

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
CIVIL DIVISION

GWEN FAULKENBERRY,
SPECIAL RENEE SANDERS,
ANIKA WHITFIELD, and
KIMBERLY CRUTCHFIELD

PLAINTIFFS

v.

Case No. 60CV-24-4630

ARKANSAS DEPARTMENT OF EDUCATION;
JACOB OLIVA, in His Official Capacity as Secretary
of the Arkansas Department of Education;

DR. SARAH MOORE, Chairwoman of the State Board
of Education; KATHY MCFETRIDGE-ROLLINS, Vice-Chair of the State
Board of Education; LISA HUNTER, JEFF WOOD, RANDY HENDERSON,
ADRIENNE WOODS, KEN BRAGG, and LEIGH S. KEENER,
Members of the Arkansas State Board of Education;

SARAH H. SANDERS, GOVERNOR
of the STATE OF ARKANSAS; and

The ARKANSAS DEPARTMENT of FINANCE
and ADMINISTRATION; and
JIM HUDSON, In His Official Capacity as
Secretary of the Arkansas Department of
Finance and Administration,

DEFENDANTS

ORDER DENYING MOTION TO DISMISS

BEFORE THE COURT is the Motion to Dismiss filed on behalf of all
Defendants. Plaintiffs have now filed their Response and the Defendants have
filed a reply.

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Defendants move, both under Rule 12(b)(6) ARCP, and under the Doctrine of Sovereign Immunity, for a dismissal of the entire case. For the reasons set forth herein, the Court DENIES the Motion to Dismiss.

I. Rule 12(b)(6) does not obtain at this early stage in a case, such as this, where sufficient 'well-pleaded' facts have been alleged.

Rule 12(b)(6) provides:

(b) How Presented. Every defense, in law or in fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader, be made by motion:

...(6) failure to state facts upon which relief can be granted,

In testing the sufficiency of the complaint on a motion to dismiss for failure to state a claim, the trial court must resolve all reasonable inferences in favor of the complaint and liberally construe the pleadings. Rules Civ.Proc., Rule 12(b)(6); *Hutchinson v. McArty*, 2020 Ark. 190, 600 S.W.3d 549. For the purposes of a motion to dismiss, only the facts alleged in the complaint are treated as true; not a party's theories, speculation, or statutory interpretation. *Id* (citing *Ark. Game & Fish Comm'n v. Heslep*, 2019 Ark. 226, 577 S.W.3d 1). Conclusory statements are not sufficient under the Arkansas Rules of Civil Procedure, which identify Arkansas as a fact-pleading state. *Kelley v. Johnson*, 2016 Ark. 268, 20, 496 S.W.3d 346, 359 (citing *Worden v. Kirchner*, 2013 Ark. 509, 431 S.W.3d 243; *Born v. Hosto & Buchan, PLLC*, 2010 Ark. 292, 372 S.W.3d 324).

The Court finds that the Plaintiff's pleadings are sufficient under the Arkansas Rules of Civil Procedure. Plaintiff's Complaint plainly states:

Under Section 42 of the LEARNS ACT, Ark. Code Ann. 6-18-2501 et. seq., a program is established entitled the "Arkansas Children's Educational Freedom Account Program" ("Freedom Accounts") otherwise known as the "Voucher Program") [sic]. Under the Voucher Program, public school funds derived from public taxes assessed and collected under the laws of Arkansas for the public schools may be deposited into an account (a "Freedom Account") established by the State of Arkansas for or on behalf of an "eligible student" (i.e.; a resident of the State of Arkansas who is eligible to enroll in a public elementary or secondary school), and is used by the State to purchase tuition, uniforms and other goods and services for such "eligible students" directly from private schools, for home schooling, and from other private service providers.

Complaint at 13 (internal citations omitted). This is a statement of fact. It is not conclusory nor is it comprised merely of theories or statutory interpretation. The Complaint contains several other facts as well but the Court will not copy the entire Complaint word for word. In fact, Defendants argue and present nine pages of factual argument (plus a one-page diagram) to counter the facts alleged by the Plaintiffs. This is the very definition of the phrase "facts in dispute".

II. Sovereign Immunity Does Not preclude the Plaintiff's Illegal Exaction Claim

An illegal exaction claim, properly pleaded, is an exception to the Doctrine of Sovereign Immunity. The Court FINDS in its review of the Complaint that it is indeed pleaded sufficiently properly to avoid dismissal for Sovereign Immunity.

Defendants claim that sovereign immunity applies under *Rutledge v. Remmel*, 2022 Ark. 86, S.W. 3d 5 and that the case must be dismissed because the Complaint does not show that the Defendants acted *ultra vires*. However, the Arkansas Supreme Court ruled in *Rutledge* that “[an] official-capacity claim for an illegal exaction is not subject to either sovereign or statutory immunity.” 643 S.W. 3d at 7.

In his concurring opinion in *Rutledge*, 643 S.W. 3d at 12, Justice Womack defined the General Rule concerning immunity and illegal exaction:

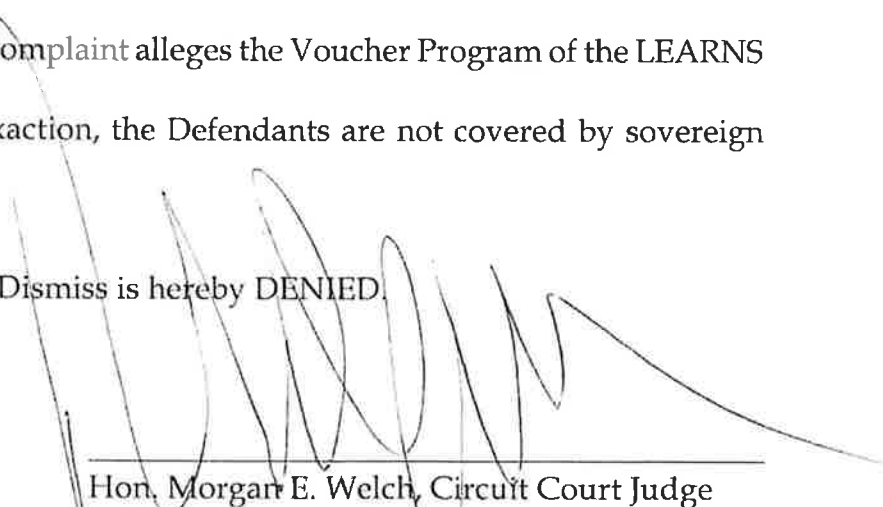
Our constitution provides that “[a]ny citizen of any county, city or town may *initiate suit*, in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of *any illegal exactions whatever*.” Ark. Const. art. 16, § 13 (emphasis added). This text-based exception to the general prohibition of suits against the State is unlike the exceptions this court has created out of whole cloth for unconstitutional, *ultra vires*, and illegal acts. Here, a constitutional provision expressly affords citizens a *judicial* remedy against the State for illegal exactions. *Id.* Accordingly, the State—and by virtue, the Attorney General in her official capacity—cannot assert sovereign immunity when defending against a properly pled illegal-exaction claim...

Since the Plaintiffs’ Complaint alleges the Voucher Program of the LEARNS Act constitutes an illegal exaction, the Defendants are not covered by sovereign immunity.

The Defendants’ Motion to Dismiss is hereby DENIED.

8/12/24

Date



Hon. Morgan E. Welch, Circuit Court Judge