UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

M.A., et al.,

Plaintiffs,

v. Case No.: 4:22-cv-134-AW-MJF

FLORIDA STATE BOARD
OF EDUCATION, et al.,
_____/

DEFENDANT, SCHOOL BOARD OF MANATEE COUNTY'S REPLY TO PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

Defendant, the School Board of Manatee County, Florida, ("School Board"), hereby replies to Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss (Dkt. No. 144) and in support thereof, states as follows:

MEMORANDUM OF LAW

I. INTRODUCTION

On October 27, 2022, Plaintiffs filed a Second Amended Complaint ("SAC") against the School Board and several other Defendants. (Dkt. No. 123). In support of their claims against the School Board, Plaintiffs allege that H.B. 1557[1] violates

[1] H.B. 1557, 24th Sess. (Fla. 2022).

the First and Fourteenth Amendments. (*Id.*). H.B. 1557 prohibits classroom instruction by school personnel or third parties on sexual orientation or gender identity in kindergarten through third grade "or in a manner that is not age-appropriate or developmentally appropriate for students in accordance with state standards." (*See* Dkt. No. 123, ¶ 33).

On November 30, 2022, the School Board moved to dismiss the SAC on three grounds: (1) that Plaintiffs lack standing to sue the School Board in part because Plaintiff M.A.—the only Plaintiff to have any alleged connection with the School Board[2]—attends Manatee School of the Arts (MSA), a charter school (Dkt. No. 131, 8-17); (2) that Plaintiffs' claims are not ripe for adjudication (*id.* at 17-18); and (3) that the SAC is a shotgun pleading. (*Id.* at 18-21).

On December 20, 2022, Plaintiffs filed a 77-page Memorandum of Law in Opposition to Defendants' Motions to Dismiss. (Dkt. No. 144) ("Opposition"). Therein, Plaintiffs attempt to counter the School Board's position on M.A.'s lack of standing by asserting that Florida's Constitution expressly requires that school boards "operate, control, and supervise all free public schools within the school district…" and that charter schools are subject to "statutes pertaining to student health, safety, and welfare." (*Id.* at 33). As to the issue of ripeness, Plaintiffs' response is limited to a single footnote buried in their response to the School Board's

[2] *See* Dkt. No. 123, ¶¶ 9, 20.

standing argument, simply stating, "Plaintiff's claims are ripe for the same reasons." (*Id.* at 34 n.19).

For the reasons discussed below, Plaintiffs' Opposition fails to overcome the School Board's Motion to Dismiss because: (A) Plaintiffs ignore or otherwise fail to address the laws limiting the School Board's exercise of control over MSA as it specifically pertains to MSA's own policies[3] and (B) Plaintiffs fail to meaningfully dispute that M.A.'s alleged injuries are not ripe. Dismissal with prejudice is therefore warranted.

II. LEGAL ARGUMENT

A. The Applicable Standard.

At the outset, it is important to reiterate the ***correct***[4] standard of review. To survive a motion to dismiss, the complaint must include a short and plain statement showing that Plaintiff is entitled to the relief sought. *Ashcroft v. Iqbal*, 556 U.S. 662, 676-678 (2009). Naked assertions devoid of further factual enhancement are

[3] In the absence of any response to the School Board's argument that Plaintiffs (besides M.A.) lack standing to sue the School Board, the School Board only addresses the standing issues as it pertains to M.A. herein. To the extent that Plaintiffs contend that any other Plaintiffs have standing to sue the School Board, the School Board restates and reincorporates those arguments by reference. (*See* Dkt. No. 133, at 9).

[4] Notably, this is the second time that the School Board has corrected the "applicable standard" cited by Plaintiffs. (*See* Dkt. No. 102, at 3 n. 2). The United States Supreme Court has abrogated the standard cited by Plaintiffs. *See Bell Atlantic Corp., v. Twombly*, 550 U.S. 544, 562-563 (2007) (explaining why the "no set of facts" language has "earned its retirement").

insufficient to meet this requirement. *Id.* The Court is not bound to accept true legal conclusions stated as factual allegations. *Id.*

B. M.A. Does Not Have Standing to Sue the School Board.

Standing requires satisfaction of three elements: (1) "injury in fact"; (2) existence of a causal connection between said injury and the conduct complained of; and (3) it must be "likely" as opposed to "speculative" that the injury will be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiffs bear the burden of establishing standing. *Id.* at 561.

Plaintiffs identify two examples of how H.B. 1557 allegedly violates M.A.'s constitutional rights: (1) M.A. and other Gay-Straight Alliance (GSA) members "were ***initially*** barred from participating in a GSA" (Dkt. 144, at 8) (emphasis added) (internal quotations omitted) and (2) a middle-school student told M.A. about a "new ***policy***" that would require students to wear clothing consistent with their gender assigned at birth and prohibit dancing between students of the same gender. (*Id.* at 9) (emphasis added). Plaintiffs further allege that M.A.'s "***school*** administrators refused to disclaim the existence of the ***policy***." (*Id.*) (emphasis added).

As to the first allegation, Plaintiffs advise in a footnote that "M.A. and other members of his GSA were eventually able to obtain a teacher advisor and began attending meetings on November 17, 2022." (*Id.* at 9, n. 2). Pursuant to this admission, the School Board clearly has not interfered with the GSA's ability to

meet. In the absence of any concrete and particularized injury based on this allegation, Plaintiffs cannot show an injury-in-fact as required to establish standing. *See Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 984 (11th Cir. 2005).

As to the remaining allegations, Plaintiffs support their argument that M.A. has standing to sue the School Board by asserting that the Florida Constitution expressly requires that school boards "operate, control, and supervise all free public schools within the school district…" and that charter schools are subject to "statutes pertaining to student health, safety, and welfare." (*Id.* at 33). Plaintiffs' reliance on the foregoing provisions is misplaced because M.A.'s claims concern MSA policy. Statutory law prohibits the School Board from imposing its policies upon MSA unless MSA agrees. *See* FLA. STAT. § 1002.33(b)(1)(d). Plaintiffs do not allege that such an agreement exists. To the contrary, Plaintiffs admit that Manatee County policy requires equal opportunity for all stakeholders including students, families, and staff, by acknowledging, recognizing, and celebrating everyone in its school system regardless of gender, sex, gender identity, gender expression, or sexual orientation, prohibits discrimination and harassment on the basis of sexual orientation, transgender status, and gender identity, and requires that educational programs "be designed to meet the varying needs of students." (Dkt. No. 123, ¶ 27). Further, the school administrators who purportedly disclaimed the existence of this alleged policy are not Manatee County employees. *See* FLA. STAT. § 1002.33(12)

("A charter school shall select its own employees."). Likewise, MSA is governed by its own Governing Board—separate and apart from the School Board. *See e.g.*, FLA. STAT. § 1002.33(9)(g)4 (stating that the charter school's governing body "shall exercise continuing oversight over charter school operations" and establish and maintain internal controls to "[p]romote and encourage compliance with applicable laws, rules, contracts, grant agreements, and best practices."); FLA. STAT. § 1002.33(16)(c)2 ("The duties assigned to a district school board apply to a charter school governing board.").[5] Plaintiffs fail to reconcile the foregoing with their conclusory and unsupported assertion that the School Board operates MSA. (*See* Dkt. No. 123, ¶ 20).

For related reasons, Plaintiffs' assertion that Section 1002.33(b)(1)(d) is inapposite because the School Board "has the power to terminate a charter if it finds the school has committed a material violation of law" is misguided. (*See* Dkt. No. 144, at 18 n. 3) (internal quotations omitted). In essence, M.A.'s concerns revolve

[5] The charter school governing board's responsibility to oversee charter school operations is further evidenced by the fact that, following H.B. 1557, the Commissioner of the Department of Education issued a memorandum to all school districts "***including*** charter school governing boards." (Dkt. No. 144, at 12; *see also* Dkt. No. 95). The fact that this Memorandum is directed to both school boards and charter school governing boards supports the position that the School Board has continuously maintained from the inception of this litigation—that Florida statutory law dictates that charter school governing boards have authority and control over operations relevant to M.A.'s claims. Indeed, if Plaintiffs' characterization of the School Board's and MSA's relationship were accurate there would have been no need for the Commissioner to issue this Memorandum to both entities.

around an alleged dress code and alleged policy prohibiting students from dancing with other students of the same gender. (*See* Dkt. 144, at 9). H.B. 1557 does not prohibit such conduct and does not require school boards and/or charter school governing boards to implement such policies. Rather, it prohibits ***classroom instruction*** by school personnel or third parties on sexual orientation or gender identity in kindergarten through third grade "or in a manner that is not age-appropriate or developmentally appropriate for students in accordance with state standards." (*See* Dkt. No. 123, ¶ 33). Thus, it is at best speculative to imagine a situation under these alleged circumstances that the School Board could prove that MSA materially violated H.B. 1557 by "clear and convincing evidence".[6] Absent a material violation of law, the School Board cannot terminate the charter or otherwise interfere in MSA's operations. *See* FLA. STAT. § 1002.33(8).

As evidenced by the foregoing, it is implausible that M.A.'s alleged injuries are causally connected to the School Board's actions and equally implausible that

[6] Pursuant to its Opposition, Plaintiffs oversimplify the charter termination process. (*See* Dkt. No. 144, at 18 n. 3). Florida law limits the grounds upon which the School Board can lawfully terminate a charter, requires that certain notices be issued before the termination can take place, and requires a hearing before an administrative law judge if the charter school governing board challenges the termination. (*See* Dkt. No. 131, at 14-15; *see also* FLA. STAT. § 1002.33(8)(b). The requirements are even more stringent where a school board wishes to terminate the charter immediately. (*See* Dkt. No. 131 at 15, n. 7; *see also* FLA. STAT. § 1002.33(8)(c)).

M.A.'s alleged injuries would be redressed by an injunction against the School Board. M.A. does not have standing. Dismissal with prejudice is warranted.

C. M.A.'s Claims are Not Ripe for Review.

First and foremost, dismissal of the SAC with prejudice is warranted to the extent that Plaintiffs waived or abandoned the argument that M.A.'s claims are ripe for review due to their failure to address the School Board's arguments in this regard. *See, e.g., U.S. Steel Corp.*, 495 F.3d at 1287 n. 13; *Flanigan's Enterprises, Inc.,* 242 F.3d at 987 n. 16 (11th Cir. 2001); *Orta*, 2015 WL 2365834, at *2; *Dresser*, 2013 WL 82155, at *10 n. 1. Further, arguments presented solely in a footnote are not properly before the Court. *See Orta v. City of Orlando*, No. 6:14-CV-1835-ORL-41, 2015 WL 2365834, at *2 (M.D. Fla. May 18, 2015); *Dresser v. HealthCare Servs., Inc.*, No. 8:12-CV-1572-T-24, 2013 WL 82155, at *10 n. 1 (M.D. Fla. Jan. 7, 2013). Plaintiffs limit their response to the School Board's ripeness argument to a single conclusory footnote. (Dkt. No. 144, at 34 n. 19). Their response to the School Board's ripeness argument is not properly before the Court.

However, even if Plaintiffs did not waive said argument, dismissal is still warranted. A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated or may not occur at all. *Texas v. United States*, 523 U.S. 296, 300 (1998). The logic of this principle is best represented by the fact that one of the three issues identified by M.A. as the basis for his claims—

i.e., the allegation that M.A. could not find a teacher advisor to lead the GSA due to H.B. 1557—is no longer at issue as MSA's GSA has since acquired an advisor to lead it and M.A. began attending meetings in November. (Dkt. No. 144, at 21 n. 2). Any fear by M.A. that H.B. 1557's passage would result in the discontinuation of the GSA never came to fruition.

Likewise, M.A.'s remaining claims as it relates to the alleged dress code and dance policy are contingent upon future events and speculation. Indeed, the existence of these policies is based ***solely*** upon another student's speculation. (Dkt. No. 123, ¶ 79). Just like M.A.'s allegation regarding the GSA, it is possible that M.A.'s fears regarding the alleged policies may never come to fruition. Further, even if said policies existed, the School Board cannot enforce them. *See* FLA. STAT. § 1002.33(b)(1)(d). Thus, it is unlikely that M.A.'s alleged injuries will ever occur. M.A.'s claims are clearly not ripe for adjudication.

WHEREFORE, Defendant School Board of Manatee County respectfully moves this Court to dismiss the Second Amended Complaint, or alternatively moves for a more definite statement, and for the Court to provide all other relief it deems just and proper.

CERTIFICATE PURSUANT TO LOCAL RULE 7.1(F)

Pursuant to Local Rule 7.1(F), the Defendant School Board hereby certifies that the number of words in the Memorandum of Law section, including headings, footnotes, and quotations totals approximately 2,082 words.

/s/ Erin G. Jackson
Attorney

Dated this 6th day of January 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of January 2023, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Erin G. Jackson
Attorney