STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Jane Doe

v.

Manchester School District
and
School Administrative Unit #37

Docket No. 216-2022-CV-00117

ORDER

The plaintiff brought this action alleging that the transgender student policy of the Manchester School District violates the plaintiff's constitutional and statutory parental rights. The defendants now move to dismiss. The plaintiff objects. For the reasons set forth below, the defendants' motion to dismiss is GRANTED.

Factual Background

The Amended Complaint alleges the following facts, which the Court assumes to be true for purposes of this motion. On February 8, 2021, the Manchester School District adopted Policy 100.1, titled Transgender and Gender Non-Conforming Students (hereinafter "the Policy"). (See Am. Compl. ¶ 24; Ex 1.) The Policy provides:

> District policy requires that all programs, activities, and employment practices be free from discrimination based on sex, sexual orientation, or gender identity. This policy is designed in keeping with these mandates to create a safe learning environment for all students and to ensure that every student has equal access to all school programs and activities. . . . In all cases, the goal is to ensure the safety, comfort, and healthy development of the transgender or gender nonconforming

> student while maximizing the student's social integration and minimizing stigmatization of the student.

(Am. Compl., Ex. 1, Section I.) Of particular relevance to the plaintiff's claims, the Policy further provides that:

> The Board recognizes a student's right to keep private one's transgender status or gender nonconforming presentation at school. Information about a student's transgender status, legal name, or gender assigned at birth also may constitute confidential information. School personnel should not disclose information that may reveal a student's transgender status or gender nonconforming presentation to others, including parents and other school personnel, unless legally required to do so or unless the student has authorized such disclosure. Transgender and gender nonconforming students have the right to discuss and express their gender identity and expression openly and to decide when, with whom, and how much to share private information.
>
> When contacting the parent or guardian of a transgender or gender nonconforming student, school personnel should use the student's legal name and the pronoun corresponding to the student's gender assigned at birth unless the student, parent, or guardian has specified otherwise. Any student who has a need or desire for increased privacy, regardless of the underlying reason, should be provided with a reasonable alternative to meet the need for that individual's privacy, regardless of gender identity.

(Id., Section III.A.) The Policy was derived from a model policy that was drafted, circulated, and recommended by the New Hampshire School Boards Association, an organization to which the defendants pay dues with funds provided by taxpayers. (Am. Compl. 25.) On March 14, 2022, the District amended the Policy, making the following changes (deletions in ~~strikethrough~~ format; additions in **[bold and in brackets]**):

> The Board recognizes a student's right to keep private one's transgender status or gender nonconforming presentation at school. Information about a student's transgender status, legal name, or gender assigned at birth also may constitute confidential information. School personnel should not disclose information that may reveal a student's transgender status or gender nonconforming presentation to others~~,~~ ~~including parents and other school personnel,~~ unless legally required to do so or unless the student has authorized such disclosure.

> Transgender and gender nonconforming students have the right to discuss and express their gender identity and expression openly and to decide when, with whom, and how much to share private information. **[Nothing herein shall be construed to change the obligation of the school to take action when student safety is concerned.]**
>
> When ~~contacting the parent or guardian of~~ **[referring to]** a transgender or gender nonconforming student, school personnel should use the student's legal name and the pronoun corresponding to the student's gender assigned at birth unless the student, parent, or guardian has specified otherwise. Any student who has a need or desire for increased privacy, regardless of the underlying reason, should be provided with a reasonable alternative to meet the need for that individual's privacy, regardless of gender identity.

(Am. Compl., Ex. 2, Section III.A.)

The plaintiff's minor child (M.C.) attends a school in the Manchester School District. (Am. Compl. ¶ 48.) In the fall of 2021, the plaintiff learned that M.C. had asked teachers and fellow students to refer to M.C. by a name traditionally associated with a gender different from their gender as assigned at birth. (Id. ¶ 49.) The plaintiff reached out to M.C.'s guidance counselor and informed her that she would like the school to continue to treat M.C. according to M.C.'s birth gender, address M.C. by their given name, and address M.C. using the pronouns traditionally associated with their biological sex. (Id. ¶ 50.)

While some of M.C.'s teachers communicated their willingness to comply with the plaintiff's wishes, (id. ¶¶ 51–52), the school's principal sent the plaintiff an email in which he stated:

> While I respect and understand your concern, we are held by the District policy as a staff. I have quoted our district policy below, which outlines the fact that we cannot disclose a student's choice to parents if asked not to. If [M.C.] insists on being called [M.C.'s desired name] as a staff we have to respect that according to the policy or unfortunately we can be held accountable despite parents' wishes.

(Id. ¶ 53.) Following this exchange, M.C. informed the plaintiff that they had asked school personnel to use their birth name and pronouns. (Id. ¶ 54.) School personnel made similar representations to the plaintiff. (Id. ¶ 55.) Nevertheless, the plaintiff has brought this action claiming that the continued existence of the policy "means that [she] cannot know whether representations by District personnel are factually true, or whether the District personnel are simply following the Policy by misleading and/or lying to [her] about M.C.'s in-school gender expression and the District's response thereto." (Id. ¶ 56.) Count I alleges that by promulgating and enforcing the Policy, the defendants are violating her parental rights under Part I, Article 2 of the New Hampshire Constitution. Count II alleges that the Policy is *ultra vires*. Count III alleges that the Policy violates the Family Educational Rights and Privacy Act (FERPA). Finally, Count IV alleges that the Policy violates the Protection of Pupil Rights Act (PPRA). The plaintiff seeks a declaratory judgment, permanent injunction, nominal damages, and attorneys' fees. (Id. ¶ 1; Prayer for Relief.)

Analysis

In ruling on a motion to dismiss, the Court determines "whether the allegations contained in the pleadings are reasonably susceptible of a construction that would permit recovery." Pesaturo v. Kinne, 161 N.H. 550, 552 (2011). The Court rigorously scrutinizes the facts contained on the face of the complaint to determine whether a cause of action has been asserted. In re Guardianship of Madelyn B., 166 N.H. 453, 457 (2014). The Court "assume[s] the truth of the facts alleged by the plaintiff and construe[s] all reasonable inferences in the light most favorable to the plaintiff." Lamb v. Shaker Reg'l Sch. Dist., 168 N.H. 47, 49 (2015). The Court "may also consider documents attached to the plaintiff's pleadings, or documents the authenticity of which are not disputed by the

parties[,] official public records[,] or documents sufficiently referred to in the complaint." Beane v. Dana S. Beane & Co., P.C., 160 N.H. 708, 711 (2010). "If the facts do not constitute a basis for legal relief, [the Court will grant] the motion to dismiss." Graves v. Estabrook, 149 N.H. 202, 203 (2003).

The defendants first argue that Count I of the Amended Complaint should be dismissed because the Policy does not infringe the plaintiff's right to parent under Part I, Art. 2 of the New Hampshire Constitution. Specifically, while the defendants concede that the plaintiff has a fundamental right to raise her child as she wishes, they assert that the plaintiff's right to parent does not include the ability to direct how the school teaches her child. In response, the plaintiff argues that by preventing the free flow of information between parents and the school concerning a child's preferred name, gender identity, or social transitioning status, the Policy infringes on the fundamental right to parent. She thus asserts that the policy is subject to strict scrutiny, which it cannot survive.

The Plaintiff invokes both the State and Federal Constitutions. (See Am. Compl. ¶ 2.) Accordingly, the Court will address the State Constitutional claim first, citing to federal law to aid in its analysis. See In re Nelson, 149 N.H. 545, 547 (2003) (citing State v. Ball, 124 N.H. 226, 231–33 (1983)).

"The right of parents to raise and care for their children is a fundamental liberty interest protected by Part I, Article 2 of the New Hampshire Constitution." In re R.A., 153 N.H. 82, 90 (2005). "Similarly, the United States Supreme Court has recognized that the 'Due Process Clause of the Fourteenth Amendment protects the fundamental rights of parents to make decisions concerning the care, custody, and control of their children.'" Id. (quoting Troxel v. Granville, 530 U.S. 57, 66 (2000)). "Parental rights have been found

to operate against the State, against third parties, and against the child." Id. (quotation omitted). However, the right to make decisions about the care, custody, and control of one's children is not absolute. Reardon v. Midland Community Schools, 814 F. Supp. 2d 754, 768 (E.D. Mich. 2011) (citing Prince v. Massachusetts, 321 U.S. 158, 165–66 (1944)); see also Arnold v. Bd. of Education, 880 F.2d 305, 313 (11th Cir. 1989) ("We recognize that parental autonomy to direct the education of one's children is not beyond limitation. When parents enroll their children in public schools they cannot demand that the educational program be tailored to their individual preferences."). For example, "[w]hile parents may have a fundamental right to decide whether to send their child to a public school, they do not have a fundamental right generally to direct how a public school teaches their child." Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 395 (6th Cir. 2005). "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 . . . a dress code, these issues of public education are generally committed to the control of state and local authorities." Id. at 395–96.

By its plain terms, the Policy encourages respect for student wishes when it comes to when and with whom to share information regarding the student's preferred name and gender identity. Nevertheless, it is not stated in absolute terms. Indeed, the policy specifically contemplates that it shall not prevent school officials from taking action when student safety is concerned. Even crediting the plaintiff's assertion that the policy would allow school officials to affirmatively conceal her child's gender identity preferences from her, the Court rejects the plaintiff's argument that the Policy violates her fundamental right

to parent. See Parents for Privacy v. Barr, 949 F.3d 1210, 1231 (9th Cir. 2020) (affirming district court's conclusion that "Plaintiffs lack a fundamental right to direct Dallas High School's bathroom and locker room policy"); Thomas v. Evansville-Vanderburgh School Corp., 258 Fed.Appx. 50, 52–54 (7th Cir. 2007) (finding no violation of parent's right to direct upbringing of child where the school did not inform mother of school counselor's private conversations with student regarding her problems at school); Doe v. Irwin, 615 F.2d 1162, 1168 (6th Cir. 1980) (finding no deprivation of the liberty interest of parents in the practice of not notifying them of their children's voluntary decisions to participate in the school's voluntary birth control clinic). Indeed, the policy does not encourage or prevent students from sharing information with their parents. Moreover, the Policy does not prevent parents from observing their children's behavior, moods, and activities; talking to their children; providing religious or other education to their children; choosing where their children live and go to school; obtaining medical care and counseling for their children; monitoring their children's communications on social media; choosing with whom their children may socialize; and deciding what their children may do in their free time. In short, the Policy places no limits on the plaintiff's ability to parent her child as she sees fit.

The Court therefore finds that because no fundamental right is infringed, plaintiff's claims do not warrant the application of strict scrutiny. Instead, where a challenged law or regulation does not impinge upon a fundamental right, the Court employs a rational basis review. See Lloyd v. Sch. Bd. of Palm Beach Cty., No. 9:21-cv-81715-KMM, 2021 U.S. Dist. LECIS 210628, at *21–29 (S.D. Fla. Oct. 29, 2021) (finding that because a school mask mandate did not implicate fundamental rights, rational basis review was

appropriate). The rational basis test requires that the Policy only be rationally related to a legitimate governmental interest. State v. Hollenbeck, 164 N.H. 154, 163 (2012). The party challenging the legislation has the burden of proof. Id. This level of review contains no inquiry into whether the Policy unduly restricts individual rights, nor does the Court independently examine the factual basis. Id. Rather, the Court will inquire only as to whether the defendants could reasonably conceive to be true the facts upon which the Policy is based. Id.

Here, the defendants have a legitimate interest in ensuring that "all school district programs, activities, and employment practices be free from discrimination," to "create a safe learning environment for all students," and to "ensure that every student has equal access to all school programs and activities." See (Am. Compl., Ex. 2, Section I); see also RSA 193:38 (prohibiting discrimination in public schools on the basis of gender identity); RSA 193:39 (requiring school districts to develop and implement anti-discrimination plans). The defendants enacted the Policy in furtherance of those interests. As it pertains to student privacy, the Policy notes that a student's transgender status may constitute confidential information and provides that "[s]chool personnel should not disclose information that may reveal a student's transgender status or gender nonconforming presentation to others unless legally required to do so or unless the student has authorized such disclosure." (Am. Compl., Ex. 2, Section III.) The Policy is flexible and acknowledges that the "needs of each transgender or gender nonconforming student must be assessed on a case-by-case basis." (Id. at Section I.) The parties disagree as to whether the Policy properly balances and respects competing rights and adequately protects the interests of transgender students. While competing values and policy

interests may be at stake, "[i]t is not for the court to inquire into the wisdom or unwisdom of such [rulemaking]. Whether the act be wise, reasonable, or expedient, is a legislative and not a judicial question." Cram v. School Bd., 82 N.H. 495, 496 (1927). Here, the School Board considered the various interests involved and specifically acknowledged that differing circumstances may exist for each student. It adopted a policy derived from a model policy recommended by the New Hampshire School Boards Association. (Am. Compl. ¶ 25.) They considered changes and subsequently amended the Policy. (Id. ¶ 43.) The Policy itself sets forth its purpose and is drafted in flexible terms. While the plaintiff may disagree with the Policy, it is rationally related to a legitimate governmental interest and the Court finds, therefore, that it does not offend the constitution.

Accordingly, the defendants' motion to dismiss is GRANTED as to Count I of the Amended Complaint.

The defendants next argue that the school board was authorized to enact the Policy and therefore it is not *ultra vires*. "Administrative rules may not add to, detract from or modify the statute they are intended to implement." Appeal of Mader 2000 Trust, 174 N.H. 520, 525 (2021) (brackets and quotation omitted). "Thus, the determination of whether an administrative rule is *ultra vires* involves statutory interpretation." Id. When interpreting statutes, we ascribe the plain and ordinary meanings to the words used. Id. The interpretation of a statute is a question of law for this Court.

The relevant statutory authority is contained within RSA 193:38–:39, reproduced below:

> **193:38 Discrimination in Public Schools.** – No person shall be excluded from participation in, denied the benefits of, or be subjected to discrimination in public schools because of their age, sex, gender identity, sexual orientation, race, color, marital status, familial status, disability, religion, or

> national origin, all as defined in RSA 354-A. Any person claiming to be aggrieved by a discriminatory practice prohibited under this section, including the attorney general, may initiate a civil action against a school or school district in superior court for legal or equitable relief, or with the New Hampshire commission for human rights, as provided in RSA 354-A:27-28.
>
> **193:39 Discrimination Prevention Policy Required.** – Each school district and chartered public school shall develop a policy that guides the development and implementation of a coordinated plan to prevent, assess the presence of, intervene in, and respond to incidents of discrimination on the basis of age, sex, gender identity, sexual orientation, race, color, marital status, familial status, disability, religion, national origin, or any other classes protected under RSA 354-A.

RSA 193:38 makes discrimination based on sex or gender identity unlawful in public schools. RSA 193:39 requires that each school district develop a discrimination prevention and response plan targeted at, *inter alia*, discrimination based on sex or gender identity. The Policy by its own terms "is designed . . . to create a safe learning environment for all students and to ensure that every student has equal access to all school programs and activities." (Am. Compl., Ex. 2, Section I.) Given the relevant statutory framework, the language of the Policy, and the record before it, the Court finds the plaintiff has failed to set forth a legal or factual basis to support its contention that the policy is *ultra vires*.

As a result, the defendants' motion to dismiss Count II of the Amended Complaint is GRANTED.

Finally, the defendants contend that the plaintiff lacks standing to assert the federal statutes referenced in Counts III and IV of the Amended Complaint, and that even if she did, she has failed to state a claim for relief. In her Amended Complaint, the plaintiff asserts taxpayer standing under Part I, Article 8 of the State Constitution. However, in her objection, the plaintiff fails to address the defendants' arguments as to Counts III and IV.

Part I, Article 8 provides that:

> [A]ny individual taxpayer eligible to vote in the State, shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision. In such a case, the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced beyond his or her status as a taxpayer.

Part I, Article 8 confers standing upon a plaintiff who challenges a particular governmental spending action, that is to say, "a plaintiff with standing under Part I, Article 8 can call on the courts to determine whether a specific act or approval of spending conforms with the law." Carrigan v. N.H. Dep't of Health and Human Servs., 174 N.H. 362, 370 (2021). The phrase "has spent, or has approved spending" does not mean "a governmental body's overall management of its operations and functions, including its allocation of appropriations, as opposed to one or more discrete acts or decisions approving certain spending." Id.

The plaintiff first claims that by withholding information regarding a student's preferred name or gender identity, the defendants are violating FERPA, 20 U.S.C. ¶ 1232g(a)(1)(A), by unlawfully withholding "education records." As a threshold matter, it is well settled law that FERPA cannot be enforced through a private cause of action. See Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 69 (1st Cir. 2002) (finding no private cause of action under FERPA and collecting cases holding the same). Nor can FERPA be enforced through an action under 42 U.S.C. § 1983. See Gonzaga Univ. v. Doe, 536 U.S. 273, 290 (2002). The Court therefore has doubts about whether a plaintiff could use Article 8 taxpayer standing to assert an otherwise unavailable FERPA claim.

In any event, the relevant provision of FERPA requires educational institutions and agencies to make education record available to parents in order to be eligible for federal funding. "Education records" are defined as "those records that are: (1) Directly related to a student; and (2) Maintained by an educational agency or institution or by a party acting for the agency or institution." 34 CFR § 99.3. Here, contrary to the defendant's assertions, the language of the Policy suggests that some records may be generated about students as a result of the policy. (See Am. Compl., Ex. 2, Section III.B (noting that the permanent pupil record will contain the student's legal name and gender, but that the district is not required to use a student's legal name or gender on other school records or documents).) Nevertheless, as noted above, the Policy does not create an absolute bar to the release of information. Specifically, it states that "[s]chool personnel should not disclose information that may reveal a student's transgender status or gender nonconforming presentation to others unless legally required to do so or unless the student has authorized such disclosure." (Id., Section III.A.) Thus, to the extent any "education records" are actually generated under the Policy, by the Policy's very terms, the defendants are required to treat and handle them in accordance with FERPA. As a result, the Court finds that the Policy does not violate FERPA.

As a result, the defendants' motion to dismiss Count III of the Amended Complaint is GRANTED.

Finally, the plaintiff claims that the Policy violates the PPRA because it requires students to submit to surveys or evaluations concerning their sex behaviors or attitudes without parental consent. The relevant portion of the PPRA provides that:

> No student shall be required, as part of any applicable program, to submit to a survey, analysis, or evaluation that reveals information

> concerning . . . sex behavior or attitudes . . . without the prior consent of the student (if the student is an adult or emancipated minor), or in the case of an unemancipated minor, without the prior written consent of the parent.

20 U.S.C. § 1232h(b)(3). Likewise, the associated regulations require that

> (a) No student shall be required . . . to submit without prior consent to psychiatric examination, testing, or treatment, or psychological examination, testing, or treatment, in which the primary purpose is to reveal information concerning . . . (3) Sex behavior and attitudes.
>
> (b) As used in paragraph (a) of this section, prior consent means . . . (2) Prior written consent of the parent or guardian, if the student is an unemancipated minor.

34 CFR § 98.4

Nothing in the Policy mandates or suggests that school personnel should survey or question students regarding their preferred names or gender identities. Nor does the Policy mandate or suggest students submit to psychiatric examination, testing or treatment without the consent of a parent. Rather, the Policy establishes that should a student discuss with or express to the school a preference for a name or gender identity other than that assigned at birth, then the school would honor that choice and, to the extent allowable by law, protect the confidentiality of that information. As a result, the Court finds that the Policy does not violate the PPRA.

Accordingly, the defendants' motion to dismiss COUNT IV of the Amended Complaint is GRANTED.

Conclusion

Consistent with the foregoing, the defendants' motion to dismiss the Amended Complaint is GRANTED.

SO ORDERED.

September 5, 2022
Date

Amy B. Messer
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 09/06/2022