E-FILED
5/4/2020 6:06 PM
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.

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

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

MEMORANDUM AND ORDER

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

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

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

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

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

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

THE PENDING MOTIONS

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

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

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

FINDINGS OF FACT

It is undisputed that, based upon the definition of "eligible student" in the ESA Act, it is only applicable to schools in Davidson and Shelby Counties[2]. It also cannot credibly be disputed that the school systems which would be affected was discussed at length in the General Assembly when the ESA Act was being debated and finalized for enactment. Further, there is no dispute that the qualifications were tailored, through multiple amendments, to only include those two school systems, and that bill sponsors could only secure passage from representatives against the bill if

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

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

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

The ESA Act's Applicability

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

> (i) [Are] zoned to attend a school in an LEA[3], excluding the achievement school district (ASD)[4], with ten (10) or more schools:
>
> (*a*) Identified as priority schools in 2015, as defined by the state's accountability system pursuant to § 49-1-602;
>
> (*b*) Among the bottom ten percent (10%) of schools, as identified by the department in 2017 in accordance with § 49-1-602(b)(3); and
>
> (*c*) Identified as priority schools in 2018, as defined by the state's accountability system pursuant to § 49-1-602

Tenn. Code Ann. § 49-6-2602(3)(C)(i).

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

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

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

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

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

Legislative History of the ESA Act

House Bill No. 939

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

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

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

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

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

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

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

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

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

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

Senate Bill No. 795

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

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

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

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

Conference Committee Report and Final Passage

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

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

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

ESA Act Implementation

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

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

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

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

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

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

The Plaintiffs

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

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

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

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

> The State of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools. The General Assembly may establish and support such postsecondary educational institutions, including public institutions of higher learning, as it determines.

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

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

LEGAL ANALYSIS

Summary Judgment Standard

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

Plaintiffs' Standing[9]

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

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

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

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

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

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

Id. at *5 (footnote omitted).

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

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

112 F.Supp.2d at 698.

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

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

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

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

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

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

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

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

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

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

The Home Rule Amendment

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

> The General Assembly shall have no power to pass a special, local or private act having the effect of removing the incumbent from any municipal or county office or abridging the term or altering the salary prior to the end of the term for which such public officer was selected, and *any act of the General Assembly private or local in form or effect applicable to a particular county or municipality either in its governmental or its proprietary capacity shall be void and of no effect unless the act by its terms either requires the approval by a two-thirds vote of the local legislative body of the municipality or county, or requires approval in an election by a majority of those voting in said election in the municipality or county affected.*

Tenn. Const. art. XI, § 9 (emphasis added). It requires the State, if the General Assembly passes an applicable private act, to obtain approval from the local legislative body or its electorate. Tenn. Code Ann. § 8-3-201 specifies that the Secretary of State be notified of such a private act and transmit a certified copy to the affected jurisdiction. The Tennessee Code then details the timing and effect of the certification process. The General Assembly's classification of an act as public or private, however, is irrelevant. "The sole constitutional test must be whether the legislative enactment, irrespective of its form, is local in effect and application." *Farris v. Blanton*, 528 S.W.2d 549, 551 (Tenn. 1975).

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

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

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

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

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

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

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

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

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

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

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

The Home Rule Amendment Components

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

Local in Form and Effect

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

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

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

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

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

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

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

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

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

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

Applicable to a Particular County

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

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

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

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

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