SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

TWO RIVERS PUBLIC CHARTER SCHOOL; & **TWO RIVERS BOARD OF TRUSTEES,** Plaintiffs, v. **ROBERT WEILER, JR., JONATHAN DARNEL, LAUREN HANDY, RUBY NICDAO, LARRY CIRIGANO, JOHN DOE 1, JOHN DOES, & JANE DOES,** Defendants.	**Civil Action No. 2015 CA 009512 B** **Calendar 7** **Judge Jeanette Clark** **Next Event:** **Initial Scheduling Conference** **April 29, 2016 at 9:30 a.m.** **PLAINTIFFS' CONSOLIDATED BRIEF IN OPPOSITION TO THE MOTIONS TO DISMISS OF DEFENDANTS ROBERT WEILER, JR., RUBY NICDAO, LARRY CIRIGNANO, & JONATHAN DARNEL**[1]

[1] Plaintiffs incorporate, as if fully set forth herein, the arguments contained in their Consolidated Brief in Opposition to the Special Motions to Dismiss of Defendants Robert Weiler, Jr., Ruby Nicdao, Larry Cirignano, and Jonathan Darnel, filed on February 26, 2016.

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PLAINTIFFS' CONSOLIDATED BRIEF IN OPPOSITION TO THE MOTIONS TO DISMISS OF DEFENDANTS ROBERT WEILER, JR., RUBY NICDAO, LARRY CIRIGNANO AND JONATHAN DARNEL

Plaintiffs respectfully submit this consolidated brief in opposition to the motions to dismiss of protestor Defendants Robert Weiler, Jr.[2] Ruby Nicdao[3], Larry Cirignano,[4] and Jonathan Darnel[5] under Rule 12(b)(1) and (6). Although each Defendant filed individual motions and memoranda, each raises the same issues and shares the same fundamental defects that warrant denial.[6]

I. Procedural History

Plaintiffs brought this action on December 9, 2015, seeking to join Defendants and others from, *inter alia*, entering school property, blocking the students' safe passage to school, focused picketing of Two Rivers' students, and using signs larger than 11" x 17" in the presence of students under twelve years of age. (Verified Compl. ("Compl.") at p. 25-28).

Defendants Weiler, Cirignano, and Nicdao were properly served between December 17 and 19, 2015.[7] Defendant Darnel was served on February 3, 2015. On January 8, 2016, prior to filing his motions, Defendant Robert Weiler, Jr. filed an Answer. The following motions are pending before this Court:

a. Defendant Ruby Nicdao's Special Motion to Dismiss Under 12(b)(1) and DC Anti-SLAPP, filed January 29, 2016;

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[2] Filed on Feb. 4, 2015.
[3] Filed on Jan. 29, 2016.
[4] Filed on Feb. 1, 2016.
[5] Filed on Feb. 23, 2016. Darnel's motion to dismiss is derivative of Defendant Nicdao's motion to dismiss and suffers from the same infirmities as his special motion to dismiss. *See* Consolidated Br. in Opp. to the Special Mot. to Dismiss of Defs. Robert Weiler, Jr., Ruby Nicdao, Larry Cirignano, and Jonathan Darnel, at ¶III and n.12.
[6] The Weiler and Cirignano motions expressly incorporate the motion of Defendant Nicdao. The Weiler motion also suffers additional procedural defects that warrant denial without consideration of the merits. *See* Section II *infra.*
[7] Defendant Lauren Handy was served with a copy of the Summons and Verified Complaint on February 13, 2016. *See* Affidavit of Service by Certified/Registered Mail (Feb. 22, 2016). Plaintiffs anticipate that Defendant Handy will file similar motions to dismiss.

b. Defendant Ruby Nicdao's Motion to Dismiss Under 12(b)(1) and (6), filed January 29, 2016;

c. Defendant Larry Cirignano's Special Motion to Dismiss Under 12(b)(1) and DC Anti-SLAPP, filed February 1, 2016;

d. Defendant Robert Weiler, Jr.'s Special Motion to Dismiss Under 12(b)(1) and DC Anti-SLAPP, filed February 5, 2016;

e. Defendant Larry Cirignano's Motion to Dismiss Under 12(b)(1) and (6), filed February 5, 2016; and

f. Defendant Robert Weiler, Jr.'s Special Motion to Dismiss 12(b)(1) and DC Anti-SLAPP, filed February 6, 2016.

g. Defendant Jonathan Darnel's Motion to Dismiss Under 12(b)(1), filed February 23, 2016; and

h. Defendant Jonathan Darnel's Special Motion to Dismiss Under 12(b)(6) and DC Anti-SLAPP, filed February 23, 2016.

Plaintiff submits this consolidated brief in opposition to the Motions to Dismiss under 12(b)(1) and (6). Plaintiffs have filed a separate opposition to the Special Motions to Dismiss under 12(b)(1) and the DC Anti-SLAPP Act.

II. Defendant Robert Weiler, Jr.'s motion to dismiss should be denied because his previously-filed answer operates as a waiver under Rule 12(b).

On January 8, 2016, Defendant Robert Weiler, Jr., *pro se*, responded to Plaintiffs' verified complaint by filing an answer. The Answer asserted no defenses under Rule 12(b). Nearly 30 days *after* filing his answer, Defendant Weiler filed two motions to dismiss: (1) a special motion to dismiss under D.C. Code § 16-5502 and Rule 12(b)(6) on February 5, 2016; and (2) a motion to dismiss under Rules 12(b)(1) and (6) asserting Plaintiffs "lack standing to bring this suit" and "fail[ure] to state a claim upon which relief can be granted" on February 6, 2016. District of Columbia Civil Rule 12(b) states that a motion stating the defense of lack of jurisdiction over the subject matter or failure to state a claim upon which relief can be granted "shall be made before pleading if a further pleading is permitted." SRC 12(b). Because

Defendant Weiler filed a responsive pleading prior to moving this Court under Rule 12(b), his asserted defenses in his motion to dismiss should be deemed waived.

III. Plaintiffs' have Article III standing to pursue claims against Defendants because there is a "case and controversy" and the claims alleged and remedies pursued are Plaintiffs' own.

While Plaintiffs must establish standing, at the motion to dismiss stage the standard by which the Court determines whether they have met that burden is lower than at later stages. *Lujan*504 U.S. 555, 561 (1992); *see also Am. Soc'y for Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334, 338 (D.C. Cir. 2003) ("lesser standard required to show standing on a motion to dismiss"). When analyzing standing at the dismissal stage the court must "assume that [the plaintiff] states a valid legal claim and 'must accept the factual allegations in the complaint as true.'" *Info. Handling Servs., Inc. v. Def. Automated Printing Servs.*, 338 F.3d 1024, 1029 (D.C.Cir.2003)(internal citation omitted).

To have standing, a party must have a "case or controversy" under Article III of the Constitution. *Lujan v. Defenders of Wildlife*, 504 U.S. at 560. The Supreme Court clarified that the test comprises three elements. *Id.* at 560. First, a party must have suffered an "injury in fact," an actual or imminent concrete and particularized invasion of a legally-protected interest; second, the injury must be fairly traceable to the challenged action of the defendant; and third, the injury must be redressable by a favorable decision. *Id.* Defendants claim that Plaintiffs lack standing to pursue their claims because the actual harm Defendants caused was to the students and their parents, not to the school. *See* Nicdao Special Mot. at 7; Nicdao Mot. to Dismiss at 7-10. Defendants argue that "[i]n a nutshell, Plaintiffs assert associational standing on behalf of their students with respect to claims of alleged emotional harm that are uniquely personal to those students and their parents." *See* Nicdao Mot. to Dismiss at 7. This is incorrect and

misstates Plaintiffs' position. Plaintiffs 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.

A. Two Rivers has suffered an injury in fact as a result of Defendants' outrageous conduct.

When evaluating whether a party has standing to bring a case, the court asks whether the plaintiff has "'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Grayson v. AT & T Corp.*, 15 A.3d 219, 234 (D.C. 2011) (*quoting Baker v. Carr*, 369 U.S. 186, 204 (1962)). The Article III judicial power, which has been said to apply equally to the Article I courts of the District, exists to "redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action . . . .'" *Grayson*, 15 A.3d at 234 (*quoting Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)).

1. Two Rivers has spent a portion of its limited resources to mitigate the effects of Defendants' outrageous conduct rather than on educating students.

As demonstrated in Plaintiffs' verified complaint, Two Rivers has the deepest personal stake and has suffered real injury because of Defendants' aggressive and inappropriate conduct. To adequately protect its students, as it must by law, Two Rivers has 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.[8] School staff and administrators have been asked to arrive at the school

[8] Defendants have requested a hearing on this motion and their special motions to dismiss pursuant to the DC Anti-SLAPP Act. Plaintiff will present additional evidence at that hearing.

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. This was precisely what Defendant Darnel stated would happen in his 1 November 2015 email to school administrators. Compl. ¶ 36. Because Plaintiffs do not know if and when protestors will be present, they must take these precautions every single day. Students have been forced to stay inside instead of going out for recess on days when protestors were present. 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. 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. Rather than spending this precious time and money on the task of educating Two Rivers' students, Plaintiffs have been forced to spend it on dealing with Defendants. Defendants' argument that the school has suffered no injury is preposterous.

2. Two Rivers' risks losing families and funding.

A public charter school in the District of Columbia depends on its ability to attract students to obtain sufficient operating funds to deliver excellent educational services. Under the rules and regulations that govern the funding of public charter schools in the District, a public charter school is funded under a "formula," which is defined as the "number . . . of students enrolled" multiplied by "a uniform dollar amount." D.C. Code § 38-1804.01(a)(2). The school receives funds four times per year based on their reported enrollment data. Payments to charter schools are made in four equal quarterly payments (July 15, October 15, January 15 and April 15), calculated under D.C. Code § 38-2906.02. The basis of the April 15 payment is equal to the

audited[9] October enrollment numbers. D.C. Code § 38-2906.02(b)(3). And, if the audit finds that the number of verified resident students enrolled in any public charter differs from that on which the July 15 and October 15 payments were based, the Mayor shall recalculate subsequent payments adjusting them by the discrepancy. D.C. Code § 38-2906.02(c). A drop in enrollment would equate to a drop in funding. The connection between enrollment and funding is direct as is the connection between the schools' reputation and its enrollment.

Until now, Two Rivers Charter School has been consistently recognized as one of the top schools in the District. Maintaining a consistent student body, with the same students and families attending from year to year helps the school achieve its academic goals. For the 2015-2016 school year, nearly 3000 students submitted lottery applications to Two Rivers for fewer than 100 available spots in pre-K through eighth grade. Compl. ¶ 25. For four years in a row, Two Rivers has been declared a Tier One, high-performing school by DC's Public Charter School Board.

However, 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. Even given Two Rivers' reputation as one of the best schools in the District and parents' true love and support of the school, families are openly questioning whether they will subject their children to repeated efforts by Defendants and their aggressive tactics. This injury is neither conjectural nor hypothetical, it is happening at this moment and has devastating effects for Two Rivers.

[9] D.C. Code § 38-1804.02(d) *et seq.*, gives authority to the Office of the State Superintendent of Education to retain and fund the independent audit of the initial enrollment calculations provided by DCPS and the Public Charter Schools.

B. The injuries suffered by Two Rivers are fairly traceable to Defendants' outrageous conduct.

To establish that the harm is fairly traceable to the Defendants, Plaintiffs must show a causal connection between the injury and Defendants' conduct, and ensure that the injury is "not . . . th[e] result [of] the independent action of some third party not before the court." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). Here, the causal connection is clear between the injury suffered by Two Rivers and the Defendants' protests, which involved shouting, confronting children as they got out of their parents' cars to go into school and then following them to alternative entrances, telling these children there was a baby-killing factory being built next door and that their principal didn't care about it, showing these children pictures depicting bloody body parts, and creating unsafe conditions for the students entering the school. Compl. ¶¶ 33-62. Defendants' conduct, which surpassed all bounds of decency and entered the realm of extreme and outrageous, is the direct cause of the Plaintiffs' having to expend limited resources, both time and money, to ensure the safety of their students under very challenging circumstances and leading to the decline in lottery applications and losing long-time Two Rivers' families.

C. The injuries suffered by Two Rivers are redressable through a preliminary injunction.

A favorable decision would unquestionably redress the injury suffered by Plaintiffs. Plaintiffs have set forth very reasonable and narrowly tailored requests that would keep protestors from subjecting students to targeted picketing on school sidewalks or impeding their passage while they are entering or exiting the school buildings and would limit the exposure of children under the age of twelve to gruesome or violent images. Compl. at pp. 25-28. These restrictions would allow the school to plan their schools days without wondering if they will need escorts, added staff or added security. The school will have full use of the outdoor spaces

without concern that children will be targeted with aggressive messages. With the assurance that their students will not face hostile protestors on school sidewalks, Two Rivers can begin rebuilding the confidence of families and potential applicants to Two Rivers that the school intends to continue to deliver a top-rated education to its students.

IV. Two Rivers has third-party standing to sue on behalf of its students.

Having established standing in their own right to bring claims against Defendants, Plaintiffs also bring these claims as a third-party on behalf of their students. There is an exception to the general rule that a party must base a claim on only his own legal rights and interests and not those of third-parties. Besides meeting the constitutional prerequisites of standing, a plaintiff seeking third-party standing "need only demonstrate that there is some impediment to the real party in interest's ability to assert his own legal rights." *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 31 (D.C. 2010). The third party must also demonstrate "a 'close relationship' to the absent parties." *Campbell v. Louisiana*, 523 U.S. 392, 397 (1998) (citing *Powers v. Ohio*, 499 U.S. 400, 411, (1991)).

The Supreme Court has permitted schools to bring cases in order to protect the rights of the schools' students and families. *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535, 45 S. Ct. 571, 573, 69 L. Ed. 1070 (1925). Indeed, the court has found the requisite "closeness" in relationships arguably much less close than that between a school and its students. *See e.g.* Powers v. Ohio, 499 U.S. 400, 413, 111 S. Ct. 1364, 1372, 113 L. Ed. 2d 411 (1991) (holding there was sufficiently close relationship between criminal defendant and excluded jurors); *see also Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that Planned Parenthood official and licensed physician can raise the rights of contraceptive users with whom they had professional relationships); *Craig v. Boren*, 429 U.S. 190 (1976) (holding that licensed beer vendor has standing to assert claims of a male customer challenging a statutory scheme

prohibiting the sale of beer to males under the age of 21 and to females under the age of 18); *Department of Labor v. Triplett*, 494 U.S. 715, 110 S.Ct. 1428, 108 L.Ed.2d 701 (1990) (holding that attorney may challenge an attorney's fees restriction by asserting the rights of client).

Here, the closeness of the relationship between Plaintiffs and their students is undeniable. Even ignoring the obvious commonsense arguments about the connection between the interests of a school and the well-being of its students, public schools in the District of Columbia owe a duty to their students "to exercise reasonable and ordinary care for protection of pupils to whom it provides an education." *D.C. v Doe*, 524 A.2d 30, 32 (D.C. 1987). In the ordinary course, a school may not need to take extraordinary measures to ensure safe passage into and out of the school but where a "special dangerous situation" does exist, "and the school has knowledge of its existence, greater supervision is required to insure the safety of the students." *Ballard v. Polly*, 387 F. Supp. 895 (D.C. 1975).

Here, students and parents arriving at Two Rivers on August 27, November 16 and November 23, 2015, were greeted by adults holding large banners, some with depictions of bloody fetal body parts, and picketing that targeted children—telling them that the building next door was a "baby-killing factory" and that they should stop its construction. Among the protestors on November 16 was Robert Weiler, Jr. Mr. Weiler has a record as a repeat criminal offender and was incarcerated for a plotting to bomb a Planned Parenthood health clinic. Weiler Ans. at ¶3. Whatever his current claims may be to being a reformed individual, that is of little comfort to the school or its families. The "special dangerous situation" exists at the school and Plaintiffs have a legal duty to protect their students, clearly demonstrating the requisite closeness to give Plaintiffs third-party standing to bring claims on behalf of their students.

To show impediment or hindrance, the litigant "must show that some barrier or practical

obstacle (e.g., third party is unidentifiable, lacks sufficient interest, or will suffer sanction) prevents or deters the third party from asserting his or her own interest." *Benjamin v. Aroostook Medical Ctr., Inc*., 57 F.3d 101, 106 (1st Cir.1995) (italics omitted). The Supreme Court has recognized as sufficient hindrances justifying third-party standing both financial disincentive, ("small financial stake in the outcome of a suit but would be forced to endure the economic burdens of litigation") and a party's desire to protect personal privacy. *Powers*, 499 U.S. at 415 (small financial stake) and *Singleton v. Wulff*, 428 U.S. 106, 118 (1976) (personal privacy).

Here, while the students and their parents could bring individual suits, no one student or family has sufficient financial incentive to bear the costs of litigating the case. Along those same lines, the goal of the entire Two Rivers community is to reasonably limit the activities of Defendants or other protestors, not to recover money damages.

In terms of protecting the personal privacy of individuals, Two Rivers is the best party to bring an equitable suit against the Defendants on behalf of both itself and its students. Families have intense concerns for themselves or their children being named in a lawsuit. The abortion debate brings with it an undeniable association, founded in real and recent events such as the Planned Parenthood clinic shooting in Colorado Spring, with violence. Parents deeply fear being the target of retaliation for any involvement they may have, even as witnesses, let alone as named plaintiffs. And because of Two Rivers' and its Board of Trustees' indisputable vested interest in the claims and outcome, Plaintiffs brings this case against Defendants to protect all of the children at Two Rivers school and remedy the injuries suffered by the school itself.

V. Conclusion

Plaintiffs Two Rivers Public Charter School and the Board of Trustees can demonstrate both standing in their own right and on behalf of their students. Accordingly, the court should deny Defendants' motions to dismiss Plaintiffs' complaint for lack of subject matter jurisdiction.

February 26, 2016

Respectfully submitted,

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