IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BLUEFIELD DIVISION

FREEDOM FROM RELIGION FOUNDATION, INC., et al.,

Plaintiffs,

vs.

MERCERT COUNTY BOARD OF EDUCATION, et al.,

Defendants.

Civil Action No. 1:17-cv-00642

Hon. David A. Faber

SUR-REPLY IN OPPOSITION TO
MOTION TO DISMISS FIRST AMENDED COMPLAINT

In their Reply, Defendants erroneously argue that new factual developments should impact the Court's analysis of Plaintiffs' standing to challenge Defendants' longstanding Bible in the Schools program. Defendants claim that, on May 23, 2017, the Mercer County Board of Education voted to suspend the teaching of the Bible in the Schools program for "at least a year" to allow for a "thorough review of the curriculum." (Def. Reply 4-5). Defendants then devote much of their Reply to arguments addressing how this change in conduct affects Plaintiffs' claim to standing.

These arguments are fundamentally flawed because standing is evaluated *at the time a case is filed*, and the voluntary suspension of the bible classes had not occurred when this case was filed. Therefore, this new information does nothing to diminish Plaintiffs' claim to standing or counter the standing arguments Plaintiffs previously advanced in their Response Memorandum.

Even though Defendants' voluntary suspension of the program *could* affect mootness—because it is evaluated throughout the case as opposed to when the case is filed—Defendants do not address mootness at all in their Reply. Defendants' avoidance of mootness is telling and their reasons for doing so should be obvious. A defendant asserting mootness bears a heavy burden to demonstrate that it is absolutely clear the challenged conduct will not continue.

Defendants cannot meet this high burden because the facts surrounding the temporary suspension of the bible program reveal it is likely the program will continue at the conclusion of the suspension. Because the temporary suspension of the program does not moot the case and because it does not affect the Court's standing analysis, Defendants' motion to dismiss should be denied.

I. The temporary suspension of the Bible in the Schools program does not and legally cannot deprive Plaintiffs of standing.

As Defendants have previously acknowledged in this case, "[s]tanding is determined at the commencement of a lawsuit." *Pashby v. Delia*, 709 F.3d 307, 316 (4th Cir. 2013) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 571 n.5 (1992)); Def. Memo. 7. Despite this well-established rule, Defendants' Reply incorrectly considers whether the temporary suspension affects Plaintiffs' standing. The proper question remains *whether the facts pled in the First Amended Complaint demonstrate standing*. *See, e.g., Cooksey v. Futrell*, 721 F.3d 226, 234 (4th Cir. 2013) (considering and accepting as true plaintiff's complaint and attached exhibits when analyzing standing in motion to dismiss).

As discussed at length in Plaintiffs' Response Memorandum, the FAC sets forth sufficient facts to demonstrate Plaintiffs have standing to challenge Bible in the Schools. At the time of the filing of the FAC, the Bible in the Schools program was active in

elementary schools and middle schools throughout Mercer County. (FAC ¶ 25). Bible classes have been taught in Mercer County Schools for over 75 years. (FAC ¶ 18). Since 1986, the Mercer County Board of Education has administered the Bible in the Schools program to its students. (FAC ¶ 22). As a kindergartner, Jamie Doe attends a school that has bible classes, and Jamie will attend the same school for first grade. (FAC ¶¶ 11, 29) Elizabeth Deal is a resident of Mercer County and is the parent of Jessica Roe. (FAC ¶ 12). Elizabeth and Jessica had already encountered problems with the Bible in the Schools program and Elizabeth took active steps to avoid the bible classes. (FAC ¶¶ 40-48). The Deal Plaintiffs' assumption of burdens and expenses to send Jessica to a school outside of Mercer County continue. (FAC ¶ 50). At this motion to dismiss phase, the Court should consider these well-pled facts—and ignore Defendants' self-serving actions taken after the FAC was filed—and find Plaintiffs have standing.

All Defendants arguments surrounding the effect of the temporary suspension on Plaintiffs' standing are fundamentally flawed, a review of these arguments is useful to further illustrate that Plaintiffs do have standing. The theme of Defendants' arguments is that voluntary suspension of the program demonstrates Plaintiffs' claims are too "speculative" for Plaintiffs' to show imminent injury. Defendants argue Plaintiffs now stand "at least nineteen months" away from potential exposure to the Bible in the Schools program and that this future contact is too temporally remote to support standing. (Def. Reply 4-5). In addition, Defendants argue that purely hypothetical changes to the curriculum of the Bible in the Schools program forecloses standing for a challenge to the curriculum as it existed at the time the FAC was filed. (Def. Reply 5, 7-8).

The Doe Plaintiffs future contact with the dilemma of attending bible classes or removing Jamie Doe from his classmates is close enough in time to constitute a cognizable future injury. For standing purposes, the timeline to be considered when analyzing the temporal proximity of the Doe Plaintiffs' future injury remains the timeline established when the complaint was filed, i.e., the time between the filing of the complaint and Jamie Doe's first grade education. Even if the timeline were changed as a result of the voluntary suspension, Plaintiffs' future injury is still sufficiently imminent.

Plaintiffs' injury is sufficiently imminent because students and parents of students may challenge a school's practices years before the student has encountered them. (Pls. Resp. Memo. 12 (citing *Lee v. Weisman*, 505 U.S. 577 (1992); *Freedom From Religion Found. v. New Kensington Arnold School Dist.*, 832 F.3d 469 (3d Cir. 2016)). Based upon the allegations in the FAC, the Doe Plaintiffs are actually closer to facing the future constitutional injury they allege than either set of plaintiffs in the above cases. The Doe Plaintiffs would still be closer to coming into contact with the future injury than the Weismans were even if, at the time the complaint was filed, the program was not set to begin until Jamie Doe's enrollment in second grade (the effect of Defendants' voluntary, temporary suspension). Clearly, the temporal proximity in this case is sufficient to confer standing to seek prospective relief.

Defendants' attempts to distinguish the cases Plaintiffs rely upon to support this conclusion fail. Any prior contact with the challenged conduct was irrelevant to the courts' evaluation of the sufficiency of the temporal proximity in those cases. *See, e.g.*, *Lee*, 505 U.S. at 584 (finding a live, justiciable controversy because plaintiff student was enrolled in the high school and because it was "likely, if not certain" that an invocation

and benediction would be conducted at her high school graduation). Furthermore, these practices were no less subject to change or modification than the Bible in the Schools program—the school district in *Lee* could have modified the prayer practice in any number of ways and the school in *New Kensington* could have modified the Ten Commandments monument itself or added other secular displays.[1] Thus, the cases amply support Plaintiffs' claim to standing.

The purely hypothetical changes to the Bible in the Schools curriculum referenced by Defendants also have no bearing upon the Court's standing analysis. Contrary to Defendants' claims, when Plaintiffs filed their complaint challenging the specific curriculum of the Bible in the Schools program as it existed at the time, the Plaintiffs rendered the program's curriculum static *for purposes of standing*. In other words, Plaintiffs' standing is not now evaluated against some indeterminate curriculum resulting from Defendants' voluntary conduct. Plaintiffs *standing* must be evaluated against the program set out in the FAC.

Defendants' argument that plaintiffs may never mount a prospective challenge to school courses fails for the same reason. Defendants proclaim that because course curricula are inherently transient, it is not subject to challenge "well in advance of when such a class may be offered." (Def. Reply 7). However, as discussed above, the standing question as to future injury will ask whether the curriculum as it existed at the time of the

[1] Defendants base their argument that this situation is not "binary," like the ones confronting the courts in the cases cited by Plaintiff. Defendants' argument is based upon the startling assertion that bible classes in public schools are "*per se* constitutional." (Def. Reply 7). This claim goes well beyond Defendants' prior analysis of the state of the law (*see* Def. Memo. in Support 16) ("optional bible classes are not *ipso facto* unconstitutional"). More importantly, it is simply wrong. None of the cases cited by Defendants provide a presumption of constitutionality for bible classes in public schools.

complaint violates the Establishment Clause. Moreover, *likely* imminent harm is generally sufficient for standing. *See, e.g. Lujan*, 504 U.S. at 556.

Defendants' argument is also factually flawed. The bible program that existed when the case was filed arose from a seventy-five year practice of teaching the bible in elementary schools. The Bible in the Schools program itself has existed for over 30 years. The curriculum consists of voluminous written lessons. While it is theoretically possible that *discovery* may reveal that Defendants routinely alter the program curriculum, Defendants cannot make these claims at the motion to dismiss stage, and the surrounding facts belie any such claims.

Defendants' improper emphasis on the particular curriculum of the bible program stems from their continued misapprehension of how Plaintiffs' claims should be understood by the Court. Plaintiffs are challenging the Bible in the Schools program because they assert that the program is unconstitutional. Plaintiffs believe that Bible in the Schools program is unconstitutional. Because one of the bases upon which Plaintiffs believe the program is unconstitutional is the fact that the bible cannot be taught in a constitutionally-permissible manner to elementary school students, Plaintiffs are seeking relief concomitant with their position. Ultimately, it will be for the Court to determine what features of the program are unconstitutional, and it will be for the Court to determine how broadly any injunctive relief should be fashioned.

Defendants seem to assume that because Plaintiffs are challenging the Bible in the Schools program and its curriculum that *literally any change* to the curriculum will create something new, not covered by the injunctive relief that may be awarded in this case. This is presumably why Defendants continue to present strained arguments attempting to

construe Plaintiffs' claims as either a "facial challenge" or a hyper-specific challenge to only the particular curriculum, precisely as it is written. Litigation seeking injunctive relief is not susceptible to this sort of binary characterization. Plaintiffs may challenge the particular Bible in the Schools program, and the Court may award injunctive relief sufficiently broad that Defendants will not be able to skirt it by pulling one page of its curriculum. But these sorts of matters cannot be determined at the motion to dismiss stage.

Defendants also argue that the voluntary suspension of the bible program highlights the speculative nature of Plaintiffs' claims. For example, in an attempt to mirror the chain of speculation rejected by the Supreme Court in *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 (2013), the Reply stretches the Doe Plaintiffs' concerns into distinct steps. (Def. Reply 3). But Defendants' argument is premised upon its misunderstanding of the standing inquiry and is laden with many of the same deficiencies.

In actuality, Plaintiffs' FAC need only met the first step of Defendants' chart to have standing. Since the FAC provides ample support for the first step, standing exists. The subsequent suspension of the program due to litigation does not have the effect of overwriting the facts of the FAC. The second step is flawed because it fails to account for the fact that the FAC establishes the curriculum that was set to be used in Jamie's class. Plaintiffs' injury is already established before reaching the third and fourth steps because the Doe Plaintiffs suffer injury merely by facing the dilemma of confronting the unwelcome bible classes or taking steps to ensure Jamie will avoid them.

Likewise, the voluntary, temporary suspension of the program does not affect the standing of Elizabeth Deal and Jessica Roe. Based upon the facts alleged in the FAC, Jessica will continue to attend a neighboring school district because of the program and its effects. Even under the current circumstances, Jessica's local school will remain unavailable because of the indefinite nature of the temporary suspension. A responsible parent may reasonably seek to avoid ping-ponging her child between school districts each year due to temporary bible class changes.

For the same reasons, Defendants' bizarre claim that "[i]f Deal actually wants Roe to begin attending school in Mercer County again, that desire will be borne out by her decision to enroll Roe for the next school year," does not affect the Court's standing analysis (Def. Reply at 9). These assertions are improper given that the relevant time in question for the purposes of the Motion to Dismiss is the time that the FAC was filed. Even if they were considered, these sorts of conclusions could not be derived because Elizabeth Deal has no guarantees that the program will not return exactly as it was before at the end of the one year suspension.[2]

---

[2] In addition, Defendants' claim that the FAC must include a promise that Deal will re-enroll Jessica in order to have standing is unsupported by the case law upon which they rely. In *Issa v. Sch. Dist. of Lancaster*, the Court mooted the plaintiffs' cases because one of the brothers was twenty-one years old and the other had already obtained high school diploma. 847 F.3d 121, 126 n.2 (3d Cir. 2017). Their case was moot because no relief was available, not because their complaint did not specifically allege that they intended to re-enroll. In *Seamons v. Snow*, the Court determined that Seamons lacked standing because he did not have a "personal stake" in the case. 84 F.3d 1226, 1231 (10th Cir. 1996). This analysis included the fact that Seamons did not allege that he wanted to return to the school but also included the fact that the "record suggests Brian may already have graduated." *Id* at 1239. Elizabeth and Jessica are not similarly situated. Jessica has many more years of potential enrollment in Mercer County Schools. While the program continues, Elizabeth Deal faces the ongoing dilemma of taking on extra expenses to send Jessica to school in another county, or returning to Mercer County and facing the bible classes or the ostracization that came along with avoiding them.

II. The Board of Education's voluntary decision to temporarily suspend Bible in Schools does not moot the case.

"A defendant's 'voluntary cessation of a challenged practice' moots an action only if 'subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000)). The party asserting mootness has the "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Id.* (internal quotations omitted) (quoting *Laidlaw*, 528 U.S. at 189). Courts have been "particularly unwilling to find" this formidable burden is met where a "defendant expressly states that, notwithstanding its abandonment of a challenged policy, it could return to the contested policy in the future." *Porter v. Clarke*, 852 F.3d at 265 (4th Cir. 2017).

Even though Defendants have not addressed mootness, a review of Defendants' asserted facts against the heavy mootness burden they would face is useful to demonstrate that the Court should disregard Defendants' conduct as nothing more than a litigation tactic.

As a threshold matter, the Board of Education decision to temporarily suspend the Bible in the Schools program while it undergoes "thorough review" does not definitively establish that the program will not return exactly as is described in the complaint. The only evidence offered regarding the suspension decision are news articles[3] and a memo from Superintendent Deborah Akers to the Board of Education that said in relevant part:

[3] Defendants' failure to include reliable, admissible evidence providing details about the Defendants' decision and plans for the "thorough review" is problematic and leaves Plaintiffs and the Court to piece together these important facts.

> Since the Bible class is an elective, I would like to include community members and religious leaders along with our teachers in this [review] process. In order to conduct a thorough review, we need to allow at least a year to complete the task. Therefore, I am recommending that we suspend Bible classes until this review is completed.

(Def. Reply Ex. F). It is apparent from this statement that the suspension of the program envisioned by Defendant Akers is merely temporary.

Akers' statements also demonstrate the unlikelihood that the program will be cancelled or altered significantly. In her statement to the Board, Akers states her intention of involving religious leaders in the decision-making process, suggesting an aim of preserving bible classes. In addition, Akers has emphasized that Defendants are working to keep the Bible in the Schools program ("Mercer County Schools is continuing its efforts to keep the Bible in the Schools program.") ("We are still vigorously contesting it…But we have these mandatory timelines that we're up against that puts us in this position. We haven't stopped contesting it. We're still fighting it.") (Def. Reply Ex. E).

Given the decades-long history of bible classes in Mercer County Schools, these statements and the circumstances surrounding the belated suspension of the program reveal it to be no more than a litigation tactic. As the foregoing review of standing and mootness doctrines demonstrates, the tactic is ill-conceived. The suspension does not affect the Court's standing analysis, and it falls far short of satisfying Defendants' mootness burden. Allowing Defendants' conduct to affect the outcome of any justiciability analysis would encourage future defendants to engage in similar self-serving conduct and "permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Service Emps. Int'l Union, Local 1000*, --- U.S. ---, 132 S.Ct. 2277, 2287 (2012).

Respectfully submitted,

/s/ Marcus B. Schneider, Esquire
Marcus B. Schneider, Esquire
PA I.D. No. 208421
STEELE SCHNEIDER
428 Forbes Avenue, Suite 900
Pittsburgh, PA 15219
(412) 235-7682
(412) 235-7693/facsimile
mschneider@steeleschneider.com
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2017, the foregoing **PLAINTIFFS' SUR-REPLY IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS** was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic case filing system and constitutes service of this filing under Rule 5(b)(2)(E) of the Federal Rules of Civil Procedure. Parties may access this filing through the Court's ECF system.

HIRAM S. SASSER III (*pro hac vice*)
hsasser@firstliberty.org
JEREMIAH G. DYS
(W.Va. Bar No. 9998; Tex. Bar No. 24096415)
jdys@firstliberty.org
2001 West Plano Parkway
Suite 1600
Plano, TX 75075
Tel: (972) 941-4444

KERMIT J. MOORE (W.Va. Bar No. 2611)
kmoore@brewstermorhouse.com
418 Bland Street
P.O. Box 529
Bluefield, WV 24701
Tel: (304) 325-9177

MICHAEL J. WALSH, JR. (*pro hac vice*)
mwalsh@omm.com
DAVID R. DOREY (*pro hac vice*)
ddorey@omm.com
1625 Eye Street, N.W.
Washington, DC 20006
Tel: (202) 383-5150

Attorneys for Defendants

/s/ Marcus B. Schneider, Esquire
Marcus B. Schneider, Esquire