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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, vs. TENNESSEE DEPARTMENT OF EDUCATION, et al., Defendants, and NATU BAH, et al., Intervenor-Defendants.	)	Case No. 20-0143-II Chancellor Anne C. Martin, Chief Judge Judge Tammy M. Harrington Judge Valerie L. Smith **CONSOLIDATED**

ROXANNE McEWEN, et al., Plaintiffs, vs. BILL LEE, in his official capacity as Governor of the State of Tennessee, et al., Defendants, and NATU BAH, et al., Intervenor-Defendants.	)	Case No. 20-0242-II Chancellor Anne C. Martin, Chief Judge Judge Tammy M. Harrington Judge Valerie L. Smith

MEMORANDUM AND ORDER

Before the Court are the motions for temporary injunction filed separately by each group of Plaintiffs in this consolidated matter. The parties argued their motions via Zoom on August 5,

2022, before the Three-Judge Panel appointed by the Tennessee Supreme Court to preside over these consolidated cases concerning the Tennessee Education Savings Account Pilot Program, codified at Tenn. Code Ann. §§ 49-6-2601, *et seq.* (the "ESA Act" or the "Act," and in some instances, the "ESA Program" or the "Program").

Having reviewed extensive briefing and materials regarding the ESA Act and its current implementation, and heard argument of counsel, the Court is ready to rule.

Findings of Fact

The ESA Act "establishes a program allowing a limited number of eligible students to directly receive their share of state and local education funds, which would ordinarily be provided to the public-school system they attend, to pay for a private school education and associated expenses." *Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ.*, 645 S.W.3d 141, 145 (Tenn. 2022) (footnote omitted). Based upon the definition of "eligible student" in the Act, it is only applicable to schools in Davidson and Shelby Counties as well as the Achievement School District. *See id.* at 145 n.5. This point was discussed at length in the General Assembly when the Act was being debated and finalized for enactment. The qualifications were tailored, through multiple amendments, to only include those two school systems, and that bill sponsors could only secure passage from representatives against the bill if their district school systems were excluded.

In addition to making the ESA Program available to students who are eligible to attend school in Tennessee for the first time, i.e., newly age eligible for public school or a new resident of the state, the ESA Act defines eligible student as current public school students who:

> [Are] zoned to attend a school in an LEA[1], excluding the achievement school district (ASD)[2], with ten (10) or more schools:
>
> (*a*) Identified as priority schools in 2015, as defined by the state's accountability system pursuant to § 49-1-602;
>
> (*b*) Among the bottom ten percent (10%) of schools, as identified by the department in 2017 in accordance with § 49-1-602(b)(3); and
>
> (*c*) Identified as priority schools in 2018, as defined by the state's accountability system pursuant to § 49-1-602

Tenn. Code Ann. § 49-6-2602(3)(C)(i).

In 2015, the only LEAs with ten or more schools on the priority list were Metropolitan Nashville Public Schools ("MNPS") in Nashville, Shelby County Schools ("SCS") in Memphis, and the ASD. In 2017, the only LEAs with ten or more schools on the 2017 Bottom 10% list were MNPS, SCS, Hamilton County Schools, and the ASD. In 2018, the only LEAs with ten or more schools on the priority list were MNPS, SCS, and the ASD.

The General Assembly's stated purpose for the ESA Act was to improve educational opportunities for children in the state who reside in LEAs that have "consistently had the lowest performing schools on a historical basis." Tenn. Code Ann. § 49-6-2611(a)(1).

The Legislative History of the ESA Act was addressed in detail by the trial court and the Court of Appeals in prior decisions in this case and will not be reiterated here.

The State Defendants initially determined that the ESA Program would be implemented for the 2020–21 school year, in Davidson and Shelby counties. The Tennessee State Board of

[1] "LEA" is a "local education agency" as defined at Tenn. Code Ann. § 49-1-103(2), which includes the state's statutory scheme for the maintenance and operation of the public school system. The statute defines LEA the same as "school system," "public school system," "local school system," "school district," or "local school district" and "means 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."

[2] The achievement school district ("ASD") was created by the General Assembly in 2010 as a Tennessee-wide district comprised of the lowest performing schools in the state, with the goal of increasing student achievement in those schools from the bottom 5% to the top 25%. Tenn. Code Ann. § 49-1-614. It is an "organizational unit of the department of education" and not associated with any county or municipality. *Id.* It falls within the definition of LEA as a "school district created and authorized by the general assembly" and is, by design, comprised of low performing schools. Tenn. Code Ann. § 49-1-103(2).

Education's ("State Board") rules for implementing the ESA Act became effective on February 25, 2020, after proposed rules were issued in November of 2019.

Plaintiffs the Metropolitan Government of Nashville and Davidson County, Shelby County Government (collectively, the "County Plaintiffs"), Roxanne McEwen, David P. Bichell, Terry Jo Bichell, Lisa Mingrone, Claudia Russell, Inez Williams, Heather Kenny, Elise McIntosh, and Apryle Young (collectively, the "Parent Plaintiffs")[3] filed separate lawsuits against Defendants the Tennessee Department of Education, Penny Schwinn, in her official capacity as Commissioner of the Tennessee Department of Education, Bill Lee, in his official capacity as Governor of the State of Tennessee, and the members of the Tennessee State Board of Education in their official capacities[4] (collectively, the "State Defendants"), challenging the validity of the ESA Act and to halt the implementation of the ESA Program. A number of parties subsequently intervened in favor of the Program and are referred to collectively as Intervenor-Defendants.[5] This Court, prior to the appointment of a three-judge panel, concluded in Case No. 20-0143-II *Metropolitan Government of Nashville and Davidson County v. Tennessee Department of Education* that the ESA Act violated the Home Rule Amendment contained in Article XI, Section 9 of the Tennessee Constitution and enjoined the State Defendants[6] from implementing and enforcing the ESA Act. Mem. & Order, at 31, No. 20-0143-II, May 4, 2020. The Court also, however, granted permission

[3] One plaintiff, Claudia Russell, is a retired public school administrator and educator who resides and pays taxes in Davidson County but did not allege she has a child who attends Metro Nashville Public Schools. We use the label "Parent Plaintiffs" only out of convenience.

[4] The members of the Tennessee State Board of Education are named only in the *McEwen* Complaint and are as follows: Lillian Hartgrove, Chair; Robery Eby, Vice Chair; Nick Darnell, Member; Mike Edwards, Member; Gordon Ferguson, Member; Elissa Kim, Member; Nate Morrow, Member; Larry Jensen, Member; Darrell Cobbins, Member; and Mike Krause, Member. *See* Compl., at 1–2, No. 20-0242-II, Mar. 2, 2020.

[5] The Intervenor-Defendants filed separate responses to the Plaintiffs' motions, and the Court at times notes the groupings separately as "Parent Intervenor-Defendants" and "Greater Praise Intervenor-Defendants."

[6] As they were only named in the *McEwen* Complaint, the members of the Tennessee State Board of Education were not formally part of the injunction.

for the State Defendants to seek an interlocutory appeal. Mem. & Order, at 30–31. That same day the Court denied the Parent Plaintiffs' similar motion for a temporary injunction as moot in light of the already-issued injunction in *Metropolitan Government*. Order, at 4, No. 20-0242-II, May 4, 2020.

On May 18, 2022, the Tennessee Supreme Court issued its opinion, vacating this Court's injunction on the basis that the ESA Act was not "applicable" to a municipality or county and thus did not implicate the Home Rule Amendment. *Metro. Gov't of Nashville & Davidson Cnty*, 645 S.W.3d at 154–55. The Supreme Court then remanded the case to this Court, and, because in the intervening period the General Assembly provided for three-judge panels to be appointed in certain civil actions, *see* Tenn. Code Ann. §§ 20-18-101 to -105, appointed the present Three-Judge Panel to preside over both *Metropolitan Government* and *McEwen*. *See* Mandate, at 3 (unpaginated), No. 20-0143-II, June 17, 2022;[7] Order, at 1, No. 20-0143-II, May 19, 2022; Order, at 1, No. 20-0242-II, May 18, 2022. This Court then formally lifted the injunction vacated by the Supreme Court. Order, at 1, No. 20-0143-II, July 13, 2022. This Court then consolidated the two cases. Order, at 1, No. 20-0143-II & No. 20-0242-II, July 18, 2022. Since the Court formally lifted the injunction, the State has begun reinstating the program provided for by the ESA Act. Tenn. Educ. Savings Account Program, https://esa/tnedu.gov (last visited July 28, 2022); *see also* FOX13Memphis.com News Staff, *Sign-up begins for controversial Tennessee school voucher program*, FOX13 Memphis,

[7] The Tennessee Supreme Court's Mandate is marked as having been filed with this Court on June 17, 2022, even though it appears on the docket as May 18, 2022.

https://www.fox13memphis.com/news/local/tennessee-school-voucher-program-sign-up-starts-tuesday/O73GLXTAPBG33J65RZT7JSEL2Q/ (July 18, 2022). And County Plaintiffs and Parent Plaintiffs have filed their separate motions for a temporary injunction.

Legal Standard

The Tennessee Rules of Civil Procedure provide that

> [a] temporary injunction may be granted during the pendency of an action if it is clearly shown by verified complaint, affidavit or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual.

Tenn. R. Civ. P. 65.04(2). The standard for temporary injunctions involves a balancing of four factors: "(1) the threat of irreparable harm to plaintiff if the injunction is not granted; (2) the balance between this harm and the injury that granting the injunction would inflict on the defendant; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest." *Gentry v. McCain*, 329 S.W.3d 786, 793 (Tenn. Ct. App. 2010) (quoting *S. Cent. Tenn. R.R. Auth. v. Harakas*, 44 S.W.3d 912, 919 n.6 (Tenn. Ct. App. 2000)); *see also Moore v. Lee*, 644 S.W.3d 59, 63 (Tenn. 2022) (quoting *Fisher v. Hargett*, 604 S.W.3d 381, 394 (Tenn. 2020)) (stating that trial courts in Tennessee consider these four factors). "[A]n abuse of discretion occurs when a court . . . fails to properly consider the factors customarily used to guide the . . . decision." *Moore*, 644 S.W.3d at 63, 67 (quoting *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010)).

"Where, as here, the temporary injunction is sought on the basis of an alleged constitutional violation, the third factor—likelihood of success on the merits—often is the determinative factor." *Fisher*, 604 S.W.3d at 394 (citing *Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012)); *see also Newsom v. Tenn. Republican Party*, No. M2022-00735-SC-R10-CV, --- S.W.3d ---, 2022 WL 2087660, at *2 (Tenn. June 10, 2022) (citation omitted) ("If a

plaintiff cannot show a likelihood of success on the merits, that factor is typically determinative."); *Fisher*, 604 S.W.3d at 395 (citing *Lyons v. City of Columbus*, No. 2:20-cv-3070, 2020 WL 3396319, at *2 (S.D. Ohio June 19, 2020)) ("A plaintiff's failure to show likelihood of success on the merits is usually fatal.").

Injuries are irreparable when they cannot be compensated by damages. *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 550 (6th Cir. 2007) (quoting *Overstreet v. Lexington–Fayette Urban Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002)); *Cole v. Dych*, 535 S.W.2d 315, 322 (Tenn. 1976) (citing 47 Am. Jur. 2d, *Injunctions*, § 20). The federal courts have stated that such an injury is presumed "[w]hen constitutional rights are threatened or impaired." *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016) (quoting the trial court); *Obama for America*, 697 F.3d at 436 (citing *ACLU of Ky. v. McCreary Cnty.*, 354 F.3d 438, 445 (6th Cir. 2003)). A threat or impairment—even if it exists only for a minimal period of time—still "constitutes irreparable injury." *Tanco v. Haslam*, 7 F. Supp. 3d 759, 769–70 (M.D. Tenn. 2014) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)), *rev'd sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell v. Hodges*, 576 U.S. 644 (2015). Therefore, in these sorts of cases claiming constitutional injuries, it follows that a successful showing on a plaintiff's likelihood of success necessarily also establishes that a plaintiff would suffer irreparable harm. *See Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001) (citing *Elrod*, 427 U.S. at 373) (stating also that the success-on-the-merits factor should be examined first in the court's analysis). And as already stated, an unsuccessful showing is, of similar necessity, fatal to the plaintiff's argument for a temporary injunction. *Fisher*, 604 S.W.3d at 394–95.

The inability to enforce a duly enacted statute constitutes irreparable harm upon the State. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 & n.17 (2018) (citations omitted); *Maryland v. King*, 567 U.S. 1301, 1303 (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)) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.").

"We have explained that 'it is always in the public interest to prevent the violation of a party's constitutional rights.'" *Jones v. Caruso*, 569 F.3d 258, 278 (6th Cir. 2009) (quoting *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)); *see also Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 690 (6th Cir. 2014) (quoting *Connection Distrib.*, 154 F.3d at 288) (alterations in original) ("[T]he determination of where the public interest lies [ ] is dependent on a determination of the likelihood of success on the merits of the First Amendment challenge because it is always in the public interest to prevent the violation of a party's constitutional rights."). However, "[t]he harm to the opposing party and the public interest factors 'merge when the Government is the opposing party.'" *Wilson v. Williams*, 961 F.3d 829, 844 (6th Cir. 2020) (quoting *Nken v. Holder*, 556 U.S. 418, 315 (2009)).

Plaintiffs seek new injunctions to prevent the implementation of the ESA Act. The County Plaintiffs assert the Act violates the guarantee of equal protection afford by the Tennessee Constitution by singling out Davidson and Shelby Counties for disparate treatment. The Parent Plaintiffs, on the other hand, assert the Act violates the State Defendants' obligations under the Education Clause of the Tennessee Constitution. The State Defendants respond that the Act violates neither constitutional provision.

I. Equal Protection Guarantee of the Tennessee Constitution

Tennessee courts have recognized that Article I, Section 8[8] and Article XI, Section 8[9] of the Tennessee Constitution together confer "essentially the same protection" as the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[10] *Gallaher v. Elam*, 104 S.W.3d 455, 460 (Tenn. 2003) (citing *State v. Tester*, 879 S.W.3d 823, 827 (Tenn. 1994)). Thus, these provisions of the Tennessee Constitution guarantee that "all persons similarly circumstanced shall be treated alike." *Tenn. Small Sch. Sys. v. McWherter* (*Small Schools I*), 851 S.W.2d 139, 153 (Tenn. 1993). "[T]hings which are different in fact or opinion," however, "are not required by either [the federal or Tennessee] constitution to be treated the same." *Id.* (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

> The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States, and legislatures are given considerable latitude in determining what groups are different and what groups are the same. . . . In most instances the judicial inquiry into the legislative choice is limited to whether the classifications have a reasonable relationship to a legitimate state interest. . . .

Riggs v. Burson, 941 S.W.2d 44, 52 (Tenn. 1997) (quoting *Small Schools I*, 851 S.W.2d at 153) (omissions in original). "Strict scrutiny analysis is required 'only when [a legislative] classification interferes with the exercise of a "fundamental right" or operates to the peculiar

[8] "That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." Tenn. Const. art. I, § 8.

[9] "The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie, or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law. No corporation shall be created or its powers increased or diminished by special laws but the General Assembly shall provide by general laws for the organization of all corporations, hereafter created, which laws may, at any time, be altered or repealed and no such alteration or repeal shall interfere with or divest rights which have become vested." Tenn. Const. art. XI, § 8.

[10] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

disadvantage of a "suspect class."'" *Id.* (quoting *Newton v. Cox*, 878 S.W.2d at 109). "With . . . classifications [requiring strict scrutiny], the State must demonstrate 'that its classification has been precisely tailored to serve a compelling governmental interest.'" *Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn. 1988) (quoting *Plyler*, 457 U.S. at 217). Other legislative classifications are typically subject to the rational basis test. *Harrison v. Schrader*, 569 S.W.2d 822, 825 (Tenn. 1978).

> This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary. (Citation omitted.) Such action by a legislature is presumed to be valid. *Id.*

Id. (quoting *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976)). Under the rational basis test, "[i]f some reasonable basis can be found for the classification [in the statute] or if any state of facts may reasonably be conceived to justify it, the classification will be upheld." *Riggs*, 941 S.W.2d at 53 (quoting *Small Schools I*, 851 S.W.2d at 153) (alterations in original).

II. Education Clause of the Tennessee Constitution

> The State of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools. The General Assembly may establish and support such postsecondary educational institutions, including public institutions of higher learning, as it determines.

Tenn. Const. art. XI, § 12. "The certain conclusion is that Article XI, Section 12 of the Tennessee Constitution guarantees to the school children of this state the right to a free public education." *Small Schools I*, 851 S.W.2d at 151. What that means, according to the Tennessee Supreme Court is "that the General Assembly shall maintain and support a system of free public schools that provides, at least, the opportunity to acquire general knowledge, develop the powers of reasoning and judgment, and generally prepare students intellectually for a mature life." *Id.* at 150–51. The

Supreme Court also explained that "this is an enforceable standard for assessing the educational opportunities provided in the several districts throughout the state." *Id.* at 151.

Conclusions of Law

Having considered the entire record before the Court, the Plaintiffs' motions for temporary injunction are both **DENIED**. The Plaintiffs have failed to demonstrate that the extraordinary remedy of an injunction is warranted. Specifically, we are unpersuaded that the harm the Plaintiffs believe to be imminent is sufficiently irreparable or certain so as to justify blocking the implementation of a duly enacted statute of this state at this stage of the litigation. Moreover, in light of the complex legal issues in this case, and the uncertain impact on the Plaintiffs, the Court cannot find, based upon this limited record, that the Plaintiffs are likely to succeed on the merits of their claims at this time. Although the Plaintiffs concerns at the rushed process, uncertain details of the ESA rollout and apparent lack of compliance with some of the ESA Act provisions are worthy of further consideration, those factors do not provide a basis for the Court to enjoin the implementation of the program. The ultimate issue of the constitutionality of the ESA Act remains before the Court, pending further proceedings, based upon the Tennessee Constitution's Equal Protection and Education Clause.

s/Anne C. Martin
CHANCELLOR ANNE C. MARTIN, CHIEF JUDGE

s/ Tammy M. Harrington
JUDGE TAMMY M. HARRINGTON

s/ Valerie L. Smith
JUDGE VALERIE L. SMITH

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