

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

ROXANNE McEWEN, DAVID P.) Case No.
BICHELL, TERRY JO BICHELL, LISA)
MINGRONE, CLAUDIA RUSSELL,) Judge
INEZ WILLIAMS, SHERON)
DAVENPORT, HEATHER KENNY,) COMPLAINT
ELISE McINTOSH, TRACY O'CONNOR,)
and APRYLE YOUNG,)

Plaintiffs,)

vs.)

BILL LEE, in his official capacity as)
Governor of the State of Tennessee;)
LILLIAN HARTGROVE, in her)
official capacity as Chair of the)
Tennessee State Board of Education;)
ROBERT EBY, in his official capacity)
as Vice Chair of the Tennessee State)
Board of Education; NICK)
DARNELL, in his official capacity as)
Member of the Tennessee State Board)
of Education; MIKE EDWARDS, in)
his official capacity as Member of the)
Tennessee State Board of Education;)
GORDON FERGUSON, in his official)
capacity as Member of the Tennessee)
State Board of Education; ELISSA)
KIM, in her official capacity as)
Member of the Tennessee State Board)
of Education; NATE MORROW, in)
his official capacity as Member of the)
Tennessee State Board of Education;)
LARRY JENSEN, in his official)
capacity as Member of the Tennessee)

State Board of Education; DARRELL)
COBBINS, in his official capacity as)
Member of the Tennessee State Board)
of Education; MIKE KRAUSE, in his)
official capacity as Member of the)
Tennessee State Board of Education;)
Tennessee Department of Education;)
and PENNY SCHWINN, in her)
official capacity as Education)
Commissioner for the Tennessee)
Department of Education,)
)
Defendants.)
)
_____)

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I. NATURE OF THE ACTION

1. This complaint contends that the Tennessee Education Savings Account Pilot Program (“Voucher Law”), T.C.A. §49-6-2601, *et seq.*, violates the Tennessee Constitution and state law by diverting taxpayer funds appropriated for public schools in Shelby and Davidson Counties to private schools.

2. The Voucher Law applies only to Shelby and Davidson Counties and cannot apply to any other county without legislative amendment. The Law does not, by its terms, require local approval, nor was it approved by local vote in either county. Thus, the Voucher Law directly violates the “Home Rule” provision of the Tennessee Constitution, which explicitly prohibits the imposition of laws with local effect that do not require local approval.

3. The Voucher Law was passed during the 2019 legislative session, but it did not receive an appropriation for its estimated first year funding during the 2019 legislative session. This directly violates the “Appropriation of Public Moneys” provision of the Tennessee Constitution.

4. The Voucher Law also diverts critically needed public education funding from public schools in Shelby and Davidson Counties. This diversion violates the Education and Equal Protection Clauses of the Tennessee Constitution, which guarantee all public school students an adequate and substantially equal educational opportunity.

5. Diverting public education funding from public schools to private schools also violates the Basic Education Program (“BEP”), which is the State’s school funding statute. The BEP is the mechanism used to allocate taxpayer dollars appropriated by the General Assembly to maintain and support public schools across the State, including those in Shelby

and Davidson Counties. The Voucher Law diverts BEP funds to private schools and other private education expenditures.

6. The Voucher Law diverts taxpayer dollars to private schools that are not required to adhere to the same academic, accountability, governance, and non-discrimination requirements as Tennessee's public schools. Diverting limited public education funding to private schools that do not provide students the same standards of education and civil rights protections as public schools violates Tennessee's Constitution and state law.

II. JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this action pursuant to T.C.A. §16-11-101, *et seq.*, as well as T.C.A. §§1-3-121, 29-1-101 and 29-14-101, *et seq.*, and Tenn. R. Civ. P. 65.

8. This Court has personal jurisdiction over Defendants pursuant to T.C.A. §§20-2-222 and 20-2-223 on the grounds that their principal place of business is in Tennessee and that the wrongful conduct and resulting injuries alleged herein substantially occurred in Tennessee.

9. Venue is proper in this judicial district pursuant to T.C.A. §20-4-101(a) because the cause of action arose in Davidson County. Additionally, under T.C.A. §4-4-104(a), the Commissioner of Education's official residence is located in Davidson County.

III. PARTIES

10. Plaintiff Roxanne McEwen is a resident of Davidson County, Tennessee. She is a parent with one minor child in Metro Nashville Public Schools. Her daughter is in fifth

grade. Ms. McEwen's child is eligible for the ESA voucher program based on their household income and the other eligibility criteria. Ms. McEwen pays state and local taxes in Davidson County, including car registration and renewal taxes.

11. Plaintiffs David P. Bichell and Terry Jo Bichell are residents of Davidson County, Tennessee. They are parents with one child currently enrolled in Metro Nashville Public Schools, an eleventh grader classified as a student with disabilities who receives special education and related services. The Drs. Bichell own property in Nashville and pay state and local taxes, including property taxes.

12. Plaintiff Lisa Mingrone is a resident of Davidson County, Tennessee. She is a parent with one minor child in fourth grade in Metro Nashville Public Schools. Ms. Mingrone owns property in Nashville and pays state and local taxes in Davidson County, including property taxes.

13. Plaintiff Claudia Russell is a resident of Davidson County, Tennessee. She is a retired public school administrator at Metro Nashville Public Schools, and she periodically returns to the district in a temporary position to fill in for administrators who are on leave. Dr. Russell has spent her entire career working in Metro Nashville Public Schools. She began her career as a teacher and then she became an assistant principal, then a principal. She has worked in various schools in the district. Dr. Russell owns property in Nashville and pays state and local taxes in Davidson County, including property taxes.

14. Plaintiff Inez Williams is a resident of Davidson County, Tennessee. She has legal guardianship over one minor child who attends school in Metro Nashville Public Schools. The minor child is in eighth grade and is eligible for the ESA voucher program

based on their household income and the other eligibility criteria. Ms. Williams pays state and local taxes in Davidson County, including car registration and renewal taxes.

15. Plaintiff Sheron Davenport is a resident of Shelby County, Tennessee. She is a parent with two minor children currently enrolled in Shelby County Schools. Her children are in sixth and first grade at various schools in the district. Dr. Davenport owns property in Memphis and pays state and local taxes in Shelby County, including property taxes.

16. Plaintiff Heather Kenny is a resident of Shelby County, Tennessee. She is a parent with two minor children currently enrolled in Shelby County Schools. Her children are in kindergarten and second grade at various schools in the district. Ms. Kenny owns property in Memphis and pays state and local taxes in Shelby County, including property taxes.

17. Plaintiff Elise McIntosh is a resident of Shelby County, Tennessee. She is a parent with two minor children currently enrolled in Shelby County Schools. Her children are in eleventh and fourth grades at various schools in the district. Both of her children are classified as students with disabilities who receive special education or other services or accommodations in school. One of her children also identifies as LGBTQ. Ms. McIntosh's children are eligible for the ESA voucher program based on their household income and the other eligibility criteria. Ms. McIntosh pays state and local taxes in Shelby County, including car registration and renewal taxes.

18. Plaintiff Tracy O'Connor is a resident of Shelby County, Tennessee. She is a parent with four minor children in Shelby County Schools. Her children are in twelfth,

ninth, eighth, and sixth grade at various schools in the district. Ms. O'Connor owns property in Memphis and pays state and local taxes in Shelby County, including property taxes.

19. Plaintiff Apryle Young is a resident of Shelby County, Tennessee. She is a parent with five children currently enrolled in Shelby County Schools. Her children are in twelfth, eleventh, tenth, ninth, and eighth grades at various schools in the district. Ms. Young's children are eligible for the ESA voucher program based on their household income and the other eligibility criteria. Ms. Young pays state and local taxes in Shelby County, including car registration and renewal taxes.

20. Defendant Bill Lee is the Governor of the State of Tennessee and has a legal obligation to enforce the Constitution and laws of this State. Governor Lee is vested under Article III, §§1 and 10, of the Tennessee Constitution with "Supreme Executive power" and the duty to ensure that "the laws be faithfully executed." As the chief executive officer for the State of Tennessee, Governor Lee has responsibility for ensuring that school districts have adequate resources to provide all children with a public education that meets the requirements of the Tennessee Constitution and state laws and regulations. Governor Lee has an office located at State Capitol, First Floor, 600 Charlotte Avenue, Nashville, Tennessee 37243. Service on Governor Lee may be perfected by delivering a copy of the summons and complaint to the Attorney General or at his State office.

21. Defendants Lillian Hartgrove, Robert Eby, Nick Darnell, Mike Edwards, Gordon Ferguson, Elissa Kim, Nate Morrow, Larry Jensen, Darrell Cobbins, and Mike Krause are members of the State Board of Education ("State Board") and are statutorily charged with overseeing Tennessee's system of public schools, including academic standards

and policies, organization and structure of public schools, licensure of teachers, and distribution of public funds among public schools. T.C.A. §49-1-302. The Voucher Law authorizes the State Board of Education to promulgate rules to effectuate the purposes of the Law. T.C.A. §49-6-2610. In November 2019, the State Board approved rules to effectuate the Voucher Law. Tenn. Comp. R. & Regs. 0520-01-16. These Defendants are being sued in their official capacities. The Tennessee Board of Education's office is located at 500 James Robertson Parkway, Fifth Floor, Nashville, Tennessee 37243. Service on these defendants may be perfected by delivering a copy of the summons and complaint to the Attorney General or at their State offices.

22. Defendant Tennessee Department of Education is the State Education Agency in Tennessee and, together with the State Board and the State Education Commissioner, is responsible for overseeing the State system of public schools. T.C.A. §49-1-201, *et seq.* Under the Voucher Law, the Department of Education is responsible for the administration and implementation of the voucher program. T.C.A. §49-6-2604. The Department of Education is located at 710 James Robertson Parkway, Nashville, Tennessee 37243. Service on the Department may be perfected by delivering a copy of the summons and complaint to the Attorney General.

23. Defendant Penny Schwinn is the State Education Commissioner. In her official capacity, she is responsible for the implementation of law and policies established by the General Assembly and the State Board. T.C.A. §49-1-201(a). Commissioner Schwinn oversees the State system of public schools, administers the Tennessee Department of Education, and is responsible for implementing and administering the Voucher Law. *Id.*;

T.C.A. §49-6-2604. Defendant Schwinn is being sued in her official capacity and has an office at 710 James Robertson Parkway, Nashville, Tennessee 37243. Service on Commissioner Schwinn may be perfected by delivering a copy of the summons and complaint to the Attorney General or at her State office.

IV. RELEVANT LAW

A. Tennessee Constitution's Home Rule Provision

24. The "Home Rule" provision of the Tennessee Constitution mandates that the General Assembly is prohibited from enacting laws that are "local in form or effect" without requiring local approval.

25. Article XI, §9, provides in relevant part that:

any act of the General Assembly private or local in form or effect applicable to a particular county or municipality either in its governmental or its proprietary capacity shall be void and of no effect unless the act by its terms either requires the approval by a two-thirds vote of the local legislative body of the municipality or county, or requires approval in an election by a majority of those voting in said election in the municipality or county affected.

B. Tennessee Constitution's Appropriation of Public Moneys Provision

26. The "Appropriation of Public Moneys" provision of the Tennessee Constitution requires the General Assembly to appropriate the estimated first year's funding for every law passed during a legislative session.

27. Article II, §24, of the Tennessee Constitution provides in relevant part that:

Any law requiring the expenditure of state funds shall be null and void unless, during the session in which the act receives final passage, an appropriation is made for the estimated first year's funding.

28. Article II, §24, of the Tennessee Constitution also provides: "No public money shall be expended except pursuant to appropriations made by law."

29. Additionally, under Tennessee law, “[n]o money shall be drawn from the state treasury except in accordance with appropriations duly authorized by law.” T.C.A. §9-4-601(a)(1).

C. Tennessee Constitution’s Education and Equal Protection Guarantees

30. The Tennessee Constitution guarantees all children residing in the State the opportunity to obtain an education in Tennessee’s “system of free public schools.”

31. Article XI, §12, of the Tennessee Constitution, the Education Clause, provides in relevant part:

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.

32. The Tennessee Constitution also guarantees equal protection under the law.

Article I, §8, states:

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.

Article XI, §8, of the Tennessee Constitution provides in relevant part:

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[s], 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.

33. Pursuant to the guarantees of the Education and Equal Protection Clauses of the Tennessee Constitution, the Tennessee Supreme Court has recognized the State’s

“obligation to maintain and support a system of free public schools that affords substantially equal educational opportunities to all students” throughout the State. *Tenn. Small Sch. Sys. v. McWherter (Small School Systems I)*, 851 S.W.2d 139, 140-41 (Tenn. 1993).

34. The Tennessee Supreme Court has further recognized that the Tennessee Constitution imposes on the State the affirmative obligation to provide an adequate education to all children in Tennessee’s public school system. *Id.* at 150-51.

35. The Tennessee Constitution thus requires the State to provide a system of public schools that affords all children in districts across Tennessee a substantially equal opportunity for an adequate education.

36. The Tennessee Supreme Court has also found that the BEP was designed and enacted by the General Assembly to address “both constitutional mandates imposed upon the State – the obligation to maintain and support a system of free public schools and the obligation that that system afford substantially equal educational opportunities.” *Tenn. Small Sch. Sys. v. McWherter (Small School Systems II)*, 894 S.W.2d 734, 738 (Tenn. 1995).

D. BEP Statute

37. By statute, the General Assembly has established a “state school fund” that serves as the repository of “all funds appropriated or allocated from the state treasury for the operation and maintenance of the public schools or that may derive from any state taxes, the proceeds of which are devoted to public school purposes.” T.C.A. §49-3-101(a).

38. The General Assembly has also enacted the BEP, a statutory formula that determines the amount and distribution of funding to maintain and support the State’s system of free public schools. T.C.A. §§49-3-302, 49-3-351, *et seq.* The BEP is the procedure the

General Assembly enacted to provide the necessary funding for public schools. T.C.A. §§49-3-302, 49-3-303, and 49-3-351, *et seq.* The BEP funds are designated only for Local Education Agencies (“LEAs”), namely, local public school districts that comprise the statewide system of public schools. T.C.A. §49-3-351, *et seq.*

39. Under Tennessee law, the terms “LEA,” “local school district,” and “school district” are interchangeable and mean “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.” T.C.A. §49-1-103(2).

40. The BEP calculates the cost of four categories of essential education components: instructional salaries and wages, instructional benefits, classroom, and nonclassroom. T.C.A. §49-3-307(a)(2)(A). The BEP statute explicitly directs that “[a]ll funds generated for the BEP shall be spent on BEP components.” T.C.A. §49-3-351(c).

41. The BEP statute further provides that the State shall pay:

seventy percent (70%) of the funds generated for components within the instructional salaries and wages category; seventy percent (70%) of the funds generated for components within the instructional benefits category; seventy-five percent (75%) of the funds generated for components within the classroom category; and fifty percent (50%) of the funds generated for components within the nonclassroom category.

T.C.A. §49-3-307(a)(2)(B).

42. The BEP provides for the determination of state and local shares of funding for these components based on an equalization formula that takes into consideration an LEA’s fiscal capacity. T.C.A. §49-3-356.

43. Upon information and belief, in spring of each year, the State calculates the state and local shares of Davidson County's BEP allocation to maintain and support Metro Nashville Public Schools. Further upon information and belief, the State pays its share of the BEP to Davidson County in October and February of each year. Upon information and belief, Davidson County collects local property taxes from October through February every year, and the County pays the largest portion of its local taxes to maintain and support Metro Nashville Public Schools. Upon information and belief, Davidson County pays the local share of its BEP allocation to maintain and support Metro Nashville Public Schools in March of each year.

44. Upon information and belief, in spring of each year, the State calculates the state and local shares of Shelby County's BEP allocation. Further upon information and belief, pursuant to the BEP, the State calculates Shelby County's local BEP share based on the fiscal capacity of the entire county, not the fiscal capacity of each individual LEA located therein. Upon information and belief, the State's share of the BEP is paid to Shelby County in October and February of each year, and Shelby County then allocates the State's share to each LEA located within the county, including Shelby County Schools. Upon information and belief, Shelby County collects local property taxes from October through February every year, and Shelby County Schools taxpayers pay a significant portion of their local taxes to maintain and support Shelby County Schools. Upon information and belief, Shelby County allocates the local share of Shelby County Schools' BEP allocation to Shelby County Schools in March of each year.

45. As the Tennessee Supreme Court observed, the BEP contains essential governance and accountability provisions for LEAs, including:

mandatory performance standards; local management within established principles; performance audits that objectively measure results; public disclosure by each local system of objectives, strategies, and results; removal from office of local officials unwilling or unable to effectively manage a local system; and final responsibility upon the State officials for an effective educational system throughout the State.

Small School Systems II, 894 S.W.2d at 739. The Supreme Court emphasized that each of these governance and accountability provisions is integral to the BEP. *Id.*

46. In order to receive BEP funds, LEAs must “meet the requirements of state law as to the operation of the system and of the rules, regulations, and minimum standards of the state board for the operation of schools.” T.C.A. §49-3-353.

V. FACTUAL ALLEGATIONS

A. Enactment of the Voucher Law

47. During the 2019 session, the Tennessee Legislature enacted the Voucher Law, T.C.A. §49-6-2601, *et seq.* On May 24, 2019, Governor Lee signed the bill into law.

48. As discussed below, the Voucher Law establishes a voucher program exclusively in Davidson and Shelby Counties.

49. The Voucher Law diverts taxpayer funds that were appropriated to maintain and support public schools in Shelby County Schools and Metro Nashville Public Schools to private schools and other private education expenses. BEP funds otherwise payable to Shelby County Schools and Metro Nashville Public Schools will now be deposited into an “Education Savings Account” (“ESA”) for each participating voucher student.

50. The General Assembly did not make an appropriation for the estimated first year's funding of the Voucher Law during the session in which it was enacted.

51. Despite the absence of an appropriation for the estimated funding of the Voucher Law in fiscal year 2019, Defendant Department of Education entered into a \$2.5 million contract in November 2019 with ClassWallet, a private, for-profit company based in Florida. Under this contract, ClassWallet will oversee online application and payment systems for the voucher program. ClassWallet began work under this contract in November 2019.

52. Defendant Department of Education paid ClassWallet approximately \$1.2 million in 2019 for performance under this contract, despite the fact that no money was appropriated for the first year of the Voucher Law. According to testimony by the Department of Education's deputy commissioner before the General Assembly's Joint Government Operations Committee on January 27, 2020, the Department of Education diverted funds appropriated by the General Assembly for the unrelated "Career Ladder" program for public school teachers to pay ClassWallet for services performed to implement the Voucher Law.

B. The Voucher Law Targets Shelby and Davidson Counties

53. The Voucher Law applies to public schools and students in only two Tennessee counties: Shelby and Davidson.

54. The eligibility criteria for participation in the ESA voucher requires that a student:

- (i) Is zoned to attend a school in an LEA, excluding the achievement school district (ASD), 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; or
- (ii) Is zoned to attend a school that is in the ASD on May 24, 2019.

T.C.A. §49-6-2602(3)(C).

55. In the entire State of Tennessee, the only LEAs that meet the specific criteria in subsection (i) above are Shelby County Schools and Metro Nashville Public Schools.

56. As of the date specified in subsection (ii) – May 24, 2019 – all of the public schools in the ASD were located in Shelby and Davidson Counties.

57. Because the Voucher Law links its eligibility criteria to facts that existed between 2015 and 2019, it is impossible, without a legislative amendment passed by the General Assembly, for any public school that is not located in Shelby or Davidson Counties to be subject to the Voucher Law.

58. The history of the Voucher Law makes clear that the General Assembly intended the Law to apply only to Shelby and Davidson Counties. When the bill was first introduced, it applied to five counties – Shelby, Davidson, Hamilton, Madison, and Knox – but three were removed to secure the votes needed for passage by the General Assembly.

59. There are numerous references in the legislative record demonstrating the General Assembly’s intent to limit the Voucher Law to Shelby County Schools and Metro Nashville Public Schools. For example, on April 25, 2019, Senator Joey Hensley explicitly

stated during debate on the Senate Floor that the Voucher Law would cover only Davidson and Shelby County schools.

60. When the votes on the Voucher Law were cast and there was a 49-49 tie, then-Speaker Glen Casada held the vote open for over 38 minutes. During that time, he engaged in a lengthy discussion with Knoxville Representative Jason Zachary, who opposed the bill, on a balcony behind the House building. After that discussion, Knox County was no longer subject to the Voucher Law, Representative Zachary switched his vote, and the bill passed.

61. On November 15, 2019, the State Board adopted administrative rules to implement the Voucher Law. Those rules were approved by the Joint Government Operations Committee on January 27, 2020. The rules confirm that a student is eligible for a voucher only if the student “[i]s zoned to attend a school in Shelby County Schools, Metropolitan Nashville Public Schools, or is zoned to attend a school that was in the Achievement School District on May 24, 2019.” Tenn. Comp. R. & Regs. §§0520-01-16.02(11)(b).

62. Because the Voucher Law requires that the funds deposited into ESAs “be subtracted from the State BEP funds otherwise payable to the LEA,” T.C.A. §49-6-2605(b)(1), the only public schools that will lose BEP funds under the Voucher Law are those in Shelby and Davidson Counties.

63. The Voucher Law further guarantees that only public schools located in Shelby and Davidson Counties will have BEP funds diverted to ESAs by providing that, “notwithstanding” the Law’s standard severability clause, “if any provision of [the Law] is

held invalid, then the invalidity shall not expand the application of [the Law] to eligible students other than those identified in §49-6-2602(3).” T.C.A. §49-6-2611(c).

64. The Voucher Law does not require, nor was any action taken to secure, local approval of the Law by a two-thirds vote of the local governing bodies of Shelby and Davidson Counties, or approval in an election by a majority of those voting in the two affected counties. During the floor debate on the voucher bill, representatives from Shelby and Davidson Counties made it very clear that neither they, nor their constituents, supported the Law. For example, during the House debate on April 23, 2019, Davidson County Representative Jason Powell stated that he and his colleagues from Davidson County wanted “to opt out of this piece of legislation” and that “not one of us is for this piece of legislation, yet this legislation is being directly focused on Davidson County as well as another county.” Representative Antonio Parkinson stated, “for the record, we do not like this bill for Shelby County Schools.”

C. The Voucher Law Diverts Public Education Funds to Private Schools

65. The Voucher Law mandates that, for every pupil eligible for the voucher program, an amount representing both the State and local shares of an LEA’s per-pupil BEP allocation – up to the combined statewide average of State and local per-pupil BEP allocations – must be subtracted “from the State BEP funds otherwise payable to” Shelby County Schools and Metro Nashville Public Schools. T.C.A. §§49-6-2605(a)-(b)(1).

66. Upon information and belief, after the calculation of each county’s BEP allocation, the State BEP funds otherwise payable to Shelby County Schools and Metro

Nashville Public Schools will be diverted to the voucher program prior to the first payment of the State's share to each county.

67. Currently, the statewide average of the State and local BEP allocation is over \$7,500 per pupil. Therefore, Shelby County Schools and Metro Nashville Public Schools will lose more than \$7,500 for every student participating in the voucher program.

68. The Voucher Law allows up to 5,000 vouchers during the first school year that the program is implemented. T.C.A. §49-6-2604(a)(6). In each subsequent school year, the law allows an increase of 2,500 vouchers. *Id.* In the fifth year and thereafter, the law allows up to 15,000 vouchers. *Id.*

69. In year one, up to \$37 million in BEP funds will be diverted from Shelby County Schools and Metro Nashville Public Schools if 5,000 students use a voucher. By year five, ***over \$375 million*** in BEP funds could be diverted from Shelby County Schools and Metro Nashville Public Schools.

70. The General Assembly's persistent failure to provide adequate funding to maintain and support Shelby County Schools and Metro Nashville Public Schools is well documented. For example, a 2019 report found three major deficiencies in the State's funding of its public school system: a funding level approximately \$4,000 per pupil below the national average and 43rd in the nation; a lack of additional funds for LEAs such as Shelby County Schools and Metro Nashville Public Schools that enroll high proportions of students in poverty; and a very low level of investment of tax dollars in the public school system statewide. Farrie, Kim & Sciarra, *Making the Grade: How Fair Is School Funding in*

Your State?, Education Law Center (2019), <https://edlawcenter.org/assets/Making-the-Grade/Making%20the%20Grade%202019.pdf>.

71. The State’s own reports confirm the inadequacy of BEP funding. For example, a 2019 report by the Tennessee Advisory Commission on Intergovernmental Relations found that the State’s “school systems often need to hire more staff than provided for by the [BEP] formula.” https://www.tn.gov/content/dam/tn/tacir/commission-meetings/2019december/2019Dec_Tab5K-12Funding_ExecSummaryDRAFT.pdf. The BEP Review Committee, which is officially charged by the General Assembly with reviewing the BEP, recently found that the BEP formula fails to provide adequate funding for classroom teachers, school counselors, and nurses. Basic Education Program Review Committee 2019 Annual Report, https://www.tn.gov/content/dam/tn/stateboardofeducation/documents/bepcommitteeactivities/2019-bep/2019_BEP_Report.pdf. To address these resource deficits, the State’s BEP Review Committee recommended that State BEP funds be increased to provide LEAs, including Shelby County Schools and Metro Nashville Public Schools, with additional support staff, interventions for at-risk students, technology, and increased teacher compensation. *Id.*

72. Upon information and belief, State funding fails to provide Shelby County Schools and Metro Nashville Public School with sufficient resources – including teachers, guidance counselors, nurses, and interventions for high need students – essential to provide an adequate education to all students in the districts. The Voucher Law will exacerbate this condition by draining more State funding from Shelby County Schools and Metro Nashville Public Schools.

73. The over \$375 million that will be diverted from Shelby County Schools and Metro Nashville Public Schools under the Voucher Law will drastically exacerbate the current underfunding of Shelby County Schools and Metro Nashville Public Schools under the BEP. The Voucher Law will require Shelby County Schools and Metro Nashville Public Schools to make further reductions in teachers, support staff, technology, and other resources essential to providing a constitutionally adequate education to Shelby County Schools' and Metro Nashville Public Schools' students.

74. The Voucher Law authorizes grants for Shelby County Schools and Metro Nashville Public Schools from a "school improvement fund" for up to three years. T.C.A. §49-6-2605(b)(2). These grants are expressly subject to an appropriation of funds by the General Assembly each year. *Id.* Governor Lee's proposed budget does not include an appropriation that would cover the school improvement grants for Shelby County Schools and Metro Nashville Public Schools.

75. The Voucher Law restricts the use of these grants, if appropriated, to "school improvement" only. Thus, these grants, even if available, cannot be used for general operating funds and consequently will not replace the State and local BEP funds diverted from Shelby County Schools and Metro Nashville Public Schools under the Voucher Law.

76. Even if the General Assembly fully funds these "school improvement grants," the grants will not compensate Shelby County Schools and Metro Nashville Public Schools for the loss of BEP funds for each student who uses a voucher. The grants equal only the amount of money diverted to ESA voucher accounts for students who "[w]ere enrolled in and attended a school in the LEA for the one (1) full school year immediately preceding the

school year in which the student began participating in the program.” T.C.A. §49-6-2605(b)(2)(A)(i). This does not include students who are “eligible for the first time to enroll in a Tennessee school” – for example, those entering kindergarten – who are also eligible for the voucher program. T.C.A. §49-6-2602(3)(A)(ii).

77. In addition to the initial loss of BEP funds by Shelby County Schools and Metro Nashville Public Schools, the Voucher Law provides that, when an ESA account is closed for any number of reasons, the remaining funds are returned to the State’s BEP account rather than returned to Shelby County Schools or Metro Nashville Public Schools. T.C.A. §§49-6-2603(e), 49-6-2608(e). Even when a voucher student returns to Shelby County Schools or Metro Nashville Public Schools and the district resumes full responsibility for educating that student, the funds remaining in the student’s ESA account are returned to the State and not to the district. T.C.A. §49-6-2603(e).

78. Furthermore, a student’s departure from Shelby County Schools or Metro Nashville Public Schools to use an ESA does not relieve the districts of all of the costs associated with that student.

79. In addition, Shelby County Schools and Metro Nashville Public Schools bear substantial fixed costs in operating their public schools. These fixed costs include facilities repair and maintenance, teacher and staff pensions, debt service, and long-term contracts. Because participants in the voucher program will exit Shelby County Schools and Metro Nashville Public Schools from different schools, grade levels, and classrooms, the districts will be unable to proportionately reduce staff, programs, services, and other fixed costs to fully cover the loss of BEP funds under the Voucher Law.

80. As set forth in §§93-94, *infra*, the Voucher Law permits private schools participating in the voucher program to deny enrollment to students with increased needs, including students with disabilities, who may be more expensive to educate. As a result, the Voucher Law will likely increase the concentration of more costly-to-educate students in Shelby County Schools and Metro Nashville Public Schools, with less money available for their support and growth.

D. Requirements Differ for Voucher Schools and Public Schools

81. Under the Voucher Law, a student is eligible for the voucher program if the student:

- (a) was previously enrolled in and attended a Tennessee public school for one full school year immediately preceding the school year for which the student is seeking the ESA, is eligible for the first time to enroll in a Tennessee school, or received an ESA in the previous school year;
- (b) is in kindergarten through twelfth grade;
- (c) is zoned to attend a school in Shelby County Schools or Metro Nashville Public Schools, or that was in the Achievement School District on the date the law was enacted; and
- (d) is in a household with an annual income for the previous year that does not exceed twice the federal income eligibility guidelines for the free lunch program.

T.C.A. §49-6-2602(3).

82. A student participating in the voucher program may use the BEP funds deposited into an ESA account for tuition in a private school and also for many other private education expenses: private school fees and textbooks; tutors and/or tutoring facilities; transportation to and from a private school or educational provider; early postsecondary opportunity courses or examinations for college admissions; computer hardware,

technological devices, or other technology fees; uniforms; summer education programs and certain afterschool programs; tuition, textbooks and fees at certain postsecondary institutions; educational therapy services; and ESA management fees. T.C.A. §§49-6-2603(4).

83. The Voucher Law provides that only students attending a “participating school” can receive ESA funding. Participating schools are defined as those that meet the requirements established by the Department of Education and the State Board for Category I, II, or III private schools. T.C.A. §49-6-2602(9).

84. Category I private schools are “those approved individually by the Department of Education,” Category II private schools are those “accredited by an agency whose accreditation process is approved by the State Board of Education,” and Category III private schools are “those which are regionally accredited.” Tenn. Comp. R. & Regs. §0520-07-02-.01.

85. State Board regulations provide that “[t]he criteria and procedures used in the evaluation of [Category I] schools are the same as for the public schools,” Tenn. Comp. R. & Regs. §0520-07-02-.02, but this is not true for Category II and Category III private schools. Tenn. Comp. R. & Regs. §§0520-07-02-.03, 0520-07-02-.04.

86. The State Board regulations governing approval of accrediting organizations for Category II private schools include criteria for topics such as curriculum and graduation, teacher licensure and evaluation, and testing. Tenn. Comp. R. & Regs. §0520-07-02-.03(6)(c)(9). The regulations for Category III private schools require only regional accreditation, reporting of basic student information to the student’s public school

district of residence, and a minimum age for students entering kindergarten. Tenn. Comp. R. & Regs. §0520-07-02-.04. The criteria used by regional accrediting agencies varies.

87. Unlike for private schools, Tennessee’s regulations governing public schools require the State Board to “adopt academic standards for each subject area, grades kindergarten (K) through twelve (12)” that “specify learning expectations and include performance indicators.” Tenn. Comp. R. & Regs. §0520-01-03-.05. The State Board has adopted detailed academic standards in a range of subjects. *See* Tennessee Department of Education, Academic Standards, <https://www.tn.gov/education/instruction/academic-standards.html>. These standards must be “the basis for planning instructional programs in each local school system.” Tenn. Comp. R. & Regs. §0520-01-03-.05.

88. In contrast to public schools, the Voucher Law requires participating private schools to administer State tests in only two subjects, Math and English Language Arts. T.C.A. §49-6-2606(a)(1). Unlike public school students, voucher students need not be given a State test in Social Studies and Science.

89. The Voucher Law does not require all participating private schools to comply with the governance and accountability mandates of State laws, including the BEP statute, that apply to the public schools.

E. Voucher Law Lacks Anti-Discrimination and Civil Rights Protections

90. The Voucher Law requires participating private schools to certify that they will not discriminate against voucher students or applicants on the basis of race, color, or national origin. T.C.A. §49-6-2607(e)(2).

91. The Voucher Law does not prohibit participating schools from refusing admission based on disability, religion, English language ability, LGBTQ status, or family income level. The Voucher Law explicitly states that accepting ESA voucher money will not require any participating private school to change any part of its “creed, practices, admissions policies, or curriculum in order to accept participating students, other than as is necessary to comply with the requirements of the program.” T.C.A. §49-6-2609(c).

92. Upon information and belief, many Tennessee private schools limit admission and continued enrollment based on religion, sexual orientation, or other student or family characteristics protected from discrimination in public schools. For example, Evangelical Christian School in Memphis, a Category II private school, will only admit students with “one parent professing Christ as Savior.” Evangelical Christian School, How to Apply, <https://www.ecseagles.com/admissions/how-to-apply>. Briarcrest Christian School in Shelby County, a Category II, III, and IV private school, excludes – or will expel – students who “engage in inappropriate sexual behavior” that includes “premarital sexual relations, homosexuality, bisexuality or transgender related actions.” Briarcrest Christian School, Code of Conduct, <https://www.briarcrest.com/admissions/student-and-family-policies/student-code-of-conduct>. Providence Christian Academy, a Category III private school in Murfreesboro, reserves the right to refuse admission or discontinue enrollment of students from homes that are “living in, condoning or supporting sexual immorality; practicing homosexual lifestyle or alternative gender identity; promoting such practices; or otherwise having the inability to support the moral principles of the school.” Providence

Christian Academy, Student Admission Policy, <http://www.providencechristian.com/wp-content/uploads/2020/02/Parent-Student-Hand-Book-2019-2020.pdf>.

93. The Voucher Law expressly permits participating private schools to deny special education programs and services to students with disabilities by providing that program participation “has the same effect as a parental refusal to consent to the receipt of services under the Individuals with Disabilities Education Act.” T.C.A. §49-6-2603(3).

94. The Voucher Law will divert BEP funds appropriated by the General Assembly away from Shelby County Schools and Metro Nashville Public Schools to pay tuition, fees, and other expenses for private schools that are not required to serve all students. The Voucher Law allows participating private schools to use public taxpayer dollars to refuse admission to and discriminate against students based on disability status, religious beliefs, language proficiency, lack of financial means, citizenship status, gender identity, sexual orientation, or other factors. Public schools are prohibited by law from refusing admission or discriminating against students or families based on any of these characteristics or factors.

95. The Voucher Law does not require participating private schools to afford students the protections against bullying, intimidation, and harassment that public schools must provide under State law. T.C.A. §49-6-4501, *et seq.*

96. The Voucher Law expressly gives participating private schools “maximum freedom to provide for the educational needs of participating students without governmental control.” T.C.A. §49-6-2609(c). Passage of the Voucher Law does not give the Department of Education authority to “impose any additional regulation of participating schools or

providers.” T.C.A. §49-6-2609(b). The Voucher Law explicitly states that “[a] participating school or provider is autonomous and not an agent of this state.” T.C.A. §49-6-2609(a).

VI. CAUSES OF ACTION

FIRST CAUSE OF ACTION

(Violation of the Home Rule Provision of the Tennessee Constitution)

97. Plaintiffs incorporate all allegations in all preceding paragraphs as if fully set forth herein.

98. The Home Rule provision of the Tennessee Constitution, Article XI, §9, provides that the General Assembly cannot pass laws that are local in form or effect without requiring local approval.

99. By its express terms, the Voucher Law only applies to Shelby and Davidson Counties. The Law is, by its express terms, “local in form and effect.”

100. The Voucher Law does not require, nor did it receive, Shelby and Davidson Counties’ approval through the methods delineated in the Home Rule provision.

101. The Voucher Law violates the Home Rule provision and is therefore “void and of no effect” under Article XI, §9, of the Tennessee Constitution.

SECOND CAUSE OF ACTION

(Violation of the Education and Equal Protection Clauses of the Tennessee Constitution)

102. Plaintiffs incorporate all allegations in all preceding paragraphs as if fully set forth herein.

103. Under the Tennessee Constitution, the State of Tennessee, through the General Assembly, must maintain and support a system of public schools that provides adequate and

substantially equal educational opportunities to all children residing in the State. Tenn. Constitution, Article I, §8; Article XI, §§8, 12; *Small School Systems I*, 851 S.W.2d 139; *Small School Systems II*, 894 S.W.2d 734; *Tenn. Small Sch. Sys. v. McWherter (Small School Systems III)*, 91 S.W.3d 232 (Tenn. 2002).

104. In the *Small School Systems* rulings, the Tennessee Supreme Court invalidated the State's previous school funding system because it deprived public school students in certain LEAs of substantially equal education opportunities. *Small School Systems I*, 851 S.W.2d at 156. The Supreme Court also declared that the General Assembly's enactment of the BEP statute and funding formula was intended to cure those constitutional deficiencies. *Small School Systems II*, 894 S.W.2d at 736.

105. The Voucher Law will deprive students in Shelby County Schools and Metro Nashville Public Schools of substantially equal educational opportunities by diverting the BEP funds appropriated by the General Assembly to maintain and support their schools to pay for private school tuition and other private educational expenses.

106. Through the BEP statute, the General Assembly provides funding to maintain and support an adequate education for students in the State's system of public schools. Because the Voucher Law diverts substantial BEP funds intended to maintain and support Shelby County Schools and Metro Nashville Public Schools away from those districts, the Law deprives students in Shelby County Schools and Metro Nashville Public Schools of the BEP funds deemed legally necessary to provide them with an adequate education.

107. The current funding provided by the General Assembly through the BEP statute is demonstrably inadequate to enable Shelby County Schools and Metro Nashville

Public Schools to provide the teachers, support staff, and other resources necessary to afford all students an adequate education under Article I, §8, and Article XI, §§8 and 12, of the Tennessee Constitution. The diversion of BEP funds under the Voucher Law will further deprive Shelby County Schools and Metro Nashville Public Schools of the funding required to provide their students with a constitutionally-mandated adequate education.

108. Because the Voucher Law alters and diminishes the BEP funds appropriated by the General Assembly to maintain and support Shelby County Schools and Metro Nashville Public Schools, the Law violates the Equal Protection and Education Clauses of the Tennessee Constitution, Article I, §8; Article XI, §§8, 12, for students in Shelby County Schools and Metro Nashville Public Schools.

THIRD CAUSE OF ACTION

(Violation of the Requirement of a Single System of Public Schools Under the Education Clause of the Tennessee Constitution)

109. Plaintiffs incorporate all allegations in all preceding paragraphs as if fully set forth herein.

110. The Tennessee Constitution's Education Clause, Article XI, §12, requires the General Assembly to provide for the maintenance, support and eligibility standards of "*a* system of free public schools" (emphasis added).

111. The Voucher Law diverts BEP funds appropriated by the General Assembly to maintain and support Tennessee public schools to instead pay for tuition and other expenses in private schools that do not comply with the requirements of a single system of public schools.

112. The private schools authorized by the Voucher Law to participate in the voucher program are not – and cannot, by the express terms of the Law – be part of the State of Tennessee’s system of free public schools.

113. Under the Voucher Law, participating private schools are not required to comply with the same academic and eligibility standards required by State law for Tennessee’s system of free public schools.

114. Under the Voucher Law, participating private schools are expressly exempt from the legal obligation to enroll and educate all students, as is required in Tennessee’s system of free public schools. The participating private schools can deny enrollment or otherwise discriminate against students based on characteristics such as disability, religion, English proficiency, LGBTQ status, and ability to pay tuition or fees.

115. Under the Voucher Law, participating private schools are not required to provide services that public schools are obligated under State and federal law to provide to students, including special education services for students with disabilities.

116. Under the Voucher Law, participating private schools are not subject to the requirements imposed by State law on public schools to protect students from harassment, intimidation, or bullying.

117. Under the Voucher Law, participating private schools are not required to comply with the same governance and accountability mandates of State law that apply to Tennessee’s system of free public schools.

118. The Voucher Law violates the General Assembly’s obligation in Article XI, §12, of the Tennessee Constitution to maintain and support “*a system*” of free public schools (emphasis added).

FOURTH CAUSE OF ACTION

(Violation of the BEP Statute)

119. Plaintiffs incorporate all allegations in all preceding paragraphs as if fully set forth herein.

120. The BEP is the statutory formula by which the General Assembly determines and appropriates the funds required to maintain and support Tennessee’s system of free public schools, including Shelby County Schools and Metro Nashville Public Schools. T.C.A. §49-3-351, *et seq.*

121. The BEP’s statutory provisions provide for the determination, allocation, and apportionment of BEP funds to public school districts only. T.C.A. §49-3-351, *et seq.* The BEP statute does not provide for funds to be distributed to any school other than those in public school districts.

122. The Voucher Law violates the BEP statute by diverting BEP funds appropriated by the General Assembly to maintain and support Shelby County Schools and Metro Nashville Public Schools to private schools and other private education expenses.

FIFTH CAUSE OF ACTION

(Violation of the Appropriation of Public Moneys Provisions of the Tennessee Constitution and T.C.A. §9-4-601)

123. Plaintiffs incorporate all allegations in all preceding paragraphs as if fully set forth herein.

124. Article II, §24, of the Tennessee Constitution provides:

Any law requiring the expenditure of state funds shall be null and void unless, during the session in which the act receives final passage, an appropriation is made for the estimated first year's funding.

125. Article II, §24, of the Tennessee Constitution also provides: "No public money shall be expended except pursuant to appropriations made by law."

126. By statute, "[n]o money shall be drawn from the state treasury except in accordance with appropriations duly authorized by law." T.C.A. §9-4-601(a)(1).

127. The Voucher Law was enacted by the General Assembly in its 2019 legislative session.

128. During the 2019 legislative session, the General Assembly did not make an appropriation for the estimated first year's funding of the Voucher Law.

129. In November 2019, Defendant Department of Education signed a \$2.5 million contract with a private for-profit company, ClassWallet, to undertake the administration of the Voucher Law. ClassWallet began work under the contract in November 2019.

130. The Department of Education diverted public funds from an unrelated, existing State program supporting public school teachers to instead pay ClassWallet \$1.2 million in 2019 for its work on the voucher program.

131. The Department of Education's expenditures for the ClassWallet contract, or any other expenditures for the administration and implementation of the Voucher Law in 2019, without appropriation for the estimated first year's funding of the Law, render the Law null and void under Article II, §24, of the Tennessee Constitution and violate T.C.A. §9-4-601.

VII. DECLARATORY AND INJUNCTIVE RELIEF

132. Plaintiffs incorporate all allegations in all preceding paragraphs as if fully set forth herein. Plaintiffs seek a judgment declaring that the Voucher Law violates the Tennessee Constitution's provisions on Home Rule, Education, Equal Protection, and Appropriation of Public Moneys, as well as the BEP statute and T.C.A. §9-4-601, and a permanent injunction preventing enforcement of the Voucher Law.

133. Plaintiffs have suffered and will continue to suffer irreparable harm if the Voucher Law continues to be implemented by Defendants. Diversion of public education funding to the voucher program will result in the loss of millions of dollars in BEP funds that Shelby County Schools and Metro Nashville Public Schools need to provide their students, including Plaintiffs' children, with the educational opportunities mandated by the State constitution. These taxpayer dollars will be lost to illegal spending.

134. A temporary, and ultimately permanent, injunction to bar implementation of the Voucher Law will prevent irreparable harm to Plaintiffs, including the harm to Plaintiffs' children from the loss of funding required to provide them with an adequate education in Shelby County Schools and Metro Nashville Public Schools.

WHEREFORE, Plaintiffs demand judgment against Defendants on each Count of the Complaint and pray for the following relief:

A. That the Court enter a judgment declaring that the Voucher Law violates the Tennessee Constitution's provisions on Home Rule, Education, Equal Protection, and Appropriation of Public Moneys, as well as the BEP statute and T.C.A. §9-4-601;

B. That the Court issue temporary and permanent injunctions preventing the enforcement of the Voucher Law;

C. That the Court award Plaintiffs their costs, expenses, and reasonable attorneys' fees as required by law; and

D. That the Court grant such further relief as it may deem just and proper.

DATED: March 2, 2020

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