

Hon. Dennis M. Cavanaugh, U.S.D.J.
Return Date: February 27, 2006

MARCUS A BORDEN, : UNITED STATES DISTRICT COURT
Plaintiff, : DISTRICT OF NEW JERSEY
- v - :
SCHOOL DISTRICT OF THE TOWNSHIP OF: CIVIL 05-5923 (DMC)
EAST BRUNSWICK; BOARD OF EDUCATION:
OF THE TOWNSHIP OF EAST BRUNSWICK;:
and DR. JO ANN MAGISTRO, in her capacity as:
SUPERINTENDENT, SCHOOL DISTRICT OF:
THE TOWNSHIP OF EAST BRUNSWICK, :
Defendants :
:
:
:

REPLY BRIEF ON BEHALF OF **AMERICAN ATHEISTS, INC.** IN SUPPORT
OF MOTION TO INTERVENE

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STATEMENT OF FACTS

In the main, Movant relies upon the Statement of Facts in its principal brief. Movant notes, however, Paragraphs 7, 8, and 13 of Plaintiff's complaint. In those paragraphs, Plaintiff alleges "voluntary team prayers" that have endured for more than twenty-five years. Defendants do not deny the duration of that practice (Answer, ¶7)¹.

STATEMENT OF LAW

The cases upon which Defendants rely to oppose intervention are clearly distinguishable from the instant matter. Moreover, those distinguishing characteristics highlight the appropriateness of Movant's application. 10

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976), cited by Defendants, concerned litigation instituted by persons who lacked standing as defined by Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). Absent such standing, no case or controversy existed within the meaning of Article III. Here, by contrast, Plaintiff and Defendants

¹In their Answer, Defendants deny knowledge of the duration of the practice. They never deny the practice itself, or its duration (Answer, ¶13).

have already provided a case or controversy². As such, Article III requirements are satisfied.

Defendants cite Brody v. Sprang, 957 F.2d 1108 (3rd Cir., 1992), for the proposition that if one party is a government entity charged by law with representing the interests of the applicant for intervention, then this representation will be adequate. Movant recognizes this principle. But this principle has no relevance here: Defendants are not attorneys general, charged by law with representing Movant's interests. Quite the contrary, their charter is to provide the children of East Brunswick with a "thorough and efficient" education. See Robinson v. Cahill, 62 N.J. 473 (1973).

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Brody cites Delaware Valley Citizens Council v. Pennsylvania, 674 F.2d 970, 973 (3rd Cir., 1982), for the principle that Defendants invoke. Delaware Valley concerned alleged violations of the United States Clean Air Act, 42 U.S.C. 7401 et seq. Named defendants in Delaware Valley included Pennsylvania's Attorney General. Delaware Valley, citing Environmental Defense Fund v. Higginson, 631 F.2d 738, 740 (D.C.Cir., 1979), observed, "When a state is a party of a suit involving a matter of sovereign interest, it is presumed to represent the interests of its citizens."

²Movant discusses the quality of this case or controversy later.

Here, by contrast, the State is not a party. The only governmental parties are the School District of the Township of East Brunswick, and its Board of Education. The concern of those parties for New Jersey citizens is, at best, indirect. Nor is their interest separation of church and state. Plain and simple, their interest (very properly) is education.

American Atheists acknowledged that it lacked sufficient standing to have instituted suit ab initio (Atheist Brief at 3). At the same time, it pointed out why standing for an intervenor is measured against a different and relaxed standard (Atheist Brief at 3, 4). This relaxed standard is acknowledged in cases such as Wynn v. Carey, 599 F.2d 193 (7th Cir., 1979); and Piedmont Heights Civic Club, Inc. v. 10 Moreland, 83 F.R.D. 153 (N.D.Ga, 1979). And Atheists demonstrated in its moving brief that it meets that standard (Atheist Brief at 5).

Defendants seem to suggest that Movant's non-involvement in education should somehow defeat its application to intervene. As a "watch dog," American Atheists labors for the complete and absolute separation of church and state (Johnson Certif., ¶4). These labors would include the sphere of education.

"State" will always implicate a branch or agency of government. Each branch or agency will have its own body of caselaw concerning issues within its province. Every case or controversy arises in a particular context. The educational setting of

the instant controversy is one such context. Absent context, no case or controversy could exist. That this litigation arises in the context of education hardly disqualifies Movant. American Atheists' concern exists in whatever context, including education, the issue might arise.

Defendants assert absence of basis to believe that they will not adequately represent Movant's interest (Defts' Brief at 9). In so asserting, Defendants fail to account for their silence during the twenty-five (or more) years during which Plaintiff asserts the practice in question has persisted (Complaint ¶¶7, 8, 13). It was only upon someone complaining that Defendants found themselves forced to address this issue. Movants thus have a very real basis to question adequacy of the representation that 10 Defendants will provide.

The necessity for standing arises from the Article III provision that limits the jurisdiction of federal courts to cases and controversies. But, absent leave to intervene, the present existence of a case or controversy is tenuous at best, and illusory at worst. As will be now demonstrated, participation of American Atheists solidifies a case or controversy, the existence of which is otherwise questionable.

As indicated above, Coach Borden alleges that the District suffered his prayer activities for nearly twenty-five years (Complaint, ¶¶7, 8, 13). It is inconceivable that, during that twenty-five year period, no District administrator or Board member

attended a single football game and noticed their coach joining his team in prayer. But it was only when a student complained of Borden's participation that the District deigned to act. It had to. Had the District failed to respond, it would thereafter have been exposed to an adverse judgment, Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992); Santa Fe I.S.D. v. Doe, 530 U.S. 290, 120 S.Ct. 2256, 147 L.Ed.2d 295 (2000). Part of that adverse judgment would have required Defendants to pay not only their own attorney's fees, but also those of Coach Borden, 42 U.S.C. Section 1988; Hensley v. Eckerhart, 461 U.S. 424, 429, 103 S.Ct. 1933, 1937, 76 L.Ed.2d 40 (1983).

So Defendants responded. Borden sued. Borden's suit forced Defendants to 10 Answer because, had they allowed Borden to prevail by default, they would still be exposed to litigation instituted by the student.

With issue now joined, Defendants lose all incentive to vigorously defend their position. Whatever this Court's ultimate decision, Defendants will have a judgment to use as a shield against future litigation by a complaining student. This is most graphically seen by asking, "What motivation would Defendants have to appeal any final ruling that this Court may make?" American Atheists is the only (prospective)

party with motive to defend the Constitutional principles around which this entire case centers³.

Defendants recite their obligation to enforce the laws and Constitution of the government of the United States (Defts' Brief at 11). Presumably Board members of the Dover (Pennsylvania) Area School District were similarly obliged to enforce those same laws, and that same Constitution. That obligation did not prevent their requiring biology students to hear a statement mentioning intelligent design as an alternative to Darwin's theory of evolution, Kitzmiller v. Dover Area School District, 400 F.Supp.2d 707 (M.D. Pa., 2005).

³And regardless of any thoughts that Defendants' counsel may personally entertain concerning where this litigation should go, counsel only advises; counsel does not decide. Only the Board decides. Section 1.2(a) of the Rules of Professional Conduct spells this out:

A lawyer shall abide by a client's decision concerning the scope and objectives of representation[.]

Under L.Civ.R. 103.1(a), counsel is bound by R.P.C. 1.2(a).

This Board simply has no reason to reject whatever resolution Plaintiff may find to his liking. What makes this especially true is that Plaintiff makes no demand for money damages. Money enters into Plaintiff's complaint only as it relates to attorney fees. Strictly as a prudent business decision, Defendants may acquiesce in order to stop the clock of their own attorney. Indeed, this Board might well incur the displeasure of taxpayers were it to do otherwise.

Movant emphatically disavows any suggestion that Defendants would similarly act. At the same time, Defendants' alleged twenty-five years of inaction strongly suggests that present parties fail to adequately represent Movant's position.

Finally, Defendants cite Ingebretsen v. Jackson Public School District, 864 F.Supp. 1473 (S.D.Miss., 1994), aff'd 88 F.3d 274 (5th Cir., 1996). Ingebretsen recites costs upon litigation when a proposed intervenor "merely underlines the issues of law already raised by the primary parties." But Ingebretsen, like Delaware Valley, involved litigation wherein the State Attorney General was already a party. No present party to this action is charged with representing this State's citizens in general, or separation of church and state in particular. Movant doubts that its participation, 10 if allowed, would consist of mere "underlining."⁴

⁴To the extent that Defendants' position in this litigation may coincide with that of Movant, Movant would be delighted to be able to do nothing more than to say, "I agree."

CONCLUSION

American Atheists, Inc. should be permitted to intervene. This court should grant leave for Movant to file the pleading that accompanied its moving papers.

Respectfully submitted,

s/Allan Marain

ALLAN MARAIN