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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,	)	
vs.	)	Case No. 20-0143-II
	)	Chancellor Anne C. Martin, Chief Judge
TENNESSEE DEPARTMENT OF EDUCATION, et al.,	)	Judge Tammy M. Harrington
	)	Judge Valerie L. Smith
Defendants,	)	
and	)	
NATU BAH, et al.,	)	
Intervenor-Defendants.	)	**CONSOLIDATED**

ROXANNE McEWEN, et al.,	)	
Plaintiffs,	)	
vs.	)	Case No. 20-0242-II
	)	Chancellor Anne C. Martin, Chief Judge
BILL LEE, in his official capacity as Governor of the State of Tennessee, et al.,	)	Judge Tammy M. Harrington
	)	Judge Valerie L. Smith
Defendants,	)	
and	)	
NATU BAH, et al.,	)	
Intervenor-Defendants.	)	

MEMORANDUM AND ORDER

This order is issued by Judges Tammy M. Harrington and Valerie L. Smith. Chancellor Anne C. Martin, Chief Judge, joins its holdings only in Sections I.A.2.i (standing of County

Plaintiffs, Education Clause claim, enforceable right belongs to the students), I.A.3 (standing of County Plaintiffs, *ultra vires* claim), I.B.1 (taxpayer standing of *McEwen* Plaintiffs), I.B.2.iv (parent standing of *McEwen* Plaintiffs, ESA Act claim), I.B.2.v (parent standing of *McEwen* Plaintiffs, UAPA claim), and I.B.2.vi (parent standing of *McEwen* Plaintiffs, Appropriations Clause claim). She writes separately below.

The parties in this matter appeared through counsel on September 19, 2022, before this Court—presided over by a Three-Judge Panel appointed by the Tennessee Supreme Court pursuant to Tenn. Code Ann. § 20-18-101 and Tenn. Sup. Ct. Interim R. 54—to argue six motions made under Rule 12 of the Tennessee Rules of Civil Procedure. These motions consist of four motions to dismiss and two motions for judgment on the pleadings brought by the defendants and intervenor-defendants in this matter. The Court took the motions under advisement and is now ready to rule.

For the reasons that follow, we hold the plaintiffs in this case lack standing to pursue their claims. In the alternative, we hold those claims lack ripeness. Therefore, the motions of the defendants and intervenors are **GRANTED** with respect to those issues and **DENIED** as moot as to all other issues. The Amended Complaints are **DISMISSED**.

Background

Plaintiffs the Metropolitan Government of Nashville and Davidson County and Shelby County are referred to as County Plaintiffs or Plaintiff Counties. Plaintiffs Roxanne McEwen, David P. Bichell, Terry Jo Bichell, Lisa Mingrone, Claudia Russell, Inez Williams, Heather Kenny, Elise McIntosh, and Apryle Young are referred to as the *McEwen* Plaintiffs. Absent Dr. Russell, the remaining *McEwen* Plaintiffs are referred to as Parent Plaintiffs or Plaintiff Parents. The Court utilizes "Plaintiffs" to denote the plaintiffs from both cases.

Defendants Bill Lee, Lillian Hartgrove, Robert Eby, Nick Darnell, Jordan Mollenhour, Warren Wells, Ryan Holt, Nate Morrow, Larry Jensen, Darrell Cobbins, Emily House, the Tennessee Department of Education, and Penny Schwinn are referred to collectively as State Defendants. Intervenors Natu Bah, Builguissa Diallo, Star Brumfield, Greater Praise Christian Academy, Sensational Enlightenment Academy Independent School, Ciera Calhoun, Alexandria Medlin, and David Wilson, Sr., are collectively referred to as Intervenor-Defendants. Intervenors Bah, Diallo, and Brumfield have styled themselves as "Parent-Intervenors" and are designated as such when the Court refers to them separately from the other Intervenor-Defendants. Intervenors Greater Praise Christian Academy, Sensational Enlightenment Academy Independent School, Calhoun, Medlin, and Wilson have styled themselves as "Greater Praise Intervenor-Defendants" and are similarly designated as such when the Court refer to them separately from Parent-Intervenors. The Court utilizes "Defendants" to denote both State Defendants and Intervenor-Defendants.

The relevant facts and procedural posture of this case have been adequately recounted in a prior order of this Court. Mem. & Order, at 2–6, 11, No. 20-0143-II & No. 20-0242-II, Aug. 5, 2022.

Legal Standards

A motion to dismiss based upon Tennessee Rule of Civil Procedure 12.02(6) requires a court to determine if the pleadings state a claim upon which relief may be granted. Tenn. R. Civ. P. 12.02(6); *Cullum v. McCool*, 432 S.W.3d 829, 832 (Tenn. 2013). A Rule 12.02(6) motion challenges "only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence." *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011). A defendant filing a motion to dismiss "admits the truth of all the relevant and material allegations

contained in the complaint, but . . . asserts that the allegations fail to establish a cause of action." *Id.* (quoting *Brown v. Tenn. Title Loans, Inc.*, 328 S.W.3d 850, 854 (Tenn. 2010)) (alteration in original) (internal quotation marks omitted). The resolution of such a motion is determined by examining the pleadings alone. *Id.; see also Phillips v. Montgomery Cnty.*, 442 S.W.3d 233, 237 (Tenn. 2014). The Court may "grant a motion to dismiss only when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Elvis Presley Enterprises, Inc. v. City of Memphis*, 620 S.W.3d 318, 323 (Tenn. 2021) (quoting *Crews v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002)).

The Court examines a motion for judgment on the pleadings under Tennessee Rule of Civil Procedure 12.03 using the same standard as a Rule 12.02(6) motion to dismiss. Where, as here, a movant seeks judgment on the basis of the failure to state a claim, the motion ought to be denied "unless it appears that the plaintiff can prove no set of facts in support of the claim that would entitle him to relief." *Waller v. Bryan*, 16 S.W.3d 770, 773 (Tenn. Ct. App. 1999); *see also Trigg v. Middle Tenn. Elec. Membership Corp.*, 533 S.W.3d 730, 732 (Tenn. Ct. App. 1975) (citations omitted) ("State courts have held that on an appeal from an order allowing a judgment on the pleadings, all well pleaded facts and all reasonable inferences drawn therefrom must be accepted as true.").

Analysis

At the outset, we would note that in Tennessee, the courts are "charge[d] . . . to uphold the constitutionality of a statute wherever possible." *Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009). When presented with a question of the constitutionality of a statute, the Court must "begin with the presumption that an act of the General Assembly is constitutional" and "indulge every presumption and resolve every doubt in favor of the statute's constitutionality." *State v. Pickett*,

211 S.W.3d 696, 700 (Tenn. 2007) (quoting *Gallaher v. Elam*, 104 S.W.3d 455, 569 (Tenn. 2003)); *see also Waters*, 291 S.W.3d at 917 (Koch, J., concurring in part and dissenting in part) (citing *Gallaher*, 104 S.W.3d at 459–60; *In re Adoption of E.N.R.*, 42 S.W.3d 26, 31 (Tenn. 2001); *State ex rel. Maner v. Leech*, 588 S.W.2d 534, 540 (Tenn. 1979)) ("This presumption places a heavy burden on the person challenging the statute."); *Perry v. Lawrence Cnty. Election Comm'n*, 411 S.W.2d 538, 539 (Tenn. 1967) (quoting *Frazer v. Carr*, 360 S.W.2d 449 (Tenn. 1962)); *Bell v. Bank of Nashville*, 7 Tenn. 269 (1823) ("'[T]he Legislature of Tennessee, like the legislature of all other sovereign states, can do all things not prohibited by the Constitution of this State or of the United States.' . . . 'To be invalid a statute must be plainly obnoxious to some constitutional provision.'"). The Court will keep this presumption in mind as it undertakes its analyses.

I. Standing

The Tennessee Supreme Court recently discussed standing in the context of this very case, and this Court must apply the same standards then articulated:

> The United States Constitution confines the jurisdiction of the federal courts to cases and controversies. Although the Constitution of Tennessee does not include a similar express limitation on the exercise of judicial power, 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, Tennessee courts therefore decide only legal controversies. 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.
> . . .
>
> To determine whether standing exists, a court must focus on the party bringing the lawsuit rather than on the merits of the claim. The weakness of a claim on the merits must not be confused with a lack of standing. While standing often turns on the nature and source of the claim asserted, it in no way depends on the merits of the claim. 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.
>
> In this case, the crux of the controversy involves the first element. 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. The degree of evidence depends, of course, upon the stage of litigation at which standing is challenged. . . .

Metro. Gov't of Nashville & Davidson Cnty., 645 S.W.3d at 148–49 (citations & internal quotation marks omitted). While our Supreme Court held that the Plaintiffs had indeed established adequate standing to contest the constitutionality of the ESA Act under the Home Rule Amendment, both the different procedural posture of the motions now before us and the different claims require this Court to conduct a new analysis. *See id.* at 149 (noting that a plaintiff's burden depends upon the stage of the litigation at which standing is challenged); *id.* at 150 (supporting its reasoning with cases that held localities had standing to challenge allegedly unconstitutional interference in their local affairs under similar home rule provisions of other state constitutions). Thus, it is appropriate for the Court to consider the issue anew in the context of Plaintiffs' claims. We will first consider whether the County Plaintiffs have standing, then whether the *McEwen* Plaintiffs have standing as taxpayers, and finally whether the *McEwen* Plaintiffs have standing as parents of schoolchildren.

A. *Standing of County Plaintiffs*

Defendants argue County Plaintiffs lack standing to bring their claims. Primarily, they assert the absence of a distinct and palpable injury, but they also dispute the causal connection between County Plaintiffs' alleged injury and the Act. County Plaintiffs point to the diverted funding as a clear injury in light of their continued obligation to fund the education of students who have left their school systems and taken their state funding with them. The Court addresses each claim in turn below. For the reasons that follow, we find County Plaintiffs lack standing to bring any of their claims.

1. Equal Protection Claim

State Defendants point to our Supreme Court's prior statement that "a political subdivision of the state . . . 'is limited to asserting rights that are its own,' meaning that it cannot merely 'assert the collective individual rights of its residents.'" *City of Memphis v. Hargett*, 414 S.W.3d 88, 100 (quoting 56 Am. Jur. 2d *Municipal Corporations, Counties, and Other Political Subdivisions* § 734, at 817–18 (2010)). "[R]ights that are its own" means just that—unlike a private organization, County Plaintiffs cannot establish third-party standing; they cannot bring suit on behalf of their constituents even when their interests align. *See id.* at 100 n.10 (citing *ACLU v. Darnell*, 195 S.W.3d 612, 626 (Tenn. 2006)). And State Defendants argue this is precisely what County Plaintiffs have done with respect to their Equal Protection claim by asserting the differential treatment of their school districts and students rather than the counties themselves. Such treatment, according to State Defendants, cannot establish an injury to the counties. *See Metro. Gov't of Nashville & Davidson Cnty.*, 645 S.W.3d at 153 ("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 . . . ."); *City of Memphis*, 414 S.W.3d at 100 & n.10. County Plaintiffs respond, however, that their money "is the heart and soul of the ESA Act" and that to argue they suffer no injury "is to ignore the fiscal realities of the Act entirely." County Plaintiffs explain that those Counties not subject to the ESA Act pay their school districts the local contribution required by the existing state funding formula through their annual budgeting process. But because of the Act, the school districts for County Plaintiffs will receive less money from the State while County Plaintiffs are required to keep funding those districts as if the participating students had never left for private schools. They argue the ESA Act requires them to fund the private school education of ESA students—a burden it does not place on any other county in this state.

Greater Praise Intervenor-Defendants argue this alleged injury is entirely speculative because it would only occur if those school districts request supplemental funding from County Plaintiffs to educate students no longer attending those schools. And even if the funding is requested, Greater Praise Intervenor-Defendants argue, County Plaintiffs do not need to contribute that funding. Thus, Greater Praise Intervenor-Defendants maintain the injury is merely hypothetical and contingent upon County Plaintiffs' own preferences. State Defendants, on the other hand, assert no causal connection between this harm and the ESA Act exists because the funding obligation County Plaintiffs point to does not come from the ESA Act but the education funding statute. Moreover, State Defendants claim County Plaintiffs admitted on appeal that their total appropriations remain roughly the same even after implementation of the ESA Act.

We are unpersuaded that County Plaintiffs have standing to pursue their equal protection claim. As County Plaintiffs themselves state, their money "is the heart and soul of the ESA Act" and, thus, this dispute. Any disparate treatment between County Plaintiffs and the other counties of this state must come down to a disparate treatment in funding. But the loss of money has already been remedied by the ESA Act itself. The Act provides for funding from "a school improvement fund" to the school districts equal to the amount diverted for participating ESA students. *See* Tenn. Code Ann. § 49-6-2605(b)(2)(A). County Plaintiffs argue it is insufficient because that amount is only provided for the first three fiscal years of the program and at any rate is subject to appropriation. *See id.* § 49-6-2605(b)(2)(A). But such an injury, if it occurs, is entirely speculative because the legislature has accounted for the funding gap that is the source of the harm. By prematurely seeking relief, County Plaintiffs are simply asking this Court to wade into a policy debate, something we cannot do.

Moreover that "funding gap," created and instantaneously filled, involves *the school districts*, not the counties. Yes, County Plaintiffs must continue to fund their school districts with the same dollar amount as they did the year before, even in the absence of some students. Is this an injury? Absent the infringement of local sovereignty as contemplated in the Home Rule Amendment—which our Supreme Court has now ruled is not applicable in this case—we think not. The State directing its own subdivisions to continue allocating funding is hardly the sort of injury contemplated by the guarantee of equal protection of the laws for the people in this State. We find County Plaintiffs' arguments to be speculative and representative of their disapproval of policy. We recognize it is the distinct role of the legislature to make policy decisions and decline to engage in what we view to be impermissible judicial oversight.

Accordingly, State Defendants' and Greater Praise Intervenor-Defendants' motions to dismiss with respect to County Plaintiffs' equal protection claim are **GRANTED**, and that claim is hereby **DISMISSED**.

2. Education Clause Claim

State Defendants argue County Plaintiffs again assert rights not their own in bringing a claim under the Education Clause because the right to a free, public education belongs to the schoolchildren of Tennessee. *See Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 151 (Tenn. 1993) ("*Small Schools I*") ("The certain conclusion is that Article XI, Section 12 of the Tennessee Constitution guarantees to the school children of this state the right to a free public education.").[1] The Education Clause does not afford any such right to the counties of this state, and thus, State Defendants maintain, County Plaintiffs lack standing to bring a claim under that provision. County Plaintiffs rely on their same financial argument under equal protection because

[1] State Defendants note in their briefing that "[w]hile the issue of standing was not raised as an issue on appeal in *Small Schools I*, the plaintiffs included a group of students and their parents."

they are providing a private school education not a public one as contemplated by the Education Clause.

i. Enforceable Right Belongs to the Students

In their Amended Complaint, County Plaintiffs explain the Court's holding in *Small Schools I* that the Education Clause creates an enforceable standard for assessing the educational opportunities provided in the several districts throughout Tennessee because those opportunities must be adequate and substantially equal. County Plaintiffs argue that the ESA Act negatively impacts the opportunities provided in Shelby and Davidson Counties because the Act unlawfully targets them by diverting their funds. Even assuming that to be true does not change that the Education Clause affords *students* with the right to a free, public education that is adequate and substantially equal. Nor does it change that the Education Clause places the responsibility for achieving that end with the General Assembly. As reiterated by County Plaintiffs' reliance on language and an argument more suited to an equal protection claim, County Plaintiffs have not suffered an injury to any right afforded by the Education Clause under the circumstances of this case.

ii. Speculative Injury

In the alternative, the Court holds that County Plaintiffs' education claim must fail for the same reason as their equal protection claim—the alleged injury is at best speculative due to the school improvement fund and perhaps no injury at all. Regardless, with the ESA Act's replacement of the diverted funds, there can be no change in the adequacy of the education provided by Plaintiff Counties' schools.

Accordingly, State Defendants' and Greater Praise Intervenors' motions to dismiss County Plaintiffs' Education Clause claim are **GRANTED**, and that claim is hereby **DISMISSED**.

3. *Ultra Vires* Claim

State Defendants argue that County Plaintiffs have no distinct injury arising from their *ultra vires* claim on how the Department of Education remits payment for participating students under the ESA Act and maintain that County Plaintiffs have asserted no injury to be suffered as a result. County Plaintiffs respond that had State Defendants taken the time to procure contracts and establish actual ESAs, rather than rushing through the program's implementation through unauthorized direct reimbursements, the injury would not have occurred. The injury referred to by County Plaintiffs in their brief, however, appears to be their funding of the private school education of students participating in the ESA program. But in being required to fund private school educations, County Plaintiffs' grievance is with the substance of the ESA Act, not its allegedly unlawful implementation. Much like in the case *ACLU v. Darnell*, 195 S.W.3d 612 (Tenn. 2006), where the Tennessee Supreme Court found that the plaintiffs did not have standing to bring the action, the Court explained:

> Defendants and Intervenors allege that Plaintiffs' sexual orientation and interest in same gender marriage concern the substance of the Marriage Amendment but do not provide Plaintiffs standing to challenge the Marriage Amendment on the basis that it was not published in compliance with Article XI, section 3 because any deficiency in the timeliness of publication 'operated on all members of the public equally, whether gay or not.' . . . we conclude that Plaintiffs have failed to establish any causal connection between their claimed injuries and the alleged illegality—untimely publication. . . . The record on appeal clearly indicates that the individual Plaintiffs were aware of the proposed Marriage Amendment prior to the 2004 election, despite the alleged untimely publication.

Similarly, whether the State is improperly reimbursing private schools rather than paying the families of ESA students to pay those private schools is a question that has no bearing on County Plaintiffs' funding obligations. County Plaintiffs' Amended Complaint raises no further allegation of injury by the State's implementation of the ESA Act. Finding no causal connection between the Act and County Plaintiffs' alleged injury, the Court concludes that County Plaintiffs lack

standing to bring their *ultra vires* claim. Accordingly, in this limited respect, State Defendants' and Greater Praise Intervenor-Defendants' motions to dismiss County Plaintiffs' *ultra vires* claim are **GRANTED**, and that claim is hereby **DISMISSED**.

B. *Standing of McEwen Plaintiffs*

1. Taxpayer Standing

Generally, "private citizens . . . cannot maintain an action complaining of the wrongful acts of public officials unless such private citizens aver special interest or a special injury not common to the public generally." *Fannon v. City of LaFollette*, 329 S.W.3d 418, 427 (Tenn. 2010) (quoting *Bennett v. Stutts*, 521 S.W.2d 575, 576 (Tenn. 1975)). An exception exists, however, when the taxpayer has (1) alleged a "specific illegality in the expenditure of public funds," and (2) made a "prior demand on the governmental entity asking it to correct the alleged illegality." *Id.* (quoting *Cobb v. Shelby Cnty. Bd. of Comm'rs*, 771 S.W.3d 124, 126 (Tenn. 1989)). Our Supreme Court has elaborated further:

> As this Court explained in *Cobb*, the taxpayer's complaint "must allege a specific legal prohibition on the disputed use of funds or demonstrate that it is outside the grant of authority to the local government." In establishing that a prior demand has been made, a plaintiff is required to "first have notified appropriate officials of the illegality and given them an opportunity to take corrective action short of litigation." A prior demand "is excused [only] where the status and relation of the involved officials to the transaction in question is such that any demand would be a formality."

Id. at 427–28 (citations omitted) (alteration in original).

State Defendants and Intervenor-Defendants argue first that taxpayer status must fail because no prior demand has been made in this case. *McEwen* Plaintiffs argue that such a demand would have been futile because of State Defendants direct involvement in the negotiations for and ultimately enactment of the ESA Act, and thus a mere formality satisfying the exception to the requirement.

The Court is disinclined to exempt Plaintiffs from the prior demand in this case. *McEwen* Plaintiffs point to the reasoning of the Court of Appeals in *Ragsdale v. City of Memphis*, 70 S.W.3d 56, 63 (Tenn. Ct. App. 2001): "In the instant case, the executives of both City and County have actively participated in the negotiations involving the NBA franchise, have signed required legislation, and have ultimately signed the required contractual documents. Under these circumstances, a prior demand would be a mere formality and should be excused." Here, *McEwen* Plaintiffs maintain their allegations regarding Governor Lee (campaigned on and signed the ESA Act), Education Commissioner Schwinn (moved to quickly implement the Act), Members of the State Board of Education (adopted the administrative rules implementing the Act), and former House Speaker Glen Casada (holding open the vote on the Act to negotiate its final passage) demonstrate similar active participation. But extending the rationale of *Ragsdale* to this scenario would swallow the prior-demand requirement entirely. Governors regularly campaign on future legislation and in most cases sign legislation before it becomes law. Agencies and their officials regularly implement new legislation. A house speaker regularly shepherds bills across the finish line. By applying the exception here, this Court would render it no exception at all.

Furthermore, State Defendants and Intervenor-Defendants also argue that *McEwen* Plaintiffs only made an allegation of "specific illegality" with respect to Count VI, their appropriations claim. *McEwen* Plaintiffs respond that all of their claims allege that the expenditure of funds under the ESA is illegal based on the respective constitutional provision or state statute that gives rise to their claim. State Defendants counter that the requirement of an allegation of specific illegality means something more—"a specific legal prohibition on the disputed use of funds or demonstrat[ion] that it is outside the grant of authority to the local government." *Fannon*, 329 S.W.3d at 427 (citing *Cobb*, 771 S.W.2d at 126). The Court must agree with State Defendants

lest this exception also grow so broad as to swallow the rule. Under *McEwen* Plaintiffs rationale, any government act that uses funds from the state treasury would create taxpayer standing if the taxpayer could formulate a claim of unconstitutionality or other statutory violation. This would undermine the entire basis for the doctrine of taxpayer standing. *See id.* at 427 (quoting *Badgett v. Rogers*, 436 S.W.2d 292, 293–94) ("[T]he courts have long recognized the necessity of allowing municipal officials to perform their duties without interference from frequent and possibly frivolous litigation and the inexpedience of putting municipal officers at hazard to defend their acts whenever any member of the community sees fit to make the assault, whether for honorable motives or not."). Of *McEwen* Plaintiffs' claims, the appropriations claim alone alleges an illegality in the expenditure itself rather than unconstitutionality or unlawful implementation of the ESA Act. But, as already discussed, the appropriations claim still lacks the requirement for a prior demand.

Accordingly, the Court finds that *McEwen* Plaintiffs have failed to establish taxpayer standing for their claims. With respect to taxpayer standing, the motions of State Defendants are **GRANTED**. As far as the Court can discern, Plaintiff Russell, who does not claim she has a child affected by the ESA, only seeks standing as a taxpayer. Therefore, she is **DISMISSED** as a party to this action.

2. Standing as Parents

State Defendants and Intervenor-Defendants next argue the remaining *McEwen* Plaintiffs, Parent Plaintiffs, lack standing as parents because they cannot show that their children have been or will be harmed by the ESA Program. Parent Plaintiffs respond that this contention is incorrect and ultimately unpersuasive because they can demonstrate the harm caused.

i. Education Clause Violation (Equal Protection)

Parent Plaintiffs' first cause of action is an alleged violation of the requirement articulated in *Small Schools I*, 851 S.W.2d at 151, at the conjunction of the Education Clause and the Tennessee Constitution's Equal Protection provisions that Parent Plaintiffs' children are entitled to the opportunity for a free, public education that is adequate and substantially equal as the opportunities afforded to all other Tennessee schoolchildren. Parent Plaintiffs have argued that the ESA Act diverts funds from the school districts in their counties alone and that the remaining funding is inadequate. As already discussed in the context of County Plaintiffs, however, this alleged injury is merely speculative while the school improvement fund is in effect. If there is no loss of funds, there is no disparate treatment—and therefore, no injury. The Court holds Parent Plaintiffs lack standing for this claim.

ii. Education Clause Violation (public funding of private schools)

The second cause of action alleges the ESA Act violates the Education Clause by diverting funds from the schools of Parent Plaintiffs' children to fund private education, something Parent Plaintiffs argue is unconstitutional. As with Count I, the alleged injury has not occurred because the diverted funds have been replaced. Absent the necessary injury to challenge the ESA Act on this basis, Parent Plaintiffs lack standing for this cause of action as well.

iii. BEP/TISA Violation

The third cause of action alleges the ESA Act violates the existing education funding statute by diverting funds formulated thereunder for private schools not contemplated by the formula. Once again, the alleged injury has not occurred if the diverted funding has been replaced. The Court holds Parent Plaintiffs also lack standing for this cause of action.

iv. ESA Act Violation

The fourth cause of action alleges that the implementation of the ESA Program has violated the ESA Act itself by reimbursing private schools rather than funding ESAs. Count IV ultimately suffers from the same defect as County Plaintiffs' *ultra vires* claim because the harm Parent Plaintiffs have alleged, the diversion of funding from and thereby increased inadequacy of their children's schools, has no causal connection to how the ESA Program is using the money for the participating ESA students.

v. UAPA Violation

The fifth cause of action alleges that the same implementation of the ESA Program has violated the Uniform Administrative Procedures Act because it violates the rules previously promulgated by the State Board of Education. The alleged UAPA violation, like the ESA Act violation, has no bearing, however, on Parent Plaintiffs' alleged injury. Parent Plaintiffs again lack standing for want of a causal connection.

vi. Appropriations Clause Violation

The sixth cause of action alleges that the Tennessee Department of Education contracted in 2019 with a private company to administer the ESA Program without an appropriation as required by Article II, Section 24 of the Tennessee Constitution. This expenditure without an appropriation again has no causal connection to the alleged harm—diversion of funds from their children's schools to the detriment of their children's education. Thus, the Court must again find that Parent Plaintiffs lack standing to bring Count VI.

II. Ripeness

Alternatively, we hold that Plaintiffs' claims lack ripeness. Ripeness is another justiciability doctrine, inquiring "whether the harm asserted has matured sufficiently to warrant

judicial intervention." *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975) (quoted favorably in *Darnell*, 195 S.W.3d at 620 n.7). The Tennessee Supreme Court has explained that a claim lacks ripeness when it "involves uncertain or contingent future events that may or may not occur as anticipated or, indeed, may not occur at all." *B&B Enterprs. of Wilson Cnty., LLC v. City of Lebanon*, 318 S.W.3d 839, 848 (Tenn. 2010) (citing *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 479–80 (1990)). The Court's determination of ripeness involves two questions: first, whether the claim is "appropriate for judicial resolution"; and second, whether the Court's "refusal to act" would prejudice the claimants' ability to seek redress of their grievances. *Id.* In other words, has the claimants' alleged injury occurred or might it occur in the future? *See State v. Price*, 579 S.W.3d 332, 338 (Tenn. 2019) (quoting *West v. Schofield*, 468 S.W.3d 482, 491 (Tenn. 2015)) ("An issue is not fit for judicial decision if it is based 'on hypothetical and contingent future events that may never occur.' Rather, the issue must be 'based on an existing legal controversy.'"). And if the injury has not yet occurred, will the claimants be able to seek relief when it does occur? *See id.* (quoting *West*, 468 S.W.3d at 492) ("The second prong of the ripeness analysis takes into account 'whether withholding adjudication . . . will impose any meaningful hardship on the parties.'"); *B&B Enterprs. of Wilson Cnty., LLC*, 318 S.W.3d at 849 (quoting *AmSouth Erectors, LLC v. Skagg Iron Works, Inc.*, W2002-01944-COA-R3-CV, 2003 WL 21878540, at *6 (Tenn. Ct. App. Aug. 5, 2003)) ("The court will decline to act 'where there is no need for the court to act or where the refusal to act will not prevent the parties from raising the issue at a more appropriate time.'").

State Defendants argue Plaintiffs' equal protection and education clause claims are unripe because they rely on the allegation of an inequitable distribution of funds—thereby treating Shelby and Davidson Counties and their schools unequally as well as depriving the students in those

schools of an adequate education—when those funds have not yet been distributed. Moreover, argue State Defendants, citing Tenn. Code Ann. §§ 49-6-2603(a)(1)–(3)[2] and -2605(b)(2)(A),[3] the Davidson and Shelby LEAs will keep some[4] state funds to educate ESA students without the actual obligation to educate those students. State Defendants further point to Tenn. Code Ann. § 49-6-2605(b)(2)(A)'s[5] establishment of a school improvement fund from which the Department of

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[2] These provisions state:

> (a) To participate in the program, a parent of an eligible student who is seventeen (17) years of age or younger, or an eligible student who has reached the age of eighteen (18) must agree in writing to:
>
> (1) Ensure the provision of an education for the participating student that satisfies the compulsory school attendance requirement provided in § 49-6-3001(c)(1) through enrollment in a private school, as defined in § 49-6-3001(c)(3)(A)(iii), that meets the requirements established by the department and the state board for a Category I, II, or III private school;
>
> (2) Not enroll the participating student in a public school while participating in the program; [and]
>
> (3) Release the LEA in which the participating student resides from all obligations to educate the participating student while participating in the program. Participation in the program has the same effect as a parental refusal to consent to the receipt of services under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1414); . . . .

Tenn. Code Ann. § 49-6-2603(a)(1)–(3).

[3] This provision states:

> There is established a school improvement fund to be administered by the department that, for the first three (3) fiscal years in which the program enrolls participating students and subject to appropriation, shall disburse an annual grant to each LEA to be used for school improvement in an amount equal to the ESA amount for participating students under the program who:
>
> (i) Were enrolled in and attended a school in the LEA for the one (1) full school year immediately preceding the school year in which the student began participating in the program; and
>
> (ii) Generate BEP funds for the LEA in the applicable fiscal year that will be subtracted from the state BEP funds payable to the LEA under subdivision (b)(1).

Tenn. Code Ann. § 49-6-2605(b)(2)(A).

[4] The ESA Act also provides that

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

Tenn. Code Ann. § 49-6-2605(a) (emphasis added).

[5] *See supra* note 3.

Education "shall disburse an annual grant to each LEA to be used for school improvement in an amount equal to the ESA amount for participating students under the program." Thus, argue State Defendants, these LEAs can expect to receive more money per student than they would in the absence of the ESA. Still further, State Defendants argue the alleged harm, if it ever occurs, is to the LEAs not the Plaintiff Counties or the children of the Plaintiff Parents.

Plaintiff Counties respond that State Defendants are implementing the ESA Program right now, citing Governor Lee's statement on social media that the program was actively accepting applicants, meaning Plaintiffs' claims raise a live controversy, not some hypothetical, future event. Plaintiff Counties frame the injury here not merely as the additional financial burden placed upon them but the loss of discretion over their own funding choices as the result of a single ESA award. With respect to the Education Clause, Parent Plaintiffs argue that their children attend schools that already had unconstitutionally inadequate funding and now are being further deprived. They further argue that withholding judgment on the ESA Act would impose a meaningful hardship by further depriving their children's schools of funding.

Here, the actual difference in funding caused by the ESA Act will not occur, if ever, until after three fiscal years because the Act establishes a school improvement fund that will award the affected schools "an amount equal to the ESA amount for participating students under the program." Tenn. Code Ann. § 49-6-2605(b)(2)(A). Plaintiffs nevertheless allege a shortfall will exist between the amount diverted and the amount awarded because of the sub-provisions requiring the student to have actually been calculated into the BEP and ESA formulae. *See* Tenn. Code Ann. § 49-6-2605(b)(2)(A)(i)–(ii); McEwen Pls.' Am. Compl., ¶¶ 82–89, No. 20-0143-II & No. 20-0242-II, Aug. 3. 2020, Am. Compl. for Decl. & Inj. Relief, ¶¶ 156–67, No. 20-0143-II & No. 20-0242-II, Aug. 3, 2020. This is not enough, and Plaintiffs' argument continues to rely on

speculation. No differential treatment between Plaintiffs' schools and the others of this state or other financial injury can exist under the ESA Act until a funding gap occurs. Similarly, no divestment of the schools of Parent Plaintiffs' children can occur before the alleged funding gap occurs. Before such time, this controversy is merely a disagreement of public policy and inappropriate for judicial decision.

The question remains whether Plaintiffs are prejudiced by dismissal of their claims. We find their arguments in the affirmative unpersuasive. Should the alleged injury occur in the future, Plaintiffs would have the recourse of pursuing appropriate litigation. Permitting State Defendants to implement a policy Plaintiffs disagree with will not jeopardize their rights.

Accordingly, the Court holds in the alternative that Plaintiffs' claims lack ripeness and should be **DISMISSED**.

Conclusion

Finding no distinct and palpable injury to Plaintiffs in light of the ESA Act's replacement of diverted funds, we hold Plaintiffs lack standing to challenge the Act. In several instances, Plaintiffs' claims had no bearing on the alleged injury to begin with, lacking a necessary causal connection between the nature of the cause of action and the alleged injury. The Court alternatively holds that Plaintiffs' claims are not yet ripe because the ESA replaces the diverted funding for at least three years. Therefore, State Defendants' and Greater Praise Intervenor-Defendants' motions are **GRANTED** on these articulated bases. Parent-Intervenors' motions for judgment on the pleadings are not reached by the Court and therefore **DENIED** as moot. The Amended Complaints are **DISMISSED**.

Any other relief requested is hereby **DENIED**.[6]

[6] On November 22, 2022, Greater Praise Intervenor-Defendants filed a Motion for Reconsideration of their Motion for Equitable Relief. Since this matter is dismissed in its entirety, the Court denies the relief requested.

This is a Final Order, and there are no outstanding court costs that have not been previously paid.

It is so ORDERED.

s/Tammy M. Harrington
JUDGE TAMMY M. HARRINGTON

s/Valerie L. Smith
JUDGE VALERIE L. SMITH

CONCURRENCE IN PART AND DISSENT IN PART

I join the opinion of the Court only with respect to Sections I.A.2.i (standing of County Plaintiffs, Education Clause claim, enforceable right belongs to the students), I.A.3 (standing of County Plaintiffs, *ultra vires* claim), I.B.1 (taxpayer standing of *McEwen* Plaintiffs), I.B.2.iv (parent standing of *McEwen* Plaintiffs, ESA Act claim), I.B.2.v (parent standing of *McEwen* Plaintiffs, UAPA claim), and I.B.2.vi (parent standing of *McEwen* Plaintiffs, Appropriations Clause claim). I further join the Court's capable discussion of the general principles of standing and ripeness, but I cannot agree with the Court's application of those principles to the allegations before us and, therefore, I must respectfully dissent.

With respect to County Plaintiffs' equal protection claim, they have alleged the ESA Act diverts state funds from their school districts based upon participating students that leave those school districts for private schools while expressly requiring the enrollment figures to be maintained. Thus, according to County Plaintiffs, the Act diverts state funds provided for particular students while nevertheless retaining the obligation for County Plaintiffs to continue allocating money for those students. County Plaintiffs have further alleged that the ESA Act makes a classification that unlawfully discriminates against County Plaintiffs by creating this effect for them and only them. Defendants argue that the funding gap that gives rise to County Plaintiffs' claim is ameliorated by the additional funding provided by the school improvement fund. But Defendants and the Court all fail to appreciate that it is not the dollars themselves that are the injury but the disparate treatment of County Plaintiffs. Moreover, at this stage of the proceedings, whether the stopgap provision temporarily salvages Plaintiff Counties' financial losses is a question of fact, and Plaintiff Counties allege that the provision fails to do so. Looking at the statutory language itself demonstrates the funding provided by the school improvement fund is not

necessarily equal to the amount diverted by the ESA Act, as certain conditions must be met by the participating student to obtain such funding. *See* Tenn. Code Ann. § 49-6-2605(b)(2)(A). It is my opinion that the allegation of an injury caused by the disparate treatment of the counties under the ESA Act is sufficient to satisfy the requirements of standing for an equal protection claim.

With respect to Parent Plaintiffs and their Equal Protection-Education Clause claim, they have alleged the ESA Act deprives their children's schools of funds unlike the schools of children in other counties, and they have alleged that the stopgap provision is inadequate to cover those losses. Again, at this stage, the Court ought to accept these allegations and move forward in its analysis because the allegations are sufficient for standing. Similarly, under the Education Clause alone, Parent Plaintiffs' allegations that the ESA Act takes funding from their children's schools in a manner violative of those children's right to a free, public education and gives said funding to a private school ought to be sufficient for standing. And, as for whether the ESA Act violates the BEP or its replacement TISA by diverting funds, it is also my opinion that alleging a statutory violation that takes away funding from their children's schools ought to be sufficient for Parent Plaintiffs to establish standing.

Moving on to ripeness, I reiterate that, whatever the difference in funding turns out to actually be between the diverted funds and the funds awarded by the school improvement fund, Plaintiffs here have alleged that difference to generate a shortfall,[7] and we are obliged to treat such allegations as true under the Rule 12 standard. The alleged shortfall is created by a statute that is in effect *at this time*, not in three or more years. Further, Plaintiffs' allegations detail how certain incoming students might further take funding,[8] which the Court must treat as true under the Rule

[7] *See* McEwen Pls.' Am. Compl., ¶¶ 82–89, No. 20-0143-II & No. 20-0242-II, Aug. 3. 2022, Am. Compl. for Decl. & Inj. Relief, ¶¶ 156–67, No. 20-0143-II & No. 20-0242-II, Aug. 3, 2022.
[8] *See* Am. Compl. for Decl. & Inj. Relief, ¶¶ 166–67.

12 standard. Further still, assuming *arguendo* that the State has covered the financial difference with its stopgap provision, it would not alleviate the equal protection problems alleged by Plaintiffs in singling out their schools for disparate treatment. I would have found that Plaintiffs' allegations are more than sufficient to establish ripeness, as the claims are appropriate for judicial resolution and, if the Court refused to act, it would prejudice the Plaintiffs' ability to seek redress of their grievances, considering the Act is currently in effect.

Under this reasoning, I would have permitted County Plaintiffs' equal protection claim, and both of Parent Plaintiffs' Education Clause claims, as well as their BEP/TISA violation claim, to proceed to further analysis from the Court.

For these reasons, I respectfully dissent.

s/Anne C. Martin
CHANCELLOR ANNE C. MARTIN, CHIEF JUDGE

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RULE 58 CERTIFICATION

A copy of this Order has been served by U.S. Mail upon all parties or their counsel named above.

s/Megan Broadnax
Deputy Clerk & Master

11-23-22
Date