

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH BAKER and
MARYN TEED,

CIVIL ACTION

Plaintiffs

v.

PENNRIDGE SCHOOL DISTRICT;
ROBERT KISH, Ph.D.; THOMAS J.
CREEDEN; and KEITH GODSHELL,

Defendants

NO. 01-3728

MEMORANDUM and ORDER

McLaughlin, J.

March 24, 2003

The plaintiffs, Joseph Baker and Maryn Teed, a former and current student, respectively, in the Penridge School District, have brought suit under 42 U.S.C. § 1983 and Article 1, Section 7 of the Pennsylvania Constitution against the Penridge School District, and against Dr. Robert Kish, Thomas Creeden, and Keith Godshell in their official and individual capacities. The plaintiffs allege that the defendants violated their free speech and equal protection rights through promulgation and enforcement of a school policy regulating student expression. Pending before the Court is the defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). The Court will grant the motion with respect to Ms. Teed's claims and will grant the motion in part and deny the motion in part with respect to Mr. Baker's claims.

Mr. Baker's claims for injunctive and declaratory relief are dismissed because he has conceded that he does not have standing to pursue these claims. His claims under the Pennsylvania Constitution are dismissed for failure to state a claim because Pennsylvania law does not provide a cause of action for violations of the Pennsylvania Constitution. Mr. Baker's claims against the individual defendants in their official capacities are dismissed because these suits are duplicative of his suit against the Pennridge School District. Mr. Baker has stated a claim for nominal damages against the school district and the individual defendants in their individual capacities for violations of his First and Fourteenth Amendment rights.

All of Ms. Teed's claims are dismissed because she does not have standing to seek any of her requested relief.

I. Background

The facts of this case, in the light most favorable to the plaintiffs, are as follows.' The Pennridge School District

¹ In considering a motion to dismiss under Rule 12(b)(6), the Court "take[s] all well pleaded allegations as true, construe[s] the [amended] complaint in the light most favorable to the plaintiff[s], and determine[s] whether under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665 (3d Cir. 1988).

operates Pennridge High School, a public secondary school. The individual defendants are officials of the school district. Thomas Creeden is the principal of the high school, Keith Godshell is the assistant principal of the high school, and Dr. Robert Kish is the superintendent of the school district. See Am. Compl. at ¶¶ 3-6, 15.

Mr. Baker graduated from Pennridge High School in June 2001. Ms. Teed is a student in the Pennridge School District. See Am. Compl. at ¶¶ 1, 2, 13, 20.

On March 15, 2001, Mr. Baker attempted to distribute a flier to his classmates at Pennridge High School during non-instructional time. The flier discussed alleged errors in the high school biology text regarding evolution and included a list of ten questions that students could ask their biology teachers about alleged misinformation concerning evolution in the school's textbooks. The flier also mentioned an upcoming school board meeting at which individuals could voice their frustration with the alleged errors in the textbook. Finally, the flier encouraged individuals to "be a mensch," which is "a term used by Jewish people for centuries . . . mean[ing] upright, honorable, and decent person, [and] [s]omeone willing to stand up for the truth, even if it is not popular (like Joe Baker)." See Am. Compl. at ¶ 14 and Ex. 1.

When Mr. Baker attempted to distribute his flier, Mr. Creeden and Mr. Godshell informed him that he violated school policy. Mr. Creeden and Mr. Godshell told Mr. Baker that the flier: (1) libeled the school's biology teacher and (2) offended the school's biology and science teachers to the extent that it suggested the students should question the materials used to teach evolution at Pennridge High School. In subsequent conversations with Mr. Creeden and Mr. Godshell, Mr. Baker was informed that he violated a school policy by not allowing school officials two days to review his flier before he attempted to disseminate it as required under the school's prior approval policy. See Am. Compl. at ¶ 15-16.

The school policy violated by Mr. Baker was Pennridge School District Policy 220 ("Policy 220"). At the time that Mr. Baker violated school policy, Policy 220 provided that:

The Board respects the rights of students to express themselves in word or symbol and to distribute materials as part *of* that expression, but recognizes that the exercise of that right must be limited by the need to maintain an orderly school environment and to protect the rights of all members of the school community.

The Board reserves the right to designate and prohibit manifestations of student expression which are not protected by the right of free expression because they violate the rights of others. Such expressions are those which:

1. Libel any specific person or persons.
2. Seek to establish the supremacy of a particular religious denomination, sect or point of view. . . .
4. Are obscene or contain material otherwise deemed to be harmful to impressionable students who may receive them. . . .

The Board shall require that students who wish to distribute materials submit them for prior review. Where the reviewer cannot show within two school days that the materials are unprotected, such material may be distributed. Appeal from the prior review shall be permitted to the Superintendent and the Board in accordance with district rules.

See Am. Compl. at ¶ 18 and Ex. 2.

Policy 220 applies to any type of printed material that a student wishes to distribute at school. The defendants acted jointly in promulgating and enforcing Policy 220. See Am. Compl. at ¶¶ 17-19.

Ms. Teed wants to disseminate non-libelous, nondisruptive material to her classmates. Policy 220 dissuaded her from disseminating materials. See Am. Compl. at ¶ 20.

On October 11, 2001, Mr. Baker and Ms. Teed filed a four count amended complaint against the Pennridge School District and against the individual defendants in their individual and official capacities. Counts one and two allege that Policy 220 violates the plaintiffs' free speech rights under

the United States and Pennsylvania Constitutions, respectively. Counts three and four allege that Mr. Baker's equal protection rights under the United States and Pennsylvania Constitutions, respectively, were violated when Mr. Baker was singled out for disparate treatment and disfavored status without a rational relationship to any legitimate pedagogical interest.

The plaintiffs ask the Court to: (1) declare Policy 220 unconstitutional; (2) enjoin the defendants from prohibiting Ms. Teed, and all students similarly situated, from disseminating literature or expressing themselves by other appropriate means based on Policy 220; (3) enjoin the defendants from violating the constitutional rights of Ms. Teed, and all students similarly situated, in the future; and (4) order the defendants to pay \$1.00 as compensation to Mr. Baker and Ms. Teed as well as the plaintiffs' attorney fees and litigation costs.

Subsequent to the filing of the amended complaint, Policy 220 was revised. With permission of the Court, the parties filed supplemental briefs that discussed the effect of revised Policy 220 on the plaintiffs' lawsuit.

The Court held oral argument on the defendants' motion to dismiss on February 25, 2003.²

² References to the oral argument transcript are indicated as "Tr." followed by the transcript's page number.

II. Analysis

A. Article III Requirements

Article III of the Constitution limits the jurisdiction of the federal courts to situations where there is a case or controversy. Two limits imposed by the case or controversy requirement are that federal courts do not have subject-matter jurisdiction over a suit unless: (1) the plaintiff has standing to sue and (2) the plaintiff's claim is not moot. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64-67 (1997).

There are three constitutional requirements that a plaintiff must meet in order to have standing to sue. First, the plaintiff must demonstrate an injury in fact - a harm that is actual and concrete, as opposed to conjectural or hypothetical. Second, there must be a causal connection between the plaintiff's injury and the defendant's conduct. Third, the relief requested must be likely to redress the injury suffered by the plaintiff. See *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2002). A plaintiff must have standing **for** each form of relief sought. *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983).

There are also three constitutional requirements that must be met throughout a case to ensure that a plaintiff's claim is not moot. First, there must be a legal controversy that is

real and not hypothetical. Second, the controversy must affect an individual in a concrete manner to provide the factual predicate for reasoned adjudication. Third, the controversy must have sufficiently adverse parties to ensure that the issues will be sharpened for judicial resolution. Int'l Bhd. of Bolilermakers v. Kelly, 815 F.2d 912, 914-15 (3d Cir. 1987). If there is not an actual controversy at any point during the proceedings, then a case is moot, and a federal court no longer has jurisdiction. See Church of Scientology of Cal. v. United States, 506 U.S. 9, 11 (1992).

1. Mr. Baker's Claims

The amended complaint alleges that the defendants violated Mr. Baker's free speech and equal protection rights by enforcing Policy 220 against him when he attempted to distribute his flier that discussed the evolution teaching materials used at Penridge High School. In the amended complaint, Mr. Baker seeks injunctive and declaratory relief as well as damages in the amount of \$1.00 as compensation and payment of his attorney fees and litigation costs.

Mr. Baker has conceded that under City of Los Angeles v. Lyons, 461 U.S. 95 (1983), he does not have standing to bring his claims for declaratory and injunctive relief. See Tr. at 8.

Additionally, Mr. Baker's claims for injunctive and declaratory relief are moot because he graduated from Pennridge High School in June 2001. See Indianapolis Sch. Comm'rs v. Jacobs, 420 U.S. 128, 129 (1975). The question is whether his claim for damages satisfies the requirements of standing and **of** mootness.³

The injury in fact requirement of standing is satisfied when a person seeks damages based on allegations that his constitutional rights were violated in the past. See United States v. Hays, 515 U.S. 737, 744-45 (1995); Laird v. Tatum, 408 U.S. 1, 13-14 (1972). Here, Mr. Baker seeks damages based on his allegations that the defendants violated his constitutional rights by preventing him from disseminating his flier. Mr. Baker's claim for damages, therefore, satisfies the injury in fact requirement.⁴

³ It is not clear whether the defendants only raise a mootness challenge or whether they also make a standing challenge to Mr. Baker's claim for damages. Regardless **of** whether the defendants raised one or both challenges, the Court must satisfy itself that both requirements are met because standing and mootness are jurisdictional limitations. FOCUS v. Allegheny Court of Common Pleas, 75 F.3d 834, 838 (3d Cir. 1996) (raising issue of standing sua sponte); New Jersey Turnpike Auth. v. Jersey Cent. Power & Light, 772 F.2d 25, 30 & n.10 (3d Cir. 1985) (raising issue of mootness sua sponte).

⁴ The causation and redressability requirements of standing for Mr. Baker's nominal damages claim are not disputed by the parties, and the Court finds that both requirements are met. See Allen v. Wright, 468 U.S. 737, 751 (1984).

The defendants argue that Mr. Baker's claims are moot because he only has a claim for nominal damages. A viable claim for damages, however, satisfies all three mootness requirements because it "invests [the plaintiff] with a continuing, concrete stake in the outcome of the litigation." Khodara Env'tl., Inc. v. Beckman, 237 F.3d 186, 196 (3d Cir. 2001).

A plaintiff who sues for the deprivation of constitutional rights has a viable claim for nominal damages even if he cannot show that he suffered an actual injury. See Carev v. Piphus, 435 U.S. 247, 257-58, 266-67 (1978). By allowing nominal damages to be awarded, the Supreme Court has recognized the importance of having constitutional rights observed. Id. at 266; see City of Riverside v. Rivera, 477 U.S. 561, 574 (1986). Given the importance of having constitutional rights observed, the Court agrees with the Courts of Appeals that have found a claim for only nominal damages is a viable damages claim that saves a case from mootness. See, e.g., Bernhardt v. County of Los Angeles, 279 F.3d 862, 872-73 (9th Cir. 2002); Amato v. City of Saratoga Springs, 170 F.3d 311, 316-21 (2d Cir. 1999); Comm. for First Amendment v. Campbell, 962 F.2d 1517, 1526-27 (10th Cir. 1992); Henson v. Honor Comm. of Univ. of Virginia, 719 F.2d 69, 72 & n.5 (4th Cir. 1983); see also Doe v. Delie, 257 F.3d 309, 314 & n.3 (3d Cir. 2001) (holding that a claim for only

nominal and punitive damages was not moot). Because Mr. Baker has a viable nominal damages claim, his suit is not moot.

2. Ms. Teed's Claims

Ms. Teed has alleged that Policy 220 infringes her free speech rights. She seeks injunctive and declaratory relief as well as damages in the amount of \$1.00 as compensation and her attorney fees and litigation costs. The defendants challenge Ms. Teed's standing and argue that she has alleged only abstract and conjectural harm.

Ms. Teed's claim for damages based on past infringement of her rights does not satisfy the injury in fact requirement of standing because the amended complaint contains no allegation that Ms. Teed attempted to distribute materials or received discipline for violating Policy 220.

Ms. Teed must show a likelihood of substantial and immediate irreparable harm to satisfy the injury in fact requirement for her declaratory and injunctive relief claims. See City of Los Angeles v. Lyons, 461 U.S. 95, 105-06, 111 (1983); see also Luian v. Defenders of Wildlife, 504 U.S. 555, 562, 564 (1992). Ms. Teed claims that the harm she will suffer is not being able to disseminate materials out of her fear that Policy 220 will be enforced against her.

Subjective allegations that an individual's free speech rights will be chilled by government action are not an "adequate substitute for a claim of specific present objective harm or threat of specific future harm." Laird v. Tatum, 408 U.S. 1, 13-14 (1972). In Laird, the plaintiffs alleged that their First Amendment rights were violated because their expression was chilled by the army's surveillance of domestic groups. These allegations did not identify any harm, other than a chilling of the plaintiffs' First Amendment rights, that would be suffered by the plaintiffs in the future. The plaintiffs did not satisfy the injury in fact requirement because they had not shown a likelihood of future harm. Id.

Since its decision in Laird, the Supreme Court has reaffirmed the principle that subjective allegations of a chilling effect on an individual's free speech rights are not enough to show a likelihood of future harm. For example, in Meese v. Keene, 481 U.S. 465, (1987), the plaintiff argued that a statute that required him to identify three motion picture films that he wanted to watch as political propoganda violated his First Amendment rights. To the extent that the plaintiff alleged that the statute had a chilling effect on the exercise of his First **Amendment** rights to **obtain** and view the films, he did not

have standing to seek the statute's declaratory and injunctive relief. Keene, Id. at 473.

Similarly to the plaintiffs in Laird and Keene, Ms. Teed has made subjective allegations that Policy 220 has a chilling effect on her right to disseminate materials. Without more than a subjective allegation that her right to disseminate materials has been chilled by Policy 220, Ms. Teed does not satisfy the injury in fact requirement.

Ms. Teed's allegations are at most a vague description of her intent to disseminate materials in the future. Vague allegations that future activities will be harmed by government action are not enough to show a likelihood of future harm. See Luian, 504 U.S. at 562, 564. In Luian, the plaintiffs challenged a federal regulation that provided that the Endangered Species Act did not apply abroad. The plaintiffs presented detailed affidavits showing that they previously traveled abroad to view the endangered animals and they desired to return to these areas in the future. The evidence did not satisfy the injury in fact requirement because the evidence did not reveal future concrete plans for returning to the areas. Id.

Similarly to the Luian plaintiffs, Ms. Teed's allegations that she desires to disseminate materials is nothing more than a vague allegation of future **plans**. It is an

allegation that contains no level of certainty that Ms. Teed will disseminate materials in the future.

Ms. Teed's vague allegations of future harm are in direct contrast to the allegations of concrete harm that the plaintiff made in Keene. In addition to his subjective allegations of a chilling effect that were not enough for standing, the plaintiff in Keene made concrete allegations that he would suffer future harm. The plaintiff in Keene was a lawyer and a state senator. He alleged that a law forcing him to disclose that he obtained and viewed political propaganda would damage his chances for reelection and harm his ability to practice law. These allegations showed the likelihood of future harm necessary to satisfy the injury in fact requirement for obtaining injunctive and declaratory relief. Keene, 481 U.S. at 473-75.

Ms. Teed has not made allegations similar to the allegations made by the plaintiff in Keene. There is a chance that Ms. Teed's rights could be violated if Policy 220 is allowed to stand, but based on the allegations in the amended complaint, the possible infringement of her rights is hypothetical and conjectural. The chance that Ms. Teed's rights may be violated is not enough to satisfy the injury in fact requirement.

Without any allegations of specific harm, Ms. Teed's challenge is no more than an assertion that Policy 220 is unconstitutional. As noted by the Supreme Court in Lyons, a federal court may not entertain a claim by any or all citizens who no more than assert that certain governmental practices are unconstitutional. Lyons, 461 U.S. at 111; see Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997) ("An interest shared generally with the public at large in the proper application of the Constitution and the laws will not do" to satisfy the elements of standing).

The plaintiff argues that the requirements of standing are relaxed when a plaintiff claims that government action violates the First Amendment by establishing an unconstitutional licensing scheme or prior restraint.⁵ What the plaintiff overlooks is that the requirement that is relaxed is the prudential standing limitation that prevents a plaintiff from asserting the rights of third parties. City of Chicaso v.

⁵ In addition to the licensing and prior restraint cases, Ms. Teed relies on Anderson v. Davila, 125 F.3d 148 (3d Cir. 1997), to support her argument that she has standing. Ms. Teed's reliance on Anderson is misplaced. In that case, the plaintiff's allegation that the defendants retaliated against him for filing an employment discrimination suit satisfied the injury in fact requirement for his First Amendment retaliation claim. 125 F.3d at 160-61. Ms. Teed has not alleged that the defendants retaliated against her.

Morales, 527 U.S. 41, 55 n.22 (1999); see Virginia v. Am. Booksellers Ass'n Inc., 484 U.S. 383, 392-93 (1988); Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 954-57 (1984); New York v. Ferber, 458 U.S. 747, 767-69 (1982); The Pitt News v. Fisher, 215 F.3d 354, 363-64 (3d Cir. 2000).

The irreducible minimum of the Article III standing requirements are not relaxed when a plaintiff alleges that government action establishes an unconstitutional licensing program or prior restraint. Joseph H. Munson Co. 467 U.S. at 956-58; The Pitt News, 215 F.3d at 360-64. Because Ms. Teed does not satisfy the injury in fact requirement of Article 111, it is irrelevant whether the prudential standing limitations could be relaxed in her case.⁶

The Court does not reach the issues of whether Ms. Teed's claims are moot or whether the other defenses asserted by the defendants apply to her claims because all of her claims are dismissed for lack of standing.

⁶ With respect to the alleged equal protection violation, the amended complaint only contains allegations that Mr. Baker's equal protection rights were violated. See Am. Compl. ¶¶ 28-29, 30-31. Ms. Teed, therefore, has not asserted a claim that her equal protection rights were or will **be** violated by Policy 220. Even if Ms. Teed had asserted an equal protection claim, the claim would be dismissed because she has not satisfied the injury in fact requirement.

B. Failure to State a Claim Under the Pennsylvania Constitution

The defendants argue that Mr. Baker's claims under the Pennsylvania Constitution fail to state a claim because there is no provision authorizing a private suit under the Pennsylvania constitution. The Court agrees. See, e.g., Kelleher v. City of Reading, No. 01-3386, 2001 WL 1132401, at *2-*3 (E.D. Pa. Sept. 24, 2001); Sabatini v. Reinstein, No. 99-2393, 1999 WL 636667, at *3 (E.D. Pa. Aug. 20, 1999); Lees v. West Greene Sch. Dist., 632 F. Supp. 1327, 1335 (W.D. Pa. 1986).

C. Failure to State a Claim Under the Equal Protection Clause

The defendants argue that Mr. Baker fails to state a claim for a violation of the Equal Protection Clause **of** the United States Constitution because he alleges no group to which he belonged. An equal protection claim, however, can exist based on a class **of** one if a plaintiff alleges that he has been intentionally treated differently from others who are similarly situated and there is no rational basis for the difference. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam).

Mr. Baker alleges that "the actions of the defendants . . . singled [him] out . . . for disparate treatment and

disfavored status in the community without any rational relationship to a legitimate pedagogical interest apart from the content and/or viewpoint of his proposed speech." Under Olech, the allegation that Mr. Baker was intentionally treated differently than other similarly situated students based on his speech is sufficient to state a claim.

D. Failure to State a Claim Against Dr. Kish

Federal Rule of Civil Procedure 8 requires that pleadings set forth a short and plain statement of the claim showing that the pleader is entitled to relief. The defendants argue that Mr. Baker fails to state a claim against Dr. Kish because he alleges no personal involvement by Dr. Kish in the actions of the defendants.

The amended complaint states that "[d]efendants, jointly and severally, acted under color of state law in promulgating and enforcing the aforesaid policy" Additionally, the amended complaint identifies Dr. Kish as the Superintendent of the Pennridge School District and alleges that Policy 220 is a policy of the Pennridge School District. Mr. Baker's allegations, although not very detailed, are sufficient to meet the notice pleading requirements and state a claim against Dr. Kish.

E. Failure to State a Claim Against the Individuals in
Their Official Capacities

The individual defendants argue that the Mr. Baker's claims against them in their official capacities should be dismissed as duplicative of Mr. Baker's claims against the Penridge School District. Mr. Baker's claims against the individuals in their official capacities are duplicative of his claim against the governmental entity, in this case, the Penridge School District. Dismissal is, therefore, appropriate. Kentucky v. Graham, 473 U.S. 159, 165-67 & n.14 (1985).

An appropriate order follows.

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JOSEPH BAKER and
MARYN TEED,

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Plaintiffs

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PENNRIDGE SCHOOL DISTRICT;
ROBERT KISH, Ph.D.; THOMAS J.
CREEDEN; and KEITH GODSHELL,
Defendants

NO. 01-3728

ORDER

AND NOW, this 24th day of March, 2003, upon
consideration of the defendants' motion to dismiss (Docket No.
9), the plaintiffs' opposition thereto, the supplemental filings
of the parties, and following oral argument, IT IS HEREBY ORDERED
that for the reasons set forth in a memorandum of today's date:

(1) the motion is GRANTED with respect to Ms. Teed's
claims; and

(2) the motion is GRANTED IN PART AND DENIED IN PART
with respect to Mr. Baker's claims. The motion is granted as to
the injunctive and declaratory relief sought by Mr. Baker, as to
the suit against the individual defendants in their official
capacities, and as to counts two and four of the amended
complaint. The motion is denied with respect to counts one and
three of the amended complaint to the extent that Mr. Baker seeks

nominal damages from the Pennridge School District and the individual defendants in their individual capacities.

BY THE COURT:

Mary A. McLaughlin

MARY A. MCLAUGHLIN, J.

faxed 3/25/03:
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