

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

ROXANNE McEWEN, et al.,	)	Case No. 20-0242-II
)	
Plaintiffs,	)	Hon. Anne C. Martin
)	
vs.	)	PLAINTIFFS' CONSOLIDATED
	)	OPPOSITION TO THE STATE
BILL LEE, et al.,	)	DEFENDANTS' MOTION TO DISMISS;
	)	GREATER PRAISE CHRISTIAN
Defendants.	)	ACADEMY, ALEXANDRIA MEDLIN
	)	AND DAVID WILSON, SR.'S MOTION
	)	TO DISMISS UNDER RULE 12.02(6);
	)	AND BRIA DAVIS, STAR BRUMFIELD,
)	NATU BAH AND BUILGUISA
)	DIALLO'S JOINT MOTION FOR
)	JUDGMENT ON THE PLEADINGS

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I. INTRODUCTION

Plaintiffs Roxanne McEwen, David P. Bichell, Terry Jo Bichell, Lisa Mingrone, Claudia Russell, Inez Williams, Sheron Davenport, Heather Kenny, Elise McIntosh, Tracy O'Connor, and Apryle Young (collectively, "Plaintiffs") respectfully submit this consolidated response in opposition to (i) the State Defendants' Motion to Dismiss; (ii) Greater Praise Christian Academy, Alexandria Medlin and David Wilson, Sr.'s Motion to Dismiss Under Rule 12.02(6); and (iii) Bria Davis, Star Brumfield, Natu Bah and Builguissa Diallo's Joint Motion for Judgment on the Pleadings.

The Complaint, which sets forth five separate causes of actions against the State Defendants, alleges that the Tennessee Education Savings Account Pilot Program ("Voucher Law"), T.C.A. §49-6-2601, *et seq.*, violates the Tennessee Constitution and state law by diverting taxpayer funds appropriated for public schools in Shelby and Davidson Counties to private schools. The Complaint's five causes of actions are each adequately pled, and Defendants' motions should be denied in their entirety.¹

First, all Plaintiffs have standing to assert their claims. *Infra* at § IV.A. Plaintiffs are taxpayers challenging illegal governmental action that unlawfully diverts public funds,

¹ All ¶__ and ¶¶__ refer to the Complaint ("Complaint"). "State Mem." refers to State Defendants' Memorandum of Law in Support of their Motion to Dismiss. "LJC Mem." refers to Greater Praise Christian Academy; Alexandria Medlin; and David Wilson, Sr.'s Memorandum of Law and Facts in Support of Motion to Dismiss Under Rule 12.02(6). "Beacon/IJ Mem." refers to Memorandum of Law in Support of Intervenor-Defendants' Joint Motion for Judgment on The Pleadings Under Rule 12.03. "State Mot." refers to State Defendants' Motion to Dismiss. "Beacon/IJ Mot." refers to of Intervenor-Defendants' Joint Motion for Judgment on The Pleadings Under Rule 12.03. "LJC Mot." refers to Greater Praise Christian Academy; Alexandria Medlin; and David Wilson, Sr.'s Motion to Dismiss Under Rule 12.02(6).

and Plaintiffs, as parents and taxpayers, suffer a special injury from the Voucher Law that is not common to the public generally.

Second, the Complaint alleges that the Voucher Law violates the Home Rule provision of the Tennessee Constitution because it is local in form and effect, yet does not require and did not receive local approval. *Infra* at §IV.B. Contrary to Defendants' contentions, the fact that the Voucher Law applies to two counties, and not just one, is irrelevant. Because Davidson County and Shelby County are the only counties which will ever be impacted by the Voucher Law, it is plainly unconstitutional. Nor does the fact that the Voucher law relates to a partly-State function, education, or refers to local education agencies rather than the counties directly, exclude it from the Home Rule provision's requirements.

Third, the Complaint alleges that the Voucher Law violates the Education and Equal Protection Clauses of the Tennessee Constitution. *Infra* at §IV.C. The Voucher Law further exacerbates underfunding in the Basic Education Program ("BEP"), depriving students of resources essential to providing an adequate education, and "school improvement fund" grants, even if funded, will not make up for the shortfall. In addition, the diversion of BEP funds treats public school students in Shelby County Schools and Metro Nashville Public Schools differently from other public school students across the State, violating the equity mandates of the Education Clause, and there is no rational basis for the State's disparate treatment of these students. Moreover, these claims are ripe and justiciable. The Complaint involves a substantial controversy between parties having adverse interests of sufficient immediacy to warrant judicial resolution, and the Tennessee

Supreme Court has expressly held that Plaintiffs' adequacy claims are justiciable, precluding any contention to the contrary.

Fourth, the Complaint alleges that the Voucher Law violates the Education Clause, which requires the General Assembly to provide for the maintenance, support and eligibility standards of "*a system* of free public schools," by using taxpayer funds on private schools which are *not* part of Tennessee's system of free public schools. *Infra* at §IV.D. Defendants' contention that funding private schools does not violate this constitutional mandate misreads the plain text of the Education Clause, and other courts have rejected similar assertions.

Fifth, the Complaint alleges that the Voucher Law violates the BEP, the statutory formula by which the General Assembly determines and appropriates the funds required to maintain and support Tennessee's system of free public schools. *Infra* at §IV.E. The Voucher Law diverts BEP funds appropriated by the General Assembly to maintain and support Shelby County Schools and Metro Nashville Public Schools to private schools and other private education expenses, despite the fact that the BEP formula was itself mandated by the Tennessee Supreme Court to remedy prior constitutional funding violations by the General Assembly.

Finally, the Voucher Law violates the "Appropriation of Public Moneys" provisions of the Tennessee Constitution and T.C.A. §9-4-601 because an appropriation was not made for the Voucher Law's estimated first year's funding, and the State expended resources to contract with a private company to undertake administration of the Voucher Law without appropriations authorized by law. *Infra* at §IV.F. There is no support for Defendants'

assertion that the appropriations bill transformed the Governor's Proposed Budget into law, thereby appropriating money for the Voucher Law. Nor was there a meaningful estimate for the Voucher Law's first year's funding.

Because Plaintiffs' claims are all pled in compliance with the minimal pleading standards of Tenn. R. Civ. P. 8.01, Defendants' motions should be denied.

II. PROCEDURAL HISTORY

On March 2, 2020, Plaintiffs, who are taxpayers and public school parents in Shelby and Davidson Counties, filed this action against Governor Bill Lee, the Tennessee Department of Education, the Commissioner of Education, and the members of the State Board of Education ("the State") in Davidson County Chancery Court, challenging the legality of the Voucher Law passed in May 2019, codified at T.C.A. §49-6-2601 *et seq.* In early March, Beacon Center ("Beacon"), Institute for Justice, and Liberty Justice Center each sought to intervene as defendants on behalf of parents and a private school who want to participate in the voucher program. The existing parties agreed to their limited intervention, subject to the terms outlined in the Agreed Order issued by the Court after a hearing on March 20, 2020.

On March 27, 2020, Liberty Justice Center filed a Motion to Dismiss. Pursuant to the Agreed Order, Beacon and Institute for Justice must "file all briefs, motions, or other legal arguments jointly during the pendency of the case." Accordingly, on April 15, 2020, they filed a Joint Motion for Judgment on the Pleadings under Rule 12.03. The State also

filed a Motion to Dismiss on the same day.² The Agreed Order further mandates that all “Intervenor-Defendants shall consult with . . . the State Defendants prior to filing all briefs and motions to *avoid duplicative briefing to the extent possible.*” (emphasis added). However, Liberty Justice Center filed its Motion to Dismiss well in advance of the State, suggesting that Liberty Justice Center likely did not consult with the State on the content of their filing. Moreover, Intervenor-Defendants’ and the State’s Motions overlap on numerous points, which strongly suggests a lack of consultation to avoid duplicative briefing prior to the filing of their Motions.³

For the purposes of judicial economy – and to avoid further duplicative briefing – Plaintiffs respond to the Motions collectively. *See* Agreed Order ¶4 (“Plaintiffs may file a consolidated response to any motion.”).

III. LEGAL STANDARD

“Under Tennessee Rule of Civil Procedure 8, Tennessee follows a liberal notice pleading standard . . . which recognizes that the primary purpose of pleadings is to provide

² The State also filed a Motion to Consolidate on April 15, 2020. Plaintiffs’ Response to that Motion is filed concurrently herewith.

³ *E.g.*, the State (State Mem. at 5-7) and Liberty Justice Center (LJC Mem. at 6-10, 14, 16) both argue that Plaintiffs do not have standing; the State (State Mem. at 19-21) and Beacon/Institute for Justice (Beacon/IJ Mem. at 5-6) both argue the Voucher Law does not violate the Home Rule clause because it does not apply to counties; all Defendants argue (State Mem. at 13-14; Beacon/IJ Mem. at 13-17; LJC Mem. at 15) that the Voucher Law does not violate the Education Clause’s provision for a “system of public schools”; all Defendants argue (State Mem. at 14-16; Beacon/IJ Mem. at 17; LJC Mem. at 16) the Voucher Law supersedes the BEP statute; all Defendants argue (State Mem. at 21-24; Beacon/IJ Mem. at 20-24; LJC Mem. at 17-21) that appropriations for the first year of the voucher program were made; and, all Defendants argue (State Mem. at 22-23; Beacon/IJ Mem. at 23-24; LJC Mem. at 19-21) that TDOE’s appropriation of Career Ladder funds was duly authorized by law.

notice of the issues presented to the opposing party and court. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011). Tenn. R. Civ. P. 8.01 requires that a complaint “shall contain: (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief the pleader seeks.” Rule 8.05(1) further provides that “[e]ach averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required.”

Defendants’ motions are brought pursuant to Tenn. R. Civ. P. 12.02(1), 12.02(6) and 12.03. State Mot. at 1; Beacon/IJ Mot. at 1; LJC Mot. at 2.

A motion to dismiss under Tenn. R. Civ. P. 12.02(1) challenges the court’s subject matter jurisdiction to hear a case. *Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 445-46 (Tenn. 2012). When a defendant asserts a facial challenge to a court’s subject matter jurisdiction, such as the State’s contentions here, “the factual allegations in the plaintiff’s complaint are presumed to be true.” *Id.* “If a complaint attacked on its face competently alleges any facts which, if true, would establish grounds for subject matter jurisdiction, the court must uncritically accept those facts, end its inquiry, and deny the dismissal motion.” *Staats v. McKinnon*, 206 S.W.3d 532, 542-43 (Tenn. Ct. App. 2006).

A motion to dismiss under Tenn. R. Civ. P. 12.02(6) “challenges only the legal sufficiency of the complaint, not the strength of the plaintiff’s proof or evidence.” *Webb*, 346 S.W.3d at 426. The court “must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences.” *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696 (Tenn. 2002). “A trial court

should 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.’” *Webb*, 346 S.W.3d at 426 (quoting *Crews v. Buckman Labs Int’l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002)).

Tenn. R. Civ. P. 12.02(6) motions are rarely appropriate in declaratory judgment actions. *Cannon Cty. Bd. of Educ. v. Wade*, 178 S.W.3d 725, 730 (Tenn. Ct. App. 2005). “The prevailing rule is that when a party seeking a declaratory judgment alleges facts demonstrating the existence of an actual controversy concerning a matter covered by the declaratory judgment statute, the court should not grant a Tenn. R. Civ. P. 12.02(6) motion to dismiss but, instead, proceed to render a declaratory judgment as the facts and law require.” *Id.* (citing *Hudson v. Jones*, 278 S.W.2d 799, 804 (Mo. Ct. App. 1955)).

A motion to dismiss under Tenn. R. Civ. P. 12.03 is resolved using “the same standard of review” governing motions to dismiss for failure to state a claim under Rule 12.02(6). *Young v. Barrow*, 130 S.W.3d 59, 63 (Tenn. Ct. App. 2003).

IV. ARGUMENT

A. Plaintiffs Have Standing to Assert Their Claims

Plaintiffs, as taxpayers and parents of children enrolled in public schools operated by Metro Nashville Public Schools and Shelby County Schools, have standing to bring this lawsuit in two ways. First, Plaintiffs are taxpayers challenging illegal governmental action that unlawfully diverts public funds. Second, Plaintiffs suffer a special injury from the Voucher Law that is not common to the public generally.

1. **Plaintiffs Have Standing as Taxpayers to Challenge the Voucher Law as an Illegal Expenditure of Public Funds**

Tennessee courts allow taxpayers to challenge illegal governmental action and the misuse or unlawful diversion of public funds from their stated purpose if three elements exist: “(1) the plaintiff/taxpayers have taxpayer status; (2) the taxpayers allege a specific illegality in the expenditure of public funds; and (3) the taxpayers have made a prior demand on the governmental entity asking it to correct the alleged illegality.” *City of New Johnsonville v. Handley*, No. M2003-00549-COA-R3-CV, 2005 WL 1981810, at *13 (Tenn. Ct. App. Aug. 16, 2005) (citing *Cobb v. Shelby Cty Bd. of Comm’rs*, 771 S.W.2d 124, 126 (Tenn. 1989)). As to the third element, a demand is not required where “the status and relation of the involved officials to the transaction in question is such that any demand would be a formality.” *Badgett v. Rogers*, 436 S.W.2d 292, 295 (Tenn. 1968).

In the present case, these three elements are easily satisfied. First, Plaintiffs are taxpayers who pay state and local taxes. ¶¶10-19; *see also City of New Johnsonville*, 2005 WL 1981810 at *13 (affirming trial court’s ruling that “there is no material dispute of fact that some of the plaintiffs are taxpayers of the City of New Johnsonville”).

Second, Plaintiffs allege that the Voucher Law is an illegal expenditure of public funds. ¶¶97-131. Specifically, Plaintiffs allege that the Voucher Law violates multiple provisions of the Tennessee Constitution and state law. *See Pope v. Dykes*, 93 S.W. 85, 88 (Tenn. 1905) (holding that taxpayers had standing to challenge the building of a road not authorized by law, “which will result in irreparable injury to the county and taxpayers”); *Lacefield v. Blount*, 304 S.W.2d 515, 522-23 (Tenn. Ct. App. 1957) (taxpayer citizen permitted to challenge appropriation made by county); *Stuart v. Bair*, 67 Tenn. 141, 147

(1874) (taxpayer citizens permitted to challenge government action that would have required the payment of taxes and the removal of the seat of justice, its records and officers).

The State argues that only one of Plaintiffs' causes of action, the Appropriation of Public Moneys violation, "alleges illegality in the expenditure of funds." State Mem. at 7. This assertion mischaracterizes Plaintiffs' claims. All of Plaintiffs' causes of action allege the need to strike down the Voucher Law, which is an illegal expenditure of public funds. For each of Plaintiffs' five causes of action, Plaintiffs have "allege[d] a specific illegality in the expenditure of public funds," as required by Tennessee courts. These specific illegalities are based on violations of the Home Rule, Education, Equal Protection, and Appropriation of Public Moneys provisions of the Tennessee Constitution, as well as the BEP statute. To suggest that any of Plaintiffs' claims do not allege a specific illegality in the expenditure of public funds is simply incorrect.

Third, Plaintiffs were not required to make a prior demand of governmental officials to remedy this illegal law because such a demand would have been a mere formality and a futile gesture. Defendant Governor Lee signed the voucher bill into law. ¶47. Defendant Education Commissioner Schwinn – who oversees the state system of public schools, administers the Tennessee Department of Education, and is responsible for implementing the Voucher Law – has moved as quickly as possible to implement the Voucher Law so that vouchers can be used in the upcoming school year. ¶¶23, 51-52. Defendant members of the State Board of Education, who are statutorily charged with overseeing the State's system of public schools, adopted administrative rules in November 2019 to effectuate the

Voucher Law. ¶¶21, 61. Defendant Tennessee Department of Education (“TDOE”), which is also responsible for overseeing the State’s system of public schools, is responsible for the administration and implementation of the Voucher Law. ¶22. TDOE executed a \$2.5 million contract with a private vendor – and paid \$1.2 million under this contract to date – to oversee online applications and payment systems for the voucher program. ¶¶51-52. Former House Speaker Casada also went to extraordinary efforts to secure the passage of the voucher bill, including holding the floor vote open for 38 minutes while having a private conversation on the House balcony with Representative Zachary, who subsequently switched his vote, ensuring passage of the bill. ¶60. A demand to any of these governmental officials to remedy this illegal law would have been a futile formality, and the State cannot credibly assert otherwise.

The Liberty Justice Center argues that Plaintiffs’ Complaint was required to state that a prior demand would have been a futile gesture or a vain formality.⁴ LJC Mem. at 8-9. But *Metro. Gov’t of Nashville & Davidson Cty. ex rel Anderson v. Fulton*, 701 S.W.2d 597, 601 (Tenn. 1985), cited by the Liberty Justice Center to support this argument, holds

⁴ Although this is not what the caselaw requires, this is exactly what Plaintiffs have done. See *Badgett*, 436 S.W.2d at 295 (“In the instant case, ***no demand upon the city was alleged***; but, in this case, its absence does not undermine the standing of complainant to sue. The Mayor and Finance Director patently have interests contrary to this action. Demand upon them would have been a vain formality.”) (emphasis added) (citations omitted); *Burns v. Nashville*, 221 S.W. 828 (Tenn. 1920) (finding that a demand on the commissioners would have been a “useless formality” when one of the remedies sought was against the commissioners); *Malone v. Peay*, 7 S.W.2d 40, 41-42 (Tenn. 1928) (assuming that because the transaction being challenged was approved by the Attorney General, taxpayers could sue because the officers of the state who would ordinarily bring this suit had “interests antagonistic thereto and would be embarrassed by its maintenance”); *Ragsdale v. City of Memphis*, 70 S.W.3d 56, 63 (Tenn. Ct. App. 2001) (stating a demand would be “a mere formality” where city and county executives participated in negotiations, signed legislation, and signed the required contractual documents).

that the demand requirement is indeed waived “when it appears that one of the accused public officers would have had to take the corrective action or would have been intimately involved in doing so, or would have been seriously embarrassed by the action.” As set forth above, this is exactly what the Complaint pleads. A demand to any of these governmental officials to remedy this unconstitutional law would have been a futile gesture and a vain formality.

Thus, Plaintiffs, as taxpayers, have standing to challenge this illegal governmental action that unlawfully diverts public funds.

2. Plaintiffs, as Parents of Children Enrolled in Metro Nashville Public Schools and Shelby County Schools, Have Standing Because They Suffer a Special Injury that Is Not Common to the Public Generally

a. As Parents, Plaintiffs Suffer a Distinct and Palpable Special Injury that Is Caused by the Voucher Law and Will Be Redressed When the Law Is Struck Down

Plaintiffs also have standing to challenge the Voucher Law as parents of children who attend public school in the two targeted counties. In general, to establish standing a plaintiff must show: (1) an injury that is “distinct and palpable,” (2) a causal connection between the alleged injury and the challenged conduct, and (3) the injury is capable of being redressed by a favorable decision of the court. *City of Memphis v. Hargett*, 414 S.W.3d 88, 98 (Tenn. 2013). Individual citizens and taxpayers in Tennessee may challenge governmental actions when they allege a special injury, status, or relation that is not common to the body of citizens as a whole. *Badgett*, 436 S.W.2d at 294 (Tenn. 1968); *see also State ex rel. Baird v. Wilson Cnty.*, 371 S.W.2d 434, 439 (Tenn. 1963); *Patten v. City*

of Chattanooga, 65 S.W. 414, 420 (Tenn. 1901) (holding that standing requires “the payment of a tax to increase [plaintiffs’] tax burdens, or otherwise inflict an injury not common to the body of the citizens”); *Town of Erwin v. Unicoi Cty.*, No. 03A01-9111-CH-00382, 1992 WL 74569, at *1 (Tenn. Ct. App. 1992) (citing *City of Greenfield v. Butts*, 582 S.W.2d 80 (Tenn. Ct. App. 1979)); *Curve Elementary Sch. Parent & Teacher’s Org. v. Lauderdale Cty. Sch. Bd.*, 608 S.W.2d 855, 859 (Tenn. Ct. App 1980) (finding that parents who have children in school affected by allegedly unlawful acts had standing because the parents and their children may suffer damages and injustices different than those suffered by citizens at large); *Bd. of Educ. of Shelby Cty. v. Memphis Cty. Bd. of Educ.*, 911 F. Supp. 2d 631, 645-46 (W.D. Tenn. 2012) (recognizing that school children in targeted county have right to challenge education-related law).

In the education context, in a case where a school board decided to close an elementary school, the Tennessee Court of Appeals explained:

[T]he parent members of the Association who have children attending the Curve Elementary School had standing to individually institute this lawsuit [because] the allegations of the complaint place these parents and their children in a position of possibly suffering damages and injustices of a different character or kind from those suffered by the citizens at large due to the allegedly unlawful acts of the Board.

Curve Elementary Sch. Parent & Teacher’s Org., 608 S.W.2d at 859. *See also Bd. of Educ. of Shelby Cty.*, 911 F. Supp. 2d at 645-46 (allowing county commissioners to challenge law on behalf of school children in targeted county who “face hindrances in pursuing their own claims” and would be unable to vindicate “their” rights in court).

Here, Plaintiffs allege a special injury that is distinct and palpable and is not common to the public generally. Plaintiffs’ injury is caused by the Voucher Law and can

only be redressed when the law is struck down. In terms of special injury, Plaintiffs suffer damages and injustices of a different character and kind from those suffered by the citizens at large due to the illegal Voucher Law. Plaintiffs are parents of children enrolled in public schools operated by Metro Nashville Public Schools and Shelby County Schools.⁵ In Davidson and Shelby Counties – and in no other county in the State – Basic Education Program (“BEP”) funds, which are public funds that the General Assembly appropriates to fund public K-12 schools, will be used to fund private schools that are not accountable to the public. If all vouchers are used in the upcoming school year, up to \$37 million will be diverted from Metro Nashville Public Schools and Shelby County Schools. *See* ¶69. If all vouchers are used in the first five years of the program, over \$375 million in BEP funds will be diverted from these two school districts to private schools. *Id.* When this diversion of BEP funds occurs, Plaintiffs – unlike parents of public school children in *every* other county in the State – will be forced to send their children to schools that have been deprived of critical resources needed to provide educational opportunities due to the state BEP funds diverted by the Voucher Law. Additionally, to make up for this funding shortfall, Plaintiffs will have to pay increased local taxes. Under both of these scenarios, Plaintiffs suffer a special injury that is different than the public generally and than parents in the 93 other counties in Tennessee. Moreover, Plaintiffs’ injury is also unlike other citizens in the two

⁵ The State and the Liberty Justice Center allege that Plaintiff Claudia Russell lacks standing to bring this lawsuit. State Mem. at 5-6; LJC Mem. at 6-9. While Ms. Russell does not have standing as a parent of a child enrolled in public school in Davidson or Shelby Counties, she, like all Plaintiffs in this case, pays state and local taxes. Thus she, like the others, has taxpayer standing to challenge the Voucher Law as an illegal expenditure of public funds. And any demand by Ms. Russell that governmental officials remedy this illegal law would have been nothing more than a futile gesture.

targeted counties who either do not have children or have children who are not enrolled in public school. As a result, Plaintiffs suffer a distinct special injury from the Voucher Law that is of a different character and kind than that suffered by the public generally.

The Liberty Justice Center attempts to distinguish *Curve* from the present case by arguing that the *Curve* Court allowed parents to challenge violations that directly damaged their children's schools, but not to bring claims that affect the citizenry at large. LJC Mem. at 9. This distinction fails because Plaintiffs are not attempting to bring claims that affect the citizenry at large. Rather, Plaintiffs' children – as students enrolled in public schools in the two counties targeted by the Voucher Law – suffer a special injury that is of a different character and kind from that suffered by the public generally, by public school parents and children who reside in *every* other county in Tennessee, and by other citizens in the two targeted counties who either do not have children or have children who are not enrolled in public school.

b. As Parents, Plaintiffs Have Standing to Bring Each of the Five Claims in Their Complaint, Despite Defendants' Unpersuasive Arguments to the Contrary

The State and Liberty Justice Center incorrectly argue that Plaintiffs, as parents of school children enrolled in Metro Nashville Public Schools and Shelby County Schools, do not suffer a distinct injury as a result of the Voucher Law. State Mem. at 6; LJC Mem. at 9. Plaintiffs' injuries are clear. Their children, unlike the children of Tennessee parents in every other county in the State, are enrolled in school districts that will be deprived of state BEP funds for their education because those funds will be diverted to private schools. As a result, Metro Nashville Public Schools and Shelby County Schools – where Plaintiffs'

children are enrolled – will have less BEP funding to support the teachers, staff, programs and other expenditures essential to their education. ¶¶72-73. Losing \$37 million in BEP funds in one school year and \$375 million in BEP funds in five years will have a devastating impact on the resources available to educate Plaintiffs’ children. ¶¶69-73. If a financial loss of this magnitude does not qualify as “special injury” in the context of educating children, it is difficult to imagine a loss that would qualify.

Attempting to take this broad argument a step further, the State and the Liberty Justice Center unpersuasively argue that Plaintiffs suffer no special injury under specific claims in the Complaint. Under the Home Rule claim, Plaintiffs suffer special injury as parents of public school children that is profoundly different than injuries suffered by the by the public generally, by public school parents and children who reside in *every* other county in in Tennessee, and by other citizens in the two targeted counties who either do not have children or have children who are not enrolled in public school. The State attempts to argue that because Plaintiffs do not have a right under the Home Rule provision to provide local approval of the Voucher Law, “any injury asserted is not their own.” State Mem. at 6. This is simply incorrect. The Home Rule provision of the Constitution requires a law that is local in form or effect be approved 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). Plaintiffs have rights under the Home Rule provision, and they are suffering the special injury described above because the Home Rule provision was violated. *See Bd. of Educ. of Shelby Cty.*, 911 F. Supp. 2d at 645-46, 660 (holding that

education-related law targeting one county violated the Home Rule provision in a case brought by county commissioners on behalf of school children who were unable to vindicate their own claims and rights in court). Furthermore, because Plaintiffs were denied their right to vote on the Voucher Law – as required by the Home Rule provision in the absence of a vote by the local legislative body – they suffered an additional special injury as voters in the targeted counties.

The State argues that the second claim in Plaintiffs’ complaint – the Voucher Law’s violation of the Education and Equal Protection Clauses of the Tennessee Constitution – is “too conjectural and hypothetical” to satisfy standing requirements. State Mem. at 6. This claim is far from conjectural and hypothetical: the Voucher Law *will* deprive Plaintiffs’ children of their constitutional right to adequate and substantially equal educational opportunities by diverting state BEP funds intended for public schools in the two targeted counties to pay for private school tuition. Further, the State’s and Intervenor-Defendants’ speculation about future “school improvement grants” cannot shield this unconstitutional law from being challenged. As the Complaint alleges, school improvement grants may not be funded in future years, and even if funded, they do not make up for the enormous financial loss that Plaintiffs’ children’s schools will face. ¶¶74-76.

The State and the Liberty Justice Center argue that Plaintiffs suffer no special injury under Plaintiffs’ other three causes of action, which allege violations of the Education and Appropriation of Public Moneys provisions of the Tennessee Constitution and of the BEP statute. State Mem. at. 6-8; LJC Mem. at 14-17. Again, these arguments fail. Because the Voucher Law impermissibly uses public education funds on private schools outside the

public education system in violation of the Education Clause of the Tennessee Constitution, Plaintiffs suffer the special injury described above. Because the Voucher Law expends public funds without an appropriation in violation of the Appropriation of Public Moneys provision of the State Constitution, Plaintiffs suffer the special injury described above. And because the Voucher Law also diverts BEP funds in violation of state statute, Plaintiffs suffer the special injury described above.

Plaintiffs, as parents of public school students in the only two districts in the State where the Voucher Law applies, suffer a special injury that is different than the injury suffered by the public generally, by public school parents and children who reside in *every* other county in Tennessee, and by other citizens in the two targeted counties who either do not have children or have children who are not enrolled in public school.

Thus, Plaintiffs, as parents of public school students enrolled in the two counties targeted by the Voucher Law, suffer a special injury that is not common to the public generally. Therefore, Plaintiffs have standing to bring all five claims in their Complaint.

B. The Voucher Law Violates the Home Rule Provision

The Voucher Law is subject to, and fails to meet, the requirements of the Home Rule provision of the Tennessee Constitution. Tenn. Const. Art. XI, §9. This provision of the Tennessee Constitution provides that an act of the General Assembly that is local in effect is null and void unless by its terms it requires local approval in the counties affected by the law. The Voucher Law affects only Shelby and Davidson Counties and has no provision for local approval. Plaintiffs have alleged sufficient facts to state a claim that the Voucher Law violates the Home Rule provision and must be struck down. *See* ¶¶2, 53-64.

1. The Voucher Law Is Local in Effect Because It Targets Only Two Counties

The Home Rule provision applies to statutes that target specific counties or municipalities, and this is no less true when two counties are targeted instead of one. The language and history of the Home Rule amendment demonstrate that it was added to the state constitution to prevent the General Assembly from enacting legislation that targets particular counties or municipalities without requiring their local approval. *Farris v. Blanton*, 528 S.W.2d 549, 551 (Tenn. 1975) (“Since 19 November 1953, it has been firmly established that any and all legislation ‘private and local in form Or effect’ affecting Tennessee counties or munic[i]palities, in any capacity, is absolutely and utterly void unless the Act requires approval of the appropriate governing body or of the affected citizenry.”). Indeed, the Tennessee Supreme Court has explicitly held that the Home Rule provision applies to statutes that target two counties. *Leech v. Wayne Cty.*, 588 S.W.2d 270, 274 (Tenn. 1979) (“Where . . . the General Assembly has made a permanent, general provision, applicable in nearly [90] of the counties . . . we do not think it could properly make different provisions in two of the counties . . .”). Thus, the fact that the Voucher Law targets both Davidson and Shelby Counties, rather than only one of the two, is of no consequence to Plaintiffs’ Home Rule claim. Intervenor-Defendants’ assertion that Article XI, §9 is inapplicable because the Voucher Law affects two counties rather than one, LJC Mem. at 10-11, is thus contrary to the plain meaning and intent of the Home Rule provision.

Because eligibility for the voucher program is fixed by date in the statute, no other counties can ever come under the purview of the Voucher Law. ¶57. The cases cited by the Liberty Justice Center, LJC Memo. at 11, in which statutes passed muster under the

Home Rule provision, hinged not on the fact that the statutes affected more than one county, but rather that they were written in a way that would allow the number of affected counties to increase over time. *See Bozeman v. Barker*, 571 S.W.2d 279 (Tenn. 1978) (holding that statute which applied to two counties was constitutional because it could become applicable to additional counties in the future due to population growth); *Civil Serv. Merit Bd. of City of Knoxville v. Burson*, 816 S.W.2d 725 (Tenn. 1991) (holding that statute which applied to three counties was constitutional for the same reason); *Frazer v. Carr*, 360 S.W.2d 449 (Tenn. 1962) (holding that statute which applied to four counties was constitutional for the same reason). In these cases, the precise number of counties initially affected, ranging from two to four, was immaterial to the Supreme Court's holdings. This clearly demonstrates that the Home Rule provision can apply to statutes that affect more than one county. If initial applicability to two or more counties was determinative, the Supreme Court would simply have ruled that Home Rule challenges were inappropriate because those statutes affected more than a single county, rather than engaging in an analysis of whether the statutes could eventually apply to additional counties through future population growth.

2. The Voucher Law Affects the Counties in Their Role in Funding Public Education

Tennessee law has long recognized that the provision of education is both a state and local matter. *State ex rel. Weaver v. Ayers*, 756 S.W.2d 217, 225 (Tenn. 1988) (finding that education is a partnership between the State and its political subdivisions, and that the Tennessee General Assembly has “manifestly vested the authority to appropriate funds for county purposes (including education)” in county government). Under Tennessee law,

there is “shared authority” over public education matters “among the State, the local boards of education, and the local legislative bodies.” *Id.* at 222. Local legislative bodies, such as county governments, have both the authority and responsibility to levy taxes to fund public schools and to approve local school district budgets. *State ex rel. Brown v. Polk Cty.*, 54 S.W.2d 714, 715-16 (Tenn. 1932) (county government has responsibility to raise revenue for public schools and to approve board of education budget); *Morgan Cty. Bd. of Comm’rs v. Morgan Cty. Bd. of Educ.*, No. 03A01-9308-CV-00290, 1994 WL 111457 (Ct. App. Tenn. Apr. 6, 1994) (setting forth respective powers and responsibilities of local legislative bodies and boards of education with regard to public schools). Therefore, a law that implicates the funding of public school districts affects the counties whose responsibility it is to levy taxes and approve the school districts’ budgets.

The Home Rule provision applies to laws that affect counties in either their “governmental or . . . proprietary capacity.” Tenn. Const., Art. XI §9. Thus, even if the county is acting in its “governmental” function as an agent of the State in fulfilling the State’s ultimate obligation to fund public education, Tennessee law is clear that the Home Rule provision still applies. *Bd. of Educ. of Shelby Cty., Tenn.*, 911 F. Supp. 2d at 660 (holding that law setting forth criteria for establishing municipal schools violated the Home Rule provision because it affected one county without requiring local approval); *see also Bd. of Educ. of Memphis City Sch. v. Shelby Cty.*, 339 S.W.2d 569, 579-82 (Tenn. 1960) (holding that the Home Rule provisions apply when a law affects a county in its function as a governmental agency); *Davidson Cty. v. City of Nashville*, 228 S.W.2d 89 (Tenn. 1950) (holding that law involving allocation of school funds affecting one county was

unconstitutional under Home Rule provision). the State cite *City of Knoxville ex rel. Roach v. Dossett*, 672 SW.2d 193 (Tenn. 1984) and *State ex rel. Cheek v. Rollings*, 308 S.W.2d 393 (Tenn. 1957), two cases where the Home Rule provision did not apply to laws involving the state judiciary, to support their contention that when state functions are involved, the Home Rule provision is inapplicable. State Mem. at 17. However, Tennessee law is clear that when county functions are implicated, including in matters involving the judiciary, the Home Rule provision applies. *Lawler v. McCanless*, 417 S.W.2d 548 (Tenn. 1967); *Durham v. Dismukes*, 333 S.W.2d 935 (Tenn. 1960).

In the instant case, both Davidson and Shelby Counties have the power and responsibility to raise revenue to fund their public schools and to approve school district budgets. The Voucher Law imposes a program on these counties that they did not approve. Moreover, it fundamentally affects the school districts' finances, for which the counties are responsible. The Voucher Law diverts state BEP funds intended for the school districts in each county, thereby requiring each county to raise additional revenue to compensate for state BEP funds lost to the voucher program. Regardless of whether the Voucher Law involves matters of education policy, it clearly implicates county powers and responsibilities and therefore is subject to the Home Rule provision. *Bd. of Educ. of Shelby Cty.*, 911 F. Supp. 2d at 660. Thus, the State's arguments that the Home Rule provision does not apply because education is a state matter must fail. State Mem. at 18.

In fact, because the purpose and function of the Voucher Law is to divert state BEP funds to private schools, it does not implicate a state educational function at all. The State has the constitutional duty to fund public schools, Tenn. Const. Art. XI, §12, but it has no

corresponding obligation to fund private schools. The cases cited by the State to support its proposition that education is a state and not a local matter involve the State's role in establishing and maintaining a statewide system of *public* education. State Mem. at 18-19; see *S. Constructors, Inc. v. Loudon Cty. Bd. of Educ.*, 58 S.W.3d 706, 715 (Tenn. 2001) (the State's function is to provide for the maintenance, support and eligibility standards of a system of free public schools); *Cagle v. McCanless*, 285 S.W.2d 118 (Tenn. 1955) (public education rests upon the solid foundation of state authority); *City of Humboldt v. McKnight*, No. M2002-02639-COA-R3-CV, 2005 WL 2051284 at *13 (Ct. App. Tenn. Feb 21, 2006) (State's function is to fashion a statewide public school system that meets constitutional requirements.). Under the Voucher Law, the State funds private schools. The Voucher Law plays no part in the State's functions of establishing, maintaining or supporting a statewide system of public schools. Therefore, the aforementioned cases cited by the State are inapposite.

3. The Voucher Law Need Not Refer to Davidson and Shelby Counties to Trigger a Home Rule Inquiry

The Home Rule provision applies in the instant case because the Voucher Law affects Davidson and Shelby Counties. The fact that the law refers to local education agencies ("LEAs") is irrelevant. *Contra* State Mem. at 19-21; Beacon/IJ Mem. at 5-6. The relevant inquiry under the Home Rule provision is dictated by the clear language of the provision: if a law is local "in effect," it is subject to the Home Rule provision. *Davidson Cty.*, 228 S.W.2d at 90 (law related to the allocation of funds to LEAs affects county); *Bd. of Educ. of Shelby Cty.*, 911 F. Supp. 2d at 654 (law setting forth criteria for establishing municipal schools had local effect on county). As discussed above, Davidson and Shelby

Counties have the power and responsibility to levy taxes to fund the LEAs located therein, as well as to approve the budgets of those LEAs. *Polk Cty.*, 54 S.W.2d at 715-16; *Morgan Cty. Bd. of Comm'rs*, 1994 WL 111457. The Voucher Law diverts BEP funds intended for LEAs that these counties are obligated to fund. As a result of the diversion of BEP funds, these counties will be required to raise more revenue to compensate for the loss of state funding. Thus, the Voucher Law necessarily and directly affects both counties, implicating the Home Rule provision. Defendants' and Intervenor-Defendants' contention that the Home Rule provision does not apply because the Voucher Law refers to LEAs rather than counties conflicts with the plain language of the Home Rule provision and the longstanding reality of school governance in Tennessee.

Beacon/Institute for Justice claim that because the Davidson and Shelby County charters do not state that the counties "control" the public schools, the Home Rule provision does not apply. *See* Beacon/IJ Mem. at 8-10. It is irrelevant to Plaintiffs' Home Rule claim that the counties do not "control," "administer," nor are they "equated with" the public schools. Beacon/IJ Memo at 8-10. The inquiry under the Home Rule provision must focus on whether the Voucher Law *affects* the counties. *See Chattanooga-Hamilton Cty. Hosp. Auth. v. City of Chattanooga*, 580 S.W.2d 322, 328 (Tenn. 1979) (ruling that the Home Rule provision applied because the challenged law "affect[ed] the county"). As discussed above, the Voucher Law clearly affects Davidson and Shelby Counties, as they must levy taxes and approve the budgets of Metro Nashville Public Schools and Shelby County Schools. There is no provision in either charter that negates the counties' role in levying taxes to fund the LEAs or approving their budgets. In fact, Nashville's charter explicitly

provides that the Metropolitan Government of Nashville and Davidson County shall have the power “to establish, maintain and regulate, free of sectarian influences, a system of free schools.” Charter of the Metropolitan Government of Nashville and Davidson County §2.01(6). Moreover, the Shelby County Charter was last amended in 2008. Subsequent to that amendment, a court ruled that the Home Rule provision applies to the county in matters involving Shelby County Schools. *Bd. of Educ. of Shelby Cty.*, 911 F. Supp. 2d at 660. The counties’ charters in no way undermine Plaintiffs’ allegations that the Voucher Law *affects* the counties. Therefore, Intervenor-Defendants’ claim that the charters prevent application of the Home Rule provision must be rejected.

C. The Voucher Law Violates the Education and Equal Protection Clauses of the Tennessee Constitution

The Voucher Law violates the right to an adequate and equitable public education under the Education and Equal Protection Clauses of the Tennessee Constitution. Contrary to the State’s contentions, these claims are ripe for review and it is well established under Tennessee law that they are justiciable. Because the Voucher Law diverts public education funding that is essential to the education rights of students in Metro Nashville Public Schools and Shelby County Schools, and does so with no rational basis, the arguments advanced by Defendants and Intervenor-Defendants do not affect Plaintiffs’ well-pled cause of action under the Education and Equal Protection Clauses.

1. Plaintiffs’ Claims Are Ripe

The State wrongly contends that Count II – Plaintiffs’ claim that the Voucher Law violates the Equal Protection and Education Clauses of the Tennessee Constitution – is not ripe for judicial determination. *See State Mem.* at 8-9.

“The justiciability doctrine of ripeness ‘requires a court to answer the question of “whether the dispute has matured to the point that it warrants a judicial decision.’”” *State v. Price*, 579 S.W.3d 332, 338–39 (Tenn. 2019) (quoting *B & B Enters. of Wilson Cty. v. City of Lebanon*, 318 S.W.3d 839, 848 (Tenn. 2010)). “Courts should engage in a two-pronged analysis in determining whether a particular case is ripe for review.” *Id.*

First, “[a]n issue is not fit for judicial decision if it is based ‘on hypothetical and contingent future events that may never occur.’” *Id.* (internal quotation omitted). “The ripeness doctrine, however, does not require the harm to have actually occurred.” *Cent. W. Va. Energy Co. v. Wheeling-Pittsburgh Steel Corp.*, 245 F. App’x 415, 425 (6th Cir. 2007). Second, the Court should consider “whether withholding adjudication . . . will impose any meaningful hardship on the parties.” *Price*, 579 S.W. 3d at 338 (internal quotation omitted). Writing for a unanimous Supreme Court in *Golden v. Zwickler*, 394 U.S. 103 (1969), Justice Brennan adopted the following test:

‘The difference between an abstract question and a ‘controversy’ contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.’

Id. at 108, 89 S. Ct., at 959-60 (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

Here, Plaintiffs’ claims are ripe. Count II alleges that the Voucher Law violates the Equal Protection and Education Clauses of the Tennessee Constitution because (a) the current funding provided by the General Assembly through the BEP is *already* “inadequate

to enable Shelby County Schools and Metro Nashville Public Schools to provide the teachers, support staff, and other resources necessary to afford all students an adequate education under Article I, §8, and Article XI, §§8 and 12, of the Tennessee Constitution”; and (b) “the Voucher Law *will further* deprive Shelby County Schools and Metro Nashville Public Schools of the funding required to provide their students with a constitutionally-mandated adequate education.” ¶¶102-108. These are not “hypothetical and contingent future events that may never occur.” *Price*, 579 S.W.3d at 338-39 (internal quotation omitted). Rather, the Voucher Law will exacerbate the underfunding that is already occurring in Metro Nashville Public Schools and Shelby County Schools, making an already untenable situation even worse. ¶72.⁶

Withholding judgment on the legality of the Voucher Law will also impose a meaningful hardship on Plaintiffs. *Wheeling-Pittsburgh*, 245 F. App’x at 425. Delaying resolution of these claims will result in Plaintiffs’ children’s schools – which are already underfunded – being further deprived of educational resources. When this happens, Plaintiffs’ children will suffer. ¶¶70-73. While the State contends that “the ESA Program has not been fully implemented,” State Mem. at 9, “[o]ne does not have to await the consummation of threatened injury to obtain preventive relief.” *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 201 (1983) (internal quotation omitted). Because the Complaint contains detailed factual allegations that the

⁶ The State’s assertion about school improvement grants, State Mem. at 9, are inapposite as these grants may not be funded in a given year, and even if funded, they cannot make up for the funding shortfall caused by the Voucher Law. *See infra* Part IV.C.3.

Voucher Law will exacerbate existing funding and resource deficiencies in Metro Nashville Public Schools and Shelby County Schools, Count II is ripe for adjudication.

2. Adequacy Claims Under the Tennessee Constitution’s Education Clause Are Justiciable

The Tennessee Supreme Court has ruled that adequacy claims under the Education Clause of the Tennessee Constitution are justiciable. *Tenn. Small Sch. Sys. v. McWherter* (“*Small Sch. Sys. I*”), 851 S.W.2d 139, 148 (Tenn. 1993) (holding that it is the judiciary’s “duty to consider the question of whether the legislature, in establishing the educational funding system” has violated the provisions of the Tennessee Constitution). The Court emphasized that to avoid deciding a case under the Education Clause simply because appropriating education funding is a legislative function would be “a denigration of our own constitutional duty.” *Id.* at 150-51 (rejecting State’s argument that there is no judicially enforceable standard by which to judge educational adequacy) (internal quotation omitted). Thus, the State’s contention that this case presents a non-justiciable political question, State Mem. at 12-13, contravenes binding, well-established Tennessee Supreme Court precedent. In fact, the same argument regarding justiciability was recently rejected in an education adequacy case currently pending in the Chancery Court for Davidson County. In that case, *Shelby County Board of Education v. Haslam*, Case No. 15-1048-III (Order Denying Defendants’ Motion to Dismiss) (Davidson County Chancery Court, July 24, 2018), the court held that adequacy claims are justiciable in Tennessee, stating that “to rule that the review of an adequacy claim is non-justiciable would be changing the Supreme Court of Tennessee’s rulings.” *Id.* at 6.

In an attempt to disregard the *Shelby County* court’s adequacy decision, the State relies on the same contentions it raised unsuccessfully in that case. As in the case at bar, the State in the *Shelby County* case, citing *Baker v. Carr*, 369 U.S. 186 (1962), argued that the separation of powers somehow renders constitutional adequacy claims non-justiciable. The *Shelby County* court expressly rejected the idea that *Baker* signals nonjusticiability of an adequacy claim under Tennessee’s Education Clause. *Shelby Cty. Board of Education v. Haslam*, Case No. 15-1048-III, at 6 (concluding that *Baker* “would allow the judiciary to exercise its judicial function to review Plaintiffs’ adequacy claim”). As the Tennessee Supreme Court ruled, to leave interpretation of the Education Clause to the legislature would be an abdication of the Court’s inherent function. *Small Sch. Sys. I*, 851 S.W.2d at 148.

In its failed motion to dismiss in *Shelby County*, the State also raised the argument set forth here that educational adequacy claims are not justiciable because the Education Clause is not self-executing. That contention is flawed as well. The mere fact that the Education Clause is not self-executing does not preclude judicial review. Courts in Tennessee have repeatedly reviewed the constitutionality of non-self-executing provisions of the state constitution. *State ex rel. Maner v. Leech*, 588 S.W.2d 534, 541 (Tenn. 1979); *Biggs v. Beeler*, 180 Tenn. 198, 219 (1943). Moreover, as explained above, the Tennessee Supreme Court has already ruled that educational adequacy and equity claims under the non-self-executing Education Clause are justiciable. *Small Sch. Sys. I*, 851 S.W.2d at 148; *see also Shelby Cty. Bd. of Educ.*, Case No. 15-1048-III at 6 (concluding that “the

Education Clause contemplates that the judiciary would be called upon to interpret this clause and ensure that the clause was enforced”).

Tennessee law is clear that adequacy claims under the constitution’s Education Clause are justiciable. In addition to the Tennessee Supreme Court, a majority of state courts have found adequacy claims justiciable under their state constitutions’ education clauses.⁷ The State provides no persuasive reason to depart from this overwhelming precedent. The State’s justiciability arguments must be rejected.

3. The Voucher Law Violates the Tennessee Constitution’s Guarantee of an Adequate and Equitable Education

The Tennessee Constitution mandates that the General Assembly “provide for the maintenance, support and eligibility standards of a system of free public schools.” Tenn. Const. Art. XI, §12. The Tennessee Supreme Court has held that through this system of free public schools, the General Assembly must ensure adequate and equitable educational

⁷ The rulings from sister states include: Arkansas, *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472 (Ark. 2002); Colorado, *Lobato v. People*, 218 P.3d 358 (Colo. 2009); Connecticut, *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206 (Conn. 2010); Delaware, *Delawareans for Educ. Opportunity v. Carney*, 199 A.3d 109 (Del. Court of Chancery, 2018); Idaho, *Idaho Sch. for Equal Educ. Opportunity v. State*, 976 P.2d 913 (Idaho 1998); Kansas, *Gannon v. State*, 319 P.3d 1196 (Kan. 2014); Kentucky, *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); Maryland, *Hornbeck v. Somerset Cty. Bd. of Educ.*, 458 A.2d 758 (Md. 1983); Massachusetts, *McDuffy v. Sec’y of the Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); Minnesota, *Cruz-Guzman v. State*, 916 N.W.2d 1, (Minn. 2018); Montana, *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257 (Mont. 2005); New Hampshire, *Claremont Sch. Dist. v. Governor* (“*Claremont II*”), 703 A.2d 1353 (N.H. 1997); New Jersey, *Abbott v. Burke*, 20 A.3d 1018 (N.J. 2011); New York, *Hussein v. State*, 973 N.E.2d 752, (N.Y. 2012); North Carolina, *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997); Ohio, *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997); Pennsylvania *William Penn Sch. Dist. v. Pennsylvania Dep’t of Educ.*, 170 A3d 414 (Pa. 2017) Texas, *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005); Vermont, *Brigham v. State*, 889 A.2d 715 (Vt. 2005); Washington, *McCleary v. State*, 269 P.3d 227 (Wash. 2012); West Virginia, *Pauley v. Kelly*, 255 S.E.2d 859 (W.Va. 1979); Wisconsin, *Vincent v. Voight*, 614 N.W.2d 388 (Wis. 2000); and Wyoming, *Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995).

opportunities for all public school students. *Small Sch. Sys. I*, 851 S.W.2d 139; *Tenn. Small Sch. Sys. v. McWherter* (“*Small Sch. Sys. II*”), 894 S.W.2d 734 (Tenn. 1995); *Tenn. Small Sch. Sys. v. McWherter* (“*Small Sch. Sys. III*”), 91 S.W.3d 232 (Tenn. 2002). The General Assembly funds the State’s public school system through the BEP.

The Supreme Court has recognized that the goal of the BEP is to address “both constitutional mandates imposed upon the State the obligation to maintain and support a system of free public schools and the obligation that that system afford substantially equal educational opportunities.” *Small Sch. Sys. II*, 894 S.W.2d at 738. Thus, the BEP is the vehicle through which the State provides students in each public school district with constitutionally adequate and equitable educational opportunities. The Voucher Law, by reducing state BEP funds for public schools in Shelby County Schools and Metro Nashville Public Schools – but in no other districts – directly violates the guarantees of adequate and equitable educational opportunities under the Tennessee Constitution.

a. Plaintiffs Have Stated a Claim that the Voucher Law Violates the Right to an Adequate Education

The Complaint alleges that the BEP is insufficient to cover the cost of all components essential to an adequate education. ¶¶70-72; *see, e.g.*, Basic Education Program Review Committee 2019 Annual Report (finding, for example, that it would cost over an additional \$500,000 to provide adequate counselors in Metro Nashville Public Schools, and an additional almost \$9 million to provide adequate counselors in Shelby

County Schools).⁸ According to the State’s own reports, both Metro Nashville Public Schools and Shelby County Schools already receive inadequate BEP funding to meet students’ educational needs, as well as state and federal educational requirements. ¶71.

Both Metro Nashville Public Schools and Shelby County Schools serve significant populations of students who require additional academic and social supports in order to learn successfully. ¶70. However, as sufficiently alleged in the Complaint, the districts do not have adequate educational resources to meet these students’ needs, such as teachers, guidance counselors, nurses and interventions for high-needs students. ¶71-72. Diverting more BEP funds from the district to pay for private schools will likely result in more cuts to educational services that are desperately needed by district students. Plaintiffs have proffered detailed factual allegations that the Voucher Law will exacerbate this inadequacy. ¶¶60-80.

The State’s and Liberty Justice Center’s bald and unsupported assertions that the Voucher Law will result in a “windfall” to the districts, State Mem. at 9; LJC Mem. at 13, are inconsistent with the facts alleged in the Complaint. The Voucher Law, by its express terms, will cause both districts to lose far more per pupil in state BEP funds than either district receives, because it mandates that both the state *and* local share of the BEP allocation intended for each district be deducted from the districts’ *state* BEP share. ¶65. The BEP is the mechanism through which the State fulfills its obligation to ensure constitutionally adequate education funding in each district. ¶¶37-46. The per-pupil

⁸ https://www.tn.gov/content/dam/tn/stateboardofeducation/documents/bepcommitteeactivities/2019-bep/2019_BEP_Report.pdf

calculations under the BEP are the State's determination of what constitutes adequate public education funding. As explained below, under the Voucher Law, both Shelby County Schools and Metro Nashville Public Schools will lose *more* state BEP funding for each student using a voucher than each district receives in state BEP funding for one student. Thus, even if the current BEP allocations were adequate, the diversion of state BEP funds from these districts would result in a violation of the Education Clause.

The BEP formula calculates the yearly BEP allocation for each district. *See* ¶40; T.C.A. §§49-3-302, 49-3-351, *et seq.* That allocation represents the state contribution plus the required local contribution, *i.e.*, what the State provides to the district and what the district is required by law to pay. ¶¶40-43. The Voucher Law provides that the amount to be deducted from state BEP funds otherwise payable to each district, for each voucher student, equals:

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.

T.C.A. §49-6-2605(a) (emphasis added). Under the Voucher Law, an amount representing *both the state and local contribution* will be deducted from each district's *state* BEP funding. ¶65. Consequently, each district will necessarily lose more state BEP funding that it receives from the State for each student.

To illustrate this point, in the current fiscal year, Metro Nashville Public Schools' BEP per-pupil allocation is approximately \$8,198.⁹ Of that amount, the district receives

⁹ Tenn. Sch. Bds. Assoc., Metro Nashville Public School District Financial Overview, <http://tsbadatadashboard.com/metropolitan-nashville-public-school-district/>; *see also*, Complaint,

\$3,493 per pupil in BEP state funding and is required to contribute \$4,705 per pupil.¹⁰ The \$7,500 per pupil that will be diverted from Metro Nashville Public Schools comes from its state BEP funding. Thus, for every student leaving Metro Nashville Public Schools to participate in the voucher program, the district will lose an amount far exceeding its state funding for that pupil. In fact, the district will lose state funding equaling *more than twice the per pupil amount* for every student who receives a voucher.

In the current fiscal year, Shelby County Schools' BEP allocation is approximately \$7,003 per pupil.¹¹ Of that amount, the district receives \$4,642 per pupil in state funding under the BEP and Shelby County is required to contribute \$2,361 per pupil.¹² The approximately \$7,500 per pupil that will be diverted from Shelby County Schools' state BEP funding for each voucher student well exceeds the amount the district receives in state funding under the BEP. Thus, as with Metro Nashville Public Schools, for every student leaving Shelby County Schools, the district will lose an amount far exceeding its state funding for that student. Losing this disproportionate share of state BEP funds under the Voucher Law further restricts the districts' ability to provide essential resources to their students.

Metropolitan Government of Nashville and Davidson County, et al. v. Tennessee Department of Education, et al. (Metro Nashville Complaint), Case No. 20-0143-II, ¶¶104-05.

¹⁰ *Id.*

¹¹ Tenn. Sch. Bds. Assoc., Shelby County Schools District Financial Overview <http://tsbadatadashboard.com/shelby-county-school-district/>; *see also Metro Nashville Complaint* ¶¶108-09.

¹² *Id.*

Contrary to the State's and Liberty Justice Center's contentions, State Mem. at 9; LJC Mem. at 13, the school improvement fund grants that may be available under the Voucher Law will not compensate for the loss in funding resulting from the diversion of BEP funds to the voucher program. The Complaint sets forth in detail the uncertainty about whether these grants will be funded, and the restrictions on their use, length, and students covered – all of which prevent these grants from compensating for the loss in BEP funding under the Voucher Law. ¶¶74-76. Nor is there any guarantee, after these school improvement fund grants expire, that any school improvement grants made available to low-performing schools in the state generally, LJC Mem. at 14, would be awarded to these districts or would compensate for the loss of funding from the Voucher Law.

Plaintiffs' Complaint makes additional unrefuted allegations supporting their claims that the Voucher Law will lead to inadequate educational resources in violation of the Education Clause. These include: (i) the existence of substantial fixed costs that prevent the districts from reducing expenses commensurate with the reduction in enrollment under the voucher program (¶79); (ii) the likelihood that the voucher program will increase the concentration of more costly-to-educate students in the districts because private schools participating in the voucher program can deny enrollment to students with disabilities and others with increased needs (¶80); and (iii) the fact that BEP funds for students who return to the districts from the voucher program mid-year will not revert to the districts. ¶77; T.C.A. §49-6-2603(e).

b. Plaintiffs Have Stated a Claim that the Voucher Law Violates the Right to Equitable Educational Opportunities

The Complaint alleges that the diversion of state BEP funds violates the equity mandate of the Education Clause, by treating public school students in Shelby County Schools and Metro Nashville Public Schools differently than public school students across the State. ¶¶62, 65, 105. As discussed *supra*, Part IV.B., the Voucher Law targets students in Shelby County Schools and Metro Nashville Public Schools only. Moreover, as demonstrated above, the mechanism for funding the vouchers disproportionately impacts students in those districts. The two districts lose more than the per-pupil share of state BEP funding for each student who leaves to use a voucher. In any other district in the State, when student enrollment declines, the state BEP share will decline proportionally to that number of students. No district suffers a deduction of state funds in the amount of the state *plus* local share for students who leave the district, other than Metro Nashville Public Schools and Shelby County Schools under the Voucher Law. ¶¶62, 65. Thus, there are sufficient allegations that students enrolled in Shelby County Schools and Metro Nashville Public Schools are disadvantaged *vis-a-vis* students in other districts across the State. *See Small Sch. Sys. I*, 851 S.W.2d at 156 (holding that there was an equity violation under the Education Article when students in different public school districts had disparate educational opportunities as a result of state funding).

Defendants and Intervenor-Defendants advance two specious arguments that do not undermine the sufficiency of Plaintiffs' allegations stating a claim of inequity under the Education Clause. First, they claim that the districts will not lose funds under the Voucher

Law and thus will not be disadvantaged as compared to other districts. State Mem. at 9; LJC Mem. at 13. As Plaintiffs demonstrate, *supra Part IV.C.3.a.*, this contention is false. Second, Intervenor-Defendants twist the equity argument by claiming that there is equal opportunity to attend either a private or public school. Beacon/IJ Mem. at 10; LJC Mem. at 13. This assertion is irrelevant. The Tennessee Constitution obligates the State to provide equality of educational opportunity in the statewide system of free *public* schools, with no obligation to fund private schools. Because there is no constitutional obligation related to private school students, the educational opportunity for students in private schools is irrelevant to this case. Rather, the relevant inquiry is whether there is equality of opportunity among *public* school students throughout the State. As alleged by the Plaintiffs, by deducting an amount larger than the state share of per-pupil BEP funding for every student who leaves the district to use an ESA voucher in Metro Nashville Public Schools and Shelby County Schools only, the Voucher Law treats public school students in those two districts differently than public school students in other districts in the State.

4. There Is No Rational Basis that Justifies the Classification in the Voucher Law

There is no rational basis to justify the disparate treatment of students in Metro Nashville Public Schools and Shelby County Schools versus public school students in the rest of the State. Under Tennessee Law, there must be “some reasonable basis for the disparate state action.” *Small Sch. Sys. I*, 851 S.W.2d at 153; *see also Small Sch. Sys. III*, 91 S.W.3d at 233 (finding no rational basis for excluding teacher salaries from the BEP); *State v. Tester*, 879 S.W.2d 823, 829 (Tenn. 1994) (finding no rational basis to limit a law to only three counties in the State).

The State contends that the legitimate state interest in having the Voucher Law target students in these two districts was to provide additional educational opportunities to children in LEAs with the consistently lowest performing schools. State Mem. at 11. However, the legislative history belies this claim. Originally, five counties with the lowest performing schools were targeted in the voucher bill: Davidson, Hamilton, Knox, Madison, and Shelby. ¶58. The other three counties were removed, not for educational reasons, but for political reasons: to secure the votes of legislators from those counties removed from the bill. *Id.*

Moreover, the Tennessee Supreme Court has held that there is no “legitimate interest justifying the granting to some citizens, educational opportunities that are denied to other citizens similarly situated.” *Small Sch. Sys. I*, 851 S.W.2d at 156. Therefore, even if the stated justification for singling out students enrolled in Metro Nashville Public Schools and Shelby County Schools was an attempt to provide additional educational opportunities to some of those students, there is no rational basis for disproportionately harming students who remain enrolled in these districts. As discussed above, the Voucher Law diverts far more than the per-pupil state share of state BEP funds for every student who leaves Metro Nashville Public Schools or Shelby County Schools to use a voucher. This disproportionate diversion disadvantages students in these public school districts versus those in the rest of the State, leaving them with fewer educational resources and fewer educational opportunities. Thus, the State’s contention that there is a rational basis for the classification under the Voucher Law fails.

D. The Voucher Law Violates the Education Clause’s Mandate of a Single System of Public Schools

The Complaint alleges that the Voucher Law also violates the Education Clause because it contravenes the requirement that the State fulfill students’ rights to a publicly funded education by providing for the maintenance, support, and eligibility standards of “*a system* of free public schools.” ¶¶109-118. Tenn. Const. Art. XI, §12 (emphasis added). The Voucher Law diverts BEP funds that have been appropriated by the General Assembly for the purpose of maintaining and supporting Tennessee public schools to instead pay for tuition at private schools that need not comply with the requirements of the statewide system of public education. ¶¶65-66. The private schools that participate in the voucher program are not, by definition and by the terms of the Voucher Law, part of the State of Tennessee’s system of public schools. ¶¶82-83. Furthermore, they are not obligated to comply with myriad requirements imposed on the State’s system of public schools. As detailed in Plaintiffs’ Complaint, they need not comply with the same academic, accountability, or governance standards. ¶¶84-89. These private schools can also discriminate against students based on characteristics such as disability, religion, and LGBTQ status. ¶¶90-95. And they can refuse to provide essential educational services, such as special education programs for students with disabilities. ¶¶93, 96. Plaintiffs have pled facts sufficient to state a claim that the use of public education funds on private schools violates the constitutional mandate that the General Assembly provide public education by maintaining and supporting a single system of free public schools.

1. The Constitution Requires the State to Fulfill the Education Clause’s Mandates Solely Through a System of Free Public Schools

The Education Clause lays out the manner in which the State must fulfill its obligation to provide adequate and equitable educational opportunity to all Tennessee children. Interpreting the “plain meaning of Article XI, Section 12,” the Tennessee Supreme Court has explained that the Education Clause “expressly recognizes *the inherent value* of education *and then* requires the General Assembly to ‘provide for the maintenance, support and eligibility standards of a system of free public schools.’” *Small Sch. Sys. I*, 851 S.W.2d at 150 (second emphasis added).¹³ Similarly, in *Bush v. Holmes*, the Florida Supreme Court explained that whereas “[t]he second sentence of [the Florida Education Clause] provides that it is the ‘paramount duty of the state to make adequate provision for the education of all children residing within its borders,’” the next sentence “provides a restriction on the exercise of this mandate by specifying that the adequate provision required in the second sentence ‘shall be made by law for a uniform, efficient, safe, secure and high quality system of *free public schools*.’” 919 So. 2d 392, 407 (Fla. 2006) (quoting Fla. Const. Art. IX, §1(a)) (emphasis in original). Likewise, in Tennessee’s Education Clause, the generalized edict of the first sentence, providing that “[t]he State of Tennessee recognizes the inherent value of education and encourages its support,” is defined and restricted by the more specific succeeding sentence, which proclaims that

¹³ The Beacon/Institute for Justice argue that the constitutional framers should have specified public schools as the means to educate Tennessee children. *See* Beacon/IJ Mem. at 17. As the Tennessee Supreme Court has recognized, the framers did just that.

“[t]he General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools.” Tenn. Const. Art. XI, §12. Thus, attempting to provide publicly funded education through payment of private school tuition and expenses is a violation of Tennessee’s Education Clause.

The State and Intervenor-Defendants assert that the Voucher Law does not “impede,” “extinguish,” or “abolish” the system of public schools because public schools still exist as an option for parents who choose them. State Mem. at 13-14; Beacon/IJ Mem. at 13-15; LJC Mem. at 15. This fact is immaterial to Plaintiffs’ claim that the voucher program violates the State’s constitutional obligation to maintain a single system of public schools. Use of public education funds for unaccountable private schools, *in addition* to the public school system, violates the constitutional requirement that the General Assembly maintain a single “system” of public education. Tenn. Const. Art. XI, §12; *see also Small Sch. Sys. II*, 894 S.W.2d at 738 (holding that the BEP fulfills the mandate in Article XI, §12 to maintain and support a public school system that provides all students substantially equal educational opportunities). Even if the Voucher Law had no effect on the provision of education in public schools – which plaintiffs assert it does, *see supra*, Part IV.C.3 – the State’s establishment of, and use of public education funds to support, the private school voucher program is sufficient to state a claim that the Voucher Law violates the Education Clause.

In *Bush*, the Florida Supreme Court rejected the argument that the State “could fund a private school system of indefinite size and scope as long as the state also continued to fund the public schools at a level that kept them” otherwise compliant with the

constitutional requirements that they be “uniform, efficient, safe, secure, and high quality.” 919 So.2d at 409 (quoting Fla. Const. Art. IX, §1(a)). The Court held that “because voucher payments reduce funding for the public education system, the [voucher program] *by its very nature* undermines the system of ‘high quality’ free public schools that are the sole authorized means of fulfilling the constitutional mandate to provide for the education of all children residing in Florida.” *Id.* (emphasis added). The Florida Supreme Court likewise rejected the argument, also asserted by Defendants in the instant case, that the voucher program merely “supplement[s] the public education system,” holding that it “[i]nstead . . . diverts funds that would otherwise be provided to the system of free public schools that is the exclusive means set out in the Constitution for the Legislature to make adequate provision for the education of children.” *Id.* at 408-09.

Additional courts have acknowledged that voucher programs that divert public education funds to private education uses are incompatible with Education Clause requirements that the legislature provide publicly funded education via a statewide system of public schools. In *Simmons-Harris v. Goff*, which Beacon/Institute for Justice cite in support of their position, the Ohio Supreme Court concluded that the state constitution’s requirement that the General Assembly provide “a thorough and efficient system of common schools throughout the State,” Ohio Const. Art. VI, §2, could support the argument “that implicit within this obligation is a prohibition against the establishment of a system of uncommon (or nonpublic) schools financed by the state.” 711 N.E.2d 203, 212 (Ohio 1999). Likewise, in *Cain v. Horne*, a challenge to two voucher programs, the Arizona Supreme Court concluded that the state constitution’s Aid Clause, prohibiting the

appropriation of public funds to private schools, “furthers th[e] goal” of its Education Clause that the State ““provide for the establishment and maintenance of a general and uniform public school system.”” 202 P.3d 1178, 1183 (Ariz. 2009) (quoting Ariz. Const. Art. 11 §1).

2. The State Cannot Fulfill Its Education Clause Obligation Through Private School Vouchers Precisely Because Private Schools Are Private and Unaccountable

It is uncontested that the Voucher Law permits diversion of taxpayer funds to private schools that do not comply with the same academic and accountability standards as Tennessee’s public schools and can openly discriminate in admissions and in the provision of educational services. ¶¶85-96; *see also, e.g.*, Beacon/IJ Mem. at 16. Intervenor-Defendants’ description of Plaintiffs’ challenge to the public funding of such private schools as stifling educational innovation or parents’ right to direct their children’s education, *see id.* at 16-17, is a mischaracterization of Plaintiffs’ simple contention that the State cannot fulfill its obligation to maintain and support a public school system through payment of tuition to unaccountable private schools. *See Bush*, 919 So.2d at 408 (“Although parents certainly have the right to choose how to educate their children, [the Education Clause] does not, as the Attorney General asserts, establish a ‘floor’ of what the state can do to provide for the education of Florida’s children. The provision mandates that the state’s obligation is to provide for the education of Florida’s children, specifies that the manner of fulfilling this obligation is by providing a uniform, high quality system of free public education, and does not authorize additional equivalent alternatives.”).

Contrary to Defendant-Intervenors’ assertions, Beacon/IJ Mem. at 15-16, Plaintiffs’ Education Clause claim does not rest on the premise that entities participating in the voucher program become public schools. Indeed, the operative fact is the voucher program’s use of *public* education funds on *private* education providers that are not part of the single constitutionally-authorized system of public education. *See, e.g., State v. Mayor & Aldermen of Dyersburg*, 235 S.W.2d 814, 818 (Tenn. 1951) (discussing the “single state system so essential to the preservation and improvement of the means of educating our youth”). The Voucher Law not only requires the General Assembly to fund private schools, it does so with the funds meant to support the sole constitutionally authorized system of publicly funded education – the public schools. It is precisely because private schools participating in the voucher program “remain private,” Beacon/IJ Mem. at 16 – and thus outside the reach of legal requirements regarding academic standards, accountability, and non-discrimination that govern the statewide system of public schools – that a voucher program funded with public education dollars violates the Education Clause of the Tennessee Constitution.

E. The Voucher Law Violates the BEP

The Complaint alleges that the Voucher Law violates the constitutionally mandated public education funding scheme enshrined in the BEP statute. ¶¶119-122. It diverts funding intended to “maintain and support a free system of public schools,” *see Small Sch. Sys. I*, 851 S.W.2d 139, to private schools and other private education expenses. The State and Intervenor-Defendants suggest that the Court interpret the Voucher Law as modifying the BEP statute. Such an interpretation would cause a constitutional conflict to arise.

Namely, BEP funds issued by the General Assembly in furtherance of its duties under the Education and Equal Protection Clauses would be expended to unconstitutional ends. *See* Tenn. Const. Art. XI, §§8, 12; Art. I, §8. “It is the duty of th[e] Court to adopt a construction which will sustain a statute and avoid constitutional conflict if its recitation permits such a construction.” *See State v. Lyons*, 802 S.W.2d 590, 592 (Tenn. 1990) (internal citation omitted). Here, treating the Voucher Law as a later-in-time amendment to the BEP statute renders the entire BEP funding scheme unconstitutional in light of the Education and Equal Protection Clauses.

1. The BEP Statute and the Voucher Law Conflict

The General Assembly funds public K-12 schools using the BEP, a statutory formula that determines the “funding necessary for our schools to succeed.” T.C.A. §49-3-302(3); *see also* T.C.A. §49-3-351, *et seq.* The BEP’s statutory provisions provide for the determination, allocation, and apportionment of BEP funds to public school districts only. T.C.A. §49-3-351, *et seq.* The BEP was created by the General Assembly after the Tennessee Supreme Court struck down the Legislature’s previous funding structure as violating the State’s Equal Protection Clause. *See Small Sch. Sys. I*, 851 S.W.2d 139. When the small schools systems again challenged the General Assembly’s funding scheme – the newly created BEP – the Supreme Court wrote that “the BEP addresses both constitutional mandates imposed upon the State – the obligation to maintain and support a system of free public schools and the obligation that that system afford substantially equal educational opportunities.” *Small Sch. Sys. II*, 894 S.W.2d at 738 (upholding BEP formula with single modification to include teachers’ salaries).

The Voucher Law conflicts with the BEP statute in at least two ways. First, the Voucher Law directs the Department of Education to subtract an amount representing both the state and local shares of an LEA’s per-pupil BEP allocation from the state BEP funds otherwise payable to Shelby County Schools and Metro Nashville Public Schools, and to deposit those funds in an account to be used by the parent of a student for private school tuition or other private education costs. T.C.A. §§49-6-2605(a)-(b)(1). Second, the Voucher Law mandates that when an ESA is closed for any number of reasons, the remaining funds are returned to the State’s BEP account rather than to the LEA – even if the former voucher student re-enrolls in that LEA. T.C.A. §49-6-2603(e). Thus, the law diverts funding “necessary for our schools to succeed” away from public schools and redirects those funds to the State even if the student re-enrolls in a public school operated by the LEA.

2. Amendment of the BEP Statute by Implication Creates an Unconstitutional Result

As a general rule, when “two acts conflict and cannot be reconciled, the prior act will be repealed or amended by implication to the extent of the inconsistency between the two.” *Hayes v. Gibson Cty.*, 288 S.W.3d 334, 337 (Tenn. 2009) (quoting *Cronin v. Howe*, 906 S.W.2d 910, 912 (Tenn. 1995)). However, as the State highlights, when construing a statute the Court must “reconcile inconsistent or repugnant provisions” and also “construe a statute so that no part will be inoperative, superfluous, void or insignificant, **and the one section will not destroy another . . .**” *State v. Miller*, 575 S.W.3d 807, 811 (Tenn. 2019) (citing *Tidwell v. Collins*, 522 S.W.2d 674, 676-77 (Tenn. 1975)) (emphasis added). In the specific context of determining the constitutionality of a statute, it is the

court’s duty to “adopt a construction which will sustain a statute and avoid constitutional conflict if any reasonable construction exists that satisfies the requirement of the Constitution.” *In re Bentley D.*, 537 S.W.3d 907, 910 (Tenn. 2017) (quoting *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 529 (Tenn. 1993)).

Construing the Voucher Law and BEP statute together effectively creates an amendment that destroys the constitutional purpose of the BEP statute. *See Miller*, 575 S.W.3d at 811. The BEP was created, and upheld as, the mechanism by which the General Assembly meets its constitutional obligations to maintain and support a system of free public schools and to afford substantially equal educational opportunities to all public school students. *Small Sch. Sys. II*, 894 S.W.2d at 738. As such, it upholds the State’s constitutional obligations and directs public, taxpayer money to the public school system. The Voucher Law does the opposite: it directs tax-payer money away from the public school system and diminishes the constitutional role of the BEP in violation of the Education and Equal Protection Clauses, as argued above. Therefore, the Voucher Law does not merely “amend” the BEP statute but alters it fundamentally, jeopardizing the constitutionality of the State’s public school funding scheme.

F. The Voucher Law Violates the Tennessee Constitution’s Appropriation of Public Moneys Provision

The Complaint alleges that the Voucher Law violates the “Appropriation of Public Moneys” provision of the Tennessee Constitution and that contracts made pursuant to its implementation are unconstitutional under the same provision. ¶¶123-131. There was no appropriation made for the estimated first year’s funding of the voucher program. Even if the Court does find that an appropriation was made, the appropriation that was supposed

to represent an “estimate” of the first year’s funding of the Voucher Law was effectively meaningless under the constitution. Finally, TDOE entered into contracts with vendors to implement the Voucher Law using money legislatively appropriated to another, unrelated program. The misuse of those public funds is unconstitutional under the mandate that, “[n]o public money shall be expended except pursuant to appropriations made by law.” Tenn. Const. Art. II §24.

1. The Voucher Law Is Null and Void Because It Did Not Receive an Appropriation for Its Estimated First Year Funding

The Complaint alleges that the Voucher Law did not receive an appropriation for its estimated first year’s funding and is therefore null and void. ¶128. The State and Intervenor-Defendants all argue, duplicatively, that an appropriation was made for the estimated first year’s funding of the Voucher Law. *See* State Mem. at 21-24; Beacon/IJ Mem. at 20-24; LJC Mem. at 17-21. These assertions are incorrect. In the entire 2019-2020 appropriations bill, Pub. Ch. 405, the Voucher Law is mentioned only once, on page 100. On that page, the text indicates that the appropriation for the Voucher Law is \$0. ¶28.

The State and Intervenor-Defendants argue that form language found in the appropriations bill transforms the Governor’s Proposed Budget into law. State Mem. at 22-23; LJC Mem. at 18. But the language they refer to is vague, and no party offers any evidence indicating that the appropriations bill is not the final authority for appropriations made in the State of Tennessee. At the very least, the dispute over the status of the Governor’s Proposed Budget presents an issue of fact, which must be construed in favor of the non-moving party at this stage of the proceedings. *See Stein v. Davidson Hotel Co.*,

945 S.W.2d 714, 716 (Tenn. 1997) (“In considering a motion to dismiss, courts should construe the complaint liberally in favor of the plaintiff, taking all allegations of fact as true, and deny the motion unless it appears that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief.”) (citation omitted); *Davis v. Barr*, 646 S.W.2d 914, 918 (Tenn. 1983) (reversing lower court’s dismissal of case pursuant to motion for judgment on the pleadings because disputed factual issues existed in the pleadings that could only be resolved after full evidentiary hearing on the merits).

2. Even if There Was an Appropriation for the Voucher Law, the “Estimate” for Its First Year’s Funding Was Meaningless Under the Constitution

Even if the Court finds that the Governor’s Proposed Budget was a valid appropriation, despite the absence of any appropriation for the Voucher Law in the appropriations bill at Pub. Ch. 405, the Governor’s Proposed Budget amount of \$771,300 for the “estimated first year’s funding” of the Voucher Law was meaningless and violates the Constitution.

When the voucher bill was discussed in the Senate Education Committee, Defendant Commissioner Schwinn testified that funding would be necessary to pay for voucher-related staff positions at the TDOE and contracts with private vendors to administer and implement the voucher program. *See* Sen. Finance, Ways, & Means Committee, 111th Gen. Assemb. (Tenn. Apr. 23, 2019) (Statements of Defendant Commissioner of Education). Commissioner Schwinn testified that she anticipated needing about 20 staff members to oversee the rollout and administration of the Voucher Law. *Id.* Using the entire \$771,300 in the Governor’s Proposed Budget to pay for these 20 TDOE staff

members, without factoring in contracts with private vendors or *any other* cost of the program, there would be a total of, on average, only \$38,565 annually to cover salary and benefits for each TDOE staff position.

At that same hearing, Defendant Commissioner Schwinn explained all of the investments that would need to be made in the first year of the program in order to implement and begin enforcing it. *See* Sen. Finance, Ways, & Means Committee, 111th Gen. Assemb. (Tenn. Apr. 23, 2019) (Statement of Defendant Commissioner of Education):

If this were to pass, then that would be for the full year preceding. So we would spend all of next year hiring staff and making sure that we have a detailed number of procedures in place and part of the things that we would put into place as the Department, is to also bring in external support to be able to do a checks and balances on our internal procedures to ensure that they are as robust as possible.

*Id.*¹⁴

Yet, less than two months after the Voucher Law passed, in July 2019, TDOE began discussions with ClassWallet, a private, for-profit company, about administering the voucher program. The cost of that contract alone was **\$2.5 million**. ¶129.

Beacon/Institute for Justice argues that the Appropriation of Public Moneys provision and related statutes are “balanced budget” provisions, Beacon/IJ Mem. at 20-21, intended to prevent deficit spending. Assuming this is true, the Constitution’s mandate that “an appropriation is made for the estimated first year’s funding” was violated. The

¹⁴ Available at http://tnga.granicus.com/MediaPlayer.php?view_id=414&clip_id=17271 (at 1:58:08-1:58:48).

\$771,300 in the Governor’s Proposed Budget was a meaningless underestimation of the first year’s funding for the Voucher Law. If this provision of the constitution is to have any meaningful purpose or interpretation, the “estimated first year’s funding” must be a realistic estimate. This is especially true when dealing with funding for critical programs like public education.

3. TDOE’s \$2.5 Million Contract with ClassWallet Violates the Constitution Because It Was Paid with Funds Appropriated to the Career Ladder Program

TDOE entered into a \$2.5 million contract with ClassWallet, a private, for-profit company, to administer the voucher program. ¶51. In 2019, TDOE paid ClassWallet approximately \$1.2 million. *Id.* at ¶52. Because the Governor’s Proposed Budget included only \$771,300 and the appropriations bill appropriated nothing at all for the first year of the Voucher Law, TDOE paid for the contract with money appropriated to another, unrelated program – the Career Ladder program – which was designed to incentivize public schoolteachers and public school administrators.

Article II, §24, of the Tennessee Constitution provides in relevant part, “No public money shall be expended except pursuant to appropriations made by law.” By statute, “[n]o money shall be drawn from the state treasury except in accordance with appropriations duly authorized by law.” T.C.A. §9-4-601(a)(1). The plain meaning of the text is clear: in order for public money to be spent, it must only be spent pursuant to a valid appropriation and for no other purpose.

Defendants and Intervenors emphasize that the Career Ladder program has been discontinued in order to distract from the relevant legal issues and imply that the

misappropriation of these funds was inconsequential. It is true that the Career Ladder program has been discontinued – meaning no additional participants will enter the program but it is still being funded for remaining participants – but this point is irrelevant to the issue of unlawful appropriation and re-allocation of public funds.

Intervenors also cite a *portion* of the appropriations bill, Pub. Ch. 405 at 53, which they imply allows Career Ladder funding to be used to pay Voucher Law expenses: “if the head of any department . . . of the state government finds that there is a surplus . . . under such entity, and a deficiency in any other division . . . then in that event the head of such department . . . may transfer such portion of such funds as may be necessary for the one division . . . where the surplus exists to the other . . .”). Beacon/IJ Mem. at 23. Liberty Justice Center relies on that same *portion* of the statute.¹⁵ LJC Mem. at 21.

However, the *entire* provision of that quoted text, including the sentence that Intervenors inexplicably omitted, reads:

No part of the funds appropriated to any department, office, instrumentality, or agency of the state government shall be expended in any other such entity, but if the head of any department, office, commission or instrumentality of the state government finds that there is a surplus in any classification, division, or unit under such entity, and a deficiency in any other division, unit or classification, then in that event the head of such department, office, commission or instrumentality of the state government may transfer such portion of such funds as may be necessary for the one division, unit or classification where the surplus exists to the other, except as otherwise provided herein, provided such transfer is approved by the Commissioner of Finance and Administration. *Such transfer of funds pursuant to this item shall be subject to the approval of a majority of a committee comprised of*

¹⁵ Defendants rely on no text in support of their assertion that department heads can freely transfer money. State Mem. at 23-24.

the Speaker of the Senate, the Speaker of the House and the Comptroller of the Treasury.

Public Chapter 405 of the 111th General Assembly at page 53, Sec. 15, Item 1 (emphasis added). The final sentence of that paragraph, which both Intervenors omitted, is crucial because it requires department heads to adhere to a process that was not followed by Defendant TDOE or Defendant Commissioner Schwinn.

As required by this provision of the statute, a transfer of funds must “be subject to the approval of a majority of a committee comprised of the Speaker of the Senate, the Speaker of the House and the Comptroller of the Treasury.” It is undisputed that such a committee neither convened nor approved the diversion of Career Ladder funds to pay for Voucher Law expenses.¹⁶

Furthermore, funds that are appropriated but unspent in a fiscal year *are required to revert to the general fund* for re-appropriation by the General Assembly in the next fiscal year, subject to several noted exceptions. Pub. Ch. 405, Section 36, at 73-81. TDOE’s Career Ladder program is not included in the noted exceptions. *Id.* Thus, TDOE was required to allow the unspent Career Ladder funds to revert to the general fund.

¹⁶ The Commissioner of Finance and Administration stated before the Joint Appropriations Subcommittee that a rote approval of the Department’s request to transfer funds was granted. *Dept. of Educ.: Focus Hearing Before the Appropriations Subcomm.*, HH0201, 2020 Leg., 111th Gen. Assemb. (Tenn. Feb. 12, 2020), available at http://tnga.granicus.com/MediaPlayer.php?view_id=532&clip_id=21580. However, a contract is not entered into lawfully simply because some parts of its financing were lawful; the entire process must be lawful or it is null and void. Because there is no indication that the full statutorily required process was followed, the funding of the Voucher Law has, up to this point, been unlawful and violative of the Tennessee Constitution.

V. CONCLUSION

Defendants' Motions should be denied in their entirety.

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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)

dsciara@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, electronic mail, and U.S. mail to the following on this 23rd day of April, 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