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

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,	)	
Plaintiffs,	)	
v.	)	**No. 20-0143-II**
TENNESSEE DEPARTMENT OF EDUCATION, et al.,	)	**Chancellor Anne C. Martin**
Defendants,	)	
and	)	
NATU BAH, et al.,	)	
Intervenor-Defendants.	)	

STATE DEFENDANTS' AND INTERVENOR-DEFENDANTS' JOINT MOTION FOR STAY OF INJUNCTION DURING PENDENCY OF APPEAL

The State Defendants and Intervenor-Defendants respectfully move to stay the injunction ordered by this Court in its Memorandum and Order during the pendency of appeal. This Court has discretion pursuant to Tenn. R. Civ. P. 62.03 to suspend relief during the pendency of an appeal.[1]

This Court has declared that the Tennessee Education Savings Account Pilot Program ("ESA Program"), codified at Tenn. Code Ann. §§ 49-6-2601—2612, violates the Home Rule Amendment of the Tennessee Constitution. (Mem. Op. and Order.) This Court ordered an

[1] Rule 62.06 also provides "[w] hen an appeal is taken by the state, a county, a municipal corporation, or an officer or agency thereof acting in its behalf, the judgment may be stayed in the court's discretion.''

injunction preventing state officials from implementing and enforcing the ESA Program. (*Id.* at 31.)

This Court has determined that the issue whether the ESA Program violates the Home Rule Amendment is a matter of public interest that is extremely time sensitive in its *sua sponte* grant of permission for interlocutory appeal. (*Id.* at 30.) All Defendants now request that this Court suspend the injunction through the pendency of appeal.

"The determination of whether, and on what terms, to stay an injunction…is left to the discretion of the judge." *Gallatin Hous. Auth. v. Pelt,* 532 S.W.3d 760, 769 (Tenn. Ct. App. 2017). Upon consideration of this request, the Court may consult comparable federal authority. "[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 Supreme Council AASR SJ v. McWilliams,* 586 S.W.3d 373, 381 (Tenn. Ct. App. 2019).

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* Order, *Grutter v. Bollinger,* 247 F.3d 631, 632 (6th Cir. 2001); *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog,* 945 F.2d 150, 153 (6th Cir.1991). "Thus, [they] consider (1) whether the defendant has a strong or substantial likelihood of success on the merits; (2) whether the defendant will suffer irreparable harm if the district court proceedings are not stayed; (3) whether staying the district court proceedings will substantially injure other interested parties; and (4) where the public interest lies." *Baker*, 310 F.3d at 928.

The trial court's injunction preventing state officials from implementing and enforcing the ESA Program will result in irreparable injury. Those injuries are several. "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." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). *Accord Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006) ("the public interest" is in seeing "the will of the people of [Tennessee] being effected in accordance with [Tennessee] law."). The will of the people of the State as expressed by their elected representatives will be irreparably frustrated.

Participating students and parents who have begun the application process for participation in the ESA Program are now facing the prospect of returning to underperforming schools. Schools who have made hiring decisions in anticipation of enrollment of children via the ESA Program may find it necessary to terminate those teachers. Those same schools have made investments in infrastructure, administration, and planning that cannot be undone at this late date. Irreparable injury will result.

As shown in the attached Affidavit of Deputy Commissioner Amity Schuyler, allowing for confirmation of an ESA award and enrollment in a private school between the present and June 15, 2020 is crucial to operation of the program for the 2020-2021 school year. (Exhibit 1, Schuyler Aff. ¶ 4.) And as shown in the attached Affidavits of the Intervenor-Defendant parents, without a stay their children will be forced to return to their assigned public schools where they face verbal and emotional abuse (Exhibit 2, Bah Aff. ¶¶ 7–8, 14–15; Exhibit 3, Davis Aff. ¶¶ 7–9), regularly encounter violence (Exhibit 4, Brumfield Aff., ¶¶ 7–9), and where their academics could be improved[2] (Exhibit 2, Bah Aff., ¶¶4–6; Exhibit 5, Diallo Aff., ¶¶ 4–6). Finally, as shown in the

[2] For example, Intervenor-Defendant Natu Bah's sons are assigned to A. Maceo Walker, 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., available at https://reportcard.tnk12.gov/districts/792/schools/2740/page/SchoolAchievement.

attached Affidavit of Intervenor-Defendant Kay Johnson, director of Greater Praise Christian Academy, private schools that intend to participate in the ESA Pilot Program are making decision and incurring costs in anticipation of increased enrollment thanks to the program (Exhibit 6). In contrast, Plaintiffs will not be harmed by allowing these deadlines to go forward; their alleged harm is due to loss of funding and funding to ESA accounts does not occur until August 15, 2020. (Schuyler Aff. ¶ 4.)

In addition, State Defendants and Intervenor-Defendants have "more than a mere possibility of success on the merits[,]" *Griepentrog*, 945 F.2d at 153, and are indeed likely to succeed on appeal. They argue that no case in Tennessee has extended the Home Rule Amendment to entities that are not a county or municipality. In addition, State Defendants argue that substantive education policy is not within the purview of the Home Rule Amendment and cite Tennessee Supreme Court cases that do not extend the Home Rule Amendment to matters over which the Legislature exercises plenary authority. (State's Resp. Opp'n Mot. Summ. J. at 11-13.) All Defendants raise serious questions about other areas in which the Home Rule Amendment simply does not apply. *See Griepentrog*, 945 F.2d at 153. Should the Supreme Court or Court of Appeals recognize that the Home Rule Amendment does not apply in this case, the Court's findings regarding the ESA Program as local in form or effect will be moot. Thus, Defendants satisfy this factor for purposes of this motion. *See id.*

Because the foregoing factors weigh in favor of staying the injunction, State Defendants' and Intervenor-Defendants' request should be granted.

CONCLUSION

For the state reasons, this Court should stay the injunction during pendency of appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this Motion has been forwarded by electronic mail (in lieu of U.S. Mail by agreement of the parties) and the electronic filing system on this 5th day of May, 2020, to:

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