

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA**

M.A., by and through his parent
AMBER ARMSTRONG; S.S., by
and through her parents, IVONNE
SCHULMAN and CARL
SCHULMAN; RABBI AMY
MORRISON and CECILE HOURY;
LOURDES CASARES and
KIMBERLY FEINBERG; ANH
VOLMER; SCOTT BERG; and
MYNDEE WASHINGTON,
Plaintiffs,

v.

FLORIDA STATE BOARD OF
EDUCATION; THOMAS R.
GRADY, BEN GIBSON,
MONESIA BROWN, ESTHER
BYRD, GRAZIE P. CHRISTIE,
RYAN PETTY, and JOE YORK, in
their official capacities as members
of the Board of Education;
FLORIDA DEPARTMENT OF
EDUCATION; BROWARD
COUNTY SCHOOL BOARD;
SCHOOL BOARD OF MANATEE
COUNTY; SCHOOL BOARD OF
MIAMI-DADE COUNTY;
ORANGE COUNTY SCHOOL
BOARD; and PASCO COUNTY
SCHOOL BOARD,
Defendants.

**Civil Action No.: 4:22-cv-00134
(AW) (MJF)**

**DEFENDANT ORANGE COUNTY SCHOOL BOARD'S
REPLY TO MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS
PLAINTIFFS' SECOND AMENDED COMPLAINT**

Defendant, ORANGE COUNTY SCHOOL BOARD ("OCSB"), by and through undersigned counsel, replies, in opposition to Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss Second Amended Complaint (Docket No. 144). OCSB will track Plaintiffs' Memorandum in Opposition and will only address those areas which arguably implicate

OCSB.

I. Relevant Background

On Page 9 of their Memorandum, Plaintiffs again reference the statement of district spokesperson Michael Ollendorf regarding OCSB's implementation of House Bill 1557. First, based on the clear language of the bill's text, House Bill 1557 became effective on July 1, 2022. See Docket No. 123, Second Amended Complaint, ¶70 so alleging. See also the text of House Bill 1557 [here](#). See page 7. No teacher was instructing between July 1, 2022 and August 1, 2022, as OCSB was on summer vacation. In fact, teachers did not come back to school until August 2, 2022, the day after the August 1, 2022 memorandum was issued. See the 2022-2023 OCPS School Calendar indicating teachers returned to school on August 2, 2022 [here](#). So, in fact, no teacher ever worked under Mr. Ollendorf's alleged instruction regarding implementation of the bill.

Again, as explained in OCSB's Motion to Dismiss, Mr. Ollendorf's statements to the Washington Post are not the policy of the district. OCSB's August 1, 2022 memorandum directly contradicts Plaintiffs' allegations regarding how OCSB teachers were instructed to implement House Bill 1557. Plaintiffs again repeat on Page 9 of their Memorandum in Opposition that Mr. Ollendorf "invoked H.B. 1557 to instruct teachers they should not talk about their same-sex partners or wear clothing that could be seen as inviting discussion about LGBTQ issues." (Docket No. 144, page 9) Plaintiffs cannot legally overcome the district's official policy statement in the form of the August 1, 2022 memorandum which states as follows with respect to the erroneous allegations made about OCSB's position on the law:

- "There is no merit, for example, to the suggestion that the statute restricts gay and transgender teachers from 'put[ting] a family photo on their desk' or 'refer[ring] to themselves and their spouse (and their own children).' Those actions are not 'instruction,' which is 'the action, practice, or profession of teaching.'"
- "Based upon this guidance, the mere wearing of an 'Ally' lanyard or

rainbow symbols on clothing or in classrooms, or the display of ‘safe space’ stickers in the classroom are not ‘classroom instruction’ as defined by the State in its Motion to Dismiss the lawsuit seeking to invalidate House Bill 1557.” (Docket No. 133, Exhibit “A,” pages 2-3)

Moreover, as the August 1, 2022 memorandum indicates, Principals were instructed to “please distribute to all teachers during pre-planning.” (Docket No. 133, Exhibit “A,” page 1). Mr. Ollendorf’s alleged statements were not provided to teachers – the August 1, 2022 memorandum was provided to teachers as instruction for implementation of the law.

Plaintiffs make a half-hearted argument that this Court may not consider the August 1, 2022 Memorandum at the Motion to Dismiss stage. Plaintiffs did not contradict Horsely v. Feldt, 304 F.3d 1125, 1134 (11th Cir. 2002), where the Court held:

“*In re Silicon Graphics Inc. v. Securities Litigation*, 183 F.3d 970 (9th Cir. 1999) under which a document attached to a motion to dismiss may be considered by the court without converting the motion into one for summary judgment only if the attached document is (1) central to plaintiff’s claim; and (2) undisputed. [Citation omitted] ‘Undisputed’ in this context means the authenticity of the document is not challenged.”

See also Harris v. Ivax Corp., 182 F.3d 799, FN 2 (11th Cir. 1999): “But a document central to the complaint that the defense appends to its motion to dismiss is also properly considered provided that its contents are not in dispute.” Plaintiffs do not, and cannot, dispute that the Memorandum was issued by OCSB on August 1, 2022 and that it is central to their complaints and to OCSB’s defense.

Plaintiffs’ reliance on Shahar v. Bowers, 120 F.3d 211 (11th Cir. 1997) is not applicable – the 11th Circuit in Shahar was confronted with a motion to supplement the appellate record or for a remand to do so to include two newspaper articles. Id. at 212: “This case is before the court on Plaintiff-Appellant’s petition for rehearing and on her motion to supplement the record or for a remand to do so.” The instant action is certainly not before an appellate court on a motion for

rehearing. It is at the motion to dismiss stage and the 11th Circuit has clearly held the contents of undisputed documents central to the allegations and defenses thereto may be considered at the motion to dismiss stage.

However, Shahar did have an interesting observation by the 11th Circuit:

“Ms. Shahar asks us to take judicial notice of the conduct of one person, Michael J. Bowers; and she asks us to take judicial notice of conduct which is not his official conduct (an example of his official conduct which might be judicially noticed would be that he issued a particular official opinion on a certain date). **She has shown us no case—and we have found none—where a federal court of appeals took judicial notice of the unofficial conduct of one person based upon newspaper accounts (or the person's campaign committee's press release) about that conduct.**⁵ We are not inclined to extend the doctrine of judicial notice as far as Plaintiff–Appellant asks us to take it.” *Id.* at 214. (Emphasis added)

Plaintiffs are asking this court to take judicial notice of Mr. Ollendorf’s unofficial statement in a newspaper article. Florida Statutes §1001.41(1) gives the School Board alone the general power to “determine policies and programs consistent with state law and rule deemed necessary by it for the efficient operation and general improvement of the district school system.” Unequivocally, Mr. Ollendorf’s statements cannot constitute the official policy of OCSB. This Court should decline Plaintiffs’ request for judicial notice.

II. Argument Section A: Injury in Fact

OCSB Plaintiff Volmer has not suffered any injury in fact. Her sole allegation in the Complaint bears repeating:

In Orange County, where Plaintiff Volmer’s children attend school, teachers have been instructed not to talk about same-sex partners because “it could be deemed classroom instruction on sexual orientation or gender identity,” according to district spokesman Michael Ollendorff. Teachers in K-3 classrooms were also cautioned against wearing clothing that could bring up similar discussions. As a result, Volmer’s children are being denied an equal educational opportunity, including an opportunity to see LGBTQ teachers as equal citizens and role models, that she wants to be made available to them, in order to foster a non-discriminatory

environment for all families and persons. Thus, again, because it is unclear whether H.B. 1557 precludes teachers from talking about their same-sex partners (or transgender identity) in class or even wearing clothing that could prompt discussions related to LGBTQ persons and issues, Volmer's child (and others at her school) are being denied the opportunity to hear about such issues and identities, as they would like to do. (Docket No. 123, ¶80)

In fact, in their Memorandum in Opposition, Plaintiffs cite, as the sole injury in fact, allegedly caused by OCSB that: "Volmer's children and others in Orange County schools have been deprived of an environment where teachers can speak about their same sex partners or wear clothing expressing message about the LGBTQ Community." (Docket No. 144, page 18). As discussed previously, OCSB teachers have not been instructed to cease discussion of their same-sex partners, nor have they been instructed to cease wearing certain clothing. Plaintiffs do not allege that their children's teachers refrained from speaking about same-sex partners or ceased wearing certain clothing at school because of House Bill 1557. Such an allegation is necessary to even approach finding Plaintiff Volmer has standing to sue OCSB.

Plaintiffs cite ACLU of Florida, Inc. v. Miami-Dade County School Board, 557 F.3d 1177 (11th Cir. 2009) for the proposition that they have standing. To the contrary, the case demonstrates that Plaintiffs do not have standing because they cannot prove their injury is imminent.

"Even though the [plaintiff's] complaint sets forth facts from which we could imagine an injury sufficient to satisfy Article III's standing requirements, we should not speculate concerning the existence of standing, nor should we imagine or piece together an injury sufficient to give plaintiff standing when it has demonstrated none. The plaintiff has the burden to 'clearly and specifically set forth facts sufficient to satisfy [] Art. III standing requirements.' If the plaintiff fails to meet its burden, this court lacks the power to create jurisdiction by embellishing a deficient allegation of injury." *Id.* at 1197.

Plaintiffs' claim of not receiving the instruction they want their child to receive does not demonstrate an injury in fact. No adverse actions will be taken against Plaintiffs if they do not

receive the exact instruction they desire. Moreover, the allegations necessarily implicate that the instruction they want to receive would not be received until some point in the future – this too prevents a finding of immediacy sufficient to confer standing:

“Although ‘imminence’ is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—**that the injury is *certainly* impending**. It has been stretched beyond the breaking point when, as here, **the plaintiff alleges only an injury at some indefinite future time**, and the acts necessary to make the injury happen are at least partly within the plaintiff’s own control. In such circumstances we have insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all.” *Id.* at 1191.

Again, Plaintiff Volmer has not alleged that, but for House Bill 1557, her children’s’ teachers would have taught about sexual orientation and/or gender identity in their classes. As such, Plaintiffs’ injury is simply speculation. They cannot demonstrate imminence and cannot demonstrate injury in fact to establish standing.

Plaintiff Volmer alleges she has demonstrated injury in fact on the free speech and vagueness claim because “discussing same-sex partners or wearing clothes ... could bring up similar discussions.” (Docket No. 144, Page 31). However, as this Court has previously held, House Bill 1557 does not apply to individual students and parents.

“Starting with the latter, **Plaintiffs have not shown any probability that they themselves will suffer consequences if there is ‘[c]lassroom instruction . . . on sexual orientation or gender identity.’ As noted above, the law is enforced against school districts and not individuals**. So although there are allegations that a student will be less likely to ‘share information about their family’s LGBTQ friends with their peers,’ Am. Compl. ¶ 77, and that a teacher ‘will be ‘walking on eggshells’ next year,’ *id.* ¶ 224, **there has been no allegation that H.B. 1557 would be enforced against a Plaintiff.**”

...

“Plaintiffs allege that some parents worry they ‘may no longer be included in school events, including career day or other classroom activities, because of a fear that *their presence* will lead to violations of H.B. 1557 or make school community

members uncomfortable.’ Am. Compl. ¶ 215 (emphasis added). Other parents worry they may not be able to ‘authentically present themselves’ because ‘speaking about their relationship and family, or even being present as a couple’ when they are ‘visiting or presenting to their children’s class’ might be prohibited by H.B. 1557. *Id.* ¶ 208. They also allege that some teachers ‘are petrified’ to directly address bullying based on a student’s gender identity. *Id.* ¶ 227. And they allege that others believe rainbow flags must be removed from classrooms, that LGBTQ teachers cannot mention their partners, or that students cannot mention having LGBTQ parents. *Id.* ¶¶ 184, 204, 231. But there is no arguable vagueness as to any of these actions. These actions are not classroom instruction on sexual orientation or gender identity, even if they involved parties who mention a sexual orientation or gender identity. **In short, none of the asserted future actions involve classroom instruction on sexual orientation or gender identity, so the act is not vague is it applies to them.** (Docket No. 120, Pages 9, 11)

III. **Argument Section B: Traceability and Redressability**

Plaintiff Volmer maintains that her alleged injury is fairly traceable to OCSB’s enforcement of the law. Again, Plaintiff cites to the statements of Mr. Ollendorf. (Docket No. 144, page 32). This Court has already held that Plaintiffs must allege “sufficient facts to plausibly show harms that are ‘fairly traceable’ to the law’s enforcement—harms that are ‘likely’ to ‘be redressed by a favorable decision.’ *Lujan*, 504 U.S. at 560-61 (marks omitted).” (Docket No. 120, page 7). Plaintiffs unequivocally cannot allege any enforcement of the law against them, as OCSB has not prohibited teachers from speaking of their same-sex partners or wearing certain clothing. (Docket No. 133, Exhibit “A,” pages 2-3.)

IV. **OCSB will defer to the State Defendants’ arguments regarding alleged violations of Due Process Clause, First Amendment, Equal Protection Clause, and Title IX**

Plaintiffs substantively challenge House Bill 1557 as a violation of the United States Constitution’s Due Process Clause, Equal Protection Clause and the First Amendment, as well as Title IX of the Civil Rights Act, (20 U.S.C. §1681). As OCSB has done through the entirety of this litigation, it will defer to the State Defendants to defend the constitutionality of House Bill 1557. As tacitly acknowledged by Plaintiffs in their Second Amended Complaint, OCSB has a

duty to implement House Bill 1557. The duty is imposed by law on OCSB. See §1001.42(15), Fla. Stat.: “The district school board, acting as a board, shall exercise all powers and perform all duties listed below: Require that all laws and rules of the State Board of Education or of the district school board are properly enforced.” See also §1001.51(14), Fla. Stat., requiring that the District School Superintendent follow all laws.

As a reminder, unless and until this Court deems House Bill 1557 unconstitutional, OCSB must implement the law as enacted as required by state law. Sch. Bd. of Collier Cnty. v. Florida Dep't of Educ., 279 So. 3d 281, 288 (Fla. 1st DCA 2019).

V. Misplaced reliance on statements from Mr. Ollendorf under Monell

Plaintiffs attempt to hold OCSB liable under a theory of *respondeat superior* for Mr. Ollendorf’s statements by alleging that he was “conveying district policies to teachers.” (Docket No. 144, Pages 60-61). All of Plaintiffs’ claims are brought pursuant to 42 U.S.C. §1983. Under the law governing the statute, OCSB is not liable under a *respondeat superior* theory for the statements of non-policy makers which it did not sanction:

“A plaintiff seeking to impose liability on a municipality (school district) under section 1983 must identify a municipal ‘policy’ or ‘custom’ that caused a deprivation of federal rights. *Board of County Comm’rs of Bryan Cty. v. Brown*, 520 U.S. 397, 403, 117 S.Ct. 1382, 1388, 137 L.Ed.2d 626 (1997). But it is well established that a municipality may not be held liable under section 1983 on a theory of respondeat superior. *See Monell v. Dept. of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Instead, ‘recovery from a municipality is limited to acts that are, properly speaking, acts ‘of the municipality’—that is, acts which the municipality has officially sanctioned or ordered.’” *Davis v. DeKalb Cnty. Sch. Dist.*, 233 F.3d 1367, 1375 (11th Cir. 2000).

Again, Mr. Ollendorf was not communicating District policy to teachers. He was responding to a question from a Washington Post reporter. OCSB does not communicate with its teachers through news stories published in newspapers more than 800 miles from OCSB’s headquarters. OCSB

communicated its guidance on House Bill 1557 through the August 1, 2022 memorandum. No amount of fixation on one quote by Plaintiffs can overcome the fact that that OCSB's official statement of policy on House Bill 1557 was the August 1, 2022 memorandum issued to all principals.

Moreover, any statements regarding the implementation of House Bill 1557 were subject to meaningful review by both the OCSB Superintendent as operational head of the school district (§1001.32(3), Fla. Stat.), and the OCSB as policy makers for the school district under state law (§1001.41(1), Fla. Stat.). Since Mr. Ollendorff's statements were subject to meaningful review based upon his position in the media relations office, his statements cannot form an official policy or custom of OCSB and cannot form the basis of liability under §1983: "Thus, '[f]inal policymaking authority over a particular subject area does not vest in an official whose decisions in the area are subject to meaningful administrative review.'" Quinn v. Monroe Cnty., 330 F.3d 1320, 1325 (11th Cir. 2003).

The Second Amended Complaint does not allege that OCSB delegated any decision making authority to Mr. Ollendorff on compliance with House Bill 1557. His alleged statements cannot form the basis of §1983 liability against OCSB.

VI. Plaintiffs did file a shotgun pleading

OCSB will rely upon its arguments in its Motion to Dismiss the Second Amended Complaint regarding the Second Amended Complaint being a shotgun pleading.

CONCLUSION

For the reasons stated in its Motion to Dismiss the Second Amended Complaint and this Reply, the Second Amended Complaint should be dismissed with prejudice.

COMPLIANCE WITH LOCAL RULE 7.1(F)

OCSB certifies that this Motion complies with Local Rule 7.1(I) as it contains less than 3200 words, as calculated by the Word Processing program Microsoft Word.

DATED: January 6, 2023

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have filed the foregoing with the Clerk of Court via CM/ECF this 6th day of January 2023. I further certify that any party that enters an appearance in this matter will receive a copy of this document via CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive Notice of Electronic Filing.



JOHN C. PALMERINI, B.C.S.