

**IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE  
20<sup>TH</sup> JUDICIAL DISTRICT, DAVIDSON COUNTY, PART TWO**

ELIAS ZARATE, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 THE TENNESSEE BOARD )  
 OF COSMETOLOGY AND BARBER )  
 EXAMINERS; ROXANA GUMUCIO, in her )  
 official capacity as executive director of the )  
 Tennessee Board of Cosmetology; RON R. )  
 GILLIHAN, KELLY BARGER, NINA )  
 COPPINGER, JUDY MCALLISTER, )  
 PATRICIA J. RICHMOND, MONA )  
 SAPPENFIELD, FRANK GAMBUZZA, )  
 AMY TANKSLEY, ANITA CHARLTON, )  
 YVETTE GRANGER, JIMMY BOYD, )  
 BRENDA GRAHAM, and REBECCA )  
 RUSSELL, in their official capacities )  
 as members of the Board. )  
 )  
 Defendants. )

Case No. 18-534-II

N.F.

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**MEMORANDUM AND ORDER**

The Plaintiff, Elias Zarate (“Plaintiff”), filed this action on May 15, 2018 seeking declaratory and injunctive relief. The Plaintiff requested this Court to declare unconstitutional the provision of Tenn. Code Ann. § 62-3-110(b)(2) that requires any person seeking a barber's license to have a twelfth-grade education or equivalent degree. This matter is presently before the Court on the Defendants’ motion to dismiss. Upon consideration of the pleadings, the various exhibits submitted by the parties, the arguments of counsel at the hearing of this motion and the entire record, the Court finds the Defendants’ motion to dismiss should be denied. The Court incorporates and reiterates the findings made by this Court in

open court at the end of the hearing of this motion. The Defendants shall file with this Court a written transcript of the Court's oral ruling by no later than November 23, 2018.

The Plaintiff makes a facial challenge to the constitutionality of Tenn. Code Ann. § 62-3-110(b)(2)'s requirement that a barber's license applicant be a high school graduate, or hold an equivalent degree, arguing that this provision violates 1) Article 1, Section 8, of the Tennessee Constitution; 2) the equal protection requirements of Article 1, Section 8, and Article 11, Section 8, of the Tennessee Constitution; and 3) the equal protection and due process provisions of the 14th Amendment to the United States Constitution

The Defendants seek to dismiss this Complaint pursuant to Tennessee Rule of Civil Procedure 12.02(1), asserting this Court lacks subject matter jurisdiction in this case for three independent reasons. First, the Defendants claim the Plaintiff lacks standing because he has not sought a master barber certificate from the Tennessee Board of Cosmetology and Barber Examiners (hereinafter "the Cosmetology Board"). Thus, per the Defendants, the Plaintiff has not suffered any concrete and particularized injury that would provide standing. Second, the Defendants assert that the Plaintiff's challenge is not yet ripe for review in that the dispute has not matured to the point that it warrants a judicial decision. The Court considers the ripeness argument to be the same essential argument as the Defendants' assertion that the Plaintiff lacks standing. Finally, the Defendants submit the Plaintiff has failed to exhaust his administrative remedies as provided in Tenn. Code Ann. § 4-5-225(b), which requires that a plaintiff first file a petition for a declaratory order with the agency and the agency refuse to issue such a declaratory order before the Plaintiff can proceed with a declaratory judgment

action before this Court.

Both parties have submitted, and rely upon, various documents outside the allegations made in the Complaint. The Court finds these exhibits relate to the Defendants' request to dismiss this Complaint for lack of subject matter jurisdiction, and accordingly, such documents may be admitted and considered by this Court in assessing the viability of the Defendants' motion. *In re Estate of Goza, v. Wells*, No. W2012-01745-COA-R3-CV, 2013 WL 4766544 at \*3 (Tenn. Ct. App. Sept. 4, 2013) (citing *Chenault v. Walker*, 36 S.W.3d 45, 56 (Tenn. 2001)). In the Tennessee Supreme Court's words, a trial court confronted with such motions must "determine whether the evidence in favor of finding jurisdiction is sufficient to allow the case to proceed." *Chenault*, 36 S.W.3d at 56. When defending against a motion to dismiss for lack of jurisdiction, a plaintiff bears the burden of proving facts establishing that the court has jurisdiction. *Id.* Where the defendant has filed affidavits or other competent evidentiary materials challenging the case's underlying jurisdictional facts, the plaintiff may not rely solely upon the complaint, but must make a prima facie showing of facts that establish jurisdiction. *Id.* To do so, the plaintiff may submit affidavits or other helpful evidence. *Id.* Furthermore, "[w]hen evaluating the case at that stage, the trial court will take as true the allegations of the non-moving party and resolve all factual disputes in its favor [without crediting] conclusory allegations or draw[ing] farfetched inferences." *In re Estate of Goza*, 2013 WL 4766544 at \*3 (quoting *Chenault*, 36 S.W.3d at 56). In doing so, however, the court does not make any finding as to whether the plaintiff's version of events is, in fact, correct. That determination ultimately rests with the trier of fact. *Id.*

The Court's full reasoning for denying the Plaintiff's motion to dismiss was stated by the Court at the end of the hearing on this motion, and, as previously mentioned, that ruling is incorporated in this Order. Initially, the Court rejects the Defendants' assertion that Tenn. Code Ann. § 4-5-225(b) requires the Plaintiff to first file a declaratory order petition with the Cosmetology Board before seeking relief from this Court when, as here, a plaintiff asserts a facial challenge to the constitutionality of a State statute. The Tennessee Supreme Court has observed that "the facial constitutionality of a statute may not be determined by an administrative tribunal due to 'the fundamental constitutional principle of separation of powers.'" *Colonial Pipeline Co. v. Morgan*, 263 S.W. 3d 827, 842-43 (Tenn. 2008) (quoting *Richardson v. Board of Dentistry*, 913 S.W.2d 446, 453 (Tenn. 1995)). The Supreme Court has recognized that it is the "sole obligation of the judiciary to interpret the laws and determine the constitutionality of actions taken by the other two branches of government." *Id.*

Next, the Court finds without merit the Defendants related claims that the Plaintiff either lacks standing or must first exhaust his administrative remedies before proceeding with an action in this Court. The criteria to establish standing for a plaintiff seeking declaratory relief have been well articulated by Tennessee courts. The Tennessee Court of Appeals stated:

"The primary purpose of the Declaratory Judgment Act is 'to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations....'" *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 193 (Tenn. 2000) (quoting Tenn. Code Ann. § 29-14-113). ... The act allows a proper plaintiff to challenge the constitutionality of a statute or seek a construction of a statute when the plaintiff does not seek to reach state funds. *Colonial Pipeline Co. v. Morgan*, 263 S.W. 3d 827, 853 (Tenn. 2008) ("[w]e hold that sovereign immunity simply does not apply to a declaratory judgment challenging the constitutionality of a statute against state officers.").

A plaintiff must have standing to seek a declaratory judgment. *State of Tennessee ex rel. DeSelm v. Owings*, 310 S.W.3d 353, 357 (Tenn. Ct. App. 2009)).

\* \* \*

To establish standing, a plaintiff must show three “indispensable” elements “by the same degree of evidence” as other matters on which the plaintiff bears the burden of proof. First, a plaintiff must show a distinct and palpable injury: conjectural or hypothetical injuries are not sufficient. Standing also may not be predicated upon an injury to an interest the plaintiff shares in common with all other citizens. Were such injuries sufficient to confer standing, the State would be required to defend against “a profusion of lawsuits” from taxpayers, and a purpose of the standing doctrine would be frustrated.’

The second essential element of standing is a causal connection between the claimed injury and the challenged conduct. A plaintiff may satisfy this element by establishing the existence of a ‘fairly traceable’ connection between the alleged injury in fact and the defendant’s challenged conduct. The third and final element necessary to establish standing is a showing that the alleged injury is capable of being redressed by a favorable decision of the court.

*Id.* (quoting *Am. Civil Liberties Union v. Darnell*, 195 S.W.3d 612, 619-20) (Tenn. 2006).

*City of Memphis v. Hargett*, No. M2012-02141-COA-R3-CV, 2012 WL 5265006 (Tenn. Ct. App. Oct. 25, 2012) at\*14-15.

As previously stated, in considering a motion to dismiss, this Court must take as true all allegations in the Plaintiff’s Complaint. Applying the above standards to the Plaintiff’s Complaint, the Court finds that the Petitioner has standing to bring his claim. First, the Court finds the Plaintiff, per Paragraph 12 of his Complaint, seeks to obtain a barber license. Second, the Court finds, per the Complaint, that the Plaintiff does not have a twelfth-grade education or its equivalent. Thus, Tenn. Code Ann. § 62-3-110(b)(2) effectively requires the

Cosmetology Board to deny any barber license application submitted by the Plaintiff. Allegations that the Court must take as true are found at paragraphs 38 to 39, 85 to 86, and 141 to 143 of the Complaint. Further, the Plaintiff expressly asserts that his lack of a high school education or equivalent degree also has prevented him from attending barber schools to obtain the required training to seek a barber license. Those allegations are set forth in paragraphs 65, 71 to 74, and 144 to 145 of the Complaint. Taking these facts as true, they demonstrate a distinct and palpable injury to the Plaintiff. The injury is that the Plaintiff cannot obtain a license to barber, which is a career he wishes to pursue. He thus satisfies the first standing element.

The Court also finds a causal connection exists between the claimed injury and the challenged conduct. The alleged unconstitutional high school or equivalent degree requirement precludes the Plaintiff from either obtaining a license or, per the petition, even taking the training required to apply for a license.

Finally, the Court finds this alleged injury is capable of being redressed by a favorable decision of the Court. The Plaintiff is asking this Court to remove this barrier to the Plaintiff, who seeks a master barber certificate. The removal of this alleged unconstitutional barrier would allow the Plaintiff to pursue the required training to obtain his barber's license and then apply for the license. Without this relief, the Plaintiff will never be eligible for a license, absent a change in Tennessee law. The Court therefore finds that the elements of standing are met in this case.

The Court does not accept the Defendants' argument that the Plaintiff must first exhaust administrative remedies by applying for a license. Such an application would be futile in this case, given the Plaintiff's failure to have a high

school education or its equivalent. In *Cantrell v. Walker Die Casting, Inc.*, 121 S.W.3d 391, 396 n. 3 (Tenn. Ct. App. 2003), the Tennessee Court of Appeals observed that traditional exhaustion principles include an exception for instances when resort to the administrative route is futile, or the remedy inadequate. As stated by the Court of Appeals, “the standard adjudging the futility of resorting to the administrative remedies provided by a plan is whether a clear and positive indication of futility can be made.” *Id.* at 399, n. 3 (quoting *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 419 (6<sup>th</sup> Cir. 1998)). The plaintiff must show that it is certain that his claim will be denied on appeal, not merely that he doubts that an appeal will result in a different decision. *Id.* (quotation omitted). The futility exception is quite restricted and applied only when resort to administrative remedies is clearly useless. *Id.* (citations and quotations omitted); *see also State ex rel. Jones v. City of Nashville*, 198 Tenn. 280, 279 S.W.2d 267, 268-69 (1955).

The Court finds it would be futile for this Plaintiff to file for a barber license. Because he lacks a high school education or its equivalent, the Cosmetology Board *must* deny his application under state law, no matter what. Furthermore, per the Complaint, the Plaintiff cannot even obtain training because the colleges or universities or schools that offer this training will not let him take the training without proof that he has obtained a high school degree or its equivalent. Thus, the pursuit of an administrative remedy would be futile.

Finally, this Court does not accept the Defendants’ argument that the Plaintiff’s application would ultimately be denied due to his alleged unprofessional conduct, which was the subject of an Order in a separate administrative proceeding, Docket No. 12.07-143651J (which Order was filed with this Court), and that this finding independently could be a ground for denial of a

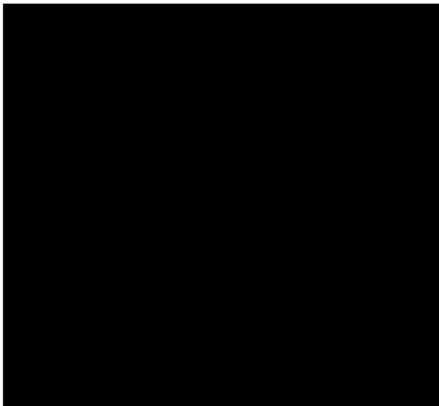
license under Tenn. Code Ann. § 62-3-121(6). The Court finds that such an assumption is pure speculation. What is certain is that the requirement that the Plaintiff possesses a twelfth-grade education or its equivalent is currently a barrier to the Plaintiff obtaining a barber license.

Accordingly, the Court denies the Defendants' motion to dismiss. As set forth above, the Plaintiff shall file a transcript of this Court's oral ruling on this motion by no later than November 23, 2018.

It is so ORDERED.

  
WILLIAM E. YOUNG  
CHANCELLOR, PART II

Cc:



**RULE 58 CERTIFICATION**

A copy of this order has been served by U.S. Mail upon all parties or their counsel named above.

  
\_\_\_\_\_  
Deputy Clerk and Master  
Chancery Court

  
\_\_\_\_\_  
Date