UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

GAVIN GRIMM,

Plaintiff,

v.

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant.

Civil No. 4:15-cv-54

ORDER

Currently before this Court are Plaintiff Gavin Grimm's Motion to Vacate Order for Supplemental Briefing and Plaintiff's Notice of Consent to Dismissal of Requests for Relief (C) and (D). ECF Nos. 125, 126. For the reasons stated herein, the Court dismisses Requests for Relief (C) and (D) in the Amended Complaint (ECF No. 113 at 17), and vacates its October 26, 2017 Order directing Supplemental Briefing (ECF No. 123).

I. BACKGROUND

The Court has recounted the procedural history of this case. *See* ECF No. 123 at 1–2.[1] On August 22, 2017, Plaintiff filed an Amended Complaint, alleging claims under Title IX of the

[1] Plaintiff Gavin Grimm, a transgender male teenager, commenced this action against the Gloucester County School Board in July 2015, alleging that the School Board's policy of assigning students to restrooms based on their biological sex violated Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In September 2015, another judge of this Court issued a Memorandum Opinion and Order that (1) dismissed Grimm's claim under Title IX for failure to state a claim, and (2) denied his Motion for a Preliminary Injunction based on alleged violations of Title IX and the Equal Protection Clause. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736, 753 (E.D. Va. 2015).

An interlocutory appeal of those decisions followed, which led to an appellate review process by the United States Court of Appeals for the Fourth Circuit and the United States Supreme Court that lasted nearly two years. *Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056, slip op. at 5–6 (4th Cir. Aug. 2, 2017). During this time, the district court case was re-assigned to the undersigned. In August 2017, the

Education Amendments of 1972, 20 U.S.C. § 1681(a), and under the Equal Protection Clause of the Fourteenth Amendment. ECF No. 113. The Amended Complaint sought: (1) a retrospective declaratory judgment and nominal damages, and (2) a prospective declaratory judgment and permanent injunctive relief. *Id.* at 17. Subsequently, Defendant filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF No. 118.

After the parties briefed the Motion to Dismiss, this Court issued an Order advising the parties that Plaintiff's graduation from high school raised threshold jurisdictional issues related to mootness. The Court further advised the parties that to the extent that the Motion to Dismiss questioned whether the case still presented a justiciable controversy, the Court would construe the Motion to Dismiss as brought pursuant to Rule 12(b)(1). The Court then ordered supplemental briefing regarding mootness. ECF No. 123. In response to the Court's Order, Plaintiff filed the Motions currently before the Court.

II. ANALYSIS

A. Plaintiff's Notice of Consent to Dismissal of Requests for Relief (C) and (D)

With respect to Plaintiff's Notice of Consent to Dismissal of Requests for Relief (C) and (D), Plaintiff has advised the Court that "[c]ontinuing to pursue claims for prospective

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Fourth Circuit was again presented with the parties' original appeal of the September 2015 Memorandum Opinion and Order. *Id.* at 6.

During the pendency of the appeal, a potential mootness issue arose when Plaintiff graduated from high school. On August 2, 2017, the Fourth Circuit issued an Order remanding the case to this Court for a finding on the question of mootness and to develop a factual record on this issue. *Id.* at 6–8. This Court ordered the parties to submit a Joint Position Statement proposing procedures for developing this factual record and conducting proceedings on remand. ECF No. 108.

In their Joint Position Statement, the parties advised that they had filed a stipulation to voluntarily dismiss Plaintiff's interlocutory appeal regarding the Preliminary Injunction. ECF No. 111. Because of this, they believed that "there will be no need for additional fact-finding to determine whether the motion for preliminary injunction has become moot." *Id.* Instead, parties proposed that this Court grant Plaintiff's Motion to Amend the Complaint and set a schedule allowing Defendant to file a motion to dismiss. ECF Nos. 109, 111. This Court considered the Joint Position Statement, the record, and the history of the litigation, and granted the Consent Motion, allowing the parties to proceed with briefing in accordance with their proposed schedule. ECF No. 112.

declaratory and injunctive relief would require the parties and the court to expend time and resources resolving factual questions that would delay and distract from the central legal question of whether Defendant violated [Plaintiff's] rights under Title IX and the Fourteenth Amendment while he was a student at Gloucester High School." ECF No. 125 at 2. Accordingly, the parties consent to dismissal of Requests for Relief (C) and (D), and ask that the Court dismiss such Requests pursuant to Federal Rule of Civil Procedure 12(b)(1). *Id.* at 3. Based on parties' consent, the Court DISMISSES Requests for Relief (C) and (D), which seek a permanent injunction and a prospective declaratory judgment (ECF No. 113 at 17).

B. Plaintiff's Motion to Vacate Order for Supplemental Briefing

The dismissals of the requests for prospective declaratory relief leave Requests for Relief (A) and (B), which seek retrospective relief. Plaintiff has advised that these remaining requests should not be subject to mootness challenges, but may be subject to dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF No. 126 at 2.

Plaintiff argues that his graduation did not moot his request for nominal damages. "Even if a plaintiff's injunctive relief claim has been mooted, the action is not moot if the plaintiff may be 'entitled to at least nominal damages.'" *Rendelman v. Rouse*, 569 F.3d 182, 187 (4th Cir. 2009) (quoting *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 429 n.4 (4th Cir. 2007)).

Plaintiff also argues that his request for a retrospective declaratory judgment is not moot because this request is intertwined with the damages claim. A "plaintiff's request for declaratory relief is not moot [when] his 'damages claim is contingent upon a finding by the court that the [complained of activity] is unconstitutional.'" *Marks v. City Council of City of Chesapeake, Va.*,

723 F. Supp. 1155, 1160 (E.D. Va. 1988) (second brackets in original), *aff'd* 883 F.2d 308 (4th Cir. 1989).

Defendant responds by acknowledging that "a claim is not moot when there is a claim for compensatory damages *and* nominal damages pending such that the plaintiff could at a minimum recover nominal damages." ECF No. 128 at 3 (emphasis added). However, Defendant argues, because Plaintiff only seeks nominal damages in relation to his request for retroactive declaratory relief, but does not seek compensatory damages, Plaintiff's case should be declared moot. *Id.*

"When students challenge the constitutionality of school policies, their claims for declaratory and injunctive relief generally become moot when they graduate." *Mellen v. Bunting*, 327 F.3d 355, 364 (4th Cir. 2003) (internal citations omitted). After a student has graduated, "a case or controversy no longer exists between [the parties] with respect to the validity of the rules at issue." *Bd. of Sch. Comm'rs v. Jacobs*, 420 U.S. 128, 129 (1975) (per curiam).

However, claims for damages may continue to present a live controversy. *Id.* at 365. That is, "even if a plaintiff's injunctive relief claim has been mooted, the action is not moot if the plaintiff may be 'entitled to at least nominal damages.'" *Rendelman*, 569 F.3d at 187. To be awarded nominal damages, a plaintiff need only show that a constitutional deprivation occurred, not proof of actual injury. *Chapin Furniture Outlet Inc. v. Town of Chapin*, 252 Fed. App'x 566, 572 (4th Cir. 2007).

The decision in *Mellen* is particularly instructive on this point. In *Mellen*, cadets at the Virginia Military Institute filed a complaint alleging that the Institute's supper prayer violated federal and state constitutions and the Virginia Act for Religious Freedom. The cadets sought

declaratory and injunctive relief, as well as nominal damages. 327 F.3d at 363. The district court entered summary judgment in favor of the cadets, awarding declaratory relief and enjoining the defendant from sponsoring the supper prayer. However, as to the request for monetary damages, the district court concluded that the defendant was entitled to qualified immunity. The parties then filed cross-appeals. *Id.*

On appeal, the Fourth Circuit considered whether the case had become moot because the plaintiffs no longer attended the Institute. *Id.* The Fourth Circuit concluded that although the former cadets' claims for declaratory and injunctive relief were moot, "their damage claim"—that is, their claim for *nominal* damages—"continue[d] to present a live controversy." *Id.* at 365 (citing *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 798 (9th Cir. 1999)).

Furthermore, "to the extent that . . . resolution [of a claim for declaratory relief] determines liability for damages to redress injuries alleged and proven," a plaintiff's claim for declaratory relief is not necessarily moot. *See Marks*, 723 F. Supp. at 1159 (citing *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 n.7 (1985); *Lane v. Reid*, 559 F. Supp. 1047, 1048–51 (S.D.N.Y. 1983)). Accordingly, the Court finds that because Plaintiff's claim for damages rests upon a determination of the constitutionality of the complained-of action, his claim for retrospective declaratory relief is not moot. *See Powell v. McCormack*, 395 U.S. 486 (1969). That is, "this Court must decide the constitutional issue in order to make possible a decision on [plaintiff's] damages claim." *Marks*, 723 F. Supp. at 1160 (citing *Shifrin v. Wilson*, 412 F. Supp. 1282, 1292 (D.D.C. 1976)).

This Court concludes that Plaintiff's graduation did not moot either his request for nominal damages for the School Board's alleged past violations of his rights under Title IX and the Equal Protection Clause or his request for a declaratory judgment regarding these alleged

violations. This Court has jurisdiction over this case to the extent that Plaintiff seeks a retrospective declaratory judgment and nominal damages for past alleged violations of Title IX and the Equal Protection Clause. Defendant's Motion to Dismiss pursuant to Rule 12(b)(6) will be taken under advisement after additional briefing.

III. CONCLUSION

For the reasons stated herein, the Consent Motion for Dismissal of Requests for Relief (C) and (D) (ECF No. 125) and Plaintiff's Motion to Vacate Order for Supplemental Briefing (ECF No. 126) are GRANTED. Accordingly, Requests for Relief (C) and (D) of Plaintiff's Amended Complaint (ECF No. 113) are DISMISSED. The October 26, 2017 Order (ECF No. 123) directing the parties to file supplemental briefing on the question of mootness is VACATED.

The parties are DIRECTED to file amended briefing regarding Defendant's Motion to Dismiss (ECF No. 118) as follows: Defendant shall file an amended Motion to Dismiss regarding the remaining Requests for Relief no later than forty-five days after the date of entry of this Order. Plaintiff shall file a Response no later than twenty-one days after service of Defendant's amended Motion. Defendant may file a Reply no later than seven days after service of the Response.

IT IS SO ORDERED.

/s/
Arenda L. Wright Allen
United States District Judge

December 12th, 2017
Norfolk, Virginia