

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

TWO RIVERS PUBLIC CHARTER SCHOOL, <i>et al.</i>)	
)	Case No. 2015 CA 009512 B
Plaintiffs,)	
)	Civil II, Calendar No. 7
v.)	
)	Judge Jeanette J. Clark
ROBERT WEILER, JR., <i>et al.</i>)	Next Court Event:
)	Initial Conference
Defendants.)	April 29, 2016; 9:30 a.m.
)	

**REPLY MEMORANDUM IN FURTHER SUPPORT OF
DEFENDANT RUBY NICDAO’S MOTION TO DISMISS PLAINTIFFS’
COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION**

Defendant Ruby Nicdao submits this Reply to the Opposition filed on February 26, 2016 (“Opp.”) by Plaintiffs Two Rivers Public Charter School (“Two Rivers”) and the Two Rivers Board of Trustees to Defendant Ruby Nicdao’s (“Nicdao”) Motion to Dismiss Plaintiffs’ Complaint for Lack of Subject Matter Jurisdiction.

PRELIMINARY STATEMENT

Plaintiffs’ opposition to Nicdao’s Motion to Dismiss for lack of standing is grounded on two principal arguments. First, Plaintiffs maintain that they have standing in their own right to bring this action because they have suffered financial injury as a result of Defendants’ collective conduct. Second, Plaintiffs insist that they have standing to assert the rights of the students of Two Rivers and the parents of those students under applicable caselaw recognizing third-party standing. Neither argument withstands analysis. The notion that Plaintiffs have suffered a legally cognizable injury in fact is refuted not only by the complete absence of any allegations in the

Complaint or competent evidence of such injury but also by their failure to demonstrate that Nicdao's alleged conduct proximately caused that financial injury.

Plaintiffs' third-party standing argument fares no better because, under applicable Supreme Court precedent, they have failed to allege and prove facts entitling them to assert the rights of Two Rivers students and the students' parents. In particular, Plaintiffs fail to demonstrate that their interests in combating Nicdao's First Amendment expression, which are financial in nature, are aligned with the interests of the student and parents, which involve avoiding the supposed emotional distress that some students and parents allegedly claim to have suffered. Equally lacking are any allegations or competent evidence of any legally recognized obstacles to the students and parents bringing suit against Nicdao in their own right.

For these reasons, and as discussed more fully below, Plaintiffs' Complaint should be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) of the Superior Court Rules of Civil Procedure because Plaintiffs lack standing to bring the claims asserted therein.

ARGUMENT

I. TWO RIVERS FAILS TO DEMONSTRATE THAT IT HAS STANDING IN ITS OWN RIGHT TO PURSUE THE ASSERTED CLAIMS AGAINST DEFENDANT NICDAO.

Plaintiffs contend that Nicdao has misstated their position on standing by arguing that they are relying exclusively on associational standing in pursuing this case. Plaintiffs thus declare that they "pursue claims and seek redress for those harms related to the school and do not rely on associational standing to pursue these claims and equitable remedies." (Opp. at 3-4.) Plaintiffs' argument that they have standing in their own right to bring these claims against Nicdao is unsupportable because they lack the required "injury in fact," and the injury they do claim to have suffered was not proximately caused by Nicdao's alleged conduct.

A. The “injury in fact” allegedly suffered by Two Rivers is not pleaded in the Complaint and, in any case, does not amount to an invasion of a legally protected interest.

For standing purposes, “injury in fact,” is defined in part as “an invasion of a *legally protected* interest which is . . . concrete and particularized.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (emphasis added). As Plaintiffs recognize, they must allege and prove “some threatened or actual injury” resulting from “putatively illegal action.” *Grayson v. AT&T Corp.*, 15 A.3d 219, 224 (D.C. 2011); *see also Diamond v. Charles*, 476 U.S. 54, 62 (1986) (recognizing that “the party seeking judicial resolution of a dispute ‘show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct’ of the other party”) (quoting *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979)). The key is that Plaintiffs must show not merely that they have suffered some kind of injury but that the injury is of a legally protected interest or results from illegal conduct.

As for the nature of their claimed injuries, Plaintiffs assert – without any evidentiary support – that: (1) they have “had to reschedule the school day to account for the possibility of protestors being present at the school before, after or during the school day”; (2) “School staff and administrators have been asked to arrive at the school before their normal workday to ensure staff are on hand to warn parents and escort children into the building past protestors yelling and holding gruesome signs”; (3) “Students have been forced to stay inside instead of going out for recess on days when protestors [sic] were present”; (4) “The school has had to expend its limited school resources to temporarily hire a security guard to ensure there is someone dedicated to monitoring any possible threat inside and outside of the school”; and (5) “The administration and staff have spent countless hours pursuing all possible solutions to mitigating the effects of the protestors conduct, including this request for an injunction.” (Opp. at 4-5.) Defendants further assert – again without evidentiary support – that “since the onset of Defendants’ protests in front

of the school, the school has received multiple requests from parents to have their students transferred to a different school, families have reentered the DC Public School lottery in hopes of getting their students into a different school next year and lottery request numbers for Two Rivers have dropped.” (Opp. at 6.) Notwithstanding the lack of admissible evidentiary support, none of these so-called “injuries” amounts to an invasion of a legally protected interest or is the proximate result of any illegal conduct.

One fatal flaw in Plaintiffs’ argument is that none of these so-called “injuries” is even alleged in the Complaint, much less supported by competent evidence accompanying Plaintiff’s Opposition. As the case cited on page four of Plaintiffs’ Opposition holds, failure to plead sufficient facts plausibly showing that the plaintiff meets the constitutional standing requirement mandates dismissal under Superior Court Rule 12(b)(1). *See Grayson v. AT&T Corp.*, 15 A.3d 219, 224 (D.C. 2011) (holding that trial court properly dismissed complaint that failed to allege injury in fact).

In addition, Plaintiffs cite no authority demonstrating that they have a legally protected interest in avoiding the rescheduling of the school day, having to ask school staff to arrive early, hiring a security guard, or the expenditure of time in attempts to mitigate the effects of those exercising their First Amendment rights on the public sidewalk. Put differently, Plaintiffs fail to articulate any valid legal theory that would entitle them to any relief, let alone the drastic remedy of injunctive relief, from any of the Defendants for these “injuries.” The Complaint contains no allegations that Plaintiffs themselves are the intended objects of the emotional distress allegedly being inflicted by any Defendant. And as Nicdao establishes in her Special Motion to Dismiss, Plaintiffs fail to plead a valid claim for private nuisance.

Regarding Plaintiffs' assertion that lottery applications to Two Rivers have dropped as a result of Defendants' conduct, they neither quantify the extent of the alleged decline in applications nor establish that any requests to transfer students out of Two Rivers specifically were caused by any alleged conduct of any Defendant. Indeed, they submit *no* admissible evidence that *any* decline in applications has in fact occurred, and the Complaint contains none, either. Plaintiffs' assertion therefore amounts to "unadorned speculation," which "will not suffice to invoke the federal judicial power." *Simon v. East Ky. Welfare Rights Org.*, 426 U.S. 26, 44, (1976); *see also Warth v. Seldin*, 422 U.S. 490, 507 (1975) (reasoning that standing cannot rest "on little more than the remote possibility, unsubstantiated by allegations of fact, that [plaintiffs'] situation might have been better had respondents acted otherwise, and might improve were the court to afford relief").

B. Two Rivers cannot establish causation by attributing the alleged conduct of all Defendants to Defendant Nicdao alone.

Even assuming that Plaintiffs sufficiently have alleged and proved an injury in fact for standing purposes, which they have not, they cannot satisfactorily prove, as required, that Nicdao's alleged conduct was the proximate cause of their injuries. Plaintiffs' allegations against Nicdao are not specifically alleged to have caused any particularized harm to Plaintiffs, to any Two Rivers students, or to any of the students' parents. This is a critical flaw in Plaintiffs' case. *See, e.g., Bly v. Tri-Cont'l Indus., Inc.*, 663 A.2d 1232, 1238 (D.C. 1995) (recognizing that plaintiffs must adduce evidence from which a jury could reasonably conclude that a specific defendant's conduct proximately caused their injuries). It is insufficient for Plaintiffs to allege simply that all of the Defendants' conduct taken together proximately caused Plaintiffs' claimed injuries, when the conduct at issue consisted of discreet incidents that occurred on different days over a four-month period and involved different people taking different actions (some holding

signs, others shouting at passers-by, others handing out leaflets) who are not sufficiently alleged to have acted in concert.¹ Rather, Plaintiffs must allege and prove that *Nicdao's* conduct, not any other Defendant's conduct, proximately caused Two Rivers to spend resources that the school otherwise would not have spent. Plaintiffs have not and cannot make this showing.

II. TWO RIVERS FAILS TO ESTABLISH THAT IT HAS ASSOCIATIONAL STANDING TO PURSUE CLAIMS ON BEHALF OF ITS STUDENTS.

In arguing that they have satisfied the requirements to assert third-party standing on behalf of the students of Two Rivers and the students' parents, Plaintiffs cite *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010). This decision actually supports *Nicdao's* Motion, not Plaintiff's Opposition, because it found that the requirements for third-party standing had not been met. As the *Al-Aulaqi* court noted, the "Supreme Court has been clear in enumerating the relevant third party standing prudential considerations—a close relationship and an identity of interests between the litigant and the third party as well as some hindrance to the third party's ability to litigate on his own behalf." *Id.* at 28. Plaintiffs thus concede that they must demonstrate both the "close relationship" and the "hindrance" factors.

As for the "close relationship factor," Plaintiffs contend that the "closeness of the relationship between Plaintiffs and their students is undeniable." (Opp. at 9.) Plaintiffs thus ask the Court simply to assume that students and the school they attend necessarily share common interests by the very nature of the relationship. But Plaintiffs fail to recognize an important analytical factor involved in evaluating whether the requisite close relationship exists. As the *Al-*

¹ As discussed in *Nicdao's* Reply Memorandum in further support of her Special Motion to Dismiss under D.C. Code § 16-5502, Plaintiffs fail to allege facts sufficient to state a plausible claim for civil conspiracy. (See Def. *Nicdao's* Reply Mem. in Further Support of Spec. Mot. to Dismiss at 6-8.) *Cf. Weishapl v. Sowers*, 771 A.2d 1014, 1024 (D.C. 2001) ("Where there is no direct evidence of an agreement between the alleged co-conspirators, there must be circumstantial evidence from which a common intent can be inferred"; civil conspiracy claim failed for lack of evidence of an unlawful agreement).

Aulaqi court noted, “Courts examining claims of third party standing thus must assess the extent of potential conflicts of interests between the plaintiff and the third party whose rights are being asserted . . . and deny third party standing where the litigant’s interests in the subject of the suit to some extent conflict with those of the third parties whose rights the litigant purports to advance.” *Al-Aulaqi*, 727 F. Supp. 2d at 33 (internal quotation marks, citations, and brackets omitted). Here, Plaintiffs have made no showing that any students or parents of such students wish to bring legal action based on any Defendant’s First Amendment-protected expressive activity or that any students or parents approve of or support Plaintiffs bringing this action on their behalf. Furthermore, by Plaintiffs’ own admission, they have a financial interest in avoiding a potential drop in enrollment, which is not necessarily synonymous with, and indeed may conflict with, the interest of students in avoiding emotional distress allegedly caused by Defendants’ activities. In addition, Plaintiffs have not foreclosed the possibility that some Two Rivers students and the parents of such students actually may support Nicdao’s speech or her right to express that speech on the public ways and may oppose this lawsuit. If so, the interests of those particular students and parents definitely would conflict with Plaintiffs’ interests.

The *Al-Aulaqi* court also identified another important consideration that undermines Plaintiffs’ argument for third-party standing: Third-party standing “is appropriate only when the third party’s rights protect that party’s relationship with the litigant.” *Id.* at 34. Thus, third-party standing has been recognized only when the defendant: (1) directly interferes with “litigant’s ability to engage in conduct together with the third party” by imposing a legal sanction against the litigant; or (2) intentionally disrupts or burdens a “special relationship” between the litigant and the third party. *See id.* at 34. In the case at bar, Plaintiffs have identified no rights of any Two Rivers students that protect the students’ relationship with the school and that are being

threatened by Nicdao's alleged conduct. Plaintiffs also do not allege that Nicdao specifically intended to disrupt the classroom, prevent students from attending recess, or otherwise prevent students from attending or receiving instruction from Two Rivers. Here, as in *Al-Aulaqi*, any conceivable harm that could be caused to Plaintiffs' financial interests (of which there is none) would be the unintended consequence of conduct by Nicdao that had an entirely different purpose – to raise the consciousness of students and their parents on a matter of public concern (abortion). (See Nicdao Declaration, ¶¶ 3 & 4.)

On the second prong of the prudential standing test discussed in *Al-Aulaqi*, whether there is some impediment to the real party in interest's ability to assert his own legal rights, Plaintiffs also fail to allege or prove that any Two Rivers students or the students' parents face such an impediment. Here again, Plaintiffs cite a case, *Benjamin v. Aroostook Medical Center, Incorporated*, 57 F.3d 101 (1st Cir. 1995), that undercuts rather than supports their position. In *Benjamin*, the court actually declined to allow third-party standing because it found no impediment to the real party in interest bringing suit. The *Benjamin* court recognized that such an impediment would exist only if the "third party is unidentifiable, lacks sufficient interest, or will suffer some sanction," or if there is some other practical obstacle that "prevents or deters the third party from asserting his or her own interest." *Id.* at 106. Plaintiffs assert in conclusory fashion that "no one student or family has sufficient financial incentive to bear the costs of litigating the case" (Opp. at 10), but they offer no pleading allegations or any admissible evidence to support the existence of such a financial obstacle. Nor do they explain why no group of parents is capable of banding together to bear the financial burden collectively. Plaintiffs also offer no proof that any specific parents or students "deeply fear being the target of retaliation for any involvement they may have, even as witnesses, let alone as named plaintiffs." (Opp. at 10.)

Equally absent is any evidence that any parents or students have been threatened by any Defendant, or will face some identifiable sanction, for expressing an interest in taking legal action. For these reasons, Plaintiffs have failed to show any hindrance to the ability of Two Rivers students or the students' parents to bring suit.

As for whether Plaintiffs would be the most effective advocates of the rights at issue, *see Benjamin*, 57 F.3d at 106-07 (recognizing that "one of the principal justifications for the [third-party standing] rule is that it assures that the party bringing the litigation will be the most effective advocate of the rights at issue") (internal quotation marks omitted), here too Plaintiffs' argument for third-party standing fails. Plaintiffs are in no position to determine which particular action by which particular Defendant proximately caused legally actionable emotional distress to any specific Two Rivers student. After all, even Plaintiffs do not contend that all of their students were equally exposed to the same conduct on the same day by all the same Defendants. Without the participation of the affected students and parents (if there are any), Plaintiffs are unable to demonstrate any causal connection between Nicdao's activities and the emotional distress of any particular student who was exposed to Nicdao's speech. Thus, Plaintiffs cannot be the most effective advocates of the rights supposedly at issue in this case and cannot prove damages proximately caused by the emotional distress they allege.

Based on the grounds explained above, Plaintiffs have failed to establish that third-party standing appropriately can be invoked in this case.

CONCLUSION

For all the foregoing reasons, as well as those set forth in Nicdao's principal memorandum, 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: March 24, 2016

Respectfully submitted,

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