

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

JOAQUÍN CARCAÑO, *et al.*,
Plaintiffs,

v.

ROY A. COOPER, *et al.*,
Defendants,

v.

PHIL BERGER, *et al.*,
Intervenor-Defendants

No. 1:16-cv-00236-TDS-JEP

**INTERVENOR-DEFENDANTS’
RESPONSE TO PLAINTIFFS’
MOTION FOR LEAVE TO FILE
DECLARATION OF ERICKA
MYERS**

Intervenor-Defendants Phil Berger and Tim Moore (“Intervenors”) respectfully submit the following response to Plaintiffs’ motion for leave to file the declaration of Ericka Myers (Docs. 236, 237, 237-1). While Intervenors do not oppose filing of the Myers declaration, Plaintiffs are mistaken that the declaration “provides additional evidence of Plaintiffs’ standing.” Doc. 237, at 5. To the contrary, the declaration only underscores what Intervenors have already argued in moving to dismiss the Fourth Amended Complaint, namely that Plaintiffs lack standing to bring their claims against House Bill 142. *See* Doc. 225, at 4-10; Doc. 234, at 2-4 (explaining why Fourth Amended Complaint fails all three Article III standing prongs).

STATEMENT OF FACTS

1. In the declaration, Myers alleges she has an eight-year-old child who is “transgender” (meaning the child was “male at birth” but has “known from a young age that she is a girl”), and who attends second grade “in the New Hanover School District in North Carolina.” Doc. 237-1, ¶¶ 2-4. She alleges further that her child’s elementary school

“bars [the child] from using the girls’ restroom because she is transgender,” *id.* at ¶ 7, and that when Myers questioned this policy in August 2017 she was informed by the school principal that “[the principal] had consulted with an assistant superintendent, who said H.B. 142 permits schools to take this position.” *Id.* at ¶ 9. Myers also alleges the child has been told by teachers that “it is illegal for them to let her [use the girls’ restroom], because this is the administration’s interpretation of H.B. 142.” *Id.* at ¶ 12. Additionally, Myers alleges the child has been given the options of using the boys’ restroom, the nurse’s restroom, or the restroom in the teacher’s lounge. *Id.* at ¶¶ 8, 10. Finally, Myers alleges that the school’s policy has caused the child “to experience hostility, anxiety, and humiliation.” *Id.* at ¶ 13.

ARGUMENT

2. Plaintiffs argue that Myers’ allegations bolster their standing because the child’s “anxiety and distress ... provides additional evidence of non-hypothetical, non-conjectural injury.” Doc. 237, at 5. Additionally, they claim the allegations support the causation and redressability prongs of standing because “[s]chool officials at Myers’ daughter’s school ... have pointed to H.B. 142 as the basis for” prohibiting the child’s use of the girls’ restroom. *Id.* at 6.

3. Contrary to Plaintiffs’ argument, however, the allegations in the Myers declaration only underscore why they lack standing to pursue their claims. *See generally, e.g., Wikimedia Foundation v. Nat’l Security Agency*, 857 F.3d 193, 207 (4th Cir. 2017) (explaining that “[t]o establish standing, a plaintiff must show: (1) an injury in fact; (2) a sufficient causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury will be redressed by a favorable decision”) (citations omitted);

see also Doc. 225, at 4-10; Doc. 234, at 2-4 (explaining why Fourth Amended Complaint fails all three Article III standing prongs).

4. First, regardless of whether the harms alleged in the declaration satisfy the injury-in-fact requirement, the declaration plainly alleges harms caused only by parties *not before the Court*, which is fatal to the causation and redressability requirements of standing. *See, e.g., Doe v. Va. Dep't of State Police*, 713 F.3d 745, 755-56 (4th Cir. 2013) (explaining that “[a]n injury sufficient to meet the causation and redressability elements of the standing inquiry must result from the actions of the respondent, not from the actions of a third party beyond the Court’s control”) (quoting *Mirant Potomac River, LLC v. EPA*, 577 F.3d 223, 226 (4th Cir. 2009)) (and collecting authorities)). Myers alleges actions only by officials in the “New Hanover School District,” Doc. 237-1, ¶¶ 4, 7, 9, 12, but none of those persons or entities is a Defendant in this case. Nor do Plaintiffs allege that any Defendants are legally responsible for the alleged New Hanover policy. Nor could they be, because North Carolina law places responsibility for public school governance in local school boards, not State officials or the General Assembly.¹ Consequently, the harms alleged in the Myers declaration—even assuming they are true²—cannot satisfy the causation and redressability prongs of Article III standing.

¹ *See* N.C.G.S. § 115C-36 (providing that “[a]ll powers and duties conferred and imposed by law respecting public schools, which are not expressly conferred and imposed upon some other official, are conferred and imposed upon local boards of education,” and that “[s]aid boards of education shall have general control and supervision of all matters pertaining to the public schools in their respective administrative units and they shall enforce the school law in their respective units”).

² Because Intervenors bring a *facial* challenge to standing, *see, e.g., Wikimedia Found.*, 857 F.3d at 208 (distinguishing “facial” from “factual” standing challenges), the

5. Plaintiffs are also mistaken in arguing they can establish causation and redressability merely by alleging that New Hanover officials “pointed to H.B. 142 as a basis” for their actions. Doc. 237, at 6. As Intervenors have already explained in their motion to dismiss, HB 142 “enacts no access or anti-discrimination standards, has no enforcement provision, makes no demands on private conduct, and carries no penalties.” Doc. 225, at 4. To the contrary, HB 142 is a jurisdictional provision that sets *no* substantive facility access policies and, indeed, expressly *repealed* the prior biological access policy in HB 2. *See id.* at 1-2, 3. Consequently, as a matter of law HB 142 cannot serve as a “basis” for any school district’s restroom access policy. Even assuming Myers’ allegations are true, the mere fact that certain school officials not before the Court may have mistakenly identified HB 142 as a basis for their restroom policy cannot establish that HB 142 legally caused the alleged harms, nor that a favorable decision in this case would redress those harms. *See, e.g., People for the Ethical Treatment of Animals, Inc. v. Stein*, 259 F.Supp.3d 369, 375 (M.D.N.C. 2017) (explaining that “a plaintiff must establish,” *inter alia*, “a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant” and “that it is *likely and not merely speculative* that the plaintiff’s injury will be remedied by the relief plaintiff seeks in bringing suit”) (quoting *Beck v. McDonald*, 848 F.3d 262, 269 (4th Cir. 2017) (emphases added); *cf., e.g., Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 940 (1982) (finding lack of state action, given “[t]hat respondents

Court can dismiss the Fourth Amended Complaint for “fail[ure] to allege facts upon which [standing] can be based,” without the necessity of inquiring into whether those facts are true or not. *Id.*

invoked the statute without the grounds to do so could in no way be attributed to a state rule or a state decision”).

CONCLUSION

The allegations in the Myers declaration further underscore that the Fourth Amended Complaint should be dismissed, among other reasons, for lack of standing.

Respectfully submitted,

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*appearing pursuant to Local Rule 83.1(d)

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CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participating attorneys.

This the 9th day of March, 2018.

/s/ Stephen S. Schwartz
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with Local Rule 7.3(d)(1) because it contains 1,142 words, as determined by the word-count function of Microsoft Word.

This the 9th day of March, 2018.

/s/ Stephen S. Schwartz _____
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