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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

VELIA AGUIRRE; ROSEMARY McATEE,

Plaintiffs,

vs.

STATE OF ARIZONA; ARIZONA
DEPARTMENT OF EDUCATION;
THOMAS HORNE, in his official capacity
as Superintendent of Public Instruction,

Defendants,

Case No. CV2024-026463

**PLAINTIFFS' REPLY IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

**(Assigned to the Honorable
David McDowell)**

INTRODUCTION

This case boils down to a single legal question: Does state law *require* the Arizona Department of Education to demand curriculum documentation for *every* supplementary material purchase, or not? On that legal issue, there is no material factual dispute, and judgment should be entered for Plaintiffs as a matter of law.

The State insists that this Court cannot decide the legality of Defendants' policy of requiring this curriculum documentation ("Documentation Policy") for every "supplementary material" reimbursement request by Empowerment Scholarship Account ("ESA") holders, because "a multitude of material fact questions remain unanswered." Resp. at 1.¹ That is not true. None of the State's purported factual disputes is *material* to

¹ The State's Response double-counts Page "1." All citations herein count from the second "Page 1" (the State's first page of substantive briefing).

1 the issues in this case. Regardless of any slight variations in how Department staff have
2 evaluated particular curriculum documentation submissions, the core of the
3 Documentation Policy has remained the same: the Department requires parents to submit
4 curriculum documentation with “supplementary materials” reimbursement requests, and
5 refuses to approve supplementary material expenses without the requisite documentation
6 of a “curriculum nexus.” The Department has done that since the Attorney General’s July
7 2024 demand that the Department implement this new policy. The only dispositive
8 question in this lawsuit is whether that Policy is lawful, and that question is purely legal,
9 not factual. Thus, none of the immaterial disputes the Department offers precludes
10 summary judgment.

11 The Policy is unsupported by law and violates both the *Handbook* and the
12 Department’s own regulations, both adopted pursuant to statute. Plaintiffs are entitled to
13 declaratory and injunctive relief against the Policy, and the Court should enter judgment in
14 their favor.

15 ARGUMENT

16 I. Plaintiffs seek prospective relief.

17 First, a point of clarification: this case is not “an appeal” of “ADE administrative
18 decisions.” Resp. at 17. Rather, this case challenges Defendants’ refusal to allow families
19 to use ESA funds to buy supplementary materials for their children’s education, as both
20 the statutes and Defendants’ own regulations require. *See* Compl. ¶ 1. Plaintiffs seek only
21 *prospective* relief, not reimbursement for any past expenses. *See id.* ¶¶ 98–101 & Request
22 for Relief at 17; Motion for Summary Judgment (“Motion”) at 2, 5, 8 (asking Court to
23 grant declaratory and injunctive relief).

24 For this reason, the State’s arguments regarding “whether Plaintiffs’ requests would
25 have been rejected for other reasons or would now be approved” miss the point. Resp. at
26 16. To be sure, Plaintiffs’ Verified Complaint and Motion do describe specific
27 reimbursement requests that have been wrongfully denied because of the Documentation
28 Policy, *see, e.g.*, Compl. ¶¶ 18–26, 30–36, but these are just examples to demonstrate how

1 the Documentation Policy works and to establish Plaintiffs’ standing—to show that
2 Plaintiffs have suffered (and are still suffering) “injury in fact,” and that their claims for
3 declaratory relief are “‘based on an existing [set] of facts’ and ‘[are] not advisory.’”
4 *Republican Nat’l Comm. v. Fontes*, 566 P.3d 984, 990 ¶¶ 11, 13 (Ariz. App. 2025)
5 (citation omitted); *see also, e.g., Mills v. Ariz. Bd. of Tech. Reg.*, 253 Ariz. 415, 423 ¶ 24
6 (2022) (“A plaintiff has standing to bring an action if it alleges a ‘distinct and palpable
7 injury’; a generalized harm shared by all or by a large class of people is generally
8 insufficient.” (citation omitted)). Plaintiffs are not asking, and have never asked, this
9 Court to review the denials of any specific reimbursement requests or reverse any
10 previous Department decision. Thus, the State’s speculation about whether particular
11 requests “would have been rejected ... or ... approved” for other reasons is immaterial.
12 Resp. at 16.

13 For the same reason, it’s immaterial to Plaintiffs’ claims for prospective relief
14 “whether [they] have sufficiently exhausted all administrative remedies” or whether the
15 past rejections of payment requests were “administrative decisions.” Resp. at 17.² “[A]
16 litigant is required to exhaust administrative remedies only if he has access to a statutorily
17 prescribed administrative remedy.” *Mills*, 253 Ariz. at 421 ¶ 14. But none exists here.
18 Plaintiffs did not need to exhaust administrative remedies before seeking declaratory or
19 injunctive relief because “neither the statutes nor the Board’s regulations provide a
20 mechanism for [them] to request or require review” of the Documentation Policy. *Id.*
21 ¶ 15.³

24 ² Incidentally, Plaintiffs *did* exhaust all available remedies before the Department and the
25 State Board of Education (“Board”) as to both their specific requests and their objections
to the Policy—although they did not need to do so to seek a judicial decision regarding the
legality of the Policy itself. Compl. ¶¶ 37–40.

26 ³ Nor, for that matter, does the Declaratory Judgments Act (Plaintiffs’ statutory basis for
27 seeking declaratory relief) require administrative exhaustion. *Id.* ¶ 16; *see* A.R.S. § 12-
1831 (“Courts of record within their respective jurisdictions shall have power to declare
rights, status, and other legal relations whether or not further relief is or could be claimed.
28 No action or proceeding shall be open to objection on the ground that a declaratory
judgment or decree is prayed for.”).

1 Likewise, the State misses the point when it speculates about “whether [an]
2 arbitration clause [in the 2024–2025 ESA Contracts] is applicable to this dispute, and why
3 ADE has not invoked that clause.” Resp. at 17. For one thing, the Department—the only
4 Defendant who’s a party to those contracts and has standing to invoke the arbitration
5 clause—has never sought arbitration. *See Kramer v. Toyota Motor Corp.*, 705 F.3d 1122,
6 1127 (9th Cir. 2013) (holding non-signatory could not enforce contractual arbitration
7 clause). More fundamentally, the arbitration clause, which requires “exhausting applicable
8 administrative remedies” and applies only to “disputes arising out of or relating to th[e]
9 Contract[s],” don’t apply here. State’s Opposing Statement of Facts (“State’s SOF”), Ex.
10 H at AGUIRRE.0416-0417 ¶ 19. Plaintiffs aren’t disputing specific transactions pursuant
11 to their own ESA contracts. They’re seeking prospective relief regarding how state law
12 and agency regulations require the Department to administer the ESA program.

13 **II. The Documentation Policy is clear.**

14 The State argues that “[t]here is a dispute about what ADE actually requires ESA
15 Holders to submit when seeking ADE approval to use ESA funds on supplementary
16 materials,” and “Plaintiffs’ Motion must therefore be denied.” Resp. at 13, 15. This
17 argument is unavailing for several reasons.

18 First, the supposed “different versions of [the] Documentation Policy” that the
19 State describes differ only in immaterial ways. Resp. at 2. Every one of the “eight
20 articulations of the documentation policy” the State identifies (Resp. at 14) has the same
21 core requirement that parents submit some kind of curriculum documentation with *every*
22 reimbursement request for supplementary materials, even if those materials are listed
23 under the *Handbook*’s “no documentation needed” provision.⁴

24 ⁴ *See* State’s SOF ¶ 10 (“[S]upplemental materials without curricula ... will no longer be
25 allowed.”); *id.* ¶ 12 (“Moving forward, the ESA program will not approve or reimburse
26 for any supplemental materials that are not required or recommended by a curriculum.”);
27 *id.* ¶ 46 (requiring “a clear connection between the supplementary materials you are
28 submitting and your curriculum,” stating Department’s review is “based on the curriculum
you’ve submitted”); *id.* ¶ 47 (stating that parents may “submit an additional parent-
prepared curriculum supporting and justifying the items”); *id.* ¶¶ 81, 21 (email denying
Plaintiffs’ requests and stating requests must include curriculum “show[ing] that the
requested item(s) are required or recommended”); *id.* ¶ 48 (confirming Department was

1 The State also claims that the Department approved a different reimbursement
2 request for items “including Sharpie pens and highlighters,” submitted on July 17, 2024
3 by Plaintiff Aguirre *with* curriculum documentation, even though the documents she
4 submitted did not “list[] Sharpie pens or highlighters as recommended or required.” Resp.
5 at 15. But this doesn’t undermine Plaintiffs’ argument at all. On the contrary, it further
6 demonstrates Defendants’ use of a Documentation Policy because it shows that the
7 Department *approved* a reimbursement request that was submitted with documentation,
8 while it *denied* other requests submitted *without* documentation. Precisely how the
9 Department reviews and evaluates curriculum documentation is immaterial. The point is
10 that the Documentation Policy is currently in place and requires parents to submit
11 documentation with every reimbursement request. The only dispositive question here is
12 whether that Policy is lawful.

13 Additionally, even if the State could point to some variation in how the Policy has
14 been enforced, that wouldn’t undermine Plaintiffs’ arguments. Indeed, it would be
15 unreasonable to expect total consistency in how numerous employees at a major
16 government agency (who typically “review about 250 to 300 orders a day,” State’s SOF,
17 Ex. D at 103:19–20) have each applied a policy over the course of 11 months. A practice
18 “need not be formal or written” to constitute a policy, nor does it need to be carried out
19 with absolute uniformity. *Gordon v. Cnty. of Orange*, 6 F.4th 961, 974 (9th Cir. 2021).⁵
20 Rather, it must simply “be ‘so permanent and well settled as to constitute a ‘custom or
21 usage’ with the force of law.” *Id.* (citation omitted).

22
23
24 “now requiring all supplemental material to be supported by a curriculum”); *id.* ¶ 49
25 (stating Department staff “would have to review the curriculum to ensure that the
26 common general education item was required or recommended in the curriculum”); *id.*
27 ¶¶ 50–59 (explaining how staff “review ... supplementary materials in relation to the
28 curriculum” parents submit).

⁵ *Gordon* articulates the long-established standards for a “policy, custom, or practice” in
the context of municipal *Monell* liability. If the Documentation Policy satisfies this
standard (which federal courts apply in evaluating claims against government entities for
violating individuals’ constitutional rights through their policies), then it is surely enough
of a “policy” to merit a decision regarding its legality.

1 Regardless of slight variations in execution, the Documentation Policy has
2 consistently required parents to submit curriculum documentation with *every*
3 reimbursement request for supplemental materials. That requirement—which the
4 Department has announced and reaffirmed in official public communications for nearly a
5 year—is “of sufficient duration, frequency and consistency” to constitute a policy. *Id.*; *see*
6 Motion at 6–7. And that means this Court can determine its legality.

7 While the State insists that “numerous questions ... can only be resolved through
8 further discovery,” it fails to explain the legal import of these purported questions. Resp.
9 at 13. Indeed, despite having previously sought and obtained Rule 56(d) relief, the State
10 fails to identify what specific discovery is still needed.

11 On the contrary, the State’s claims of confusion and inconsistency about precisely
12 *how* the Documentation Policy has been enforced over the past 11 months only prove that
13 Defendants *have* been enforcing a Documentation Policy: that is, requiring parents to
14 submit curriculum documentation with their reimbursement requests as a prerequisite for
15 using ESA funds on *any* supplementary materials, regardless of whether those materials
16 are listed under the *Handbook*’s “no documentation needed” provision.

17 Indeed, despite insisting that “[m]yriad issues of material fact prevent summary
18 judgment here,” Resp. 13, the State aptly identifies the fundamental legal question that—
19 notwithstanding any of those factual issues—is the core of this lawsuit: whether the
20 Department may, “as a prerequisite for reimbursement, require parents to submit *any*
21 documentation demonstrating that supplementary materials are related to the qualified
22 student’s particular course of study.” *Id.* at 1. When it comes to the items listed under the
23 *Handbook*’s “no documentation needed” provision, it may not. The validity of the Policy
24 is a purely legal question that is ripe for this Court’s adjudication, regardless of the
25 immaterial factual disputes the State attempts to raise.

26 **III. The Documentation Policy is still in force.**

27 The State also argues that the Documentation Policy “is no longer in force”
28 because the Department “abandoned any documentation requirements months ago and

1 now automatically approves all reimbursements under \$2,000.” Resp. at 2; State’s SOF
2 ¶ 61–66. That’s incorrect. While the Department recently streamlined its procedures to
3 “automatically *process*[.]” transactions under \$2,000, those transactions are not necessarily
4 *approved*. State’s SOF, Ex. D at 128:7–129:24 (emphasis added). On the contrary, the
5 Department’s 30(b)(6) witness made clear that “those requests [can] still be audited,” and
6 if audited, the requestors would need to comply with the Documentation Policy. *Id.* at
7 128–131; *see also id.* at 129:25–130:3 (affirming that “the department still expects all
8 parents to follow all applicable policies even if there’s a chance they might not get caught
9 for violating [them]”). The Department could not “give any assurance that [Plaintiffs’]
10 reimbursement requests won’t be audited.” *Id.* at 131:6–13.

11 Thus, Plaintiffs must still comply with the Documentation Policy, or else risk being
12 found non-compliant and having to disgorge any funds reimbursed in violation of that
13 Policy. If anything, the added uncertainty makes matters even worse: if parents fear a
14 previously processed reimbursement will later be audited and denied, they will hesitate to
15 submit expenses for reimbursement at all.

16 It makes no sense for the State to suggest that Plaintiffs’ claims are “moot,” Resp.
17 at 18 (citation omitted), simply because some of Plaintiffs’ requests might slip through the
18 cracks and get processed without the required curriculum documentation. Even if
19 Plaintiffs could obtain reimbursement upfront for expenses under \$2,000, that wouldn’t
20 relieve them of having to comply with all relevant ESA laws and policies—including the
21 Documentation Policy Defendants have repeatedly articulated. Indeed, the State’s
22 argument is particularly misplaced given that the State’s own attorneys opened an “illegal
23 payment of public monies” investigation against the Department for the very practice of
24 processing such requests—suggesting that Department employees and other individuals
25 could be personally liable for failing to enforce the Documentation Policy. State’s SOF
26 ¶ 7; *see, e.g., Levine v. Haralson, Miller, Pitt, Feldman & McAnally, P.L.C.*, 244 Ariz. 234,
27 239 ¶ 16 (App. 2018) (“A party should not be permitted to ‘blow hot and cold’ with
28 reference to the same transaction, or insist at different times on the truth of each of two

1 conflicting allegations according to the promptings of his private interest.” (citation
2 modified)).

3 **IV. The Documentation Policy violates the *Handbook*.**

4 Contrary to the State’s arguments, the *Handbook* provision controls in any conflict
5 with the Documentation Policy, as the *Handbook* reflects the policies approved by the
6 State Board of Education—the body statutorily charged with adopting rules and policies
7 of the ESA program. The Department does not have authority under statute to override the
8 policies of the Board and may not implement policies that directly contradict the Board’s
9 guidance. And the Documentation Policy does directly contradict the *Handbook*, which
10 provides a non-exhaustive list of materials (including materials Plaintiffs have purchased
11 and continue to purchase for their children) that “do not require curriculum”
12 documentation to justify ESA expenditures. PSOF ¶¶ 5–6. The State says that “the
13 *Handbook* clearly states that its policies are subject to change,” Resp. at 12—but that does
14 not mean the Department can unilaterally override the guidance set by the Board in the
15 *Handbook* unless the Board *actually changes* its policies. Here, the Board hasn’t done so.

16 On June 23, the Board approved a new 2025–2026 *ESA Handbook*, which states:

17 What parents are required to document for general education supplemental
18 material below is currently the subject of a lawsuit pending in Arizona
19 Superior Court. As of the date of this publication, the matter has not been
resolved.

20 Effective July 1, 2025–June 30, 2026:

21 A) If required by law or court order, all supplemental materials shall be
submitted with curriculum documentation.

22 B) If not required by law or court order, curriculum documentation is not
23 required for supplementary material generally known to be educational,
24 including the following:

25 2025–2026 Parent Handbook at 23.⁶ The *Handbook* then provides a list substantially
26 similar to the one in the previous “no-documentation-needed” provision.

27
28 ⁶ [https://www.azed.gov/sites/default/files/2025/06/Draft.Clean .ESA%202025-2026%20Parent%20Handbook%2006.18.25%20%281%29.pdf](https://www.azed.gov/sites/default/files/2025/06/Draft.Clean_ESA%202025-2026%20Parent%20Handbook%2006.18.25%20%281%29.pdf).

1 There is no court order requiring curriculum documentation. And, as explained in
2 the following section, nothing in statute requires such documentation. Therefore, Section
3 (B) applies, and the *Handbook* allows reimbursement requests for the listed
4 supplementary materials without curriculum documentation. This directly contradicts the
5 Documentation Policy.

6 **V. Statute and regulation do not support the Documentation Policy.**

7 Because the *Handbook* squarely prohibits the Documentation Policy, and the
8 *Handbook* has the force of law, the only way the Policy can survive is if it is authorized by
9 statute: that is, if statute *requires* parents to submit documentation for all supplementary
10 purchases. That would mean that the *Handbook*'s "no documentation needed" provision
11 *violates* statute.

12 But that's simply not the case. Nothing in Section 15-2402 (the provision
13 authorizing the use of ESA funds on supplementary materials) states that parents must
14 submit (or the Department must require) curriculum documentation to accompany every
15 single reimbursement request. On the contrary, as the State recognizes, "[t]he Board is
16 empowered to adopt rules and policies 'for examinations of the use of account monies,'" and the Department "is responsible for determining whether 'the purchase of a good or
17 educational service ... is an allowable expense.'" Resp. at 11 (quoting A.R.S. §§ 15-
18 2403(I) & 15-2403(L)(2)). The Department and the Board exercised that authority when
19 they drafted and enacted the "no documentation needed" provision in the *Handbook*. And
20 that provision, consistent with statute, entitles Plaintiffs to use ESA funds on certain
21 enumerated categories of supplementary materials without submitting curriculum
22 documentation.
23

24 The specific statutory language outlining allowable ESA purchases also supports
25 the purchase of supplementary materials outside the confines of the Documentation
26 Policy. Section 15-2402(B)(4)(e) authorizes families to spend ESA funds on both
27 "[c]urricula" *and* "supplementary materials." Because these terms appear separately,
28 "supplementary materials" must refer to something other than simply "curricula." *See In*

1 *re Riggins*, 257 Ariz. 28, 31 ¶ 12 (2024). It must also, by extension, mean something more
2 than those “supplemental materials” separately listed in Section 15-2401(2)’s definition of
3 “curriculum”—the ones that must be “required or recommended by the curriculum.”⁷

4 In particular, Section 15-2402(B)(4)(e)’s authorization covers educational materials
5 that the Department deems not to need specific curriculum documentation. The statute’s
6 plain text and the legislative history make clear that the Legislature added Section 15-
7 2402(B)(4)(e)’s “and supplementary materials” language specifically to allow parents to
8 purchase certain educational materials (which the *Handbook* identifies) *without*
9 submitting additional paperwork to substantiate those purchases. *See* Motion at 9–11. The
10 State’s claim that the Documentation Policy is *necessitated* by statute, Resp. at 12–13,
11 thus has no basis in the law’s text or in legislative intent.

12 The State also argues that the *regulations* adopted by the State Board of Education
13 requires the Documentation Policy. But as with statute, no such reference to a
14 documentation requirement exists in regulation. Rather, even the definition of
15 supplemental materials adopted by the State Board of Education expressly permits the
16 purchase of materials that “enhance, complement, enrich, extend or support” students’
17 courses of study, A.A.C. R7-2-1501(16), and there is no indication in this rule that a
18 parent must provide curriculum documentation to substantiate *every expense*, even for
19 materials as obviously educational as pencils and books.

20 If anything, the State Board of Education’s rule further demonstrates the
21 *Handbook*’s supremacy over an arbitrary policy change by the Department because it
22 explicitly states that the *Handbook* is subject to Board approval. Given that the State
23 Board of Education—not the Department—is “the policy-determining body” charged by
24 statute with setting the rules and policies of the ESA program, the Board’s policies as
25 prescribed in the *Handbook* supersede the conflicting Documentation Policy. A.R.S. § 15-

26 ⁷ While there may be no semantic distinction between the words “supplemental” and
27 “supplementary,” Resp. at 5, the two *statutes* that use those respective terms (Section 15-
28 2402(B)(4)(e) and Section 15-2401(2)) *do* have distinct meanings. The State often
conflates these two provisions in its brief, and it does not offer an interpretation that gives
distinct meaning to each.

1 231(B); *see also* A.R.S. § 15-2403(I) (“The state board of education may adopt rules and
2 policies necessary to administer Arizona empowerment scholarship accounts, including
3 rules and policies....”).

4 **CONCLUSION**

5 The Court should enter judgment in Plaintiffs’ favor, declare the Documentation
6 Policy unlawful, and enjoin Defendants from enforcing the Documentation Policy.

7
8 **RESPECTFULLY SUBMITTED** this 30th day of June, 2025.

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