

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

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

Plaintiffs,

vs.

MERCER COUNTY BOARD OF
EDUCATION, et al.,

Defendants.

Civil Action No. 1:17-cv-00642

Hon. David A. Faber

**PLAINTIFFS' SUPPLEMENTAL BRIEF IN OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS**

Introduction

Plaintiffs' nominal damages claims for past constitutional injuries must go forward against each Defendant. Plaintiffs suffered direct unwelcome contact with BITS and endured exclusion and ridicule as a result of their efforts to avoid the program. The alleged termination of the BITS Program does nothing to address the injuries Plaintiffs already endured while Jessica attended Mercer Schools. This case continues to present a live controversy because these claims remain live today.

Fourth Circuit case law compels this conclusion. The law on this issue is well established and leaves no room for dismissal of these live nominal claims just because the Court has found that Plaintiff's forward-looking claims for injunctive relief are moot. Where a plaintiff has asserted viable nominal damages claims based upon actual

encounters with a challenged practice, the Fourth Circuit provides clear instruction: the case itself is saved from mootness because of these claims.

An award of nominal damages based upon a finding that BITS was unconstitutional will vindicate Plaintiffs' Establishment Clause rights. Such an award will hold Defendants accountable for the past constitutional deprivations visited upon Plaintiffs; the present-day termination of BITS does not. In the constitutional context, nominal damages are no mere trifle—they are the *appropriate* means of vindicating rights violations that do not result in provable damages. Dismissal of this case in its entirety will allow the past rights violations alleged in the FAC to go unaddressed. The Court must, therefore, deny Defendants' request to dismiss Plaintiffs' nominal damages claims.

Facts

The FAC details Plaintiffs' past injuries resulting from BITS and her non-participation in the program. Because Elizabeth Deal did not sign the BITS permission slip she received when Jessica Roe began elementary school, Jessica did not participate in BITS. *FAC* ¶ 38. As a result, Jessica was placed in a coatroom in the back of her elementary classroom. *Id.* ¶ 39. From there, she could still hear the instruction from BITS class. *Id.* Elizabeth complained to Defendant Peery, the school principal, and in response, instead of placing Jessica in the coatroom, Mercer Schools removed her from the classroom but never provided alternative instruction. *Id.* at ¶¶ 40-44. In first and second grade, Jessica was sent to a library or another classroom, where she most often read a book to herself; in third grade she was sent to a computer lab, where she continued to read to herself. *Id.*

Because she did not participate in BITS, Jessica was harassed and excluded by other students. *Id.* at ¶¶ 45-46. This harassment included taunts that Jessica and her parents were going to hell. *Id.* at ¶ 45. As a result of these experiences, Elizabeth and Jessica felt like second-class citizens in Mercer Schools *Id.* at ¶ 47. After Jessica's third grade year, based in large part on BITS and the mistreatment of Jessica, Elizabeth made the decision to incur additional expenses to send Jessica to a school outside of Mercer County. *Id.* at ¶¶ 48-50.

Plaintiffs' FAC alleges that these past injuries entitle them to nominal damages. Plaintiffs allege that Defendants violated Jessica and Elizabeth's rights of conscience and their First Amendment rights by subjecting Jessica to the treatment outlined in the FAC-- forcing her to endure BITS and the negative effects associated with opting out of the class. *Id.* at ¶ 114. In addition, Elizabeth alleges that her right to parent Jessica as she sees fit was impaired as a result of BITS and the coercion it placed her under. *Id.* ¶ 116. Elizabeth and Jessica specifically sought nominal damages to compensate them for these injuries. *Id.* at Request for Relief, D.

Standard of Review

The well-established Rule 12(b)(6) standards apply to the Court's resolution of this issue. Defendants' argument that Plaintiffs' live nominal damages claims do not save this case from dismissal on the basis of mootness are presented under Rule 12(b)(1). Where a Rule 12(b)(1) challenge is made based upon the facts in the complaint, a "court must proceed as it would on a motion to dismiss . . . under Rule 12(b)(6)." *Id.* (citing *Thigpen v. United States*, 800 F.2d 393, 401 n.15 (4th Cir. 1986)).

The pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure inform the analysis of what is required to survive a Rule 12(b)(6) motion. Rule 8(a) requires “a short plain statement . . . that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2). This standard requires a “showing, rather than a blanket assertion, of entitlement to relief.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 n.3 (2007) (internal quotations and citation omitted). In other words, a plaintiff must allege that her claim is “facially plausible.” *Wag More Dogs, Ltd. Liability Corp. v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012) (plaintiff meets standard of “‘facial plausability’ by pleading ‘factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged’”) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

In reviewing a complaint for the required plausibility, the court “must accept as true all of the factual allegations contained in the complaint” but may ignore “bare legal conclusions” and “unwarranted inferences, unreasonable conclusions, or arguments.” *Williams v. West Virginia State Police*, 2017 WL 833051, at *2 (S.D. W. Va. Mar. 2, 2017) (internal quotations and citations omitted). In the standing context, “general factual allegations of injury resulting from the defendant’s conduct may suffice, for . . . we presume that general allegations embrace those specific facts necessary to support the claim.” *Wilson v. MRO Corporation*, 2017 WL 1534202, at *4 (S.D. W. Va. Apr. 27, 2017) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

Argument

I. Nominal damages are the appropriate relief for the past injuries suffered by Plaintiffs as a result of their contact with BITS.

The Supreme Court has recognized the right of a plaintiff to recover nominal damages based upon past constitutional injury. *Carey v. Piphus*, 435 U.S. 247 (1978);

Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299 (1986). *Carey* held that a plaintiff asserting a denial of due process can obtain an award of nominal damages without proof of actual injury, *Carey*, 435 U.S. at 266-67, and *Stachura* made clear that the holding in *Carey* applied to deprivations of other constitutional rights. 477 U.S. at 308 n.11, 309. “Nominal damages, and not damages based on some undefinable ‘value’ of infringed rights, are the appropriate means of ‘vindicating’ rights whose deprivation has not caused actual, provable injury.” *Id.* (emphasis added).

Nominal damages play a vital role in the vindication of constitutional rights. “[S]uccessful civil rights plaintiff[s] often secure[] important social benefits that are not reflected in nominal or relatively small damages awards.” *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986). *Carey* also recognized these important implications of permitting nominal damages claims to go forward: “By making the deprivation of such rights actionable for nominal damages without proof of injury, the law recognizes the importance to organized society that those rights be scrupulously observed.” 435 U.S. at 266. To view nominal damages for past constitutional deprivations as a mere tagalong to forward-looking claims for injunctive relief would be to miss the important role these damages play in the constitutional arena.

The past injuries alleged by Plaintiffs in the FAC are the type of past constitutional injuries for which nominal damages are appropriate. Plaintiffs allege they were deprived of their constitutional rights provided for under the Establishment Clause. Elizabeth Deal alleges that she felt coerced by the presence of BITS and that her right to parent Jessica as she saw fit was obstructed. Jessica alleges she had direct unwelcome contact with BITS and that she was excluded and harassed during her elementary school

years as a result of BITS. Both Plaintiffs allege they were made to feel like outsiders in their own community as a result of BITS and their efforts to avoid it. Apart from the expenses incurred by Elizabeth to send Jessica to a nearby school, none of these injuries are alleged to have caused provable damages. Yet they are serious constitutional deprivations and are actionable on the basis of Plaintiffs' claims for nominal damages.

II. Under Fourth Circuit precedent, the Court must permit Plaintiffs' live nominal damages claims to go forward.

This Circuit has repeatedly held that the mootness of an injunctive relief claim does not render an entire case moot where the plaintiff maintains a live claim for nominal damages. *See, e.g., Henson v. Honor Committee of Va.*, 719 F.2d 69, 72 n.5 (4th Cir. 1983) (expelled student plaintiff's "request for damages remained a live controversy even after the disciplinary proceedings were dropped" because of the right to nominal damages); *Central Radio Co. v. City of Norfolk*, 811 F.3d 625, 632 (4th Cir. 2016) (claim for retrospective relief in the form of nominal damages saved entire case from becoming moot with the mootness of prospective relief claim for an injunction). This general rule has been applied in a variety of contexts. *Mellen v. Bunting*, 327 F.3d 355, 365 (4th Cir. 2003); *American Humanist Assoc'n v. Greenville Sch. Dist.*, 652 Fed.Appx. 224, 232 (4th Cir. 2016) (both applying rule in Establishment Clause cases); *Covenant Media of S.C., LLC v. City of North Charleston*, 493 F.3d 421, 429 n.4 (4th Cir. 2007); *Central Radio Co.*, 811 F.3d at 632 (both applying rule in First Amendment context related to local sign ordinances); *Rendelman v. Rouse*, 569 F.3d 182, 187 (4th Cir. 2009) (applying the rule to prisoner cases filed under 42 U.S.C. § 1983).

Greenville and *Mellen* confronted the issue facing the Court in this case. In both cases, the defendants appealed district court findings of Establishment Clause violations

and asserted mootness arguments based upon intervening events that had occurred. *Greenville*, 652 Fed.Appx. at 231; *Mellen*, 327 F.3d 363-64. In *Greenville*, parent and student plaintiffs, who sought an injunction of ongoing religious practices and nominal damages to compensate for past contact, had moved to a different state while the case was on appeal. *Greenville*, 652 Fed.Appx. at 228. In *Mellen*, cadets who challenged the supper prayer at their state-operated military college had graduated. *Mellen*, 327 F.3d at 363. Thus, both cases involved Establishment Clause cases in the education setting where events occurring after the case was filed affected the courts' justiciability analysis.

While these changed circumstances mooted the claims for injunctive relief, neither case was moot in its entirety because of the existence of live nominal damages claims. In *Greenville*, the Court determined that the case was not moot because plaintiffs' past constitutional injury was "complete at the time the violation occurred" and the nominal damages claim in connection with this injury provided them with a continued interest in the case's outcome. *Greenville*, 652 Fed.Appx. at 232. In *Mellen*, the Fourth Circuit held that while the student's declaratory and injunctive relief claims were mooted by the students' graduation, "their [nominal] damage claim continues to present a live controversy." *Mellen*, 327 F.3d at 365. In both cases, the claims for nominal damages based upon past contact with challenged religious practices prevented complete dismissal on mootness grounds even where injunctive relief claims were mooted by intervening events.

Similarly, Plaintiffs' ongoing claims for nominal damages save this case from becoming moot. These nominal damages claims are based upon Plaintiffs' past constitutional injuries in the form of their interactions with BITS and the harm stemming

from their avoidance of it. The nominal damages sought for these injuries would constitute *retrospective relief*. Thus, even assuming Defendants' purported termination of BITS mooted Plaintiffs' (injunctive relief) claims for *prospective relief*, Plaintiffs' ongoing claims for nominal damages based upon these past injuries "continue to present a live controversy."

These alleged past injuries are also significant because they distinguish this case from the limited exception to the general rule that was recognized by a panel of the Fourth Circuit in a single, unreported case.¹ *Chapin Furniture Outlet Inc. v. Town of Chapin* acknowledged the "normal[]" rule that "a defendant's change in conduct will not moot the case" "so long as the plaintiff has a cause of action for [at least] nominal damages" but held that where "the [o]rdinance was never enforced against [a plaintiff]," the general rule does not apply. 252 F.App'x. 566, 571–72 (4th Cir. 2007) (per curiam). The court's holding reinforced the significance of nominal damages, recognizing them as the appropriate form of relief for past constitutional deprivations and not a mere throw-in form of relief. *Id.* (citing *Carey*, 435 U.S. at 254). But because the nominal damages claim alleged by the plaintiffs was not tied to real constitutional deprivations, the court

¹ Defendants cite to a single Fourth Circuit case to support their gross mischaracterization of the law in this circuit. Def. Br. in Supp., 8 (citing *Am. Legion Post 7 of Durham, N.C. v. City of Durham*, 239 F.3d 601, 605 (4th Cir. 2006)). *American Legion Post 7* did not squarely address the issue of whether nominal damages claims prevent the mootness of an entire case where an injunctive relief claim has become moot. *Am. Legion Post 7*, 239 F.3d at 605–06 (addressing only whether a claim for injunctive relief became moot). Likely, the Fourth Circuit did not feel the need to confront this issue because a live case remained on the plaintiff's other claims in the case. *Id.* at 606. Regardless of its reason for not addressing the issue, ample Fourth Circuit caselaw demonstrates that the Fourth Circuit applies the general rule that live nominal damages claims save a case from mootness.

declined to enforce the general rule. *Id.* at 572-73. Thus, the court recognized a limited exception to the general rule where plaintiffs claiming nominal damages do not prove or allege prior constitutional injury underpinning the nominal damages claim.

The general rule applies here without exception. Again, Plaintiffs have alleged numerous past constitutional injuries arising directly out of their contact with the challenged practice. These are the very sort of constitutional deprivations that are appropriately vindicated through a nominal damages claim. Because an award of nominal damages will still vindicate these claims today—regardless of Defendants’ alleged voluntary cessation—Defendant’s motion to dismiss the FAC in its entirety must be denied.

III. The law of nearly every other circuit compels the same result as Fourth Circuit jurisprudence.

The general rule applied by the Fourth Circuit has been adopted in the Second, Fifth, Sixth, Seventh, Ninth, and Tenth circuits.² *Van Wie v. Pataki*, 267 F.3d 109, 115 n.4 (2d Cir. 2001) (“For suits alleging constitutional violations under 42 U.S.C. § 1983, it is enough [to preclude mootness] that the parties merely request nominal damages.”); *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 748, n.32 (5th Cir. 2009) (collecting cases and noting that the Fifth Circuit’s “sister courts” have “consistently held that a claim for nominal damages avoids mootness”); *Murray v. Bd. Of Trs., Univ. of Louisville*, 659 F.3d 77, 79 (6th Cir. 1981); *Miller v. City of Cincinnati*, 622 F.3d 524, 533 (6th Cir.

² The First and Third circuits have not clearly confronted the question, but cases on the issue of prisoner rights suggest that these circuits would join the Fourth Circuit and the majority of other circuits in applying the general rule that live nominal damages claims save a case from becoming moot.

2010) (“[P]laintiffs’ claims remain viable to the extent that they seek nominal damages as a remedy for past wrong.”);³ *Crue v. Aiken*, 370 F.3d 668, 674 (7th Cir. 2004) (holding that claim for declaratory relief and nominal damages kept otherwise moot case alive); *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002) (recognizing that while “claims for prospective relief” had become “moot,” plaintiff’s “possible entitlement to nominal damages create[d] a continuing live controversy”); *O’Connor v. Washburn Univ.*, 416 F.3d 1216, 1221-22 (10th Cir. 2005) (distinguishing between mootness of injunctive relief claim and nominal damages claim, holding that nominal damages claim was “not mooted by the removal of the [challenged] statute from campus”). The Eighth Circuit has applied the same general rule while recognizing a limited exception for cases where the claim for nominal damages is not supported by prior constitutional injury. *See Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 802-03 (8th Cir. 2006) (applying general rule); *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 687 (8th Cir. 2012) (protestors could not contest prior version of a speech ordinance where they were not harmed by the prior version of the speech). As such, seven other circuits are in accord with the result compelled by the Fourth Circuit’s general rule.⁴

³ Defendants’ reliance upon *Morrison v. Board of Educ. of Boyd County* as support for their mootness position is misplaced. Def. Br. in Supp., 9 (citing 521 F.3d 602, 611 (6th Cir. 2008)). *Morrison* dealt with whether plaintiffs had *standing* to pursue nominal damage claims; the majority opinion did not deal with mootness. *Id.* at 607-11. As cited above, the Sixth Circuit follows the majority rule as it relates to nominal damages and mootness.

⁴ The Eleventh Circuit is the only circuit to take a contrary position. The Eleventh Circuit first held that live nominal damages claims cannot save an otherwise moot case from dismissal in *Flanigan’s v. City of Sandy Springs, Georgia*. 868 F.3d 1248, 1270 (11th Cir. 2017). The plaintiffs in *Flanigan’s* sought injunctive relief

IV. Defendants’ informal invitation for the Court to enter judgment against them for nominal damages is not a proper request for judgment.

Defendants cannot request judgment be entered against them in a Rule 12 motion. Rule 12(b) of the Federal Rules of Civil Procedure provides defendants with a framework for presenting *defenses*. Defendants’ request, in the context of their Rule 12 motion, for the Court to “enter a judgment of nominal damages consistent with Defendants’ offer of judgment” is not a proper request under this rule, and Defendants’ deficient offer of judgment is not part of the record.

If Defendants wish to concede that they are liable to Plaintiffs for nominal damages, they have the option—as they have had throughout this case—to properly move this Court to enter judgment against them. Elizabeth Deal and Jessica Roe each seek an entry of nominal damages against each Defendant. If Defendants wish to take a default judgment or file a proper motion (under Rule 56, for example) requesting judgment to that effect, Plaintiffs will likely consent to any such motion.

Conclusion

Unlike other justiciability issues this Court has confronted in this case, existing Fourth Circuit case law clearly resolves the issue at hand. The Fourth Circuit directs that this case cannot be dismissed in its entirety where live nominal damages claims based upon actual past injuries remain. Plaintiffs have adequately pled claims for nominal damages based upon past constitutional injuries stemming from their contact with and

and nominal damages regarding a code provision, but the provision had not been enforced against the plaintiffs. 868 F.3d at 1262-63. *Flanigan’s* was recently applied by the Eleventh Circuit in another case raising similar issues. *Uzuegbunam v. Preczewski*, 781 Fed.Appx. 824, 828-32 (11th Cir. 2019). To date, no other circuits have joined the Eleventh Circuit’s position.

avoidance of BITS. Those claims remain live and are unaffected by Defendants' most recent actions related to BITS, which formed the basis of this Court's decision on the mootness of Plaintiffs' claims for injunctive relief. Thus, the Court must deny Defendants' motion to dismiss on this issue.

Respectfully submitted,

/s/ Marcus B. Schneider, Esquire

Marcus B. Schneider, Esquire

W.V. I.D. No. 12814

STEELE SCHNEIDER

428 Forbes Avenue, Suite 700

Pittsburgh, PA 15219

(412) 235-7682

(412) 235-7693/facsimile

marcschneider@steeschneider.com

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2020, the foregoing **SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANTS' 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.

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