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**MONTANA ELEVENTH JUDICIAL DISTRICT COURT,
FLATHEAD COUNTY**

**KENDRA ESPINOZA, JERI ELLEN
ANDERSON, and JAIME SCHAEFER,**

Plaintiffs,

vs.

**MONTANA DEPARTMENT OF
REVENUE, and MIKE KADAS, in his
official capacity as DIRECTOR of the
MONTANA DEPARTMENT OF
REVENUE,**

Defendants.

) Cause No.: DV-15-1152A
)
) **MONTANA DEPARTMENT OF**
) **REVENUE'S BRIEF IN SUPPORT OF ITS**
) **MOTION TO DISMISS PLAINTIFFS'**
) **COMPLAINT FOR DECLARATORY**
) **AND INJUNCTIVE RELIEF**
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The Montana Department of Revenue (Department) has filed with this Court a motion for an Order dismissing the Plaintiffs' Complaint for Declaratory and Injunctive Relief on the grounds that the Plaintiffs lack standing pursuant to Rule 12(b), M.R.Civ.P. For the reasons set forth herein, Defendants respectfully request that the Court grant its motion.

BACKGROUND

During the Montana 64th Legislative Session in 2015, the Montana Legislature considered and passed Senate Bill No. 410. That bill is codified as § 15-30-3101, *et seq.*, MCA. The portions of the bill germane to this proceeding allows for state income tax credits for donations to student scholarship organizations, who in turn, may provide scholarships to students to attend private schools. Student scholarship organizations (SSOs) submit a notice of intent to operate in Montana with the Department of Revenue. § 15-30-3105, MCA. The SSO may accept donations from individuals or corporations for the purpose of providing scholarships to eligible students to enroll with a qualified education provider (QEP). § 15-30-3103, MCA. The SSO is required to submit to the Department an annual fiscal review that discloses for the three most recent calendar years the total number of contributions to the SSO, and the total number of contributors, as well as the total number and dollar value of scholarships obligated and awarded to students. § 15-30-3105, MCA. The Department is required to ensure that the SSO submits the annual fiscal review. *Id.* If the SSO fails to meet the requirements of §§ 15-30-3102, -3105, or -3107, MCA, it risks termination by the Department. § 15-30-3113, MCA.

Among other requirements, a QEP is an accredited education provider (or that has applied for accreditation) or a non-accredited tutor that administers a nationally recognized standardized assessment test. § 15-30-3102, MCA. A QEP may not be a public school or a home school. § 15-30-3102, MCA. An eligible student applies for a scholarship from an SSO, and if awarded, may enroll with a QEP of the parents' choosing. § 15-30-3104, MCA.

Any person who donates to an SSO may receive a tax credit of an amount equal to the donation, not to exceed \$150, for the year in which the donation is made. § 15-30-3111, MCA.

In any single year, a student receiving scholarships may receive no more than 50% of the per-pupil average of total public school expenditures, as calculated by the Office of Public Instruction. § 15-30-3103, MCA. At the time of the passage of SB 410, the per-pupil average was \$5,636 for a high school student, and \$4,775 for an elementary student. 2017 Biennium, SB 410 Fiscal Note (April 21, 2015). That fiscal note estimated the amount of scholarship an average student would receive in the first few years of the program. It anticipated that the average student scholarship would be \$495 for calendar year 2016, and \$543 for calendar year 2017. *Id.*

During the legislative process, the question arose concerning the constitutionality of the bill and whether granting a tax credit for the ultimate purpose of providing scholarships to allow students to attend private schools was a violation of the prohibition of aiding sectarian schools with public funds. As a result, the bill was amended to include two sections that instructed the implementing agency as to how the bill was to be implemented. One of those two provisions, Section 7 (codified at § 15-30-3101, MCA), provides:

15-30-3101. (Temporary – effective January 1, 2016) Purpose.

Pursuant to 5-4-104, the legislature finds that the purpose of student scholarship organizations is to provide parental and student choice in education with private contributions through tax replacement programs. The tax credit for taxpayer donations under this part must be administered in compliance with Article V, section 11(5), and Article X, section 6, of the Montana constitution.

Art. X, § 6, Mont. Const., prohibits the use of public funds to aid sectarian schools:

(1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

(2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education.

Following these legislative instructions, the Department proposed three administrative rules to implement the bill. At issue in this lawsuit is Rule 1, which was drafted to be in compliance with Art. V, § 11 and Art. X, § 6 of the Montana Constitution, implementing Mont. Code Ann. § 15-30-3101. Rule 1, adopted as ARM 42.4.802, effectively limits scholarships to a QEP that is a sectarian school, or is controlled by a faith-based organization. That rule in its entirety is:

(1) A "qualified education provider" has the meaning given in 15-30-3102, MCA, and pursuant to 15-30-3101, MCA, may not be:

(a) a church, school, academy, seminary, college, university, literary or scientific institution, or any other sectarian institution owned or controlled in whole or in part by any church, religious sect, or denomination; or

(b) an individual who is employed by a church, school, academy, seminary, college, university, literary or scientific institution, or any other sectarian institution owned or controlled in whole or in part by any church, religious sect, or denomination when providing those services.

(2) For the purposes of (1), "controlled in whole or in part by a church, religious sect, or denomination" includes accreditation by a faith-based organization.

ARM 42.4.802.

The Department adopted the rule on December 24, 2015, and it became effective with § 15-30-3101, *et seq.*, on January 1, 2016. The Plaintiffs filed this lawsuit prior to the effective date of the law and prior to implementation of the rule.

In accordance with § 15-30-3106, MCA, the Department created a website for the registration of SSOs. From the date the website became active on January 1, 2016, to the date of this filing, only one SSO has attempted to register. That SSO application was returned because it failed to provide a list of QEPs required pursuant to § 15-30-3104, MCA. No other SSOs have registered. *See*, Affidavit of Larry Sullivan, attached hereto as Department's Ex. A. Thus, at this time, there are no registered SSOs to provide scholarships. Because there are no SSOs to provide scholarships, no taxpayer has contributed funds that would qualify for a credit.

Contributions made during 2016 trigger the filing of tax credit for the 2017 income tax filing. The program is in its infancy.

The Plaintiffs, Kendra Espinoza, Jeri Ellen Anderson, and Jaime Schaefer (Plaintiffs) filed a Complaint for Declaratory and Injunctive Relief (Complaint) in the above-captioned matter on December 16, 2015, eight days prior to the rule becoming effective, claiming that: 1) the Department overreached its authority when it adopted ARM 42.4.802 related to Montana's Scholarship Tax-Credit Program; 2) ARM 42.4.802 violates Montana's Free Exercise Clause in Art. II, section 5 of the Montana Constitution; 3) ARM 42.4.802 violates the Federal Free Exercise Clause in the First Amendment to the U.S. Constitution; 4) ARM 42.4.802 violates Montana's Establishment Clause in Art. II, section 5 of the Montana Constitution; 5) ARM 42.4.802 violates the Federal Establishment Clause in the First Amendment to the U.S. Constitution; 6) ARM 42.4.802 violates Montana's Equal Protection Clause under Art. II, section 5 of the Montana Constitution; and 7) ARM 42.4.802 violates the Federal Equal Protection Clause in the Fourteenth Amendment to the U.S. Constitution.

Plaintiffs pray for a declaratory judgment that ARM 42.4.802 violates the Free Exercise, Establishment, and Equal Protection Clauses of the both the Montana and U.S. Constitutions; a temporary restraining order, preliminary injunction, and/or permanent injunction prohibiting the Department from enforcing ARM 42.4.802; nominal damages; and costs and attorneys' fees. Each of these claims fail because no justiciable controversy exists. None of the parties to the matter has standing to bring this suit.

LEGAL STANDARDS

Rule 12(b)(1), M.R.Civ.P., requires certain motions to be filed prior to a responsive pleading. A motion asserting the defense of lack of standing is such a motion. The filing of the motion alters the period for responsive pleadings. Rule 12(a)(4), M.R.Civ.P.

Standing of parties to bring their claims is a threshold question the court must face before reaching the substantive issue of a case. “Standing resolves the issue of whether the litigant is a proper party to seek adjudication of a particular issue, not whether the issue is justiciable.”

Chipman, et al., v. Northwest Healthcare Corporation, et al., 2012 MT 242, ¶ 25, 366 Mont. 450, 288 P.3d 193 (citing *Montana Trout Unlimited v. Beaverhead Water Co.*, 2011 MT 151, ¶ 27, 361 Mont. 77, 255 P.3d 179). Traditionally, courts require that a plaintiff have a “‘personal stake’ in the outcome of the case, ‘to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.’” *Stelling v. Rivercrest Ranches, Inc.*, 224 Mont. 313, 316, 730 P.2d 388, 391 (1986), citing *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962); *Stoianoff v. State of Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983).

Under both the “case or controversy” provision of the U.S. Constitution, art. 3, and under state “cases at law and equity” in the Montana Constitution, art. VII, § 4, there is a jurisdictional threshold for constitutional challenges: “At a minimum, the constitutional aspect of standing requires a plaintiff to show that he has personally been injured or threatened with immediate injury by the alleged constitutional or statutory violation.” *Olson v. Department of Revenue*, 223 Mont. 464, 470, 726 P.2d 1162, 1166 (1986). Before a court addresses whether a statute is constitutional, “the party who assails it must show not only that the statute is invalid, but that he has sustained, or is in immediate danger of sustaining, some direct injury as a result of its

enforcement, and not merely that he suffers in some indefinite way in common with people generally.” *Id.* (citing *Chovanak v. Matthews*, 120 Mont. 520, 526, 188 P.2d 582 (1948)).

The Montana Supreme Court has consistently determined that the parties must present a justiciable controversy before a court can consider the merits of an issue. *Dennis v. Brown*, 2005 MT 85, ¶ 8, 326 Mont. 422, 110 P.3d 17. A justiciable controversy is a threshold requirement for a court to grant relief. *Powder River County v. State*, 2002 MT 259, ¶ 101, 312 Mont. 198, 60 P.3d 357. “In determining whether a justiciable controversy exists, this Court engages in a three-part analysis:

First, a justiciable controversy requires that parties have existing and genuine, as distinguished from theoretical, rights or interests. Second, the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument invoking a purely political, administrative, philosophical or academic conclusion. Third, [it] must be a controversy the judicial determination of which will have the effect of a final judgment in law or decree in equity upon the rights, status or legal relationships of one or more of the real parties in interest, or lacking these qualities be of such overriding public moment as to constitute the legal equivalent of all of them.

Powder River, ¶ 102; *Northfield Ins. Co. v. Mont. Ass'n of Counties*, 2000 MT 256, ¶ 12, 301 Mont. 472, 10 P.3d 813, *quoted in Chipman*, ¶ 19.

ARGUMENT

The Plaintiffs in this suit do not have existing and genuine rights that allow this Court a justiciable controversy upon which to decide a constitutional question. Plaintiff Espinoza alleged that as a single mother, it is difficult for her to send her daughters to the private religious school that she has chosen--Stillwater Christian School. She alleges that she works hard and receives generous financial aid from the school. *Complaint*, ¶¶ 66, 68. She contends that it is a

financial struggle to pay tuition each month and that it would be a “tremendous financial and psychological relief . . . if her children could receive scholarships to Stillwater under the program at issue here.” *Id.*, ¶¶ 72, 74. Finally, Ms. Espinoza alleges that she would apply for the program scholarships for both her daughters as soon as an SSO begins accepting applications. *Id.*, ¶ 79.

The above allegations, however, fall far short of creating a justiciable controversy for this Court to consider. Importantly, Ms. Espinoza does not allege that she will be unable to continue to send her daughters to Stillwater Christian School without some aid from the scholarship program. For personal reasons, she has chosen to withdraw her children from the public school system and shown her willingness to work within her limited means to pay for the additional cost of a private school for her daughters and for their continued attendance there. Neither she nor her daughters have been injured by the Department’s rule. The rights or interests she claims are merely theoretical, only speculative. Ms. Espinoza does not have standing to bring this suit.

She does not allege that she has applied for a scholarship available under § 15-30-3104, MCA, or that she has inquired of the Department or any SSOs of the opportunity to apply. That she and the other Plaintiffs filed this action prior to the law becoming effective betrays their argument that they have existing and genuine rights at stake. It is undisputed that as of the date of this filing, there are no scholarships of the type created by Senate Bill 410 available for Ms. Espinoza or any other person in Montana. Moreover, there is not one existing organization (an SSO) even capable of granting the scholarships contemplated by Senate Bill 410 are non-existent.

Plaintiff Jeri Ellen Anderson’s salient allegations are nearly identical to those of Ms. Espinoza. Ms. Anderson alleges that she currently sends her daughter, Emma, to Stillwater

Christian School. Complaint, ¶ 80. Even though she had just been laid off by an insurance company, Ms. Anderson nonetheless decided to enroll her daughter in that private school. *Id.*, ¶ 85. Ms. Anderson receives financial aid directly from Stillwater, works hard, and budgets very carefully. *Id.*, ¶ 92, 93. She contends that if her daughter could receive a scholarship, “[i]t would be a significant financial and psychological relief.” *Id.*, ¶ 95.

Ms. Anderson’s lack of position as a party plaintiff mirrors Ms. Espinoza’s lack of standing. Ms. Anderson’s claims are speculative. She fails the *Powder River, supra*, test. First, her asserted rights are merely theoretical because she intends to continue to send her daughter to Stillwater. Other than to hope for some “financial and psychological relief,” she loses nothing by a scholarship not being available. Moreover, she does not allege that she has inquired from the Department or any SSOs whether scholarships are available. Therefore, Ms. Anderson’s complaint cannot meet the first part of the analysis that gives this Court a justiciable controversy. She fails the second part because, as this law barely begins implementation, Ms. Anderson is invoking a purely political, administrative, philosophical, or academic conclusion. The Court has no judgment to make. Third, she has asserted no actual rights upon which this Court can judge.

Jaime Schaefer was unhappy with the academic expectations for her daughters and first homeschooled her children, then later chose to enroll her daughters in Stillwater Christian School. Complaint, ¶¶ 101, 102. As part of that choice, she is employed as an accountant and receives financial aid so that she could send both children to Stillwater. *Id.* ¶ 103. Ms. Schaefer alleges that it is a struggle to continue payments, that her children are eligible for a scholarship, and that it would be a relief to her financial and psychological burden. *Id.* ¶¶ 107, 108, 109, 112. As with the other two Plaintiffs, her claims are deficient. As with them, while she has an interest in her children receiving scholarships when they become available, nothing has currently changed for

her or her family. She does not have the “personal stake” to “assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” *Baker, supra*.

All of the above-discussed Plaintiffs’ assertions fail to grant them standing in this matter for the same reasons--while they would be happier if they could receive additional scholarship funds for their children to attend Stillwater Christian School, ARM 42.4.804 has not operated to prevent them from attending that school. None of them has taken the necessary steps to secure a scholarship. None of them has lost their ability to enroll their children in this private school as the result of the implementation of the rule. Finally, none has provided this Court with anything other than a theoretical contention that their lives may be better if they could get additional scholarship monies for their children. This theoretical contention is insufficient to meet the *Powder River* test set forth above.

CONCLUSION

Only one SSO has applied to raise donations or grant scholarships, and that application was denied for failing to comply with the provisions of § 15-30-3104, MCA. As a result, scholarships are, therefore, not yet available. The Plaintiffs do not allege that there are scholarships available, that they have applied for such, or that they have been denied the opportunity. They also do not contend that their children will withdraw from Stillwater for lack of scholarships under the program. The Plaintiffs have not alleged that the lack of scholarships from SB 410 has prevented them from sending their children to the private school of their choice. A desire for additional funding via scholarships to ease their ability to send their children to private school does not rise to the level of a justiciable controversy for this Court to consider. None of the Plaintiffs has

standing to bring this suit. For these reasons and the reasons set forth above, the Complaint should be dismissed.

Dated this 1st day of February, 2016.

MONTANA DEPARTMENT OF REVENUE

A handwritten signature in blue ink, appearing to be 'D.W.', is written over a horizontal line.

DANIEL WHYTE
BRENDAN BEATTY
Special Assistant Attorneys General

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of February, 2016, I served true and accurate copies of the foregoing *Montana Department of Revenue's Brief in Support of Its Motion to Dismiss Plaintiffs' Complaint for Declaratory and Injunctive Relief* by the method(s) indicated below, addressed as follows:

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**MONTANA ELEVENTH JUDICIAL DISTRICT COURT,
FLATHEAD COUNTY**

KENDRA ESPINOZA, JERI ELLEN ANDERSON, and JAIME SCHAEFER,)	Cause No.: DV-15-1152A
)	
)	
Plaintiffs,)	
)	AFFIDAVIT OF LARRY SULLIVAN
vs.)	
)	
MONTANA DEPARTMENT OF REVENUE, and MIKE KADAS, in his official capacity as DIRECTOR of the MONTANA DEPARTMENT OF REVENUE,)	
)	
)	
Defendants.)	

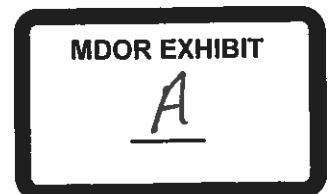
VERIFICATION

STATE OF MONTANA)
 : ss.
COUNTY OF Lewis & Clark)

Larry Sullivan, being first duly sworn upon oath, states:

I am the Unit Manager for the Withholding Tax Unit in the Business and Income Tax
Division for the Montana Department of Revenue (Department).

One of my duties as Unit Manager is to administer the Department's oversight of the
student scholarship organizations pursuant to § 15-30-3101, et seq., MCA.



The Department has received one registration request from a Student Scholarship Organization (SSO). The request was denied for the reason that the form was submitted incomplete. In accordance with § 15-30-3104, MCA, and ARM 42.4.803, the registration form includes a section requesting that the SSO list the qualified education providers that accept scholarships from the SSO. The registration form did not include any qualified education providers and therefore was deemed incomplete.

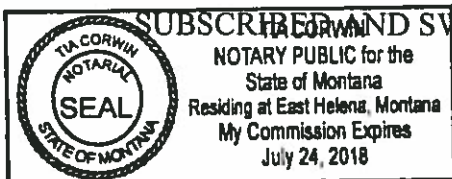
Section 15-30-3111, MCA, allows for a tax credit of up to \$150 for individuals that contribute to a registered Student Scholarship Organization (SSO). The contributions can be made beginning on January 1, 2016, with the first tax returns claiming the credit being filed in the beginning January 1, 2017. Therefore no credits have been allowed under the program as of this point.

As of the date of this affidavit, February 1, 2016, the Department has not received a valid registration for an SSO to begin to receive contributions that would qualify for the credit. As the Unit Manager, all inquiries for information related to the scholarship program are to be sent to me. As that conduit for the Department I have received no inquiries from any member of the public related to making donations to the scholarship programs, or as to the availability of scholarships under the program.

Dated this 1 day of February, 2015.

MONTANA DEPARTMENT OF REVENUE

Larry Sullivan
LARRY SULLIVAN



SUBSCRIBED AND SWORN to before me this 1st day of February, 2016.

Lia