IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

BRIAN A., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No. 3-00-0445**
	)	**Judge Campbell**
PHIL BREDESEN, Governor of the State of Tennessee; and VIOLA MILLER, Commissioner of the Tennessee Department of Children's Services,	)	**Magistrate Brown**
	)	
Defendants.	)	

RESPONSE TO MOTION FOR TEMPORARY RESTRAINING ORDER OR, IN THE ALTERNATIVE, A PRELIMINARY INJUNCTION

On September 9, 2009, the plaintiffs filed a motion seeking a temporary restraining order, or, in the alternative, a preliminary injunction to enjoin the defendants from implementing Public Chapter No. 531, which added a new subsection (f) to Tenn. Code Ann. § 37-2-205 ("Tenn. Code Ann. § 37-2-205(f)" or "the Over-Commitment Law"). Because the plaintiffs lack standing and because they have not met the requirements to show that either a temporary restraining order or a preliminary injunction is necessary, their motion must be denied.

FACTUAL BACKGROUND

The statutes governing Tennessee's child welfare system, including its juvenile courts, reside primarily in Title 37 of the Tennessee Code. Tennessee's child welfare system has evolved over many decades into its current layered hybrid of power centers and responsibilities. Tennessee's child welfare delivery system is unitary in nature. The Tennessee Department of Children's Services, created in 1996 to unite in one state agency a number of functions relating

to children, including the child welfare functions previously assigned to the Department of Human Services, delivers child welfare services statewide to each of Tennessee's counties. *See generally* Tenn. Code Ann. §§ 37-5-102; 37-5-106; and 37-5-112. For example, DCS files petitions in juvenile court seeking commitment of children to state custody, engages in permanency planning for children, and either directly or indirectly provides services to children and their families, including foster care, medical and mental health services, educational services, and other services. *See generally* Tenn. Code Ann. §§ 37-1-113; 37-1-128; 37-1-129; 37-1-130; 37-2-403; 37-5-102; 37-5-106.

In contrast, Tennessee's juvenile court system is fragmentary, with judicial authority scattered among Tennessee's 95 counties. *See* Tenn. Code Ann. §§ 37-1-101(c); 37-1-201. Juvenile courts are county entities. *See* Tenn. Code Ann. § 37-1-201. Each juvenile court is independent of every other juvenile court and of the state. *See* Tenn. Code Ann. § 37-1-201. However, juvenile courts' jurisdiction and duties are set out by statute. *See generally* Tenn. Code Ann. §§ 37-1-101 through 183. The Code assigns to juvenile court judges no executive or legislative function within county government. For instance, they do not sit on county executive or legislative bodies. *See, e.g.*, Tenn. Code Ann. § 5-5-102(2) and (3) (disqualifying judges from sitting on counties' legislative bodies).

Instead, juvenile courts are assigned distinctly judicial functions that are independent of the executive and legislative branches of county government: juvenile courts possess exclusive jurisdiction over certain classes of cases, including abuse and neglect cases, juvenile status offenses, and juvenile delinquency cases. *See* Tenn. Code Ann. § 37-1-103(a). They also share concurrent jurisdiction with other courts to adjudicate certain other classes of cases, including paternity cases, child support cases, and proceedings involving the commitment of mentally ill

children. *See* Tenn. Code Ann. § 37-1-104. Juvenile courts are entrusted with original and exclusive jurisdiction to determine whether abused and neglected, unruly, and delinquent children must be removed from their families and committed to state custody. *See* Tenn. Code Ann. §§ 37-1-103(a); 37-1-130(a)(2)(B); 37-1-131(a)(4); 37-1-132(b). They may order various services or review the adequacy of services provided by DCS to children committed to state custody. *See, e.g.,* Tenn. Code Ann. §§ 37-1-129(d) and (e) and 37-1-166(c).

The General Assembly has provided that juvenile courts should construe the juvenile code to:

> (1) Provide for the care, protection, and wholesome moral, mental and physical development of children coming within its provisions; [and]
>
> * * *
>
> (3) Achieve the [juvenile code's] purposes in a family environment whenever possible, separating the child from such child's parents only when necessary for such child's welfare or in the interest of public safety.

Tenn. Code Ann. § 37-1-101(1) and (3).

Given their divided authority, it is unsurprising that the counties and the state share financial responsibility for children who come within the protection of the juvenile court. For example, in Tenn. Code Ann. § 37-1-150 the Legislature has assigned some costs for the care and treatment of children to the county and some costs to the state. A county is generally liable for the cost of court-ordered medical and other examinations of a child. Tenn. Code Ann. § 37-1-150(a)(1) (2009) (copy attached as Exhibit 1). However, the state is responsible for certain outpatient mental health evaluations of a child. *Id.* The statute provides that a county, not the state, bears the cost of children's care and treatment except as otherwise provided: "Costs for proceedings under this title or the costs of the care or treatment of any child that is ordered by the

court shall be paid by the state only when specifically authorized by this title or other provisions of law." Tenn. Code Ann. § 37-1-150(g) (2009).

It is equally unsurprising that the split of responsibilities has generated legal and political jockeying between the state and its counties over financial liability for court-ordered care of children. In *In re J.B.*, 2008 WL 2579223 at *1 (Tenn. Ct. App. at Knoxville June 30, 2008) (copy attached as Exhibit 2), the state and the county disagreed about who should pay for certain court-ordered mental health evaluations of juveniles. Prior to *J.B*, both the state and the county had construed Tenn. Code Ann. § 37-1-150 (2008) (copy attached as Exhibit 3) as assigning to the state the responsibility to pay for court-ordered mental health evaluations for juveniles committing offenses that would be felonies if committed by an adult, while assigning to the county the responsibility to pay for those evaluations for juveniles committing misdemeanor-level offenses. *Id.* at *3. On appeal, the state argued for the first time that the statute actually assigned to the county the responsibility to pay for all court-ordered mental health evaluations for juveniles, regardless of the level of the offense. *Id.* The court agreed. *Id.* at *1.

The *J.B.* decision imposed substantial new costs on Tennessee's counties – the eleven mental health evaluations ordered by the juvenile court in *J.B.* totaled $137,706.52, or more than $13,000.00 apiece. *Id.* at *8. Political action followed. In 2009, the General Assembly amended Tenn. Code Ann. § 37-1-150 to clarify that while the county remained generally financially responsible for court-ordered care and treatment of children, the state would henceforth be responsible for certain court-ordered outpatient mental health evaluations of juveniles. Tenn. Code Ann. § 37-1-150(a)(1) (2009).

Late in the same session in which the Legislature amended Tenn. Code Ann. § 37-1-150 to mitigate the financial effect upon counties of the *J.B.* decision, the Legislature also enacted the

legislation that would become Tenn. Code Ann. § 37-2-205(f) in order to mitigate the financial effects upon the state from counties that grossly over-commit children to state custody. On June 17, 2009, the Tennessee legislature passed Senate Bill 2357/House Bill 2389, which was later denominated as Public Chapter 531 of the Tennessee Public Acts of the 106th General Assembly. Section 30 of Public Chapter 531 added the new subsection (f) to Tenn. Code Ann. § 37-2-205. In full, the new statutory section provides:

> (f)(1)(A) Notwithstanding any state law to the contrary, the Department of Children's Services shall allocate resources for children placed in state custody based on a county's child population and the average state commitment rate per thousand children. In fiscal years 2009-2010 and 2010-2011 the department shall pay for a county's commitments of dependent and neglected children and delinquent children until such commitments exceed three hundred percent (300%) of the state average commitment rate.
>
> (B) When a county exceeds the limit on either dependent and neglected children or delinquent children established in subdivision (f)(1)(A), the county shall be billed for the actual daily cost to the state for the duration of the length of stay of such child in state custody.
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> (C) The department shall develop statewide averages for:
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> (i) Dependent and neglected children; and
>
> (ii) Delinquent children.
>
> (D) The average state commitment rate shall be based on the higher of:
>
> (i) 2007-2008 fiscal year statewide average commitments per thousand children; or
>
> (ii) 2008-2009 fiscal year statewide average commitments per thousand children.
>
> (2) The department shall initiate a collaborative planning process at any such time a county is believed to be likely to exceed two hundred percent (200%) of the state average commitment rate. Upon request of the county or the court, the department shall partner with the county or the court to develop and implement strategies to identify and address underlying problems contributing to over-commitment that may exist in such county. The department shall provide

> commitment data to the county or the court as needed to prevent a county from exceeding the limits established in subdivision (f)(1)(A).
>
> (3) On or before January 15 of each year, the department shall provide a report to the general assembly listing the counties that have exceeded the state average commitment limits. The report shall also detail actions taken by the department to comply with subdivision (f)(2).
>
> (4) The Select Committee on Children and Youth is directed to study commitment patterns of children entering state custody. Findings shall be provided to the Commissioner of the Department of Children's Services and to the members of the Select Committee on Children and Youth on or before January 15, 2010.
>
> (5)(A) The Commissioner of the Department of Children's Services is authorized to promulgate rules and regulations to effectuate the provisions of this subsection (f).
>
> (B) The provisions of subsection (f) shall expire June 30, 2011, unless reauthorized by the general assembly.

Tenn. Code Ann. § 37-2-205(f).

Public Chapter 531 was a cost-containment bill and was presented to the Legislature as such. (Summary of S.B 2357 attached as Exhibit 4). The summary informed legislators that the bill would increase taxes on HMOs, authorize money transfers from certain accounts and funds, and "revise[] numerous other provisions that relate to state revenues." (Exhibit 4 at 1). Thus, the summary explained that various sections of the bill credited surcharges on a solid waste management fund to the general fund, froze salaries for various state employees, authorized various fee increases, transferred monies from special funds to the general fund, froze pay hikes for certain justice system employees, imposed upon any county that failed to meet certain pre-admission criteria the cost of mental health treatment of individuals, and imposed upon counties the cost of mental-health-related evaluation and hospitalization of certain criminal defendants. (Exhibit 4 at 1-11). The summary of Section 30 of the bill, i.e., the Over-Commitment Law, was entitled "Allocation of Resources for Children in State Custody" and plainly informed legislators

that under the Over-Commitment Law, [o]nce a county exceeds the 300 percent limit . . . the county will be billed for the actual daily cost to the state for the duration of the length of stay of the child in state custody." (Exhibit 4 at 12-13.) In short, the Over-Commitment Law was presented to legislators as a money bill. Its sponsor, Senator Jim Kyle, explained the bill to the Senate as follows:

> **Senator Kyle**: Department of Children's Services. Um, the youth development centers, this bill will allow the termination of services to children over the age of 18. Currently the services must be provided if the child is 19. The second area of it, which is Section 31, the county over-commitment, allows the state to recoup costs from counties, recoup costs from counties, committing children to state custody at a level exceeding 200% of the state average.
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> **Senator Henry**: That is, that I take it is part of, of the local costs to bill a, a . . .
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> **Senator Kyle:** Mr. White, indicates so and I would be glad yield to Mr. White to discuss how that is going to work.
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> **Senator Henry:** If we could, Mr. White, please sir, at this point we may have to come up [with] some state money, right?"
>
> **Unknown voice**: Yes, sir.
>
> **Jim White/Fiscal Review:** Yes, Mr. Jim White with the Fiscal Review Committee. Yes, Mr. Chairman, that is um correct, uh, there's this item, there's this item and a couple of other items in the bill that effectively shift costs from the state to local governments and there would have to be some provision for the state to share in that cost if this were enacted.
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> **Senator Henry:** Could I, Senator Black, may I explore this point just a bit with him?
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> **Senator Black:** Sure, I appreciate that.
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> **Senator Henry:** I am going to ask Mr. Himes and General Lewis to come up if they will. Mr. Himes, General Lewis, these gentlemen are lawyers who are knowledgeable about this feature of the constitution requiring the state to, uh, come up with some money when we put a cost to local government. Mr. Himes is counsel for the House Finance Committee at this time, is that right?
>
> **Mr. Himes:** That's correct, sir.

Senator Henry: General Lewis is the senior tax man at the Attorney General's Office. Now what we were debating yesterday and what this subcommittee would like to know is if the state imposes a cost on locals; that calls for a contribution, does it not, by the state, toward it?"

Doug Himes: Senator Henry, Doug Himes, Legal Services, again I think Article 2, Section 24 of the Tennessee Constitution in its paragraph 4, provides that no law of general application shall impose increased expenditure requirements on cities or counties unless the general assembly shall provide that the state share in the costs.

Senator Henry: OK, good. Now, the language it shall impose, read that, please sir, again.

Doug Himes: Yes sir, the provision is no law of general application shall impose increased expenditure requirements on cities or counties unless the general assembly shall provide that the state share in the costs.

Senator Henry: Impose increased expenditure, now suppose the state removes a previous revenue source of cities and counties. Does the constitution come into play at that point?

Doug Himes: Senator Henry, I believe that it doesn't. I have looked back to see if there are any opinions of the Attorney General or court cases that said that we had to but I think the plain meaning of that section is impose increased expenditures not a decrease of revenue, I think is what you are asking.

Senator Henry: General, let me ask you, please sir. If the legislature passed a bill and the Governor allows it to become law which deprives local people of a revenue source they previously had and we do not pay part of that lost revenue, is that, would that be a defensible proposition in court as to the validity of that law?

General Lewis: Mr. Chairman, I believe that it would be. I have not had a chance, since the committee requested us to come over, to review our opinions in this area but I believe, um, that it would be defensible in light of the specific language in the constitution that Mr. Himes just read.

Senator Henry: Thank you. Any member want to ask of these gentlemen? Thank you gentlemen, I appreciate you coming over. Mr. White, that covers the matter does it not? That covers the matter we were discussing, does it not? Thank you. Alright let's see, Senator Black.

Senator Black: I'm not sure I understand this section.

Senator Henry: You all can go on if you want to, thanks for coming. Appreciate it.

> **Senator Black:** Is this, in section 31, is this addressing the issue that arose last year as a result of a court decision that no longer could the state pay for inpatient treatment for um…
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> **Senator Kyle:** I can only say to you that the policy consideration for this particular matter is to somewhat ask, have our local governments be a little more judicious in who they commit to state custody. When they commit to state custody now it's kind of, it's one way of saying ya'll go pay for it, we won't. And this is going to, before they commit folks, if they are going to have to pay for part of it, we're just hoping it, it puts people, to be more judicious, than just clearing out a facility because they want some space or whatever. I am not saying that hasn't, has happened, but I am saying to you, it makes people more responsible, if you're responsible for your decisions, you'll gonna be more careful with your decisions. But it is an issue we talked about last year.

Hearing on S.B. 2357 Before the Tax Subcommittee of the Tennessee Senate Finance Ways and Means Comm., 106th Gen. Assem., 00:55:57-01:01:48, (Nashville, May 12, 2009, (http://wapp.capitol.tn.gov/apps/videowrapper/default.aspx?CommID=63) (last visited October 2, 2009).

As Senator Kyle's final remarks indicate, at least some of the Over-Commitment Law's sponsors had an additional, complementary motivation. It was hoped that counties that grossly over-committed children would be motivated to reduce unnecessary and traumatic commitments. However, there is little doubt that the Public Chapter 531, a budgetary act of which the Over-Commitment Law was but one section, was presented to the General Assembly as a cost-sharing measure intended to allocate scarce dollars between the state and its counties. Its plain language and its legislative history demonstrate that the legislative intent of the statute was to limit state spending.

ARGUMENT

I. Plaintiffs Lack Standing to Challenge Tenn. Code Ann. § 37-2-205(f) Because They Will Not Be Injured By The Statute.

Standing is a jurisdictional prerequisite. *See, e.g., Raines v. Byrd*, 521 U.S. 811, 819 (1997) ("We have always insisted on strict compliance with jurisdictional standing requirements"). The plaintiffs in this case lack standing to challenge the implementation of Tenn. Code Ann. § 37-2-205(f). None of the named plaintiffs have the required personal stake necessary to seek the requested injunctive relief because the statute in question would only potentially affect a county's commitments of dependent and neglected children and delinquent children for the fiscal years 2009-2010 and 2010-2011. The named plaintiffs in *Brian A.* have already been committed to the legal custody of the state and there is no allegation that any of the named plaintiffs will otherwise be subject to a commitment proceeding during fiscal years 2009-2010 and 2010-2011. Moreover, while the class is defined as "all foster children who are or will be in the legal custody of the Tennessee Department of Children's Services," the named plaintiffs do not have standing to sue on behalf of unnamed class members if they lack standing on their own. *See Rosen v. Tennessee Commissioner of Finance and Administration*, 288 F.3d. 918, 927 (6th Cir. 2002).

This case begins and ends with *Rosen*. *Rosen* resolves against the plaintiffs the threshold issue of standing. *Rosen* stemmed from a class action lawsuit filed in the Middle District of Tennessee by:

> ten current and former enrollees in the State of Tennessee's TennCare program, representing a class consisting of 'present and future TennCare applicants and beneficiaries who are eligible for TennCare coverage under the federal waiver, rather than under traditional Medicaid eligibility rules,' (uninsured and uninsurable individuals), who alleged that the notice and hearing procedures used by the state in making TennCare eligibility determinations failed to comply with the due process of law.

Id. at 921. In September 2001, the state announced that it was issuing a rule to take effect on October 1, 2001, that would permit the state to close TennCare enrollment to adult uninsurables as a result of receiving an amendment to the federal waiver from CMS. *Id.* at 922. This rule would not affect those adult uninsurables who were either already enrolled in TennCare or had submitted applications for enrollment prior to October 1, 2001, nor would it affect children or those who would be eligible for traditional Medicaid. *Id*. at 922-23.

The plaintiffs sought to enjoin implementation of this rule, and on appeal, the Sixth Circuit found that the plaintiffs lacked the requisite standing. In doing so, that court specifically rejected the plaintiffs' argument that the named plaintiffs did not need to assert that the October 1, 2001, rule would injure any of them personally, as they represented a class of "present and future TennCare applicants and beneficiaries" and it was therefore sufficient for the named plaintiffs to assert that the rule would directly affect future uninsurable TennCare applicants, i.e., non-members of the named plaintiffs' class. *Id*. at 928. The court wrote:

> It is well settled that, at the outset of litigation, class representatives without personal standing cannot predicate standing on injuries suffered by members of the class but which they themselves have not or will not suffer.

Id. at 928 (citing *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) ("the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants.")

The Sixth Circuit further rejected the plaintiffs' argument that they did not have to demonstrate a distinct and palpable injury to the named plaintiffs because the class had already been certified by the court and found to have standing and, therefore, they could represent the interests of other members of the class on an issue on which they might not otherwise have the requisite stake. *Id*. In rejecting this argument, the Court noted that this contention was only true

with respect to claims originally part of the action and that the challenge to the October 1 rule was not a part of the initial lawsuit:

> It is black-letter law that standing is a claim-by-claim issue. *See, e.g., Lewis v. Casey*, 518 U.S. 343, 358, n.6, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) ("standing is not dispensed in gross"); *James v. City of Dallas*, 254 F.3d 551, 563 (5th Cir. 2001) ("both standing and class certification must be addressed on a claim-by-claim basis"). The insertion of a new claim in the case makes this situation more like certain routine class certification cases, where named plaintiffs are certifies as class representatives to go forward with claims in which they have a personal stake, while those in which they do not have such a stake are dismissed without prejudice. *See Blum v. Yaretsky*, 457 U.S. 991, 999, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) (in the context of a class action, the Court held that it is not true that "a plaintiff who has been subject to injurious conduct of one kind possess[es] by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject."). *See also, e.g., Vuyanich v. Republic Nat'l Bank*, 723 F.2d 1195, 1200-01 (5th Cir. 1984) (some claims in class action plaintiffs' complaint arose out of employment practices that did not apply to the named plaintiffs and were therefore not allowed, while the named plaintiffs were allowed to continue with the claims in which they did have standing).

Id.

Here, as in *Rosen*, there are no allegations that the named plaintiffs have suffered or will suffer any distinct and palpable injury as a result of implementation of Tenn. Code Ann. § 37-2-205(f). Furthermore, their claims with respect to Tenn. Code Ann. § 37-2-205(f) were clearly not part of the initial lawsuit and, in fact, could not have been as the statute in question was not passed by the Legislature until June 17, 2009, and did not become effective until June 25, 2009. Furthermore, unlike the named Plaintiffs in *Rosen*, the named plaintiffs in this case have not even sought to amend their complaint to add a claim challenging Tenn. Code Ann. § 37-2-205(f). Accordingly, unless the named plaintiffs can show how one or more of them have a personal stake in the implementation of Tenn. Code Ann. § 37-2-205(f), they lack standing to challenge it.

Moreover, any argument that the named plaintiffs might potentially be affected by implementation of the statute in the future as a result of termination of the state's legal custody

and then a "recommitment" to the state's custody is too attenuated to establish the requisite standing. The *Rosen* court rejected exactly such an argument:

> It is clearly established that "[a]llegations of possible future injury do not satisfy the requirements of Art. III . A threatened injury must be certainly impending to constitute injury in fact." *Whitemore v. Arkansas*, 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) (internal quotations omitted). Further, this court has recently held that "while past illegal conduct might constitute evidence . . . regarding whether there is a real and immediate threat of repeated injury, 'where the threat of repeated injury is speculative or tenuous, there is not standing to seek injunctive relief.'" *Blakely v. United States*, 276 F.3d 853, 873 (6th Cir. 2002) (quoting *Grendall v. Ohio Supreme Court*, 252 F.3d 828, 833 (6th Cir. 2001)).

288 F.3d at 929. While it is well-settled that one "does not have to await the consummation of threatened injury to obtain preventive relief, *Pennsylvania v. West Virginia*, 262 U.S. 553, 593, (1923), that future threat must be, like all allegations of injury sufficient to confer Article III standing, "real and immediate," not "conjectural or hypothetical." *O'Shea v. Littleton*, 414 U.S. 488, 493-94 (1974).

Here, plaintiffs' motion for a preliminary injunction focuses solely on the plaintiff class members who are not presently in state custody. Nowhere in their motion for injunctive relief or memorandum in support thereof do the named plaintiffs claim that implementation of Tenn. Code Ann. § 37-2-205(f) will affect *them*. Without specific allegations as to how there is an imminent threat of injury to the named plaintiffs, i.e., an immediate threat of the state's legal custody of one or more of them being terminated (for reasons other than reaching the age of majority) such that the statute might then affect them, any threat of injury to the named plaintiffs must remain only "conjectural" and "hypothetical," particularly as the provisions of Tenn. Code Ann. § 37-2-205(f) are only in effect for fiscal years 2009-2010 and 2010-2011.

Nor does the fact that plaintiffs are parties to the settlement agreement in this case provide them with an independent basis for standing to challenge implementation of Tenn. Code

Ann. § 37-2-205(f). Once again, the Sixth Circuit in *Rosen* specifically rejected precisely this argument, noting that the Supreme Court has repeatedly held that to have standing in federal court, a party "must assert his own legal interests, rather than those of third parties." 288 F.3d at 931 (quoting *Gladstone Realtors v. Bellwood*, 441 U.S. 91, 100 (1979). The Sixth Circuit held that the named plaintiffs in *Rosen* "[could] not sue to enforce the rights of the unnamed class members *for the unnamed member's sake*; if at all, the plaintiffs [could] only sue to enforce their own rights as parties to the agreed order." *Id*.

Like the *Rosen* plaintiffs, the plaintiffs in this case have alleged that implementation of Tenn. Code Ann. § 37-2-205(f) would result in a breach of the settlement agreement, but they have utterly failed to allege that they would be injured by such alleged breach. Indeed, none of their claims are even focused on any injury suffered by the named plaintiffs arising out of the state's alleged breach of the settlement agreement. Rather, their claims focus solely on the effect that implementation of Tenn. Code Ann. § 37-2-205(f) will have on the future commitment of other children to state custody. Clearly, the named plaintiffs in this case seek to carry on a fight on behalf of others, and as the Sixth Circuit stated in Rosen, "[t]his is exactly what Article III standing will not permit. Parties cannot confer standing purely by agreement, even by agreeing to an agreed order." *Rosen*, 288 F.3d at 931. The plaintiffs lack standing to challenge Tenn. Code Ann. § 37-2-205. Accordingly, their petition for a preliminary injunction should be denied at the outset and this action should be dismissed for lack of jurisdiction.

II. Plaintiffs Have Not Met the Requirements To Establish That a Temporary Restraining Order Is Necessary.

Four factors are to be balanced in determining whether a temporary restraining order or a preliminary injunction is proper: (1) the likelihood of the plaintiff's success on the merits; (2) whether or not the plaintiff will suffer irreparable injury if the preliminary injunction does not

issue; (3) whether or not the injury outweighs the harm to other parties if the preliminary injunction is granted; and (4) whether the grant of a preliminary injunction is in the public interest. *NAACP v. Mansfield, Ohio*, 866 F.2d 162, 166 (6th Cir. 1989); *International Resources v. New York Life Insurance*, 950 F.2d 294, 302 (6th Cir. 1991), *cert. den.*, 112 S.Ct. 2941 (1992). In order to obtain a preliminary injunction, a plaintiff must demonstrate, among other things, a strong or substantial likelihood or probability of success on the merits. *United of Omaha Life Insurance v. Solomon*, 960 F.2d 31, 35 (6th Cir. 1992). Further, the purpose of a preliminary injunction is to maintain the status quo; it is an extraordinary remedy that should only be granted if the movant carries his or her burden of proving that the circumstances clearly demand it. *Overstreet v. Lexington-Fayette Urban County Government*, 305 F. 3d 566, 572-573 (6th Cir. 2002).

A. Plaintiffs' Chance of Success on the Merits is Negligible.

1. Defendants' Implementation of Tenn. Code Ann. § 37-2-205(f) Would Not Violate Any Obligation That They Undertook Under the *Brian A.* Settlement Agreement.

Plaintiffs assert that the defendants' implementation of Tenn. Code Ann. § 37-2-205(f) would violate two principles of the *Brian A.* settlement agreement. The first principle, set out at Section I.A.2. of the settlement agreement, provides:

> The state should make reasonable efforts to avoid foster care placement by providing services to preserve the biological family whenever that is reasonably possible. However, child welfare decision makers must have the professional capacity to make determinations as to when making efforts to preserve the biological family, or leaving the child with that family, is neither safe for the child nor likely to lead to an appropriate result for the child.

This principle is prefatory and aspirational, imposing no specific requirements upon the defendants. Thus, the plaintiffs' blanket claim that the principle is judicially enforceable is dubious; it is rendered untenable by their inclusion of juvenile court judges among the "child

welfare decision makers" to whom the defendants owe any assurances of professional decision-making capacity. Juvenile court judges were not parties to the *Brian A.* lawsuit and they are not bound by the *Brian A.* settlement agreement. The defendants have no authority to supervise juvenile court judges or review their actions. The principle imposes no obligation on the defendants relative to juvenile court judges and no obligation on juvenile court judges relative to the defendants or the settlement agreement. Accordingly, the principle supplies no authority for this Court to enjoin the defendants from implementing Tenn. Code Ann. § 37-2-205(f).

The second principle that plaintiffs assert may be enforced against defendants is set out at Section I.A.12, and provides:

> All parties in judicial proceedings involving neglect, abuse, unruly and delinquency should be provided a fair hearing and their constitutional and other legal rights should enforced and recognized.

This provision, too, is unenforceably prefatory, aspirational, vague, hortatory and lends itself even less to any sort of judicial enforcement. Like the first principle whose enforceability the plaintiffs assert, it has never even been monitored. In fact, the monitors in this case have never reported on the defendants' compliance with any provision of Section I of the settlement agreement. (*See, e.g.*, Monitoring Reports, Dkt. Nos. 160 (filed March 4, 2003), 165 (filed November 11, 2003), 245 (filed January 23, 2006), 253 (filed March 4, 2006), 262 (filed March 6, 2007), and 287 (filed December 15, 2008).)

2. Even if the Settlement Agreement Comprehends Juvenile Courts, the Plaintiffs Have Failed to State a Claim That Implementation of Tenn. Code Ann. § 37-2-205(f) Impermissibly Influences Juvenile Court Proceedings.

In addition to the plaintiffs' ill-founded claim that the Over-Commitment Law violates the *Brian A.* settlement agreement, the plaintiffs also assert that the statute violates the federal Adoption and Assistance Act of 1980 for the same reason, namely, that it deprives children of

individualized decision-making. The plaintiffs bottom all their assertions on their claim that the Over-Commitment Law was intended to, and in fact will, unconstitutionally bias juvenile court judges in violation of children's rights to due process and equal protection by making the judges consider "something *other than* the children's circumstances – namely, the threat of a fiscal penalty that hangs over the counties in which the judges sit." (Plaintiffs' Memorandum in Support of Motion for a Temporary Restraining Order or, in the Alternative, a Preliminary Injunction, at 15, Dkt. No. 297 (filed September 9, 2009)). Thus, the plaintiffs claim the statute violates not only their due process rights, but also their equal protection rights, based on their assertion that an individual "commitment decision for a child in [a county affected by the statute] will be influenced by how many other children have been committed in that county." (Plaintiffs' Memorandum, at 18, Dkt. No. 297). In short, every claim that the plaintiffs make, be it made under the settlement agreement or the Adoption Assistance Act and be it based on due process or equal protection considerations, relies on one assertion: that the Over-Commitment law unconstitutionally invades their right to disinterested judicial decision-making.

The plaintiffs hang their argument on two cases: *Tumey v. Ohio*, 273 U.S. 510 (1927) and *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972). However, these cases and their progeny refute rather than support the plaintiffs' argument. In *Tumey*, a village mayor acted as a judge in mayor's court and by statute was paid commissions only for convictions of criminal defendants. 273 U.S. at 520. The plaintiff argued that certain Ohio statutes violated his due process right to a disinterested judge because the statutes gave the mayor a pecuniary interest favoring convictions. 273 U.S. at 514. The Supreme Court agreed, holding that the statutes unconstitutionally deprived criminal defendants of due process of law by subjecting their liberty

or property to the judgment of a judge with a direct, personal, substantial pecuniary interest in reaching a conclusion against defendants. *Id.* at 531-32.

In *Tumey,* the Court created a test to measure the "possible temptation" inherent in a procedure by which a judge receives a financial benefit as the result of one party's prevailing over the other. *Id.* at 532. The Court noted that the penalties were substantial, and added that while there were doubtless some judges who would not allow such personal gain to affect their judgment. *Id.* Nevertheless, wrote the Court as to procedures involving outcome-based remuneration:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him to hold the balance nice, clear and true between the state and the accused denies the latter due process of law.

273 U.S. at 532.

Ward v. Village of Monroeville, Ohio, 409 U.S. 57 (1972) also involved a village mayor in Ohio who served as judge of the "mayor's court." In *Ward*, there was no indication that the mayor received any commissions or any other direct financial benefit from convictions. However, the mayor served the village in other, non-judicial capacities: he had "wide executive powers [as] the chief conservator of the peace. He is president of the village council, presides at all meetings, votes in case of a tie, accounts annually to the council for village finances, fills vacancies in village offices and has general overall supervision of village affairs." *Id.* at 58. The income from fees that the mayor court imposed accounted for one-third to one-half of village revenues. *Id.* The Court noted that in *Tumey* it had written that "the mere union of the executive power and judicial power in [the mayor-judge] cannot be said to violate due process of law."

Id. at 60 (quoting *Tumey*, 273 U.S. at 534). However, the Court wrote that *Tumey's* "possible temptation test" was met when:

> the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court. This too is a 'situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, (and) necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.'

Id. (quoting *Tumey*, 273 U.S. at 534).

In *Ward*, the Court distinguished *Dugan v. Ohio*, 277 U.S. 61 (1928), yet another Ohio mayor's court case. In *Dugan*, the village was governed by a legislative commission consisting of five commissioners, one of whom was also the mayor. 277 U.S. at 63. The mayor also served as the judge of the mayor's court; however, the mayor only received a fixed salary and he received no fees. *Id.* The executive powers were wielded by the commission together with a city manager. *Id.* The mayor, however, "ha[d] no executive, and exercised only judicial, functions." *Id.* His salary was "fixed by the votes of the members of the commission other than the mayor, he having no vote therein." *Id.*

The Court noted that unlike the mayor in *Tumey*, the mayor in *Dugan* had no direct pecuniary interest in convictions. *Id.* at 64. The defendant in *Dugan*, however, noted that another reason underlying the *Tumey* decision was the dual role of the judge as not only judge but also executive or legislative officer. The Court rejected the argument:

> No such case is presented at bar. The mayor . . . receives a salary which is not dependent on whether he convicts in any case or not. While it is true that his salary is paid out of a fund to which fines accumulated from his court under all laws contribute, it is a general fund, and he receives a salary in any event, whether he convicts or acquits . . . . The mayor himself has no executive, but only judicial duties. His relationship . . . as one of five members of the city commission, to the fund contributed to by his fines as judge, or to the executive or financial policy of the city, is remote.

Id. at 65. Thus, neither of the two principles underlying *Tumey's* "possible temptation" test was violated. The mayor in *Dugan* received no direct pecuniary benefit from his decisions, and his partiality was not tainted by any significant role in the city's legislative or executive branches. *Id.* at 63-65.

Following *Tumey* and *Dugan*, the Supreme Court and the Sixth Circuit have only applied this "possible temptation" test to cases involving pecuniary interest, and not likelihood or appearance of bias issues. *See, e.g., Connally v. Georgia*, 429 U.S. 245, 246, (1977) (applying "possible temptation test" to find an unconstitutional likelihood of bias in a procedure by which a justice of the peace was paid $5.00 for each search warrant issued, but no fee if the request for a warrant was denied); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (finding an unconstitutional likelihood of bias in the operation of an administrative licensing board whose members benefited financially from the outcome of their decision); *Railey v. Webb*, 540 F.3d 393, 405 (2008), *rehearing and rehearing en banc denied* (January 8, 2009) (citing *Aetna v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986) for the proposition that the "possible temptation" test does *not* apply to likelihood or appearance of bias issues generally, rather than to only pecuniary interest).

Additionally, the Supreme Court and the Sixth Circuit have repeatedly recognized that while due process demands that the judge be unbiased, *In re Murchison*, 349 U.S. 133, 136 (1955), judicial disqualification based on a likelihood or an appearance of bias is not always of constitutional significance; indeed, "most matters relating to judicial disqualification d[o] not rise to a constitutional level," *Fed. Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 702 (1948) (citing *Tumey v. Ohio*, 273 U.S. at 523).

In a very recent decision, the Sixth Circuit discussed under what circumstances judicial bias, or the likelihood or appearance of bias, rises to the level of a constitutional violation under the relevant Supreme Court precedent. *See Railey v. Webb*, 540 F.3d 393. The Sixth Circuit noted that in only two types of cases has the Supreme Court held that something less than actual bias violates constitutional due process – (1) those cases in which the judge "has a direct, personal, substantial pecuniary interest in reaching a particular conclusion," (subsequently expended to include indirect pecuniary interest); and (2) certain contempt cases, such as those in which the "judge becomes personally embroiled with the contemnor" (subsequently clarified to involve cases in which the judge suffers a severe personal insult or attack from the contemnor). *Railey v. Webb*, 540 F.3d at 400. The Sixth Circuit further noted that the Supreme Court has acknowledged four types of cases that present prudent grounds for disqualification as a matter of common sense, ethics, or "legislative direction," but generally do not rise to a constitutional level: "matters of [1] kinship, [2] personal bias, [3] state policy, [and] [4] remoteness of interest." *Id*. (citing *Tumey*, 273 U.S. at 523; *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. at 820).

Railey is consistent with earlier precedent. In *Hammond v. Baldwin*, 866 F.2d 172, 177 (6th Cir. 1989), *rehearing and rehearing en banc denied* (April 3, 1989), the Sixth Circuit noted that the cases in which a bias had been found to exist in violation of due process involved one of two characteristics: either the decision-maker derived a direct, pecuniary interest from decisions adverse to claimants, or the decision-maker was engaged in both adjudicative and executive functions in violation of the principle of the separation of powers. The Sixth Circuit declared that it was holding "to the basic principle that the entire government of a state cannot be disqualified on grounds of bias when all that is alleged is a general bias in favor of the alleged

state interest or policy" and declined to broaden the rule to include a finding of bias, because to do so would severely impede the functioning of the state's government. *Id*. at 177-178.

Neither of the characteristics identified in *Hammond* is present here. There is no allegation of direct financial benefit to juvenile court judges as a result of Tenn. Code Ann. § 37-2-205(f), nor could there be. Nor do plaintiffs allege that juvenile courts are biased because they exercise dual roles as executive or legislative officers. At best, all that the plaintiffs allege is that juvenile court judges have an indirect benefit or stake, i.e., because the counties pay their salaries, the juvenile court judges might be partisan in their decisions to commit or not commit juveniles so as not to detrimentally affect their county's budget. *Dugan* found this connection too remote, and the plaintiffs cite to no authority to the contrary. In fact, the relation of the juvenile court judges to the financial policy and budget considerations of the counties is too remote to establish an appearance or likelihood of bias that rises to a level of a constitutional violation. *See Mallinckrodt LLC v. Littell*, 616 F.Supp.2d 128, 147 (D. Maine 2009).

The cases above establish that Tenn. Code Ann. § 37-2-205(f) is constitutional. The statute does not affect juvenile court judge's direct pecuniary interest. Nor are juvenile court judges compromised by the possibility that the statute might negatively affect their counties' coffers. Juvenile court judges are not entangled in their counties' legislative or executive branches; because their functions are strictly judicial, their relationship to the relationship to their counties' financial affairs is too remote to implicate constitutional issues.

The plaintiffs attempts to distinguish the *Dugan* case by arguing that "the very intent of the Commitment Cap Law is to impermissibly influence Juvenile Court judges so that they commit fewer children" and, therefore, "the influencing of judicial decisions is the entire

rationale behind TCA 37-2-205(f)." In doing so, the plaintiffs invite this Court to stray far beyond any accepted view of legislative intent or legislative history.

Unless a statute is ambiguous, statutory interpretation is limited to the plain meaning of the text of a statute. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). This is because the "authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Services, Inc*. 545 U.S. 546, 568-569 (2005).

While a statute's ambiguity may force a court to resort to divination of the statute's intent by examination of legislative history, precedent greatly limits the court's examination. Justice Scalia recently wrote that legislative history "refers to the pre-enactment statements of those who drafted or voted for a law; it is considered persuasive by some, not because they reflect the general understanding of the disputed terms, but because the legislators who heard or read those statements presumably voted with that understanding." *District of Columbia v. Heller*, __ U.S. __, 128 S.Ct. 2783, 2805 (2008). Thus, although not controlling, official committee reports and "explanatory statements by members in charge of presenting a bill for passage" can aid in statutory interpretation. *R.R. Comm'n of Wisconsin v. Chicago, B&Q R. Co.*, 257 U.S. 563, 588-89 (1922). However, individual legislator's statements should be used with care, because "what motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968). In particular, opponent's statements should be given no consideration in divining the intent of the legislature. *NLRB v. Fruit and Veg. Packers and Wareh'mn, Local 760*, 377 U.S. 58, 66 (1964). The "fears and doubts" of the opposition cannot guide interpretation. *Shell Oil Co. v. Iowa Dep't of Rev.*, 488 U.S. 19, 29 (1988). Similarly, statements and proposals by sponsors may be contradicted in

the actual legislative record, and "may never have been adopted by a committee, much less an entire legislative body[,]" and as such some courts decline to rely on them. *Isle Royale Boaters Ass'n v. Norton*, 330 F.3d 777, 784-85 (6th Cir. 2003). This is so even when the sponsor's remarks are contemporaneous with the debate and passage of a piece of legislation. *Consumer Prod. Safety Comm'n*, 447 U.S. at 118.

Here, Tenn. Code Ann. § 37-2-205(f) is facially unambiguous. The statute requires DCS to pay for any county's commitment of children to state custody until the county has committed children at a rate three times that of the statewide average, at which point the cost of commitments shifts to the county. The statute does not prohibit any judge from committing any child to state custody or intrude on any judge's obligation to make decisions in individual children's case without regard to the financial effect on any governmental entity, state or local. Its intent is clear on its face: the state pays for children that juvenile court judges commit to state care until commitments reach a prescribed level, at which point the statute intends that the cost should shift to the counties. In essence, the statute tells counties that the state will pay "thus far and no further." The statute's clarity obviates any necessity to examine its legislative history, much less indulge the plaintiffs' claim that the statute was intended to chill individualized judicial decision-making.

Moreover, the statute's legislative history is consistent with the plain language of this cost-sharing law. The statute was but one of sixty-three sections of an omnibus budget bill, each of which was presented to legislators as cost-saving or cost-sharing measures intended to guard the financially-strapped state treasury. This intent was documented in the statute's summary and in Senator Kyle's introductory remarks. It matters not that individual legislators, sponsors, or anyone else may have had the complementary and entirely worthy intent of driving drown

excessive commitment and resultant trauma to children in a few anomalous counties' juvenile courts. Legislators were told that they were voting for a cost-saving measure; that was what they voted for, and that is what they got. This Court should decline the plaintiffs' invitation to invent intent beyond the statute's plain language and legitimate legislative history.

B. The Plaintiffs Will Not Suffer Immediate or Irreparable Injury.

For the reasons set out in the preceding sections, plaintiffs will suffer no injury. The plaintiffs lack standing for just that reason. Moreover, the statute does not impermissibly interest juvenile court judges in the outcome of the cases that they decide.

C. The Harm to The State in Being Prevented from Allocating Costs as the Legislature Deems Appropriate is Substantial Any Injunction Preventing DCS From Implementing Tenn. Code Ann. § 37-2-205(f) is Contrary to the Public Interest

As noted in the declaration of Dave Goetz, the Commissioner of the Tennessee Department of Finance and Administration, the State of Tennessee currently finds itself in "fiscal crisis." (Goetz Dec. at 2, attached as Exhibit 5). Accordingly, it has become "necessary for DCS to turn to the counties of the state to pick up the financial responsibility when a county's commitment rate exceeds 300% of the state average commitment rate." (Ex. 5 at 2). Unlike the plaintiffs, then, the state will suffer substantial harm should this Court prevent implementation of Tenn. Code Ann. § 37-2-205(f). Moreover, and for the same reasons, enjoining the implementation of Tenn. Code Ann. § 37-2-205(f) is contrary to the public's interest as expressed through the votes of its duly elected legislators.

CONCLUSION

For all of these reasons, the plaintiffs' requested motion for temporary injunction, or in the alternative, a preliminary injunction must be denied.

Respectfully submitted,

s/ Douglas Earl Dimond
DOUGLAS EARL DIMOND (BPR No. 17953)
ELIZABETH C. DRIVER (BPR No. 19363)
Senior Counsel
Office of the Attorney General
General Civil Division
P.O. Box 20207
Nashville, TN 37202
(615) 532-7913

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response has been furnished to Jacqueline B. Dixon and David L. Raybin, Hollins, Wagster, Weatherly & Raybin, P.C., Suite 2200, Fifth Third Center, 424 Church Street, Nashville, TN 37219; and Marcia Robinson Lowry, Ira P. Lustbader, and Yasmin Grewal-Kok, Children's Rights, Inc., 330 Seventh Avenue, 4th Floor, New York, NY 10001, on this 2nd day of October, 2009, electronically by operation of the Court's electronic filing system.

s/ Douglas Earl Dimond
DOUGLAS EARL DIMOND
Senior Counsel