Fulton County Superior Court
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Cathelene Robinson, Clerk

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

RAYMOND GADDY, BARRY HUBBARD, LYNN WALKER HUNTLEY, and DANIEL REINES,

Plaintiffs,

vs.

GEORGIA DEPARTMENT OF REVENUE, and DOUGLAS J. MACGINNITIE, in his official capacity as State Revenue Commissioner of The Georgia Department of Revenue,

Defendants,

and

RUTH GARCIA, ROBIN LAMP, TERESA QUINONES, and ANTHONY SENEKER,

Intervenor-Defendants.

CIVIL ACTION FILE NO. 2014CV244538

HON. KIMBERLY M. ESMOND ADAMS

ORDER GRANTING IN PART AND DENYING IN PART MOTIONS TO DISMISS

The above-styled case came before the Court for a hearing on the following motions: 1) Defendants' Motion to Dismiss; 2) Intervenors' Motion to Dismiss; and 3) Plaintiffs' Motion for Judgment on the Pleadings as to Count III; 4) Intervenors' Cross-Motion for Partial Judgment on the Pleadings as to Counts I – III and VI; and 5) Defendants' Motion to Stay Discovery and/or for Protective Order. Upon consideration of the complaint, applicable authority, and arguments of counsel, and for the reasons discussed *infra*, Defendants' and Intervenor's motions to dismiss are hereby **GRANTED IN PART** and **DENIED IN PART**, Intervenors' Cross-Motion for Partial Judgment on the Pleadings as to Counts I – III and VI is hereby **GRANTED IN THE**

ALTERNATIVE, Plaintiffs' Motion for Judgment on the Pleadings as to Count III is hereby **DENIED**, and Defendants' Motion to Stay Discovery and/or for Protective Order is **DENIED**.

FACTUAL BACKGROUND

Plaintiff's Verified Complaint for Writ of Mandamus and Injunctive Relief, construed in a light most favorable to Plaintiffs, shows that House Bill 1133, Georgia's Qualified Education Tax Credit Program ("the Program"), was enacted by the Georgia General Assembly in 2008 to allow tax credits for donations used to provide scholarships for students to attend private schools in Georgia. Under the Program, individuals and corporations receive dollar-for-dollar tax credits for Qualified Education Expenses which are donations and contributions made to private Student Scholarship Organizations ("SSOs"). (Compl. ¶¶ 34-35.) Qualified Education Expenses are defined by O.C.G.A. § 48-7-29.16(a)(2) as donations by a taxpayer during the tax year to an SSO operating under the Program, which are used for tuition and fees at a qualifying private school and for which a credit under the statute is claimed and allowed. (Id.) SSOs are self-appointed private charitable organizations which are exempt from federal income taxes under Section 501(c)(3) of the Internal Revenue Code pursuant to O.C.G.A. § 20-2A-1 *et seq.* (Id. ¶ 16-17.) The SSOs are tasked by the State with facilitating the transfer of the donations from individuals and corporations to eligible students attending private schools, many of which condition enrollment on specific religions. (Id. ¶¶ 15, 59-61, 65.) SSOs are not required to allocate all of the revenues they receive for scholarships and can use up to 10% of the revenues received for the SSOs' own unregulated purposes. (Id. ¶ 19.) After selecting the specific student recipient, the SSO is supposed to then disburse the funds to the private school of the student recipient's parents' choice. (Id. ¶ 23.) Most SSOs, however, have adopted their own private policies and practices to allow individuals and corporations to designate the private schools which receive

their redirected tax funds. (Id. ¶ 24.) As a result, after receiving the tax funds designated for a specific private school, SSOs many times then disburse the funds to the private school of the donors' choice, rather than first selecting student scholarship recipients and then allowing the students' parents to choose the private school to receive the funds. (Id.) The scholarship amounts are not *de minimus*, as the private school can receive up to $8,983 towards the full amount of a student's tuition which represents the average state and local expenditures per public school student. (Id. ¶¶ 25-26; Compl. Ex. 4.)

Through the tax credits, individuals and corporations in Georgia are given a dollar-for-dollar reduction in their total tax liability otherwise imposed by Georgia's income tax statute. (Compl. ¶ 35.) Pursuant to O.C.G.A. § 48-7-29.16(d), tax credits are prohibited if the taxpayer designates the taxpayer's Qualified Education Expense for the direct benefit of a particular student. (Id. ¶ 36.) In addition, when soliciting donations, SSOs shall not represent, or direct a private school to represent, that a taxpayer will receive a scholarship for the direct benefit of a particular student in exchange for the taxpayer's donation to the SSO. (Id. ¶ 37.) However, Plaintiffs allege that despite these statutory requirements and Defendants' own regulations, many taxpayers in Georgia have designated their Qualified Education Expense for the direct benefit of a particular student because multiple schools permit, encourage, or require families who wish to receive scholarships through the Program to demonstrate that they have made tax credit contributions to the schools or identify persons whom the family has recruited to make contributions. (Id. ¶¶ 77-78.) For example, Covenant Christian Academy's 2013-2014 Parent/Student Handbook stated that for a student to be eligible for scholarship funds, "The parent/guardian must make a donation, of any amount, to the Georgia SSO and designate those funds for Covenant Christian Academy." (Id. ¶ 78; Compl. Ex. 16.) The Handbook then

explained that "[a]ll funds designated for Covenant will be distributed according to donor/student relationship as indicated on the Covenant Christian Academy Scholarship Application Form." (Id.) Similarly, Faith Baptist Christian Academy's "Scholarship Selection Criteria" for the 2013-2014 academic year required the scholarship applicant to demonstrate "participation in the Georgia Private School Tax Credit – SSO program" by listing parent participation in an SSO and the amount donated by the parent to the SSO. (Compl. ¶ 79; Compl. Ex. 17.)

Moreover, some SSOs actively solicit donations by representing that scholarship recipients will receive scholarships in amounts equal to the donations received by the SSO, thereby asking parents and other individuals to donate an amount of scholarship funds they want a particular student to receive. (Compl. ¶ 80.) For example, Pay it Forward SSO represented on its website:

> Scholarship Amounts: Each month that we receive a donation for your school, your student will receive an equal share of the scholarship funds. For example, if we receive $10,000 in March for your school and there are 10 approved students, then each student at your school will receive a $1,000 scholarship at the end of March.

(Id.; Compl. Ex. 14.)

Plaintiffs allege that the tax credits provided by the General Assembly to incentivize individuals and corporations to donate money to SSOs are the sole source for making the scholarship funds available to students. (Compl. ¶ 39.) The tax credits for Qualified Education Expenses provide a substantially greater benefit to the individuals and corporations receiving the credits than would a mere tax deduction. (Id. ¶ 40.) Whereas a tax deduction is an amount subtracted from gross income when calculating adjusted gross income or from adjusted gross income when calculating taxable income, a tax credit is subtracted directly from total tax liability, resulting in a dollar-for-dollar reduction in tax liability. (Id. ¶ 41.) For example, for a Georgia taxpayer, a $1,000 tax deduction lowers the taxpayer's tax bill by at most $60, but a

$1,000 tax credit lowers the taxpayer's tax bill by the full $1,000, regardless of which tax bracket the taxpayer is in. (Id. ¶ 42.)

Tax expenditures, like the tax credits given to individuals and corporations in Georgia for Qualified Education Expenses, represent an allocation of government resources in the form of taxes that could have been collected and appropriated if not for the preferential tax treatment given to the expenditure by the General Assembly. (Id. ¶ 43.) The aggregate amount of tax credits available to Georgia taxpayers, set by the General Assembly, is currently $58 million. (Id. ¶ 51.) Defendants pre-approve the contribution amounts of individuals and taxpayers in Georgia on a first-come, first-served basis and then ensure that the proper documentation is supplied to support the taxpayers' claims to Qualified Education Expense credits when taxpayers file their tax returns. (Id. ¶ 38.) Plaintiffs assert that in all other respects, the Tax Credit Scholarship Statute empowers private, self-appointed SSOs and private schools to administer the program.

Plaintiffs contend that SSOs openly acknowledge they accept and redirect Georgia tax dollars to be used for scholarships for students to attend private and mostly religious schools. (Id. ¶ 55.) Many of these SSOs attempt to incentivize taxpayers to donate to them by pointing out that the donations are Georgia tax dollars which can be paid to the SSOs instead of the Department of Revenue under the Program. (Id. ¶ 56; see also id. ¶¶ 57-61.) Like the SSOs, numerous private schools enthusiastically ask parents and other taxpayers to redirect their Georgia tax dollars for the benefit of the schools and their religious missions, along with the students receiving scholarships. (Id. ¶ 62; see also id. ¶¶ 63-67.)

Religious private schools participating in the Program also recognize the tremendous benefits received by schools under the Program. For example, Grace Christian Academy's website explained, in pertinent part:

> How does this strengthen our ministry? Your contribution helps strengthen and grow GRACE by helping to increase enrollment. The school will be able to help more families in need of financial assistance by accessing funds that are in the new scholarship program without taxing the funds that we raise annually out of our own budget to help families in need. As our school grows, our students will be directly impacted, as we are able to add more services, more programs, more staff, more technology, more facilities, and more educational and ministry opportunities.
>
> This is a great tool we have been given to help grow our ministry to Christian families and we encourage you to consider becoming involved in the program.

(Id. ¶ 66; Compl. Ex. 12.)

Plaintiff Raymond Gaddy is the parent of two young children who attend public school. (Compl. ¶ 7.) Plaintiff Barry Hubbard is the grandparent of two children in public school. (Id. ¶ 6.) Plaintiff Lynn Walker Huntley is a former president of the Southern Education Foundation (SEF), a public charity whose mission is to advance equality and excellence in education in the southern states for low-income students, particularly minorities. (Id. ¶ 8.) Plaintiff Daniel Reines participated in the Program while his children attended private school and continues to participate in the program. (Id. ¶ 4.) Plaintiffs assert that they are Georgia taxpayers and have an interest in seeing that no other Georgia taxpayer receives an illegal tax credit under the Program. (Id. ¶ 9.) Plaintiffs allege that, because illegal tax credits place a greater tax burden on other taxpayers, they are injured by having to shoulder, directly or indirectly, a greater portion of Georgia's tax burden because of the illegal tax credits received by others under the Program. (Id.) Defendant Georgia Department of Revenue is vested with authority and responsibility for implementing relevant provisions of the Program and the Georgia Tax Code in compliance with the Georgia Constitution. (Id. ¶ 11.) Defendant MacGinnitie, in his official capacity as State Revenue Commissioner of the Georgia Department of Revenue, has ultimate authority and responsibility for implementing the provisions of the Program and for overseeing the Department

of Revenue's compliance with its statutory provisions, the Georgia Tax Code, and the Georgia Constitution. (Id. ¶ 13.)

Plaintiffs filed the present complaint against Defendants for: violation of the Educational Assistance provisions of the Georgia Constitution (Count I); violation of the Gratuities Clause of the Georgia Constitution (Count II); violation of Article I, Section II, Paragraph VII of the Georgia Constitution (Count III); violation of the Georgia Tax Code (Count IV); mandamus relief to compel Defendant MacGinnitie's compliance with specific provisions of the Georgia Tax Code (Count V); and injunctive relief to stop Defendants' implementation of the Program (Count VI). Intervenors Ruth Garcia, Robin Lamp, Teresa Quinones, and Anthony Seneker are parents of students receiving scholarships under the Program who filed their Unopposed Motion to Intervene and Defendants which was granted by the Court. Defendants and Intervenors filed the instant motions to dismiss Plaintiffs' complaint, arguing Plaintiffs lack standing to bring the action, are barred by sovereign immunity, and have failed to state a claim on the merits. Plaintiffs filed their Motion for Judgment on the Pleadings as to Count III of the complaint, and Intervenors filed their Cross-Motion for Partial Judgment on the Pleadings as to Counts I – III and VI.

1. Defendants' and Intervenors' Motions to Dismiss

Defendants and Intervenors moved to dismiss Plaintiffs' facial challenge to the constitutionality of the Program on the basis that Plaintiffs lack standing to bring their claims under Counts I, II, III, IV, and VI. In addition, Defendants argued that Plaintiffs' claims for declaratory and injunctive relief are barred by sovereign immunity, and their claim for mandamus fails to state a claim upon which relief can be granted.

A. Standard of Review for Motion to Dismiss

On a motion to dismiss,

> [t]he standard used to evaluate the grant of a motion to dismiss when the sufficiency of the complaint is questioned is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff with all doubts resolved in the plaintiff's favor, disclose with certainty that the plaintiff would not be entitled to relief under any state of provable facts.

Cooper v. Unified Gov't, 275 Ga. 433, 434 (2002). See O.C.G.A. § 9-11-12(b)(6). "A motion to dismiss may be granted where a complaint lacks any legal basis for recovery." Seay v. Roberts, 275 Ga. App. 295, 296 (2005). This Court excluded matters outside the pleadings from its consideration of the motions to dismiss in accordance with O.C.G.A. § 9-11-12(b).

B. Plaintiffs lack standing to challenge the constitutionality of the tax benefits.

Plaintiffs are four individual taxpayers who claim the Program is unconstitutional under three separate provisions of the State Constitution and that Defendants have violated the Georgia Tax Code. Plaintiffs claim that they have standing as taxpayers because, in their view, the tax credits are illegal. Under Georgia law, "[t]he only prerequisite to attacking the constitutionality of a statute is a showing that it is hurtful to the attacker." Perdue v. Lake, 282 Ga. 348, 348 (2007) (quoting Agan v. State, 272 Ga. 540, 542(1), (2000)). Further, "a party must show not only that the alleged unconstitutional feature injures him and deprives him of a constitutional right but *he must establish that he himself possessed the right allegedly violated.* He must be within the class of persons affected by the statute objected to." Stewart v. Davidson, 218 Ga. 760, 770 (1963) (emphasis in original). Taxpayer standing can be used to challenge a government act resulting in an expenditure of public revenue or an increased tax burden. See, e.g., City of E. Point v. Weathers, 218 Ga. 133, 135-36 (1962).

Courts that have already considered whether a tax credit is an expenditure of public

revenue have answered this question in the negative.[1] Of particular importance is Arizona Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2011), where the United States Supreme Court found that taxpayers lacked standing to challenge a scholarship tax credit program under the Establishment Clause of the United States Constitution that was almost identical to the Program at issue here. Like Georgia's Program, the Arizona program provided that taxpayers could receive a credit for donations made to independent scholarship organizations which then provided scholarships for students to attend private schools. Winn, 131 S. Ct. at 1440-1441. Although federal precedent is not binding on this Court, Georgia courts frequently look to the U.S. Supreme Court on standing issues. See Feminist Women's Health Ctr. v. Burgess, 282 Ga. 433, 434 (2007) (holding that "[i]n the absence of our own authority, we frequently have looked to United States Supreme Court precedent concerning Article III standing to resolve issues of standing to bring a claim in Georgia's courts."). Plaintiffs have not presented any arguments for why this Court should not follow this persuasive authority.

In this case, Plaintiffs have not alleged actual harm or that they themselves possessed the right allegedly violated. Plaintiffs do not challenge an expenditure of public revenue, nor have they alleged the Program will increase their taxes or otherwise result in a net loss to the state. Plaintiffs argue that because state-paid employees spend some time administering the Program, the Program results in an expenditure of public revenue. However, the Georgia Supreme Court has already rejected this argument. Weathers, 218 Ga. at 135. In addition, Plaintiffs have not alleged, nor could they demonstrate, that the Program increases their tax burden either by

[1] Arizona Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1440 (2011); Kotterman v. Killian, 972 P.2d 606, 617-18 (Ariz. 1999) (en banc); State Bldg. & Constr. Trades Council v. Duncan, 76 Cal. Rptr. 3d 507, 510, 514-15 (Cal. Ct. App. 2008); Toney v. Bower, 744 N.E.2d 351, 357-58 (Ill. App. Ct. 2001); Griffith v. Bower, 747 N.E.2d 423,426 (Ill. App. Ct. 2001); Manzara v. State, 343 S.W.3d 656, 659-61 (Mo. 2011). Although a New Hampshire trial court found to the contrary in 2013, its decision was vacated by the state supreme court after ruling that plaintiffs lacked taxpayer standing to bring the suit. Duncan v. State, No. 2013-455,2014 WL 4241774 (N.H. Aug. 28, 2014) (vacating No. 219-2012-CV-00121, slip op. at *20-26 (N.H. Super. Ct. June 17, 2013)).

causing a net loss for the state or by increasing their tax bill. Based on the text of the statutes governing the Program, Defendants argue that the Program is at the very least revenue neutral for two reasons. First, the State is already paying to educate each child in public school. When these children leave the public schools with a scholarship, the State no longer has to bear this expense. See Ga. Const. Art. VIII, § I, ¶ I (obligating the State to provide each child with an education). Second, no scholarship can exceed the amount of money that the State would have otherwise spent on these children. O.C.G.A. § 20-2A-2(1). Indeed, as some of the scholarships will inevitably be only a portion of the amount the State pays to educate each child, the Program may actually save the State money. See, e.g., Winn, 131 S. Ct. at 1438 ("The costs of education may be a significant portion of Arizona's annual budget, but the tax credit, by facilitating the operation of both religious and secular private schools, could relieve the burden on public schools and provide cost savings to the State."); Mueller v. Allen, 463 US. 388, 395 (1983) (upholding school-choice tax deduction in part because "[b]y educating a substantial number of students[, private] schools relieve public schools of a correspondingly great burden – to the benefit of all taxpayers."); Toney v. Bower, 744 N.E.2d 351, 361 (Ill. App. Ct. 2001) (upholding school-choice tax credit in part because "private schools, both sectarian and nonsectarian . . . relieve taxpayers of the burden of educating additional students [in the public schools]").

Plaintiffs cite Lowry v. McDuffie, 269 Ga. 202, 204 (1998), but Lowry is inapposite. The Lowry court found that taxpayers had standing to challenge a tax exemption for a select favored group – car dealers. That court found the plaintiff had standing because "[a]n illegal exemption place[d] a greater tax burden upon those taxpayers being required to pay" by draining the public treasury. Id. at 203. However, in this case, Plaintiffs have neither alleged, nor could they show, that the tax credit will increase their taxes or drain the state treasury. Moreover, the

Program's tax credit is available to all taxpayers, not just the select group that could use the tax exemption as in Lowry. Because Plaintiffs have no basis for standing to bring their constitutional challenges, Plaintiffs' claims in Counts I, II, and III are **DISMISSED**.

C. Defendants' alleged violation of the Tax code creates no right of action.

Plaintiffs asserted in Count IV of their Complaint that Defendants violated O.C.G.A. § 48-7-29.16(d) which provides:

> (1) The tax credit shall not be allowed if the taxpayer designates the taxpayer's qualified education expense for the direct benefit of any particular individual, whether or not such individual is a dependent of the taxpayer.
>
> (2) In soliciting contributions, a student scholarship organization shall not represent, or direct a qualified private school to represent, that, in exchange for contributing to the student scholarship organization, a taxpayer shall receive a scholarship for the direct benefit of any particular individual, whether or not such individual is a dependent of the taxpayer. The status as a student scholarship organization shall be revoked for any such organization which violates this paragraph.

Defendants argue that this provision of the tax code does not confer a right of action, either express or implied. In Georgia, "it is well settled that violating statutes and regulations does not automatically give rise to a civil cause of action by an individual claiming to have been injured from a violation thereof. Rather, the statutory text must expressly provide a private cause of action." State Farm Mut. Auto. Ins. Co. v. Hernandez Auto Painting & Body Works, Inc., 312 Ga. App. 756, 761 (2011) (citations omitted). See, e.g., O.C.G.A. §§ 48-2-35(c)(4) (authorizing a taxpayer the right to bring an action for a refund in the Georgia Tax Tribunal); 48-2-59(a) (authorizing administrative appeal of an order, ruling, or finding of the commissioner to the Georgia Tax Tribunal or the superior court); 48-3-1 (authorizing a taxpayer the right to file an affidavit of illegality from a tax execution or file a petition in the Georgia Tax Tribunal); 48-7-31(d) (authorizing a corporate taxpayer to petition the commissioner from denial of alternative

apportionment method). Further, to determine whether the violation of a statute creates a cause of action for a particular plaintiff, "it is necessary to examine the purposes of the legislation and decide whether the injured person falls within the class of persons the statute was intended to protect and whether the harm complained of was the harm it was intended to prevent." Odem v. Pace Acad., 235 Ga. App. 648, 656 (1998). See Cellular One, Inc. v. Emanuel County, 227 Ga. App. 197 (1997) (finding no private cause of action for an alleged violation of tax revenue regulations where none was provided for in the statute). In addition, unless a statutory remedy is employed, any actions are barred by sovereign immunity. See Sawnee Elec. Membership Com. v. Georgia Dep't of Revenue, 279 Ga. 22, 23 (2005) ("The statutory authorization to bring an action for a tax refund in superior court against a governmental body is an express waiver of sovereign immunity, and the State's consent to be sued must be strictly construed.").

In this case, Plaintiffs alleged that Defendants violated O.C.G.A. § 48-7-29.16(d) by awarding tax credits to individuals who designated specific student to receive the funds through recommendation solicited by SSOs and by failing to revoke the status of SSOs that solicit contributions while representing that a taxpayer will receive the scholarship for the direct benefit of a particular individual. Plaintiffs do not assert they were injured by this alleged violation of the tax code. First, the Court finds Count IV fails to state a claim because the text of O.C.G.A. § 48-7-29.16 does not create an express private right of action or remedy against Defendants. Second, the Court finds the statute does not provide an implied right of action for Plaintiffs because Plaintiffs were not harmed by its alleged violation nor do they fall within the class of persons Code Section 48-7-29.16 was intended to protect. Finally, the Court finds that even if a cause of action exists, it is nonetheless barred by sovereign immunity absent the State's express waiver. Although violation of the statute may be the basis for mandamus relief as discussed

infra, the Court finds no cause of action exists in and of itself. Therefore, Count IV of Plaintiffs' Complaint is **DISMISSED**.

D. Sovereign immunity bars Plaintiffs' request for declaratory and injunctive relief.

In their complaint, Plaintiffs' prayed that the Court enter a declaratory judgment finding the Program's statutory provisions were unconstitutional and grant injunctive relief preventing Defendants from pre-approving the tax credit contribution amounts and allowing individuals and corporations to claim dollar-for-dollar reductions in their Georgia tax liability for Qualified Education Expenses. Defendants argue that Counts I, II, III, IV, and VI of their complaint are barred by sovereign immunity. Under Georgia law:

> Sovereign immunity is the immunity provided to governmental entities and to public employees sued in their official capacities. The doctrine of sovereign immunity . . . bars any claims against [a defendant] in his official capacity. Under the Georgia Constitution, as amended in 1991, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver. Sovereign immunity has been extended to counties and thus protects county employees who are sued in their official capacities, unless sovereign immunity has been waived. And any waiver of sovereign immunity must be established by the party seeking to benefit from that waiver.

Ratliff v. McDonald, 326 Ga. App. 306, 309 (2014) (internal quotations and citations omitted). As the Supreme Court of Georgia recently declared, "[S]overeign immunity is a bar to injunctive relief at common law . . . ." Georgia Dep't of Nat. Res. v. Ctr. for a Sustainable Coast, Inc., 294 Ga. 593, 596 (2014). Therefore, those aggrieved by the wrongful conduct of public officials must seek relief against public officials in their individual, not official, capacities. Id. at 603.

In this case, Plaintiffs seek to restrain Defendant Georgia Department of Revenue and Defendant MacGinnitie, in his official capacity as State Revenue Commissioner of the Georgia

Department of Revenue, from implementing the Program because enforcement of the allegedly unconstitutional statute is *ultra vires*. However, sovereign immunity bars the relief Plaintiffs have requested. Furthermore, Plaintiffs have failed to satisfy their burden of persuasion with respect to the waiver of sovereign immunity. Therefore, the Court finds Plaintiffs' request for injunctive relief on Count VI is barred by sovereign immunity.

As to declaratory relief, O.C.G.A. § 50-13-10 provides, in pertinent part, "[t]he validity of any rule, waiver, or variance may be determined in an action for declaratory judgment when it is alleged that the rule, waiver, or variance or its threatened application interferes with or impairs the legal rights of the petitioner." O.C.G.A. § 50-13-10(a). In this regard,

> [t]he State's sovereign immunity has been specifically waived by the General Assembly pursuant to OCGA § 50-13-10, which is part of the Administrative Procedure Act. Therein, the State has specifically consented to be sued and has explicitly waived its sovereign immunity as to declaratory judgment actions in which the rules of its agencies are challenged.

DeKalb Cnty. School Dist. v. Gold, 318 Ga. App. 633, 637 (2012) (internal quotations and citations omitted). Indeed, "[o]ur Constitution and statutes do not provide for a blanket waiver of sovereign immunity in declaratory-judgment actions . . . ." Id. at 637.

Here, Plaintiffs request that the Court declare the Program unconstitutional. However, sovereign immunity also bars relief in this regard. Furthermore, Plaintiffs have failed to demonstrate that the sought-after declaratory relief falls within the limited waiver afforded by O.C.G.A. § 50-13-10 because nothing in Plaintiffs complaint suggests that Plaintiffs challenge any agency rule, waiver, or variance. The mere allegation of a violation of a constitutional right is not, in itself, sufficient to avoid the protections afforded by the State's sovereign immunity. Id. at 639. Therefore, the Court finds Plaintiffs' request for declaratory relief also is barred by sovereign immunity.

E. Plaintiffs claim for mandamus against Defendant MacGinnitie states a claim upon which relief can be granted.

Plaintiffs bring their mandamus claim in Count V of their Complaint and contend they have standing to seek to compel Defendant MacGinnitie to comply with O.C.G.A. § 48-7-29.16(d), and Defendants acknowledge same. Under Georgia law, "whenever, from any cause, a defect of legal justice would ensue from a failure to perform or from improper performance [of an official duty], the writ of mandamus may issue to compel a due performance if there is no other specific legal remedy for the legal rights[.]" O.C.G.A. § 9-6-20. With regard to standing, "[w]here the question is one of public right and the object is to procure the enforcement of a public duty, no legal or special interest need be shown, but it shall be sufficient that a plaintiff is interested in having the laws executed and the duty in question enforced." O.C.G.A. § 9-6-24. Under this provision, "a private citizen may turn to the judicial branch to seek to compel or enjoin the actions of one who discharges public duties 'where the question is one of public right and the object is to procure the enforcement of a public duty . . . .'" Adams v. Georgia Dep't of Corr., 274 Ga. 461, 461 (2001) (quoting Brissey v. Ellison, 272 Ga. 38, 39 (2000)). A writ of mandamus is properly issued against a public official "only if (1) no other adequate legal remedy is available to effectuate the relief sought; and (2) the applicant has a clear legal right to such relief." Bibb County v. Monroe County, 294 Ga. 730, 734 (2014). "In general, mandamus relief is not available to compel officials to follow a general course of conduct, perform a discretionary act, or undo a past act." Schrenko v. DeKalb Cty. Sch. Dist., 276 Ga. 786, 794 (2003). Mandamus "will not lie to compel . . . the performance of continuous duties nor will it lie where the court issuing the writ would have to undertake to oversee and control the general course of official conduct of the party to whom the writ is directed." Solomon v. Brown, 218 Ga. 508, 509 (1962). Consequently, a petition for writ of mandamus to compel a public official to "properly

enforce and execute the laws and cease all *ultra vires* actions" is properly dismissed where a plaintiff's complaint fails to set out a framework within which he could show that he has "clear legal right to have a particular act rather than a general pattern of conduct performed . . . ." Willis v. Dep't of Revenue, 255 Ga. 649, 650 (1986).

Here, Plaintiffs request mandamus issue to compel Defendant MacGinnitie to comply with the statutory duty imposed by O.C.G.A. § 48-7-29.16(d)(2) to revoke the status of an SSO representing that, in exchange for contributing to the student scholarship organization, a taxpayer will receive a scholarship for the direct benefit of any particular individual. The Court finds that Plaintiffs have standing to bring their mandamus claim because the question is one of public right, the object is to procure the enforcement of a public duty, and Plaintiffs are interested in having the laws executed and the duty in question enforced. In addition, the Court finds Plaintiffs do not seek to compel Defendant MacGinnitie to follow a general course of conduct or undo past acts, but rather Plaintiffs cite examples in their Complaint where Defendant MacGinnitie may have failed to comply with the specific statutory duty in question. Therefore, the Court does not find that Plaintiffs' claim for mandamus discloses with certainty that Plaintiffs would not be entitled to relief under any state of provable facts. Accordingly, Defendants' Motion to Dismiss as to Count V is **DENIED**.

2. Plaintiff's Motion for Judgment on the Pleadings and Intervenors' Cross-Motion for Partial Judgment on the Pleadings as to Counts I – III and VI

Notwithstanding the Court's findings, *supra*, the Court finds that even if Plaintiffs had standing, judgment on the pleadings would be proper nonetheless on Plaintiffs' constitutional challenges in Counts I, II, III, and VI of the complaint. A motion for judgment on the pleadings is authorized by O.C.G.A. § 9-11-12(c). On a motion for judgment on the pleadings,

all well-pleaded material allegations by the nonmovant are taken as true,

> and all denials by the movant are taken as false. Granting the motion is proper only where there is a complete failure to state a cause of action or defense and the movant is thus entitled to judgment as a matter of law.

South v. Bank of America, 250 Ga. App. 747, 749 (2001). Although a motion for judgment on the pleadings is limited to the pleadings, a trial court may also consider any exhibits that have been incorporated into the pleadings. Printis v. Bankers Life Ins. Co., Inc., 256 Ga. App. 266, 266 (2002).

In this case, Plaintiffs challenge the Program under three separate state constitutional provisions: the Educational Assistance Provision, the Gratuities Clause, and the Establishment Clause. These constitutional provisions only apply to government acts that use public funds. The Educational Assistance Provision permits the General Assembly to expend "public funds" for "grants, scholarships, loans, or other assistance to students and to parents of students for educational purposes." Ga. Const. Art. VIII, § VII, ¶ I(a)(1). The Gratuities Clause prohibits the General Assembly from granting any "donation or gratuity," Ga. Const. Art. III, § VI, ¶ VI(a)(1), and the General Assembly cannot donate or give what it does not own. Finally, the Establishment Clause involves only money "taken from the public treasury." Ga. Const. Art. I, § II, ¶ VII. Intervenors argue that each of these provisions applies only to government programs that use public funds where the Program at issue uses only private funds.

As discussed *supra*, tax credits are not government funds. Plaintiffs argue that the Program necessarily involves public funds because some taxpayers receive their tax credit in the form of a refund from the state treasury. However, tax refunds return a taxpayer's own money that he overpaid to the state, not the State's money. Funds that remain entirely under the control of private citizens and private institutions cannot be considered tax dollars. To find otherwise, would mean that "all taxpayer income could be viewed as belonging to the state because it is subject to taxation by the legislature." Kotterman, 972 P.2d at 618 ¶ 37. Moreover, the Supreme

Court of Georgia has already foreclosed any argument that administrative action by government employees is the equivalent of expending public funds on any specific program. Weathers, 218 Ga. at 135.

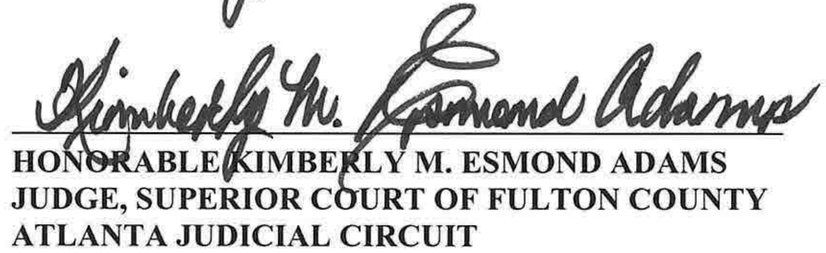
Plaintiffs further base their contention that tax credits are the equivalent of public funds on the "tax expenditure theory," which is a theory "used by government as a tool for analyzing budgetary policy." Kotterman, 972 P.2d at 619 ¶ 41. Indeed, this theory is a tool used by the General Assembly. See O.C.G.A. § 45-12-75 (requiring the preparation of a tax expenditure report). Plaintiffs ignore that the theory is not limited to tax credits. It encompasses tax credits, deductions, differential tax rates, and exclusions from income such as property tax exemptions. Indeed, courts have found no legal distinction between tax credits and other tax benefits. See, e.g., Kotterman, 972 P.2d at 621 ¶ 50; Toney, 744 N.E.2d at 357; Winn, 131 S. Ct. at 1448. Accepting Plaintiffs' argument that these three constitutional provisions govern such tax benefits would contravene the legislative scheme and the State's tax system, and this Court declines to do so. Accordingly, Plaintiffs' constitutional claims fail. Therefore, Plaintiffs' Motion for Judgment on the Pleadings as to Count III is **DENIED**, and Intervenors' Cross-Motion for Partial Judgment on the Pleadings as to Counts I – III and VI is **GRANTED IN THE ALTERNATIVE**.

3. Defendants' Motion to Stay Discovery and/or for Protective Order

Defendants filed their Motion to Stay Discovery and/or for Protective Order on the grounds that the Court had not yet ruled on their Motion to Dismiss and that Plaintiffs' discovery requests were expansive, unduly burdensome, and oppressive. Inasmuch as the Court has ruled on Defendants' Motion to Dismiss, discovery shall not be stayed pursuant to O.C.G.A. § 9-11-12(j) and is therefore **MOOT**. Furthermore, pursuant to O.C.G.A. § 9-11-26(c), Defendants'

motion is **DENIED** as it relates to the remaining mandamus claim.

SO ORDERED this 4th day of February, 2016.



HONORABLE KIMBERLY M. ESMOND ADAMS
JUDGE, SUPERIOR COURT OF FULTON COUNTY
ATLANTA JUDICIAL CIRCUIT