SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION
Civil Actions Branch

TWO RIVERS PUBLIC CHARTER SCHOOL, *et al.* Plaintiffs, v. ROBERT WEILER, JR., *et al.* Defendants.	Case No. 2015 CA 009512 B Civil II, Calendar No. 7 Judge Jeanette J. Clark Next Court Event: Initial Conference March 11, 2016; 9:30 a.m.

DEFENDANT RUBY NICDAO'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION

Under the authority of Rule 12(b)(1) of the Superior Court Rules of Civil Procedure, Defendant Ruby Nicdao hereby moves for entry of an order dismissing Plaintiffs' Complaint for lack of subject matter jurisdiction. The grounds for the relief sought are set forth in the following memorandum of points and authorities. A proposed order follows.

ORAL HEARING REQUESTED

Nicdao requests an oral hearing on her Motion to Dismiss.

RULE 12-I(a) CERTIFICATE

Undersigned counsel hereby certifies that, despite diligent efforts, he was unable to obtain Plaintiffs' consent to Nicdao's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Dated: January 29, 2016

SHULMAN, ROGERS, GANDAL, PORDY & ECKER, P.A.

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ORDER GRANTING
DEFENDANT RUBY NICDAO'S MOTION TO DISMISS PLAINTIFFS'
COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION

THIS MATTER HAVING COME BEFORE THE COURT on Defendant Ruby Nicdao's Motion for entry of an order dismissing Plaintiffs' Complaint for lack of subject matter jurisdiction;

PLAINTIFFS HAVING OPPOSED the Motion;

THE COURT HAVING CONSIDERED the Motion and its supporting papers, the Opposition and its supporting papers, and the entire record herein; and

THE COURT HAVING DETERMINED that there is good cause to grant the relief sought,

IT IS, this ____ day of _____ 2016, hereby

ORDERED that the Motion be, and it hereby is, in all respects GRANTED; and it is further

ORDERED that Plaintiffs' Complaint be, and it hereby is, DISMISSED for lack of subject matter jurisdiction.

Jeanette J. Clark
Judge of the Superior Court

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT RUBY NICDAO'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR LACK OF SUBJECT-MATTER JURISDICTION

Defendant Ruby Nicdao ("Nicdao"), by and through counsel, submits this Memorandum of Points and Authorities in support of her Motion under Rule 12(b)(1), SCR-Civ., for entry of an order dismissing Plaintiffs' Complaint for lack of subject matter jurisdiction.

PRELIMINARY STATEMENT

Plaintiffs sued Nicdao and five other named Defendants for intentional infliction of emotional distress and private nuisance, arising from Defendants' constitutionally protected expressive activity on the public sidewalk adjacent to the Two Rivers Public Charter School. Nicdao is alleged to have participated in one of four separate demonstrations outside the school, this one occurring in November 2015, to protest the impending opening of a Planned Parenthood abortion clinic near the school. Plaintiffs' claims are not really grounded on any alleged harm to the school or its employees. Rather, Plaintiffs allege that Nicdao's and the other Defendants' expressive activity in opposition to abortion amounted to harassment of the school's students and

inflicted emotional distress upon some of those students.[1] In essence, Plaintiffs are attempting to assert the rights of the students who attend the Two Rivers Public Charter School, not the rights of the school itself. As will be discussed more fully below, Plaintiffs lack standing to bring these claims because they are not asserting their own rights, and they fail to establish that they have associational standing to represent the interests of their students. Because standing is lacking, this Court lacks subject-matter jurisdiction over this action, and Plaintiffs' Complaint therefore should be dismissed.

RELEVANT FACTS

Plaintiffs are the Two Rivers Public Charter School ("Two Rivers") and its Board of Trustees (the "Board"). (Compl. at 1.) They bring two claims, one for intentional infliction of emotional distress and one for private nuisance/conspiracy to commit private nuisance. (Compl. at 1.) They assert that their purpose is "to protect the well-being of the students" of the school from Defendants' demonstrations against the construction of a Planned Parenthood facility across the street from the Two Rivers middle school and next door to its elementary school. (Compl. at 1.) The Complaint alleges that on four occasions, August 27, 2015, November 16,

[1] Plaintiffs attempt to portray the alleged harm to its students and their parents as somehow causing derivative harm to Plaintiffs themselves. (*See, e.g.*, Compl. ¶13(e), averring that Defendants' activities are "[d]isrupting the ability of students to participate in regularly-scheduled activities at the school because schools [sic] officials have been forced to keep students inside during recess and for outside activities to avoid Defendants' aggressive behavior"), and ¶71 (averring that Defendants' activities "directed at children" will cause Plaintiffs to be irreparably harmed because Plaintiffs are "responsible for the safety and emotional well-being of the students"). These ploys must fail, because Plaintiffs are not the parents of their students, and cannot properly claim responsibility for their emotional well-being, certainly not while the students are not in school. For if the school can assert authority over students (and other citizens) on the public ways outside the school before school begins, then there is little to stop their claiming authority over students and others when away from the school, and even in their homes. *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393, 404 (2007) noting that student speech outside a school-sponsored activity is entitled to the full protection of the First Amendment, while such speech occurring during a school-sponsored event is not); *Layshock v. Hermitage Sch. Dist*., 593 F.3d 249, 260 (3d Cir. 2010) ("It would be an unseemly and dangerous precedent to allow the state in the guise of school authorities to reach into a child's home and control his/her actions there to the same extent that they can control that child when he/she participates in school sponsored activities.").

2015, November 23, 2015, and December 7, 2015, a few individuals have appeared on the public ways near the school and displayed signs and orally expressed their opposition to Planned Parenthood, its practice of offering abortions, and the erection of the facility at that location. (Compl. ¶¶33-35, 37-40, 52-59, & 63-66.) Significantly, Nicdao is alleged to have been present on only one of those four days, November 23, 2015, and she is substantively mentioned only twice in the entire Complaint. (*See* Compl. at ¶¶57 & 58.)

The Complaint alleges that Nicdao "approached cars as they came to drop off children and yelled at students *while attempting to hand them pamphlets*." (Compl. ¶58; emphasis added.) She is also alleged to have "shouted to two middle school students that they should '[t]ell [their] parents to stop this bloodbath that's coming across the street . . . the little babies need your voice.'" (Compl. ¶58; second alteration in original.) The Complaint further avers that Nicdao also shouted: "'Abortion kills children. A big abortion baby-killing business is coming to your neighborhood, the bloodbath is about to begin.'" (Compl. ¶ 58.)

In fact, Nicdao never directed her comments toward elementary-aged children, but instead addressed primarily the parents and adults.[2] *See* Ex. 1 [Nicdao Decl. ¶ 6].) Her purpose was not to annoy, upset, or threaten anyone but simply to exercise her right, on the public ways, to advocate on a matter of public concern, namely the erection of the Planned Parenthood facility, where she contends that Planned Parenthood intends to kill innocent children in the womb. (Ex. 1 [Nicdao Decl. ¶¶3, 4 & 6].) In addition to speaking to passersby, Nicdao also handed out leaflets to willing recipients that contain information about Planned Parenthood, its history, and its promotion of abortion. (Ex. 1 [Nicdao Decl. ¶ 5].)

[2] It is also noteworthy that the activities on the only day Nicdao is alleged to have been present occurred outside the middle school, not the elementary school. (Compl. ¶¶54, 58.) Therefore, to the extent any children were addressed by Nicdao, they were middle school students, not elementary school students.

According to the most recent IRS Form 990 for Two Rivers that is available on the District of Columbia Public Charter School Board's website (*see* http://www.dcpcsb.org/sites/default/files/Missing%20990s2/Missing%20990s2/TwoRivers_990%282013-14%29.pdf), Two Rivers has no members or stockholders. (*See* Ex. 2 [2013 IRS Form 990] at 6, Pt. VI, § (A)(6).) According to the Complaint, the school's mission statement is: "To nurture a diverse group of students to become lifelong, active participants in their own education, develop a sense of self and community, and become responsible and compassionate members of society." (Compl., ¶17.)

The school's students have no power to elect its directors or officers, and the parents need not make up even a majority of its governing board. *See* D.C. CODE ANN. § 38-1802.05 (West, Westlaw through Dec. 29, 2015) (providing that at least two members of a charter school's board of trustees "shall be parents of a student attending the school"). According to Two Rivers's2014-15 Annual Report, only four of the 12 members of the Board of Trustees are parents. (*See* Ex. 3 [Two Rivers Public Charter School, Annual Report 2014-15 at 13].) The schools' students and parents do not fund its activities generally or the present litigation specifically because Charter Schools are, by statute, tuition free. And, needless to say, parents of public school students are not expected or obliged to fund litigation by the school. On its own website, Two Rivers states that "All public charter schools are free to students who are DC residents." (*See* http://www.tworiverspcs.org/mission/transforming-the-educational-landscape/whats-a-pcs/index.aspx; click on "How much does it cost to go to a public charter school.") Two Rivers has not alleged that its supporters guide its actions or have control over the organization in the same sense as do the members of a trade association or a fraternal benefit society. There is no

financial nexus between Two Rivers and its parents and students such that the outcome of the litigation may adversely affect Two Rivers's finances.

ARGUMENT

I. STANDARD OF REVIEW.

Under District of Columbia law, it is well established that the "plaintiff bears the burden to establish standing." *UMC Dev., LLC v. District of Columbia*, 120 A.3d 37, 43 (D.C. 2015). A challenge to standing may take two forms: (1) a facial attack on the sufficiency of the allegations of the Complaint; or (2) a factual attack based on matters outside the pleadings. *See id.* Under the first type of challenge, this Court must accept the factual allegations of the Complaint as true and construe them in favor of the non-moving party. *See id.* As noted, "a trial court's jurisdictional inquiry under Rule 12(b)(1) may extend beyond the facts pled in the complaint." Thus, when a defendant makes a 'factual' (as opposed to a 'facial') attack on the plaintiff's complaint under Super. Ct. Civ. R. 12(b)(1), the trial court may conduct an independent review of the evidence submitted by the parties, including affidavits, to resolve factual disputes concerning whether subject-matter jurisdiction exists. *Id.* (internal quotation marks and citations omitted). *Id.* And while an evidentiary hearing generally is necessary to resolve these factual issues, this Court may consider "facts outside the pleadings that are undisputed by the plaintiff." *Id.* In such a context, "if the plaintiff's standing does not appear from all the materials of record, the complaint must be dismissed." *Id.* at 44.

II. LEGAL STANDARDS GOVERNING STANDING.

Although the United States Congress did not establish the District of Columbia courts under the authority of Article III of the United States Constitution, those courts consistently have recognized, as a jurisdictional prerequisite, that there must be a live case or controversy to

litigate and that the plaintiff must have standing to sue. *See Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1206 (D.C. 2002) (recognizing that "we nonetheless apply in every case the constitutional requirement of a case or controversy and the prudential prerequisites of standing") (internal quotation marks omitted). District of Columbia courts have interpreted these requirements under the guidance of federal standing jurisprudence. *UMC Dev., LLC v. District of Columbia*, 120 A.3d 37, 42 (D.C. 2015). "Generally, the standing requirement is an *additional* element of jurisdiction . . . which helps to 'insure that the legal questions presented to the court will be resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.'" *Speyer v. Barry*, 588 A.2d 1147, 1160 (D.C. 1991) (quoting *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)) (emphasis original). Standing therefore is deemed to be a "threshold jurisdictional question which must be addressed prior to and independent of the merits of a party's claims." *Grayson v. AOL, LLC*, 15 A.3d 219, 229 (D.C. 2011).

As the District of Columbia Court of Appeals has recognized, the "*sine qua non* of constitutional standing to sue is an actual or imminently threatened injury that is attributable to the defendant and capable of redress by the court." *Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1206-07 (D.C. 2002). As a result, the "plaintiff, or those whom the plaintiff properly represents, 'must have suffered an injury in fact-an invasion of a legally protected interest which is (a) concrete and particularized, ... and (b) actual or imminent, not conjectural or hypothetical.'" *Id.* at 1207 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Regarding the prudential requirement of standing, a plaintiff can only assert its own rights, not the rights of others. *See id.* at 1207 n.5; *see also Warth v. Seldin*, 422 U.S. 490, 499

(1975) (recognizing that a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties").

III. PLAINTIFFS CANNOT ESTABLISH THAT THEY HAVE STANDING TO BRING THIS ACTION.

Plaintiffs, a public charter school and its board of trustees, assert that they have brought this action on behalf of their students, because they "are responsible for the safety and emotional well-being of the students." (Compl. at 1.) They further allege that Defendants' actions have caused students emotional distress. (Compl. ¶¶ 14 & 81.) In a nutshell, Plaintiffs assert associational standing on behalf of their students with respect to claims of alleged emotional harm that are uniquely personal to each of those students. As will be seen, however, because Plaintiffs cannot meet the requirements of associational standing, their case should be dismissed.

District of Columbia courts recognize that an association "has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Friends of Tilden Park,* 806 A.2d 1201, 1207 (D.C. 2002) (quoting *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). Plaintiffs cannot satisfy these requirements. In fact, Nicdao has been unable to locate a single reported case in which a public school has even claimed (much less being deemed to possess) associational standing to assert tort claims on behalf of its students anywhere in the country. There is no basis for this Court to establish such a new and far-reaching precedent here because Plaintiffs cannot satisfy any of the elements of the associational standing test.

As a threshold matter, neither Two Rivers nor the Board qualifies as an "association" for purposes of associational standing. Neither of them is an organization through which individual

members (who are typically adults, not children) voluntarily associate with one another to pursue common goals and interests.[3] Furthermore, Two Rivers provides a service required by law — namely, education — to be provided to its students. It is not an organization that advances the students' interests in the way that a trade association or fraternal benefit society does. Indeed, the students are compelled to attend by force of law; it is therefore not even a voluntary association. For this reason, associational standing could never apply to Plaintiffs in this action.

Regarding the first element of the associational standing test (members having standing to sue in their own right), while the students who attend Two Rivers and their parents arguably may have standing to sue in their own right (assuming *arguendo* that the School itself qualifies as an "association" in the first place), the students and parents themselves are not members of Two Rivers because, as a corporate entity, Two Rivers has declared that it has no members or stockholders. To be sure, supporters of an organization may be recognized as *de facto* members, but only if they serve on the organization's governing board, select the organization's leadership, guide its activities, or finance those activities. *See Friends of Tilden Park*, 806 A.2d 1201 at 1208-09. But the students at Two Rivers do not do any of these things. And while four parents serve on the Board and thereby guide Two Rivers's activities, it is not as if the parents of Two Rivers's students generally have the power to manage and control the organization.

The schools' students and their parents do not fund its activities generally or the present litigation specifically because charter schools are, by statute, tuition free. There is also no "financial nexus" between the respective interests of Two Rivers and the interests of its students and their parents in the outcome of this litigation. Indeed, Plaintiffs' Complaint says nothing

[3] In fact, the Board does not even have capacity to sue in its own name. *See* D.C. CODE ANN. §38-1802.05 (West, Westlaw through Dec. 29, 2015) (defining composition, eligibility, election, and duties of Board of Trustees but declining to vest the Board with the power to sue).

about whether any of the students or their parents actually approved of or otherwise is supporting this lawsuit. Two Rivers has no *de facto* membership relationship with its students and their parents in that they do not constitute a "specialized segment" of the community or a "discrete, stable group of persons with a definable set of common interests." *Id.* at 1210. For all these reasons, Plaintiffs fail to meet the first element of the associational standing test.

Regarding the second element of the associational standing test, Plaintiffs' claims for intentional infliction of emotional distress and private nuisance are not germane to the School's purpose. Indeed, in one sense, Plaintiffs' lawsuit is antithetical to the School's purpose because it seeks to censor Nicdao's message and prevent students and their parents from being educated about their new neighbor, Planned Parenthood. Plaintiffs' lawsuit thus seeks to thwart Ms. Nicdao's efforts to persuade the school community, through peaceful dialogue and constitutionally protected expression, to oppose Planned Parenthood and the establishment of an abortion clinic so close to an elementary and middle school. For these reasons, Plaintiffs fail to meet the second element of the associational standing test.

In addition, Plaintiffs are unable to establish that the students and parents cannot assert these claims on their own behalf. In *Smith v. Jefferson County Board of School Commissioners*, 641 F.3d 197 (6th Cir. 2011) (en banc), a group of public school teachers asserted standing on behalf of themselves and their students in a lawsuit against the school district challenging the constitutionality of the closure of their alternative school. The court found that the teachers failed to show "that the students or their parents face any obstacle in litigating their rights themselves" or "that the students or their parents might be deterred from suing." *Id.* at 208. The same is true here: Plaintiffs have not and cannot show that there is any obstacle to the students and their

parents litigating these claims themselves. The reason is because no such obstacle exists. Plaintiffs therefore are unable to establish standing.

As for the third and final element (neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit), it is not clear that Plaintiffs can satisfy this requirement either. Plaintiffs do not allege that all students and their parents were equally or commonly harmed by the conduct alleged in the Complaint. Only some of them are alleged to have suffered emotional distress. (*See* Compl. ¶73.) As a result, individualized proof would be required to determine the nature of the claimed distress and who precisely suffered it, thus rendering a resolution of the claim for intentional infliction of emotional distress inappropriate in a group context. *Cf. Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 344 (1977) (finding that state agency's constitutional, commerce-clause challenge to other state's statute and requests for declaratory and injunctive relief did not require "individualized proof" and were "properly resolved in a group context"). For these reasons, Plaintiffs cannot meet the third element of the associational standing test.

CONCLUSION

For all the foregoing reasons, Plaintiffs lack standing to maintain this action, which deprives this Court of subject matter jurisdiction. Accordingly, Defendant Ruby Nicdao's Motion to Dismiss for Lack of Subject Matter Jurisdiction should be granted in all respects.

Dated: January 29, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of January 2016, I caused true and correct copies of the foregoing Defendant Ruby Nicdao's Motion to Dismiss Plaintiffs' Complaint for Lack of Subject-Matter Jurisdiction, a memorandum of points and authorities in support thereof (with Exhibits 1, 2, and 3 attached), and a proposed order thereon to be served upon the following parties via the CaseFileXpress System, addressed to:

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