IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,
Plaintiffs-Appellees,

v.

TENNESSEE DEPARTMENT OF EDUCATION, et al.,
Defendants-Appellants,

NATU BAH, et al.,
Intervenor Defendants-Appellants.

DEFENDANTS' MOTION FOR SUPREME COURT TO ASSUME JURISDICTION

Defendants, the Tennessee Department of Education, Commissioner Penny Schwinn, in her official capacity as Education Commissioner, and Governor Bill Lee, in his official capacity, move under Tenn. R. Sup. Ct. 48 for this Court to assume jurisdiction over, and render an expedited decision in, the pending appeal in *Metropolitan Government of Nashville and Davidson County, et al. v. Tennessee Department of Education, et al.*., No. M2020-00683-COA-R9-CV (Tenn. Ct. App.). The appeal meets the requirements of Tenn. Code Ann. § 16-3-201(d)(1)-(2) because it is a case of unusual public importance, there is a special need for expedited decision, and it involves an issue of constitutional law.

QUESTIONS PRESENTED FOR REVIEW

Plaintiffs have sued Defendants alleging that the Tennessee Education Savings Account Pilot Program ("ESA Program"), codified at

Tenn. Code Ann. §§ 49-6-2601 to -2612, is unconstitutional. The Davidson County Chancery Court ruled that the ESA Program violates the Home Rule Amendment (art. XI, § 9) of the Tennessee Constitution and enjoined enforcement and implementation of the Program. But the chancery court, acting *sua sponte*, also granted permission to appeal from its interlocutory order.[1]

The Court of Appeals likewise granted Defendants' Rule 9 application for permission to appeal, accepting two questions for review. Defendants present these same questions for this Court's expedited review:

1. Whether the trial court erred in ruling that the ESA Program violates the Home Rule Amendment, article XI, section 9, of the Tennessee Constitution; and
2. Whether the trial court erred in ruling that the county-government plaintiffs have standing to challenge the constitutionality of the ESA Program under the Home Rule Amendment.

STATEMENT OF THE RELEVANT FACTS

The General Assembly enacted the ESA Program to improve educational opportunities for children in the State who are zoned to

[1] Plaintiffs' claim under the Home Rule Amendment was set forth in Count I of a three-count complaint. Plaintiffs sought, and the chancery court granted, summary judgment only with respect to Count I, rendering the chancery-court order interlocutory even though the court issued a "permanent injunction." (Appendix, Exhibit 2, Mem. and Order, 28-29.)

attend schools in Local Education Agencies ("LEAs")[2] that have "consistently had the lowest performing schools on a historical basis." Tenn. Code Ann. § 49-6-2611(a)(1). A student in the ESA Program may choose from a variety of participating schools[3] to accommodate his or her educational needs. The student is entitled to an allotment of funds that must be used for expenses such as tuition, textbooks, or Department-approved tutoring services. *Id*. § 49-6-2603(a)(4).

The legislature provided that the ESA Program "shall begin enrolling participating students no later than the 2021-2022 school year." *Id*. § 49-6-2604(b). The legislature required the Department to establish, among other things:

> (1) [p]rocedures to determine student eligibility . . . ;
> (2) [a]n application process that provides a timeline, before the start of the school year for which an application is being submitted . . . ; and
> (3) [a]n income-verification process . . . .

Id. § 49-6-2604.

Affidavits of then-Deputy Commissioner Amity Schuyler and Officer Eve Carney detail the processes established by the Department of Education to implement the ESA Program, as well as the timeframe established for its implementation for the upcoming (2020-2021) school

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[2] An LEA is defined as "any county school system, city school system, special school district, unified school system, metropolitan school system or any other local public school system or school district created or authorized by the general assembly." Tenn. Code Ann. § 49-1-103(2).

[3] A "participating school" is defined as a private school that meets certain state requirements. Tenn. Code Ann. § 49-6-2602(9).

year. (Appendix, Exhibit 3, Schuyler Aff.; Exhibit 4, Notice (Carney Aff.).) In pertinent part, targeted dates for successful implementation of the ESA Program are as follows:

1. May 13: confirmation of eligibility for ESA award;
2. June 1: acceptance of a seat in participating schools;
3. June 15: confirmation of acceptance of ESA award and acceptance of seat in participating schools;
4. July 20: set-up of virtual wallet for each participant; and
5. August 15: funding of ESA accounts for Fall 2020 school semester.

(Appendix, Exhibit 3, Schuyler Aff. ¶ 4.)

Plaintiffs are the Metropolitan Government of Nashville and Davidson County ("Metro"), Shelby County Government ("Shelby County"), and Metropolitan Board of Public Education ("Metro Board"). Plaintiffs filed suit in the chancery court on February 6, 2020, to enjoin implementation of the ESA Program. Because the ESA Program is scheduled to be implemented for the 2020-2021 school year, the chancery court considered dispositive motions[4] on an expedited basis. (Appendix, Exhibit 2, Mem. and Order, 2.)

The chancery court enjoined implementation and enforcement of the ESA Program on May 4, 2020, declaring that it violates the Home Rule Amendment of the Tennessee Constitution. (*Id*. at 31.) At the same time, the chancery court *sua sponte* granted permission to appeal under Tenn. R. App. 9, because "this matter is appropriate for interlocutory and

[4] Defendants' motion to dismiss and memorandum of law in support are included in the Appendix. (Exhibit 5.)

expedited appellate consideration." (*Id.* at 30.) "It is a matter of significant public interest that is extremely time sensitive . . . ." (*Id.*)

The chancery court's injunction prohibits the Department from completing its pre-award approval process to determine whether an applicant is eligible for an award. (Appendix, Exhibit 4, Notice (Carney Aff.).) To comply with the court's injunction, the Department and its vendor have stopped performing all of the following tasks: reviewing applications; assisting applicants with questions (through a call center, Department phone line, and Department e-mail box); sending out e-mail reminders for applicants to complete missing information; and processing appeals of denied applications. (*Id.* at ¶ 8.)

Before the chancery court issued its injunction, applications were proceeding through the pre-award approval process. The average application took 14 to 30 days to process and involved 12 interactions with an applicant before a decision could be made on eligibility. (*Id.* at ¶ 5.) As of May 6, there are 1,226 incomplete applications in the middle of the pre-award application process. (*Id.* at ¶ 6.)

There are also 683 applications that the Department had deemed complete for an award as of May 6. (*Id.* at ¶ 7.) The injunction precludes the Department from notifying these applicants of their approval for participation in the ESA Program. Consequently, these approved applicants cannot secure a seat in a participating school even on a provisional basis while the injunction remains in effect.

Defendants sought a stay of the injunction pending appeal in the chancery court,[5] but the chancery court denied a stay on May 13, 2020. (Appendix, Exhibit 6, Order.) In that order, the chancery court further enjoined the State Defendants "from using State resources to process applications, engage with parents and schools, or remit funds in support of the [ESA] program." (*Id*. at ¶ 3.) The court stated that the State Defendants may receive applications to the ESA Program through May 7, 2020 (*id*. at ¶ 2), effectively enjoining the State from extending the application window. Finally, the chancery court ordered the Department of Education to post a notice on the ESA website to advise the public that the program is currently enjoined and that families should have a backup plan for this coming school year. (*Id*. at ¶ 4.)

The State Defendants filed an application for permission to appeal with the Court of Appeals and a motion under Tenn. R. App. P. 7 and Tenn. R. Civ. P. 62 to stay the chancery-court injunction pending appeal. The Court of Appeals granted permission to appeal on two questions; it also determined that the appeal should be expedited. (Appendix, Exhibit 1, Order.) The court set an expedited briefing schedule and set oral

[5] Defendants filed this motion jointly with a group of "Intervenor Defendants," who subsequently filed their own applications for permission to appeal in the Court of Appeals. Upon granting permission to appeal, the Court of Appeals consolidated all cases under Case No. M2020-00683-R9-CV. (Appendix, Exhibit 1, Order.) For clarity, Defendants are henceforth referred to as "State Defendants."

argument for August 5, 2020. (*Id.*) The court denied, without stating its reasons, the State Defendants' motion for a stay pending appeal.[6] (*Id.*)

REASONS FOR ASSUMING JURISDICTION

It is most appropriate for this Court to assume jurisdiction of this appeal under Rule 48 and Tenn. Code Ann. § 16-3-201(d)(1)-(2). Section 16-3-201(d)(1) vests this Court with the discretion, "upon the motion of any party, [to] assume jurisdiction over an undecided case in which a notice of appeal or an application for interlocutory or extraordinary appeal is filed before any intermediate state appellate court." "Subdivision (d)(1) applies only to cases of unusual public importance in which there is a special need for expedited decision and that involve . . . issues of constitutional law." *Id.* § 16-3-201(d)(2).

This is precisely such a case. It involves issues of constitutional law—i.e., a challenge to the constitutionality of the ESA Program. It is of unusual public importance because it targets the State's attempt to effectively implement educational policy reform. And there is a special need for expedited decision because normal review and reversal of the chancery court's ruling that the ESA Program is unconstitutional would virtually eliminate student opportunity under the Program for the upcoming 2020-2021 school year. As the chancery court itself recognized,

[6] Together with its motion for this Court to assume jurisdiction of the appeal, State Defendants are filing a motion for review under Rule 7 asking this Court to stay the injunction pending appeal.

this case is one of "significant public interest that is extremely time sensitive." (Appendix, Exhibit 2, Mem. and Order, 30.)

I. This Case Involves a Matter of Unusual Public Importance and Significant Constitutional Issues.

There are few, if any, matters more important than the education of our children. The constitutional issue presented for review pits the State's ability to engage in significant educational policy reform against a county's ability to insist on local approval of statutes impacting certain LEAs.

The Tennessee General Assembly has exclusive authority under the Tennessee Constitution to make decisions regarding the provision of education. *See* Tenn. Const. art. XI, § 12; *see also S. Constructors, Inc. v. Loudon Cty. Bd. of Educ.*, 58 S.W.3d 706, 715 (Tenn. 2001) (stating that the legislature has "plenary and exclusive authority" to provide for a public-school system). This Court has recognized the "significant value of education and the responsibility of the state with regard to education." *Tenn. Small Schools v. McWherter,* 851 S.W.2d 139, 151 (Tenn. 1993). "Given the very nature of education, an adequate system, by all reasonable standards, would include innovative and progressive features and programs." *Id.* at 156. The ESA Program offers innovative and progressive features for "students who reside in LEAs that have consistently and historically had the lowest performing schools." Tenn. Code Ann. § 49-6-2611(a)(1).[7]

[7] The ESA Program applies to LEAs that have had "priority schools." Tenn. Code Ann. § 49-6-2602(3)(C). Priority schools include the bottom

The State has dutifully sought to implement the ESA Program for the upcoming school year. That effort is obviously thwarted by the chancery court's invalidation of the ESA Program under the Home Rule Amendment and its corresponding injunction against implementation. The Home Rule Amendment addresses important matters of sovereignty and the relationship between the State and local governments. *See* Tenn. Const. art. XI, § 9. And the question whether the Home Rule Amendment applies to the ESA Program is a matter of first impression.

The chancery court was wrong to invalidate the ESA Program under the Home Rule Amendment. This Court has not extended the terms "county" or "municipality" in the Home Rule Amendment beyond their ordinary use to include other entities. *See Perritt v. Carter*, 325 S.W.2d 233, 234 (Tenn. 1959); *Fountain City Sanitary Dist. v. Knox Cty.*, 308 S.W.2d 482, 484 (Tenn. 1957). The Home Rule Amendment provisions also do not apply because the ESA Program involves a *state* matter—one that is squarely within the purview of the General Assembly. Statutes pertaining to a subject matter within the plenary power of the General Assembly do not fall within the restrictions of the Home Rule Amendment. *See City of Knoxville ex rel. Roach v. Dossett,* 672 S.W.2d 193, 196 (Tenn. 1984); *State ex rel. Cheek v. Rollings*, 202 Tenn. 608 (1957).

The chancery court also erred in ruling that Metro and Shelby County even have standing to challenge the ESA Program. Neither

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5 percent of schools statewide in performance and high schools failing to graduate one-third or more of their students. *Id.* § 49-1-602(b)(2).

Plaintiff alleges the requisite distinct and palpable injury to the county government.

II. This Case Presents a Special Need for Expedited Decision.

Because the chancery court invalidated the ESA Program and enjoined the State from implementing it, this case presents a special need for an expedited decision from this Court. A final decision would bring certainty not only to the parties but to all the students applying for the Program and the schools participating in it. Students and parents deserve to be equipped to evaluate their educational opportunities for the upcoming school year, and beyond, and participating schools deserve to be able to make important planning decisions.

The chancery court's rulings prevent any of that from happening. The pre-award application process, which has been placed in limbo by the court's injunction, is essential to implementation of the Program. (Appendix, Exhibit 4, Notice (Carney Aff. ¶ 8).) The average application took 14 to 30 days to process and involved 12 interactions with each applicant before a decision can be made on eligibility. (*Id*. at ¶ 5.) As of May 6, there are 1,226 applications at some stage short of completion in the pre-application process. (*Id*. at ¶ 6.)

Furthermore, there are, as of May 6, at least 683 applications that the Department has deemed complete for an award. (*Id*. at ¶ 7.) These are eligible students, zoned to attend LEAs with historically low performance, who might have availed themselves of the opportunities afforded by the ESA Program but who will nevertheless be denied such opportunities by the chancery-court injunction. This Court's immediate, expedited review is needed in this case of unusual public importance.

CONCLUSION AND RELIEF SOUGHT

For the reasons stated, Defendants' motion for this Court to assume jurisdiction should be granted. The order of the chancery court declaring the ESA Program unconstitutional and ordering a permanent injunction against its implementation and enforcement should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of May, 2020, a true and exact copy of the foregoing was served via the court's electronic filing system and forwarded by electronic mail (in lieu of U.S. Mail by agreement of the parties) to:

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APPENDIX

1. Exhibit 1, Court of Appeals' May 19, 2020 Order
2. Exhibit 2, Chancery Court's May 4, 2020 Memorandum and Order
3. Exhibit 3, Schuyler Affidavit
4. Exhibit 4, Notice of Filing and Carney Affidavit
5. Exhibit 5, Defendants' Motion to Dismiss and Memorandum of Law in Support.
6. Exhibit 6, Chancery Court's May 13, 2020 Order