IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

M2020-00682-COA-R9-CV

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

v.

TENNESSEE DEPARTMENT OF EDUCATION et al.,

Defendants / Appellants,

and

NATU BAH et al.,

Intervenor-Defendants / Appellants.

ON APPLICATION FOR PERMISSION TO APPEAL UNDER TENN. R. APP. P. 9 FROM THE ORDER OF THE DAVIDSON COUNTY CHANCERY COURT

PARENT INTERVENOR-DEFENDANTS / APPELLANTS' JOINT EMERGENCY MOTION FOR REVIEW OF STAY ORDER

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Defendant-Intervenors/Appellants Natu Bah, Builguissa Diallo, Bria Davis, and Star Brumfield ("Parents") move the Court under Tennessee Rule of Appellate Procedure 7 and Tennessee Rule of Civil Procedure 62.08 to stay enforcement of the Davidson County Chancery Court's judgment in this action pending appeal.

A stay is needed because the Chancery Court misapplied article XI, section 9 of the Tennessee Constitution ("Home Rule Amendment" or "Amendment") to enjoin the State from implementing the Tennessee Education Savings Account Pilot Program, Tenn. Code Ann. § 49-6-2601, *et seq*. ("ESA Pilot Program" or "Pilot Program"). The Pilot Program creates an educational lifeline for low- and middle-income parents whose children are assigned to some of Tennessee's worst-performing public schools.[1] The Chancery Court enjoined the Pilot Program because the Chancellor held that it violated the Home Rule Amendment, which restricts the General Assembly from enacting a law that is "applicable to a particular county or municipality" in "its governmental or its proprietary capacity" absent voter approval. Tenn. Const. art. XI, § 9. But the Pilot Program does *not* apply to a county or municipality but rather Local Education Agencies (LEAs). And because the Pilot Program does not apply to municipalities or counties, it of course does not apply to them

[1] Under the ESA Pilot Program, eligible students receive an education savings account ("ESA") containing funds for a wide array of eligible educational expenses, including tuition, textbooks, and tutoring services. *Id*. § 49-6-2603(a)(4). The Pilot Program can aid 5,000 qualified students in its first year, and up to 15,000 students by 2025. Tenn. Code Ann. § 49-6-2604(c).

in their governmental or proprietary capacities. Thus, the Chancery Court was wrong to hold that the Pilot Program violates the Home Rule Amendment.

The Chancery Court's ruling represents a radical expansion of the Home Rule Amendment in two ways. It is the first time that (1) the provision has ever been held to apply to LEAs, which are neither counties nor municipalities,[2] and (2) the provision was applied to legislation that, on its face, does not require a county or municipality to do anything—not in any way, much less in its governmental or proprietary capacity. There is no requirement that any municipality or county exercise its power in any way nor spend any of its funds. Thus, the Chancery Court's application of the Amendment strips away the Amendment's limiting text and ignores decades of Tennessee Supreme Court jurisprudence.

Beyond expanding the scope of the Home Rule Amendment, the ruling below also irreparably harms the very people the ESA Pilot Program was designed to help—parents and children. Parents bringing this appeal—like thousands of Tennessee families—are eligible to use the Pilot Program's education savings accounts to help pay for better performing private schools during the upcoming 2020-21 academic year because their children are assigned to some of the state's worst-performing public schools: LEAs located in Nashville and Memphis, along with the Achievement School District. Absent a stay, Parents will have no choice but to continue sending their children to public schools

[2] "Local Education Agency" unambiguously refers to any "public school system or school district created or authorized by the general assembly." Tenn. Code Ann. § 49-1-103(2).

where they are denied an education that meets their needs, face regular bullying, and routinely witness violence and abuse.

As Parents show below, staying the Chancery Court's unprecedented ruling is warranted because failing to do so will force their children to endure dire consequences during the 2020-21 academic year while the appellate courts address whether the Home Rule Amendment was properly applied. Given the critical issues of public importance presented in this case—including the irreparable harm to Parents' children, the harm to the public interest from losing an educational lifeline benefitting children assigned to chronically failing public schools, and the lack of harm to other parties should a stay be granted—this Court should stay the Chancery Court's injunction pending appeal.

BACKGROUND

1. The Tennessee General Assembly passed the ESA Pilot Program in May 2019. Eligibility for the Pilot Program is determined, among other things, by whether the applicant is zoned to attend a school in any of the three designated LEAs that have "consistently had the lowest performing schools on a historical basis." Tenn. Code Ann. § 49-6-2611(a). An LEA is statutorily 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). In other words, LEAs refer to school districts and in no way to municipal or county governments. *See id.*

2. Plaintiffs are the Metropolitan Government of Nashville and Davidson County ("Metro"), Shelby County Government ("Shelby"), and

Metropolitan Nashville Board of Public Education ("Metro Board"). Plaintiffs sued the Tennessee Department of Education and a host of state officials ("State-Defendants"), raising three claims under the Tennessee Constitution (namely, the Home Rule Amendment, the Equal Protection Clause, and the Education Clause). (Appendix, Exhibit 1, Complaint)

3. The Chancery Court permitted Parents to intervene in the case in order to defend the constitutionality of the ESA Pilot Program.[3] (Appendix, Exhibit 2, Order Granting Intervention)

4. On March 27, 2020, Plaintiffs moved for summary judgment on their Home Rule Amendment claim. (Appendix, Exhibit 3, Pls.' Mot. for Summ. J.) On April 15, 2020, Parents jointly moved for judgment on the pleadings on all three claims under Tennessee Rule of Civil Procedure 12.03. (Appendix, Exhibit 4, Parents' Mot. for J. on the Pleadings) Parents argued that Plaintiffs had failed to state a claim for which relief can be granted, including that the ESA Pilot Program does not violate the Home Rule Amendment.

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[3] The Chancery Court also permitted an additional set of Intervenor-Defendants to intervene in the case: Greater Praise Christian Academy, Sensational Enlightenment Academy Independent School, Ciera Calhoun, Alexandria Medlin, and David Wilson, Sr. ("Greater Praise Christian Academy Intervenor-Defendants"). (Appendix, Exhibit 2, Order Granting Intervention)

5. On May 4, 2020 after hearing oral argument the week prior, the Chancery Court entered an Order in *Metro Government v. Tennessee Department of Education*, No. 20-0143-II, granting Plaintiffs' Motion for Summary Judgment on Count I of the Complaint and denying Parents' Joint Motion for Judgment on the Pleadings as to Plaintiffs' Home Rule Amendment claim.[4] (Appendix, Exhibit 5, Order)

6. Acting *sua sponte*, the Chancery Court also granted permission to seek an interlocutory appeal pursuant to Tenn. R. App. P. 9. The court found that "this is a matter appropriate for interlocutory and expedited appellate consideration. It is a matter of significant public interest that is extremely time sensitive . . . ."[5] (Appendix, Exhibit 5, Order)

7. On May 5, 2020, Parents, along with the other Defendants, jointly moved the Chancery Court to stay its ruling pursuant to Tenn. R. Civ. P. 62.03. (Appendix, Exhibit 7, Joint Mot. to Stay Inj.)

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[4] The Chancery Court's order also denied the State-Defendants' Motion to Dismiss Count I of the Complaint; denied Greater Praise Christian Academy Intervenor-Defendants' Motion to Dismiss Count I of the Complaint; and took the Defendants' arguments on Plaintiffs' remaining claims under advisement pending appellate review of Plaintiffs' Home Rule Amendment claim. (Appendix, Exhibit 5, Order)

[5] A second case raising a challenge to the ESA Pilot Program under the Home Rule Amendment is also currently pending in the Chancery Court, but that case is effectively stayed pending appellate review in this case. (Appendix, Exhibit 6, *McEwen* Order)

8. On May 6, 2020, Parents applied for interlocutory review in this Court under Tenn. R. App. P. 9. (Appendix, Exhibit 8, Int.-Defs./Appellants' Rule 9 App.)

9. On May 7, 2020, the Chancery Court held a hearing on the joint motion for stay of injunction during the pendency of the appeal and denied the relief requested. (Appendix, Exhibit 9, Tr. 66:13–15)

10. On May 13, 2020, the Chancery Court issued its order denying the joint motion for stay of injunction. (Appendix, Exhibit 10, Order Denying Joint Mot. to Stay Inj.)

REASONS FOR GRANTING A STAY PENDING APPEAL

11. This Court should stay the Chancery Court's injunction pending appeal.

12. *First*, this case involves an issue of constitutional law that impacts not only thousands of Tennessee parents, but also the General Assembly's ability to provide particularized state aid to Tennesseans whose children are trapped in underperforming independent entities like LEAs. The Home Rule Amendment restricts the General Assembly from enacting laws that are "applicable to a particular county or municipality" in "its governmental or its proprietary capacity" absent voter approval. Tenn. Const. art. XI, § 9. Thus, the Amendment cannot be used to strike down the Pilot Program because it concerns not counties or municipalities, but LEAs. In reaching the opposite conclusion, the Chancery Court became the first Tennessee court to extend application of the Home Rule Amendment to school districts. Neither Plaintiffs nor the Chancery Court identified any precedent—and Parents are aware of

none—applying the Home Rule Amendment to acts regulating LEAs. Rather, the Tennessee Supreme Court has rejected several attempts to expand the Amendment's scope beyond its text to cover more than counties or municipalities in their governmental or proprietary capacities. *See, e.g.*, *Perritt v. Carter*, 325 S.W.2d 233, 234 (Tenn. 1959) (holding that the Amendment "is not broad enough to cover special school districts"); *Fountain City Sanitary Dist. v. Knox Cty. Election Comm'n*, 308 S.W.2d 482, 484–85 (Tenn. 1957) (rejecting attempt to use the Home Rule Amendment to strike down law amending powers of a sanitary district).

13. In *Perritt*, the Tennessee Supreme Court rejected an attempt to apply the Home Rule Amendment to special school districts. 325 S.W.2d at 234. And virtually every other state court to have addressed the question in the context of their state's respective home-rule provision has concluded that those provisions do not apply to school districts. *See, e.g.*, *State ex rel. Harbach v. Mayor and Common Council of the City of Milwaukee*, 206 N.W. 210, 213 (Wis. 1926) (holding that Home Rule Amendment "imposes no limitation upon the power of the Legislature to deal with the subject of education"); *accord Barth v. Sch. Dist. of Philadelphia*, 143 A.2d 909, 911 (Pa. 1958) ("A School District is a creature or agency of the Legislature and has only the powers that are granted by statute . . . ."); *Gurba v. Cmty. High Sch. Dist. No. 155*, 18 N.E.3d 149, 156 (Ill. App. Ct. 2014) (explaining that a school district has "the somewhat lesser status of a quasi-municipality, acting for the state as its administrative arm overseeing the establishment and

implementation of free schools"). Echoing the same in *Perritt*, the Tennessee Supreme Court determined that school districts like LEAs are "mere instrumentalit[ies] of the State created exclusively for public purposes subject to unlimited control of the Legislature." 325 S.W.2d at 234.

14. *Second*, by ruling that the ESA Pilot Program triggers the voter approval requirement under the Home Rule Amendment, the Chancery Court expanded the Amendment, for the first time, to a statute that requires nothing of any county or municipality at all: The Pilot Program requires (1) no official act by any county; (2) no exercise of any county's power; and (3) no funding from any county. Thus, even if the ESA Pilot Program did apply to the Plaintiff-Appellee counties—which it does not—it would not apply to them "in [their] governmental or . . . proprietary capacity[.]"[6] Tenn. Const. art. XI, § 9. The Tennessee Supreme Court looks to the challenged law on its face to determine the question of applicability. *See, e.g.*, *Chattanooga-Hamilton County Hospital Authority v. City of Chattanooga*, 580 S.W.2d 322, 328 (Tenn. 1979) (finding Amendment applied to county because the challenged law, on its face, concerned a hospital district "acting on behalf of the County" (quotation marks omitted)).

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[6] Notably, the charter for Plaintiff-Appellee Shelby prohibits it from controlling public education in local school districts. *See* Shelby Cty. Home Rule Charter Art. VI, § 6.02(A), at 34, https://www.shelbycountytn.gov/DocumentCenter/View/475/Shelby-County-Charter?bidId=.

15. If left unchecked, this radical departure from the Home Rule Amendment's text and nearly seventy years of precedent would upend the General Assembly's ability to empower Tennesseans to exercise their pre-existing and fundamental constitutional right to direct their children's educations.

16. Given the unresolved issues of public importance presented in this case, a stay of the Chancery Court's injunction pending appeal is appropriate.

17. *Third*, there is no reason to halt implementation of the ESA Pilot Program now, nearly one year after it was passed, before this Court has had the opportunity to resolve the novel issues before it. Doing so would result in irreparable harm to Parents and their children. Absent a stay, even if this Court expeditiously reversed the Chancery Court's order, the Pilot Program could not restart implementation in time for the 2020–21 school year—thus forcing Parents to enroll their children for yet another year in public schools that fail to meet their needs. The resulting irreparable harm weighs strongly in favor of granting a stay pending appeal.

18. As Plaintiffs conceded before the Chancery Court, enjoining implementation of the Pilot Program pending appeal effectively prohibits rollout of the program until 2021. In Plaintiffs' view, this delay is acceptable. (Appendix, Exhibit 9, Tr. 45:6–8) ("Nothing about waiting another year . . . is irreparable.")

19. But for Parents, waiting another year is not just irreparable—it is utterly devastating. Absent the Pilot Program, Parents will have no choice but to subject their children to another year of cripplingly

deteriorating academics at the failing public schools that they are assigned to.[7] (Appendix, Exhibit 11, Bah Aff. in Supp. of Mot. to Stay, ¶¶ 4–6); (Appendix, Exhibit 12, Diallo Aff. in Supp. of Mot. to Stay, ¶¶ 4–6) Parents' children face regular bullying and emotional abuse in their assigned public schools (Appendix, Exhibit 11, Bah Aff. in Supp. Mot. to Stay ¶¶ 7–8, ¶¶ 14–15); (Appendix, Exhibit 13, Davis Aff. in Supp. of Mot. to Stay ¶¶ 7–9), and regularly encounter violence in their educational environments (Appendix, Exhibit 14, Brumfield Aff. in Supp. of Mot. to Stay ¶¶ 7–9). The ESA Pilot Program is Parents' educational hope for 2020-21 and beyond. Their harms are real, immediate, and irreparable if the injunction is not stayed.

20. Failing to stay the Chancery Court's ruling will likely bar some parents from accessing the ESA Pilot Program in the future. For example, one of Parents' children is at risk of violence and feels unsafe in his assigned public school—his mother "dread[s] the prospect of sending him back to public school" and testified that she "would be left with no option" but to homeschool him in 2020-21 if the Pilot Program remains enjoined. (Appendix, Exhibit 14, Brumfield Aff. in Supp. of Mot. to Stay

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[7] For example, Intervenor-Defendant Natu Bah's sons are assigned to A. Maceo Walker Middle School (Appendix, Exhibit 11, Bah Aff. in Supp. of Mot. to Stay ¶ 4), where a mere 17.4% of students are at or above grade level. *See* A. Maceo Walker Middle School Report Card, Tenn. Dep't of Educ., https://reportcard.tnk12.gov/districts/792/schools/2740/page/SchoolAchievement.

¶¶ 7–9, 11) But homeschooling her son will render him ineligible for the Pilot Program unless he re-enrolls in his assigned public school—where violent behavior permeates the educational setting on a regular basis—which will have "permanent and lasting negative effects" on him. (Appendix, Exhibit 14, Brumfield Aff. in Supp. of Mot. to Stay ¶¶ 7–9)

21. Plaintiffs argued in the Chancery Court that these harms, to the extent they are irreparable, are the fault of Parents. (Appendix, Exhibit 9, Tr. 42:7–11) ("The only irreparable harm that they will suffer might possibly flow from their decision not to try to do something else to improve their children's situation if their child, indeed, is in a situation not favorable to them.") This ignores that the ESA Pilot Program was tailored by the General Assembly to benefit children assigned to some of Tennessee's worst public schools—and Parents' affidavits supporting their stay motion reflect why it was necessary.

22. In denying the stay request, the Chancery Court stated that "parents need . . . to have a plan B" should the Pilot Program be declared unconstitutional. (Appendix, Exhibit 9, Tr. 66:11–12) But whether Parents could, in theory, pursue a backup plan rather than use the ESA Pilot Program to leave their assigned public school in 2020-21 is not the right question to ask in determining whether Parents are entitled to a stay. The relevant question is whether Parents should be required to do so before this Court has conclusively resolved the issues presented in this case. Absent a stay, Parents will be forced to pursue "plan B" even if they succeed on the merits of their appeal. Notably, Plaintiffs waited nine months after the Pilot Program was signed into law to file their lawsuit, (Appendix, Exhibit 1, Complaint), even though the statute makes it

unambiguously clear that the ESA Pilot Program could begin in 2020–21, Tenn. Code Ann. § 49-6-2604(b). In other words, Plaintiffs chose to act at a time that would cause maximum disruption to families with children eligible for the Pilot Program. For all of these reasons, the irreparable harm that Parents and their children will endure weighs heavily in favor of granting their requested stay pending appeal.

23. *Finally*, a stay preserving the status quo and permitting implementation of the ESA Pilot Program poses no risk of harm to Plaintiffs. Continuing to implement the Pilot Program (including accepting and processing applications) is handled exclusively by the state and imposes no costs upon Plaintiffs. Only state dollars are used to fund ESAs, not local funds. Tenn. Code Ann. § 49-6-2605(b)(1) ("The ESA funds for participating students must be subtracted from the state BEP funds otherwise payable to the LEA."). What's more, any distribution of state funds to Parents' education savings accounts—the bulk of the purported harm alleged in Plaintiffs' Complaint—would not take effect until the start of the 2020–21 school year in August. *See id*. ("The department shall remit funds to a participating student's ESA on at least a quarterly basis."). In other words, Plaintiffs would not be harmed by the issuance of a stay; rather, any interest they possess can be adequately protected by expeditious resolution of this appeal.

24. For these reasons, Parents request that the Court stay the Chancery Court's injunction pending appeal.

25. Reasonable notice of this motion has been given to all parties.

WHEREFORE, Parents move this Court to grant a stay of enforcement of the Chancery Court's judgment pending appeal.

DATED this 13th day of May, 2020.

Respectfully submitted,

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**Pro hac vice* motions to be filed

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of May, 2020, a true and exact copy of the foregoing **PARENT INTERVENOR-DEFENDANTS / APPELLANTS' JOINT EMERGENCY MOTION FOR REVIEW OF STAY ORDER** and **PARENT INTERVENOR-DEFENDANTS / APPELLANTS' APPENDIX IN SUPPORT OF JOINT EMERGENCY MOTION FOR REVIEW OF STAY ORDER** was served via the court's electronic filing system and forwarded via first class, postage prepaid mail to:

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