IN THE TENNESSEE SUPREME COURT

CASE NO. M2020-00683-SC-R11-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 Application for Permission to Appeal
Court of Appeals Case No. M2020-00683-COA-R9-CV,
Pursuant to Tenn. R. App. Proc. 11

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

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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*
Tara.Bergfeld@cot.tn.gov

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

Russell Moore | *Director*
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www.comptroller.tn.gov/OREA/

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ALFRED W. TAYLOR
SAMUEL B. MILLER

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

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Director, Public Services, TSL&A

Date May 15, 2020

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

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Nashville, TN 37243-0312

Received by the TN Supreme Court.

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.

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

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:

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.

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

Director, Public Services, TSL&A

Date May 5, 2020

Amendment # 2
By Pope

MO/24 ~~Resolved that the bill~~ resolution be amended by striking ~~the last~~ 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. (Jack) Smith

J. D. Lee

J. Frank Taylor

RG46, Constitutional Convention, 1834-1977,
Box 6, Folder 9

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

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

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 5, 2020 Session

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY ET AL. v. TENNESSEE DEPARTMENT OF EDUCATION ET AL.

Appeal from the Chancery Court for Davidson County
No. 20-0143-II Anne C. Martin, Chancellor

No. M2020-00683-COA-R9-CV

Davidson and Shelby counties sued the State of Tennessee to challenge the constitutionality of the Tennessee Education Savings Account Pilot Program. The trial court found that both counties had standing and that the act was unconstitutional under paragraph 2 of article XI, section 9 of the Tennessee Constitution. The State and intervening defendants appealed. We affirm.

Tenn. R. App. P. 9 Interlocutory Appeal; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, C.J., and W. NEAL MCBRAYER, J., joined.

Herbert H. Slatery, III, Attorney General and Reporter, Andrée Blumstein, Solicitor General, Stephanie A. Bergmeyer, Senior Assistant Attorney General, James Robert Newsom, Assistant Attorney General, E. Ashley Carter, Assistant Attorney General, Matthew Reed Dowty, Assistant Attorney General, and Shanell Lanette Tyler, Assistant Attorney General, for the appellants, Tennessee Department of Education, Commissioner of the Tennessee Department of Education, and Governor of the State of Tennessee.

Jason Irving Coleman, Brentwood, Tennessee, Braden H. Boucek, Nashville, Tennessee, Arif Panju, Austin, Texas, David G. Hodges, Arlington, Virginia, and Timothy Keller, Tempe, Arizona, for the appellants, Natu Bah, Builiguissa Diallo, Star Brumfield, and Bria Davis.

Brian Kirk Kelsey and Daniel R. Suhr, Chicago, Illinois, for the appellants, Greater Praise Christian Academy, Sensational Enlightenment Academy Independent School, Ciera Calhoun, Alexandria Medlin, and David Wilson, Sr.

Allison L. Bussell, Melissa S. Roberge, and Robert E. Cooper, Jr., Nashville, Tennessee, for the appellees, Metropolitan Government of Nashville and Davidson County, and Metropolitan Nashville Board of Public Education.

Emmett Lee Whitwell and Marlinee C. Iverson, Memphis, Tennessee, for the appellee, Shelby County Government.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

In 2019, the Tennessee General Assembly enacted the Tennessee Education Savings Account Pilot Program (the "ESA Act" or "the Act"). 2019 TENN. PUB. ACTS, ch. 506 (codified as Tenn. Code Ann. § 49-6-2601–2612). The ESA Act created a system to allow eligible students, in numbers rising over time from 5,000 to 15,000, to receive their share of state and local funds that would normally be sent to the school system they attend. Tenn. Code Ann. §§ 49-6-2604(c), -2605(c). An eligible student would use these funds to attend a private school. *See* Tenn. Code Ann. § 49-6-2602(9) (defining a "participating school" as "a private school" meeting certain requirements). The Act, based on the criteria for the eligible student, applies only to local education agencies ("LEAs") in Davidson and Shelby counties and the Achievement School District (ASD). Tenn. Code Ann. § 49-6-2602(3)(C).

The Metropolitan Government of Nashville and Davidson County ("Metro"), the Shelby County Government ("Shelby County"), and the Metropolitan Nashville Board of Public Education ("Metro School Board") sued Governor Bill Lee, Tennessee Department of Education Commissioner Penny Schwinn, and the Tennessee Department of Education (collectively "the State defendants" or "the State"). The plaintiffs maintained that the ESA Act violated several provisions of the Tennessee Constitution. The trial court allowed intervenors to participate as defendants: parents of public school children in Davidson and Shelby counties (the Davis and Bah intervenors respectively); and two independent schools wishing to accept eligible students, Greater Praise Christian Academy and Sensational Enlightenment Academy Independent School, plus additional parents who wish to take advantage of the ESA Act (collectively, the "Greater Praise intervenors").

The trial court expedited this matter because the State defendants intended to implement the ESA Act for the 2020-2021 school year. The State had begun accepting student applications and the private schools were making decisions about expansion and enrollment. The Greater Praise intervenors filed a motion to dismiss maintaining that the Metro School Board did not have standing to pursue this action and that all of the constitutional issues raised by the plaintiffs were without merit. The State defendants filed a motion to dismiss arguing that none of the plaintiffs had standing, two of the constitutional claims were not ripe for judicial decision, and the ESA Act did not violate the Tennessee Constitution. The plaintiffs filed a motion for summary judgment, claiming

that the ESA Act violated article XI, section 9 of the Tennessee Constitution. The State defendants filed a motion to consolidate this case with the similar case of *McEwen v. Governor Lee*, No. 20-0242-II. The Davis and Bah intervenors filed a motion for judgment on the pleadings on the grounds that the plaintiffs' complaint failed to state a claim upon which relief could be granted.

The trial court held a hearing on April 29, 2020, on the plethora of motions and issued its opinion on May 4, 2020. The learned chancellor dismissed the Metro School Board as a plaintiff for lack of standing, granted the plaintiffs' motion for summary judgment as to article XI, section 9 of the Tennessee Constitution, declared the ESA Act unconstitutional, and enjoined the State defendants from implementing the Act. The trial court deferred ruling on the other motions and, sua sponte, granted the parties the right to seek an interlocutory appeal to the Court of Appeals. On May 13, 2020, the trial court denied the defendants' joint motion for a stay pending appeal.

The State defendants and the Greater Praise and Bah intervenors filed Tenn. R. App. P. 9 applications for permission to appeal from the trial court's order. The State defendants and the Bah intervenors also moved this court for a stay pending appeal. By order of May 19, 2020, this court granted the applications for an appeal, specifying the two issues for appeal as follows:

1) Whether the trial court erred in ruling that the county government plaintiffs have standing to challenge the constitutionality of the ESA Program under the Home Rule Amendment.
2) Whether the trial court erred in ruling that the ESA Program violates the Home Rule Amendment, article XI, section 9 of the Tennessee Constitution.

This court expedited the appeal and declined to review the trial court's order denying a stay pending appeal. On June 4, 2020, the Tennessee Supreme Court declined to assume jurisdiction of the case or to review the denial of a stay.

Since the time the appeal was granted, this court has permitted a number of amici: the McEwen plaintiffs; Catholic Schools in Shelby and Davidson Counties; EdChoice Inc. and Foundation for Excellence in Education, Inc.; and the Tennessee Education Association, Metropolitan Nashville Education Association, and United Education Association of Shelby County.

STANDARD OF REVIEW

Standing

A Tenn. R. Civ. P. 12.02(6) motion to dismiss challenges the legal sufficiency of the complaint. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011). We must accept "the allegations of fact as true. However, inferences to be drawn from the facts or legal conclusions set forth in the complaint are not required to be taken as true." *Nat'l Gas Distribs. v. Sevier Cnty. Util. Dist.*, 7 S.W.3d 41, 43 (Tenn. Ct. App. 1999) (citing *Riggs v. Burson*, 941 S.W.2d 47-48 (Tenn. 1997)). The facts alleged in the complaint in this case regarding standing are mainly based on statutes. The interpretation of statutes is a question of law which we review de novo with no presumption of correctness. *Wallace v. Metro. Gov't of Nashville*, 546 S.W.3d 47, 52 (Tenn. 2018). Standing is also a question of law reviewed de novo with no presumption of correctness. *See Cox v. Shell Oil Co*., 196 S.W.3d 747, 758 (Tenn. Ct. App. 2005).

Tennessee Constitution, Article XI, Section 9

Summary judgment is the preferred method "for disposing of purely legal issues." *Hawkins v. Case Mgmt. Inc*., 165 S.W.3d 296, 299 (Tenn. Ct. App. 2004). The interpretation of a constitutional provision is a question of law which we review de novo with no presumption of correctness. *Barrett v. Tenn. Occupational Safety & Health Review Comm'n*, 284 S.W.3d 784, 786 (Tenn. 2009).

ANALYSIS

I. County Standing to Challenge the ESA Act

Standing is a judge-made doctrine used to determine whether a party is entitled to have a case decided on the merits. *Am. Civil Liberties Union v. Darnell*, 195 S.W.3d 612, 619 (Tenn. 2006). There are three elements to standing: "a distinct and palpable injury, . . . a causal connection between the claimed injury and the challenged conduct, . . . [and] a showing that the alleged injury is capable of being redressed by a favorable decision of the court." *Id*. at 620. The main focus of the arguments against standing in this case is on the injury requirement. The defendants and their supporting intervenors put forth several arguments involving the separateness of the LEAs from the county government.

The first argument is that the ESA Act addresses LEAs, not counties. Pursuant to Tenn. Code Ann. § 49-6-2602(7), the ESA Act uses the definition of LEA found in Tenn. Code Ann. § 49-1-103(2): "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." Thus, LEAs include metropolitan and county school systems. Citing *Rollins v. Wilson Cnty. Gov't*, 154

F.3d 626 (6th Cir. 1998), the defendants and intervenors argue that school systems are separate from county governments. *Rollins*, however is a labor law case turning on "whether the Wilson County School System and Wilson County Government's Finance Department are a single employer." *Rollins*, 154 F.3d at 628. The answer in *Rollins* was "no," but that result has no bearing on the ESA Act standing issue presented here. *Id.* at 630.

The State defendants and the supporting intervenors suggest that the LEAs are akin to the special school district that was the subject of *Perritt v. Carter*, 325 S.W.2d 233 (Tenn. 1959). In *Perritt*, the Supreme Court ruled that a special school district was not a municipality within the meaning of article XI, section 9, paragraph 2 and no referendum was necessary. *Perritt*, 325 S.W.2d at 234. The *Perritt* Court did not conduct much analysis on this issue, relying instead on its decision in *Fountain City Sanitary District v. Knox County Election Commission*, 308 S.W.2d 482 (Tenn. 1957), which upheld the creation of a district within Knox County for the provision of sewerage disposal, garbage collection and disposal, a water system, and fire protection. In *Fountain City*, a majority of the Tennessee Supreme Court found that the sanitary district was not a municipality within the meaning of article XI, section 9, paragraph 2. *Fountain City*, 308 S.W.2d at 484. "Municipality," according to the court, meant "city." *Id*. A sanitary district is not a "city" and neither is a special school district. Likewise, these districts are not counties.

The differences between a special school district and the LEAs in this case are multiple. Perhaps the most significant is that a special school district has its own board of education. *See, e.g.*, 1919 TENN. PRIV. ACTS, ch. 374, § 2; 1981 TENN. PRIV. ACTS, ch. 62, § 2. LEAs in Davidson and Shelby counties are governed by the county boards of education in Davidson and Shelby counties. Also, the special school districts' school tax is established by the legislature. *See, e.g.*, 1919 TENN. PRIV. ACTS, ch. 374, § 7; 1981 TENN. PRIV. ACTS, ch. 181, § 1. The school tax for the LEAs in Davidson and Shelby counties is established by the respective county commissions. Furthermore, the counties in which a special school district is located have virtually no responsibilities for them. Counties have a number of vitally important responsibilities for LEAs. *See* Tenn. Code Ann. § 49-2-101. Thus, special school districts are irrelevant to the standing of the counties in this case.

The State defendants also argue that "'[t]he fact that there are financial connections between a local school system and local government does not detract from the essentially separate functions of these two entities.'" *Young v. Stamey*, No. E2019-00907-COA-R3-CV, 2020 WL 1452010, at *10 (Tenn. Ct. App. Mar. 25, 2020) (quoting *Putnam Cnty. Educ. Ass'n v. Putnam Cnty. Comm'n*, No. M2003-03031-COA-R3-CV, 2005 WL 1812624, at *5 (Tenn. Ct. App. Aug. 1, 2005)). But it is the financial connections that are at the heart of the counties' standing argument.

The State defendants and intervenors maintain that the counties suffer no direct injury from the ESA Act. This is where the financial connections come into play. Each

participating student is still "counted in the enrollment figures for the LEA in which the participating student resides."[1] Tenn. Code Ann. § 49-6-2605(b)(1). The ESA Act funds for each participating student[2] are taken "from the state BEP funds otherwise payable to the LEA." *Id*. The defendants claim that the ESA Act reimburses the LEA for the State and local funding taken by the ESA Act for each student for the first three fiscal years of the program. *See* Tenn. Code Ann. § 49-6-2605(b)(2)(A). The reimbursement does not, however, make the counties whole. The reimbursement is actually a grant from a school improvement fund "to be used for school improvement." *Id.* From the "to be used for school improvement" language of Tenn. Code Ann. § 49-6-2605(b)(2)(A), we find that these funds are not a replacement for the operational funds taken.[3] Furthermore, the defendants speak as if the funding was guaranteed, but the language "subject to appropriation" demonstrates that it is not. *Id*.[4]

Finally, the State defendants and intervenors argue that the charters of the plaintiffs establish a separation between the county governments and the local school systems that precludes the counties from having standing. They argue that the county governments do not administer the school system and refer to charter provisions for support. This is true. But we have already noted that there are fiscal effects upon the budgets the counties must adopt that are caused by the ESA Act. The State defendants argue that there is "no budgetary injury resulting from the ESA Program, since the Program has no impact on their ability to adopt a school budget." It is not the ability of the Metro and Shelby county governments to adopt a school budget that is affected; it is the size of those budgets and the use of the reimbursement "replacement" funds.

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[1] This counting requirement by itself appears to meet the direct injury requirement for standing because it inflates the calculation of the amount of local taxes that must be raised and appropriated by the county. Combined with the maintenance of effort statutes, Tenn. Code Ann. §§ 49-2-203(a)(10)(A)(ii), 49-3-314(c)(1), the counting requirement keeps the county appropriations for the county school system artificially high.

[2] Tenn. Code Ann. § 49-6-2605(a) states in pertinent part:

> The maximum annual amount to which a participating student is entitled under the program must be equal to the amount representing the per pupil state and local funds generated and required through the basic education program (BEP) for the LEA in which the participating student resides, but must not exceed the combined statewide average of required state and local BEP allocations per pupil.

[3] The April 23, 2019 fiscal memorandum prepared for HB0939/SB0795, which became the ESA Act, discusses increased local expenditures, states that "[t]here will be a shift in BEP funding," and indicates that an additional unknown amount of funds would be passed along to the private schools from Title I, Title II, and Title IV.

[4] The General Assembly often includes such language to avoid creating entitlements. *See* Tenn. Code Ann. § 49-3-307(b) (providing that BEP factors "shall be implemented in accordance with funding as made available through the general appropriations act"); *State ex rel. Metro. Gov't of Nashville & Davidson Cnty. v. State*, 534 S.W.3d 928, 932 n.4 (Tenn. Ct. App. 2017).

We conclude that the Metro and Shelby County governments have standing to bring this action.

II. Tennessee Constitution, Article XI, Section 9, Paragraph 2

The plaintiffs maintain that the ESA Act violates the second paragraph of article XI, section 9 of the Tennessee Constitution. The pertinent language of that paragraph is as follows:

> 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 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.

All but the first paragraph of article XI, section 9 originates from the Constitutional Convention of 1953. These amendments are collectively known as the Home Rule Amendments. They were proposed as three separate amendments by the convention. JOURNAL AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION 1953, 306, 1129 (1953). The second paragraph was amendment number 6. *Id.* It was adopted by the convention as "Resolution Relative to Home Rule for Cities and Counties as to Local Legislation" on July 15, 1953. *Id.*

Interpreting constitutional provisions is much like interpreting statutes. Courts focus on intent and use a variety of rules to discern that intent. "We must interpret constitutional provisions in a principled way that attributes plain and ordinary meaning to their words and that takes into account the history, structure and underlying values of the entire document." *Estate of Bell v. Shelby Cnty. Health Care Corp*., 318 S.W.3d 823, 835 (Tenn. 2010) (citations omitted). The history of the provision itself, including the circumstances precipitating its creation, can also be important in understanding its spirit and meaning. *Gaskin v. Collins*, 661 S.W.2d 865, 867 (Tenn. 1983). The history of the constitutional provision includes pertinent comments from the constitutional convention that created the provision and the circumstances that drove its creation. *See, e.g., Highwoods Props., Inc. v. City of Memphis*, 297 S.W.3d 695, 703 (Tenn. 2009) (discussing "the misuse of private acts against municipal governments" as the impetus for part of article XI, section 9); *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 151 (Tenn. 1993) (citing the comments of Delegate Helms regarding the need for flexibility in school funding); *Gaskin*, 661 S.W.2d at 867-68 (relating the effect of the history of post-civil war disenfranchisement on article I, section 5 of the Tennessee Constitution).

Defendants argue that article XI, section 9, paragraph 2 does not apply to the ESA Act because education is a state function and because the ESA Act applies to LEAs, not counties. We have already addressed the LEA argument in the context of standing. Tennessee Code Annotated section 49-1-103(2) defines an LEA as "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." Thus, LEAs include metropolitan and county school systems. Giving an entity a new name does not change the nature of the entity or its relationship to the county government that funds it.

The State defendants argue that "[t]he Tennessee General Assembly has exclusive authority under the Tennessee Constitution to make decisions regarding the provision of education," citing article XI, section 12 of the Tennessee Constitution, which states:

> 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.

The State observes that the legislature has "plenary and exclusive authority" to provide for public schools. *S. Constructors, Inc. v. Loudon Cnty. Bd. of Educ*., 58 S.W.3d 706, 715 (Tenn. 2001). We note that the plenary authority derived from article XI, section 12 relates to *public schools*, not private[5] ones. When encouraging, assisting or benefiting private schools, the General Assembly is operating outside that plenary power. Furthermore, having plenary authority over public schools does not mean that other provisions of the Tennessee Constitution do not or cannot apply.

Acting pursuant to laws passed by the General Assembly, the State of Tennessee could operate the public school system throughout the state without involving the counties. But that is not how the State has chosen to operate. Upon examining the statutes governing education, the Tennessee Supreme Court has declared "that a partnership has been established between the State and its political subdivisions to provide adequate educational opportunities in Tennessee." *State ex rel. Weaver v. Ayers*, 756 S.W.2d 217, 221 (Tenn. 1988). This "partnership" has been in place for over 100 years. *See, e.g*., 8 Robert H. White, MESSAGES OF THE GOVERNORS OF TENNESSEE 1899-1907, 282 (1972) (quoting Governor James B. Frazier's legislative message of January 3, 1905: "Our system of public education in Tennessee is a dual system, the schools being partly supported by the State and partly by the counties."). The State vests substantial authority in local boards of

[5] A "participating school" under the ESA Act "means a private school, as defined by § 49-6-3001(c)(3)(A)(iii)," that satisfies certain requirements. Tenn. Code Ann. § 49-6-2602(9).

education. *See* Tenn. Code Ann. § 49-2-203. The State also mandates that counties help pay for the county schools. Tenn. Code Ann. § 49-2-101(6). Vesting such authority in county entities and officials establishes a partnership in the State's education efforts. This arrangement makes article XI, section 9 potentially applicable.

Based on the language of article XI, section 9, paragraph 2, there are three requirements for paragraph 2 to apply: the act must be "[1] private or local in form or effect [2] applicable to a particular county or municipality [3] either in its governmental or proprietary capacity." We must examine each of these requirements.

Private or local in form or effect

In *Farris v. Blanton*, 528 S.W.2d 549, 552 (Tenn. 1975), the Court held that if legislation was "potentially applicable throughout the state it is not local in effect even though at the time of its passage it might have applied to [one county] only." S*ee also Civil Serv. Merit Bd. of City of Knoxville v. Burson*, 816 S.W.2d 725, 729 (Tenn. 1991); *County of Shelby v. McWherter*, 936 S.W.2d 923, 935 (Tenn. Ct. App. 1996). The *Farris* Court further cautioned that, "in determining potential applicability we must apply reasonable, rational and pragmatic rules as opposed to theoretical, illusory or merely possible considerations." *Farris,* 528 S.W.2d at 552; *see also County of Shelby*, 936 S.W.2d at 935.

Designation as a "public act" by the General Assembly is not controlling. "Such a criterion would emasculate the purpose of the amendment." *Farris*, 528 S.W.2d at 551. Similarly, naming the act a "pilot program" is not controlling. In determining whether legislation is "private or local in form or effect," "we look to substance and not to form." *Id.* at 554.

The creators of article XI, section 9 did not define the phrase "private or local in form or effect." "Constitutions are to be construed with reference to well known practices and usages." *LaFever v. Ware*, 365 S.W.2d 44, 47 (Tenn. 1963). Taking the words "private or local in form or effect" with their ordinary meanings seems to denote an act that was not a general law. The drafters of the language would have understood that "[a] general law is one 'neither for one or more particular persons, nor to operate exclusively in particular part or parts of a state.'" *Nashville Gas & Heating Co. v. City of Nashville*, 152 S.W.2d 229, 234 (Tenn. 1941) (quoting 2 BOUV. LAW DICT. (Rawle's 3rd Rev.) p. 3133)). Because the ESA Act, by its terms, was designed "to operate exclusively in particular . . . parts of the state," *i.e.*, Davidson and Shelby counties, it is not a general law. *Id.* Consequently, it must be considered local in effect.

Applicable to a particular county or municipality

Greater Praise intervenors maintain that the language "applicable to a particular county or municipality" means that the challenged act can apply to only one county. Tenn.

Const. art. XI, §9, ¶ 2. We cannot derive that meaning from the language used when viewed in context, and neither has the Tennessee Supreme Court.

In *Leech v. Wayne County*, 588 S.W.2d 270, 271 (Tenn. 1979), the Tennessee Supreme Court addressed the constitutionality of an act that attempted to implement the rather drastic revamp of Tennessee local government proposed by the 1977 Constitutional Convention and approved by the electorate. Section 8 of Chapter 934 of the Public Acts of 1978 gave county legislative bodies the authority to decide whether each office in a multi-member district would be designated separately on the ballot, with candidates required to run on the basis of the separately designated offices. *Leech*, 588 S.W.2d at 274. However, by population bracket designation, this discretion was taken away from Wayne and Bledsoe counties, and they were required to have separately designated offices for which candidates were to run in multi-member districts. *Id.* This exception was challenged as to Wayne County for violating article XI, section 9, paragraph 2. The Supreme Court concluded that the provision did indeed violate Article XI, § 9, paragraph 2, stating:

> Where, however, the General Assembly has made a permanent, general provision, applicable in nearly ninety of the counties, giving the local legislative bodies discretion as to the method of election of their members, we do not think it could properly make different provisions in two of the counties, by population bracket, in the manner attempted here. Insofar as Wayne County is concerned, this amounted to nothing more than a private act relating to the composition of its county legislative body, without any statement of reasons and without requirement of a local referendum.

Id. The Supreme Court, having applied the language of article XI, section 9, paragraph 2 to an act making an exception for two counties without a referendum, has bound the lower courts to this interpretation. *Webb*, 346 S.W.3d at 430 ("'Once the Tennessee Supreme Court has addressed an issue, its decision regarding that issue is binding on the lower courts.'") (quoting *Morris v. Grusin*, No. W2009-00033-COA-R3-CV, 2009 WL 4931324, at *4 (Tenn. Ct. App. Dec. 22, 2009)) .

Wayne County is consistent with the constitutional convention debates on this language. If there is doubt about language in the constitution, "it is the first obligation of the Court to go to the Constitutional Convention which adopted this provision and see from these proceedings what the framers of this resolution intended it to mean." *Shelby Cnty. v. Hale*, 292 S.W.2d 745, 748 (Tenn. 1956). The final language of what would become the second paragraph of article XI, section 9 was presented by Delegate Lewis Pope, Chair of the Committee on Editing. TENNESSEE CONSTITUTIONAL CONVENTION JOURNAL OF 1953, at 1121. The committee made one change, inserting the words, "applicable to a particular county or municipality, either in its governmental or its proprietary capacity." *Id.* The following exchange occurred:

Mr. Burn: Do I understand that if there is an act pertaining to more than one municipality, that the legislature can enact that without referendum?

Mr. Pope: No, that would be a local bill if it applies to one or two.

Id. Mr. Pope's comments on the language his committee wrote indicate that more than one county or municipality could be included in the act and article XI, section 9, paragraph 2 would still apply.

Governmental or proprietary capacity

Long ago, the Tennessee Supreme Court held that "[s]pecial statutes affecting counties in their governmental or political capacity are not invalid under the sections of the constitution prohibiting the enactment of special or local laws." *Knox Cnty. v. State ex rel. Nighbert*, 147 S.W.2d 100, 102 (Tenn. 1940). The court was referring to article XI, section 8. *Id*. In 1950, the Supreme Court stated that "[e]ducation is a governmental function and in the exercise of that function the county acts in a governmental capacity." *Baker v. Milam*, 231 S.W.2d 381, 383 (Tenn. 1950). The *Baker* Court further held that, because the act itself disclosed a reasonable basis for the discrimination and because it only affected Decatur County in its governmental capacity, it did not violate article XI, section 8. *Id*. Three years later, the constitutional convention added new language to article XI, section 9 stating that an act, "private or local in form or effect applicable to a county or municipality in either its governmental or proprietary capacity," must have local approval to be effective. The apparent purpose of the language "either in its governmental or proprietary capacity" is to prevent local laws such as the one discussed in *Baker* from becoming effective without local approval.

The intervenors argue that the ESA Act affects citizens in their private rights, not counties. In 1925, a private act was passed to require Knox County to provide free text books in grammar schools. The act was challenged in *State ex. rel. Scandlyn v. Trotter*, 281 S.W. 925 (Tenn. 1926), as a violation of article XI, section 8. The Supreme Court determined that the act affected primarily private rights, so the exception from article XI, section 8 for county governmental functions did not apply. *Id.* at 927. The Court found the act invalid because it was supported by no rational basis to justify singling out Knox County to bear the burden or receive the benefit of the legislation. *Id.*

For article XI, section 9 to apply, the ESA Act must be "applicable to a particular county or municipality either in its governmental or proprietary capacity." Given that the purpose of article XI, section 9 is to give local control over local legislation, and that we have already found that the ESA Act is local in effect and is applicable to Davidson and Shelby counties in their governmental capacities, we conclude that whether the Act also affects or primarily affects private rights is irrelevant to the analysis under article XI, section 9.

We hold that the ESA Act is [1] local in effect, and [2] applicable to Davidson and Shelby counties [3] in their governmental capacity. It follows that article XI, section 9, paragraph 2 of the Tennessee Constitution applies to Davidson and Shelby counties and that the ESA Act is unconstitutional as applied to them due to the lack of the required referendums or votes of the county commissions.

CONCLUSION

We affirm the trial court as to the standing of Davidson and Shelby counties to bring this action and as to the determination that the ESA Act is unconstitutional as applied to Davidson and Shelby counties.[6] Costs are taxed to the State of Tennessee, for which execution may issue if necessary.

_____
ANDY D. BENNETT, JUDGE

[6] The Greater Praise intervenors asked this court, at oral argument and in their brief, to separately consider the constitutionality of the ESA Act as it affects the ASD. This is an analysis we are unwilling to undertake. The ASD is not a party. Neither of the questions this Court determined to take mentioned or focused to any extent on the ASD. The question raised by the Greater Praise intervenors is not an issue this court agreed to hear.

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing document was served via Tenn. S. Ct. R. 46A through the e-filing system and was forwarded to the attorneys listed below via the e-mail addresses below on this 24th day of November, 2020.

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