

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Ocala Division

B. N. S., a minor by and through
parent Erica Silberstein,

Plaintiff,

v.

SCHOOL BOARD OF LAKE
COUNTY, FLORIDA; SUSAN
MOXLEY, in her official capacity as
Superintendent of the School District
of Lake County, Florida; and
MOLLIE CUNNINGHAM, in her
official capacity as Principal of
Carver Middle School,

No. 5:13-cv-205-Oc-22-PRL

Defendants.

COMPLAINT

(WITH DECLARATORY AND INJUNCTIVE RELIEF SOUGHT)

Plaintiff B.N.S., a minor by and through parent Erica Silberstein,¹
sues Defendant SCHOOL BOARD OF LAKE COUNTY, FLORIDA; SUSAN
MOXLEY, in her official capacity as Superintendent of the School District of Lake

¹ Because there has been substantial media attention to many of the matters asserted herein, B. N. S. waives the privacy protection afforded to her by Fed.R.Civ.P. 5.2(a). *See* Fed.R.Civ.P. 5.2(h).

County, Florida, and MOLLIE CUNNINGHAM, in her official capacity as Principal of Carver Middle School, and alleges as follows:

INTRODUCTION

1. B.N.S. is an Eighth Grader at Carver Middle School (“Carver”) in Leesburg, Florida. To create a safer and more welcoming environment for all students, including lesbian, gay, bisexual, and transgender (“LGBT”) students and allied straight students, B.N.S. wants to start a Gay-Straight Alliance (“GSA”) as an official student club at the school. After repeated and lengthy delays, however, Defendants have not provided B.N.S. with a definitive answer as to whether the request to form the club (“Carver GSA”) has been, or will be, approved. This non-response amounts to a *de facto* denial. This denial violates the federal Equal Access Act, which protects students’ ability to form and run school clubs, as well as the First and Fourteenth Amendments to the United States Constitution.

2. Plaintiff asks this Court to (1) enjoin school officials from refusing to recognize the Carver GSA as a student club and allow it to function as a school club on equal footing with other clubs at school; and (2) declare that school officials’ past refusal to permit the operation of the Carver GSA violates federal law and Plaintiff’s constitutional rights.

JURISDICTION AND VENUE

3. Plaintiff bring this action pursuant to (1) 42 U.S.C. § 1983, for violations of civil rights under the First and Fourteenth Amendments to the United States Constitution; and (2) the Equal Access Act, 20 U.S.C. §§ 4071, *et seq.*

4. This Court has subject-matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1343(a)(3) (civil rights).

5. Venue is proper in this judicial district and division pursuant to 28 U.S.C. § 1391(b) and M.D. Fla. Loc. R. 1.02(c). Defendants reside in this district and division, and the unlawful practices that give rise to the claims herein occurred within this district and division.

PARTIES

6. Plaintiff B.N.S is an Eighth Grader at Carver. As a student at Carver, B.N.S remains subject to the policies, practices, and customs of Defendants. B.N.S is under the age of eighteen and sues individually and pursuant to Federal Rule of Civil Procedure 17(c) by and through B.N.S. mother. B.N.S has been subject to and has witnessed harassment at her school.

7. Defendant Mollie Cunningham (“Principal Cunningham”) is the Principal of Carver Middle School in Leesburg, Florida. Pursuant to Florida

Statutes Sections 1001.32 (“Management, control, operation, administration, and supervision”), subsection 4 (“School principal or head of school”); and 1001.54 (“Duties of school principals”); and Lake County School Board Policy 3.30 (“Responsibilities of Principals”), Principal Cunningham serves as the administrative and supervisory head of Carver Middle School and is responsible for enforcing, *inter alia*, the School Board rules and the directives of the Superintendent. Principal Cunningham, as an official of the School District of Lake County, Florida (“School District” or “District”), is a state actor, is sued in her official capacity, and at all times relevant to the claims herein was acting and continues to act under color of law.

8. Pursuant to School Board Policy 4.50(1), “All student clubs and organizations shall be approved by the principal / director before they can operate within a school center.” As such, Principal Cunningham is the final decision maker with respect to approval of student clubs at Carver Middle School. Accordingly, Cunningham is responsible for the unlawful and unconstitutional decision to refuse to allow the Carver GSA to form and operate at the school.

9. Defendant Susan Moxley (“Superintendent Moxley”) is the Superintendent of the School District. Pursuant to Florida Statutes Sections 1001.32 (“Management, control, operation, administration, and supervision”),

subsection 3 (“District school superintendent”); 1001.49 (“General Power of District School Superintendent”); and 1001.51 (“Duties and Responsibilities of District School Superintendent”); and Lake County School Board Policy 3.20, Superintendent Moxley is vested with the authority to exercise general oversight over the School District; counsel the School District on all educational matters; recommend action by the School District, including the adoption and execution of policies and rules pertaining to the District’s operation; and carry out the responsibility for the administration of the entire school system. Superintendent Moxley, as a School District official, is a state actor, is sued in her official capacity, and at all times relevant to the claims herein was acting and continues to act under color of law. Superintendent Moxley is sued because she was personally involved in the continued failure to approve and recognize the Carver GSA as a club.

10. Defendant School Board of Lake County, Florida (“School Board”), pursuant to the Florida K-20 Education Code, is the governing body of the School District that controls, operates, and supervises all District schools, including Carver. Defendant School Board resides in Lake County, Florida. The School Board, as a political subdivision of the State of Florida, is a state actor. The School Board is subject to civil lawsuits pursuant to Florida Statutes Section 1001.41(4).

11. The School Board sets the policies for the School District. Pursuant to School Board Policy 4.50, the School Board has delegated final decision making authority to Principal Cunningham with respect to approval of student clubs in the School District. Accordingly, through its delegation of final decision making authority to Principal Cunningham with respect to approval of student clubs at Carver, the School Board is liable for Principal Cunningham's refusal to allow the Carver GSA to form and operate. Further, the School Board was presented with the issue of granting recognition to the Carver GSA and made a decision not to consider the issue, again leading to a *de facto* denial of recognition of the GSA.

12. The School Board, Superintendent Moxley, and Principal Cunningham shall be referred to collectively as "Defendants."

GENERAL ALLEGATIONS

13. School officials at Carver have created and maintain a limited public forum. This forum is open to students to form and operate noncurricular student clubs and organizations focused on various topics, interests, and concerns. In and through participating in this forum, students and clubs derive many benefits and opportunities: The clubs (a) are officially recognized as school clubs by school officials, (b) may meet on school property, (c) may appear in the school's yearbook, (d) may use school resources for meetings and activities, and (e) may

use the public-announcement system to advertise their meetings and solicit new members.

14. Carver has noncurricular student clubs that have availed themselves of this limited public forum, including Future Business Leaders of America, “BR8” (a club for Christians), and a cup-stacking club.

15. Some or all of the noncurricular student clubs meet on school premises during non-instructional time.

16. Plaintiff wanted and still wants to avail herself of this limited public forum for noncurricular student clubs.

17. In the first half of 2012, students at Carver, including B.N.S, twice tried to form a GSA at Carver, but then-Principal David Bordenkircher denied these attempts.

18. In November 2012, B.N.S submitted a packet of materials regarding the club to Principal Cunningham, including the name of a faculty member who was willing to serve as the faculty sponsor for the club. During the conversation, Principal Cunningham acknowledged the potential utility of the club but stated that she needed to consult with the School Board. A true and accurate copy of this packet of materials is attached as Exhibit 1.

19. In January 2013, Principal Cunningham left a voicemail with B.N.S. mother, Erica Silberstein, stating that Cunningham needed to consult with the School Board.

20. Apart from these two indications, Principal Cunningham has not provided the Carver GSA with any indication on the status of the proposal for the GSA to be recognized as an official student club.

21. The Carver GSA has not been provided any indication as to whether the request to form the club as an official student club has been, or will be, approved.

22. On January 23, 2013, Plaintiff's counsel sent a letter to Superintendent Moxley and the School Board's attorney, Steve Johnson, informing them of the Carver GSA's purpose and of their obligations under the Equal Access Act and the U.S. Constitution to immediately recognize the Carver GSA as an official school club. A true and accurate copy of the January 23 letter is attached as Exhibit 2.

23. On January 30, 2013, Plaintiff's counsel spoke with the School Board attorney, who informed Plaintiff's counsel that the School Board would discuss the Carver GSA and the School District's noncurricular club policy at the next School Board meeting, on February 4, 2013.

24. On February 4, 2013, the School Board held a public workshop. For that meeting, the School Board attorney drafted a policy endorsing a limited open forum. (2/4/13 Sch. Bd. mtg. minutes, p. 4, lines 7-9). A true and accurate copy of the February 4 Board meeting minutes is attached as Exhibit 3. Based on the direction from Board members at the meeting, the School Board attorney indicated that he would prepare two policies for a subsequent meeting: one with a closed forum, and one with a limited open forum in high schools but a closed forum for middle schools. (2/4/13 Sch. Bd. mtg. minutes, p. 4, lines 36-38).

25. On February 11, 2013, the School Board held a regularly scheduled Board meeting. The School Board attorney indicated that his intent was to bring a policy to a workshop the following week for Board discussion. (2/11/13 Sch. Bd. mtg. minutes, p. 5, line 6). A true and accurate copy of the February 11 Board meeting minutes is attached as Exhibit 4.

26. On February 18, 2013, the School Board held a special meeting session. The Board discussed Carver GSA again, and Chairwoman Kylene Fischer noted that proposed revised Policy 4.50 would come back to the Board at a regularly scheduled Board meeting for a vote. (2/18/13 Sch. Bd. mtg. minutes, p. 1, lines 29-30). A true and accurate copy of the February 18 Board meeting minutes is attached as Exhibit 5.

27. On February 25, 2013, the School Board held a regularly scheduled Board meeting but did not discuss the Carver GSA or club policy.

28. On March 6, 2013, the School Board held a special meeting but did not discuss the Carver GSA or club policy.

29. On March 11, 2013, the School Board held a public workshop and a regularly scheduled Board meeting. At the regularly scheduled meeting, by a 3-2 vote, the Board provided tentative approval of an “open” policy, which would have allowed noncurricular clubs for both public middle and high schools in the District.

30. The School Board held a special meeting on March 18, 2013; a public workshop on April 1, 2013; a regularly scheduled board meeting on April 8, 2013; and a public workshop on April 15, 2013.

31. On April 22, 2013, the School Board held a regularly scheduled meeting. The agenda included providing final approval to club policy that had been tentatively approved at the March 11 meeting and that would have allowed noncurricular clubs for both public middle and high schools in the District. Instead of providing final approval for the policy, however, the Board voted 4-1 to table the measure.

32. On April 23, 2013, Plaintiff's counsel sent a letter to the School Board's attorney, Steve Johnson, informing him again of the Carver GSA's purpose and of the District's obligations under federal law to immediately recognize the Carver GSA as an official school club. The letter requested that the attorney advise Plaintiff's counsel by April 26, 2013, that the Carver GSA could immediately begin having meetings and activities as an approved noncurricular student club. A true and accurate copy of the April 23 letter is attached as Exhibit 6.

33. To date, Defendants have not approved or recognized the Carver GSA as a student club.

34. Plaintiff has suffered and will continue to suffer an injury as a result of Defendants' refusal to permit Plaintiff to access the forum for noncurricular student clubs and to operate the Carver GSA at the school. Through the exclusion from this forum, Plaintiff is and will be deprived of the many benefits of participating in the forum. Plaintiff is and will be deprived of the opportunity at school to educate the school community about discrimination and bullying and to create a safe forum for LGBT students and their allies to discuss these issues.

35. Defendants caused and will continue to cause these injuries. Defendants' denial of access to Carver's forum for noncurricular student clubs and

the ability to operate the Carver GSA at the school infringes on the U.S. Constitution's First Amendment free-speech rights of Plaintiff to educate, communicate, and associate in the school's forum. Defendants' denial of access to Carver's forum for noncurricular student clubs also violates the Equal Access Act.

36. Plaintiff faces a real and immediate threat of irreparable injury as a result of Defendants' *de facto* denial and threatened continued *de facto* denial to Plaintiff of access to Carver's forum for noncurricular student clubs and of the ability to operate the Carver GSA at the school.

37. Defendants have acted and threaten to continue acting under color of state law at all times alleged in this complaint. Their actions are by virtue of the official positions they hold.

38. Unless restrained by this Court, Defendants will continue to deny Plaintiff access to Carver's forum for noncurricular student clubs and the ability to operate the Carver GSA at the school. Plaintiff has been and will continue to be irreparably harmed by Defendants' denial, which deprives Plaintiff of her constitutional right to free speech and the rights afforded by the Equal Access Act. This deprivation under color of state law is actionable under and may be redressed by 42 U.S.C. § 1983.

39. Plaintiff has no adequate remedy at law.

40. The last day of regularly scheduled classes at Carver for the present school year is June 5, 2013.

COUNT 1: EQUAL ACCESS ACT, 20 U.S.C. §§ 4071-4074

41. Plaintiff realleges and incorporates by reference all of the preceding paragraphs in this complaint.

42. Carver Middle School and the School District of Lake County receive federal funding.

43. By refusing to permit Plaintiff to access the forum for noncurricular student clubs and to operate the Carver GSA at the school, Defendants have denied equal access and a fair opportunity to B.N.S to participate and avail herself of the benefits of that forum. This denial is a violation of the Equal Access Act.

44. Defendants' refusal to grant access is based on the Carver GSA's purpose, the content of the speech that will take place at its meetings, and the nature of the association that will take place at the meetings.

COUNT 2: FREE SPEECH AND ASSOCIATION

45. Plaintiff realleges and incorporates by reference paragraphs 1 through 40 and 44 of this Complaint.

46. Defendants have deprived, and continue to deprive, Plaintiff of her rights to free speech and association under the First Amendment to the United States Constitution, which are secured through the Fourteenth Amendment. Defendants' refusal to grant Plaintiff access to Carver's forum for noncurricular student clubs and to allow them to operate the Carver GSA at the school is the cause-in-fact of the constitutional deprivations.

47. Defendants' denial of the GSA is based on their disagreement with the Carver GSA's views and constitutes viewpoint discrimination. Defendants' denial of the GSA is also content-based discrimination that is impermissible because it is unreasonable in light of the purpose of the forum.

48. Plaintiff seeks redress for these violations of the First and Fourteenth Amendments to the U.S. Constitution through the operation of 42 U.S.C. § 1983.

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests the following relief:

A. A temporary restraining order immediately barring Defendants from continuing their unlawful refusal to allow the Carver GSA (1) the same access to the forum for noncurricular student clubs that school officials grant to other such clubs and (2) the ability to operate at the school;

B. An order preliminarily enjoining Defendants from continuing their unlawful refusal to allow the Carver GSA (1) the same access to the forum for noncurricular student clubs that school officials grant to other such clubs and (2) the ability to operate at the school;

C. An order declaring that Defendants' refusal to grant the Carver GSA access to the forum for noncurricular student clubs and the ability to operate at the school violates (1) the Equal Access Act and (2) the First and Fourteenth Amendments to the U.S. Constitution because Defendants allow other noncurricular clubs access to the forum and because Defendants impermissibly restrict Plaintiff's speech and association based on its content and viewpoint;

D. An order permanently enjoining Defendants from continuing their unlawful refusal to allow the Carver GSA (1) the same access to the forum for noncurricular student clubs that school officials grant to other such clubs and (2) the ability to operate at the school;

E. An order permanently enjoining Defendants from taking retaliatory action against Plaintiff for bringing this lawsuit or against Carver GSA's faculty advisor for fulfilling that role;

F. An award to Plaintiff of reasonable attorneys' fees, litigation expenses, and costs incurred in connection with this action from the Defendants, pursuant to 42 U.S.C. § 1988;

G. An order directing the entry of judgment for Plaintiff against Defendants for nominal damages of \$1;

H. An order retaining the Court's jurisdiction of this matter to enforce the terms of the Court's orders; and

I. Such further and different relief as is just and proper or that is necessary to make Plaintiff whole.

Dated: April 30, 2013

Respectfully Submitted,

s/ Randall Marshall

Randall C. Marshall

Fla. Bar No. 181765

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**Attending Telephonic Attorney
Admission Ceremony for Middle
District of Florida on Wednesday, May
1, 2013, at 10:00 a.m.*

Counsel for Plaintiff