

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

CASE NO.: 22-CV-00134-AW-MJF

M.A., by and through his parent  
AMBER ARMSTRONG, et al,

Plaintiffs,

vs.

FLORIDA STATE BOARD OF EDUCATION, et al,

Defendants.

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**DEFENDANT BROWARD COUNTY SCHOOL BOARD'S REPLY IN SUPPORT  
OF MOTION TO DISMISS SECOND AMENDED COMPLAINT**

The Defendant Broward County School Board ("BCSB"), by and through its undersigned attorneys and pursuant to this Court's Order (DE 127) submits its Reply in Support of its Motion to Dismiss Second Amended Complaint (DE 130) and states as follows:

**Plaintiffs' Response**

The vast majority of Plaintiffs' response (DE 144) is directed to the State Defendants motion to dismiss. No specific reference is made to the arguments advanced in the Defendant BCSB's motion to dismiss (DE 130). Plaintiffs' response however, does not dispute that the standing inquiry applies separately for each claim that plaintiffs press, for each form of relief they seek, and that the standing inquiry must be evaluated separately as to each defendant (DE 130 at p. 2-3). Finally, the only portions of Plaintiffs' response which expressly references the Defendant BCSB are found at DE 144 page 29 and page 33 footnote 9.

**Plaintiff Berg Lacks Standing**

Plaintiff Berg is the only plaintiff who has any connection with the Defendant BCSB and

is the only plaintiff who seeks relief against the BCSB. Plaintiff Berg seeks relief against the Defendant BCSB in Count I (void for vagueness) as well as Counts II and III (equal protection/discrimination).<sup>1</sup> The remainder of this document replies to the arguments advanced in Plaintiffs' response as they pertain to Berg's standing to seek declaratory and injunctive relief against Defendant BCSB and whether Counts I, II and III of the Second Amended Complaint state claims for relief against the BCSB.

### **No Injury In Fact**

Initially, Plaintiffs' response asserts that they have sustained an injury in fact by being deprived of their First Amendment right to receive information. (DE 144 at p. 28-32) While reference is made to paragraph 83 of the Second Amended Complaint, which asserts that in July 2022 BCSB removed some books located at the School District's Diversity and School Climate Department and donated the books to a museum and archives to make room for new departments being added to the physical office space due to a district reorganization; no plausible argument can be made that Berg sought to use these books in his art class at Flamingo Elementary or that his elementary school students sought to access the media center where the books were located.<sup>2</sup> Indeed, the Second Amended Complaint does not allege that Plaintiff Berg's First Amendment rights were violated in any way nor does the Second Amended Complaint seek relief against the Defendant BCSB for a First Amendment violation.

Plaintiffs' response secondly asserts that Plaintiffs have raised free-speech and vagueness challenges to HB 1557 and have properly alleged injury in fact with respect to those claims. (DE

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<sup>1</sup> Counts IV, V and VI seek relief for claimed violations of the First Amendment but none of those counts seek relief on behalf of Plaintiff Berg or against the Defendant BCSB. Similarly, Count VII seeks relief based on a claimed violation of Title IX, but again relief is not sought on behalf of Plaintiff Berg nor against the Defendant BCSB.

<sup>2</sup> See the July 8, 2022 Sun Sentinel newspaper article cited by Plaintiffs in support of the allegation. (DE 123 at p. 37 n. 59)

144 at p. 32) As set forth above, Plaintiff Berg has not asserted a free speech claim and no First Amendment claim has been asserted against the Defendant BCSB. (See DE 123 at Counts IV, V and VI) Plaintiff Berg does assert a due process void for vagueness claim against the Defendant BCSB. (DE 123 at Count I) Plaintiffs' response makes clear that this claim is based on allegations that "the State Board has enacted a rule that directly applies HB 1557's prohibitions to teachers, who risk losing their license if they violate the law". (DE 144 at p.36) However, as set forth in Defendant BCSB's motion to dismiss (DE 130 at p. 3-4) Berg does not assert a potential injury that is fairly traceable to the actions of the Defendant BCSB or an alleged injury that would be redressed by the issuance of declaratory and injunctive relief against the Defendant BCSB. Plaintiffs' Response does not in any way respond to the Defendant BCSB's arguments.

Finally, Plaintiffs' response asserts that plaintiffs have sustained an equal protection and Title IX injury in fact.<sup>3</sup> Again, as it pertains to Plaintiff Berg and the Defendant BCSB, Plaintiffs' response references the July 2022 removal of some books from a BCSB media center and their donation to an LGBTQ organization. No attempt is made to connect this action with Plaintiff Berg or the school where he works, nor does Plaintiffs' Response make any attempt to show that Plaintiff Berg has himself been the victim of any discriminatory action by the Defendant BCSB. Essentially, Plaintiffs' response asserts that Berg is a gay teacher employed by BCSB, that BCSB removed some LGBTQ books from a media center having no connection with Berg and that ergo Berg has suffered discrimination at the hands of the Defendant BCSB. Plaintiffs' syllogism does not suffice to establish Article III standing nor a viable equal protection claim against the BCSB.

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<sup>3</sup> As set forth above, Plaintiff Berg does not assert a Title IX claim nor is relief sought against the Defendant BCSB for a violation of Title IX. (DE 123 at p. 56)

**No Traceability or Redressability as to the Defendant BCSB**

Plaintiffs' response asserts that Plaintiff Berg's alleged injury in fact is traceable to the Defendant BCSB because "[o]ther districts, including Broward County, have carted away LGBTQ books..." While it is true that the removal of some books from a BCSB media center is traceable to the BCSB, no attempt is made to show how the removal of these books from a media center has caused any injury to Plaintiff Berg or how the removal of these books has deprived Plaintiff Berg of his right to equal protection of the laws. Finally, Plaintiffs' response concludes that because the BCSB, like the other school district defendants are part of the Florida public school system, an injunction against any of them would mitigate at least some of Plaintiffs' ongoing constitutional injuries. (DE 144 at p. 46) The mere fact that the BCSB and the other school districts are part of Florida's public school system does not show the traceability and redressability necessary to Article III standing.

**Plaintiff Berg's Due Process/Void for Vagueness Claim**

The Defendant BCSB adopts and incorporates herein by reference the State Defendant's response to whether Plaintiff Berg has plausibly stated a due process void for vagueness claim. However, any such claim is not traceable to the actions of the Defendant BCSB, nor would any potential future injury resulting from State Board action regarding Berg's licensing be redressable by injunctive relief against the BCSB. As set forth in BCSB's motion to dismiss, BCSB does not license teachers nor is it charged with suspending or revoking their licensure. (DE 130 at p. 3-4) Again, Plaintiff Berg does not respond to any of the arguments advanced by the BCSB.

**First Amendment Claims**

A substantial portion of Plaintiffs' Response argues that Plaintiffs have asserted viable First Amendment claims. Again, Plaintiff Berg does not assert any First Amendment claims and no

First Amendment claims are asserted against the Defendant BCSB.

**Title IX**

Plaintiff asserts that HB 1557 violates Title IX and a portion of the response addresses the claim (DE 144 at p. 71). Again, Berg does not assert a Title IX claim and no Title IX claim is asserted against the BCSB.

**Conclusion**

In summary, Plaintiffs' response does not address Plaintiff Berg's lack of standing and the substantive deficiencies of his due process and equal protection claim set forth in the Defendant BCSB's motion to dismiss. Plaintiff Berg lacks Article III standing to seek relief against the Defendant BCSB because he has not alleged an injury in fact and alternatively has not alleged that any potential constitutional injury is fairly traceable to the actions of the Defendant BCSB or would be redressed by injunctive relief against the BCSB. As a result, the Defendant BCSB requests that the Court enter an order granting its Motion to Dismiss Plaintiffs' Second Amended Complaint and dismiss the Defendant BCSB as a party defendant in this action.

Dated: January 3, 2023

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 3<sup>rd</sup> day of January, 2023, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of records or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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