' motion to dismiss Count I regarding the Home Rule Amendment is denied. The Court is taking the remaining portion of the motion under advisement, declining to rule at this time pending further proceedings in this case based upon its grant of summary judgment, including declaratory and injunctive relief, on Count I.

Bah, Diallo, Davis and Brumfield Intervenor Defendants' Motion for Judgment on the Pleadings

In their motion for a judgment on the pleadings, these Intervenor Defendants ask the Court to dismiss Plaintiffs' claims and enter a judgment in their favor because the complaint fails to state a claim upon which relief can be granted. These Intervenor Defendants' motion to dismiss Count I regarding the Home Rule Amendment is denied. The Court is taking the remaining portion of the motion under advisement, declining to rule at this time pending further proceedings in this case based upon its grant of summary judgment, including declaratory and injunctive relief, on Count I.

PERMISSION GRANTED TO REQUEST INTERLOCUTORY APPEAL

Tenn. R. App. P. 9(a) sets forth the standards a trial court, and if applicable, the Court of Appeals, is to consider in considering a motion for interlocutory appeal. They are: (1) the need to prevent irreparable injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective; (2) the need to prevent needless, expensive, and protracted litigation, giving consideration to whether the challenged order would be a basis for reversal upon entry of a final judgment, the probability of reversal, and whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed; and (3) the need to develop a uniform body of law, giving consideration to the existence of inconsistent orders of other courts and whether the question presented by the challenged order will not otherwise be reviewable upon entry of final judgment.

The Court is making the determination, without requiring the filing of a request for interlocutory appeal, that this is a matter appropriate for interlocutory and expedited appellate consideration. It is a matter of significant public interest that is extremely time sensitive, as

discussed above. The granting of this relief is not intended to preclude any party from seeking extraordinary appeal pursuant to Tenn. R. App. P. 10 or Tenn. Code Ann. § 16-3-201(d).

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that Plaintiff Metro School Board is DISMISSED as a party for lack of standing;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the summary judgment motions filed by Metro and Shelby County Government is GRANTED and the State Defendants are in VIOLATION of the Home Rule Amendment of the Tennessee Constitution, Article XI, Section 9 by attempting to enact and enforce the ESA Act, Tenn. Code Ann. § 49-6-2601, *et seq.*;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the State Defendants are ENJOINED from implementing and enforcing the ESA Act;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Defendants are immediately granted permission to seek interlocutory relief from the Court of Appeals pursuant to Tenn. R. App. P. 9(a);

IT IS FURTHER ORDERED, ADJUDGED and DECREED that all other pending motions remain UNDER ADVISEMENT.

It is so ORDERED.

Anne C. Martin

ANNE C. MARTIN
CHANCELLOR, PART II

cc: Robert E. Cooper, Jr.
Lora Barkenbus Fox
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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 MOTION TO DISMISS UNDER RULES 12.02(8) AND 12.02(6)

COME NOW 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"), by counsel and pursuant to Rules 12.02(8) and 12.02(6) of the Tennessee Rules of Civil Procedure, and respectfully move this Court to dismiss the above-captioned case with prejudice. As grounds for this motion and as more fully set forth below in their memorandum of law and facts in support hereof, the Schools and Parents state as follows.

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 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).

Therefore, the Schools and Parents respectfully request that this Court grant its motion to

dismiss in its entirety and enter a final judgment dismissing the case with prejudice and charging all court costs to Plaintiffs.

Respectfully submitted,

/s/ Brian K. Kelsey
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THIS MOTION IS SCHEDULED TO BE HEARD ON FRIDAY, MAY 22, 2020, AT 1:30 P.M. PURSUANT TO LOCAL RULE OF PRACTICE 26.04(g), IF NO REPONSE IS TIMELY FILED AND PERSONALLY SERVED, THE MOTION SHALL BE GRANTED, AND COUNSEL NEED NOT APPEAR IN COURT AT THE TIME AND DATE SCHEDULED FOR THE HEARING.

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.

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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.

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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,

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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 6th day of March, 2020.

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IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

ROXANNE McEWEN, DAVID P. BICHELL, TERRY JO BICHELL, LISA MINGRONE, CLAUDIA RUSSELL, INEZ WILLIAMS, SHERON DAVENPORT, HEATHER KENNY, ELISE McINTOSH, TRACY O'CONNOR, and APRYLE YOUNG,

Plaintiffs,

v. Case No. 20-0242-II

BILL LEE, in his official capacity as Governor of the State of Tennessee; LILLIAN HARTGROVE, in her official capacity as Chair of the Tennessee State Board of Education; ROBERT EBY, in his official capacity as Vice Chair of the Tennessee State Board of Education; NICK DARNELL, in his official capacity as Member of the Tennessee State Board of Education; MIKE EDWARDS, in his official capacity as Member of the Tennessee State Board of Education; GORDON FERGUSON, in his official capacity as Member of the Tennessee State Board of Education; ELISSA KIM, in her official capacity as Member of the Tennessee State Board of Education; NATE MORROW, in his official capacity as Member of the Tennessee State Board of Education; LARRY JENSEN, in his official capacity as Member of the Tennessee State Board of Education; DARRELL COBBINS, in his official capacity as Member of the Tennessee State Board of Education; MIKE KRAUSE, in his official capacity as Member of the Tennessee State Board of Education; Tennessee Department of Education; and PENNY SCHWINN, in her official capacity as Education Commissioner for the Tennessee Department of Education,

Defendants.

GREATER PRAISE CHRISTIAN ACADEMY;
ALEXANDRIA MEDLIN; AND DAVID WILSON, SR.'S
MOTION TO DISMISS UNDER RULE 12.02(6)

COME NOW Greater Praise Christian Academy (the "School") and Alexandria Medlin and David Wilson, Sr., on behalf of themselves and their minor children (the "Parents"), by counsel and pursuant to Tennessee Rule of Civil Procedure 12.02(6), and respectfully move this Court to dismiss the above-captioned case with prejudice. As grounds for this motion and as more fully set forth below in their memorandum of law and facts in support hereof, the School and Parents state as follows.

Plaintiff Claudia Russell should be dismissed from the lawsuit because she lacks standing to bring all five causes of action. The First Cause of Action should be dismissed because all Plaintiffs lack standing to bring the claim. In the alternative, the First Cause of Action should be dismissed because the plain meaning of the Home Rule clause applies to legislation involving only one "particular county or municipality." The Second Cause of Action should be dismissed because the ESA Pilot Program treats students equally by continuing to fund BEP per pupil expenditures for every pupil attending public school. The Third Cause of Action should be dismissed because all Plaintiffs lack standing to bring the claim. In the alternative, the Third Cause of Action should be dismissed because the ESA Pilot Program does not abolish "a system of free public schools." The Fourth Cause of Action should be dismissed because when two statutes conflict, the one enacted later controls. The Fifth Cause of Action should be dismissed because all Plaintiffs lack standing to bring the claim. In the alternative, the Fifth Cause of Action should be dismissed because a proper appropriation was made for the estimated first year's funding of the ESA Pilot Program and because all spending for the program was duly

authorized by law.

Therefore, the School and Parents respectfully request that this Court grant their motion to dismiss in its entirety and enter a final judgment dismissing the case with prejudice and charging all court costs to Plaintiffs.

Respectfully submitted,

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THIS MOTION IS SCHEDULED TO BE HEARD ON FRIDAY, MAY 22, 2020, AT 1:30 P.M. PURSUANT TO LOCAL RULE OF PRACTICE 26.04(g), IF NO REPONSE IS TIMELY FILED AND PERSONALLY SERVED, THE MOTION SHALL BE GRANTED, AND COUNSEL NEED NOT APPEAR IN COURT AT THE TIME AND DATE SCHEDULED FOR THE HEARING.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document 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 March, 2020.

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/s/ Brian K. Kelsey
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IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

ROXANNE McEWEN, DAVID P. BICHELL, TERRY JO BICHELL, LISA MINGRONE, CLAUDIA RUSSELL, INEZ WILLIAMS, SHERON DAVENPORT, HEATHER KENNY, ELISE McINTOSH, TRACY O'CONNOR, and APRYLE YOUNG,

Plaintiffs,

v. Case No. 20-0242-II

BILL LEE, in his official capacity as Governor of the State of Tennessee; LILLIAN HARTGROVE, in her official capacity as Chair of the Tennessee State Board of Education; ROBERT EBY, in his official capacity as Vice Chair of the Tennessee State Board of Education; NICK DARNELL, in his official capacity as Member of the Tennessee State Board of Education; MIKE EDWARDS, in his official capacity as Member of the Tennessee State Board of Education; GORDON FERGUSON, in his official capacity as Member of the Tennessee State Board of Education; ELISSA KIM, in her official capacity as Member of the Tennessee State Board of Education; NATE MORROW, in his official capacity as Member of the Tennessee State Board of Education; LARRY JENSEN, in his official capacity as Member of the Tennessee State Board of Education; DARRELL COBBINS, in his official capacity as Member of the Tennessee State Board of Education; MIKE KRAUSE, in his official capacity as Member of the Tennessee State Board of Education; Tennessee Department of Education; and PENNY SCHWINN, in her official capacity as Education Commissioner for the Tennessee Department of Education,

Defendants.

GREATER PRAISE CHRISTIAN ACADEMY;
ALEXANDRIA MEDLIN; AND DAVID WILSON, SR.'S
MEMORANDUM OF LAW AND FACTS IN SUPPORT OF
MOTION TO DISMISS UNDER RULE 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 for funds that may be used as tuition to attend a participating private school, among other possible uses. Earlier this month, Plaintiffs filed this action against the state, arguing that the ESA Pilot Program is unconstitutional and in violation of statute and that it should be enjoined from starting this August.

Greater Praise Christian Academy (the "School") and Alexandria Medlin and David Wilson, Sr., on behalf of themselves and their minor children (the "Parents"), moved to intervene in the case as Defendants. On March 20, their intervention was granted by the Court. Today, they filed a Motion to Dismiss pursuant to the Tennessee Rule of Civil Procedure 12.02(6), and they file concurrently this Memorandum of Law and Facts in Support of their Motion to Dismiss.

In support of this Memorandum, the School and Parents state the following. Plaintiff Claudia Russell should be dismissed from the lawsuit because she lacks standing to bring all five causes of action. The First Cause of Action should be dismissed because all Plaintiffs lack standing to bring the claim. In the alternative, the First Cause of Action should be dismissed because the plain meaning of the Home Rule clause applies to legislation involving only one "particular county or municipality." The Second Cause of Action should be dismissed because

the ESA Pilot Program treats students equally by continuing to fund Basic Education Program (BEP) per-pupil expenditures for every pupil attending public school. The Third Cause of Action should be dismissed because all Plaintiffs lack standing to bring the claim. In the alternative, the Third Cause of Action should be dismissed because the ESA Pilot Program does not abolish "a system of free public schools." The Fourth Cause of Action should be dismissed because when two statutes conflict, the one enacted later in time controls. The Fifth Cause of Action should be dismissed because all Plaintiffs lack standing to bring the claim. In the alternative, the Fifth Cause of Action should be dismissed because a proper appropriation was made for the estimated first year's funding of the ESA Pilot Program. Therefore, the entire Complaint should be dismissed with prejudice.

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

[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).

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 the required minimum match in local 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 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 annually 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. 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 March 2, 2020, the Complaint in this case was filed by eleven Plaintiffs: Roxanne McEwen, David P. Bichell, Terry Jo Bichell, Lisa Mingrone, Claudia Russell, Inez Williams,

Sheron Davenport, Heather Kenny, Elise McIntosh, Tracy O'Connor, and Apryle Young. Claudia Russell is a retired administrator and sometime substitute teacher for Metro Nashville Public Schools ("MNPS"), and the remaining Plaintiffs are parents or guardians of children attending MNPS or Shelby County Schools ("SCS"). The First Cause of Action alleges a violation of the Tennessee Constitution Home Rule clause. The Second Cause of Action alleges a violation of the Tennessee Constitution Education clause and Equal Protection clause. The Third Cause of Action alleges a violation of the Tennessee Constitution Education clause. The Fourth Cause of Action alleges a violation of the BEP statute. The Fifth Cause of Action alleges a violation of the Tennessee Constitution Appropriation of Public Moneys provision and Tenn. Code Ann. § 9-4-601.

LEGAL STANDARD

> A Tenn. R. Civ. P. 12.02(6) motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint itself. *Cook v. Spinnakers of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994). The grounds for such a motion is that the allegations of the complaint, if considered true, are not sufficient to constitute a cause of action as a matter of law. *Id.*

Robinson v. Sundquist, No. M2001-01491-COA-R3-CV, 2003 Tenn. App. LEXIS 364, at *2-3 (Tenn. Ct. App. May 20, 2003).

ARGUMENT

I. Plaintiff Claudia Russell should be dismissed from the lawsuit because she lacks standing to bring all five causes of action, and taxpayer standing should be denied for all Plaintiffs.

"Standing is a judge-made doctrine used to determine whether a particular plaintiff is entitled to judicial relief." *Diaz Constr. v. Indus. Dev. Bd. of the Metro. Gov't of Nashville & Davidson Cty.*, No. M2014-00696-COA-R3-CV, 2015 Tenn. App. LEXIS 107, at *9 (Tenn. Ct. App. Mar. 6, 2015) (citations omitted), attached as Exhibit 1. "The limitations imposed by standing and related doctrines" are essential to prevent courts from being "called upon to decide

abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Chapman v. Shelby Cty. Gov't*, No. W2012-02223-COA-R3-CV, 2013 Tenn. App. LEXIS 403, at *6 (Tenn. Ct. App. June 20, 2013) (citations omitted), attached as Exhibit 2. This is exactly what Plaintiffs attempt here: to call upon this Court to decide a question of wide public significance when they have no particularized standing to do so.

A Rule 12.02(6) motion is the appropriate way to resolve a complaint when the plaintiffs lack standing to bring the case. *Heredia v. Gibbons*, No. M2016-02062-COA-R3-CV, 2019 Tenn. App. LEXIS 351, at *9 (Tenn. Ct. App. July 17, 2019) ("Lack of standing may be raised as a defense under Rule 12.02(6)…"), attached as Exhibit 3; *In re Ava B.*, No. M2014-02408-COA-R10-PT, 2016 Tenn. App. LEXIS 296, at *7 (Tenn. Ct. App. Apr. 27, 2016) (same), attached as Exhibit 4. On such a motion, "each claim must be analyzed separately," and plaintiffs must establish their standing as to each particular claim or count. *Wofford v. M.J. Edwards & Sons Funeral Home Inc*., 528 S.W.3d 524, 542 (Tenn. Ct. App. 2017).

Plaintiff Claudia Russell is a retired administrator and sometime substitute teacher in MNPS (Compl. ¶ 13). She pays state and local taxes in Metro Nashville. However, the fact that she pays taxes does not automatically qualify her for taxpayer standing.

It is well-established law in Tennessee state courts that "where there is no injury that is not common to all citizens, a taxpayer lacks standing to file a lawsuit against a governmental entity." *Fannon v. City of Lafollette*, 329 S.W.3d 418, 427 (Tenn. 2010). *Accord Watson v. Waters*, 375 S.W.3d 282, 287 (Tenn. Ct. App. 2012). The fact that a taxpayer or citizen cares passionately about or is personally connected to a public policy issue, as Dr. Russell may be,

does not mean that she is granted standing as a citizen or taxpayer. *ACLU v. Darnell*, 195 S.W.3d 612, 624 (Tenn. 2006).

In *Fannon* the Tennessee Supreme Court reaffirmed these traditional principles and set forth specific boundaries around when taxpayers may successfully establish standing. These boundaries require two elements: "[O]ur courts typically confer standing when a taxpayer (1) alleges a specific illegality in the expenditure of public funds and (2) has made a prior demand on the governmental entity asking it to correct the alleged illegality." *Id.* In this case, the Plaintiffs alleged unconstitutional expenditure of public funds in their Complaint. But they did not allege a prior demand on the state to correct the alleged illegality. "In establishing that a prior demand has been made, a plaintiff is required to first have notified appropriate officials of the illegality and given them an opportunity to take corrective action short of litigation." *Id.* at 427-28. Nowhere in the Complaint do the Plaintiffs make any suggestion that they served a letter or other notice on any of the relevant government officials as to the alleged unconstitutionality of the ESA program. *See, contra, Cobb v. Shelby Cty. Bd. of Comm'rs*, 771 S.W.2d 124, 125-26 (Tenn. 1989) (plaintiffs met prior demand expectation by sending a letter to the mayor which was analyzed by the mayor's attorney who insisted on staying the course, thus prompting the lawsuit). Where the plaintiffs failed to comply with the requirements for taxpayer standing, they must be dismissed. *Phillips v. Cty. of Anderson*, No. E2000-01204-COA-R3-CV, 2001 Tenn. App. LEXIS 308, at *10 (Tenn. Ct. App. Apr. 30, 2001) (dismissing taxpayer suit for lack of prior demand), attached as Exhibit 5.

Some plaintiffs are able to salvage their standing by showing that a prior demand would be a "futile gesture" or "vain formality" such that they could proceed straight to a suit. *Fannon*, 329 S.W.3d at 428. However, when the complaint fails to allege such futility as a necessary

component of standing, then it must be dismissed. *Metro. Gov't of Nashville & Davidson Cty. ex rel. Anderson v. Fulton*, 701 S.W.2d 597, 601 (Tenn. 1985) ("There is no such allegation in the present case with respect to the Metropolitan Council. The allegations of the complaint therefore, in our opinion, are insufficient to show standing by the private individual who attempted to bring this suit."). *See Phillips*, 2001 Tenn. App. LEXIS 308, at *12 (same). In this case also, Plaintiffs failed to allege the futility of making a prior demand. Therefore, their attempt at standing as taxpayers should be denied.

In particular, Dr. Russell is the only plaintiff who asserted only taxpayer standing. Because she has fallen short by failing to establish the necessary elements of taxpayer standing in her Complaint, she must be dismissed from the lawsuit on all counts.

II. The First Cause of Action should be dismissed because all Plaintiffs lack standing to bring the claim.

The ten plaintiffs other than Dr. Russell all assert standing on two grounds: taxpayer standing and parent/guardian standing. The Tennessee Court of Appeals has set forth the standard for parent standing in an educational context:

> We do hold, however, that the parent members of the Association who have children attending the Curve Elementary School had standing to individually institute this lawsuit. 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. v. Lauderdale Cty. Sch. Bd., 608 S.W.2d 855, 859 (Tenn. Ct. App. 1980). On this basis, parents have standing to bring claims that directly damage their children's schools, but they still lack standing to bring claims that affect the citizenry at large. *See Town of Carthage v. Smith Cty.*, Appeal No. 01-A-01-9308-CH-00391, 1995 Tenn. App. LEXIS 142, at *16 (Tenn. Ct. App. Mar. 8, 1995) ("Although standing does not depend on the merits of a claim, it often turns on the nature and source of the claim asserted."),

attached as Exhibit 6.

In the First Cause of Action, the Plaintiffs allege that the ESA Pilot Program violates the Home Rule clause of the state constitution. The interest in upholding this clause is shared by all citizens at large to ensure respect for local institutions of government. The local units of government themselves may have standing, and in fact, in this instance two counties and a school board have brought a separate case. *See Metro Gov't v. Tenn. Dep't of Educ.*, No. 20-0143-II, Davidson Co. Chancery Court. But citizens at large share a generalized injury that does not confer standing. *Hamilton v. Metro. Gov't of Nashville*, No. M2016-00446-COA-R3-CV, 2016 Tenn. App. LEXIS 791, at *5 (Tenn. Ct. App. Oct. 25, 2016) ("the complaining party [must] alleged an injury in fact, economic or otherwise, which distinguishes that party, in relation to the alleged violations, from the undifferentiated mass of the public."), attached as Exhibit 7; *Watson*, 375 S.W.3d at 287 (complaint must "aver special interest or a special injury not common to the public generally."). The fact that the ESA Pilot Program passed without local input in no way constitutes a special injury to the Plaintiffs as parents of the children who attend MNPS and SCS schools.

III. In the alternative, the First Cause of Action should be dismissed because the plain meaning of the Home Rule clause applies to legislation involving only one "particular county or municipality."

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 (emphasis added). Plaintiffs allege that the ESA Pilot Program violates this clause because it currently affects only two counties. Compl. ¶¶ 97-101.

But the Home Rule clause applies only when a legislative act applies to a single ("particular") county or municipality. *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). Therefore, the ESA Pilot Program, which is piloted in two counties, does not run afoul of the Home Rule clause.

IV. The Second Cause of Action should be dismissed because the ESA Pilot Program treats students equally by continuing to fund BEP per-pupil expenditures for every pupil attending public school.

Three clauses of the Tennessee Constitution invoked by Plaintiffs' Complaint (pp. 26-28, ¶¶ 103-108), when read in conjunction, promise equal educational opportunity for students in public schools. *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993).

First, 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.

Second, the Law of the Land clause of the Tennessee Constitution provides:

That no man shall be taken or imprisoned, or disseized of his freehold, liberties or

> privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land.

Tenn. Const., Art. I, § 8.

Third, the General Law clause of the Tennessee Constitution provides:

> The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie [immunities], or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law. No corporation shall be created or its powers increased or diminished by special laws but the General Assembly shall provide by general laws for the organization of all corporations, hereafter created, which laws may, at any time, be altered or repealed, and no such alteration or repeal shall interfere with or divest rights which have become vested.

Tenn. Const., Art. XI, § 8.

The Plaintiffs allege the ESA Pilot Program violates these clauses because it reduces the number of dollars received by MNPS and SCS through the state formula for funding Kindergarten – 12th grade education, known as the Basic Education Program (BEP). The BEP uses a complex formula, based on local need and ability to pay, to create a unique state allocation per pupil for each school district. Tenn. Code Ann. § 49-3-351. It then multiplies that number by the number of students found in each school district each year and sends those dollars to the district. Tenn. Code Ann. § 49-3-351(d).

The Plaintiffs' argument fails because 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 public school, the public school district is excused from educating that child. Though the dollars go from the district to the ESA, so too, does the responsibility for education. The district 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 BEP grants to provide their educations. *See* Opinion of Attorney General Robert E. Cooper, Jr., No. 08-194, at 4 (Dec. 29, 2008), attached as Exhibit 8 (noting that under the BEP maintenance-of-effort requirement, school districts may reduce their funding when student population decreases). When student population decreases from one year to the next in SCS and MNPS, as has occurred in recent years, no one claims that the resultant decrease in total BEP allocation is treating SCS and MNPS unequally because the per-pupil formula for each school district remains the same. In the same way, children who receive an ESA and those who remain in the public school system are treated equally as to funding: their schools both receive the same amount from the state to educate them.

If anything, the ESA Pilot Program actually advantages affected school districts in three ways. First, while the state portion of per-pupil expenditures is the same for students in each district who receive the ESA and those who do not, the local portion is different. The ESA includes only the minimum match in local per-pupil expenditures, Tenn. Code. Ann. § 49-6-2605(a), but many school districts, including SCS and MNPS, contribute more in per-pupil expenditures than the minimum match required by the BEP. This difference in per-pupil expenditures, which could amount to as much as a few hundred dollars per child, is left behind in the local school district each year to help educate the remaining students; therefore, the children of ten of the plaintiffs will see their per-pupil expenditures *increase* as a result of the ESA Pilot Program.[2]

[2] This per pupil expenditure windfall could increase even more because, by its terms, the ESA Pilot Program also caps the ESA amount in another way: it "must not exceed the combined statewide average of required state and local BEP allocations per pupil." Tenn. Code. Ann. § 49-6-2605(a).

Second, 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 shall be paid to school districts in the pilot program "in an amount equal to the ESA amount for participating students." *Id*. SCS and MNPS will be paid for three years to educate children who are no longer in the system. *Id*. This ghost reimbursement will more than pay for any transitional costs associated with implementing the program. Once again, compared to students in school districts not participating in the ESA Pilot Program, the children of ten of the plaintiffs will see their per-pupil expenditures *increase*.

Third, at the end of three years, the school improvement fund will disburse school improvement grants for programs to support priority schools throughout the state. *Id*. Because the pilot program was begun in three school districts with the vast majority of the priority schools, they will continue to be the beneficiaries of the school improvement fund, thus, once again, *increasing* their per-pupil funding.

Because the children of parents who comprise ten of the eleven Plaintiffs are not disadvantaged but are in fact advantaged by the terms of the ESA Pilot Program as written, their claim for an unequal educational opportunity should be dismissed.

V. The Third Cause of Action should be dismissed because all Plaintiffs lack standing to bring the claim.

The Third Cause of Action alleges the creation of a second system of public schools, which the Plaintiffs claim is in violation of the Education clause of the Tennessee Constitution. This alleged new system allegedly injures the citizenry at large, but the Complaint does not claim that it has a particularized impact on the children of the Plaintiffs.

As in Section II, the Plaintiffs must establish a "special injury" specific to their status as parents rather than a generalized injury on this claim. Again, this they cannot do. Their children

may continue to attend the exact same schools they did before the law was passed, and nothing in this cause of action alleges that the existence of a second, separate system of state-funded schools diminishes the quality of education in the original system of public schools. No such allegation is made because no such allegation could be sustained: a set of alternatives which other parents may choose to use, in and of itself, does not necessarily damage students in the original schools.

VI. In the alternative, the Third Cause of Action should be dismissed because the ESA Pilot Program does not abolish "a system of free public schools."

The plain meaning of the Education clause requires the General Assembly to maintain "a system of free public schools." The General Assembly continues to authorize and fund such a system through its statutes and budgets. *See* Tenn. Code Ann. Title 49, Chapter 2 (creating local school districts); Tenn. Code Ann. Title 49, Chapter 6 (governing elementary and secondary education generally); Public Chapter 405 of the 111th General Assembly (Fiscal Year 2019-20 state budget) (appropriating $4.9 billion in state expenditures to public education through the BEP). Passage of the ESA Pilot Program did not abolish the public school system. Parents are still perfectly free to choose a local public school, and their children will be funded by the state at the exact same per-pupil level as they would have without the ESA Pilot Program. Thus, the pilot program does not violate the Education clause. *See* Opinion of Attorney General Robert E. Cooper, Jr., No. 13-27, at 7-8 (March 26, 2013), attached as Exhibit 9 (as to a proposed voucher program); Opinion of Attorney General Robert E. Cooper, Jr., No. 12-68, at 2 (July 6, 2012), attached as Exhibit 10 (as to charter schools). Because the ESA Pilot Program does not violate the Education clause, this cause of action must be dismissed.

VII. The Fourth Cause of Action should be dismissed because when two statutes conflict, the one enacted later in time controls.

In Count IV, the Plaintiffs allege that the ESA Pilot Program violates the BEP statute (Compl. at 30, ¶¶ 119-122). If the pilot program were an executive order or administrative rule, this might be an argument. But the ESA Pilot Program is a statute. It comprises Part 26 of Chapter 6 of Title 49 of the Tennessee Code. Equally, the BEP is a statute. *See* Tenn. Code Ann. § 49-3-302(3) *et seq*.

It is black-letter law that a later-in-time statute supersedes an earlier statute if the two are in conflict. *Taylor v. State*, No. M2005-00560-CCA-R3-CO, 2005 Tenn. Crim. App. LEXIS 1233, at *6-7 (Crim. App. Dec. 1, 2005), attached as Exhibit 11 (quoting 82 C.J.S. Statutes § 354 (1999)); *Matthews v. Conrad*, No. 03A01-9505-CH-00141, 1996 Tenn. App. LEXIS 109, at *5 (Tenn. Ct. App. Feb. 26, 1996), attached as Exhibit 12. *See* Opinion of Attorney General Robert E. Cooper, Jr., No. 11-36, at 3 (April 21, 2011), attached as Exhibit 13 (same); Opinion of Attorney General Robert E. Cooper, Jr., No. 09-87, at 4 (May 18, 2009), attached as Exhibit 14 (same).

VIII. The Fifth Cause of Action should be dismissed because all Plaintiffs lack standing to bring the claim.

The fifth cause of action is a classic taxpayer-standing claim: it alleges the unconstitutional expenditure of public funds. Yet, as demonstrated in Section I above, all Plaintiffs lack standing as taxpayers to bring this claim. They failed to plead the elements of taxpayer standing under well-established Tennessee law. *See* Section I, *supra*.

In addition, the ten plaintiffs who are parents do not have standing in their status as parents, either. *See* Section II, *supra*. The alleged misappropriation of funds for implementation of the ESA Pilot Program in no way diminished the money sent to their children's schools

through the BEP allocation. Because all Plaintiffs lack standing, this claim must be dismissed.

IX. In the alternative, the Fifth Cause of Action should be dismissed because a proper appropriation was made for the estimated first year's funding of the ESA Pilot Program and because all spending for the program was duly authorized by law.

A. A proper appropriation was made for the estimated first year's funding of the ESA Pilot Program.

In the Fifth Cause of Action, the Plaintiffs first allege that the General Assembly failed to properly appropriate funds for the estimated first year's funding of the ESA Pilot Program (Compl. at 31, ¶¶ 124-128). This is factually inaccurate, as proven by public records on official government websites that the School and Parents ask the Court to take judicial notice of. *See Energy Automation Sys. v. Saxton*, 618 F. Supp. 2d 807, 810 n.1 (M.D. Tenn. 2009) ("A court may take judicial notice of the contents of an Internet website.") (citing *City of Monroe Emples. Ret. Sys. v. Bridgestone Corp.*, 387 F.3d 468, 472, n. 1 (6th Cir. 2004)) (citing *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003)) ("a court that is ruling on a Rule 12(b)(6) motion may consider materials in addition to the complaint if such materials are public records . . . ").

The Appropriation of Public Moneys clause of the Tennessee Constitution provides:

> Any law requiring the expenditure of state funds shall be null and void unless, during the session in which the act receives final passage, an appropriation is made for the estimated first year's funding.

Tenn. Const. Art. II, §24. The first year's funding of the ESA Pilot Program was estimated to be $771,300. *See* Tennessee General Assembly Fiscal Review Committee 2019 Cumulative Fiscal Note at 56, Public Chapter 506 ("$771,300/FY 19-20"), available online at http://www.capitol.tn.gov/Archives/Joint/committees/fiscal-review/reports/2019%20Cumulative%20Fiscal%20Note%20-%20111th.pdf (retrieved Mar. 26, 2020). The amount appropriated by the General Assembly was also $771,300, as explained

below.

The governor's Fiscal Year (FY) 2019-20 budget document, which was presented to the Legislature prior to passage of the ESA Pilot Program, included an appropriation for the program of $25,450,000, which was the sum of an appropriation of $25,250,000 in FY 2019-20 and recurring each year thereafter plus a one-time, nonrecurring appropriation of $200,000 for FY 2019-20. *See* State of Tennessee, The Budget Document FY 2019-20, at A-37 and B-78, available online at https://www.tn.gov/content/dam/tn/finance/budget/documents/2020BudgetDocumentVol1.pdf (retrieved Mar. 13, 2020). This $25,450,000 appropriation was incorporated into the ultimate appropriations act that was signed into law through the following language:

> From the appropriations made in this act, there hereby is appropriated a sum sufficient for implementation of any legislation cited or otherwise described by category in this act or in the Budget Document transmitted by the Governor that has an effective date prior to July 1 of the current calendar year, provided that such legislation is funded in the Budget Document as submitted by the Governor or in the final legislative balancing schedules summarizing enacted amendments incorporated into this act or other appropriations acts of this legislative session and that the fiscal impact of implementing the legislation, as indicated in the final cumulative fiscal note of the Fiscal Review Committee on enacted legislation, is less than or equal to the amounts indicated in the Budget Document or the amendment balancing schedules.

Public Chapter 405 of the 111th General Assembly at Page 52, Sec. 12, Item 4, available online at https://publications.tnsosfiles.com/acts/111/pub/pc0405.pdf (retrieved Mar. 13, 2020). The figure was amended, however, later in the act. $24,678,700 in nonrecurring funds was subtracted in anticipation of passage the next day of the ESA Pilot Program, or Senate Bill 795 / House Bill 939, because the legislation had already been amended to push back the earliest start date of the program until the FY 2020-21 budget. *Id*. at Page 100, Sec. 57, Item 1, Paragraph 5. When you subtract $24,678,700 from $25,450,000, that leaves the amount appropriated by Public Chapter

405 for the 2019-20 budget year: $771,300. This is the exact cost estimated by the Fiscal Review Committee to implement the program in FY 2019-20 in its 2019 Cumulative Fiscal Note.

Therefore, a correct appropriation was made for the estimated first year's funding, in full satisfaction of Appropriation of Public Moneys clause, and this cause of action should be dismissed.

B. All spending for the ESA Pilot Program was duly authorized by law.

In the Fifth Cause of Action, the Plaintiffs second allege that when the Department of Education signed a $1.2 million contract with ClassWallet in November 2019 for administration of the ESA Pilot Program, the contract "render[ed] the Law null and void under Article II, §24, of the Tennessee Constitution and violate[d] T.C.A. §9-4-601." (Compl. at 31, ¶¶ 129-131). Such an allegation, if true, would not render the ESA Pilot Program law null and void; it would only render the ClassWallet contract null and void. Regardless, the allegation is not true because the ClassWallet contract was duly authorized by law.

Article II, Section 24 of the Tennessee Constitution, the Appropriation of Public Moneys clause, also states, "No public money shall be expended except pursuant to appropriations made by law." Appropriations made by law include both appropriations acts enacted by the General Assembly each year as well as statutes. In particular, the Plaintiffs claim the ClassWallet contract violated Tenn. Code Ann. § 9-4-601(a)(1), which states: "No money shall be drawn from the state treasury except in accordance with appropriations duly authorized by law." But the Plaintiffs fail to read the remainder of Title 9, Chapter 4 of the Tennessee Code, which explains that the ClassWallet contract was "duly authorized by law."

In particular, Tenn. Code Ann. § 9-4-5110 explains the process by which the ClassWallet contract was "duly authorized by law":

> Not later than June 1 of each year, the governor shall require the head of each department, office, and agency of the state government to submit to the commissioner of finance and administration a work program for the ensuing fiscal year, such program to include all appropriations made by the general assembly to such department, office, or agency for its operation and maintenance and for capital projects, and to show the requested allotments of the appropriations by quarters for the entire fiscal year. The governor, with the assistance of the commissioner, shall review the requested allotments with respect to the work program of each department, office, or agency, and shall, if the governor deems it necessary, revise, alter, or change such allotments before approving them. The aggregate of such allotments shall not exceed the total appropriations made by the general assembly to the department, office, or agency for the fiscal year in question. The commissioner shall transmit a copy of the allotments as approved by the governor to the head of each department, office, or agency concerned. The commissioner shall thereupon authorize all expenditures to be made from the appropriations on the basis of such allotments and not otherwise.

Tenn. Code Ann. § 9-4-5110(a).

In their Complaint, the Plaintiffs describe this exact process but fail to realize that the process was "duly authorized by law":

> According to testimony by the Department of Education's deputy commissioner before the General Assembly's Joint Government Operations Committee on January 27, 2020, the Department of Education diverted funds appropriated by the General Assembly for the unrelated "Career Ladder" program for public school teachers to pay ClassWallet for services performed to implement the Voucher Law.

(Compl. at 13, ¶ 52).

This process was not only authorized by statute, it was also authorized by the 2019-20 appropriations act:

> From funds available to any department, commission, board, agency, or other entity of state government, there is earmarked a sum sufficient to fund any bill or resolution, that becomes law or is adopted, respectively, for which the Commissioner of Finance and Administration certifies in writing that the cost of implementation of the bill or resolution will be funded within existing appropriations of the entity, within the availability of revenues received by the entity, or within other existing budgetary resources.

Public Chapter 405 of the 111th General Assembly at Page 52, Sec. 12, Item 5, available online at https://publications.tnsosfiles.com/acts/111/pub/pc0405.pdf (retrieved Mar. 13, 2020). The

appropriations act goes on to clarify that intra-departmental transfers are allowed:

> [I]f 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.

Id. at Page 53, Sec. 15, Item 1.

The statutes and appropriations act contain much technical budget jargon, but their meaning, upon close reading, is clear: they authorize a state department to reallocate surplus funds from one account to another account when necessary to implement a bill or resolution, as long as the department does not exceed its total cumulative appropriation and as long as the Commissioner of Finance and Administration certifies the transfer. *See also* Tenn. Att'y Gen. Op., No. 81-662 at *1-2 (Dec. 17, 1981), attached as Exhibit 15 ("[A]n expansion request may be accomplished through a work program revision pursuant to T.C.A. § 9-6-112 [now § 9-4-5112] as long as the aggregate quarterly allotments for the Department . . . do not exceed the total appropriations for said Department for [the] fiscal year."). Thus, the expenditure in this case was "duly authorized by law" because it was conducted in accordance with a well-established method set forth in law to address just such a circumstance.

Because the expenditure alleged to be inappropriate in the Complaint was "duly authorized by law," as required by Tenn. Code Ann. § 9-4-601(a)(1), and was "expended . . . pursuant to appropriations made by law," as required by Tenn. Const. Art. II § 24, this cause of action should be dismissed.

CONCLUSION

For the reasons stated above, all five causes of action should be dismissed with prejudice.

The first, third, and fifth causes of action should be dismissed because no Plaintiff has standing to bring them. Plaintiff Claudia Russell also has no standing to bring the second and fourth causes of action. The second and fourth causes of action are foreclosed as to the other ten plaintiffs by clear, on-point precedent that shows the Plaintiffs failed to state a claim upon which relief can be granted. In the alternative, the first, third, and fifth causes of action also fail to state a claim upon which relief can be granted. Therefore, the motion to dismiss should be granted in full with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document 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 March, 2020.

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