STATE OF NEW HAMPSHIRE

BELKNAP COUNTY SUPERIOR COURT

David "Skip" Murphy

v.

Robert Gadomski, et al.

Docket No. 211-2021-CV-00191

ORDER ON DEFENDANTS' MOTION TO DISMISS

The plaintiff David "Skip" Murphy brought this action for declaratory judgment and injunctive relief against the defendants, Robert Gadomski, Gretchen Gandini, Karen Thurston, Jeanin Onos, Kyle Sanborn, Audra Kelly, SAU #73, and the Gilford School District (collectively "the defendants").[1] (Court index #1.) The defendants now move to dismiss the complaint. (Court index #5.) The plaintiff objects. (Court index # 9.) Based on the parties' arguments by pleading, the relevant facts, and the applicable law, the defendants' motion to dismiss is GRANTED.

Facts

The complaint alleges the following facts, which the court must assume to be true for the purposes of this motion to dismiss. See Berry v. Watchtower Bible & Tract Soc'y of N.Y., 152 N.H. 407, 410 (2005). The plaintiff is the parent of a minor child who is enrolled in the defendant school district. (Compl. ¶ 1.) On January 6, 2020, Gilford

[1] The defendants moved to cancel the hearing for temporary injunction on the basis that the plaintiff does not have standing under Part I, Article 8 of the New Hampshire Constitution to obtain preliminary injunctive relief. (Court index # 4). There being no objection filed, the court granted the motion. (Id.) Whether the plaintiff has standing to bring the complaint, however, was not asserted in the defendant's motion or addressed by the court.

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School District (the "District") adopted The Transgender and Gender Non-Conforming Students Policy (the "Policy"). (Id. ¶ 35.) The Policy states, in part:

> The Gilford School Board recognizes a student's right to keep private one's transgender status or gender non-conforming 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 non-conforming presentation to others, including parents and other school personnel, unless legally required to do so or unless the student or parent has authorized such disclosure. Transgender and gender non-conforming 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 non-conforming 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.

(Compl. ¶ 37; see also Pl.'s Ex. 1.) Pursuant to the Policy, District personnel are provided with a procedure "to address needs raised by transgender students and/or their parent(s)/guardian(s)." (Compl. ¶ 38.) The Policy also directs that "[a] student under this policy should be addressed by a name or pronoun that corresponds to the student's gender identity that is consistently asserted at school." (Id. ¶ 48; see also Pl.'s Ex. 1.)

In addition, the Gilford School Board has adopted a policy entitled "Non-Discrimination, Equal Opportunity Employment and District Anti-Discrimination Plan"" (the "Anti- Discrimination Policy") and a policy entitled "Public Conduct on School Property" (the "Public Conduct Policy"). The Anti-Discrimination Policy provides that no person should be discriminated against based on age, sex, gender identity, sexual orientation, race, color, marital status, familial status, disability, religion, or national origin. (Compl. ¶ 50; see Pl.'s Ex. 2.) This policy applies to:

> All persons employed or served by the district. It applies to all sites and activities the District supervises, controls, or where it has jurisdiction under the law, including where it (a) occurs on, or is delivered to, school property

> or school-sponsored activity or even on or off school property; or (b) occurs off of school property or outside of a school sponsored activity or event, if the conduct interferes with a student's educational opportunities or substantially disrupts the orderly operations of the school or school-sponsored activity or event, as set forth in Board Policy JICK [Pupil Safety and Violence Prevention.

(Id.)

The Public Conduct Policy states, in relevant part, that:

> [f]or purposes of this policy "school property" means any building, vehicles, property, land, or facilities used for school purposes or school-sponsored events, whether public or private. The School District expects mutual respect, civility, and orderly conduct among all individuals on school property or at a school event. No person on school property or at a school event shall: [. . .]
>
> Violate other District policies or regulations, or an authorized District employee's directive.
>
> Any person who violates this policy or any other acceptable standard of behavior may be ordered to leave school grounds. Law enforcement officials may be contacted at the discretion of the supervising District employee if such employee believes it necessary.
>
> Additionally, the District reserves the right to issue "no trespass" letters to any person whose conduct violates this policy, acceptable standards of conduct, or creates a disruption to the school district's educational purpose.

(Compl. ¶ 52; see Pl.'s Ex. 3.)

Legal Standard

When ruling on a motion to dismiss, the court must discern "whether the allegations in the [complaint] are reasonably susceptible of a construction that would permit recovery." Boyle v. Dwyer, 172 N.H. 548, 553 (2019). The court assumes the pleadings to be true and construes all reasonable inferences in the light most favorable to the pleading's proponent. Weare Bible Baptist Church, Inc. v. Fuller, 172 N.H. 721, 725 (2019). The court then engages in a threshold inquiry that tests the facts alleged by the plaintiff against the applicable law, and if the allegations constitute a legal basis for relief,

must deny the motion to dismiss. Pro Done, Inc. v. Basham, 172 N.H. 138, 141–42 (2019). "In conducting this inquiry, [the court] may also consider documents attached to the plaintiffs' pleadings, documents the authenticity of which are not disputed by the parties, official public records, or documents sufficiently referred to in the complaint." Boyle, 172 N.H. at 553. 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 "need not...assume the truth of statements that are merely conclusions of law." Lamb v. Shaker Reg'l Sch. Dist., 168 N.H. 47, 49 (2015).

Analysis

The defendants move to dismiss the complaint on three grounds: (1) the plaintiff lacks standing; (2) there exists no private right of action for violation of the two federal law claims; and (3) the matter is not ripe for review. (See generally Mot. Dismiss.) The plaintiff objects. (See generally Pl.'s Obj.)

I. **Standing**

"When a motion to dismiss challenges a petitioner's standing to sue, the trial court must look beyond the petitioner's allegations and determine, based on the facts, whether the petitioner has sufficiently demonstrated its right to claim relief." Hannaford Bros. Co. v. Town of Bedford, 164 N.H. 764, 766-67 (2013). The defendants challenge the plaintiff's taxpayer standing under Part I, Article 8 of the New Hampshire Constitution; his Article III standing under the Federal Constitution; and his standing under RSA 491:22, the declaratory judgment statute. The court addresses each issue in turn.

a. Taxpayer Standing

Part I, Article 8 of the New Hampshire Constitution provides, in relevant part:

> [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. However, this right shall not apply when the challenged governmental action is the subject of a judicial or administrative decision from which there is a right of appeal by statute or otherwise by the parties to that proceeding.

N.H. CONST. pt. I, art. 8. "The question of the plaintiff's standing turns on...whether the plaintiff alleged that the State 'has spent, or has approved spending, public funds in violation of' the law." Carrigan v. N.H. Dep't of Health and Human Servs, 174 N.H. 362, 368 (2021) (quoting N.H. CONST. pt I, art. 8.) "That is, 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. This interpretation of the phrase 'has spent, or has approved spending' is confirmed by the final sentence of the provision, which provides that the right to standing created by Part I, Article 8 'shall not apply when the challenged governmental action is the subject of a judicial or administrative decision from which there is a right of appeal.'" Id. at 370 (emphasis in original) (citation omitted).

"When Part I, Article 8 is read as a whole, the phrase 'has spent, or has approved spending' must be understood as referencing a specific category of 'governmental action.'" Id. Part 1, Article 8 does not confer to the people the right to challenge "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 has not alleged any "discrete acts or decisions" of spending related to the Policy. Rather, he alleges that the defendants necessarily must "have spent public funds considering, adopting, and publishing the Policy. Defendants have further spent public funds training personnel on the enforcement of the policy." (Compl. ¶ 132.) These allegations, however, fail to identify any specific spending decisions by the defendants. Part 1, Article 8 applies to *specific* governmental action, and the plaintiff does not identify any actual, discrete actions taken by the District in adopting the Policy. Instead, the plaintiff asserts, in a general sense, that the District has spent money adopting this policy. It is illogical to suppose that the mere allegation that a governmental body likely spent money implementing a policy gives a taxpayer standing. Under that interpretation, as the defendants point out, any decision made by a governmental body may be challenged without alleging anything more than the mere adoption of the policy. Accordingly, the plaintiff does not have taxpayer standing under Part I, Article 8 of the New Hampshire Constitution. Even if the general conduct of adopting and training personnel were to constitute sufficient "spending of government funds" the plaintiff further must demonstrate there is no right of appeal, which is clearly not the case. The plaintiff sought review of the Policy in the superior court and the superior court rulings will be subject to appeal to the New Hampshire Supreme Court.

b. Standing under Article III

The plaintiff also asserts he has standing to sue under First Amendment Article III. Notably, however, the complaint asserts only violations of Part I, Article 22 of the

New Hampshire Constitution, and not violations of a First Amendment right under the Federal Constitution. Assuming, without deciding, that the New Hampshire Constitution allows for pre-enforcement free speech standing, as does Article III of the Federal Constitution, the plaintiff has not met those requirements.

"In challenges under the First Amendment, two types of injuries may confer Article III standing without necessitating that the challenger actually undergo a criminal prosecution. The first is when the plaintiff has alleged an intention to engage in a course of conduct arguably with a constitutional interest, but proscribed by [the] statute, and there exists a credible threat of prosecution." Mangual v. Rotger-Sabat, 317 F.3d 45, 56-57 (1st Cir. 2003). "The second type of injury is when a plaintiff is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences." Id. (quotation omitted). However, "[a] plaintiff's subjective and irrational fear of prosecution is not enough to confer standing under Article III for either type of injury." Id; see Laird v. Tatum, 408 U.S. 1, 13-14 (1972) ("[A]llegations of subjective 'chill' are not an adequate substitute claim of specific present objective harm or a threat of specific future harm."). "Both the injury based on threat of prosecution and the injury based on self-censorship depend on the existence of a credible threat that the challenged law will be enforced." Mangual, 317 F.3d at 57.

The plaintiff in this case experiences no credible threat of prosecution. As an initial matter, the Policy does not mandate or compel speech. Rather, the Policy states that students "should" be addressed using the pronouns associated with the gender identity they assert at school. "Words and phrases which are generally regarded as making a provision mandatory include 'shall' and 'must.' On the other hand, a provision

couched in permissive terms is generally regarded as directory or discretionary." Appeal of Rowan, 142 N.H. 67, 71 (1997). Because the Policy does not use "shall" or "must," but instead the permissive term "should," the Policy merely requests district personnel address students using the pronouns which correspond with their gender identity asserted at school.

Additionally, it is only by joining the Policy with two other school policies–the Anti-Discrimination Policy and the Public Conduct Policy– that the plaintiff deduces he will be issued a no-trespass order or otherwise prosecuted pursuant to the Policy. Specifically, the plaintiff alleges that he would be prosecuted for addressing a student by the incorrect pronouns on school grounds because the Policy requires use of the appropriate pronouns, the Anti-Discrimination Policy prohibits discrimination, and the Public Conduct Policy prohibits anyone on school property from violating any other district policy or they will be issued a no-trespass order. Notably, the Policy, on its own, only concerns the conduct of district employees. It is true that if the plaintiff were on school grounds he would be subject to the Public Conduct Policy which prohibits anyone on school property from violating any other District policy. It is also may be true that to address a student by the incorrect pronouns would be antagonistic to the Policy. However, the language of the pronoun provision is permissive not mandatory. As a result, addressing a student by the incorrect pronouns would not be a violation as contemplated by the Public Conduct Policy. To assert a credible threat of prosecution, therefore, the plaintiff would need to show that the Public Conduct Policy somehow transformed the permissive nature of the pronoun provision into one that is mandatory. Accordingly, asserting a credible threat of prosecution requires the plaintiff to make

inference upon inference–that the Policy pronoun provision is mandatory, that the District will apply the Public Conduct Policy to the pronoun provision, and that the District will enforce every violation to the utmost degree. Notably, the Policy alone does not include any provision specifically describing the consequences if it is not followed. Therefore, the court finds that there is no credible threat of prosecution.

The plaintiff further alleges he has standing merely by challenging the Policy as overbroad and vague. However, "the general rule in New Hampshire is that a party has standing to raise a constitutional issue only when the party's own rights have been or will be directly affected." Gen. Elec. Co. v. Comm'r, N.H. Dep't Revenue Admin., 154 N.H. 457, 461 (2006). "Standing under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another, with regard to an actual, not hypothetical, dispute, which is capable of judicial redress." Duncan v. State, 166 N.H. 630, 642-43 (2014). Under the Federal Constitution, when a statute proscribes constitutionally protected speech, a party whose speech the statute forbids may bring a constitutional challenge against the statute even if the party's own speech could constitutionally be proscribed, but said party must still experience injury or threat of injury as a result of the proscription. See Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (A plaintiff has standing to allege "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity."); see also City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 755-59 (1988) ("[R]ecognizing the explicit protection accorded speech and the press in the test of the First Amendment, our cases have long held that when a licensing statute allegedly vests unbridled discretion in a

government official over whether to permit or deny expressive activity, *one who is subject to the law* may challenge it facially without the necessity of first applying for and being denied a license." (emphasis added)); Montenegro v. N.H. Div. of Motor Vehicles, 166 N.H. 215 (2014).

As discussed above, the plaintiff experiences no credible threat of prosecution, and he has not been injured pursuant to the Policy because the Policy, on its own, applies to district employees and not to the plaintiff. Notably, the plaintiff cites cases in which individuals challenging a statute as overbroad or vague have already been prosecuted under said statute. See, e.g., Montenegro, 166 N.H. at 217 (petitioner denied vanity plate because it was deemed "offensive" under NH. Admin Rules, Saf-C 514.61(c)(3)); Kolender v. Lawson, 461 U.S. 352 (1983) (petitioner prosecuted and convicted pursuant to California Penal Code § 647(e)); Smith v. Goguen, 415 U.S. 566 (1974) (petitioner convicted under provision of Massachusetts' flag-misuse statute); Johnson v. U.S., 135 U.S. 591 (2015) (petitioner faced an increased prison term under residual clause of Armed Career Criminal Act). Therefore, the court finds that under both the New Hampshire and Federal Constitution the plaintiff must experience an injury arising from enforcement of the statute to challenge the statute as overbroad or vague. For that reason, the plaintiff also does not have standing to challenge the policy as overbroad or vague.

c. RSA 491:22 Standing

The defendants similarly challenge whether the plaintiff has standing under RSA 491:22, the declaratory judgment statute. "To establish standing to bring a declaratory judgment proceeding under RSA 491:22, I, a party must show that some right of the party has been impaired or prejudiced." Carlson v. Lativan Lutheran Exile Church of Boston

& Vicinity Patrons, Inc., 170 N.H. 299, 302-03 (2017), as modified on denial of reconsideration (Oct. 20, 2017). "[T]he claims raised must be definite and concrete touching the legal relations of parties having adverse interests..." Id. at 303. The party seeking declaratory relief must show that "the facts are sufficiently complete, mature, proximate and ripe to place the party in gear with the party's adversary, and thus warrant the grant of judicial relief." Id. Actions for declaratory judgment "should be confined to justiciable controversies of sufficient immediacy and reality as to warrant action by the courts." Delude v. Amherst, 137 N.H. 361, 364 (1993). "The requirement that a party demonstrate harm to maintain a legal challenge rests upon the constitutional principle that the judicial power ordinarily does not include the power to issue advisory opinions." Asmussen v. Comm'r, New Hampshire Dep't of Safety, 145 N.H. 578, 588 (2000) (quotations omitted) ("In evaluating whether a party has standing to sue, we focus on whether the party suffered a legal injury against which the law was designed to protect.").

The plaintiff also asserts violations of his parental rights. Specifically, the plaintiff challenges that the Policy allows the defendants to "purposefully withhold[ ] information from parents directly related to their minor children's support, care, nurture, welfare, safety, and education" and "withhold[ ] information with respect to their children's desire to consider becoming or identifying as transgender..." (Compl. ¶¶ 76, 85.) The Policy provides, in part, "[s]chool personnel should not disclose information that may reveal a student's transgender status or gender non-conforming presentation to others, including parents. . ." (Id. at ¶ 37; see also Pl.'s Ex. 1) The Policy, therefore, explicitly applies to transgender and gender non-conforming students. Indeed, the plaintiff does not allege that he has a transgender or gender non-conforming child in the

school to whom this policy would apply. Accordingly, his parental rights are not implicated by the Policy.

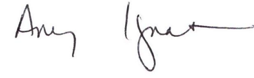
The plaintiff has not presented an immediate and ongoing injury which touches the legal relations of the parties and their adverse interests. The plaintiff has not suffered an injury or threat of injury sufficient to show that his rights have been or will be impaired. See Carlson, 170 N.H. at 303-304 (plaintiff did not have standing under declaratory judgment statute because "not only was there no evidence that [defendant's] use of the driveway interfered with [plaintiff's] use of the driveway, but there was no evidence that [defendant] is likely to overburden or otherwise interfere with [plaintiff's] right sometime in the future.") As previously discussed, the Policy does not directly proscribe the plaintiff's speech and he has failed to make a showing that the Policy implicates his parental rights. Instead, the plaintiff asserts a hypothetical situation—based on his own deduction combining three distinct policies—about what the District *might* do in the event he addressed a student by the incorrect pronouns while on school grounds, or the hypothetical situation of what the District would do if the plaintiff had a transgender child. See Id. at 303 ("the claims raised. . . must not be based upon a hypothetical set of facts."). Because the plaintiff's purported invasion of rights is purely speculative, he therefore lacks standing to bring an action for declaratory judgment.

Because the court finds that the plaintiff lacks standing, the defendants are entitled to dismissal of all claims. As a result, the court need not consider the defendants' remaining arguments. See Canty v. Hopkins, 146 N.H. 151, 156 (2001) (holding that the court need not consider a party's remaining arguments where one is dispositive of the case).

Conclusion

For those reasons, the defendants' motion to dismiss is GRANTED.

SO ORDERED.



Date: March 14, 2022

Amy L. Ignatius
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 03/15/2022