David M. Ortley
District Judge, Department No. 4
Flathead County Justice Center
920 South Main, Suite 310
Kalispell, MT 59901
(406) 758-5906

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-15-1152 (D) ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF FOR LACK OF STANDING

This matter is before the Court on Defendants' Motion to Dismiss Plaintiffs' Complaint for Declaratory and Injunctive Relief for Lack of Standing, filed February 02, 2016, and Plaintiffs' Motion for Preliminary Injunction, filed January 29, 2016. Having considered the motions and having heard argument of counsel, the Court enters the following order:

1. Defendants' Motion to Dismiss for Lack of Standing is denied.
2. Defendants shall serve an answer to the Complaint for Declaratory and Injunctive Relief within 42 days after the date of this Order.
3. Plaintiffs' Motion for Preliminary Injunction is granted.
4. Until further order of this Court, the Montana Department of Revenue is enjoined from enforcing Rule 1 (Admin. R. Mont. 42.4.802) in its entirety.

BACKGROUND

This case involves the questioned constitutionality of an administrative rule adopted by the Montana Department of Revenue (DOR) in response to a legislative enactment which created a tax credit for contributions to qualified scholarship organizations. The DOR rule prohibits awarding scholarships to students who attend religious schools. The Plaintiffs challenge the constitutionality of DOR "Rule 1" (Admin. R. Mont. 42.4.802). DOR challenges the justiciability of the issues, as well as the Plaintiffs' standing to assert their claims.

In 2015, the Montana 64th Legislature considered and passed Senate Bill No. 410, which was signed into law on April 28, 2015 and is codified at Mont. Code Ann. § 15-30-3101, *et seq.* In relevant part, SB 410 provides a nonrefundable (state) income tax credit to a taxpayer or corporation for donations made to a student scholarship organization. En. § 14, Ch. 457, L 2015; Mont. Code Ann. § 15-30-3111 (2015). *Id.* In turn, student scholarship organizations are to provide scholarships "to eligible students to attend instruction offered by a qualified education provider." En. § 9, Ch. 457, L. 2015; Mont. Code Ann. § 15-30-3103 (2015).

The tax credit allowed to a taxpayer or corporation for donations made to a student scholarship organization is equal to the amount of the donation, not to exceed $150.00. En. § 14, Ch. 457, L. 2015; Mont. Code Ann. § 31-30-3111(1) (2015). The tax credit allowed may not exceed the taxpayer's income tax liability. *Id.*; Mont. Code Ann. § 31-30-3111(3) (2015). The tax credit must be applied in the year the donation is made and no carryforward or carryback is permitted. *Id.*; Mont. Code Ann. § 31-30-3111(4) (2015).

The stated purpose of SB 410 is as follows:

> 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.

En. § 7, Ch. 457, L. 2015; Mont. Code Ann. § 15-30-3101 (2015). SB 410 became effective on January 01, 2016.

A "student scholarship organization" means a charitable organization in Montana that is exempt from federal income tax under 26 U.S.C. § 501(c)(3), allocates not less than 90% of its annual revenue for scholarships to allow student to enroll with any qualified education provider, and provides educational scholarships to eligible students without limiting student access to only one education provider. Enc. § 8, Ch. 457, L. 2015; Mont. Code Ann. § 15-30-3102(9) (2015). An "eligible student" is a student who is a Montana resident and who is 5 years of age or older on or before September 10 of the year of attendance and has not yet reached 19 years of age. *Id.*; Mont. Code Ann. § 15-30-3102(2) (2015). A "qualified education provider" means an education provider that:

> (a) is not a public school;
> (b) (i) is accredited, has applied for accreditation, or is provisionally accredited by a state, regional, or national accreditation organization; or
> (ii) is a nonaccredited provider or tutor and has informed the child's parents or legal guardian in writing at the time of enrollment that the provider is not accredited and is not seeking accreditation;
> (c) is not a home school as referred to in Mont Code Ann. § 20-5-102(2)(e);
> (d) administers a nationally recognized standardized assessment test or criterion referenced test and:
> (i) makes the results available to the child's parents or legal guardian; and
> (ii) administers the test for all 8th grade and 11th grade students and provides the overall scores on a publicly accessible private website or provides the composite results of the test to the office of public instruction for posting on its website;
> (e) satisfies the health and safety requirements prescribed by law for private schools in this state; and
> (f) qualifies for an exemption from compulsory enrollment under Mont. Code Ann. §§ 20-5-102(2)(e) and 20-5-109.

Id.; Mont. Code Ann. § 15-30-3102(7) (2015).

Under SB 410, DOR may adopt rules, prepare forms, and maintain records that are necessary to implement and administer the provisions of the Bill. En. § 17, Ch. 457, L. 2015; Mont. Code Ann. § 15-30-3114. On October 15, 2015, DOR gave notice of public hearing on the proposed adoption of new Rules I thorough III pertaining to tax credits for contributions to qualified education providers and student scholarship organizations. Dkt. Doc. No. 16, Pls.' Br. in Support of Mot. for Prelim. Inj. Relief at Pls.' Ex. C ((Jan. 28, 2016). Proposed Rule 1 limited the definition of a "qualified education provider" to

organizations that are not owned or controlled by any church, religious sect, or denomination, in whole or in part:

> QUALIFIED EDUCATION PROVIDER (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[1] 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.

Id.

In November 2015, pursuant to Mont. Code Ann. § 2-4-403, in November 2015, the Revenue and Transportation Interim Committee (Committee) conducted a poll of the members of the Legislature in regard to proposed Rule 1. Dkt. Doc. No. 1, Pl.'s Compl. at Ex. 4. On December 01, 2015, the Committee released the results of the poll, which showed that a majority of the members of both houses found that proposed Rule 1 was contrary to legislative intent. *Id.*

DOR adopted Rule 1, as proposed, on December 24, 2015. *Id.* at Ex. D; Admin. R. Mont. 42.4.802 (2016). The effective date for application of Rule 1 (Admin. R. Mont. 42.4.802) was January 01, 2016 *Id.* at Ex. C.

PROCEDURAL HISTORY

On December 16, 2015, Plaintiffs Kendra Espinoza, Jeri Ellen Anderson, and Jaime Schaefer (collectively, "Plaintiffs") commenced this action by filing a Complaint for Declaratory and Injunctive Relief, naming DOR and Mike Kadas, in his official capacity as Director of DOR, as Defendants. Dkt. Doc. No. 1, Pls.' Compl. (Dec. 16, 2015). The

---

[1] In *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), the Tenth Circuit Court of Appeals recognized that the term "sectarian" imparts a negative connotation, referencing *Funk & Wagnalls New International Dictionary of the English Language* 1137 (comp. ed. 1987) which defines "sectarian" as "[p]ertaining to a sect; bigoted." *Colo. Christian Univ.*, 534 F.3d at 1258 n. 5. The Court noted that the United States Supreme Court has not used the term in recent opinions except in quotations from earlier opinions or other sources. *Id.*

Plaintiffs allege that they are each the parent of a student (or students) who attends Stillwater Christian School.[2] *Id.*, at ¶¶ 15-17. The Plaintiffs each allege that they have difficulty paying the cost of tuition for their child/children to attend Stillwater Christian School. *Id.* at ¶¶ 66-68, 72, 85, 92-94, 103, 107. The Plaintiffs each allege that their child (or children) is eligible for a scholarship from a student scholarship organization. *Id.* at ¶¶ 75, 96, 109. The Plaintiffs allege that because of Rule 1, their child (or children) could not use such a scholarship at the school of their choice because Stillwater Christian School is a religious school. *Id.* at ¶¶ 77, 97, 110. The Plaintiffs allege that, but for Rule 1, as soon as a student scholarship organization begins accepting scholarship applications, each would apply for a scholarship (or scholarships) for her child (or children) to assist with the cost of their child's (or children's) education. *Id.* at ¶¶ 79, 99, 112. The Plaintiffs allege that Rule 1 discriminates against them based on their decision to choose a religious school. *Id.* ¶¶ 77,97, 110.

The Plaintiffs allege that Rule 1 exceeds DOR's authority under the Montana Administrative Procedures Act (MAPA) and is invalid and its enactment "without legal authority," is *ultra vires*. See *Id.* at Count I. Plaintiffs alleged that, by enacting Rule 1, DOR violated their rights. *Id.* The Plaintiffs' allege that Rule 1 violates their rights under (1) the "free exercise clause" in Mont. Const. art. II § 5; (2), the "free exercise clause" in. U.S. Const. Amend. I, "effective through 42 U.S.C. § 1983;" (3) the "establishment clause" in Mont. Const. art. II § 5; (4) the "establishment clause" in U.S. Const. Amend. I, "effective through 42 U.S.C. § 1983;" (5) the "equal protection clause" in Mont. Const. art. II § 4; and (6) the "equal protection clause" in U.S. Const. Amend. XIV, "effective through 42 U.S.C. § 1983." See *Id.* at Counts II through VII. The Plaintiffs seek a declaratory judgment, injunctive relief, and an award of nominal damages and reasonable costs and attorneys' fees. *Id.* at pp. 27-28.

---

[2] Stillwater Christian School is located in Kalispell, Montana. According to its website, Stillwater Christian School is the only private PreK-12 school in the Flathead Valley. Stillwater Christian School, *About* (n.d.), accessed Mar. 09, 2016, at http://www.stillwaterchristianschool.org/domain/257.

On December 24, 2015, the Plaintiffs filed a Notice of Constitutional Challenge of Statute, pursuant to Mont. R. Civ. P. 5.1. Dkt. Doc. No. 4.

On January 29, 2016, the Plaintiffs filed their Motion for Preliminary Injunction, with accompanying brief, seeking a preliminary injunction enjoining DOR from enforcing Rule 1. Dkt. Doc. Nos. 15 and 16. On February 01, 2016, the Plaintiffs requested oral argument on the Motion for Preliminary Injunction. Dkt. Doc. No. 17. On February 19, 2016, the Plaintiffs filed a Notice of Supplemental Authority in support of their motion. Dkt. Doc. No. 24. The Defendants filed their response to the motion for preliminary injunction on February 23, 2016. Dkt. Doc. No. 25. On March 04, 2016, the Plaintiffs' filed their reply brief in support of their motion. Dkt. Doc. No. 26.

On February 02, 2016, the Defendants filed their Motion to Dismiss Plaintiffs' Complaint for Declaratory and Injunctive Relief for Lack of Standing, with accompanying brief. Dkt. Doc. Nos. 18 and 19. The Defendants' requested oral argument on their motion to dismiss. Dkt. Doc. No. 20. The Plaintiffs' filed their response to the motion to dismiss on February 19, 2016. Dkt. Doc. No. 23. On March 07, 2016, the Defendants filed their reply brief in support of their motion to dismiss. Dkt. Doc. No. 28.

ANALYSIS AND RATIONALE

Pursuant to Mont. R. Civ. P. 12(b), the Defendants move to dismiss the Complaint in this matter on the grounds that the Plaintiffs lack standing. Standing is a threshold jurisdictional requirement in every case. *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 29, 360 Mont. 207, 255 P.3d 80. Therefore, the Court will begin with Defendants' motion to dismiss.

DEFENDANTS' MOTION TO DISMISS: LACK OF STANDING

When a court considers a motion to dismiss made pursuant to Mont. R. Civ. P. 12(b)(6), it must view the allegations in the light most favorable to the plaintiff and accept as true all facts well pleaded. *Helena Parents Commn. v. Lewis & Clark Co. Commrs.*, 277 Mont. 367, 370, 922 P.2d 1140 (1996).

The questions of standing addresses whether a litigant is entitled to have the court decide the merits of a particular dispute or of particular issues. *Chipman v. Northwest Healthcare Corp.*, 2012 MT 242, ¶ 25, 366 Mont. 450, 288 P.3d 193. In the context of a

challenge to government action, the Montana Supreme Court has stated that the following criteria must be satisfied to establish standing: (1) The complaining party must clearly allege past, present or threatened injury to a property or civil right; and (2) the alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party. *Armstrong v. State*, 1999 MT 261, ¶ 6, 296 Mont. 361, 989 P.2d 364. A personal stake in the outcome of the controversy at the commencement of the litigation is required in every case. *Schoof v. Nesbit*, 2014 MT 6, ¶ 15, 373 Mont. 226, 316 P.3d 831. When the alleged injury is premised on the violation of constitutional and statutory rights, standing depends on "whether the constitutional or statutory provision...can be understood as granting persons in the plaintiff's position a right to judicial relief." *Schockley v. Cascade Co.*, 2014 MT 281, ¶ 11, 376 Mont. 493, 336 P.3d 375. In the context of claims brought to redress an alleged violation of Montana's equal protection provisions, the injury that a plaintiff needs to show is the denial of equal treatment resulting from the imposition of a barrier. *Gazelka v. St. Peter's Hosp.*, 2015 MT 127, ¶ 15, 379 Mont. 142, 347 P.3d 1287.

The purpose of the "tax credit for donations to student scholarship organizations" program (hereinafter "tax credit program") is to "provide parental and student choice in education," that is, to select an education provider that is "not a public school" and "is not a home-school," and "qualifies for an exemption from compulsory enrollment under Mont. Code Ann. §§ 25-5-102 and 25-5-109." See Mont. Code Ann. §§ 15-30-3101 through 15-30-3103 (2015). The tax credit program's end benefit to a parent and his or her child is a scholarship (derived from privately-donated funds) that is paid directly to the parent's and child's chosen "qualified education provider," to be applied to the child's tuition. Mont. Code Ann. § 15-30-3104 (2015).

The "exemption from compulsory enrollment" extends to children enrolled in a nonpublic school, including a parochial, church, religious or private school, that complies with the provisions of Mont. Code Ann. § 25-5-109. Mont. Code Ann. § 25-5-102(2)(e) (2015). To qualify its students for exemption from compulsory enrollment, a nonpublic school (including a parochial, religious or church school) must maintain and make available for inspection pupil attendance and immunization records, provide minimum

aggregate hours of pupil instruction, provide a course of study that meets certain instructional program standards, and be housed in a building that complies with applicable health and safety regulations. Mont. Code Ann. § 25-5-109 (2015). The term "qualified education provider" thus encompasses parochial, church or religious schools that qualify for the compulsory enrollment exemption (hereinafter referred to as "religious school(s)).

Under the statute's definition of the term "qualified education provider," the end benefit of the tax credit program (a scholarship) is generally available to students enrolled in private schools. Intended beneficiaries of the tax credit program are parents and students who choose *a* "qualifying education provider" – without regard to whether said "qualifying education provider" is secular or religiously-affiliated.

The plain language of Rule 1 excludes religious schools from the definition of "qualified education provider." When read in the context of SB 410, Rule 1 undeniably closes the door on any opportunity to reap the tax credit program's end benefit to any intended beneficiary who chooses a religious school. Rule 1 makes it more difficult for a member of one group of intended beneficiaries (those who choose a religious schools) than a member of another group of intended beneficiaries (those who choose a private secular school) to obtain the educational opportunity that is the end benefit of the tax credit program – that is, the scholarships contemplated in SB 410. Equality of educational opportunity is *guaranteed to each person* of the state of Montana. Mont. Const. art. X § 1 (emphasis added). The plain language of Mont. Const. art. X, § 1 can be understood to grant a right to relief to a person who alleges that his or her right to equality of educational opportunity has been violated by Rule 1.

Under both the U.S. and Montana Constitutions, the government may neither establish a religion nor make any law that prohibits the free exercise of religion. U.S. Const. amend. I; Mont. Const. art. II § 5. A law or regulation may violate the Establishment Clause of the First Amendment if its actual purpose is to endorse or disapprove of religion, if it has the primary or principal effect of inhibiting or advancing religion and if it fosters excessive entanglement with religion. *Big Sky Colony, Inc. v. Mont. Dept. of Labor & Indus.*, 2012 MT 320, ¶ 44, 368 Mont. 66, 291 P.3d 1231 (setting

out the factors of the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). Further, a law or regulation that unduly burdens the free exercise of religion impermissibly infringes upon the government neutrality required under both the U.S. and Montana Establishment Clauses. *Griffith v. Butte Sch. Dist. No. 1*, 2010 MT 246, ¶ 62, 358 Mont. 193, 244 P.3d 321. Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his or her behavior and to violate his beliefs, a burden upon religion exists. *Id.* (citing the test set out in *Thomas v. Review Bd. of Ind. Empl. Sec. Div.*, 450 U.S. 707 (1981) to determine whether there is a burden on the free exercise of religion). U.S. Const. amend. I and Mont. Const. art. II § 5 can be understood to grant a right to relief to a person who alleges that Rule 1 prohibits or impermissibly burdens (interferes with) his or her free exercise of religion.

The equal protection clauses of both the United States and Montana Constitutions prohibit laws that impermissibly classify individuals and treat them differently on the basis of that classification. *State v. Ellis*, 2007 MT 210, ¶ 10, 339 Mont. 14, 167 P.3d 896. U.S. Const. Amend. XIV § 1; Mont. Const. art. II § 4. The Montana Supreme Court has recognized that, for purposes of equal protection analysis, religion is an inherently suspect classification (class) upon which to draw a distinction. *Small v. McRae*, 200 Mont. 497, 524, 651 P.2d 982 (1982).

The Montana Supreme Court looks to the federal courts for guidance in applying Montana's standing requirements and equal protection guarantees. *Gazelka*, ¶ 15. The United States Supreme Court has articulated a broad concept of standing to bring equal protection challenges, including standing based on the inability to compete on equal footing:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The injury in fact in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Gazelk, ¶ 14 (quoting *Ne. Fla. Ch. Of Assoc. Gen. Contr. of Am. V. City of Jacksonville*, 208 U.S. 656,666 (1993). See also, e.g., *Regents of Univ. of Ca. v. Bakke*, 438 U.S. 265 (1978) (plaintiff challenging a medical school affirmative action program need not prove that he would have been admitted absent the challenged program because his injury was the inability to compete for all sets in the entering class). The same rule would apply in a case where an administrative rule precludes one group of a program's intended beneficiaries from ever obtaining the benefit. The "injury" Rule 1 causes to intended beneficiaries who choose a religious school is the inability to compete – to even be considered – for the end benefit (scholarships) of the tax credit program.

The Montana Administrative Procedures Act (MAPA), codified in Mont. Code Ann. Title 2, Chapter 4, can be understood to grant a right to relief to an intended beneficiary of the tax credit program who alleges that Rule 1 interferes with his right to equality in educational opportunity and/or to equal protection or the rule was adopted in violation of MAPA:

> (1) A rule may be declared invalid or inapplicable in an action for a declaratory judgment if it is found that the rule or its threatened application interferes with or impairs or threaten to interferes with or impair the legal rights or privileges of the plaintiff.
> (2) A rule may also be declared invalid in the action on the grounds that the rule was adopted with an arbitrary or capricious disregard for the purpose of the authorizing statue as evidenced by documented legislative intent...
> (4) The action may be brought in the district court for the county in which the plaintiff resides or has a principal place of business or in which the agency maintains its principal office. The agency must be made a party to the action.

Mont. Code Ann. § 2-4-506 (2015). If a legislative poll determines that a majority of the members of both houses find that a proposed or adopted rule is contrary to the intent of the legislature, the proposed or adopted rule must be conclusively presumed to be contrary to the legislative intent in any court proceeding involving the rule's validity. Mont. Code Ann. § 2-4-404 (2015).

Relying on *Bova v. City of Medford*, 564 F.3d 1093 (9th Cir. 2009), DOR argues that the Plaintiffs have not suffered a sufficient concrete, particularized injury because their claims rest upon contingent future events. In *Bova*, Defendant City of Medford adopted a

policy of discontinuing health care insurance coverage to its employees after they retired from city service. *Bova*, 564 F.3d at 1095. The Plaintiffs were current city employees, none of whom had yet been denied any benefits under the policy. *Id.* The Plaintiffs filed an action for injunctive and declaratory relief in federal district court. *Id.* at 1094. The Plaintiffs alleged they were city employees of retirement age, planned to retire within the next three (3) years, and expected to be denied benefits. *Id.* at 1095. The federal district court granted summary judgment to the Defendant City on the grounds that the Plaintiffs' claims were not ripe. *Id.* The Ninth Circuit Court of Appeals affirmed the lower court, finding that the Plaintiffs' alleged injury – denial of health insurance coverage – had not occurred and was contingent on each Plaintiffs' retirement from City service and the City's official denial of benefits to him or her. *Id.* at 1096-97. The *Bova* Court observed that it was possible that neither of the contingent events would occur because the Plaintiffs could change jobs, be terminated or die before retiring or, by the time they retired, the policy in question could be changed. *Id.* The *Bova* Court held that, unless and until the contingent events occurred, neither Plaintiff had suffered an injury concrete and particularized enough to survive the ripeness inquiry. *Id.* "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated or indeed may not occur at all." *Id.* at 1096 (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal citation omitted)).

While the Montana Supreme Court has recognized that cases are not ripe if the parties point only to hypothetical, speculative or illusory disputes as opposed to actual, concrete conflicts, it has explained that, because standing may rest on a *threatened injury*, ripeness asks whether an injury that has not yet happened *is sufficiently likely to happen* or, instead is *too* contingent or remote to support present adjudication. *Reichert v. State*, 2012 MT 111, ¶ 55, 365 Mont. 92, 278 (2012) (emphasis added).

DOR argues the rights and interests that the Plaintiffs claim are merely theoretical or speculative because none of the Plaintiffs allege that she has applied for a scholarship or inquired of a student scholarship organization of an opportunity to do so and, at this point, no existing student scholarship organization is even capable of granting the scholarships contemplated by SB 410.

Generally, a party need not engage in "exercises in futility" in order to establish ripeness. See, *S.D. Mining Assoc. v. Lawrence Co.*, 155 F.3d 1005, 1008-09 (8th Cir. 1998). Nothing would be served by requiring the Plaintiffs to have applied for or inquired into a scholarship because it is a foregone conclusion that, based on their choice of a religious school, their applications would be denied by *any* student scholarship organization participating in the tax credit program. As long as Rule 1 is in effect, the threatened injury – the inability of the Plaintiffs to compete for the end benefit of the tax credit program (scholarships) – is a certainty.

Here, each of the Plaintiffs allege that she is a parent who has chosen to send their child (or children) to a school that is a "qualified education provider" within the Legislature's intended meaning of the term, as set forth in SB 410. Each of the Plaintiffs allege that her child (or children) is eligible to receive a scholarship of the type created by the tax credit program and that as soon as a student scholarship organization begins accepting such applications, she would apply. Each of the Plaintiffs allege that, although her child is eligible to receive a scholarship under the tax credit program, because of Rule 1, her child could not use such a scholarship to attend the "qualified education provider" of she has chosen because it is a religious school. Each of the Plaintiffs alleges that Rule 1 discriminates against her based on her religious views. Each of the Plaintiffs allege that Rule 1 impairs her right of equality in education opportunity and right of religious freedom (free exercise of religion). Further, the Plaintiffs allege that, in adopting Rule 1, DOR violated MAPA because Rule 1 engrafts additional requirements that are contradictory to the purpose of the tax credit program and that were not envisioned or intended by the Legislature.

The Court finds that each of the Plaintiffs has a personal stake in the outcome of this controversy because, as long as it is in effect, Rule 1 acts as a barrier to her to obtain the end benefit of the tax credit program (a scholarship), based on her choice of a religious school. The Court finds that the Plaintiffs have established that they have standing, therefore Defendants' Motion to Dismiss Plaintiffs' Complaint for Declaratory and Injunctive Relief for Lack of Standing should be denied.

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION.

The Plaintiffs request that this Court issue a preliminary injunction enjoining DOR from applying Rule 1 in its implementation of the tax credit program until such time as the Court can resolve whether, in adopting Rule 1, DOR exceeded its authority under MAPA and/or on the constitutionality of Rule 1, including the constitutionality of the Montana Constitutional provisions upon which Rule 1 is allegedly based.

A preliminary injunction is an extraordinary remedy and should be granted with caution based in sound judicial discretion. *Citizens for Balanced Use v. Maurier*, 2013 MT 166, ¶ 11, 370 Mont. 410, 303 P.3d 794 (internal citation omitted).

In relevant part, Mont. Code Ann. § 27-19-201 authorizes the issuance of a preliminary injunction when it appears that the applicant is entitled to the relief sought *or* the commission of an act by a party would cause irreparable harm to the applicant *or* the adverse party is doing something that threatens to violate the applicant's rights, respecting the subjects of the action. Mont. Code Ann. § 27-19-201(1),(2) and (3) (2015). Because the subsections of Mont. Code Ann. § 27-19-201 are disjunctive, only one subsection need be met for an injunction to issue. *Sweet Grass Farms, Ltd. v. Bd. of Commrs. Of Sweet Grass Co.*, 2000 MT 147, ¶ 27, 300 Mont. 66, 2 P.3d 825.

The applicant for a preliminary injunction has the burden of showing that he or she is entitled to a preliminary injunction and must establish a prima facie case that it is at least doubtful whether or not he will suffer irreparable injury before his rights can be fully litigated. *Id.* at ¶¶ 27-28. In deciding whether an applicant has established a prima facie case, a court should determine whether a sufficient case has been made out to warrant the preservation of rights in status quo until trial, without expressing a final opinion as to such rights. *Id.* at ¶ 28 (internal citation omitted).

Based on argument and evidence that it has received up to this point, the Court finds that the Plaintiffs have established that they are likely to succeed on the merits of their claims. The Legislature's stated purpose in enacting the tax credit program is to provide parental and student choice in education with private contributions through tax replacement programs. Mont. Code Ann. § 15-30-3101. Rule 1 interjects qualifiers into the definition of "qualified education provider" that were not included by the Legislature

in the plain language of Mont. Code Ann. § 15-30-3102(7). Where an administrative rule conflicts with or is inconsistent with a statute, the statute prevails. *City of Great Falls v. Mont. Dept. of Pub. Serv. Reg.*, 2011 MT 144 ¶ 22, 361 Mont. 69, 254 P.3d 595; See also Mont. Code Ann. § 2-4-305(6) (2015). A rule that is not consistent with or conflicts with the statue is not valid or effective. Mont. Code Ann. § 2-4-305(6) (2015). In the Legislative poll the majority of the members of both houses voted that proposed Rule 1 was contrary to legislative intent. Rule I was adopted as proposed. If a legislative poll determines that a majority of members of both houses find that a proposed or adopted rule is contrary to the intent of the legislature, the proposed or adopted rule must be conclusively presumed to be contrary to legislative intent in any court proceeding involving the rule's validity. Mont. Code Ann. § 2-4-404 (2015). The effect of the qualifiers that Rule 1 adds to the definition of the term "qualified education provider" is to preclude the Plaintiffs, each of whom is a parent who has chosen to enroll her "student" in a non-public, religiously-affiliated school, from competing on an equal footing with parents who have chosen to enroll their children in a non-public secular school for the end benefit of the tax credit program. Mont. Const. art. X § 1, which guarantees equality in educational opportunity to every person in Montana, draws no distinction between parents and students enrolled in non-public religiously affiliated schools and those enrolled in non-public secular schools. Rule 1 draws a distinction based on religious affiliation. For purposes of equal protection analysis, religion is an inherently suspect class upon which to draw a distinction. *Small*, 200 Mont. at 524, 651 at 996. DOR's justification for adopting Rule 1 is to comply with Mont. Const. art. V § 11(5) and art. X § 6, both of which concern expenditure of appropriations. In 2012, the First Judicial District Court held that a tax credit is not an appropriation. *MEA_MFT v. McCulloch*, 2012 Mont. Dist. LEXIS 20 (Mont. 1st. Jud. Dist. Mar. 14, 2012). In *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, the United States Supreme Court found that a tax credit provided to people to who donate to school tuition organizations providing scholarships to students attending private K-12 schools, including religious schools, was not a government expenditure. In 2008, the Tenth Circuit Court of Appeals found that a Colorado law excluding students at religiously-affiliated colleges from

receiving state-provided scholarships violated the Free Exercise and Establishment Clauses of U.S. Const. amend. I. See *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245 (10th Cir. 2008). All of these factors make it likely that the Plaintiffs will succeed on the merits of their claims.

Based on the argument and evidence the Court has received up to this point, the Court finds that the Plaintiffs have established a prima facie case that it is at least doubtful whether or not he will suffer irreparable injury before his rights can be fully litigated. There is testimony that a registered student scholarship organization is fund raising, has received donations, and intends to offer scholarships of the type that are the end benefit of the tax credit program. Aff. Kristin Hansen ¶¶ 1,5,12 and13 (Feb. 16, 2016). Because Rule 1 acts as a complete barrier to the Plaintiffs to compete for such scholarships, as long as the Rule 1s in effect, it is a present and continuous barrier for the Plaintiffs and makes it doubtful whether or not they will suffer irreparable injury before their rights can be fully litigated.

The Court finds that the Plaintiffs have met their burden to show that they are entitled to a preliminary injunction and a sufficient case has been made out to warrant the preservation of rights in status quo until trial. "Status Quo" has been defined as "the last actual, peaceable, noncontested condition which preceded the pending controversy." *Id.* (quoting *Porter v. K & S Partnership*, 192 Mont. 175, 181, 627 P.2d 836, 839 (1997). The Court finds the "last actual, peaceable, noncontested condition which preceded [this] controversy" was when Mont. Code Ann. § 15-30-3102(7) (2015) became effective on January 01, 2016 and at the moment (however brief) before Rule 1 (Admin. R. Mont. 42.4.802) became effective – that is, the statutory definition of "qualified education provider" as it would be had Rule 1 never gone into effect.

March 31ST, 2016.

District Court Judge

c: Daniel Whyte/Brendan Beatty
William Mercer/Richard Komer/Erica Smith

MMB 3/31/16