

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. PROCEDURAL HISTORY	3
III. STATEMENT OF FACTS	6
A. The State Recklessly Rushes to Implement the Voucher Law	6
B. The Voucher Law Creates a Separate System of Publicly Funded Private Schools that Do Not Have to Comply with Public School Academic, Accountability, and Antidiscrimination Standards	11
C. The Voucher Law Will Unlawfully Divert Hundreds of Millions of Dollars from Metro Nashville Public Schools and Shelby County Schools to Private Schools	14
IV. ARGUMENT	16
A. McEwen Plaintiffs Are Likely to Succeed on the Merits of Their Claim that the Voucher Law Violates the Education K Ó	

	Page
C. The Balance of Harms Weighs Heavily in Favor of Granting McEwen Plaintiffs’ Motion for a Temporary Injunction.....	30
D. The Public Has a Strong Interest in This Court Granting McEwen Plaintiffs’ Motion for a Temporary Injunction.....	34
V. CONCLUSION	36

Tennessee Supreme Court Rules

Rule 54.....	5
Rule 54 §3(a)(5).....	5 §0520

Tenn. Comp. R. & Regs.

§0520-05-01-05 §0520.....	§0520.....	§0520.....	§0520-05-01-05
§0520-05-02-01.....			7, 8 §0520
§0520-05-02-.01-.04.....			11
§0520-07-02-.03 §0520.....			T/F 12.96 Tf1 C

I. INTRODUCTION

The Tennessee Education Savings Account Pilot Program (“Voucher Law” or “voucher program”) is an unconstitutional statute to fund a program of private education that is outside the system of free public schools mandated by Article XI, §12 of the Tennessee Constitution. The Voucher Law will divert hundreds of millions of dollars from Metro Nashville Public Schools and Shelby County Schools to private schools, which are not required to comply with the same academic and accountability standards as public schools, and many of which can and do discriminate against Tennessee children and families based on their disability, religion, and sexual orientation, among myriad other factors.

The Education Clause of the Tennessee Constitution guarantees and requires that the State provide an adequate and substantially equal education to all Tennessee children through a system of free public schools:

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 post-secondary educational institutions, including public institutions of higher learning, as it determines.

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clauses in their state constitutions, including an opinion just weeks ago that enjoined a voucher law in West Virginia.

An injunction now, *before the school year begins in just a few weeks*, is especially critical because of the unprecedented efforts being taken by the State to implement the voucher program on a timeline that it previously represented to this Court was impossible. The State’s misconduct, if not enjoined, is causing and will continue to cause massive confusion and hundreds of thousands of dollars in expenses for private schools and their parents months after any typical deadlines have passed. Even more alarming is the reckless disregard for families that may be on the hook for thousands of dollars in expenses if they enroll their children in private schools only to find later in the school year that the Voucher Law is unconstitutional and the State is unable to pay for their private schooling. This financial risk has only been exacerbated in recent days as the State has announced that, in light of the inadequate time to ramp up the voucher program, it has developed a half-baked plan to have participating schools invoice the State for voucher student expenses *after* the expenses have already been incurred, plainly violating the statute’s requirement that the State “establis

(statement of Deputy Commissioner of Education Amity Schuyler). In 2019, the TDOE paid ClassWallet approximately \$1.2 million for performance under this contract. (April 3, 2020 Decl., Ex. 2) (statements of TDOE Chief Financial Officer Drew Harpool).

On November 15, 2019, the State Board adopted administrative rules to implement the Voucher Law. (April 3, 2020 Decl., Ex. 3) (statement of State Board General Counsel Angie Sanders). Those rules were approved by the Joint Government Operations Committee on January 27, 2020 and went into effect February 25, 2020. *Id.*; 0 6B1ET00.00000912 0 612 79t, re312

Rep. Hazlewood: Alright, thank you. *I think the understanding or, the conversations I had about that bill were always that it would start in that later year.*

Id. (emphasis added); T.C.A. §49-6-2604(b).

On May 4, 2020, these efforts to implement the voucher program were supposed to come to a stop pursuant to the Court’s Memorandum and Order, which stated “that the State Defendants are ENJOINED from implementing and enforcing the ESA Act.” , Memorandum and Order (May 4, 2020), at 31. Yet, in spite of the Court’s Order, Defendant Governor Lee *continued* to encourage parents to apply for vouchers. , Pltfs’ Resp. in Opp. to State Defs.’ and Intervenor-

In spite of these prior representations that voucher rollout would require completed applications and TDOE preparations as much as *several months* prior to the start of the school year, as of July 18, 2022 “Intent to Enroll” forms for parents and families, as well as “Intent to Participate” forms for “Independent Schools,” were live and active on the State’s ESA voucher website.⁶

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Ex. 3 at 12. Nowhere does the Voucher Law allow for such a process.⁷

B. The Voucher Law Creates a Separate System of Publicly Funded Private Schools that Do Not Have to Comply with Public School Academic, Accountability, and Antidiscrimination Standards

Pursuant to the Voucher Law, a student participating in the voucher program uses Basic Education Program (“BEP”) funds deposited into an ESA account⁸ for tuition in a participating private school and other private education expenses. T.C.A. §§49-6-2603(4).

State Board regulations provide that the criteria and procedures used in evaluation of Category II and III are not the same as public schools. Tenn. Comp. R. & Regs. §§0520-07-02-.03, 0520-07-02-.04. 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(4)(c)(8). 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(2)(a)(8). The criteria used by regional accrediting agencies varies.

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.⁹ These standards must be "the basis for planning instructional programs in each local school system." Tenn. Comp. R. & Regs. §0520-01-03-.05.

The Voucher Law also 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

Science. The Voucher Law does not require all participating private scho

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. Additionally, 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.*

IV. ARGUMENT

Rule 65.01 of the Tennessee Rules of Civil Procedure provides this Court the authority to issue a temporary injunction to halt Defendants' implementation of the Voucher

school system.

Tennessee courts have long interpreted the Education Clause as requiring the General Assembly to support and maintain a single system of free schools, *i.e.*, the statewide public school system. In the landmark *Tenn. Small Sch. Sys.* line of cases, the Tennessee Supreme Court held that the General Assembly's obligation under Article XI, §12 is twofold: "the obligation to maintain and support a system of free public schools and the obligation that that system afford substantially equal educational opportunities." *Small Sch. Sys. II*, 894 S.W.2d at 738; *see also Tenn. Small Sch. Sys. v. McWhorter*, 622 S.W.2d 818 (Tenn. 1981).

funding and governance is an integral part of the plan and each is indispensable to its success.” *Id.* The Court then ruled in both *Small Sch. Sys. II* and *Small Sch. Sys. III* that an earlier iteration of the BEP was unconstitutional because teachers’ salaries, an essential component of the statewide system, were not equalized throughout Tennessee. *Small Sch. Sys. II*, 894 S.W.2d at 738; *Small Sch. Sys. III*, 91 S.W.3d at 233-34.

The *Small Sch. Sys.* decisions are consistent with a long line of Tennessee precedent. Tennessee courts have historically recognized that, in discharging its constitutional obligation to provide equal educational opportunity, the State’s policy is to maintain and support a single statewide system of public education. *Bd. of Educ. of the Memphis City Schools v. Shelby Cnty.*, 339 S.W.2d 569, 578-79 (Tenn. 1960). *See also Richardson v. City of Chattanooga*, 381 S.W.2d 1 (Tenn. 1964); *State v. Mayor & Aldermen of Dyersburg*, 235 S.W.2d 814, 818 (Tenn. 1951); *State v. City of Knoxville*, 90 S.W. 289, 293 (Tenn. 1905).

Subsequent precedent confirms the principle that the State’s obligation is to maintain a single system of public schools and that any education outside or in addition to that is not part of this single constitutionally mandated system. In *Crites. v. Smith*, 826 S.W.2d 459, 467 (Tenn. Ct. App. 1991), the Tennessee Court of Appeals, rejecting a challenge by homeschooling parents, upheld the authority of the State Commissioner of Education to set a strict deadline for notice to local school boards that a parent is withdrawing a child from the public school system. The Court reasoned that the deadline was necessary so as not to disrupt the public school system. The Court noted: “[w]hile absolute freedom and flexibility to attend or not attend public school or home school at will may be desirable to some, it does not comport with the orderly conduct of a school system provided for all the children of the

state.” *Id.* Because home schooling occurred outside the public schools, it was clearly not part of the State’s system of free schools.

Indeed, the State itself has recognized that the Tennessee Constitution contemplates one system of public education. In a 2018 opinion responding to an inquiry about the relative powers of the State Board and local boards of education, the Tennessee Attorney General concluded:

Pursuant to [the] constitutional mandate [of Article XI, §12], the

supporting *private* schools is not a State function.¹⁴ 2020 WL 5807636, at *5 (“[T]he plenary authority derived from article XI, section 12 relates to *public schools*, not private ones. When encouraging, assisting or benefiting private schools, the General Assembly is operating outside that plenary power.”) (emphasis in original). Thus, private schools cannot be part of the system of free public schools contemplated by Article XI, §12. Diverting the funds intended to maintain and support the public school system to schools outside that system both exceeds and undermines the State’s Education Clause duty and is thus unconstitutional.

b. The Voucher Law Impermissibly Exceeds the State’s Constitutional Mandate to Provide a System of Free Public Schools

Pursuant to the doctrine of *expressio unius*, the Constitution prohibits the Legislature from exceeding the Article XI, §12 mandate by publicly funding private education outside the system of free public schools.

Expressio unius is an axiomatic rule of interpretation in Tennessee. “[I]t is a rule of construction, well recognized by the courts, that the mention of one subject in an act means the exclusion of other subjects.” *Southern v. Beeler*, 195 S.W.2d 857, 866 (Tenn. 1946) (“Now since the statute mentions only one subject, *i.e.*, the division of elementary school funds, we are justified in concluding, inferentially, at least, that high school funds were excluded by this legislative direction.”). *See also, e.g., Penley v. Honda Motor Co.*, 31 S.W.3d 181, 185 (Tenn. 2000) (“It is a well-established canon of statutory construction that

¹⁴ The Supreme Court left the Court of Appeals’ ruling on this point of law undisturbed.

‘the mention of one subject in a statute means the exclusion of other subjects that are not mentioned.’”) (quoting *Carver v. Citizen Util. Co.*, 954 S.W.2d 34, 35 (Tenn. 1997)).

Article XI, §12 requires the General Assembly to fund a system of free public schools. Publicly funding private education exceeds that mandate, as the Education Clause explicitly requires a system of public schools, to the exclusion of a separate program of publicly funded private education. However, a publicly funded system of private education, separate and apart from the system of public schools, is exactly what the Legislature is attempting to establish through the Voucher Law – with wholly different, and minimal, standards regarding academic quality, accountability, and antidiscrimination protections. Moreover, the Voucher Law funds this separate system by diverting funding expressly intended to support and maintain the system of free public schools designated in Article XI, §12, thereby also frustrating the express mandate of the Education Clause. This separate program for funding private education is unconstitutional.

Other state courts have enjoined voucher programs on these very grounds. In *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), the Florida Supreme Court struck down a voucher statute under the *expressio unius* principle. The Florida Constitution mandates “a uniform, efficient, safe, secure, and high quality system of free public schools.” FLA. CONST. art. IX, §1(a). The Supreme Court held that the Legislature’s constitutional mandate to provide free public schools prohibited it from creating a system of funding for nonpublic schools with different academic and antidiscrimination standards. *Bush*, 919 So. 2d at 407.

Recently, a West Virginia court invalidated that state’s voucher program on *expressio unius* grounds. In *Beaver v. Moore*, the court found the West Virginia Constitution’s

Education Clause requirement of a “thorough and efficient system of free schools” meant that “the state of West Virginia cannot provide for nonpublic education or take any action which frustrates this obligation [to provide a system of public schools].” Ex. 5 at 65. The court further found that private education is not a constitutional interest of the State. *Id.* at 66. Tennessee’s Education Clause is even more explicit than West Virginia’s in requiring the General Assembly to not only maintain and support a system of free schools but “a system of free *public* schools.” TENN. CONST. art. XI, §12 (emphasis added). Thus, funding private schools impermissibly exceeds the constitutional mandate.

Additional courts have acknowledged that voucher programs that divert public

Tennessee children. Interpreting the “plain meaning of Article XI, Section 12,” the

919 So. 2d at 408 (emphases added). Even if the Voucher Law had no effect on the provision of education in public schools

to provide for the educational needs of participating students without governmental control.” T.C.A. §49-6-2609(c). The Voucher Law states that it 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), and explicitly affirms that “[a] participating school or provider is autonomous and not an agent of this state.” T.C.A. §49-6-2609(a).

It is precisely because private schools participating in the voucher program “remain private,” as defendants have emphasized – and thus outside the reach of legal requirements regarding academic standards, accountability, and non-discrimination that govern the statewide system of public schools – that a voucher program funded with public education dollars violates the Education Clause of the Tennessee Constitution.

B.

As set forth above, Article XI, §12 of the Tennessee Constitution requires the State to provide a “system of free public schools.” TENN. CONST. art. XI, §12. The State’s relentless attempt to publicly fund private schools and other private education providers violates the constitutional requirement that the General Assembly maintain a single system of public education. *Id.*

Absent a temporary injunction, McEwen Plaintiffs will suffer irreparable harm, *per se*, due to the violation of a constitutional right. *See Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (“A restriction on the fundamental right to vote therefore constitutes irreparable injury.”). Thus, the need for a temporary injunction to maintain the *status quo* and prevent further harm to McEwen Plaintiffs is manifest and urgent.

Moreover, McEwen Plaintiffs, as taxpayers, will also suffer irreparable harm from the unlawful diversion of public funds from the purpose for which they were intended. *See Pope v. Dykes*, 93 S.W. 85, 88 (Tenn. 1905) (crediting plaintiff’s contention that the misappropriation of public funds “will result in irreparable injury to the county and taxpayers”). “In such cases, the taxpayers have such a special interest in the subject matter as will authorize them to maintain an injunction.” *State ex rel. Baird v. Wilson Cnty.*, 371 S.W.2d 434, 439 (Tenn. 1963). Here, the Voucher Law has already unlawfully diverted over \$1 million in public funds to ClassWallet for administration of the Voucher Law. *See* §III. If the State is permitted to continue to implement the Voucher Law for the 2022-2023 school year, funds will be unlawfully diverted from Shelby County Schools and Metro Nashville Public Schools to pay private school tuition. *See* §III.

In addition to the diversion of funds from McEwen Plaintiffs' children's school districts, these districts' planning and budgeting processes will also be thrown into disarray by the rushed rollout of the voucher program – and the attendant loss of students and funding – mere weeks before the school year is set to begin. At this point, myriad decisions, including staffing, have already been made. A temporary injunction will preserve the *status quo* and prevent the continued unlawful and unrecoverable expenditure of taxpayer dollars until such time as the Court is able to rule on the merits of McEwen Plaintiffs' claims.

C. The Balance of Harms Weighs Heavily in Favor of Granting McEwen Plaintiffs' Motion for a Temporary Injunction

In contrast to the irreparable harm McEwen Plaintiffs will suffer in the absence of an injunction, Defendants will suffer no harm from the injunction's issuance.

First, as of July 19, 2022, Intervenor-Defendant Greater Praise Christian Academy is still ineligible to participate in the voucher program as it is a Category IV school. *See* T.C.A. §49-6-2602(9); *see also* “Non-Public Schools List, updated July 19, 2022,” *available at* <https://www.tn.gov/education/school-options/non-public-schools.html> (last visited July 21, 2022) (listing Greater Praise as a Category IV school). Greater Praise cannot be harmed by an injunction against a program in which it is not eligible to participate.

Second, the manner in which the State plans to begin the voucher program violates the Voucher Law itself, and enjoining the State from violating the Voucher Law itself cannot possibly constitute a legitimate harm. As outlined above, TDOE's “FAQ” for participating families states:

For the 2022-23 school year, participating non-public schools will be required to fund the student expenses (tuition, fees, computers, etc.) and then submit an invoice to the department for reimbursement. The department will be

can clear this hurdle before the school year begins, yet State Defendants are prepared to expend likely millions of dollars in costs, labor, and litigation to ensure that students receive State funding to subsidize private tuition. The State's transparent attempt to manufacture reliance by families on vouchers for the 2022-2023 school year through a botched and hurried rollout of the voucher program, despite actual notice of impending motions for injunctive relief (of which the State gave parents and families no notice), cannot possibly be rewarded by any balancing of the equities in Defendants' favor.

In fact, an injunction is likely to benefit, not harm, Defendants. An injunction will prevent the significant disruption to schools, students, and families that would be caused if the Voucher Law is implemented now and then found to be unconstitutional after the beginning of the 2022-2023 school year. A case from within the Sixth Circuit, *Garrett v. Bd of Educ. of Sch. Dist. of Detroit*, 775 F. Supp. 1004 (E.D. Mich. 1991), is directly on point. There, plaintiffs sued the Board of Education of the Detroit school district alleging that the board violated the U.S. and Michigan Constitutions, as well as federal and State statutes, by establishing male-only academies purportedly designed "to address the high unemployment rates, school dropout levels and homicide among urban males." *Id.* at 1006. In granting a temporary injunction, the District Court noted that although admitting females to the male-only academies would delay their start, "greater disruption would result if plaintiffs won this suit and the Academies were then aborted." *Id.* at 1013. As in the instant case, "injunctive relief would fulfill the traditional purpose of preserving the 'existing state of things until the rights of the parties can be fairly and fully investigated and determined.'" *Id.* (quoting *DeLorean*, 755 F.2d at 1229). Indeed, as in this case, because the *Garrett* plaintiffs were

education, as well as to the operation of the districts serving their public school peers and to the daily functioning of the classrooms to which they will return.

Maintaining the *status quo* during the pendency of the litigation best serves the interests of all parties and the public at large. Continued implementation of the Voucher Law is contrary to the public interest.

V. CONCLUSION

For the foregoing reasons, McEwen Plaintiffs respectfully request that the Court grant their Motion for a Temporary Injunction and issue an order enjoining implementation and enforcement of the Voucher Law.

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