

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BLUEFIELD DIVISION**

FREEDOM FROM RELIGION
FOUNDATION, INC., et al.,

Plaintiffs,

vs.

MERCERT COUNTY BOARD OF
EDUCATION, et al.,

Defendants.

Civil Action No. 1:17-cv-00642

Hon. David A. Faber

**MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS
FIRST AMENDED COMPLAINT**

Introduction

The Mercer County School Board will soon complete its thirty-first year administering a program that openly teaches the central tenets of Christianity to the elementary and middle school students in Mercer County's schools. Students who do not wish to receive the bible instruction provided in these "Bible in the Schools" classes may choose to be removed from the classroom during the lesson. For the parents who do not wish to have their children receive religious teaching from their public school, this creates an obvious dilemma: violate their personal conscience and expose their child to bible indoctrination or have their child removed from his or her classmates.

The parent Plaintiffs are residents of Mercer County with elementary-age children facing this very dilemma. Plaintiff Elizabeth Deal has already faced the dilemma. After initially choosing to remove her daughter, Jessica Roe, from bible class, Deal eventually decided to enroll Jessica in a neighboring district to avoid the class and the alienation

associated with not participating. Plaintiff Jane Doe will face the same dilemma in August 2017 when her child, Jamie Doe, begins first grade. These individuals Plaintiffs and Plaintiff Freedom From Religion Foundation, an organization that seeks to protect the interests of Plaintiffs like Deal and Doe, challenge the constitutionality of the “Bible in the Schools” program under the Establishment Clause.

Defendants have moved to dismiss Plaintiffs’ complaint. Unsurprisingly, Defendants’ Motion to Dismiss does *not* challenge the merits of Plaintiffs’ right to bring a claim challenging the “Bible in the Schools” program. Instead, Defendants ignore the plain allegations in Plaintiffs’ Amended Complaint and attempt to recast Plaintiffs’ claim into one they believe they can challenge under Rule 12(b)(6). This argument can be dismissed out of hand because it does not address the actual complaint before the Court.

In a further attempt to prevent judicial review of its bible program, Defendants challenge the standing of the Plaintiffs. Defendants’ standing arguments discount the constitutional significance of the dilemma both parent Plaintiffs face. Plaintiff Deal continues to alter her conduct to protect Jessica from unwelcome exposure to the bible classes and the consequences of her daughter’s prior removal from the class. In three months, Plaintiff Jane Doe will be forced to take similar steps or expose Jamie to unwelcome bible teachings. Establishment Clause jurisprudence recognizes that plaintiffs facing these kinds of decisions have standing regardless of which path they choose.

Factual Background

I. The “Bible in the Schools” Program

For over 75 years, public schools in Mercer County have been providing bible instruction to their students. (Plaintiffs’ First Amended Complaint (FAC) ¶ 18). In 1986,

the Mercer County Board of Education (the “Board”) began administering the “Bible in the Schools” program. (FAC ¶ 22). The Bible in the Schools classes instill religious teachings in elementary and middle school students. (FAC ¶ 26). The classes are currently being taught in 15 elementary schools, one intermediate school, and three middle schools in Mercer County. (FAC ¶ 25). The classes are designed to teach the central tenets of Christianity and to encourage students to follow Christian teachings. (FAC ¶ 27).

The Bible in the Schools classes are taught by itinerant bible teachers who, at a minimum, possess “a degree in Bible.” (FAC ¶¶ 53, 54). The classes are held weekly as part of the regular school day and last for 30 minutes in elementary schools and 45 minutes in middle schools. (FAC ¶ 61). The overwhelming majority of students participate in bible classes. (FAC ¶ 62). Although the bible classes are said to be “voluntary,” Defendants have failed to provide many students who opt not to attend the classes with alternative instruction.¹ (FAC ¶¶ 62, 64).

The Board is responsible for adopting policies that govern Mercer County Schools and has authority over the Bible in the Schools program. (FAC ¶ 90). By policy and practice, the Board approved of the Bible in the Schools program for students in first through eighth grade. (FAC ¶ 93). The Board and Mercer County Schools employ the Bible in the Schools teachers. (FAC ¶ 94). The Board also maintains a number of general policies under which it has oversight of the Bible in the Schools program, including policies regarding in-service training to teachers and other personnel and adoption of texts for each subject for a period of five years upon the recommendation of the Superintendent.

¹ The Amended Complaint sets forth additional details regarding the Bible in the Schools program, which, given the nature of Defendants’ arguments in their motion to dismiss, are not relevant to the Court’s resolution of the motion. *See* FAC ¶¶ 57-60, 68-89.

(FAC ¶¶ 91-92). Mercer County Schools also provides written lessons to all itinerant bible teachers, which must be followed as given except for small revisions that have been approved at least two weeks before the lesson is taught. (FAC ¶ 25).

Deborah Akers, the Superintendent of Mercer County Schools, has the primary duties of implementing Mercer County Schools' policies and programs. (FAC ¶¶ 14, 98). Akers has created policies supporting and implementing the Bible in the Schools program for approximately 25 years. (FAC ¶ 97). In overseeing the Bible in the Schools program, Akers has coerced students into receiving religious instruction and has worked in concert with school principals to administer religious instruction to students. (FAC ¶¶ 98, 106).

II. The Plaintiffs and Their Objections

Jamie Doe is the pseudonym of a minor student who attends kindergarten in a Mercer County schools elementary school. (FAC ¶ 11). Jamie Doe's school offers bible classes beginning in first grade. (*Id.*). Jane Doe is Jamie Doe's parent and she plans for Jamie to continue to receive her elementary school education within Mercer County Schools (Jane and Jamie Doe are referred to collectively as the "Doe Plaintiffs"). (FAC ¶¶ 10, 28). Beginning in August, Jane plans for Jamie to attend first grade at the same school Jamie currently attends. (FAC ¶ 29). This is the most convenient school for Jamie to attend. (FAC ¶ 30). As a parent of a Mercer County Schools student, Jane Doe has received information from the school about its bible classes. (FAC ¶ 32).

Jane Doe objects to the Bible in the Schools program. Jane is an atheist and wishes to raise her child without religion. (FAC ¶ 31). Jane does not want Jamie to participate in any school bible courses or to be ostracized by other students or staff because of Jamie's nonparticipation. (FAC ¶ 32). Once Jamie begins first grade, Jamie will be forced to attend

bible indoctrination classes against the wishes and conscience of Jane, or he will be the only student or one of only a few students who do not participate. (FAC ¶ 33).

Jessica Roe is the pseudonym of a minor student who attended elementary schools within Mercer County from 2012 to 2016. (FAC ¶ 13). While Jessica was enrolled, the Defendants administered Bible in the Schools classes at schools she attended. (FAC ¶¶ 34, 43). Elizabeth Deal, Jessica's mother, felt pressure to enroll Jessica in the bible class. (FAC ¶ 36). Elizabeth identifies as agnostic. (FAC ¶ 37). She did not and does not want Jessica to receive religious instruction from Jessica's public school. (FAC ¶ 37).

While in first through third grade, Mercer County Schools failed to provide Jessica instruction or enrichment activities during the Bible in the Schools classes. (FAC ¶ 42). Jessica felt excluded and was harassed by other students for not participating in bible classes. (FAC ¶¶ 45, 46). Elizabeth removed Jessica from Mercer County Schools this school year to send Jessica to a neighboring school District. (FAC ¶ 48). The Bible in the Schools program and the treatment Jessica received as a result of not participating in the bible classes was a major reason for her removal. (FAC ¶ 48). Jessica is currently a fourth grade student attending school in a neighboring school district. (FAC ¶ 49). Elizabeth incurred, and continues to incur, additional expenses in order to send Jessica to a school outside of Mercer County. (FAC ¶ 50).

Standard of Review

All of Defendants' arguments are handled under the same standard. Although Defendants' motion to dismiss presents arguments under Rule 12(b)(1) and Rule 12(b)(6), the standard used is the same where, as here, the standing argument is based upon the allegations in a complaint. *Rose v. Kanawha County Board of Education*, 2016 WL

1229112, at *4 (S.D. W. Va. Mar. 26, 2016). Where such a “facial” challenge is made, a “court must proceed as it would on a motion to dismiss . . . under Rule 12(b)(6).” *Id.* (citing *Thigpen v. United States*, 800 F.2d 393, 401 n.15 (4th Cir. 1986)).

The pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure inform the analysis of what is required to survive a Rule 12(b)(6) motion. Rule 8(a) requires “a short plain statement . . . that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2). This standard requires a “showing, rather than a blanket assertion, of entitlement to relief.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 n.3 (2007) (internal quotations and citation omitted). In other words, a plaintiff must allege that her claim is “facially plausible.” *Wag More Dogs, Ltd. Liability Corp. v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012) (plaintiff meets standard of “‘facial plausability’ by pleading ‘factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged’”) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

In reviewing a complaint for the required plausibility, the court “must accept as true all of the factual allegations contained in the complaint” but may ignore “bare legal conclusions” and “unwarranted inferences, unreasonable conclusions, or arguments.” *Williams v. West Virginia State Police*, 2017 WL 833051, at *2 (S.D. W. Va. Mar. 2, 2017) (internal quotations and citations omitted). In the standing context, “general factual allegations of injury resulting from the defendant’s conduct may suffice, for . . . [courts] presume that general allegations embrace those specific facts necessary to support the claim.” *Wilson v. MRO Corporation*, 2017 WL 1534202, at *4 (S.D. W. Va. Apr. 27, 2017) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

Argument

I. **Plaintiffs present legally-cognizable Establishment Clause claims challenging the “Bible in the Schools” program.**

The plain statements of the FAC clearly establish Plaintiffs are challenging the constitutionality of the “Bible in the Schools” program in the Mercer County Schools under the Establishment Clause of the First Amendment. (FAC ¶ 1 (“This action challenges the constitutionality of the “Bible in the Schools” program . . .”); *id.* ¶ 2 (“Plaintiffs seek a declaration that the “Bible in the Schools” program violates the Establishment Clause [and] an injunction prohibiting Defendants from administering or participating in the “Bible in the Schools” program . . .”). Furthermore, the FAC is replete with specific allegations pertaining to the Bible in the Schools curriculum, *id.* ¶¶ 68-89, and the harms Plaintiffs allege the program causes. (FAC ¶¶ 29-33, 34-50).

Defendants ignore these clear statements and proclaim that the FAC’s allegations pertaining to the Bible in the Schools program—the vast majority of the Amended Complaint—is a red herring to distract from Plaintiffs’ true purpose of presenting a “facial challenge” to *any* use of the bible in the Mercer County Schools. This fanciful reading of the Amended Complaint rests exclusively upon two averments by Jane Doe (that she is an atheist and does not wish for Jamie to participate in any bible course, not just the Bible in the Schools course) and one subparagraph in Plaintiffs’ ultimate prayer for relief (which seeks to enjoin Defendants from administering “bible classes” as opposed to specifically the “Bible in the Schools classes”). (Def. Memo. 14). Those three pieces of the complaint do not have the effect of overriding the rest of the Complaint and converting Plaintiffs’ own characterization of their claims into what the Defendants call a “facial challenge.”

Plaintiff Jane Doe's allegations that she would object to the administering of *any* bible course are in no way inconsistent with a challenge to the particular Bible in the Schools program. The Bible in the Schools classes are unquestionably bible classes. Moreover, Jane Doe's other allegations in the Amended Complaint express concerns specific to this program and the impact it will have on the Doe Plaintiffs. *See, e.g.*, FAC ¶¶ 32-33. In this context, Jane Doe's statements of her atheism and objections to Jamie Doe encountering *any* bible classes provide a short and plain statement of the injury the presence of the Bible in the Schools program will cause the Doe Plaintiffs.

Plaintiffs' prayer for relief has no bearing upon the Court's consideration of this motion to dismiss. Simply put, "[a] demand for relief is not part of a plaintiff's claim." *Charles v. Front Royal Volunteer Fire and Rescue Dept., Inc.*, 21 F.Supp.3d 620, 629 (W.D. Va. 2014) (internal quotations and citation omitted). Thus, "the nature of the relief included in the demand for judgment is immaterial to the question of whether a complaint adequately states a claim upon which relief can be granted." *Id.* (citations omitted). At this stage the court must look only to whether the facts pled in the complaint set forth a claim upon which *some relief* could be granted. *Id.* (citing *Bontkowski v. Smith*, 305 F.3d 757, 762 (7th Cir. 2002)). Therefore, Defendants' argument that Plaintiffs' *claim for relief* is too broad has no place in the Court's analysis of the nature and scope of Plaintiffs' *claims*.

The self-serving reason behind Defendants' tortured reading of Plaintiffs' FAC is apparent: Defendants cannot move to dismiss a claim that challenges Defendants' specific Bible in the Schools program, so the recast the claim as one they believe they can challenge at this stage. After conjuring the "facial challenge" Defendants claim Plaintiffs' FAC sets forth, they point to case law they claim establishes there are no "per se" rules

prohibiting all bible instruction in schools. (Def. Memo. 14-17). But because Plaintiffs are not actually making the claim Defendants attack, Defendants entire argument can be disregarded, and the Court can proceed to addressing standing and municipal liability.

II. Plaintiffs have standing to pursue their claims and requested relief.

To establish Article III standing, a plaintiff must demonstrate that she “(1) has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan*, 504 U.S. 555, 560-61 (1992)). Standing must be established as to each claim and each request for relief. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). Claims for nominal damages require past injury, and claims for injunctive relief require sufficiently certain future injury. *City of Los Angeles v. Lyons*, 461 U.S. 95, 104-05 (1983).

The Fourth Circuit has expressly adopted the majority view that an Establishment Clause plaintiff need only demonstrate “direct, unwelcome contact” with a challenged religious exercise to demonstrate an injury-in-fact. *Id. Suhre v. Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1996) (noting “standing requirements in Establishment Clause cases are tailored to the “spiritual, value-laden beliefs” typically affected in such cases”). Under this standard, “where there is a personal connection between the plaintiff and the challenged display in his or her home community, standing is more likely to lie.” *Suhre*, 131 F.3d at 1087. Similarly, where the spiritual affront is located within a public facility, the injury may be compounded. *Id.*

To avoid forcing plaintiffs to experience direct, unwelcome contact in order to acquire standing, courts have also recognized that altering one's conduct to avoid such unwanted contact is an injury sufficient to support constitutional standing. *Id.* at 1088. The recognition of altered conduct as an injury-in-fact has its beginning in school prayer cases, including *School Dist. of Abington Twp., Pa. v. Schempp*. 374 U.S. 203, 224 (1963). In *Schempp*, students and their parents challenged a school district's practice of beginning each school day with Bible readings and recitation of the Lord's Prayer. *Id.* at 205-06. The school defended its practice by, among other things, claiming that student participation in the prayer was voluntary and that they could avoid exposure to the prayer simply through abstention. *Id.* at 224-25. The Court found the plaintiffs had standing to challenge the policy even though it allowed for abstention. *Id.* The decision in *Schempp* demonstrates that students and parents have standing regardless of how they choose to handle these sorts of dilemmas—i.e., whether they choose to directly face the unwelcome contact or take steps to avoid such contact. *Suhre*, 131 F.3d at 1086 (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 487 n.22 (holding “[t]he plaintiffs in *Schempp* had standing, not because their complaint rested on the Establishment Clause . . . but because impressionable school children were subjected to unwelcome religious exercise *or were forced to assume special burdens to avoid them*”)).

A. Plaintiffs Freedom From Religion Foundation, Jane Doe, and Jamie Doe have standing to seek prospective relief.

Plaintiffs Jane and Jamie Doe will face the “*Schempp* dilemma” in August 2017, when Jamie Doe begins first grade within the Mercer County Schools. Jane has alleged she and Jamie will face a decision of direct contact with the bible class or the assumption of special burdens to avoid that contact. Jane Doe faces this dilemma because she does not

want to expose Jamie to bible instruction, but she feels pressure to enroll Jamie Doe in the Bible in the Schools class to avoid placing Jamie in the position of being excluded and alienated from all or most of her classmates. According to *Schempp*, the Doe Plaintiffs will suffer constitutional injury-in-fact regardless of the choice Jane makes.

Given that the Doe Plaintiffs will face certain constitutional injury beginning in August 2017, the question facing the Court on the standing of these plaintiffs is whether that certain future injury confers standing for the Doe Plaintiffs to seek injunctive relief. To resolve this question, the Court must determine whether this “alleg[ed] future injury . . . is ‘certainly impending,’” or whether there is a “substantial risk” it will occur. *See Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334, 2341 (2014) (citing *Clapper v. Amnesty Intern USA*, 133 S.Ct. 1138, 1150 n.5 (2013)).

This requirement in cases seeking prospective relief is designed to ensure an injury is “not too speculative for Article II purposes.” *Clapper*, 133 S.Ct. at 1147 (citation omitted). The requirement is “a somewhat elastic concept.” *Id.* A threatened future injury must be concrete in a qualitative and temporal sense. *Beck v. McDonald*, 848 F.3d 262, 271 (4th Cir. 2017) (citations and quotations omitted). Injuries that rest upon a “speculative chain of possibilities” are too uncertain. *Clapper*, 133 S.Ct. at 1150.

The injury facing the Doe Plaintiffs is imminent because it will occur only seven months after the original Complaint was filed and because the facts alleged in the Amended Complaint demonstrate that it is certain and unavoidable. For over 75 years, public schools in Mercer County have been providing bible instruction to their students. So long as Jamie Doe continues to attend a Mercer County School, the Doe Plaintiffs will face the dilemma of having to choose between unwanted exposure to this bible class or the

burden of removing Jamie from her classmates. The certainty of this future injury is underscored by the fact that Jane has received information regarding the bible class and already feels coerced to subject Jamie to the class. This coercion is especially troubling given the FAC alleges students who opt out of the bible class do not receive adequate alternative instruction. Even if alternative instruction were provided, however, students who do not attend the bible class are alienated and excluded from their classmates.

To the extent Defendants contend Jamie Doe's first grade education is not temporally concrete (Def. Memo 7 (simply computing without argument the seven month period between filing day and future injury)), that argument should be rejected because it flies in the face of long-standing case law recognizing standing of student plaintiffs to challenge as-yet-unencountered practices in their schools. For instance, in *Lee v. Weisman*, the Supreme Court struck down a high school's practice of inviting clergy to give invocations and benedictions at graduation ceremonies. 505 U.S. at 599. At the time the Court ruled, the student plaintiff was a junior in high school, having not yet encountered the effect of the school's high school graduation policy. *Id.* at 581. More importantly, at the time the case was filed, the student plaintiff was a middle school student, *some four years away* from graduating high school. *Id.* Despite the time between filing and graduation, the Court recognized the student's standing to seek an injunction because it appeared likely the practice would occur at plaintiff's high school graduation. *Id.* at 584; *see also, Freedom From Religion Foundation v. New Kensington*, 832 F.3d 469, 473-74, 481 (3d Cir. 2016) (recognizing standing of a middle school student's parent to seek removal of a Ten Commandments monument displayed at a school district's high school, which the student would not attend for 2 years).

Defendants do little to argue that the future injury is not qualitatively concrete. They do not point to any sort of “speculative chain of possibilities” that must occur for Plaintiffs to face the certain future injury analyzed above. Rather, Defendants cherry-pick superficially supportive comments from wholly distinguishable cases while claiming the Doe Plaintiffs come up short even if they “think it is reasonably likely” they will encounter the future *Schempp* dilemma. Without pointing to any speculative contingencies to show why Plaintiffs allege only “possible future injury,” Defendants argument fails.

Defendants cannot inject uncertainty by pointing to the “voluntary” nature of the Bible in the Schools program. Courts have consistently held that unwanted religious exercises cannot escape review by purporting to be “voluntary.” *Lee*, 505 U.S. at 596 (“It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.”); *Schempp*, 374 U.S. at 288 (Brennan, J., concurring) (“Thus, the short, and to me sufficient, answer is that the availability of excusal or exemption simply has no relevance to the establishment question”); *Mellen v. Bunting*, 327 F.3d 355, 372 (4th Cir. 2003) (“VMI cannot avoid Establishment Clause problems by simply asserting that a cadet’s attendance at supper or his or her participation in the supper prayer are ‘voluntary.’”).

Mellen, in particular, is instructive to the facts of this case. The plaintiffs there challenged the recitation of prayers at the dinners held for students at the Virginia Military Institute. *Mellen*, 327 F.3d at 363. The Fourth Circuit found the practice violated the Establishment clause and observed that even if the dinners were wholly voluntary, challengers would still suffer injury in the form of the forced alienation of those

individuals from the VMI community to avoid religious endorsement. *Mellen*, 327 F.3d at 372 n.9 (citing *Lee*, 505 U.S. at 596). As *Mellen* and *Lee* show, even if Jane Doe opts to keep Jamie Doe out of the Bible in the Schools classes, she will suffer an injury-in-fact because the Defendants' own policy will force Jamie Doe to be separated from her classmates when the bible class occurs.

Similarly, Defendants do not create uncertainty by claiming Jane Doe could enroll Jamie Doe in a Mercer County elementary school that does not teach the bible class. This argument is disingenuous because Mercer County Schools' own policy establishes that students are expected to attend the school in the "attendance area in which they reside," and transfer requests are subject to review.² But even assuming Jane Doe could freely transfer Jamie to the only elementary school that does not administer the Bible in the Schools program, doing so would amount to the undertaking of special burdens to avoid the unwelcome bible classes because the elementary school Jamie attends is the school most convenient to the Does. In addition, assuming these burdens would also have the effect of alienating Jamie Doe from her classmates and local community.

Finally, Defendants argument that the Doe Plaintiffs cannot challenge the Bible in the Schools Program because Jamie Doe has not encountered the curriculum must also be rejected. As the above analysis demonstrates, the impending certain injury provides the Doe Plaintiffs with standing, and no part of the standing analysis requires the Doe Plaintiffs to have direct contact with the Bible in the Schools program before they can seek prospective relief. What this argument by Defendants really amounts to is an attempt to

² Mercer County File: J-19 (Rev. 5/12/15), <http://boe.merc.k12.wv.us/policy51/J-19.pdf> (last visited May 9, 2017).

shoehorn this case into alignment with *Moss v. Spartanburg County School Dist. Seven*, 683 F.3d 599, 606 (4th Cir. 2012). That attempt fails because *Moss* involved third-party religious instruction in which those choosing to attend the outside classes left their peers and schools, whereas here, the school itself is providing the religious instruction and forcing those opting out of the class to be alienated from their peers. Moreover, while one family did not have standing in *Moss*, another family did have standing, in part because they were not Christian, had received promotional materials from a school offering a bible class, and felt excluded from the school. *Id.* at 607.

In light of the foregoing, the Doe Plaintiffs have demonstrated standing to seek prospective relief because of their certainly-impending future injury. This future injury is not contingent on any sort of string of speculative events, it rests only upon Jamie Doe's continued attendance in the compulsory education provided by his home school system. No course of action the Doe Plaintiffs can take will prevent the fast-approaching, constitutionally-significant injury-in-fact. Therefore, Defendants' efforts to dismiss the Doe Plaintiffs' claims for prospective relief for want of standing must be denied.

B. Elizabeth Deal and Jessica Roe also have standing to seek both prospective and retrospective relief.

Elizabeth Deal and Jessica Roe are currently suffering the same injury that awaits the Doe Plaintiffs. Since 2012, Elizabeth Deal has faced the dilemma of whether to subject Jessica Roe to the bible class in her local school or the burden of removing Jessica from her classmates and exposing her to risks of harassment. For three years, Plaintiff Deal chose to have Jessica removed from the bible class. After suffering through seeing Jessica alienated from her classmates as a result of that decision, in 2016, Deal decided to enroll

Jessica in a neighboring school district to avoid both the bible class and the alienation that came along with opting out of it.

The ongoing avoidance measures being taken by Deal constitute an ongoing injury-in-fact that would be remedied by an award of injunctive relief. Deal continues to reside within Mercer County and could send Roe to the County's schools were it not for the ongoing administration of the Bible in the Schools program. In order to enroll Jessica in a different school district, Deal pays money each year to Jessica's new school. As long as the Bible in the Schools programs continues, Jessica will be a displaced student, and Deal will continue to have to incur expense to take the path of avoidance she has chosen.

Defendants fail to recognize this ongoing injury, which provides standing for injunctive relief. While Defendants acknowledge Deal would have had standing if she sued while Jessica was still enrolled in Mercer County Schools, they ignore entirely the fact that the difference between how Deal is now handling the dilemma and how she handled it for the first three years is one of degree only. One route to avoid direct exposure to the bible classes is to opt out of the classes. But as Deal learned between 2012 and 2016, this approach exposed Roe to alienation, ostracism, and harassment. As a result, Deal took her avoidance one step further by removing Roe from the school system altogether. Even having done that, Deal still faces the decision every year of whether to expose Roe to the bible class she will encounter in a Mercer County school or incur costs and alienate her daughter from her former classmates and local school community. To find this is not an ongoing injury would force Establishment Clause plaintiffs to precisely calibrate the level of harm they incur to protect their standing to sue, something Establishment Clause jurisprudence counsels the Court not to do. *Suhre*, 131 F.3d at 1089 (“We are unwilling to

put potential Establishment Clause plaintiffs to the task of precisely calibrating their reactions to offensive state-sponsored religious symbolism at the peril of either reacting too little to have standing or reacting so much that their constitutional claims are deemed moot.”).³ These plaintiffs’ ongoing avoidance confers standing to pursue injunctive relief.⁴

Because Plaintiffs Deal and Roe have standing to seek injunctive relief, Defendants’ argument that Plaintiffs’ cannot proceed on a claim of *only* nominal damages is moot. Nonetheless, it is worth noting that even if the Court were to conclude Plaintiffs Deal and Roe do not have standing to seek injunctive relief, their claim for nominal damages should still go forward. Fourth Circuit case law suggests this Circuit would consider a claim of purely nominal damages sufficient to confer Article III standing. In *Covenant Media of S.C., LLC v. City of North Charleston*, the Fourth Circuit held that an injury redressable by nominal damages is sufficient to confer standing.⁵ 493 F.3d 421, 429

³ This rationale applies here with equal force even though the court in *Suhre* reached this conclusion by addressing whether to require affirmative avoidance instead of just direct, unwelcome contact. In effect, this decision held that Establishment Clause plaintiffs need not go as far as Elizabeth Deal has gone in this case. While there is a theoretical point where a plaintiff could go so far that there is no ongoing injury—such as moving several states away—in this case, Deal continues to reside within Mercer County.

⁴ Defendants baldly speculate that Elizabeth Deal would not re-enroll Jessica in school in Mercer County Schools if the Bible in the Schools classes are enjoined, suggesting that there must be other reasons compelling enough to not do so. This sort of speculation should be disregarded by the Court, but in any event, Deal should not be forced to deal with the presence of the challenged Bible in the Schools program as even a factor in her decision making.

⁵ Defendants’ attempts to distinguish *Covenant Media* miss the mark. First, Defendants point to the fact that the plaintiff there also sought an injunction as being a distinguishing feature. However, as Defendants themselves state in their brief, standing must be demonstrated for each claim for relief, so the existence of standing for a claim for injunctive relief would not extend standing for nominal damages where it did not independently exist. Second, Defendants argue the court’s holding is limited to addressing mootness, which Defendants contends, is materially different than standing. This is at odds

(4th Cir. 2007) (“Because [plaintiff] alleges a personal injury . . . that is redressable by nominal damages, we conclude that the district court erred in determining that [plaintiff] lacked standing.”). In its decision, the court approvingly cited to *Advantage Media, LLC v. City of Eden Prairie*, which also held that nominal damages (and a claim for attorneys’ fees) satisfy the redressability requirement and confer standing. 456 F.3d 793, 802 (8th Cir. 2006). Moreover, Justice O’Connor’s deciding concurrence in *Farrar v. Hobby* implicitly supports this view as well. 506 U.S. 103, 116, 120-21 (1992) (O’Connor, J., concurring) (finding that an award of nominal damages may be sufficient for “prevailing party status” under 42 U.S.C. § 1988 where nominal damages can represent a victory and vindication of certain rights).

III. Plaintiffs have alleged municipal liability claims against Defendants Mercer County Schools and the Mercer County Board of Education.

Plaintiffs’ claims against the municipal Defendants are premised upon the administration of the Bible in the Schools program, which has been ongoing for 30 years. The FAC alleges that the Board and Mercer County Schools handle all responsibilities of the program except financing, including most significantly, approval and implementation of the program itself; establishment of curriculum, lesson plans and educational requirements for bible teachers; hiring and employment of bible teachers; and provision of alternative instruction for students who do not attend bible classes. These allegations

with the quoted portion of *Covenant Media* suggesting a finding of standing premised upon a claim for nominal damages. *Id.* at 429. Third, Defendants attempt to distinguish the case because it also included a claim for compensatory damages. Compensatory damages were not mentioned in the finding of standing, and although the discussion of mootness mentions compensatory damages in passing, it does not suggest the existence of those damages was a factor in the determination that the case was not moot. *Id.* at 421, n.4.

amply support a claim that the municipal Defendants are responsible for administering the Bible in the Schools program through policy and custom.⁶

Given these specific allegations and the open, longstanding existence of the Bible in the Schools program, Plaintiffs' municipal liability claims must go forward. A custom, for purposes of demonstrating municipal liability, arises where a practice "is so persistent and widespread and so permanent and well settled as to constitute a custom or usage with the force of law." *Carter v. Morris*, 164 F.3d 215, 218 (4th Cir. 1999) (citation omitted). It is impossible to imagine how the 30-year Bible in the Schools program, which implements a biblical curriculum through teachers *employed by the Board and the Schools* does not meet the established definition of a municipal custom, even if there were no written policies. Absent the discovery of compelling facts revealing the program to be a clandestine operation by low-level employees, these facts alone will satisfy any burden Plaintiffs have to show the existence of a custom that proximately caused the violations of Plaintiffs' constitutional rights alleged in this case. Clearly, at the pleading stage, these facts are sufficient, and Defendants' motion to dismiss on this issue must be denied.

IV. Plaintiffs have asserted a valid claim against Defendant Akers.

As the Supreme Court has held, "to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *see also Hafer*, 502 U.S. at 21, 25 (1991). The Fourth Circuit has expressly noted that "Section 1983 permits

⁶ Defendants' argument that Plaintiffs fail to point to the act of a final policymaker may be disregarded because Plaintiffs are not required to do so where they have alleged that a policy and/or custom caused the violation. *See Barrett v. Board of Educ. Of Johnston County, N.C.*, 590 F. App'x. 208, 210 (4th Cir. 2014) (municipal liability may be premised upon municipal policy, municipal custom, *or* the decisions of a final policymaker).

individual capacity suits against state officers for damages arising from official acts.” *Lizzi v. Alexander*, 255 F.3d 128, 137 (4th Cir. 2001) (citing *Hafer*, 502 at 23).

As to Plaintiffs’ claims against Defendant Akers, the FAC alleges facts that meet this standard. According to the FAC, as superintendent of Mercer County Schools, Akers has the primary duties of implementing Mercer’s policies and programs. In that role, the FAC alleges, Akers has created policies supporting and implementing the Bible in the Schools program for approximately 25 years. In implementing the Bible in the Schools program, Plaintiffs allege Akers has, on her own and in concert with school principals, administered religious instruction to students and coerced students into receiving that instruction. In light of the religious nature of the program, these allegations demonstrate official actions of Akers that, over the course of 25 years, have played a role in the existence, continuation, and implantation of the Bible in the Schools program at the heart of the deprivations alleged by Plaintiffs.

These allegations are more specific than the sort of “sweeping conclusory allegations” Defendants argue Plaintiffs’ claims against Akers rest upon. The allegations against Akers are more than the “formulaic recitation of the elements,” (*See* Def. Memo. 17 (citing *Iqbal*. 556 U.S. at 681)), because they specify the types of conduct Akers has engaged in over the course of 25 years in overseeing and implementing the Bible in the Schools program. Thus, Plaintiffs’ claims against Akers should continue beyond the pleading stage so that Plaintiffs may develop facts about her more specific conduct.

Respectfully submitted,

/s/ Marcus B. Schneider, Esquire

Marcus B. Schneider, Esquire

W.V. I.D. No. 12814

STEELE SCHNEIDER

428 Forbes Avenue, Suite 900

Pittsburgh, PA 15219

(412) 235-7682

(412) 235-7693/facsimile

mschneider@steleschneider.com

CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2017, the foregoing **MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS FIRST AMENDED COMPLAINT** was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic case filing system and constitutes service of this filing under Rule 5(b)(2)(E) of the Federal Rules of Civil Procedure. Parties may access this filing through the Court's ECF system.

/s/ Marcus B. Schneider, Esquire

Marcus B. Schneider, Esquire