

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

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

EQUALITY FLORIDA, et al,

Plaintiffs,

vs.

RONALD D. DESANTIS, in his official
Capacity as Governor of Florida, et al,

Defendants.

DEFENDANT SCHOOL BOARD OF BROWARD COUNTY'S REPLY
MEMORANDUM IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS (DE 62)

Defendant School Board of Broward County, by and through its undersigned attorneys hereby files its Reply Memorandum in support of said Defendant's Motion to Dismiss (DE 62) and states as follows:

Plaintiffs' Lack Standing

Individual Plaintiffs

The only individual Plaintiff named in the First Amended Complaint who has any connection with Broward Public Schools is elementary art teacher Scott Berg (DE 52 at ¶¶217-221). Plaintiffs' response does not specifically identify any concrete and particularized actual injury to Plaintiff Berg. (DE 91 at p. 18)¹

¹ Plaintiffs list several paragraphs of the amended complaint which allegedly assert that some individual Plaintiffs have "already faced censorship or been disciplined based on their speech". However, none of these paragraphs include allegations regarding Plaintiff Scott Berg. (DE 91 at p.17)

Plaintiff's response also asserts that "Plaintiffs have plausibly demonstrated standing to bring a pre-enforcement challenge...." (DE 91 at p. 18) With regard to Plaintiff Berg, the response points to paragraph 217 of the First Amended Complaint which alleges that because of the statutory subsection Plaintiff Berg will refrain from having his students draw their own families next school year because Berg is worried that "such a lesson will invite scrutiny as students ask about Berg's own family (which consists of two men) or other student's families which may include LGBTQ individuals" (DE 91 at p.18)

First, Berg does not allege a course of conduct "that is affected with a constitutional interest. While working as a classroom teacher employed by a public school district, Berg does not engage in speech as a private citizen with regard to his classroom instruction of students and instead functions as a government speaker. *Evans-Marshall v. Board of Education of the Tipp City Exempted Village School District*, 624 F.3d 332, 340-342 (6th Cir. 2010) and *Johnson v. Poway Unified School District*, 658 F.3d 954, 966-968 (9th Cir. 2011). Second, Berg does not plausibly allege an imminent non-conjectural potential future injury. Instead, Berg's claim is based on speculation as to what his students may inquire about in the coming school year and the statute itself expressly limits enforcement to the district school board rather than the classroom teacher.

Organizational Plaintiffs

The Defendant School Board of Broward County adopts and incorporates by reference the State Defendants reply arguments regarding the Organizational Plaintiffs lack of standing.

No Basis for Entity Liability

The Eleventh Circuit has made clear that in determining whether §1983 liability can be imposed on a county, municipality or other local governmental entity, the district court should

look to whether under state law the defendant entity has authority and responsibility over the governmental function at issue. See *Grech v. Clayton County, Georgia*, 335 F.3d 1326, 1330-1344 (11th Cir 2003). The governmental function at issue in the instant case involves a limitation on the curriculum (classroom instruction) of students in kindergarten through grade 3. There is no dispute in the instant case that neither the Broward County School Board nor the other district school board's have the authority and responsibility over the governmental function at issue and that instead it is the State of Florida which has the authority and responsibility over the governmental function and issue. As such, there is no basis for entity liability under §1983 as against the Defendant School Board of Broward County.

No Constitutional Violation

Due Process Claim

The Defendant School Board adopts and incorporates by reference the State Defendants reply arguments regarding Plaintiffs' due process claim.

First Amendment Claim

The statutory subsection at issue imposes a limitation on the curriculum (classroom instruction) provided to public school students in kindergarten through grade 3.² Individual teachers do not have a First Amendment right to select the curriculum which will be provided to the public school students they teach. In *Evans-Marshall v. Board of Education of the TIPP City Exempted Village School District*, 624 F.3d 332, 341 (6th Cir. 2010), the Sixth Circuit affirmed the

² While the statutory subsection also provides that classroom instruction on sexual orientation or gender identity may not occur in a manner that is not age appropriate or developmentally appropriate for students in accordance with state standards, the Florida Department of Education has not yet developed the state standards which will guide the implementation of this latter provision. House Bill 1577 provides that the Florida Department of Education shall adopt such statewide standards by June 30, 2023.

dismissal of a First Amendment retaliation claim brought by a discharged teacher who alleged that her employment had been terminated in retaliation for deviating from the required curriculum and in part stated:

State law gives elected officials – the school board (in this case the Florida Legislature) – not teachers, not the chair of a department, not the principal, not even the superintendent, responsibility over the curriculum. This is an accountability measure, pure and simple, one that ensures the citizens of a community have a say over a matter of considerable importance to many of them – their child’s education – by giving them control over the membership on the board (in this case the Florida Legislature).

The First Amendment does not ban this policy choice on this accountability measure. The Constitution does not prohibit a State from creating elected school boards and from placing responsibility for the curriculum of each school district in the hands of each board. Teachers no doubt are required to speak or write and otherwise express themselves, but this does not make them sovereigns unto themselves. The curricular choices of the school should be presumptively their own – the fact that such choices arouse deep feelings argues strongly for democratic means of reaching them. (internal quotes and citations omitted)

Plaintiffs do not state a viable First Amendment claim.

Equal Protection Claim

Plaintiff’s response asserts that the Florida Legislature’s adoption of HB 1557 was motivated by discrimination. Neither the First Amended Complaint nor Plaintiff’s response provide any basis for a finding that the Defendant School Board of Broward County has denied Plaintiff Berg or the Organizational Plaintiffs with equal protection of the law. As such, Plaintiffs fails to state a §1983 claim against the Defendant School Board of Broward County based on a denial of equal protection.

Conclusion

The Defendant School Board of Broward County, in accordance with the reasons and authorities stated above, request that the Court enter an order dismissing this action as against the Defendant School Board of Broward County.

Dated: August 10, 2022

Respectfully submitted,

/s/Michael T. Burke
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CERTIFICATE OF SERVICE

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