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 REVIEW OF ORDERS DENYING STAY OF INJUNCTION

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. App. P. 7(a) and Tenn. R. Civ. P. 62.08 for review of the May 19, 2020 order of the Court of Appeals and the May 13, 2020 order of the Davidson County Chancery Court denying a stay of the chancery court's May 4, 2020 injunction. Defendants ask this Court to stay pending appeal the injunctive orders of the chancery court entered on May 4, 2020, and May 13, 2020. The State will suffer irreparable harm in the absence of a stay. The State is also likely to succeed in this appeal.[1]

[1] Defendants file this motion for a stay contemporaneously with their motion for this Court to assume jurisdiction over this appeal under Tenn. Sup. Ct. R. 48.

THE LOWER-COURT ORDERS DENYING A STAY

On May 4, 2020, the chancery court enjoined the Defendants from implementing or enforcing the Tennessee Education Savings Account Pilot Program, Tenn. Code Ann. §§ 49-6-2601 to -2612 ("ESA Program"). (Appendix, Exhibit 3, Mem. and Order.) On May 13, 2020, the chancery court denied a stay of the injunction pending appeal. In that same order, the chancery court further enjoined the Defendants "from using State resources to process applications, engage with parents and schools, or remit funds in support of the [ESA] program." (Appendix, Exhibit 2, Order, at ¶ 3.) The court stated that the 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 Court of Appeals granted applications for permission to appeal on May 19, 2020. But the court denied Defendants' motion for a stay pending appeal, stating no reasons for the denial. (Appendix, Exhibit 1, Order.)[2] The court set an expedited briefing schedule and set oral argument for August 5, 2020. (*Id.*)

[2] Applications under Tenn. R. App. P. 9 were filed by the Defendants, and separately by a group of "Intervenor Defendants." 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."

STATEMENT OF THE RELEVANT FACTS

The General Assembly enacted the ESA Program on May 24, 2019. 2019 Tenn. Pub. Acts, ch. 506, § 2. The Program seeks to improve educational opportunities for children in the State who are zoned to attend schools in local education agencies (LEAs) 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 must enroll in a participating school[3] and is entitled to an allotment of funds that shall be used for expenses such as tuition, textbooks, or Department-approved tutoring services. *Id.* § 49-6-2603(a). The legislature required the Department of Education 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. The legislature also provided that the ESA Program "shall begin enrolling participating students no later than the 2021-2022 school year." *Id.* § 49-6-2604(b).

Plaintiffs, two county governments and a local board of education, filed suit in the chancery court on February 6, 2020, to enjoin implementation of the Program, alleging that it is unconstitutional. Granting summary judgment to the Plaintiffs on one count of their

[3] A "participating school" is defined as a private school that meets certain state requirements and seeks to enroll students in the Program. Tenn. Code Ann. § 49-6-2602(9).

complaint, the chancery court enjoined implementation and enforcement of the ESA Program on May 4, 2020, declaring that it violates the Home Rule Amendment (Article XI, Section 9) of the Tennessee Constitution. (Appendix, Exhibit 3, Mem. and Order.) The State Defendants, along with Intervenor Defendants, filed a Joint Motion for Stay of Injunction During Pendency of Appeal in the chancery court on May 5, 2020 (Appendix, Exhibit 6, Motion for Review (Exhibit 2, Joint Motion)), and on May 6 the State Defendants filed an application for permission to appeal with the Court of Appeals. The chancery court held a hearing on the joint motion for stay on May 7 and entered an order denying the motion on May 13. (Appendix, Exhibit 2, Order.) Defendants then filed a motion for a stay pending appeal in the Court of Appeals under Tenn. R. App. P. 7. While the court granted permission to appeal on May 19, 2020, and set an expedited briefing schedule, it denied the motion for a stay pending appeal. (Appendix, Exhibit 1, Order.)

Affidavits of then-Deputy Commissioner Amity Schuyler and Chief District and Schools 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 2020-2021 school year. (Appendix, Exhibit 4, Schuyler Aff.; Exhibit 5, 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 4, Schuyler Aff. ¶ 4.)

The chancery-court injunction prohibits the Department of Education from completing its pre-award approval process to determine whether an applicant is eligible for an award. (Appendix, Exhibit 5, 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.

ARGUMENTS[4]

As the Advisory Commission Comment to Tenn. R. App. P. 7 makes clear, a motion for review of an order denying a stay of injunction "should be considered in connection with Tennessee Rule of Civil Procedure 62.08, which expressly preserves the power of an appellate court to stay proceedings or to suspend relief or grant whatever additional or modified relief is deemed appropriate during the pendency of the appeal." That same Comment also points out that the circumstances in which a stay may be obtained pending an appeal—either from the trial court or the appellate court—are specified in Tenn. R. Civ. P. 62.

When, as here, "an appeal is taken by the state, . . . or an officer or agency thereof acting in its behalf, the judgment may be stayed in the court's discretion." Tenn. R. Civ. P. 62.06. And in injunction actions such as this case, "the court in its discretion may suspend relief or grant whatever additional or modified relief is deemed appropriate during the pendency of the appeal." Tenn. R. Civ. P. 62.03.

An appellate court therefore has discretion to grant a stay pending appeal under Rule 7. In the Court of Appeals, Plaintiffs asserted that an appellate court must review a trial court's denial of a stay pending appeal only for abuse of discretion. (Appendix, Exhibit 10, Pls.' Resp., 13-14.) But that assertion flatly contradicts Tenn. R. Civ. P. 62.08. Indeed, the whole point of a stay pending appeal is to maintain the *status quo ante*

[4] Defendants' arguments in support of their motion for review are set forth here, in accordance with Tenn. R. App. P. 7(a), rather than in a separate memorandum of law under Tenn. R. App. P. 22(a).

to preserve appellate jurisdiction and ensure that the appellate court's review will be meaningful.

Furthermore, Plaintiffs' reliance on *Open Lake Sporting Club v. Lauderdale Haywood Angling Club*, 511 S.W.3d 494 (Tenn. Ct. App. 2015), for the proposition that deference must be given to the trial court's denial of a stay, is demonstrably wrong. *Open Lake*, 511 S.W.3d at 505, relies solely on the unpublished decision in *Bunker v. Finks,* No. E2001-01496-COA-R3-CV, 2002 WL 924211 (Tenn. Ct. App. May 8, 2002), and *Bunker*, 2002 WL 924211, at *6, relies solely on *Sanjines v. Ortwein & Assoc., P.C.*, 984 S.W.2d 907 (Tenn. 1998). But *Sanjines* involved a motion to stay *proceedings*, i.e., a motion to hold trial-court proceedings in abeyance; it did not involve a motion to stay a trial-court judgment pending appeal. *See* 984 S.W.2d at 909 ("At issue here is whether the trial court abused its discretion in refusing to grant the plaintiff's motion to stay proceedings in the malpractice case until the conclusion of the post-conviction matter.").[5]

[5] Plaintiffs also cited *Tavino v. Tavino*, No. E2013-02587-COA-R3-CV, 2014 WL 5430014, at *13-14 (Tenn. Ct. App. Oct. 27, 2014), *superseded by statute on other grounds as stated in Cox v. Lucas*, 576 S.W.3d 356, 359 (Tenn. 2019).) But *Tavino* relies solely on *Spruce v. Spruce*, 2 S.W.3d 192 (Tenn. Ct. App. 1998), and *Spruce* involved the denial of a *Rule 60.02 motion* for post-judgment relief; it did not involve a motion for a stay pending appeal. *See* 2 S.W.3d at 194 ("The standard of our review is well-stated in *Underwood v. Zurich Ins. Co.*, 854 S.W.2d 94 (Tenn.1993): 'A motion for relief based on Rule 60.02 grounds addresses itself to the sound discretion of the trial judge. The scope of review of an appellate court is to determine if the discretion was abused. (Citation omitted). *Id.* at 97.'").

This Court should exercise its discretion to grant a stay of the chancery court's injunction pending appeal, because reversal of the injunction on appeal is likely and the State will suffer irreparable harm in the absence of a stay.[6] *See Dabora, Inc. v. Kline*, 884 S.W.2d 475, 477 (Tenn. Ct. App. 1994) (granting limited stay pending appeal because appellant would otherwise suffer financial hardship, even though appellant later lost on appeal). *See also Combined Communications, Inc. v. Solid Waste Region Bd.*, No. 01A01-9310-CH00441, 1993 WL 476668, at *1 (Tenn. Ct. App. Nov. 17, 1993) ("[A] stay [pending appeal] may be necessary and just where there are doubtful issues and there is real danger of irreparable harm from denial of a stay.").

In similar federal cases "[t]he court balances the traditional factors governing injunctive relief in ruling on motions to stay pending appeal." *Baker v. Adams Cty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002). *See Grutter v. Bollinger,* 247 F.3d 631, 632 (6th Cir. 2001). "Those factors are 1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; 2) the likelihood that the moving party will

[6] Since Defendants are contemporaneously moving for this Court to assume jurisdiction of this appeal, Defendants are essentially asking that the chancery-court injunction be stayed pending appeal *before this Court*. But even if the Court were to decline to assume jurisdiction of the appeal at this time, the Court would still have discretion to issue a stay pending appeal in the Court of Appeals, in order to preserve its jurisdiction under Tenn. R. App. P. 11. *Cf. San Diegans for the Mt. Soledad Nat'l War Memorial v. Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers) (stating that the United States Supreme Court may stay a judgment pending appeal in a circuit court when, *inter alia*, it is likely that certiorari would later be granted).

be irreparably harmed absent a stay; 3) the prospect that others will be harmed if the court grants the stay; and 4) the public interest in granting the stay." *Grutter*, 247 F.3d at 632.

Even if these factors are applied to guide this Court's discretion,[7] the factors weigh in favor of staying the chancery-court injunction here. Defendants have a strong likelihood of success on appeal. The State will suffer irreparable harm in the absence of a stay. Furthermore, there will be substantial injury to other interested parties, including students who may be eligible for the ESA Program yet will be unable to receive its benefits during the upcoming school year. Finally, the public has an obvious interest in duly enacted state laws being implemented and enforced.

I. Defendants Have a Strong Likelihood of Success on Appeal.

Defendants have a strong likelihood of success on appeal. As a threshold matter, the chancery court erred in determining that Plaintiffs have standing. Moreover, the chancery-court ruling on the merits of the constitutional issue is contrary to the plain language of the Home Rule Amendment of the Tennessee Constitution and cases interpreting that provision.

A. The county governments do not have standing.

The chancery court's first error was in determining that the county-government Plaintiffs have standing. A court must carefully examine "a

[7] "[W]hen interpreting [Tennessee] rules of civil procedure, [state courts] consult and are guided by the interpretation that has been applied to comparable federal rules of procedure." *United Sup. Council AASR SJ v. McWilliams*, 586 S.W.3d 373, 381 (Tenn. Ct. App. 2019).

complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *ACLU of Tenn. v. Darnell*, 195 S.W.3d 612, 620 (Tenn. 2006). But the chancery court failed to consider the particular right at issue. (*See* Appendix, Exhibit 3, Mem. and Order, 16-18.)

"[A] political subdivision of the state . . . 'is limited to asserting rights that are its own,'" *City of Memphis v. Hargett*, 414 S.W.3d 88, 100 (Tenn. 2013), and to establish standing to sue a plaintiff must show a distinct and palpable injury, *Hargett*, 414 S.W.3d at 98. But neither a county government's right to sovereignty nor its duty to provide funding is impacted by the ESA Program. The county-government Plaintiffs are therefore unable to show that implementation of the ESA Program causes them the requisite injury to establish standing.

B. The ESA Program does not violate the Home Rule Amendment.

Even assuming that the Plaintiffs have standing, the chancery court ruled incorrectly on the merits. The court erred in declaring that the ESA Program violates the Home Rule Amendment for two reasons. First, the ESA Program cannot be subject to the local-approval requirements of the Home Rule Amendment because it does not apply to counties or municipalities. Instead, it provides an optional program to qualified students who are zoned to attend schools *in certain LEAs*. *See* Tenn. Code Ann. § 49-6-2602(3)(c).

By its plain language, the Home Rule Amendment limits the General Assembly's authority to pass laws applicable the local affairs of "a particular *county* or *municipality*." Tenn. Const. art. XI, § 9 (emphasis

added). This Court has not extended the terms "county" or "municipality" in the Home Rule Amendment beyond their ordinary use to include other entities. *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). Indeed, the Court has rejected the proposition that other entities, including a special school district, would require local approval under the Home Rule Amendment. *Id.*

The chancery court was therefore wrong to find a violation of the Home Rule Amendment based on its conclusion that "courts identify counties or municipalities and their school systems as the same." (*See* Appendix, Exhibit 3, Mem. and Order, 22.) Indeed, this Court did not treat the county and school system as the same when it looked to whether the Home Rule Amendment applied to a county school board[8] for purposes of Dillon's Rule. *Southern Constructors, Inc. v. Loudon Cty. Bd. of Educ.*, 58 S.W.3d 706, 715 (Tenn. 2001). In fact, the Court stated that "the General Assembly does not appear to have conferred any type of 'home rule' authority upon county boards of education or particular schools as has been done in other states." *Id.* The Court of Appeals has likewise rejected the treatment of LEAs and counties as interchangeable. *See City of Humboldt v. McKnight*, No. M2002-02639-COA-R3CV, 2005 WL 2051284, at *15-*17 (Tenn. Ct. App. Aug. 25, 2005) (the state consistently requires one responsible unit—the local school system or LEA . . . "we cannot agree with the proposition that the county is the

[8] County boards of education manage and control a county school system. *See* Tenn. Code Ann. § 49-2-203.

entity that is responsible for education of all students living in the county . . . [n]either the statutes nor actual practice supports such a statement.").

The second reason that the chancery court erred in ruling that the ESA Program violates the Home Rule Amendment is that enactment of the ESA Program falls within the exclusive purview of the legislature. This Court has held that 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. *City of Knoxville ex rel. Roach v. Dossett*, 672 S.W.2d 193, 196 (Tenn. 1984); *State ex rel. Cheek v. Rollings*, 308 S.W.2d 393, 397-98 (Tenn. 1957).

Enactment of the ESA Program is a matter of *state* education policy. This Court has repeatedly concluded that education is a state function. *See, e.g., Southern Constructors, Inc.*, 58 S.W.3d at 715; *State ex rel. Weaver v. Ayers*, 756 S.W.2d 217, 221 (Tenn. 1988) ("Not only does Article XI, § 12, of the Tennessee Constitution expressly require the General Assembly to 'provide for the maintenance, support and eligibility standards of a system of free public schools,' but this Court has recognized for many years that education is a State function."). "[E]ducation, is, at core, a state rather than a county or municipal function." *Rollins v. Wilson Cty. Gov't*, 967 F. Supp. 990, 996 (M.D. Tenn. 1997). It is an "accepted fact that public education in Tennessee rests upon the solid foundation of *State authority* to the exclusion of county and municipal government." *Cagle v. McCanless*, 285 S.W.2d 118, 122 (Tenn. 1955) (emphasis in original).

This Court has recognized that "[g]iven the very nature of education, an adequate system, by all reasonable standards, would

include innovative and progressive features and programs." *Tenn. Small Schools v. McWherter,* 851 S.W.2d 139, 156 (Tenn. 1993). The General Assembly's decision to offer an alternative education program to students zoned for its historically low-performing LEAs is not a "local affair." The ESA Program is a state matter to which the Home Rule protections do not apply.

In sum, Defendants are likely to succeed on appeal, both on the merits of the constitutional issue and on the standing issue. Reversal of the chancery-court judgment would be warranted on either or both of these bases.

II. Defendants and Others Will Suffer Irreparable Harm Absent a Stay.

As discussed below, the State is irreparably harmed whenever it is wrongly enjoined from enforcing a duly enacted law. Here it has been wrongly enjoined from enforcing the duly enacted ESA Program. But beyond that, the State will suffer direct, immediate, and irreparable harm from the chancery court's prohibition on implementation of the ESA Program.

In *Grutter v. Bollinger,* 247 F.3d 631, 633 (6th Cir. 2001), the Sixth Circuit found irreparable harm to the University of Michigan when an injunction disrupted the 2001-2002 first-year law school class. The university argued that if it were to take the time necessary to perform tasks required by the injunction "final decisions on applicants will be delayed[, and] [a]s a result, applicants are likely to accept admissions at other schools." *Id.* The Sixth Circuit concluded that "[t]his harm cannot be undone and therefore is irreparable." *Id.*

The situation is similar here. The chancery court's injunction prevents Defendants from processing applications and otherwise implementing the ESA Program in time for the 2020-2021 school year, resulting in irreparable harm. Allowing for confirmation of an ESA award and enrollment in a participating school before June 15 is essential for the operation of the Program for the 2020-2021 school year. (Appendix, Exhibit 4, Schuyler Aff. ¶ 4.) If the chancery court's injunction is not stayed before June 15, eligible students may be denied enrollment in participating schools for the 2020-2021 school year—even if they are approved for an ESA award. (*Id.* at ¶ 6.)

The pre-award application process is essential to implementation of the ESA Program. (Appendix, Exhibit 5, 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.) Review of those applications, interaction with applicants to answer questions and request additional documentation, and completion of the appeal process is needed *now*.

Plaintiffs asserted below that "[a]ny alleged harm to the State is harm of the State's own creation," because it "affirmatively elected to proceed with implementation of the ESA Act a full school year before the deadline set by the General Assembly." (Appendix, Exhibit 10, Pls.' Resp. 21-22.) Plaintiffs seem to misapprehend the legislative directive that the ESA Program begin enrolling participating students "no later than" the 2021-22 school year. The Executive Branch is obligated to faithfully

execute the law upon its enactment, and implementation of the Program for the 2020-21 school year—i.e., sometime before, and thus *no later than*, the 2021-22 school year—would obviously maximize availability of the improved educational opportunities the Program is intended to deliver. The State is poised to do just that, but for the chancery-court injunction. Losing the ability to offer those new opportunities for a full school year would constitute very real—and totally irreparable—harm for the State, let alone the students, parents, and schools participating in the ESA Program.

Indeed, the experience of the Intervenor Defendants, as parents of children seeking the opportunities of the ESA Program, is representative of the irreparable harm others will suffer from the chancery court's injunction. For instance, Star-Mandolyn Brumfield has testified that one more year at her son's public school will have lasting negative effects on him, and that crowding and violence disrupts his ability to learn. (Appendix, Exhibit 6, Motion for Review (Exhibit 2, Joint Motion (Ex. 4, Brumfield Aff. ¶¶ 7, 9)).)

Furthermore, there are, as of May 6, at least 683 applications that the Department has deemed complete for an award. (Appendix, Exhibit 5, Notice (Carney Aff. ¶ 7).) These are eligible students, zoned to attend LEAs with historically low performance, who may avail themselves of the opportunities afforded by the ESA Program but who will nevertheless be denied such opportunities by the chancery-court injunction. A stay must be issued to avoid this harm while a determination is made whether the chancery court erred in issuing that injunction.

Plaintiffs are also wrong to claim that they will be irreparably harmed by a stay of the injunction. (Appendix, Exhibit 10, Pls.' Resp. 24.) They assert that a stay pending appeal would infringe on local sovereignty and cause a loss of school funding in a few months. Neither assertion has merit.

First, the assertion of sovereignty infringement is just Plaintiffs' merits argument on the constitutional issue. But as discussed above, the ESA Program applies to LEAs, not to counties, so the local-approval provisions of the Home Rule Amendment do not apply and there is no infringement on local sovereignty. Second, there would be no loss of school funding if the injunction is stayed and the August 15 transfer of funds to ESA accounts proceeds as planned. (Appendix, Exhibit 4, Schuyler Aff. ¶ 4.) The LEAs will receive a grant for school improvement in an amount equal to the ESA amount for participating students. Tenn. Code Ann. § 49-6-2605(b)(2)(A). The LEAs are also released from all obligations to educate the students accepted into the ESA Program. *Id.* § 49-6-2603(a)(3). Plaintiffs will suffer no harm from a stay of the injunction pending appeal.

III. Staying the Chancery-Court Injunction Is in the Public Interest.

The public interest, as reflected by the public-policy choices of the people's elected representatives, also weighs in favor of staying the chancery court's order, which enjoins enforcement of a duly enacted law. *See Maryland v. King*, 567 U.S. 1301, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) ("'Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of

irreparable injury.'") (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). The General Assembly enacted the ESA Program almost exactly a year ago, and it expressly provided for implementation of the ESA Program "no later than the 2021-2022 school year." Tenn. Code Ann. § 49-6-2604(b). By prohibiting implementation of the Program, the chancery-court injunction directly frustrates the policy determinations of the legislature.[9]

[9] Plaintiffs hinted below that the ESA Program may not be legislatively funded for the upcoming 2020-21 school year, citing a media report. (Appendix, Exhibit 7, Pls.' Resp. 21 & n.15.) But news reports, especially reports on the prospective views of individual legislators regarding what the legislature may or may not do, have no proper place before the Court. Moreover, a stay pending appeal is meant to maintain the status quo, and the status quo here involves the planned implementation of the legislatively enacted ESA Program. The legislature should be left to make appropriations for the Program as it sees fit, free from the influence or impediment of a wrongly issued judicial injunction.

CONCLUSION AND RELIEF SOUGHT

For the reasons stated, Defendants' motion for review should be granted, and this Court should stay the chancery court's May 4 and May 13, 2020 injunctive orders pending appeal.

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 Order entered May 19, 2020
2. Exhibit 2, Chancery Court Order entered May 13, 2020
3. Exhibit 3, Chancery Court Memorandum and Order entered May 4, 2020
4. Exhibit 4, Schuyler Affidavit
5. Exhibit 5, Notice (Carney Affidavit)
6. Exhibit 6, State Defendants' Motion for Review of Order Denying Stay of Injunction with Appendix
7. Exhibit 7, Intervenor-Defendants' Amended Joint Emergency Motion for Review of Stay Order with Appendix
8. Exhibit 8, Intervenor-Defendants' Notice of Filing Supplements to Amended Appendix
9. Exhibit 9, Intervenor-Defendants' Motion for Review of Order Denying Stay of Injunction Pending Appeal, Pursuant to T.R.A.P. 7
10. Exhibit 10, Plaintiffs' Response in Opposition to Defendants' Motion for Review