E-FILED
5/7/2020 11:27 AM
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.

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

ROXANNE McEWEN, et al., Plaintiffs, vs. BILL LEE, et al., Defendants.	)	Case No. 20-0242-II Hon. Anne C. Martin MCEWEN PLAINTIFFS' SUBMISSION REGARDING STATE DEFENDANTS' AND INTERVENOR-DEFENDANTS' JOINT MOTION FOR STAY OF INJUNCTION DURING PENDENCY OF APPEAL

I. INTRODUCTION

On May 4, 2020, the Court issued a Memorandum and Order ("SJ Order") granting the Metropolitan Government of Nashville and Davidson County and Shelby County Government's (collectively the "Metro Plaintiffs") motion for summary judgment, and enjoined Governor Lee, the Tennessee Department of Education ("TDOE"), and Education Commissioner Penny Schwinn (collectively "the State Defendants") from implementing and enforcing the ESA Act.

At the same time, the Court issued a separate Order ("TI Order"), finding the McEwen Plaintiffs' Motion for a Temporary Injunction Pursuant to Tenn. R. Civ. P. 65.04 ("TI Motion") moot in light of the SJ Order, and stating, in the SJ Order, "the Court has granted the relief the [McEwen] Plaintiffs seek with their motion." TI Order at 4.

In spite of the SJ Order and the Court's injunction contained therein, it appears that the State Defendants have continued to implement the ESA Act. A TDOE website allowing parents to apply for a school voucher remains active with no mention of the SJ Order,[1] and Governor Lee expressly encouraged parents to apply to the program during a public press conference on May 5, 2020, in violation of the SJ Order.[2] Having thus disregarded this Court's injunction for several days, State Defendants' and Intervenor-Defendants' Joint Motion for Stay of Injunction During Pendency of Appeal ("Motion to

[1] *See* https://familymembers.esa.tnedu.gov/apply-now/.

[2] Gov. Bill Lee COVID-19 Media Briefing, May 5, 2020, at 34:46-35:02, *available at* https://sts.streamingvideo.tn.gov/Mediasite/Play/2796a59ea48c40f4a9010ea50e72fc011d?catalog=e8dd4e04d1064f2ab14ba2b7162822d021.

Stay") now seeks to continue implementing the ESA Act in spite of this Court's clear finding that it violates the Tennessee Constitution.

The TI Motion demonstrated that the McEwen Plaintiffs were entitled to a temporary injunction.[3] For the same reasons that the McEwen Plaintiffs were entitled to a temporary injunction, the Motion to Stay should be denied. Indeed, the case for denial of the Motion to Stay is even stronger because (i) the Court has already determined that the ESA Act is unconstitutional; and (ii) Defendants cannot come close to demonstrating that any harm from the SJ Order "decidedly outweighs" the harms to Plaintiffs from issuance of a stay.

Defendants' Motion to Stay should be denied. In the alternative, if a limited stay is granted, it should only allow the State to continue accepting applications until the deadline imposed by TDOE for submitting applications expires later today.

II. ARGUMENT

In determining whether to stay the grant of an injunction, courts "balance four factors: the movant's likelihood of success on appeal; whether irreparable injury to the movant will result in the absence of a stay; prospective harm to others if a stay is granted; and the public's interest in granting a stay." *Dodds v. United States Dep't of Educ.*, 845

[3] The McEwen Plaintiffs incorporate the TI Motion briefing by reference in order to avoid duplicate filings. *See* Tenn. R. Civ. P. 10.04 ("Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion"). In addition, the Court can take judicial notice of such filings in resolving the Motion to Stay. *See Mandela v. Reynolds*, No. 01-A-01-9303-CH00126, 1993 WL 236607, at *2 (Tenn. Ct. App. June 30, 1993) ("The prior proceedings and judgments in the same court were subject to judicial notice because they were 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned,' *i.e.*, the records of the Trial Court.").

F.3d 217, 220-21 (6th Cir. 2016). "[I]n order to justify a stay of the district court's ruling, the defendant must demonstrate at least serious questions going to the merits and irreparable harm that ***decidedly outweighs the harm that will be inflicted on others if a stay is granted***." *Baker v. Adams Cty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002) (emphasis added).

A. Defendants Are Unlikely to Succeed on the Merits of Any Appeal

In order to establish a likelihood of success sufficient to warrant a stay, Defendants "must demonstrate at least serious questions going to the merits." *Id.* at 928. Defendants cannot do so here.

In evaluating the constitutionality of the ESA Act, this Court considered "voluminous materials . . . including legal memoranda, declarations, and legislative history materials," as well as lengthy oral argument from all four defendants. SJ Order at 4. The Court then issued a detailed opinion holding that the Voucher Law violates the Home Rule provision "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." *Id.* at 28. The Motion to Stay offers a single anemic paragraph rehashing Defendants' failed arguments about the Home Rule provision and reoffers the same facts previously put before the Court in the form of refiled affidavits. Motion to Stay at 4. In short, Defendants have failed to raise any legitimate questions or new arguments related to the merits of the SJ Order.

In granting summary judgment, the Court proactively granted Defendants permission to seek interlocutory relief but did not stay enforcement of its injunction. The

Motion to Stay presents no new facts or law that should compel the Court to alter its decision.

B. Defendants Have Failed to Establish Irreparable Harm

In evaluating harm in relation to a stay, courts consider three factors: "(1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided." *Jesty v. Haslam*, No. 3:13-cv-01159, 2014 WL 1117069, at *1-2 (M.D. Tenn. Mar. 20, 2014). "[T]he irreparable injury must be real and practically unavoidable and certain." *State ex rel. Agee v. Chapman*, 922 S.W. 2d 516, 519 (Tenn. Ct. App. 1995). Defendants' supposed evidence of harm fails on all factors.

First, Defendants assert that enjoining them from continuing to implement the voucher program is a form of irreparable harm because it prevents the State from "effectuating statutes enacted by representatives of its people." Motion to Stay at 2-3. The voucher program, however, was not mandated by the General Assembly to be available until the fall of 2021. T.C.A. §49-6-2604(b). While Defendants may prefer to implement the program earlier than required, the injunction will not prevent its timely implementation in the unlikely event that the ESA Act is upheld on appeal. *See* Plaintiffs' Consolidated Reply in Further Support of Plaintiffs' Motion for Temporary Injunction Pursuant to Tenn. R. Civ. P. 65.04 ("TI Reply") at 10-11.

Second, Defendants contend that the injunction will prevent parents and children from obtaining a voucher and force them to return to "underperforming schools," where the children may face difficult circumstances. Motion to Stay at 3. However, no Defendant has put forth ***any*** evidence that they will receive a voucher, that they will be accepted into

a specific private school, or that the private schools they wish to attend will offer a superior education or remedy their current concerns. *See* TI Reply at 11-12. Nor have any Defendants presented any evidence that the existing mechanisms to address any of the concerns these students may face in their current schools have been utilized. These mechanisms include anti-bullying measures, as required by statute, T.C.A. §49-6-4503, as well as intra-district transfers and public school choice options. In short, there is no proof that allowing the State to continue to expend funds and resources on an unconstitutional law will remedy the concerns Defendants assert.

In fact, a stay will likely multiply the prospective harms. If this Court's summary judgment decision is upheld, any vouchers awarded during the stay would be void. *See* Plaintiffs' Memorandum of Law in Support of Motion for a Temporary Injunction Pursuant to Tenn. R. Civ. P. 65.04 ("Pltfs' Mem. TI") at 32-33. But if a stay is granted in the meantime, the State will continue to spend taxpayer money on an unconstitutional program, families will find themselves having made commitments to private schools they are then unable to pay, and private schools will admit students using voucher funds only to see such students and funding disappear. The return of voucher students to public schools will also disrupt their education and the education of students already in the districts. All these factors weigh strongly against any harm identified by Defendants. *Id.*

C. Defendants Cannot Meet their Burden to Show that Any Harm "Decidedly Outweighs" the Harm to Plaintiffs

To justify a stay, Defendants must show "irreparable harm that ***decidedly outweighs*** the harm that will be inflicted on others if a stay is granted." *Baker*, 310 F.3d at 928 (emphasis added). In resolving the Motion to Stay, the Court must consider the harm not

just to the Metro Plaintiffs but to "other interested parties," such as the McEwen Plaintiffs. *Sony/ATV Music Publ'g LLC v. 1729172 Ontario, Inc.*, No. 3:14-cv-1929, 2015 WL 13705073, at *1 (M.D. Tenn. Oct. 16, 2015); *Graveline v. Johnson*, 747 F. App'x 408, 416 (6th Cir. 2018) (court must evaluate "the prospect that others will be harmed if the court grants the stay"). While Defendants have failed to establish any harm, the McEwen Plaintiffs will suffer irreparable harm if the Motion to Stay is granted.

First, "[t]he loss of a constitutional right, even for a minimal period[] of time, unquestionably constitutes irreparable injury." *Tanco v. Haslam*, 7 F. Supp. 3d 759, 769-70 (M.D. Tenn. 2014) (*rev'd sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)) (internal quotations omitted). Here, the Court ruled that the State violated the Home Rule provision when it enacted the ESA Act. SJ Order at 28. If the SJ Order is stayed, Plaintiffs will continue to suffer irreparable harm from the loss of their constitutional right to local approval under the Home Rule provision.

Second, if the SJ Order is stayed, Plaintiffs will continue to suffer irreparable harm from the spending of taxpayer dollars to implement this unconstitutional law. *See Pope v. Dykes*, 93 S.W. 85, 88 (Tenn. 1905) (crediting plaintiff's contention that the misappropriation of public funds "will result in irreparable injury to the county and taxpayers"). Here, the Voucher Law has already ***unlawfully*** diverted over $1 million in public funds to a private vendor. ¶52.[4] In May and June 2020, the State plans to expend

[4] All ¶__ and ¶¶__refer to the Complaint.

significant staff resources to implement the Voucher Law. Affidavit of Amity Schuyler ("Schuyler Affidavit") ¶4. By July 1, 2020, the State plans to hire ***20 new employees*** to implement the voucher program. *Id*. Spending additional taxpayer funds to implement this unconstitutional law unquestionably causes the Plaintiffs to suffer irreparable harm.

Importantly, State Defendants have never disputed that these two injuries are sufficient to demonstrate irreparable harm. TI Reply at 9. And because Defendants have failed to provide evidence demonstrating that they will suffer any actual harm, they cannot come close to establishing harm that "decidedly outweighs" the harm to Plaintiffs.

D. The Public Interest Supports Denial of the Stay

The public has a strong interest in preventing the implementation of an unconstitutional law. Pltfs' Mem. TI at 35. Moreover, the "[p]ublic interest is near its zenith when . . . seeing that public funds are not purloined or wasted." *Chappel v. Montgomery Cty. Fire Prot. Dist. No. 1,* 131 F.3d 564, 576 (6th Cir. 1997) (internal quotations omitted); Pltfs' Mem. TI at 35. After a thorough review of the language of the ESA Act, its legislative history, and the elements of a claim under the Home Rule provision, this Court ruled that "the State Defendants violated the Home Rule Amendment when they enacted the ESA Act." SJ Order at 28. Thus, allowing the State to flout the constitution by taking steps to implement this illegal voucher program, and expending taxpayer dollars to do so, is clearly contrary to the public interest.

As the McEwen Plaintiffs further discussed in the TI Motion, denial of the Motion to Stay would preserve the *status quo*, preventing harm to all parties and thus advancing the public interest. Pltfs' Mem. TI at 35-36.

Without so much as a hint of irony, Defendants contend that if a stay is not granted, "[t]he will of the people of the State as expressed by their elected representatives will be irreparably frustrated." Stay Motion at 3. But recognizing that the Home Rule provision is "designed to empower[] local governments," this Court ruled that it was ***the State*** that had frustrated the will of the people of Davidson and Shelby Counties when it enacted the Voucher Law without their constitutionally required consent. SJ Order at 20 (internal quotations omitted). Moreover, the ESA Act does not require the voucher program to begin enrolling students until the 2021-2022 school year. T.C.A. §49-6-2604(b). There has been no showing that a stay is necessary to implement the ESA Act in the extremely unlikely event that the Act is found to be constitutional on appeal.

E. Any Stay Should Be Limited to Allowing the State to Continue Accepting Applications Through Today's Deadline

If the Court is inclined to grant a stay of the SJ Order, the stay should be limited to allowing the State to continue accepting voucher applications until the deadline it has imposed of close of business on May 7, 2020. *See* Schuyler Affidavit ¶4. The stay should ***not apply*** to any further implementation or expenditure of funds on the voucher program, including, but not limited to, the following: accepting further applications, processing of applications, communication with applicants, communication with private schools, communication with the public, or spending funds related to ***any aspect*** of the voucher program.

Three days ago, this Court found the ESA Act to be unconstitutional. To allow the State to continue implementation of, and expenditure of taxpayer funds on, an unconstitutional law would further alter the *status quo* in favor of Defendants, amplify

Plaintiffs' irreparable harm, and "'intru[de] into the ordinary processes of administration and judicial review.'" *Nken v. Holder*, 556 U.S. 418, 427 (2009).

III. CONCLUSION

The Stay Motion should be denied.

DATED: May 7, 2020

Respectfully submitted,

ROBBINS GELLER RUDMAN
& DOWD LLP
CHRISTOPHER M. WOOD (BPR No. 032977)

s/ Christopher M. Wood
CHRISTOPHER M. WOOD
414 Union Street, Suite 900
Nashville, TN 37219
Telephone: 615/244-2203
615/252-3798 (fax)
cwood@rgrdlaw.com

ACLU FOUNDATION OF TENNESSEE
THOMAS H. CASTELLI (BPR No. 024849)
STELLA YARBROUGH (BPR No. 033637)
P.O. Box 120160
NASHVILLE, TN 37212
Telephone: 615/320-7142
615/691-7219 (fax)
tcastelli@aclu-tn.org
syarbrough@aclu-tn.org

SOUTHERN POVERTY LAW CENTER
CHRISTINE BISCHOFF
(admitted *pro hac vice*)
LINDSEY RUBINSTEIN
(admitted *pro hac vice*)
111 East Capitol Street, Suite 280
Jackson, MS 39201
Telephone: 769/524-2013
christine.bischoff@splcenter.org
lindsey.rubinstein@splcenter.org

EDUCATION LAW CENTER
DAVID G. SCIARRA
(admitted *pro hac vice*)
WENDY LECKER
(admitted *pro hac vice*)
JESSICA LEVIN
(admitted *pro hac vice*)
60 Park Place, Suite 300
Newark, NJ 07102
Telephone: 973/624-1815
973/624-7339 (fax)
dsciarra@edlawcenter.org
wlecker@edlawcenter.org
jlevin@edlawcenter.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been forwarded via electronic filing service and electronic mail to the following on this 7th day of May, 2020:

Stephanie A. Bergmeyer
Office of Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202-0207
stephanie.bergmeyer@ag.tn.gov

David Hodges
Keith Neely
Institute for Justice
901 N. Glebe Road, Suite 900
Arlington, VA 22203
dhodges@ij.org
kneely@ij.org

Arif Panju
Institute for Justice
816 Congress Avenue, Suite 960
Austin, TX 78701
apanju@ij.org

Jason Coleman
7808 Oakfield Grove
Brentwood, TN 37027
jicoleman84@gmail.com

Braden H. Boucek
B.P.R. No. 021399 Beacon Center
P.O. Box 198646
Nashville, TN 37219
braden@beacontn.org

Brian K. Kelsey
Daniel R. Suhr
Liberty Justice Center
190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603

s/ Christopher M. Wood
CHRISTOPHER M. WOOD