UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

EQUALITY FLORIDA, 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

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. 91) and in support thereof, states as follows:

MEMORANDUM OF LAW

I. INTRODUCTION

On May 25, 2022, Plaintiffs filed a First Amended Complaint ("FAC") against the School Board and several other Defendants. (Dkt. No. 47).

On June 27, 2022, the School Board filed a 25-page Motion to Dismiss the FAC, which raised three arguments: (1) that ***all*** Plaintiffs (including both Individual and Organizational Plaintiffs) lack standing to sue the School Board (Dkt. No. 67,

9-21); (2) that Plaintiffs' claims are not ripe for adjudication (*id.* at 21-22); and (3) the FAC is a shotgun pleading. (*Id.* at 22-24).

On June 28, 2022, the Court issued an Order, advising that Plaintiffs should file one response to all motions to dismiss and that Plaintiffs should promptly move for relief if this is unworkable. (Dkt. No. 71). Plaintiffs did not seek such relief.

On July 27, 2022, Plaintiffs filed a 75-page Memorandum of Law in Opposition to Defendants' Motions to Dismiss. (Dkt. No. 91) ("Opposition"). Despite the Opposition's length, references to the School Board's specific arguments are minimal. For example, Plaintiffs' response to the School Board's standing argument as it pertains to the relationship between the School Board and charter schools and the School Board's ripeness argument are each limited to a single footnote. (Dkt. 91, 40 n. 9-10).

With respect to the School Board's third argument, Plaintiffs contend that the FAC "attributes specific actions and connections to each Defendant" without any citation to the FAC. (Dkt. 91, 72). Plaintiffs then seemingly attempt to clarify the FAC by stating that Plaintiffs "all allege claims against the State Defendants and they each allege claims against their own local school boards." (*Id.*).

On August 2, 2022, Plaintiffs filed a Notice of Supplemental Authority accompanied by a memorandum issued by Defendant Commissioner of Education to School Boards, **Charter School Governing Boards,** and others. (Dkt. No. 95).

According to Plaintiffs, this memorandum contradicts the School Board's contention that "H.B. 1557 does not apply in charter schools" because "this guidance is directed to Charter School Governing Boards." (*Id.* at 3).

As evidenced by the foregoing, Plaintiffs' Opposition fails to overcome the School Board's Motion to Dismiss because Plaintiffs fail to: (A) meaningfully dispute that M.A. lacks standing to sue the School Board;[1] (B) meaningfully dispute that M.A.'s alleged injuries are not ripe; and (C) resolve the FAC's deficiencies as a shotgun pleading. Dismissal of the Counts against the School Board is warranted.

II. LEGAL ARGUMENT

At the outset, it is important to reiterate the ***correct***[2] standard of review. To survive a motion to dismiss, the FAC 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

[1] 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. 67, at 9-10, 16-21).

[2] In the Opposition, Plaintiffs state that "[a] motion to dismiss may be granted only 'when the movant demonstrates beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" (Dkt. No. 91, 29) However, the United States Supreme Court has since abrogated this standard. *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.*

At this stage in the litigation, the Court is bound by the four corners of the FAC, and Plaintiffs may not amend the FAC via a response. *Teal v. Spears*, No. 4:12CV456-RH/CAS, 2014 WL 116584, at *5 (N.D. Fla. Jan. 13, 2014).

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

First and foremost, dismissal of the FAC is warranted to the extent that Plaintiffs have waived or abandoned the argument that Plaintiffs have standing to sue the School Board due to their failure to adequately address the School Board's standing arguments and/or failure to address said arguments at all. *See U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1287 n. 13 (11th Cir. 2007); *Flanigan's Enterprises, Inc. of Georgia v. Fulton Cnty., Ga.,* 242 F.3d 976, 987 n. 16 (11th Cir. 2001). 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).

However, even if Plaintiffs did not waive said arguments, dismissal is still warranted because Plaintiffs' Opposition and FAC are devoid of any legal or factual enhancement to establish standing. 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.

In its Motion to Dismiss, the School Board explained in detail why M.A. cannot establish any of these elements. (*See* Dkt. No. 67, 10-16). While Plaintiffs' Opposition includes a section titled "Plaintiffs Have Standing" (*see* Dkt. No. 91, 30-42), Plaintiffs' rebuttal arguments focus almost entirely on arguments raised by "the State." (*See, e.g., id.* at 31-32, 34-38, 41-42). Likewise, allegations pertaining to M.A.—the only Plaintiff alleged to have any connection with the School Board pursuant to the incorrect assertion that the School Board "operates" Manatee School for the Arts (MSA)[3]—are mentioned only once. (*Id.* at 31). Specifically, allegations pertaining to M.A. are cited (amongst numerous others) in support of Plaintiffs' general assertion that:

> [The FAC] includes detailed allegations that the Individual Plaintiffs intend to engage in a course of conduct that is affected with a constitutional interest, including speech in which they would otherwise engage and the acquisition of information at school.

(*Id.*) (citing Dkt. No. 47, ¶ 189). The paragraph pertaining to M.A. cited in support of the foregoing includes the assertion that Plaintiff often writes about issues related to his sexual identity and sexual orientation, that he wrote about H.B. 1557 and

[3] *See* Dkt. No. 47, ¶¶ 30, 88.

"[n]ow it is unclear whether he would be able to write such an essay," that he "worries" that his education will be stymied by H.B. 1557, and that he "believes" that certain conversations will no longer be possible. (Dkt. No. 47, ¶ 189).

Thereafter, Plaintiffs state in conclusory terms that "deprivation of these interests amounts to injury-in-fact." (Dkt. No. 91, 31). In support of the foregoing, Plaintiffs cite two cases. In the first case, *Wilson v. State Bar of Ga.*, 132 F.3d 1422 (11th Cir. 1998), the Eleventh Circuit upheld the District Court's decision to grant a motion for summary judgment on the basis that plaintiffs lacked standing to assert a pre-enforcement challenge to rules under the First Amendment where they failed to show the existence of a credible threat of prosecution. *Id.* at 1428.

While Plaintiffs state in conclusory terms that Plaintiffs have plausibly demonstrated standing because they have alleged a credible threat of prosecution (*see* Dkt. 91, 31), Plaintiffs do not cite to any such allegation or offer any facts evidencing a credible threat of prosecution by the School Board against M.A. Florida law prohibits the School Board from unilaterally applying its policies to MSA. *See* FLA. STAT. § 1002.33(b)(1)(d). Therefore, regardless of what policies the School Board has in place—whether related to H.B. 1557 or not—the School Board cannot enforce its policies against M.A or otherwise threaten M.A. with any "prosecution."

In the second case, *Acosta v. Huppenthal*, No. 10-cv-623, 2012 WL 12829991 (D. Ariz. Jan. 10, 2012), the District Court granted the Defendant's Motion to

Dismiss on the basis that certain plaintiffs, including teachers, lacked Article III standing, because the teachers' argument that they will be fired because of enforcement of the challenged law was "too attenuated to confer Article III standing." *Id.* at *4. While the Court did find that a student had Article III standing to sue ***the State actors***, it based this decision on its conclusion that "Plaintiffs students' free speech claims are grounded in an alleged right to receive information and ideas within the curriculum." *Id.* at *7.

The foregoing brings up the same hurdles that M.A. cannot overcome to establish standing to sue the School Board—making M.A. in the present lawsuit more similar to the teachers in *Acosta* than the student. Florida law prohibits the School Board from unilaterally applying its policies to MSA. *See* FLA. STAT. § 1002.33(b)(1)(d). Under Florida law, MSA's Governing Board is obligated to exercise continuing oversight over MSA's operations and is responsible for promoting and encouraging compliance with applicable laws—not the School Board. FLA. STAT. § 1002.33(i)-(j). Under Florida law, MSA's teachers (i.e., those who would distribute information and ideas within a curriculum) are employees of MSA—not the School Board. *See* FLA. STAT. § 1002.33(12). The foregoing is fatal to any contention that a causal connection exists between the alleged injuries suffered by M.A. and any conduct by the School Board[4] and any contention that a

[4] *See* Dkt. No. 67, 12-15

decision by this Court against the School Board would redress any of M.A.'s alleged injuries.[5]

Plaintiffs do not dispute that the above-mentioned legal provisions bar the School Board from exercising authority over MSA. Rather, in a footnote, Plaintiffs summarize the School's Board standing argument to be that "Plaintiffs cannot satisfy Article III because M.A. attends a charter school." (Dkt. No. 91, 40 n. 10). In support of the foregoing, Plaintiffs cite pages 13 through 17 of the School Board's Motion to Dismiss. (*See id.*). Plaintiffs then state that this argument fails because "H.B. 1557 arguably applies to charter schools" and "Manatee County does not cite any provision that would preclude it from exercising authority over charter schools to ensure compliance with H.B. 1557." (*Id.*).

This is a complete misstatement of the School Board's arguments. In reality, pages 13 through 17 of the School Board's Motion to Dismiss discuss the above-mentioned sections of Florida Statute, which clearly demonstrate that no causal connection exists between any alleged conduct by the School Board and any alleged injury to M.A. because MSA employees and/or MSA's Governing Board would be the entities involved with respect to M.A.'s alleged concerns as it pertains to enforcement of H.B. 1557. Plaintiffs' statement that the School Board does not cite

[5] *See id.* at 15-16.

any provision that would preclude it from exercising authority over charter schools is clearly inaccurate.

Importantly, Plaintiffs do not cite any provision—besides H.B. 1557 itself (which does not address this specific topic)—demonstrating that the School Board ***has*** authority over charter schools to ensure compliance with H.B. 1557. Plaintiffs themselves note in the FAC, to which the Court is currently bound,[6] that it is "unclear" whether H.B. 1557 applies to charter schools. (*See* Dkt. No. 47, n. 1).

Plaintiffs' statement in the same footnote that the School Board's standing argument fails because "H.B. 1557 arguably applies to charter schools" and their analogous statement in the Notice of Supplemental Authority that the School Board contends that "H.B. 1557 does not apply in charter schools," also misstates the School Board's position. In its Motion to Dismiss, the School Board expressly states that the School Board's argument as to M.A.'s lack of standing applies ***even if*** H.B. 1557 applies to charter schools. (Dkt. No. 67, 4 n. 3) (emphasis original). Thus, H.B. 1557's application to charter schools is of no consequence. M.A. does not have standing to sue the School Board regardless.

Relatedly, the Memorandum filed with Plaintiffs' Notice of Supplemental Authority and the fact that it is directed to both School Boards and Charter School Governing Boards supports the position that the School Board has continuously

[6] *Teal*, 2014 WL 116584, at *5.

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. (*See* Dkt. No. 67, 6-7, 12-16). The relief sought pursuant to this lawsuit by M.A. cannot be remedied by suing the School Board. The Counts against the School Board should be dismissed with prejudice.

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

Dismissal of the FAC 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. However, even assuming that Plaintiffs did not waive said argument, dismissal is still warranted for the following reasons.

A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all. *Texas v. United States*, 523 U.S. 296, 300 (1998). M.A.'s alleged injuries are limited to nothing more than fears of future events that may not ever occur— (1) his belief that his proposed "Committee on Classroom Practices" will be rejected due to H.B. 1557 and (2) his concern that H.B. 1557 will prohibit him from writing on certain issues or having conversions on certain topics. (Dkt. No. 47, ¶¶ 180, 189). Plaintiffs' response to the

above-mentioned argument is limited to a single sentence in a footnote in the section addressing Plaintiffs' ability to establish standing:

> …Plaintiffs' claims are ripe for the same reasons: the unconstitutionality of H.B. 1557 is apparent here and now on the face of the statute, so there is no basis to justify inaction or indecision.

(Dkt. No. 91, 40 n. 9) (internal citations omitted). In support of this conclusory assertion, Plaintiffs cite *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1304 (11th Cir. 2017. (*See id.*). *Wollschlaeger* involves a lawsuit brought by physicians against ***state officials*** challenging the provisions of legislation, which, if violated by physicians, constitutes grounds for disciplinary action to be taken against them. *See id.* at 1294-1303. On the issue of ripeness, the Eleventh Circuit found that plaintiffs' claims were ripe for adjudication because plaintiffs wished to say and do what they believed the law prevented them from saying or doing and that due to said law, "and in order to avoid discipline by the Board of Medicine," these physicians engaged in self-censorship. *Id.* at 1304. In so holding, the Eleventh Circuit relied on the principle that harm can be realized even without an actual prosecution where the danger of legislation is one of self-censorship. *Id.* at 1304-1305.

M.A. and the School Board are distinguishable from the parties in *Wollschlaeger* and H.B. 1557 is distinguishable from the legislation at issue in *Wollschlaeger*. Unlike the threat of prosecution alleged by the physicians, M.A. is not subject to discipline by the School Board pursuant to H.B. 1557. Thus, unlike

the physicians in *Wollschlaeger* who had no choice but to engage in self-censorship to avoid being disciplined, *see Wollschlaeger*, 848 F.3d at 1302, any self-censorship allegedly engaged in by M.A. does not result in him avoiding any discipline or other threat of prosecution by the School Board. For the reasons previously stated, *see* Part II.A *supra*, statutory law would bar the School Board from intervening directly when it came to anything M.A. did at MSA with respect to activities such as writing on certain topics and engaging in certain conversations. As such, it is unlikely that M.A.'s alleged injuries—especially due to any action by the School Board—will occur. The Counts against the School Board should be dismissed with prejudice.

C. Plaintiffs Failed to Remedy the FAC's Pleading Deficiencies.

A complaint that contains multiple counts where each count adopts the allegations of all preceding counts is a common type of shotgun pleading that fails to adequately notify defendants of the claims against them. *Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1323 (11th Cir. 2015). Plaintiffs do not dispute that they incorporated all preceding paragraphs into each Count by reference without distinction resulting in a total of ***307*** paragraphs being incorporated by the last Count. (*See, e.g.*, Dkt. No. 47, ¶¶ 261, 273, 286, 293, 300, 308). Rather, Plaintiffs contend that this is not an instance where the pleading failed to give Defendants adequate notice of the pleadings against them because the School Board was "clearly able to respond…as is evidenced from the many pages of briefing devoted to their

arguments for dismissal." (Dkt. No. 91, 71-72). This contention highlights the issue rather than resolves it. Due to Plaintiffs' incorporation of all preceding paragraphs and failure to specify which Plaintiffs intend to sue the School Board, the School Board had no choice but to assume that ***all*** Plaintiffs intend to sue the School Board lest the School Board waive the argument that all Plaintiffs lacked standing to sue it. (*See id.*, at 9-10, 16-21). Thus, Plaintiffs' pleading deficiencies ultimately resulted in the School Board wasting resources making arguments it could have avoided if the FAC were clearer—which is exactly why Courts do not tolerate shotgun pleadings. *See Barmapov v. Amuial*, 986 F.3d 1321, 1324 (11th Cir. 2021).

Plaintiffs' attempt to clarify the claims also does not resolve the FAC's deficiencies. Specifically, Plaintiffs attempt to clarify by stating that Plaintiffs "**all** allege claims against the State Defendants and they **each allege claims against their own local school boards**." (*Id.*) (emphasis added). The problem with this "clarification" is two-fold. First, the School Board's argument that M.A. does not meet Article III's standing requirements relies precisely on the fact that the School Board is not M.A.'s "local school board" because statute delegates MSA's Governing Board with the operational oversight that pertains to M.A.'s alleged harm. *See* Part II.A *supra*.

Second, this "clarification" fails to clarify whether the ***Organizational*** Plaintiffs "each" also allege claims against "their own local school boards"—and

what this even means. Would this be based on the location of their members? If the answer to the foregoing is "yes," are any members located in Manatee County? The FAC and Opposition are silent on these issues. As a result, the School Board still does not have adequate notice of the claims against it.

WHEREFORE, Defendant School Board of Manatee County respectfully moves this Court to dismiss the FAC, 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 3,162 words.

/s/ Erin G. Jackson
Attorney

Dated this 10th day of August 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of August 2022, 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