The Honorable John H. Chun

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

EL CENTRO DE LA RAZA, a Washington non-profit corporation, *et al.*,

Plaintiffs,

v.

STATE OF WASHINGTON,

Defendant.

NO. 16-2-18527-4 SEA

ORDER RE:

INTERVENOR-DEFENDANTS' MOTION TO DISMISS FOR LACK OF STANDING, PURSUANT TO CR 12(b)(1); AND

DEFENDANT STATE OF WASHINGTON'S PARTIAL MOTION TO DISMISS PLAINTIFFS' AMPLE FUNDING AND ALTERNATIVE LEARNING EXPERIENCE CLAIMS

I. INTRODUCTION

THIS MATTER comes before the Court on Intervenor-Defendants' Motion to Dismiss for Lack of Standing, Pursuant to CR 12(b)(1) (the "Intervenor-Defendants' Motion") and Defendant State of Washington's Partial Motion to Dismiss Plaintiffs' Ample Funding and Alternative Learning Experience Claims (the "State's Motion").

The Court received the following materials submitted in connection with the two motions:

Hon. John H. Chun
King County Superior Court
516 3rd Ave., Seattle, WA 98104
(206) 477-1423

1. Intervenor-Defendants' Motion (Dkt. #12);
2. The State's Motion and attachment A thereto (Dkt. #16);
3. Intervenor-Defendants' Notice of Joinder and Joinder in State of Washington's Motion to Dismiss (Dkt. #25);
4. Plaintiffs' Response to Defendant State of Washington's Partial Motion to Dismiss Plaintiffs' Ample Funding and Alternative Learning Experience Claims and Intervenors' Motion to Dismiss Organizational Plaintiffs ("Plaintiffs' Response") (Dkt. #37);
5. Declaration of Jessica A. Skelton in Support of Plaintiffs' Response to the State's and Intervenors' Motions to Dismiss and Exhibit A thereto ("Skelton Declaration") (Dkt. #38);
6. Intervenor-Defendants' Reply in Support of Their Motion to Dismiss for Lack of Standing, Pursuant to CR 12(b)(1) (Dkt. #41); and
7. Defendant State of Washington's Reply in Support of Partial Motion to Dismiss Plaintiffs' Ample Funding and Alternative Learning Experience Claims (Dkt. #40).

A hearing took place the morning of Friday, November 4, 2016. Plaintiffs were represented by Paul J. Lawrence, Jamie L. Lisagor, and Athan Papailiou. The State of Washington was represented by Aileen B. Miller, Rebecca Glasgow, and David A. Stolier. And Intervenor-Defendants were represented by Robert M. McKenna, Melanie Phillips, and Adam Tabor.

Having considered the materials submitted, together with the arguments of counsel, the Court hereby ORDERS as follows:

II.

BACKGROUND

This case concerns whether the Charter School Act (the "CSA" or the "Act"), RCW Chapter 28A.710, violates the Washington Constitution. The two motions before the Court raise primarily questions of justiciability regarding certain plaintiffs and claims.

The plaintiff group consists of organizations (the "organizational plaintiffs") as well as individuals. The Intervenor-Defendants' Motion challenges the standing of the eleven organizational plaintiffs.

The State's Motion seeks dismissal of plaintiffs' Ample Funding and Alternative Learning Experience ("ALE") claims on justiciability grounds. Plaintiffs seek declaratory and injunctive relief with respect to both claims. Regarding the Ample Funding claim, Plaintiffs contend that the CSA interferes with the State's constitutional duty to fully fund public education. Plaintiffs also contend that charter schools are not ALEs; that the State unlawfully diverted (and will again divert) public funds to charter schools operating as ALEs; and that the Superintendent of Public Instruction's promulgation of Emergency Rules allowing charter schools to operate as ALEs during the 2015-2016 school year was unlawful.

III.

SUMMARY OF RULING

For the reasons discussed herein, the Court grants in part and denies in part the Intervenor-Defendants' Motion. The complaint indicates that Washington Education Association, International Union of Operating Engineers 609, and United Food and Commercial Workers Union 21 have public school employees as members. The CSA concretely and demonstrably affects these members by restricting their collective bargaining rights. Thus, these three organizational plaintiffs have representational standing. In contrast, the complaint does not adequately plead injury in fact or taxpayer status with respect to the remaining organizational plaintiffs. Accordingly, these eight plaintiffs are dismissed. The Court, however, grants

Plaintiffs leave to amend their complaint to plead the taxpayer status of the organizational plaintiffs.

Furthermore, for the reasons herein, the Court grants the State's Motion. The Ample Funding claim is dismissed on ripeness grounds; the ALE claim is dismissed on mootness and ripeness grounds. The Ample Funding claim lacks ripeness because it speculates that the CSA inhibits the State from meeting its 2018 public school funding obligations under *McCleary v. State*, 173 Wn.2d 477 (2012), and theorizes that the State cannot properly fund both charter schools and traditional public schools. Further, the CSA expresses legislative intent to fund charter schools equitably with other public schools via appropriations from the opportunity pathways account, not to divert general fund monies to charter schools that would otherwise be directed to traditional public schools. Finally, the ALE claim is moot because the Superintendent's Emergency Rules authorizing charter schools to operate as ALEs have expired; and the claim is not ripe because it requires speculation that, if the CSA were struck down, the Superintendent would once again promulgate emergency rules allowing charter schools to operate as ALEs.

IV.

INTERVENOR-DEFENDANTS' MOTION

Plaintiffs assert theories of taxpayer and representational standing. The Intervenor-Defendants say that both theories fail.

A. Taxpayer Standing.

Plaintiffs claim standing as taxpayers. Washington "recognizes litigant standing to challenge governmental acts on the basis of status as a taxpayer." *State ex rel. Boyles v. Whatcom Cnty. Superior Court*, 103 Wn.2d 610, 614 (1985). Such a plaintiff must be a taxpayer and bears the responsibility of properly pleading taxpayer status. *Id.*; *Friends of N. Spokane Cnty. Parks v. Spokane Cnty.*, 184 Wn. App. 105, 115 (2014) (citing *Warth v. Seldin,* 422 U.S. 490, 518 (1975)).

Intervenor-Defendants contend that organizations may not assert taxpayer standing. But Washington cases hold that governmental and non-governmental organizational plaintiffs qualify for taxpayer standing. *See, e.g., id.* at 111, 116 ("Washington courts have long recognized the right of an individual or entity 'to challenge governmental acts based solely upon the litigant's status as a taxpayer'") (quoting *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 281 (1997));[1] *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 269 (1975) (recognizing direct taxpayer standing for an issue regarding the misuse of taxpayer funds "raised by a private citizen or a governmental entity").

Here, the complaint does not plead the taxpayer status of the organizational plaintiffs. Nor do Plaintiffs point to any legal authority that would permit the Court to infer such status from the allegations therein. Pursuant to CR 15(a), the Court grants Plaintiffs leave to amend their complaint,[2] within ten days of this order, to plead the taxpayer status of the organizational plaintiffs.

B. Representational Standing.

1. Representational Standing Based on Standing of Members.

a. Applicable Legal Standards.

Washington recognizes representational standing based on the personal standing of an organization's members:

> An organization "has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

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[1] At oral argument, counsel for Intervenor-Defendants raised issues relating to the precedential value and rationale of *Friends of N. Spokane Cnty. Parks*, a decision of Division Three of the Court of Appeals. But a published ruling by any division of that court is binding on all state trial courts. *See Marley v. Dep't of Labor & Indus.*, 72 Wn. App. 326, 330 (1993), *aff'd sub nom. Marley v. Dep't of Labor & Indus. of State*, 125 Wn.2d 533 (1994) ("As a preliminary matter, we recognize that the [King County Superior] court was bound by [Division III's] decision in *Fairley*."). This Court is bound by *Friends of N. Spokane Cnty. Parks* and follows that decision.

[2] *See* Plaintiffs' Response (Dkt. # 37), 9 n.3 (essentially requesting leave to amend if further allegations are required for taxpayer standing).

Am. Legion Post #149 v. Wash. State Dep't of Health, 164 Wn.2d 570, 595 (2008) (quoting *Hunt v. Wash. State Apple Adver. Comm'n.*, 432 U.S. 333, 343 (1977)).

For individuals, there is a two-part test under the Uniform Declaratory Judgment Act ("UDJA"):

> The first part of the test asks whether the interest sought to be protected is "'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" The second part of the test considers whether the challenged action has caused "'injury in fact,'" economic or otherwise, to the party seeking standing.

Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 802 (2004) (citation omitted). "[A] party must be directly affected by a statute to challenge its constitutionality." *Fed. Way Sch. Dist. No. 210 v. State*, 167 Wn.2d 514, 528 (2009).

Zone of Interests. For the purposes of standing, if a complainant's interest is arguably within the zone of interests to be protected or regulated by the challenged statute, this requirement is satisfied. *See To-Ro Trade Shows v. Collins*, 144 Wn.2d 103, 414-15 (2001). *See also Branson v. Port of Seattle*, 152 Wn.2d 862, 876 n.7 (2004) ("When evaluating whether a party's interests are within the zone of interests to be protected by a statute, courts often refer to the general purpose of the statute.").

Injury in Fact. To show injury in fact, a plaintiff must allege a particularized injury concretely and demonstrably resulting from the challenged action, which injury will be redressed by the remedy sought. *City of Seattle v. State*, 103 Wn.2d 663, 681 (1985). The plaintiff must also show that it "will be specifically and perceptibly harmed by the action." *Save a Valuable Env't v. City of Bothell*, 89 Wn.2d 862, 866 (1978) (citing *United States v. S. C. R. A. P.*, 412 U.S. 669 (1973)). An alleged injury is not redressable if the plaintiff "would continue to suffer the exact injury of which it . . . complains" if granted the remedy sought. *City of Seattle*, 103 Wn.2d at 681.

Germaneness. Representational standing also requires that the interest a plaintiff organization seeks to protect is germane to the organization's purpose. *Mukilteo Citizens for*

Simple Gov't v. City of Mukilteo, 174 Wn.2d 41, 45 (2012). For example, the Supreme Court found a union's interest in protecting its members' retirement accounts was germane to its purpose of "establish[ing] proper and equitable standards of wages, hours and other conditions of employment" for its members. *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 214 (2002), *as amended*, 50 P.3d 618 (2002). As another example, the Supreme Court found that an interest in the use of red-light traffic cameras was germane to a stated organizational purpose (public safety) of Mukilteo Citizens for Simple Government, an unincorporated association of Mukilteo residents. *Mukilteo Citizens for Simple Gov't*, 174 Wn.2d at 46.

b. Organizational Plaintiffs with Members Who are Employees of Public Schools.

Three organizational plaintiffs—Washington Education Association ("WEA"), International Union of Operating Engineers 609 ("IUOE"), and United Food and Commercial Workers Union 21 ("UFCW 21")—are alleged to have members who are employees of public schools. These three organizations have standing here.

First, the collective bargaining interests of the members of WEA, IUOE, and UFCW 21 are at least arguably within the zone of interests to be protected or regulated by the CSA. The CSA provides in pertinent part that "[a]ny bargaining unit or units established at the charter school must be limited to employees working in the charter school and must be separate from other bargaining units in school districts, educational service districts, or institutions of higher education." RCW 41.56.0251. This provision regulates employees of public school districts as well as charter school employees. Notably, this provision resides in RCW Chapter 41.56—titled "Public Employees' Collective Bargaining"—and not in RCW Chapter 28A.710. And the stated purpose of RCW Chapter 41.56 is "to promote the continued improvement of the relationship between public employers and their employees by providing a uniform basis for implementing the right of public employees to join labor organizations of their own choosing." RCW 41.56.010.

Second, the members of WEA, IUOE, and UFCW 21 are alleged to have suffered a particularized injury concretely and demonstrably resulting from the CSA, which injury would be redressed by the remedy sought. The injury is the denial of association with charter school employees with whom they might otherwise form a bargaining unit. With respect to each of these three plaintiffs, the complaint alleges the CSA "undermin[es] collective bargaining through improperly adopted restrictions on collective bargaining and bargaining units." Complaint (Dkt. 1), ¶¶ 9, 13, 16. Striking down RCW 41.56.0251 would redress this injury by allowing this association.

Third, the collective bargaining interests these three organizational plaintiffs seek to protect are germane to their purposes. To be sure, interests in collective bargaining are germane to the purposes of labor organizations such as IUOE and UFCW 21. And Plaintiffs allege IUOE "has been actively involved in advocating for and collectively bargaining on behalf of classified employees in the Seattle School District . . . "; and UFCW 21 "engage[s] in advocacy on issues affecting all working families by protecting collective bargaining rights . . . " *Id.* at ¶¶ 13, 16. Moreover, the complaint alleges that WEA seeks "to advance the professional interests of its members in order to make public education the best it can be for . . . staff . . . . WEA's goal is to build confidence in public education and increase support for the State's public school system." *Id.* at ¶ 9.

Finally, neither the claims asserted nor the relief requested require the participation of individual members of IUOE, UFCW 21, or WEA in the lawsuit. Intervenor-Defendants do not dispute this point.

c. The Remaining Organizational Plaintiffs.

Plaintiffs do not adequately plead injury in fact with respect to the remaining eight organizational plaintiffs: El Centro de la Raza ("ECDLR"), League of Women Voters ("League"), Washington Association of School Administrators ("WASA"), Aerospace

Machinists Union, IAM&AW DL 751("IAM"), Washington State Labor Council, AFL-CIO ("WSLC"), Washington Federation of State Employees ("WFSE"), Teamsters Joint Council No. 28 ("Council No. 28"), and American Federation of Teachers Washington ("AFT-WA").

First, with respect to the remaining organizations claiming that the CSA harms their members by "undermining collective bargaining"—WASA, IAM, WSLC, WFSE, AFT-WA, and Council No. 28—it is not alleged that these organizations have public school employees as members. Complaint (Dkt. 1), ¶¶ 8, 14, 15, 17, 18, 19. With respect to these plaintiffs, the complaint asserts general, and not particularized, injury relating to collective bargaining; specific and perceptible harm is not alleged.

Second, regarding the organizations claiming members who are parents of children enrolled in public schools—i.e., ECDLR, WEA, IUOE, IAM, WSLC, WFSE, and Council No. 28—the complaint does not allege any injury concretely and demonstrably resulting from the CSA. Plaintiffs argue that these organizations' members' public school-enrolled children would have personal standing, citing *Seattle School District No. 1 of King County v. State*, 90 Wn.2d 476, 493 (1978). There, the Supreme Court held that public school children suffered injury in fact from the "adverse impact of insufficient revenue" that was "demonstrated by the findings of fact." *Id.* at 495. In *Federal Way School District No. 210*, the Supreme Court clarified its holding in *Seattle School District No. 1*, stating, "We held in *Seattle School District No. 1* that both parent and children plaintiffs had standing where the adverse impact of insufficient revenue on educational programs for individual students was demonstrated by the record." 167 Wn.2d at 528. *Federal Way School District No. 210* rejects the notion that harm can be based on an "implicit assumption" that a particular funding scheme results in "disparate educational quality." *Id.* at 529. There, the students and their parents did not have standing because no adverse impact

had been demonstrated and "the only evidence in this record show[ed] . . . [the] students generally score above the state average." *Id.* Similarly, Plaintiffs here have not demonstrated an adverse impact on parents and students. Rather, they have alleged only a generalized injury. And the complaint does not show how striking down the CSA would redress any harm to these individuals.

Third, Plaintiffs claim the CSA "take[s] away money that would otherwise have gone to . . . underfunded public schools and, instead, [gives] the money to charter schools." Plaintiffs' Response (Dkt. #37), 13. This assertion remains conclusory, however, and the nexus unclear; i.e., the complaint does not show how the claimed harm—diversion of funds—concretely and demonstrably results from the CSA. *See* Complaint (Dkt. #1), ¶ 61. Plaintiffs' theory—that monies from the general fund will be siphoned off to the opportunity pathways account, and then to charter schools, resulting in harm to traditional public schools—remains conjectural at this time.[3] And again, it is also unclear how striking down the CSA would redress the claimed harm. For example, Plaintiffs do not explain how, if the CSA were struck down, any of the allegedly diverted funds would likely be disbursed to public schools as opposed to some other funding obligation.

2. Representational Standing Based on Taxpayer Standing.

Plaintiffs contend that the organizational plaintiffs have representational standing based on the taxpayer standing of the organizations' members. But representational standing based on taxpayer standing has not been recognized in Washington. Plaintiffs cite *Lee v. State*, in which the Washington Supreme Court stated, "[a]lthough an analysis is unnecessary because every member of this suit has taxpayer standing, the League of Women Voters likely also has

[3] *See also* part V.A of this order, which further addresses Plaintiffs' diversion theory.

standing." 185 Wn.2d 608, 615 n.3 (2016). This statement does not support Plaintiffs' contention, as it is obiter dictum and it does not explain why the League likely had standing.[4]

In light of the foregoing, the Court grants in part and denies in part the Intervenor-Defendants' Motion. ECDLR, the League, WASA, IAM, WSLC, WFSE, Council No. 28, and AFT-WA are dismissed without prejudice. The Court need not reach the remaining issues raised in Intervenor-Defendants' Motion.

V.

THE STATE'S MOTION

Plaintiffs seek a declaratory judgment and injunctive relief for its Ample Funding and ALE claims.

For a claim to be justiciable under the UDJA, there must be:

> (1). . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Lee, 185 Wn.2d at 616 (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815 (1973)). "Inherent in these four requirements are the traditional limiting doctrines of standing, mootness, and ripeness, as well as the federal case-or-controversy requirement." *To-Ro*, 144 Wn.2d at 411.

Even if moot, a case may be decided if it involves a matter of "continuing and substantial public interest." *Sorenson v. Bellingham*, 80 Wn.2d 547, 558 (1972). This exception involves a three-factor test that weighs, "(1) whether the issue is of a public or private nature; (2) whether

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[4] Plaintiffs also cite this dictum for the proposition that, since the individual plaintiffs have standing, the Court need not reach issues concerning whether the organizational plaintiffs have standing. Plaintiffs' Response, 7 (Dkt. #37). The Court disagrees. No applicable legal authority holds that, if one plaintiff has standing, any other party may join as a plaintiff regardless of whether that other party has standing.

an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur." *Hart v. Dep't of Soc. & Health Servs.*, 111 Wn.2d 445, 448 (1988) (citing *In re Cross*, 99 Wn.2d 373, 377 (1983)). The Court must find "an actual benefit to the public interest in reviewing a moot case [that] outweighs the harm from an essentially advisory opinion." *Id.* at 450. Moreover, for the public importance exception to apply, the dispute must be ripe. *League of Educ. Voters v. State*, 176 Wn.2d 808, 819 (2013).

Likewise, "[i]njunctive relief is prospective and requires evidence of current violations." *Braam ex rel. Braam v. State*, 150 Wn.2d 689, 708 (2003) (citing *Rumbolz v. Public Util. Dist. No. 1 of Okanogan Cnty.*, 22 Wn.2d 724, 734 (1945)). An injunction's "purpose is not to protect a plaintiff from mere inconveniences or speculative and insubstantial injury." *Tyler Pipe Indus., Inc. v. State, Dep't of Revenue*, 96 Wn.2d 785, 796 (1982).

A. Ample Funding Claim.

Plaintiffs' Ample Funding claim is predicated in large part on the Supreme Court's findings in *McCleary* that the State is failing to satisfy its constitutional duty of ample provision. Yet, in making this argument, Plaintiffs highlight in significant part failures that predate the enactment of the CSA this year. *See* Plaintiffs' Response (Dkt. #37), 21. In addition, the broad allegation that the CSA is worsening the *McCleary* harm and will inhibit the State from meeting its 2018 deadline is speculative and theoretical at this point.

Further, Plaintiffs speculate that lottery revenue will prove insufficient to fund charter schools, that the legislature will shift funds between the opportunity pathways account and the general fund, and that funds will be diverted away from other public schools. The CSA does not indicate any such diversion. Instead, the CSA provides, "[t]he legislature intends that state funding for charter public schools be distributed equitably with state funding provided for other

public schools." RCW 28A.710.280(1). It also provides, "[t]he state legislature shall, at each regular session in an odd-numbered year, appropriate from the Washington opportunity pathways account for the current use of charter schools." RCW 28A.710.270. The legislature's intent to equitably fund charter schools, plus the upcoming odd-numbered year appropriation for charter schools from the opportunity pathways account, do not generate an actual, present, and existing dispute of monies being diverted away from public schools.[5]

At this point, Plaintiffs' Ample Funding claim is based on speculation about the CSA's effects. As the claim is not ripe, it is dismissed.

B. Alternative Learning Experience ("ALE") Claim.

To the extent Plaintiffs challenge the expired Emergency Rules and past operation of ALEs, the ALE claim is moot. And to the extent Plaintiffs claim, in conclusory fashion, that "[t]here is an imminent risk that the State will continue to misuse the ALE scheme . . . ," the ALE claim is not ripe.

Plaintiffs concede that "enactment of the Act may have temporarily halted the diversion of funds using the ALE scheme." Plaintiffs' Response (Dkt. #37), 32. Plaintiffs do not contend that the Emergency Rules are in effect and currently diverting funds from traditional public schools to charter schools under an impermissible ALE categorization.

At this point, one can only speculate that the allegedly improper ALE categorization is likely to recur. The Emergency Rules were implemented under unique circumstances when the previous charter school law was struck down in its entirety shortly after the school year began. Plaintiffs have not alleged facts indicating a likelihood of this scenario repeating. Because the

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[5] The "Fiscal Impacts" information provided by Plaintiffs appears to indicate merely that charter schools will be funded through the opportunity pathways account instead of the general fund. Skelton Declaration (Dkt. # 38), Ex. A.

Emergency Rules are not currently in effect, and because it has not been shown that the State is likely to allow charter schools to operate as ALEs, the ALE claim is moot and not ripe. As the claim is not ripe, the public importance exception cannot apply. Accordingly, the claim is dismissed.

In light of the foregoing, the Court need not reach the remaining issues raised in the State's motion and grants it.

VI.

CONCLUSION

The Intervenor-Defendants' Motion is GRANTED IN PART and DENIED IN PART. ECDLR, the League, WASA, IAM, WSLC, WFSE, Council No. 28, and AFT-WA are DISMISSED WITHOUT PREJUDICE. Pursuant to CR 15(a), Plaintiffs are GRANTED LEAVE TO AMEND their complaint, within ten days of this order, to plead the taxpayer status of the organizational plaintiffs.

The State's Motion is GRANTED. Plaintiffs' Ample Funding and Alternative Learning Experience claims are DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

DATED this 18th day of November, 2016.

John H. Chun

Judge John H. Chun

Hon. John H. Chun
King County Superior Court
516 3rd Ave., Seattle, WA 98104
(206) 477-1423