UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDWARD W. REYNOLDS and ERIN L. REYNOLDS, individually and on behalf of their minor children, A.R and E.R.; A.B., a minor child, by and through Next Friend, EDWARD W. REYNOLDS; MONICA C. SCHAFER; and CHRISTOPHER D. JOHNECHECK,

Plaintiffs,

v

Judge Paul L. Maloney
Magistrate Judge Phillip J. Green
No. 18-00069

GREG TALBERG, CHRISTOPHER LEWIS, NANCY DEAL, SARAH BELANGER, KATHY HAYES, JOEL GERRING and WILLIAMSTON COMMUNITY SCHOOLS,

Defendants,

STAND WITH TRANS and WILLIAMSTON HIGH SCHOOL GAY-STRAIGHT ALLIANCE,

Defendants-Intervenors.
_____/

DEFENDANTS, GREG TALBERG, CHRISTOPHER LEWIS, NANCY DEAL, SARAH BELANGER, KATHY HAYES, JOEL GERRING and WILLIAMSTON COMMUNITY SCHOOLS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

Plaintiffs have filed suit challenging the District's policies related to the equal treatment of students. To make clear, the challenged policies have not been enforced against any of the Plaintiffs. Rather, Plaintiff's suit is a "**preenforcement challenge"** to Policies 8010 and 8011. Plaintiffs have not presented justiciable claims.

Despite having no-injury-in fact, Plaintiffs claim they still have standing, and their claims are ripe, because they are the "subject of the regulatory scheme" and they are the "subject of the challenged action." However, the case Plaintiffs rely on, *Nat'l Rifle Ass'n of America v. Magaw*, 132 F.3d 272 (6th Cir. 1997), found that individuals merely affected by the imposition of a statute, such as Plaintiffs in this case, do not have standing. In *Magaw*, multiple groups of plaintiffs, including five individuals who claimed to be affected by the legislation, sought declaratory judgment that the Crime Control Act was unconstitutional. In relevant part, the Act prohibited the manufacture and transfer of semi-automatic weapons. Violators of the Act were subject to prison sentences. A group of individuals who wished to purchase the prohibited products in the future filed suit for declaratory judgment, asking the Court to find the act unconstitutional. The Sixth Circuit affirmed the dismissal of these plaintiffs' claims because they lacked standing and, therefore, were not justiciable.

Nearly identical to Plaintiffs in this lawsuit, the individual plaintiffs in *Magaw* argued that the statute had a chilling effect on their desire to purchase the outlawed weapons. The Sixth Circuit rejected their argument and found that "[t]he mere existence of a statute, which may or may not ever be applied to the plaintiffs, and the mere

possibility of criminal sanctions applying, does not in and of itself create a 'case or controversy.'" 132 F.3d at 293. The Court continued, "Plaintiffs' assertions that they 'wish' or 'intend' to engage in proscribed conduct is not sufficient to establish an injury-in-fact under Article III.'" *Id.* (citations omitted) "Plaintiffs' allegations of fear of prosecution, which thwart their desire to possess or transfer prohibited products, affect not only the named plaintiffs, but also anyone desiring to possess the products proscribed by the Crime Control Act. The Supreme Court has refrained from adjudicating 'generalized grievances,' pervasively shared." *Id.* at 294. Similarly, the Policies in this case apply to all students in the building equally. Similar to the *Magaw* plaintiffs' decision to not purchase the prohibited firearms, (some) plaintiffs' unilateral decision to remove their children from the district before the policy has been enforced does not create an injury-in-fact.

The recent Sixth Circuit opinion of *Morrison v. Board of Education of Boyd Co.*, 521 F.3d 602 (6th Cir. 2008) confirms that these Plaintiffs' preenforcement challenge of the District's policies lacks standing and ripeness, and therefore justiciability – even for their First Amendment claims. In *Morrison*, which is nearly identical to the instant matter, a high school student challenged the school district's anti-discrimination policies because they protected "actual or perceived sexual orientation or gender identity." The plaintiff in *Morrison* is a Christian who believes that homosexuality is a sin, and that part of his responsibility as a Christian is to tell others that the conduct does not comport with his understanding of Christian morality. The plaintiff's lawsuit claimed that, wary of

potential punishment, he remained silent with respect to his personal religious beliefs, and this had a chilling effect on his right to free speech.

The Sixth Circuit rejected the claim "because we conclude that Morrison lacks standing to pursue his claim of chilled speech," 521 F.3d at 608, and pithily announced that "[t]his case is about nothing." *Id.* at 607. The Court stated that "[t]o avoid conferring standing by way of guesswork, we require that a litigant demonstrate either a concrete harm or the threat of such harm. With respect to the standing of First Amendment litigants, the Supreme Court is emphatic: 'Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.'" (citations omitted). *Id.* at 608. The Court found that "subjective chill requires some specific action on the part of the defendant in order for the litigant to demonstrate an injury in fact." "[A]bsent proof of a concrete harm, where a First Amendment plaintiff only alleges inhibition of speech, the federal courts routinely hold that no standing exists." *Id.* at 609. The Court held: "In order to have standing, therefore, a litigant alleging chill must still establish that a concrete harm—i.e., enforcement of a challenged statute—occurred or is imminent." *Id.* at 610. The Court then found that the record lacked evidence of the district threatening to punish or that it would have punished Morrison for protected speech; therefore, he did not have a justiciable claim. *Id.* In criticizing the plaintiff's lawsuit, the Court stated:

> Morrison asks us, essentially, to find a justiciable injury where his own subjective apprehension counseled him to choose caution and where he assumed—solely on the basis of the Board's 2004–05 policies and without any

> specific action by the Board—that were he to speak, punishment would result. We decline to do so. Absent a concrete act on the part of the Board, Morrison's allegations fall squarely within the ambit of "subjective chill" that the Supreme Court definitively rejected for standing purposes. Morrison cannot point to anything beyond his own "subjective apprehension and a personal (self-imposed) unwillingness to communicate," and those allegations of chill, without more, fail to substantiate an injury-in-fact for standing purposes.

Id. at 610. Nearly identical to *Morrison*, Plaintiffs here lack an injury-in-fact because there is no allegation that the district threatened to punish or that it would have punished Plaintiffs for protected speech. Some Plaintiffs' unilateral decision to avoid speculative, potential future enforcement—not guaranteed to occur—and remove their children from the District does not create an injury-in-fact to confer standing. Such action is no different than the *Morrison* plaintiff's decision not to speak; it is a subjective reaction without any proof of imminent enforcement of the policy against them.

Plaintiffs also cite to *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985) (challenge to city renting space in its airport for Catholic diocese to build a chapel) and *ACLU v. Rabun County*, 698 F.2d 1098 (11th Cir. 1983) (challenge to a large Latin cross in a state park) to support their claim of standing. But those cases are not "preenforcement challenge" cases; the structures had already been built.

Next, Plaintiffs do not dispute the fact that school districts may regulate student speech. Plaintiffs only cite to a Tenth Circuit decision, *Axson-Flynn v. Johnson*, arguing that sanctioning a student who expresses a religious belief violates the First Amendment. But the Sixth Circuit has never made that generalized pronouncement. In *Settle v. Dickson Co. Sch. Bd.,* 53 F.3d 152 (6th Cir.1995), a student proposed to write her

required research paper on Jesus Christ. The teacher refused to permit the student to do so. When the student did anyway, she was assigned a failing grade. The Court rejected the student's First Amendment claims.

Plaintiffs also claim that they may bring Elliott Larsen Civil Rights Act and Title IX claims solely based on the language of the district's policies, without any injury-in-fact. That is plainly false, and Plaintiffs have not cited any cases to support that claim. The cases Plaintiffs cited to further this argument all had some discrete act committed by the defendant; they were not lawsuits based solely on the language of the policy. In *Kassab v. Mich. Bas. Prop. Ins. Ass'n.*, plaintiffs allege that the defendant failed to pay an insurance claim because of his ethnicity. The suit was not filed solely as a result of the defendant's policy. In *Whitman v. Mercy Mem. Hosp.,* the plaintiff sued because he was informed he would not be allowed to enter the delivery room during his child's birth because of his status. In *Whirlpool Corp. v. Civil Rights Comm'n*, the suit related to employees being terminated because of their familial relationship with coworkers. And in *Depart. of Civil Rights ex. rel. Forton v. Waterford Twp. Dept.*, the plaintiff filed suit because a female was refused participation on a basketball team. None of these lawsuits were filed solely because of the policy, as Plaintiffs allude.

Plaintiffs also argue that the ELCRA "occupies the field for discrimination law in education," so the District presumably cannot enact policies. ELCRA contains identical language as Title VII. The Sixth Circuit has found that Title VII's identical prohibition against sex discrimination protects transgender individuals from

discrimination. See *EEOC v. R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560 (6th Cir. 2018)(transgender discrimination violates Title VII). So, the District's policy does not expand ELCRA. Plaintiffs' claim also fails because public school districts are recipients of federal funding. Districts must also comply with Title VI, Title VII, and Title IX as a condition to receiving federal funding. These federal laws require recipient districts to enact policies consistent with those federal statutory schemes as a condition of funding. See www2.ed.gov ("Title IX requires that each school publish a policy that it does not discriminate on the basis of sex in its education programs and activities."). Recent Federal law, including in the Sixth Circuit, has defined sexual discrimination under both Title VII and Title IX to include protections for transgender individuals. See *EEOC*, 884 F.3d 560; *M.A.B. v. Board of Ed. of Talbot Co.*, 286 F.Supp.3d 704 (D. MD. 2018)(student, who was designated female at birth but had male gender identity, stated Title IX claim on allegation that Board of Education denied him access to boys' restrooms and locker rooms because he was transgender); *A.H. v. Minersville Area Sch. Dist.*, 290 F.Supp.3d 321 (M.D. PA. 2017)(district's alleged bathroom policy violated transgender student's rights under Title IX.). Thus, the District is required by federal law to adopt anti-discrimination policies consistent with Title VII and Title IX, which now means acknowledging the rights of transgender students.

Plaintiffs claim that they have a fundamental right to control the education of their children, and Policy 8011 excludes parents from deciding how gender identity issues are handled. However, parents "do not have a fundamental right generally to

direct how a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or, as here, a dress code, these issues of public education are generally 'committed to the control of state and local authorities.'" *Blau v. Fort Thomas Pub.Sch. Dist.*, 401 F.3d 381, 395-396 (6th Cir. 2005). Thus, parents do not have a fundamental right to control the curriculum and education in the district. Such an argument could have the anomalous result of white supremacist parents controlling a district's Civil Rights lessons because they object to inclusion. What is more, Plaintiffs misstated Policy 8011. This Policy states that parental support is "a key determinant of transgender and nonconforming student health." Therefore, it is "the responsibility [of the district] to keep parents informed." Policy 8011. Plaintiffs ignore this statement.

Plaintiffs claim that the Supreme Court's ruling in *Obergefell v. Hodges* affirms a substantive due process right to their religious beliefs. But the lessons of *Obergefell* confirm the constitutionality of the District's policies; it does not expose a violation of Plaintiffs' right to personal identity. That case affirmed the right to same-sex marriage and adoption. Thus, after *Obergefell*, even those whose religious beliefs find homosexuality objectionable are still forced to acknowledge same-sex marriages as being legal and same-sex partners as parents of adopted children.

s/TIMOTHY J. MULLINS
GIARMARCO, MULLINS & HORTON, PC
Attorney for Defendants

DATED: May 9, 2018

CERTIFICATE OF ELECTRONIC SERVICE

TIMOTHY J. MULLINS states that on May 9, 2018, he did serve a copy of **Defendants, Greg Talberg, Christopher Lewis, Nancy Deal, Sarah Belanger, Kathy Hayes, Joel Gerring and Williamston Community Schools' Reply Brief in Support of Motion to Dismiss** via the United States District Court electronic transmission on the aforementioned date.

s/TIMOTHY J. MULLINS
GIARMARCO, MULLINS & HORTON, PC
Attorney for Defendants
101 W. Big Beaver Road, 10th Floor
Troy, MI 48084-5280
(248) 457-7020
tmullins@gmhlaw.com
P28021