

IN THE TENNESSEE SUPREME COURT

CASE NO. M2020-00683-SC-R11-CV

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

v.

TENNESSEE DEPARTMENT OF EDUCATION, et al.,
Defendants / Appellants,

and

NATU BAH, et al.,
Intervenor-Defendants / Appellants.

**INTERVENOR-DEFENDANTS / APPELLANTS
JOINT MOTION TO MODIFY CHANCERY COURT
INJUNCTION PURSUANT TO RULE 62.08**

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INTRODUCTION

This Court granted Intervenor-Defendants/Appellants Natu Bah, Builguissa Diallo, Bria Davis, Star Brumfield, Greater Praise Christian Academy, Seasonal Enlightenment Academy Independent School, Ciera Calhoun, Alexandria Medlin, and David Wilson, Sr. (“Intervenors”) applications for review with this Court on February 4, 2021.¹ If Intervenors’ appeal is successful, their children will be eligible to participate in the subject of this litigation—the Tennessee Education Savings Account Pilot Program, Tenn. Code Ann. §§ 49-6-2601 *et seq.* (“ESA Statute” or “ESA Pilot Program”)—this coming fall. This Motion seeks only to preserve that possibility by modifying the injunction that the chancery court issued in this case last year. *See* Tenn. R. Civ. P. 62.08 (establishing this Court’s power to preserve “the effectiveness of any judgment that may subsequently be entered” during the pendency of an appeal); *see also* Tenn. R. App. P. 7 advisory comm’n cmt. (explaining that this power is “expressly preserve[d]” by the rules).

Under the injunction issued last year by the chancery court, the State is prohibited from taking the necessary administrative steps to ensure that Intervenors can utilize the ESA Pilot Program for the academic year commencing in Fall 2021. Barring modification of this injunction, Intervenors and their children will be forced to lose another year of quality education *even if* this Court subsequently determines they win on appeal because ESAs will not be available in time.

¹ The two sets of intervenor-defendants filed separate TRAP 11 applications, but jointly file this Motion.

Therefore, in order to preserve the effectiveness of any judgment in favor of Intervenorors that this Court may enter, Intervenorors respectfully move this Court pursuant to Tennessee Rule of Civil Procedure 62.08 to modify the chancery court’s injunction to permit the State to collect and process ESA Pilot Program applications, adjudicate appeals from the denial of applications, and prepare employees to administer the ESA Pilot Program for the 2021 – 2022 school year. Because the State should begin making these administrative preparations by early March in order for them to be effective for this coming school year, Intervenorors respectfully request a decision from this Court by March 5, 2021.

STATEMENT OF FACTS²

The General Assembly enacted the ESA Pilot Program in 2019 to benefit low- and middle-income³ children assigned to Tennessee’s worst-performing school districts. Tenn. Code Ann. § 49-6-2602(3)(C); *see also id.* § 49-6-2611(a)(1). The ESA Pilot Program accomplished this goal by empowering eligible families to leave their assigned school and use their per-pupil state education funds⁴ to pay for a wide array of educational expenses, including tuition at a school that meets their child’s needs. Although the ESA Statute contemplated that the program would take

² Although the facts of this case are fully briefed in Intervenorors’ Rule 11 applications, Intervenorors include an abridged summary here for the purposes of resolving this motion.

³ The ESA Statute requires an eligible student to be “a member of a household with an annual income . . . that does not exceed twice the federal income eligibility guidelines for free lunch.” Tenn. Code Ann. § 49-6-2602(3)(D).

⁴ The funds deposited in an ESA account equal the amount the child is entitled to under Tennessee’s Basic Education Program.

effect starting with the 2021 – 2022 school year, the Tennessee Department of Education elected to accelerate rollout and began accepting applications for the 2020 – 2021 school year in February 2020.

Unhappy with the prospect of families choosing to take their state education funds elsewhere if their children are assigned to underperforming schools operated by school districts located in Nashville Metro and Shelby County, Plaintiffs Metro and Shelby County filed suit on February 6, 2020. Plaintiffs alleged that the ESA Pilot Program violated the Tennessee Constitution’s Home Rule Amendment, Equal Protection Clauses, and Education Clause. (R. Vol. I at 35–42, Metro Compl.) Intervenors successfully joined the lawsuit to defend the ESA Pilot Program on March 6, 2020, and the parties subsequently filed cross-motions for judgment. After a hearing, the chancery court ruled in favor of the Plaintiffs on their Home Rule Amendment claim, enjoined further rollout of the ESA Pilot Program on that basis, and *sua sponte* granted the parties permission to seek interlocutory review.⁵ (R. Vol. VIII at 1097, Metro Mem. and Order)

The chancery court’s injunction has remained in place as this case made its way through the Tennessee Court of Appeals and now comes to the Tennessee Supreme Court.⁶ It has already prevented Intervenors

⁵ The chancery court rendered no decision on the merits of Plaintiffs’ remaining constitutional claims, electing to hold them in abeyance pending the resolution of this appeal. (R. Vol. VIII at 1127, Metro Mem. and Order)

⁶ Defendants jointly moved for a stay of the chancery court’s injunction pending appeal. (R. Vol. VIII at 1129) The chancery court denied the

from using the ESA Pilot Program for the 2020 – 2021 school year. Absent modification, it will prevent Intervenors from using the ESA Pilot Program for the 2021 – 2022 school year as well, even if Intervenors’ appeal to this Court is successful. According to the Tennessee Department of Education, the State must begin making administrative preparations by early March or else the ESA Pilot Program will not be ready by Fall 2021, regardless of how the Court decides this case. (Exh. 1, Second Carney Aff. ¶ 3) The Department’s preparations include handling over 1,200 applications that were being processed when the chancery court’s injunction went into effect in May 2020. (R. Vol. IX at 1210, First Carney Aff. ¶ 6). Each application takes 14–30 days to process, with the average application involving 12 interactions with the potential applicant before a decision can be made as to the applicant’s eligibility. (*Id.* ¶ 5). If an applicant is denied, he or she is given two opportunities to appeal that determination before it becomes final. (*Id.* ¶ 9(6), (9)). Throughout this process, both the Department and a third-party vendor field calls and emails from potential applicants to assist them with their applications. (*Id.* ¶ 9(14)–(15)). The injunction entered by the chancery court bars the Department from making these necessary preparations. Unless the injunction is modified by early March to permit these preparations to take place, Intervenors will not be able to participate in the ESA Pilot Program even if they succeed on the merits of this appeal.

motion, and the Court of Appeals subsequently denied Defendants’ request for review. Intervenors also filed reach-down motions with this Court, *see* Tenn. S. Ct. R. 48, but their motions were denied.

REASONS FOR MODIFYING INJUNCTION

Like the United States Supreme Court, this Court has long possessed “the inherent power . . . to stay or supersede proceedings on appeal.” *In re McKenzie*, 180 U.S. 536, 551 (1901). In recognition of this inherent power, both the Tennessee Rules of Civil Procedure and the Tennessee Rules of Appellate Procedure specifically contemplate that this Court may “stay proceedings or . . . suspend relief or grant whatever additional or modified relief is deemed appropriate during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of any judgment that may subsequently be entered.” Tenn. R. Civ. P. 62.08; *see also* Tenn. R. App. P. 7 advisory comm’n cmt. (explaining that this power is “expressly preserve[d]” by the rules).

This case presents the quintessential reason for the exercise of this inherent authority. Intervenors are actively appealing the lower court’s unprecedented determination that the ESA Pilot Program runs afoul of the Home Rule Amendment of the Tennessee Constitution. If Intervenors are successful, they will be entitled to apply to participate in the program for the 2021 – 2022 school year. But if the chancery court’s injunction remains in place, Intervenors and their children will be forced to lose out on another year of quality education *even if* this Court determines that they win on the merits of their appeal. A winning judgment is not particularly effective if it does not provide the winning party the relief they seek. In this case, Intervenors seek to use the ESA Pilot Program to

provide their children with a better education than what they are receiving in chronically underperforming public schools.⁷

Modification is also warranted because the balance of the equities has shifted during the pendency of this appeal. When the injunction was first issued and challenged, the parties’ concerns—and the chancery court’s concomitant weighing of the equities—were focused on the availability of the ESA Pilot Program for the 2020 – 2021 school year. Indeed, when Defendants requested a stay of the chancery court’s injunction pending appeal, Plaintiffs repeatedly argued that Defendants suffered no irreparable injury absent a stay because the ESA Statute did not require implementation until the following school year—2021 – 2022:

- “First, the ESA Act provides that ‘[t]he program shall begin enrolling participating students no later than the 2021-2022 school year.’ Tenn. Code Ann. § 49-6-2604(b). . . . [T]he state has created the so-called ‘irreparable harm’ by rushing the Act’s implementation contrary to legislative intent.” (R. Vol. VIII at 1176–77, Pls.’ Resp. to Defs.’ Motion to Stay)
- “Any potential harm to the State is a harm of its own creation. . . . [T]he state affirmatively elected to proceed with implementation a full school year before the deadline set by

⁷ At A. Maceo Walker Middle School in Shelby County, for example, the children of Intervenor Natu Bah are not progressing academically in an environment that has utterly “deteriorated.” (R. Vol. VIII at 1140, Bah Aff. ¶ 6). A mere 17.4% of students at this public school are at or above grade level. *See* A. Maceo Walker Middle School Report Card, Tenn. Dep’t of Educ., <https://reportcard.tnedu.gov/schools/792-2740/achievement> (last visited Feb. 7, 2021).

the General Assembly for enrolling participating students.”
(*Id.* at 1182)

- “Defendants can argue their case on appeal and, if successful, quote, begin enrolling participating students no later than the 2021-2022 school year, end quote, just as the statute states.” (R. Vol. XIII at 43–44, Mot. to Stay Hearing, May 7, 2020)

Today, nearly one year later, irreparable harm is upon us. Intervenors and their families—who have already lost one year of quality education during the pendency of this appeal—now stand to lose another. Plaintiffs Metro and Shelby County, by contrast, are not prejudiced by the limited relief Intervenors seek. Indeed, all Intervenors want is what Plaintiffs were so willing to allow just a year ago: the opportunity to “argue their case on appeal and, if successful, quote, begin . . . participating . . . no later than the 2021-2022 school year, end quote, just as the statute states.” (*Id.*)

CONCLUSION

In order to preserve the possibility that a judgment in Intervenors’ favor will allow them to utilize the ESA Pilot Program in the 2021 – 2022 school year, Intervenors respectfully ask this Court to modify the chancery court’s injunction to permit the State to collect and process ESA Pilot Program applications, adjudicate appeals from the denial of applications, and prepare employees to administer the ESA Pilot Program for the 2021 – 2022 school year.

Dated: February 8, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 2021, a true and exact copy of the foregoing was served via the court's electronic filing system and via electronic mail to:

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