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

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY and SHELBY COUNTY GOVERNMENT, Plaintiffs, vs. 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 the Tennessee, Defendants, and NATU BAH, BUILGUISSA DIALLO, STAR BRUMFIELD, GREATER PRAISE CHRISTIAN ACADEMY, SENSATIONAL ENGLIGHTENMENT ACADEMY INDEPENDENT SCHOOL, CIERA CALHOUN, ALEXANDRIA MEDLIN, and DAVID WILSON, SR., Intervenor-Defendants.	Case No. 20-0143-II Chancellor Anne C. Martin, Chief Judge Judge Tammy M. Harrington Judge Valerie L. Smith

GREATER PRAISE INTERVENOR-DEFENDANTS' RESPONSE IN SUPPORT OF STATE DEFENDANTS' MOTION TO VACATE INJUNCTION & REQUEST FOR A RULING PRIOR TO JULY 13, 2022

Greater Praise Intervenor-Defendants[1] file this response in support of the State Defendants' Motion to Vacate Injunction and request a ruling from this Court prior to July 13,

[1] Greater Praise Christian Academy; Sensational Enlightenment Academy Independent School; Ciera Calhoun; Alexandria Medlin; and David Wilson, Sr.

2022 because 1) since this Court set the motion to be addressed on that date, Plaintiffs have indicated that they do not oppose the motion and 2) time is of the essence for Intervenor-Defendants to participate in the Education Savings Account Pilot Program during the fast-approaching 2022-2023 school year.

The Court should grant the motion prior to the status conference for two reasons: 1) Under Tennessee law and the May 18 and June 13, 2022 rulings of the Supreme Court, the injunction has already been lifted: "Without an underlying . . . violation, the injunction issued by the District Court must necessarily be vacated." *Scheidler v. NOW, Inc.*, 537 U.S. 393, 411 (2003); and 2) Plaintiffs do not oppose the motion: "Plaintiffs take no position on the State Defendants' motion." Pls.' Resp. 1. Further in support hereof, Intervenor-Defendants state the following:

1. In its May 18, 2022 Opinion, the Supreme Court stated, "[T]he judgment of the trial court with respect to Plaintiffs' claim under the Home Rule Amendment is vacated . . . ." Opinion 1, 14, attached as Exhibit A.

2. In its May 18, 2022 Judgment, the Supreme Court repeated, "The judgment of the trial court with respect to Plaintiffs' claim under the Home rule Amendment is vacated . . . ." Judgment 1, attached as Exhibit B.

3. In its June 13, 2022 Order, the Supreme Court denied Plaintiffs' Petition for Rehearing. Order, attached as Exhibit C.

4. In its May 4, 2020 Memorandum and Order, this Court issued five orders, including that "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; IT IS FURTHER ORDERED, ADJUDGED and DECREED that the State Defendants are ENJOINED from implementing and enforcing the ESA Act[.]" Memorandum and Order 31, attached as Exhibit D.

5. Because the Order and Judgment of the Supreme Court "vacated" the "judgment of the trial court with respect to Plaintiffs' claim under the Home Rule Amendment" and because the

May 4, 2020 Order of this Court issued an injunction "from implementing and enforcing the ESA Act" wholly based on a "VIOLATION of the Home Rule Amendment," the injunction is now vacated.

6. In its May 13, 2020 Order, this Court denied a "joint motion to stay the injunction pending appeal," Order 1, stating, "The motion to stay the injunction as requested under Tennessee Rule of Civil Procedure 62.03 is DENIED. State Defendants are permitted to receive applications to the ESA Program through May 7, 2020. State Defendants remain otherwise enjoined from using State resources to process applications, engage with parents and schools, or remit any funds in support of the program." Order 2, attached as Exhibit E. The Order also ordered the State Defendants to post a notice of the injunction on the ESA website. *Id*.

7. Because this Court's May 13, 2020 Order was based on Tennessee Rule of Civil Procedure 62.03, it kept this Court's injunction in place only, as the rules says, "during the pendency of the appeal." Tenn. R. Civ. P. 62.03. *See* David G. Knibb, *Federal Court of Appeals Manual* § 21.7, at 404 (4th ed. 2000) ("Once the court of appeal decides an appeal, any stay or injunction pending appeal dissolves automatically unless otherwise ordered.").

8. Because the May 13, 2020 Order of this Court denied to stay the injunction based on the Home Rule Amendment and did so only, per its own terms, "pending appeal," and because the appeal is no longer pending, the Mandate from the Supreme Court, which "vacated" the "judgment of the trial court," having now issued, the injunction is now vacated.

9. As a matter of law, when a decision is reversed and a judgment is vacated, any other order (such as attorney's fees or injunctive relief) premised on that judgment is similarly vacated. *See Scheidler*, 537 U.S. at 411 ("Because all of the predicate acts supporting the jury's finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must also be reversed. Without an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated."). Numerous courts hold to the same principle: when a judgment is vacated, any corollary injunction is also necessarily vacated. *See, e.g., Quiksilver, Inc. v. Kymsta Corp.*, 466 F.3d 749, 754 n.4 (9th Cir. 2006) ("Because we are reversing the district court's granting of judgment as a matter of law, the accompanying injunction is necessarily vacated."); *Armesto v. Rosolino*, No. 70424-9-I, 2014 Wash. App. LEXIS 1625, at *13 (Ct. App. July 7, 2014); *Weitzner v. Div. of Hous. & Cmty. Renewal*, 190 A.D.2d 552, 554, 593 N.Y.S.2d 237, 238 (App. Div. 1st Dept. 1993).

10. Intervenor-Defendant parents Ciera Calhoun; Alexandria Medlin; and David Wilson, Sr. respectfully seek a ruling on the State Defendants' motion from this Court promptly because they need to hear from the Tennessee Department of Education right away whether their children are approved to participate in the program and whether the state intends to implement the program in 2022-2023, so they can make decisions on where to send their children to school this fall.

11. Intervenor-Defendant schools Greater Praise Christian Academy and Sensational Enlightenment Academy Independent School need to hear from the Tennessee Department of Education right away whether the state intends to implement the program in 2022-2023 and, if so, how many ESA student openings will be granted, so they can properly prepare for the school year beginning this August. As Greater Praise Christian Academy Director Kay Johnson testified in 2020, she needs to hire new teachers to serve additional students who come to Greater Praise through the ESA program. Affidavit of Kay Johnson 2, attached as Exhibit F.

12. In addition, the nearly 2,000 low-income Tennessee students who applied for the ESA program and who are not represented by counsel in this case desperately need this Court's prompt ruling, so they may receive clarity from the State.

WHEREFORE, Intervenor-Defendants pray that this Court enter an order as soon as practicable granting the State Defendants' Motion to Vacate Injunction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be 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, by agreement of the parties, on this 1st day of July, 2022.

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Exhibit

A

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
February 24, 2022 Session[1]

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

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

No. M2020-00683-SC-R11-CV

This case is before us on an interlocutory appeal limited to a single claim: Plaintiffs'[2] constitutional challenge to the Tennessee Education Savings Account Pilot Program (the "ESA Act" or the "Act"), Tenn. Code Ann. §§ 49-6-2601 to -2612, under article XI, section 9 of the Tennessee Constitution (the "Home Rule Amendment" or the "Amendment"). The trial court held that Plaintiffs had standing to pursue this claim and denied Defendants' motions to dismiss on that basis. The court held that the ESA Act is unconstitutional under the Home Rule Amendment and granted Plaintiffs' motion for summary judgment on this claim. The trial court then sua sponte granted Defendants an interlocutory appeal, and the Court of Appeals granted their application for an interlocutory appeal by permission pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. The Court of Appeals affirmed the trial court's judgment with respect to the issue of standing and the issue of the constitutionality of the ESA Act under the Home Rule Amendment. We hold that Plaintiffs have standing to bring their Home Rule Amendment claim and affirm the judgment of the Court of Appeals with respect to that issue. However, we hold that the ESA Act does not implicate the Home Rule Amendment such that the Act is not rendered unconstitutional by the Amendment, and we reverse the judgment of the Court of Appeals with respect to that issue. Accordingly, the judgment of the trial court with respect to Plaintiffs' claim under the Home Rule Amendment is vacated, and the case is remanded to the trial court for entry of a judgment dismissing that claim, for further proceedings consistent with this opinion, and for consideration of Plaintiffs' remaining claims.

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[1] This case was originally heard on June 3, 2021. Due to the untimely passing of Justice Cornelia A. Clark, this case was re-argued on February 24, 2022.

[2] The Metropolitan Nashville Board of Public Education was also a plaintiff in the trial court. It was dismissed for lack of standing, and that judgment is not before the Court on this interlocutory appeal. The Board, therefore, is not a party to this appeal.

Tenn. R. App. P. 11 Appeal by Permission; Judgment of the Court of Appeals Affirmed in Part and Reversed in Part; Case Remanded to the Trial Court

ROGER A. PAGE, C.J., delivered the opinion of the court, in which JEFFREY S. BIVINS, J., and THOMAS R. FRIERSON, II, SP. J., joined. SHARON G. LEE, J., filed an opinion concurring in part and dissenting in part, in which HOLLY KIRBY, J., joined. SARAH K. CAMPBELL, J., not participating.

Herbert H. Slatery III, Attorney General and Reporter; Andrée Sophia Blumstein, Solicitor General; Jim Newsom, Special Counsel; Stephanie A. Bergmeyer, Senior Assistant Attorney General; and Matt R. Dowty, Assistant Attorney General, for the appellants, Tennessee Department of Education, Governor of the State of Tennessee, and Commissioner of the Tennessee Department of Education.

Justin Owen, Nashville, Tennessee, for the appellant, Star Brumfield.

Jason I. Coleman, Brentwood, Tennessee; Arif Panju, Austin, Texas; and David G. Hodges and Keith Neely, Arlington, Virginia, for the appellants, Natu Bah and Buiiliguissa Diallo.

Brian K. 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.

Robert E. Cooper, Jr., Allison L. Bussell, and Melissa Roberge, Nashville, Tennessee, for the appellee, Metropolitan Government of Nashville and Davidson County.

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

Ty E. Howard and Caroline D. Spore, Nashville, Tennessee; and Chris Patterson, Memphis, Tennessee, for the amici curiae, The Alliance for School Choice, Southern Christian Leadership Conference-Memphis Chapter, and Latinos for Tennessee.

Yvonne K. Chapman, Memphis, Tennessee, for the amici curiae, Rep. Glen Casada, former Rep. Bill Dunn, former Sen. Dolores Gresham, Rep. Esther Helton, former Rep. Andy Holt, Sen. Jack Johnson, Sen. Brian Kelsey, Rep. Sabi Kumar, Rep. William Lamberth, Rep. Dennis Powers, former Rep. Robin Smith, and Rep. Mark White.

Robert F. Parsley, Chattanooga, Tennessee; and Leslie Davis Hiner, Indianapolis, Indiana, for the amici curiae, EdChoice, Inc. and Foundation for Excellence in Education, Inc.

Christopher M. Wood, Thomas H. Castelli, and Stella Yarbrough, Nashville, Tennessee; Christine Bischoff and Lindsey Rubenstein, Jackson, Mississippi; and David G. Sciarra, Wendy Lecker, and Jessica Levin, Newark, New Jersey, for the amici curiae, McEwen Plaintiffs, Tennessee NAACP, Pastors for Tennessee Children and Pastors for Children.

Richard L. Colbert, Nashville, Tennessee, for the amici curiae, Tennessee Education Association, Metropolitan Nashville Education Association, and United Education Association of Shelby County.

OPINION

I. Factual and Procedural Background

Enacted by the Tennessee General Assembly in 2019, the Education Savings Account Pilot Program, see 2019 Tenn. Pub. Acts ch. 506 (codified at Tenn. Code Ann. §§ 49-6-2601 to -2612), establishes a program allowing a limited number of eligible students[3] to directly receive their share of state and local education funds, which would ordinarily be provided to the public-school system they attend, to pay for a private school education and associated expenses. The maximum number of eligible students allowed to participate in the program increases over a five-year period from 5,000 students in year one to 15,000 students in year five. Tenn. Code Ann. § 49-6-2604(c) (2020). The Act provides that only students who are zoned to attend a school in Metro Nashville Public Schools, Shelby County Schools, or the Achievement School District ("ASD")[4] are eligible to participate in the program.[5]

[3] See Tenn. Code Ann. § 49-6-2602(3) (defining "eligible student").

[4] The ASD is not a party to this appeal, and the constitutionality of the ESA Act as it affects the ASD is not an issue before this Court.

[5] The Act defines an "eligible student," in part, as one who:

> (i) Is zoned to attend a school in an [sic] [local education agency ("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 May 24, 2019[.]

The Metropolitan Government of Nashville and Davidson County ("Metro"), Shelby County Government ("Shelby County"), and Metropolitan Nashville Board of Public Education ("Metro School Board") filed a declaratory judgment action that named as defendants Governor Bill Lee, the Tennessee Department of Education Commissioner, and the Tennessee Department of Education (collectively, the "State"). In their complaint, Metro, Shelby County, and the Metro School Board asserted that the ESA Act violates several provisions of the Tennessee Constitution, namely the Home Rule Amendment, Tenn. Const. art. XI, § 9, cl. 2; the equal protection clauses, id. art. I, § 8; id. art. XI, § 8; and the education clause, id. art. XI, § 12. The trial court allowed parents of public-school children in Davidson and Shelby counties (the "Natu Bah Intervenors") in addition to two independent schools, Greater Praise Christian Academy and Sensational Enlightenment Academy Independent School, and additional parents wanting their children to participate in the ESA program (collectively, the "Greater Praise Intervenors") to intervene and participate as defendants.

On March 6, 2020, the Greater Praise Intervenors filed a motion to dismiss, arguing that the constitutional claims raised by Metro, Shelby County, and the Metro School Board were without merit and that the Metro School Board did not have standing to challenge the Act. Similarly, on March 11, 2020, the State filed a motion to dismiss, asserting that none of the suing entities had standing, that the complaint failed to state a claim upon which relief could be granted, and that the equal protection claim and education clause claim were not ripe for review.[6] Metro, Shelby County, and the Metro School Board filed a motion for summary judgment on March 27, 2020, maintaining that the Act violated the Home Rule Amendment. The Natu Bah Intervenors filed a motion for judgment on the pleadings on April 15, 2020, arguing that the complaint failed to state a claim upon which relief could be granted.

The trial court held a hearing on April 29, 2020, and issued its memorandum and order on May 4, 2020. While the court dismissed the Metro School Board as a plaintiff for lack of standing,[7] it granted Metro and Shelby County's motion for summary judgment, concluding that the ESA Act violates the Home Rule Amendment, and enjoined the State from implementing the Act. Thus, the State, Greater Praise Intervenors, and Natu Bah

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Tenn. Code Ann. § 49-6-2602(3)(C). It is undisputed by the parties that, absent future legislative action, only Metro Nashville Public Schools, Shelby County Schools, and the Achievement School District fall within the enumerated statutory requirements.

[6] The State also later filed a motion to consolidate the case with the similar case of McEwen v. Lee, No. 20-0242-II.

[7] As previously noted, the issue of standing as it relates to the Metro School Board is not before us on appeal.

Intervenors' (collectively, the "Defendants") motions to dismiss and for judgment on the pleadings as they applied to the Home Rule Amendment claim were denied. The trial court took under advisement pending motions addressing Metro and Shelby County's equal protection claim and their education clause claim,[8] and deferred ruling on the motions in the case of McEwen v. Lee. The trial court sua sponte granted permission to Defendants to seek an interlocutory appeal under Tennessee Rule of Appellate Procedure Rule 9(a). On May 13, 2020, the trial court denied Defendants' joint motion for a stay pending appeal.

The State, Greater Praise Intervenors, and Natu Bah Intervenors filed applications for permission to appeal to the Court of Appeals under Rule 9 of the Tennessee Rules of Appellate Procedure. The State and Natu Bah Intervenors also moved the intermediate appellate court for a stay pending appeal. On May 19, 2020, the Court of Appeals declined to review the trial court's order denying a stay but granted Defendants' applications for appeal. The intermediate appellate court specified the following issues for review:

> 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.

The Court of Appeals expedited the appeal, and this Court declined to assume jurisdiction of the case or to review the denial of the stay on June 4, 2020. The intermediate appellate court ultimately affirmed the trial court, holding that Metro and Shelby County had standing to challenge the ESA Act under the Home Rule Amendment and that the Act was unconstitutional pursuant to the Home Rule Amendment. Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dept. of Educ., No. M2020-00683-COA-R9-CV, 2020 WL 5807636, at *8 (Tenn. Ct. App. Sept. 29, 2020), perm. app. granted, (Tenn. Feb. 4, 2021). We granted Defendants' applications for permission to appeal.

II. Scope and Standard of Review

This is an interlocutory appeal. The Court's review is therefore limited to those questions clearly within the scope of the issues certified for interlocutory appeal. Funk v. Scripps Media, Inc., 570 S.W.3d 205, 210 (Tenn. 2019). As noted above, in their complaint, Plaintiffs challenged the constitutionality of the ESA Act under (1) the Home

[8] These claims are not before this Court on appeal.

Rule Amendment; (2) the equal protection clauses; and (3) the education clause. This appeal, however, raises only one of those three constitutional challenges—the Home Rule Amendment challenge and Plaintiffs' standing to bring that challenge.

The trial court decided the issue of standing on the State's motion to dismiss pursuant to Tennessee Rule of Civil Procedure 12.02(6).[9] The Court reviews the motion to dismiss on the issue of standing de novo with no presumption of correctness. Effler v. Purdue Pharma, L.P., 614 S.W.3d 681, 687 (Tenn. 2020). On a motion to dismiss, the Court presumes all factual allegations to be true and construes them in favor of the plaintiff. Foster v. Chiles, 467 S.W.3d 911, 914 (Tenn. 2015). This is equally true with respect to factual allegations regarding standing. See Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992) (For the purposes of a challenge to standing "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." (second alteration in original) (internal quotation marks omitted)).

The trial court decided the merits of the Home Rule Amendment claim on Plaintiffs' motion for summary judgment. "Summary judgment is appropriate when '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 a judgment as a matter of law.'" Martin v. Rolling Hills Hosp., LLC, 600 S.W.3d 322, 330 (Tenn. 2020) (quoting Tenn. R. Civ. P. 56.04). "We review a trial court's decision on a motion for summary judgment de novo without a presumption of correctness." Id. In this case, review of Plaintiffs' claim requires consideration of the constitutionality of the ESA Act under the Home Rule Amendment. It, therefore, entails both constitutional and statutory construction. Issues of constitutionality and of constitutional and statutory construction are all questions of law, which the Court reviews de novo with no presumption of correctness. Willeford v. Klepper, 597 S.W.3d 454, 464 (Tenn. 2020).

III. Analysis

A. Standing

[9] It is not entirely clear from the discussion of standing in the trial court's memorandum and order denying Defendants' motions and granting Plaintiffs' motion for summary judgment whether the court concluded Plaintiffs have standing for purposes of all three constitutional claims or merely for purposes of their Home Rule Amendment claim. In summarizing the motions pending before it, however, the court seems to have indicated that it was deferring ruling on the issue of standing with respect to all other claims. Moreover, the certified issue and the decision of the Court of Appeals address standing only for purposes of the Home Rule Amendment claim. This Court's consideration of standing, therefore, is limited to the Home Rule Amendment claim.

The United States Constitution confines the jurisdiction of the federal courts to "cases" and "controversies." U.S. Const. art. III, § 2, cl. 1. Although the Constitution of Tennessee does not include a similar express limitation on the exercise of judicial power, Norma Faye Pyles Lynch Family Purpose LLC v. Putnam County, 301 S.W.3d 196, 202 (Tenn. 2009) (citing Miller v. Miller, 149 Tenn. 463, 261 S.W. 965, 971 (1924)), Tennessee courts have long recognized that "the province of a court is to decide, not advise, and to settle rights, not to give abstract opinions," id. at 203 (quoting State v. Wilson, 70 Tenn. 204, 210 (1879)). Tennessee courts therefore decide only "legal controversies." Id. (quoting White v. Kelton, 232 S.W. 668, 670 (Tenn. 1921)). To determine whether a particular case involves a legal controversy, Tennessee courts utilize justiciability doctrines that "mirror the justiciability doctrines employed by the United States Supreme Court and the federal courts." Id.; see also West v. Schofield, 468 S.W.3d 482, 489–90 (Tenn. 2015). One of these justiciability doctrines—standing—is disputed in this appeal.[10]

To determine whether standing exists, a court must focus on the party bringing the lawsuit rather than on the merits of the claim. Fisher v. Hargett, 604 S.W.3d 381, 396 (Tenn. 2020); Metro. Air Rsch. Testing Auth., Inc. v. Metro. Gov't of Nashville & Davidson Cnty., 842 S.W.2d 611, 615 (Tenn. Ct. App. 1992); see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 799–800 (2015). The weakness of a claim on the merits must not be confused with a lack of standing. Ariz. State Legislature, 576 U.S. at 800. While standing "often turns on the nature and source of the claim asserted," it "in no way depends on the merits" of the claim. Warth v. Seldin, 422 U.S. 490, 500 (1975); see also Fisher, 604 S.W.3d at 396. Rather, to establish standing, three elements must be satisfied:

> 1) a distinct and palpable injury; that is, an injury that is not conjectural, hypothetical, or predicated upon an interest that a litigant shares in common with the general public; 2) a causal connection between the alleged injury and the challenged conduct; and 3) the injury must be capable of being redressed by a favorable decision of the court.

Fisher, 604 S.W.3d at 396 (citing City of Memphis v. Hargett, 414 S.W.3d 88, 97 (Tenn. 2013)). In this case, the crux of the controversy involves the first element.

[10] Another justiciability doctrine is ripeness. See Norma Faye Pyles Lynch Fam. Purpose LLC, 301 S.W.3d at 203. The State raises ripeness for the first time in its brief in this Court and argues that, "until the ESA Pilot Program is implemented, it is impossible to know what, if any, fiscal impact it will have on Plaintiffs." While there is a serious question of waiver as to the State's ripeness argument in this interlocutory appeal, we note that this argument is based solely on the fiscal impact of the statute. Because our decision as to standing is based on a separate alleged injury not implicated by the State's ripeness argument, we decline to dismiss this appeal for lack of ripeness.

The plaintiff bears the burden of establishing these elements "'by the same degree of evidence' as other matters on which the plaintiff bears the burden of proof." ACLU of Tenn. v. Darnell, 195 S.W.3d 612, 620 (Tenn. 2006) (quoting Petty v. Daimler/Chrysler Corp., 91 S.W.3d 765, 767 (Tenn. Ct. App. 2002)). The degree of evidence depends, of course, upon the stage of litigation at which standing is challenged. See Petty, 91 S.W.3d at 767; see also Lujan, 504 U.S. at 561 ("The party invoking federal jurisdiction bears the burden of establishing these elements. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." (citations omitted)). In this case, Defendants challenged standing through a motion to dismiss. Accordingly, Plaintiffs' factual allegations are presumed to be true and are construed in their favor. Foster, 467 S.W.3d at 914; see also Lujan, 504 U.S. at 561. Applying these standards, we conclude that Plaintiffs' allegations suffice to establish standing to contest the constitutionality of the ESA Act under the Home Rule Amendment.

The portion of the Home Rule Amendment at issue in this appeal provides:

> [A]ny 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, cl. 2. As this Court has previously explained, the Home Rule Amendment was added "to strengthen local self-government." Civil Serv. Merit Bd. of Knoxville v. Burson, 816 S.W.2d 725, 728–29 (Tenn. 1991); see also Farris v. Blanton, 528 S.W.2d 549, 551 (Tenn. 1975) ("The whole purpose of the Home Rule Amendment was to vest control of local affairs in local governments, or in the people, to the maximum permissible extent."). "The effect of the home rule amendments was to fundamentally change the relationship between the General Assembly and these types of municipalities, because such entities now derive their power from sources other than the prerogative of the legislature." S. Constructors, Inc. v. Loudon Cnty. Bd. of Educ., 58 S.W.3d 706, 714 (Tenn. 2001).

In their claim that the ESA Act is void under the Home Rule Amendment, Plaintiffs have alleged a distinct and palpable injury to the legal interest the Home Rule Amendment was enacted to protect—local control of local affairs. See Town of Black Brook v. State, 362 N.E.2d 579, 581 (N.Y. 1977) (holding that a locality has standing "when an act of the State Legislature is alleged to have encroached upon the powers of a locality in violation

of the home rule article," because "when a home rule challenge is brought, the powers the locality is seeking to protect are not suffered at the will of the State Legislature, but directly and specifically guaranteed by the Constitution"); Town of Dartmouth v. Greater New Bedford Reg'l Vocational Tech. High Sch. Dist., 961 N.E.2d 83, 96 (Mass. 2012) ("[A] municipality has standing to raise a claim that a legislative enactment violates the Home Rule Amendment, which restricts the Legislature's power to act in relation to cities and towns."). Accordingly, having concluded that Plaintiffs satisfied their burden of establishing standing by alleging the ESA Act violates their constitutionally protected interest in local control of local affairs, we affirm the Court of Appeals' decision that Plaintiffs have standing to challenge the constitutionality of the Act under the Home Rule Amendment. We reiterate that this determination on the issue of standing "in no way depends on the merits" of Plaintiffs' claim. Warth, 422 U.S. at 500.

B. The Home Rule Amendment

As previously noted, the portion of the Home Rule Amendment at issue is found at article XI, section 9, clause 2 of the Tennessee Constitution, which provides:

> [A]ny 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.

The ESA Act does not require the approval by a two-thirds vote of the local legislative body of Plaintiffs or require approval in an election by a majority of those voting in said election. Consequently, if the ESA Act implicates the Home Rule Amendment, the Act is unconstitutional and void thereunder. If the Act does not implicate the Amendment, Plaintiffs' constitutional challenge fails as a matter of law.

Like the Court of Appeals, we too find on the basis of the language of the Home Rule Amendment three requirements for its application: 1) the statute in question must be local in form or effect; 2) it must be applicable to a particular county or municipality; and 3) it must be applicable to the particular county or municipality in either its governmental or proprietary capacity. In this case, we find dispositive and so limit our analysis to the second requirement—that the ESA Act must be "applicable to" Plaintiffs in order to implicate the Home Rule Amendment.

By its terms, the ESA Act applies to Local Education Agencies ("LEAs"). See Tenn. Code Ann. § 49-6-2602(3)(C) (2020) (defining an "eligible student" to participate in the ESA program as one attending a school in certain limited LEAs); id. § 49-6-2602(7)

(defining an LEA by reference to Tenn. Code Ann. § 49-1-103 (2020), which 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"). By its terms, the ESA Act does not facially apply to cities or counties such as Plaintiffs. However, the trial court and intermediate appellate court found, and Plaintiffs contend in this Court, that the ESA Act is applicable to them within the meaning of the Home Rule Amendment. We disagree.

The trial court found that the ESA Act is applicable to Plaintiffs because of what it viewed as the inseparable partnership between the LEAs and Plaintiffs. The trial court explained that "school systems (which are the same as LEAs) cannot be viewed as separate and distinct from the local governments that fund them. They are truly in a partnership." The Court of Appeals similarly relied on the financial relationship between Plaintiffs and their respective LEAs in finding that the ESA Act is applicable to Plaintiffs. As the Court of Appeals summarized:

> 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.

Metro. Gov't of Nashville & Davidson Cnty., 2020 WL 5807636, at *4. In particular, the Court of Appeals noted that Tennessee Code Annotated section 49-6-2605(b)(1), which has been characterized as the "counting requirement," requires that each participating student still be counted in the enrollment figures for the LEA in which the student resides. This results in Plaintiffs being required to appropriate, tax, and fund their LEAs for those participating students. The Court of Appeals characterized the effect of the counting requirement, in conjunction with the maintenance of effort statute, as inflating the amount of local taxes that must be raised and appropriated by Plaintiffs and keeping Plaintiffs' appropriations for the county school system artificially high. Id. at *3 n.1.

In this Court, Plaintiffs have argued that while the ESA Act applies in form to LEAs, it applies in effect to them. According to Plaintiffs, they must tax and fund their LEAs under the ESA Act at the same level as when the participating students were still attending schools in the LEAs. The ESA Act, thus, impacts Plaintiffs' funding of public education and so, according to Plaintiffs, is applicable to them.

The Natu Bah Intervenors, and now the State as well, argue that the lower courts and Plaintiffs conflate two distinct requirements for the application of the Home Rule Amendment and the distinct language used in those two requirements—namely, that 1) the statute in question must be "local in form or *effect*"; and that 2) it must be "*applicable to* a particular county or municipality." The State asserts that, for purposes of the Home Rule Amendment, the common understanding of the phrase "applicable to" is that the statute "regulates" or "governs" the county or municipality.[11] We agree.

It goes without saying that, among the many functions a statute may have, one primary function is to govern or regulate not only certain subject matters—such as education—but particular classes of people or entities. See, e.g., State v. Blockman, 615 S.W.2d 672, 674–75 (Tenn. 1981). This Court has previously stated that "[r]egulate, as defined by lexicographers, is to adjust by rule or method, to direct, to rule, to govern, to methodize, to arrange. Every element of this definition involves restraint, *the exercise of a power over a thing by which its activities are ruled or adjusted, or directed to certain ends*." State ex rel. Saperstein v. Bass, 152 S.W.2d 236, 238 (Tenn. 1941) (emphasis added) (quoting City of Nashville v. Linck, 80 Tenn. 499, 512 (1883)); see also Silverman v. City of Chattanooga, 57 S.W.2d 552, 552 (Tenn. 1933) ("The word regulate is defined . . . as meaning, 'to adjust or control by rule, method, or governing principles or laws.'").

Here, we conclude that the ESA Act regulates and governs only the conduct of the LEAs, not of the Plaintiffs. Tennessee Code Annotated section 49-6-2605(b)(1) specifically states that "[f]or the purpose of funding calculations, each participating student must be counted in the enrollment figures for the LEA in which the participating student resides." The practical impact of this language was explained by the Greater Praise Intervenors at oral argument: "The language of the [ESA Act] sets *responsibilities on the LEA as to how they count*. [The LEAs] then turn those counts over to the counties, but it's not that the county is doing any different counting. It's the LEA that's doing a different count and then turning those numbers over to the county, *which then responds according to formula*." (Emphasis added).[12] In other words, it is the conduct of the LEA in how it

[11] See February 24, 2022 Oral Argument at 12:50, Metro. Gov't of Nashville & Davidson Cnty., No. M2020-00683-SC-R11-CV (Tenn. Feb. 24, 2022), https://youtu.be/vqZXyQz-6Uc ("When we talk about something being applicable to as lawyers and as courts, I think the common understanding is that a law applies if it governs or if it regulates the entity."); see also June 3, 2021 Oral Argument at 12:40, Metro. Gov't of Nashville & Davidson Cnty., No. M2020-00683-SC-R11-CV (Tenn. June 3, 2021), https://youtu.be/bWibEJvm8PU ("I think that when you're talking about a law in particular applicable to means that it regulates somebody or something.").

[12] This understanding of the mechanics of the counting requirement was not disputed by the Plaintiffs at oral argument. Moreover, the description of the counting requirement is supported by Tennessee Code Annotated section 49-2-203(a)(9)(A)(i), which "[r]equire[s] the director of schools and the chair of the local board of education to prepare a budget on forms furnished by the commissioner, and when the budget has been approved by the local board, to submit the budget to the appropriate local

counts its students that the Act governs and regulates. The obligations of the counties to fund the LEAs are derived from other statutory provisions related to school funding outside of the ESA Act. See, e.g., Tenn. Code Ann. § 49-3-356(a) (2020) ("Every local government shall appropriate funds sufficient to fund the local share of the BEP."); Tenn. Code Ann. § 49-3-315 (2020) (requiring the county trustee, in cooperation with the county director of schools, to distribute "[a]ll school funds for current operation and maintenance purposes collected by [the] county" pro rata among all LEAs in the county in accordance with weighted full-time equivalent average daily attendance ("WFTEADA")); Tenn. Code Ann. §49-3-307(a)(10) (2020) (outlining the considerations for determining the local portion of the BEP). See generally Tenn. Comptroller of the Treasury, Basic Education Program (BEP), https://comptroller.tn.gov/office-functions/research-and-education-accountability/interactive-tools/bep.html (last visited May 3, 2022). We simply do not agree with Plaintiffs that the effects of the interplay between the ESA's counting requirement and the statutes establishing their funding obligations are enough to trigger the application of the Home Rule Amendment. While Plaintiffs may be affected by the Act, we do not agree with the dissent that this is enough to render the ESA Act "applicable to" them for purposes of the Home Rule Amendment.[13]

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legislative body," and section 49-3-351(d), which provides that "the [Basic Education Program] ("BEP")] of every LEA will be calculated on the basis of prior year [enrollment figures,]" including average daily membership ("ADM"), see Tenn. Code Ann. § 49-3-302(2) (2020), full-time equivalent average daily attendance ("FTEADM"), see id. § 49-3-302(9), or identified and served special education students. LEAs are tasked with reporting average daily membership for purposes of funding at various points throughout the year. See Tenn. Dep't of Educ., Off. of Loc. Fin., Basic Education Program Handbook for Computation 70–71 (2018), https://www.tn.gov/content/dam/tn/stateboardofeducation/documents/bepcommitteeactivities/2019-bep/BEPHandbook%20revised%20September%202018.pdf (last visited May 3, 2022).

[13] This interpretation is consistent with our principles of constitutional construction, particularly the presumption of precision in language to which this Court has ascribed for over sixty years. See Shelby Cnty. v. Hale, 292 S.W.2d 745, 748 (Tenn. 1956) ("[I]t will be presumed that the language thereof has been employed with sufficient precision to convey [the intent of the people.]"); Hooker v. Haslam, 437 S.W.3d 409, 426 (Tenn. 2014); see also Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1, 14 (Tenn. 2000) ("No words in our Constitution can properly be said to be surplusage . . . ."); Wallace v. Metro. Gov't of Nashville & Davidson Cnty., 546 S.W.3d 47, 52 (Tenn. 2018) ("We presume that the Legislature intended each word in a statute to have a specific purpose and meaning." (quoting Arden v. Kozawa, 466 S.W.3d 758, 764 (Tenn. 2015))); Welch v. State, 289 S.W. 510, 511 (Tenn. 1926) (noting that the presumption is particularly pertinent when considering the use of two or more different words or terms within the same provision of the Constitution). As noted above, Plaintiffs contend that the ESA Act is applicable to them for purposes of the Home Rule Amendment based on the asserted resulting financial effect of the ESA Act on them. Thus, Plaintiffs ask that the Court effectively read the phrase "applicable to" as synonymous with the phrase "having an effect on." We reject this construction. Such a construction would require the Court to assume that the drafters of the Home Rule Amendment were imprecise in their choice of two distinct terms, "applicable" and "effect," within the very same provision of the Constitution,

The Court also rejects the trial court's finding that Plaintiffs are so intimately related to their respective LEAs as to render them one and the same, thus making the ESA Act applicable to Plaintiffs. This argument is contrary to this Court's long-standing precedent with respect to the structure and operation of the educational system under Tennessee law. That jurisprudence establishes beyond refute that the LEAs are distinct from the county or municipal governments. See State ex rel. Weaver v. Ayers, 756 S.W.2d 217, 225 (Tenn. 1988) (describing the distinct roles and responsibilities of the State, the county boards of education, and the county governments, and noting the limited role of the county governments in the provision of education in Tennessee); see also Putnam Cnty. Educ. Ass'n. v. Putnam Cnty. Comm'n., No. M2003-03031-COA-R3-CV, 2005 WL 1812624, at *4–5 (Tenn. Ct. App. Aug. 1, 2005) (noting the separate origins, functions, and management of county governments and local boards of education); Rollins v. Wilson Cnty. Gov't, 154 F.3d 626, 630 (6th Cir. 1998) ("Under Tennessee law, the school systems are separate from the county governments. The two entities have separate origins, functions, and management."). The separateness of Plaintiffs and their respective LEAs is not ameliorated by their financial connections. As another panel of the Court of Appeals noted in a decision only months before that court's decision in this case, "[c]ounties and school systems perform separate functions. The 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 *8 (Tenn. Ct. App. Mar. 25, 2020) (citation omitted).

This argument also is contrary to the Court's precedent establishing that, while county boards of education operate in a sense as county government entities through their role in the educational partnership between themselves, the State, and the county governments, the county boards of education themselves are not bestowed with home rule authority. See S. Constructors, 58 S.W.3d at 715 n.10. In the absence of home rule authority, LEAs cannot logically be deemed to be endowed with the protection of the Home Rule Amendment.[14]

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and that the drafters did not intend each of those terms to have a specific purpose and meaning. We decline to make such an assumption.

[14] We find further support for our construction of the Home Rule Amendment in the history of the Amendment. As cogently explained by Justice Swepston in his concurring opinion in Fountain City Sanitary District v. Knox County Election Commission:

> [T]he so-called Home Rule Amendment was never intended to apply to any type of governmental corporation other than the cities of the different classes. In addition to what is stated in the opinion prepared by Tomlinson, J., it will be revealing to examine the Journal of the Constitutional Convention Proceedings, beginning on page 1038 and running down through 1059. A perusal of these pages will disclose that the word "cities" and the word "counties" are used throughout the discussion and that the word "municipality" appears only two or three times. There is not the slightest indication that there was any

For the foregoing reasons, the Court concludes that the ESA Act is not applicable to Plaintiffs for purposes of the Home Rule Amendment, the Home Rule Amendment is not implicated by the ESA Act, and Plaintiffs' claim that the ESA Act is unconstitutional under the Home Rule Amendment, therefore, fails as a matter of law.

IV. CONCLUSION

For the reasons stated herein, the Court affirms, albeit on different grounds, the judgment of the Court of Appeals that Plaintiffs have standing to pursue their constitutional challenge to the ESA Act under the Home Rule Amendment. The Court, however, reverses the judgment of the Court of Appeals on that claim and holds that the ESA Act is not implicated by the Home Rule Amendment and so is not rendered unconstitutional pursuant to that Amendment. Thus, the judgment of the trial court with respect to Plaintiffs' claim under the Home Rule Amendment is vacated, and the case is remanded to the trial court for entry of a judgment dismissing that claim, for further proceedings consistent with this opinion, and for consideration of Plaintiffs' remaining claims. Costs on appeal are taxed to Plaintiffs, for which execution may issue if necessary.

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ROGER A. PAGE, CHIEF JUSTICE

> thought in the minds of the different speakers of any type of municipality other than a "city" of one or the other class.
>
> Therefore, it is plain why the caption to Section 9 reads as follows:
>
> > Power over local affairs—Home rule for cities and counties—Consolidation of functions.——
>
> It, therefore, seems to me to be utterly nondeterminative that drainage districts, water districts, sanitary districts, school districts, etc., may properly be designated quasi municipal corporations or that many of them have a number of powers that are similar to or the same in substance as certain powers possessed by cities. They are simply not included within the intention of the framers of the Home Rule Amendment.

308 S.W.2d 482, 486 (Tenn. 1957) (Swepston, J., concurring).

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
February 24, 2022 Session[1]

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

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

No. M2020-00683-SC-R11-CV

SHARON G. LEE, J., with whom HOLLY KIRBY, J., joins, concurring in part and dissenting in part.

In this interlocutory appeal, the issues we address are whether the Plaintiffs, Metropolitan Government of Nashville and Davidson County ("Metro") and Shelby County, have standing to challenge the constitutionality of the Tennessee Education Savings Account Pilot Program,[2] ("the ESA Act"), and, if so, whether the ESA Act violates the Home Rule Amendment.

I agree with the Court that the Plaintiffs have standing to bring this action. The ESA Act causes a distinct and palpable injury to the Plaintiffs' sovereignty—their right to control their local affairs—as guaranteed by the Home Rule Amendment. As we have held, the Home Rule Amendment was adopted "to strengthen local self-government" and "to fundamentally change" the relationship with the General Assembly. *Civil Serv. Merit Bd. of Knoxville v. Burson*, 816 S.W.2d 725, 728 (Tenn. 1991); *S. Constructors, Inc. v. Loudon Cnty. Bd. of Educ.*, 58 S.W.3d 706, 714 (Tenn. 2001). Based on the Home Rule Amendment, Tennessee's counties and home-rule municipalities "derive their power from sources other than the prerogative of the legislature," and they enjoy constitutional protection against local legislation enacted without their consent. *S. Constructors*, 58

[1] This case was originally heard on June 3, 2021. In light of the untimely death of Justice Cornelia A. Clark, this case was re-argued on February 24, 2022.

[2] Tenn. Code Ann. §§ 49-6-2601 to -2612 (2020 & Supp. 2021).

S.W.3d at 714; Tenn. Const. art. XI, § 9, cl. 2. Thus, the Plaintiffs' standing is based on the ESA Act's impairment of their ability to self-govern regarding school funding.

I disagree with the Court that the ESA Act does not implicate the Home Rule Amendment. The Court's decision ignores the acknowledged harm to the Plaintiffs' sovereignty caused by the ESA Act.[3] It is this established injury to the Plaintiffs' ability to self-govern that the Home Rule Amendment was intended to protect. While the ESA Act facially refers only to a Local Education Agency ("LEA"),[4] the Act substantially affects the Plaintiffs' ability to decide issues of local concern. That is enough under our previous decisions to implicate the Home Rule Amendment. Without a provision of local approval as required by the Amendment, the ESA Act is unconstitutional.

The Home Rule Amendment

The Home Rule Amendment was adopted by the 1953 Limited Constitutional Convention and was ratified by Tennessee voters in November 1953. One area of concern for convention delegates was legislation that removed governmental functions from certain cities and counties without local approval.[5] By approving the Home Rule Amendment, the Convention sought to protect the rights of counties and municipalities by requiring that any local bill affecting them had to provide for one of two forms of local approval.[6]

The Home Rule Amendment to the Tennessee Constitution prohibited direct interference with local officeholders and required local approval for legislation affecting particular counties and municipalities:

> [*A*]*ny 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*

[3] The Court limits its analysis to whether the ESA Act applies to the Plaintiffs. I also limit my analysis to this point. In my view, the remaining requirements of the Home Rule Amendment are also met: that the ESA Act is local in form or effect and is applicable to the Plaintiffs in their governmental or proprietary capacities.

[4] LEAs include any county or city school system or special school district. *See* Tenn. Code Ann. § 49-1-103 (2020).

[5] Journal and Proceedings of the Limited Constitutional Convention of Tennessee 937 (1953).

[6] *Id.* at 1113.

> *majority of those voting in said election in the municipality or county affected.*

Tenn. Const. art. XI, § 9, cl. 2 (emphasis added).

The ESA Act

Under the ESA Act, "eligible students" in Metro and Shelby County—beginning with 5,000 students and increasing to 15,000 students in five years—may deposit their individual portion of state *and* local education funding into personalized savings accounts.[7] This transfer satisfies the state's funding obligations for those students, and the state need not provide any more funding for the LEA. *See* Tenn. Code Ann. § 49-6-2605(b)(1) (2020 & Supp. 2021). Students can withdraw from public schools and use their account funds as vouchers to pay private school tuition and related expenses. *See* Tenn. Code Ann. §§ 49-6-2602(9) (2020 & Supp. 2021); 49-6-3001(c)(3)(A)(iii) (2020 & Supp. 2021) (defining "private school" as a subset of "nonpublic school[s]"). The Plaintiffs have to appropriate the same level of per-pupil funding to an LEA as the year before, regardless of any decrease in state funding.[8]

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[7] Under the ESA Act, "eligible students" are students zoned to attend any school in an LEA, other than the Achievement School District, with at least ten 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). "Priority schools" are designated by the Commissioner of the Department of Education and include schools in the bottom five percent of schools in performance, schools failing to graduate one-third 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) (2020 & Supp. 2021). Students need not be zoned for one of the schools meeting all three of the ESA Act's criteria to be eligible for a voucher account. As long as a school district contains ten such schools, all of its students may be eligible, no matter the school they are zoned to attend. Students zoned to attend a school in the Achievement School District as of May 24, 2019, are also eligible for an account. *Id.* § 49-6-2602(3)(C)(ii). The Achievement School District is an LEA within the Tennessee Department of Education, consisting of low-performing schools run by the District or certain charter management organizations. Achievement Sch. Dist., *About Us*, http://achievementschooldistrict.org/index.php/aboutus/ (last visited May 3, 2022). All the schools in the Achievement School District are in Metro and Shelby County.

[8] *See* Tenn. Code Ann. §§ 49-3-314; 49-6-2605(b)(1) (requiring the county school districts to "count[]" each student with a voucher account, "[f]or the purpose of funding calculations," in their

As background, the ESA Act was first proposed to apply to Tennessee's five largest counties: Metro (Davidson County), Shelby, Knox, Hamilton and Madison.[9] When the ESA Act met with opposition in the House, the scope of the Act was limited to Metro and Shelby, Hamilton, and Knox Counties by changing the definition of "eligible students."[10] The ESA Act narrowly passed the House by a vote of fifty to forty-eight after the Speaker of the House promised that the Senate version of the Act would exclude Knox County. In the Senate, the final version of the ESA Act applied only to Metro and Shelby County based on a narrow definition of "eligible students" that included students zoned to attend school in districts with ten or more priority schools in 2015 and 2018 and that were among the bottom ten percent of schools in 2017.[11] This definition anchored the criteria to particular years, meaning that the ESA Act could only ever apply to Metro and Shelby County without further legislation. The ESA Act passed by a margin of fifty-one to forty-six votes in the House and nineteen to fourteen votes in the Senate. Applying only to Metro and Shelby County, the ESA Act had no provision for approval by a two-thirds vote of the local legislative body or a majority vote in a local election in either county.

The ESA Act's Application to the Plaintiffs

The central issue here is whether the ESA Act is "applicable to" the Plaintiffs to implicate the Home Rule Amendment. The phrase "applicable to" comes from the Home Rule Amendment, which provides that the Amendment applies to a statute (here, the ESA Act) that is "local in form or effect *applicable to a particular county* . . . in its governmental . . . capacity." Tenn. Const. art. XI, § 9, cl. 2 (emphasis added). The Court holds that the phrase "applicable to" in the Home Rule Amendment means that a statute must "regulate" or "govern" a county or municipality to implicate the Home Rule Amendment. According to the Court, the ESA Act only regulates or governs the LEAs, not the Plaintiffs. Yet this holding conflicts with our previous decisions interpreting the Home Rule Amendment and with the Court's own analysis on standing, which recognizes and depends to a large degree on the fundamental intent, purpose, and effect of the Home Rule Amendment.

The fact that the ESA Act names the LEAs and not the Plaintiffs should not be the end of our review. We cannot elevate form over substance and stop short with our analysis.

"enrollment figures"); *see also* Tenn. Code Ann. § 49-3-356(a) (requiring that "[e]very local government shall appropriate funds sufficient to fund the local share" of the statewide funding levels).

[9] H.B. 0939, Amend. No. 1, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019) (H. Amend. 0188) (withdrawn Apr. 23, 2019).

[10] *See id.* amend. No. 2 (H. Amend. 0445) (as adopted by the House Apr. 23, 2019).

[11] S.B. 0795, Amend. No. 5, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019) (S. Amend. 0417) (as adopted by the Senate Apr. 25, 2019).

This Court has long disfavored such a formalistic analytical approach to the Home Rule Amendment. As we explained over forty years ago:

> Since 19 November 1953, it has been firmly established that any and all legislation "private and local in form [o]r effect" affecting Tennessee counties or municipalities, in any capacity, is absolutely and utterly void unless the Act requires approval of the appropriate governing body or of the affected citizenry.
>
> 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 the amendment. The whole purpose of the Home Rule Amendment was to vest control of local affairs in local governments, or in the people, to the maximum permissible extent. 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). Thus, we should see whether, although not expressly named in the ESA Act, the Plaintiffs are in fact governed or regulated by the Act. We do this by seeing if the Act substantially affects the Plaintiffs in a material way.

In *Chattanooga-Hamilton County Hospital Authority v. City of Chattanooga*, 580 S.W.2d 322 (Tenn. 1979), we held that the Home Rule Amendment was implicated as to a county when two private acts expressly named and so governed or regulated a newly created hospital authority and, in addition, substantially affected the county.[12] We also held that the Home Rule Amendment was not implicated as to a city because the private acts did not "substantially affect[]" the city. *Id.* at 328. The lesson from *Chattanooga-Hamilton County Hospital Authority* is that a statute that is facially directed at another entity, but which substantially affects a county, may be found to govern or regulate the county, be "applicable to" it, and thus implicate the Home Rule Amendment.

Consistent with *Chattanooga-Hamilton County Hospital Authority* is an official opinion from the Tennessee Attorney General finding "a strong argument" in favor of the correctness of the Secretary of State's determination that a private act was invalid because it did not provide for local approval under the Home Rule Amendment. Tenn. Att'y Gen. Op. No. 00-149, *Memphis School District, Validity of 1970 Private Acts, Ch. 30* [sic], at 2 (2000). The private act in question amended the Memphis City School System's charter

[12] We held that the private acts were valid because they provided for local approval by the county's electorate and legislative body. *See Chattanooga-Hamilton Cnty. Hosp. Auth.*, 580 S.W.2d at 328.

and, among other things, required candidates for the Memphis City School Board to file a nominating petition and deposit $100 with the Shelby County Election Commission secretary. If a candidate was elected or received ten percent of the votes cast, the Election Commission secretary had to refund the deposit to the candidate; otherwise, the secretary had to pay the deposit to the Comptroller of the City of Memphis to be paid to the School Board and earmarked for education.[13] The Attorney General concluded that the Private Act affected Shelby County and the City of Memphis, as well as the Memphis City School System. The Private Act did this by placing duties on officials of the County and the City and by directing how they would use certain funds. Thus, the Attorney General concluded the Home Rule Amendment required a referendum, which was not provided for in the Private Act. *See id.* In short, the Private Act was facially directed at the Memphis City School System but also affected Shelby County and the City of Memphis. It thus implicated the Home Rule Amendment.

Like the private act amending the Memphis City School System's charter, the ESA Act is facially directed at the LEAs but regulates or governs the Plaintiffs by substantially affecting them in a material way. The ESA Act does this by imposing certain duties and obligations on officials in Metro and Shelby County regarding school funding. Although an LEA prepares and submits to the county a proposed budget for school spending, the LEA cannot assess, levy or collect taxes to fund the budget. Meanwhile, the county must approve a budget for the LEA, set a tax rate, and levy and collect taxes to fund the budget. *See State ex rel. Weaver v. Ayers*, 756 S.W.2d 217, 221–25 (Tenn. 1988). LEAs are funded by both state and local governments, with the local portion varying according to local taxes collected by the counties. *See id.*; Tenn. Code Ann. § 49-3-307(a)(10) (2020). Overall funding levels are determined according to the state's Basic Education Program ("BEP").[14] Only in Metro and Shelby County are state and local education funds deposited in eligible students' savings accounts to pay for private education. *See* Tenn. Code Ann. § 49-6-2605(a). This transfer to the students' savings accounts satisfies the state's obligations under the BEP, and the state need not provide any further funding to the LEA. *See id.* § 49-6-2605(b)(1) ("The ESA funds for participating students must be subtracted from the state BEP funds otherwise payable to the LEA."). Yet the LEAs must continue to "count[]" each student with a voucher account, "[f]or the purpose of funding calculations," in their "enrollment figures"—even though the student no longer attends public schools. *Id.* Metro and Shelby County have to appropriate the same level of per-pupil funding as in the prior

[13] Act of March 2, 1970, ch. 340, § 7, 1970 Tenn. Priv. Acts 1271, 1274, 1277. *But cf.* Tenn. Att'y Gen. Op. No. 00-149, at 1 n.2 (noting the act never took effect based on the Secretary of State's certification that it was "rejected or disapproved or not concurred in by the proper authorities").

[14] "'Basic Education Program' or 'BEP' is the funding formula for the calculation of kindergarten through grade twelve (K-12) education funding necessary for our schools to succeed[.]" Tenn. Code Ann. § 49-3-302(3) (2020).

year, regardless of any change in the state's funding for the later year. *See* Tenn. Code Ann. § 49-3-314(c)(2) (2020) ("No LEA shall use state funds to supplant total local current operating funds . . . ."); *see also* Tenn. Code Ann. § 49-3-356(a) (2020) ("Every local government shall appropriate funds sufficient to fund the local share of the BEP."). Only in Metro and Shelby County may "eligible" students leave the public school system for private schools while still being counted as public school students for funding purposes. This means that Metro and Shelby County have to continue to fund the local share of the BEP for ESA students attending private schools but not for non-ESA students who attend private schools.

In short, the ESA Act harms the Plaintiffs in their sovereign capacity. It does this by removing from the Plaintiffs the discretion to apply school funds to any public need they may deem appropriate—including education—or to adjust their tax rates depending on public school enrollment. The ESA Act, thus, substantially affects the Plaintiffs in a material way and so governs or regulates them, thereby implicating the Home Rule Amendment. That is why under the Home Rule Amendment, the Plaintiffs have a constitutional right to locally approve any statute that affects them in their sovereign capacity.

Our early Home Rule Amendment decision in *Fountain City Sanitary District v. Knox County Election Commission*, 308 S.W.2d 482 (Tenn. 1957), does not undercut this analysis or conclusion. Indeed, it has no real bearing. This decision suggests that certain local governmental or quasi-governmental entities, such as sanitary districts, are not *themselves* municipalities for purposes of the Home Rule Amendment. *See also Perritt v. Carter*, 325 S.W.2d 233 (Tenn. 1959) (holding that special school districts are not municipalities under the Home Rule Amendment). I agree. And if a statute only governs or regulates these types of entities, the statute may not implicate the Home Rule Amendment. But that misses the point. *Fountain City Sanitary District* did not consider whether a statute that facially governs or regulates an entity but also substantially affects a county or municipality in a material way also governs or regulates, and so is applicable to, the county or municipality—thereby implicating the Home Rule Amendment. Here, the ESA Act, while facially directed at the LEAs, substantially affects the Plaintiffs in a material way. That the LEAs themselves are not counties or municipalities is irrelevant to this analysis and conclusion.

Under the Home Rule Amendment, it is "firmly established that any and all legislation 'private and local in form [o]r effect' affecting Tennessee counties or municipalities, in any capacity, is absolutely and utterly void unless the Act requires approval of the appropriate governing body or of the affected citizenry." *Farris*, 528 S.W.2d at 551 (quoting Tenn. Const. art. XI, § 9, cl. 2). "The whole purpose of the Home Rule Amendment was to vest control of local affairs in local governments, or in the people,

to the maximum permissible extent." *Id.* To this end, "[t]he sole constitutional test must be whether the legislative enactment, irrespective of its form, is local in effect and application." *Id.* To adopt the Court's formalistic construction of the Home Rule Amendment and the ESA Act is to ignore this purpose and to elevate form over substance. *Cf. 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 the amendment.")

For these reasons, I agree the Plaintiffs have standing because of the ESA Act's harm to their sovereignty. But I respectfully dissent from the Court's decision on the constitutionality of the Tennessee Education Savings Account Pilot Program under the Home Rule Amendment. I would find the ESA Act unconstitutional.

_____

SHARON G. LEE, JUSTICE

Exhibit

B

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE
February 24, 2022 Session

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

Chancery Court for Davidson County
No. 20-0143-II

No. M2020-00683-SC-R11-CV

JUDGMENT

This case was heard upon the entire record on appeal from the Court of Appeals, application for permission to appeal having heretofore been granted, and briefs and argument of counsel; and upon consideration thereof, this Court is of the opinion that Plaintiffs have standing to pursue their constitutional challenge to the ESA Act under the Home Rule Amendment as determined by the Court of Appeals. However, this Court reverses the judgment of the Court of Appeals in part and holds that the ESA Act is not implicated by the Home Rule Amendment and so is not rendered unconstitutional pursuant to that Amendment.

Accordingly, the judgment of the Court of Appeals is reversed. The judgment of the trial court with respect to Plaintiffs' claim under the Home rule Amendment is vacated and the case is remanded to the trial court for entry of a judgment dismissing that claim, for further proceedings consistent with this opinion, and for consideration of Plaintiffs' remaining claims. Costs on appeal are taxed to Plaintiffs, for which execution may issue if necessary.

Exhibit

C

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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

Chancery Court for Davidson County
No. 20-0143-II

No. M2020-00683-SC-R11-CV

ORDER

On May 31, 2022, Appellees, the Metropolitan Government of Nashville and Davidson County, Tennessee and the Shelby County Government, filed a petition for rehearing pursuant to Rule 39 of the Tennessee Rules of Appellate Procedure. The Court has thoroughly reviewed the petition. The Court previously considered the issues raised in the petition in the course of its resolution of the appeal. The petition, therefore, is respectfully denied.

PER CURIAM

Sarah K. Campbell, Justice, Not Participating

Exhibit

D

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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; s*ee 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
Allison L. Bussell
Marlinee C. Iverson
E. Lee Whitwell
Stephanie A. Bergmeyer
David Hodges

Keith Neely
Jason Coleman
Braden H. Boucek
Arif Panju
Christopher M. Wood
Thomas H. Castelli
Stella Yarbrough
Christine Bischoff
Lindsey Rubinstein
David G. Sciarra
Wendy Lecker
Jessica Levin
Brian K. Kelsey
Daniel R. Suhr
Timothy Keller

Exhibit

E

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

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

ORDER

On May 4, 2020, the Court granted the motion for summary judgment filed by Plaintiffs Metropolitan Government of Nashville and Davidson County and Shelby County Government, declared the Tennessee Education Savings Account Pilot Program, codified at Tenn. Code Ann. §§ 49-6-2601, *et seq.*, unconstitutional, and enjoined its implementation and enforcement. This matter is now before the Court on a joint motion to stay the injunction pending appeal filed by Defendants Tennessee Department of Education ("TDOE"), Education Commissioner Penny Schwinn, and Governor Bill Lee (collectively, "State Defendants") and Intervenor-Defendants Natu Bah, Builguissa Diallo, Bria Davis, Star Brumfield, Greater Praise Christian Academy, Sensational Enlightenment Academy Independent School, Ciera Calhoun, Alexandria Medlin, and David Wilson, Sr. ("Intervenor-Defendants"). The Court held oral argument on the motion to stay the injunction on May 7, 2020.

Upon consideration of the parties' positions, the Court hereby orders as follows:

1. The motion to stay the injunction as requested under Tennessee Rule of Civil Procedure 62.03 is **DENIED**.

2. State Defendants are permitted to receive applications to the ESA Program through May 7, 2020.

3. State Defendants remain otherwise enjoined from using State resources to process applications, engage with parents and schools, or remit any funds in support of the program.

4. State Defendants are ordered to post on the ESA website a notice to the public that the program is currently enjoined, the result is being appealed, the State hopes to be successful on appeal and put the program in effect for the upcoming school year, but that it remains uncertain at this time and families should have a backup plan for this coming school year. State Defendants are further ordered to file a notice with the Court regarding their compliance with this requirement. Other public communications by the State regarding the ESA program shall be consistent with the requirements of this paragraph.

It is so **ORDERED**.

Entered this 13th day of May, 2020.

Anne C. Martin
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APPROVED FOR ENTRY:

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Exhibit

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IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

ROXANNE MCEWEN et al.,

Plaintiffs,

v. Case No. 20-0242-II

BILL LEE, in his official capacity as Governor of the State of Tennessee et al.,

Defendants.

AFFIDAVIT OF KAY JOHNSON

STATE OF TENNESSEE)

COUNTY OF SHELBY)

I, Kay Johnson, do swear under oath as follows:

1. I am an adult citizen of Shelby County, Tennessee, and of sound mind. I have personal knowledge of each of the statements herein and, if called for deposition or trial, would testify as stated below.

2. I am the Director of Greater Praise Christian Academy ("GPCA"), a nonprofit, private, Christian school in Memphis, Shelby County, Tennessee. As Director of GPCA, I am the full-time, chief executive officer responsible for all administrative decisions, including but not limited to the decisions below regarding admissions, staffing, and the direction of the school. I make the statements below on behalf of myself and GPCA.

3. GPCA serves families, primarily in the Frayser neighborhood of Memphis, who are looking for a quality K-12 education in a safe, small, private, Christian environment.

4. GPCA intentionally serves students who are some of the hardest to teach: they are

academically challenged and come from families that are economically challenged.

5. Most families served by GPCA are low-income, minority families.

6. In fact, so many of the GPCA families served are low-income that it is designated by the U.S. Department of Education as a Title I school, and every student at the school is eligible to receive free lunch.

7. GPCA is specifically designed to assist students who are academically behind in the traditional public-school system or who have social barriers at home that hinder their academic performance. We love these children and work tirelessly for their success.

8. Last year, I became aware that the State of Tennessee had enacted the Tennessee Education Savings Account ("ESA") Pilot Program to provide an ESA up to approximately $7,100 per year for students like those served by GPCA to pay for costs like tuition, textbooks, uniforms, and transportation.

9. GPCA was among the first private schools to submit an Intent to Participate statement for the ESA Pilot Program to the Tennessee Department of Education.

10. GPCA currently serves sixty (60) students. I informed the Tennessee Department of Education that, with the ESA Pilot Program in place, GPCA could serve another eighty-four (84) students, for a total of one hundred forty-four (144) students. This will allow us to keep our classroom size at our desired twelve-to-one (12:1) student-to-teacher ratio. GPCA is known in the community for the work we do with students in grades six through twelve, but the ESA Pilot Program will allow us to concentrate on adding students in grades Kindergarten through eight.

11. GPCA is a Category IV private school in Tennessee for the current school year. Because the ESA Pilot Program is offered only to Category I-III private schools, I began working in January with the Tennessee Department of Education for GPCA to become a Category I private school by August 2020. This has required much work on many fronts, both

academic and administrative.

12. Placing a temporary injunction on the ESA Pilot Program will cause a major hardship to GPCA. The status quo is that GPCA has been working hard since January on efforts to more than double the size of our school. Placing a temporary injunction on the ESA Pilot Program will not preserve the status quo. It will stop us in our tracks at a critical moment in our school's history in which we need to be moving full-steam ahead toward the 2020-2021 school year. Coronavirus has not stopped us. We ask this Court not to stop us either.

13. Currently, GPCA leases one building to house its school and shares a second building. Our expansion with the ESA Pilot Program will require GPCA to fully lease the second building. I have already met with officers from the state fire marshal and paid them fees to approve our facilities for the expanded number of students. I need to tell my landlord right away if I will not be using all of the second building.

14. I have already hired a specialist to help me with my administrative duties at GPCA to ensure that we meet the qualifications for a Category I school and for participation in the ESA Pilot Program.

15. I have already begun the process of hiring at least ten new teachers that GPCA needs to serve our expanded student body with the ESA Pilot Program. I have already spoken with two math coaches: one for middle school and one for high school. I have pulled résumés for other teachers. To obtain the best teachers for our school, GPCA will need to sign contracts with new teachers before the first week in June, 2020.

16. I have already notified the U.S. Department of Education Title I program that GPCA will be expanding its enrollment and participating in the ESA Pilot Program. I have told them of the need for more funding and how those funds will be used. Placing a temporary injunction on the ESA Pilot Program will harm me in keeping the federal government apprised

of our plans.

17. I have already reviewed and decided on a new year-long, schoolwide assessment that will help GPCA as we transition to administering the Tennessee comprehensive assessment program (TCAP) tests for math and English language arts for ESA students in grades 3-11, as required by the ESA Pilot Program.

18. In short, since January I have been working diligently on days, nights, and weekends to ensure that GPCA will participate in the ESA Pilot Program this August. I have even explored whether we can start school early in July to make up for time lost because of COVID-19. Placing a temporary injunction on the pilot program will cause much harm to GPCA and to the students we are trying to serve in a few short months.

FURTHER AFFIANT SAYETH NOT.

Signed by Kay Johnson
Director, Greater Praise Christian Academy

Subscribed to and sworn in compliance with Executive Order No. 26 by Tennessee Governor Bill Lee, dated April 9, 2020, before me this 14 day of April, 2020

Notary Public

my Comm Exp. July 31, 2022

ROBERT H. BROWN
STATE OF TENNESSEE
NOTARY PUBLIC
COUNTY OF SHELBY