UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

ERIC MCARTHUR and JENNY MCARTHUR, proceeding on their own behalf and on behalf of their minor children, M.J.M., M.D.M., M.H.M., and M.M.,	
Plaintiffs,	Civil Action No. 1:21-cv-1435
v.	
SCOTT BRABRAND, Superintendent of Fairfax County Public Schools, STELLA PEKARSKY, Chair of the Fairfax County School Board, and GLORIA ADDO AYENSU, Director of Department of Health for Fairfax County,	
Defendants.	

PLAINTIFFS' OPPOSITION TO DEFENDANT AYENSU'S MOTION TO DISMISS

INTRODUCTION

Defendant Gloria Ayensu, Director of the Fairfax County Health Department ("FCHD"), claims that the Amended Complaint against her should be dismissed because neither she nor FCHD controls the Fairfax County Public School ("FCPS") district's quarantine policies, which Plaintiffs Eric and Jenny McArthur challenge. But FCHD not only formulates guidance for the school district's quarantine requirements, it also directly and substantially participates in the implementation and enforcement of those unlawful policies by dictating when children can return to school following a "potential close contact" with someone who tests positive for COVID-19. FCHD played a significant role in causing the legal wrong and inflicting the injury on M.M. and M.H.M. in this case by refusing to clear them for return to school despite their naturally acquired

immunity, simply because they had not been vaccinated. To the extent that, as of February 4, 2022, FCHD alleges that it is no longer involved in implementing and enforcing the quarantine policy, it is through voluntary cessation of conduct that has already caused completed violations of Plaintiffs' rights, which does not moot the case against Dr. Ayensu.

In sum, Plaintiffs' injury can be directly traced to FCHD's conduct, and therefore she is properly named a party to this lawsuit. *See Bennett v. Spear*, 520 U.S. 154, 168-69 (1997) ("the injury must be fairly traceable to the alleged action of the defendant.").

BACKGROUND

The McArthurs reside in Vienna, Virginia, and all four of their children attend schools in the Fairfax County Public School District (First Amended Complaint ["FAC"] ¶ 23). Plaintiffs' 7-year-old daughter, M.M., attends second grade at Sunrise Valley Elementary School, where her 11-year-old brother, M.H.M., is a fifth grader (FAC ¶ 24). Their older brothers, 17-year-old M.J.M. and 14-year-old M.D.M., are in eleventh and ninth grade, respectively, at South Lakes High School (FAC ¶ 25).

M.H.M. and M.M. contracted COVID-19 at the end of October 2021 (FAC ¶¶ 31-33). The children completed home quarantines, returning to school on November 8 (M.H.M.) and November 15 (M.M.) (FAC ¶¶ 31, 35).[1] Not three weeks later, on December 2, M.M. was forced

[1] Dr. Ayensu attempts to cast doubt on the timing of M.M.'s COVID-19 infection because she, unlike M.H.M., did not obtain a PCR test. But the FAC alleges facts demonstrating that M.M. contracted COVID-19. Those factual allegations must be accepted as true for the purposes of this motion to dismiss. Given that her father and brother tested positive shortly before she began displaying symptoms, that her mother then tested positive, and that she later tested positive for antibodies, the evidence strongly indicates that she contracted the virus at that time. In any event, even if she had contracted COVID-19 earlier, the positive antibody test established that she had naturally acquired immunity. That is all that matters here. *When* M.M. acquired immunity is irrelevant, as Defendants' decision to offer an unending exemption from the quarantine requirement to vaccinated students demonstrates.

to quarantine a second time because she was identified as a "potential close contact" of another student or staff member who had tested positive for COVID-19 (FAC ¶ 40).

Per FCPS's policy at the time, if M.M. had been vaccinated, she would have been allowed to return without quarantining, provided FCHD confirmed that she was asymptomatic as well as vaccinated (FAC ¶¶ 43-45). By contrast, as long as M.M. remains unvaccinated—despite her naturally acquired immunity—the policy would force her to quarantine any time she is identified as a "potential close contact" of someone at the school who tests positive (FAC ¶¶ 44-45).

On December 3, M.M.'s mother completed a FCHD verification survey indicating that M.M. was unvaccinated, had been infected with COVID-19 in the last 90 days, and was experiencing no symptoms (FAC ¶ 37). Later that day, M.M.'s mother received an email notification from FCHD stating that M.M. could not be cleared to return to school "because [she was] not vaccinated for COVID-19" (FAC ¶ 48).

On December 7, M.M.'s mother spoke to an individual at FCHD who stated that a positive test within the past 90 days would allow her to return to school immediately (FAC ¶ 50). Later that day, M.M.'s father called FCHD back and talked to another person who reported that only vaccination, not a positive PCR test within the past 90 days, would permit release from quarantine (FAC ¶ 51).

M.M. suffered mental and emotional distress, as well as learning loss, as a result of being excluded from in-person school. She began crying when told she had been placed on "pause" and would miss another week of school (FAC ¶ 56). Throughout the quarantine she was very emotional, having temper tantrums that were unusual for her, and she experienced difficulty focusing on schoolwork. Mrs. McArthur had difficulty keeping her calm (FAC ¶ 57).

In their initial complaint, which was filed only on behalf of M.M., Plaintiffs averred that their daughter would continue to be subject to quarantine whenever the school identifies her as a "potential close contact" of an infected student or staff member (Complaint ¶ 47, Doc. 1). As cases had been rising in the D.C.-Virginia-Maryland region, the complaint alleged that, in all likelihood, M.M. would soon have another "potential close contact" and once again be forced to quarantine, unlike her vaccinated peers (Complaint ¶ 48-49, Doc. 1).

That eventuality did indeed transpire. On January 31, 2022, Mrs. McArthur received separate notices as to both M.M. and M.H.M. informing them that the school had determined, "in cooperation with the Fairfax County Health Department," that the children had "potential close contacts," and would have to quarantine for at least 5 days (FAC ¶ 60; Attachment A of FAC, Exs. 11, 13). The emails also stated that FCHD "will determine if your child meets the criteria to be exempt from quarantine and will provide a clearance email for your child's return to school" (Attachment A, Exs. 11, 13).

Because M.M. and M.H.M. had contracted COVID-19 more than 90 days earlier—92 days in the case of M.M., and 95 days in the case of M.H.M.—they did not qualify for an exemption and were forced to quarantine yet again (FAC ¶ 61). Had the children been vaccinated—regardless of how long ago—the policy would not have required them to quarantine (FAC ¶ 62).[2]

[2] Dr. Ayensu misrepresents Plaintiffs' contentions with respect to naturally acquired and vaccine-induced immunity. Plaintiffs do not "concede that studies relied upon by the CDC demonstrate the superiority of 'vaccine-achieved immunity'" (Def. MTD at 4). To the contrary, Plaintiffs explained that these papers misrepresent the actual findings of the studies. Further, during the pendency of this litigation, CDC publicly released a new study in which it finally acknowledged what it had been trying to avoid recognizing: that there is no question naturally acquired immunity is superior (FAC ¶ 112). And finally, new data from Pfizer indicates that, for 5-11-year-olds, the vaccine "offers virtually no protection against infection, even within a month after full immunization." Apoorva Mandavelli and Noah Weiland, "Pfizer Shot Is Far Less Effective in 5- to 11-Year-Olds than in Older Kids, New Data Show," *The New York Times* (Feb. 28, 2022),

On February 1, 2022, M.M. was permitted to return to school as apparently five days had passed since the "potential close contact." M.H.M., whose "potential close contact" apparently occurred later with a different person, was not permitted to resume in-person class until February 3 (FAC ¶ 64).

Effective beginning at 5:00 pm on Friday, February 4, 2022, FCPS made further changes to the quarantine policy. Going forward, the FCHD quarantine email to families will be replaced by an FCPS Pause (Close Contact) Letter. And the FCHD Vaccine Verification Survey will be replaced by an FCPS Student Quarantine Exemption and Attestation Form (available at https://www.fcps.edu/sites/default/files/media/forms/se365.pdf) (FAC ¶ 64). In other words, at least for the time being, FCHD will no longer be responsible for clearing (or refusing to clear) children to return to school (FAC ¶ 65).

Defendant Ayensu alleges that the case against her should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) because she is not an employee of FCPS and does not dictate the district's policies, nor did she exercise any authority over or issue any order to M.M. and M.H.M. to be quarantined. *See* February 22, 2022 Motion to Dismiss First Amended Complaint for Defendant Gloria Ayensu ("Def. MTD") at 7-8.

STANDARD OF REVIEW

In reviewing a Rule 12(b)(6) motion, a court "must accept as true all of the factual allegations contained in the complaint" and "draw all reasonable inferences … in favor of the plaintiff." *E.I. du Pont de Nemours & Co. v. Kolon Indus.*, 637 F.3d 435, 449 (4th Cir. 2011). "A court decides whether [the pleading] standard is met by separating the legal conclusions from the

available at https://www.nytimes.com/2022/02/28/health/pfizer-vaccine-kids.html (last visited Feb. 28, 2022).

factual allegations, assuming the truth of only the factual allegations, and then determining whether those allegations allow the court to reasonably infer" that the plaintiff is entitled to the legal remedy sought. *A Soc'y Without a Name v. Comm'w of Va.*, 655 F.3d 342, 346 (4th Cir. 2011), *cert. denied*, 566 U.S. 937 (2012).

After reviewing the complaint and drawing all inferences in the plaintiffs' favor, the court may grant the motion to dismiss *only if* the plaintiffs have "failed to set forth fair notice of what the claim is and the grounds upon which it rests that make such a claim plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint will survive a motion to dismiss if it contains sufficient factual matter to state a claim for relief that is plausible on its face and provides more than labels and conclusions or a formulaic recitation of the elements of a cause of action. *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). The rules do not require a probability of success but simply "more than a mere possibility that a defendant has acted unlawfully." *Twombly*, 550 U.S. at 556.

ARGUMENT

I. BECAUSE THE FCHD DECIDES WHETHER OR NOT CHILDREN MAY RETURN TO SCHOOL FOLLOWING A "POTENTIAL CLOSE CONTACT," DR. AYENSU IS AN APPROPRIATE DEFENDANT

Dr. Ayensu contends that she has no authority over FCPS's quarantine policy; that Plaintiffs' allegation that she is responsible for injury to M.M. is based merely on FCHD's promulgation of guidance upon which FCPS relies; that Plaintiffs point to no official act on the part of Dr. Ayensu or FCHD that infringed their rights; and that in any event the February 4 policy change absolves her of responsibility (Def. MTD at 5-10).

But Defendant is the Director of FCHD, which not only formulates guidance that the school district follows but at all relevant times implemented and enforced the school's unlawful

quarantine policy (FAC ¶ 29). FCHD is charged with clearing students to return to school following a "potential close contact" with a COVID-19 positive person, or conversely and as applicable to this case, denying students permission to return because of their unvaccinated status (FAC ¶¶ 43, 48, 50, 51). Indeed, in early December following M.M.'s "potential close contact," Ms. McArthur received a notification, via email, from FCHD stating that "we are unable to clear your child to go back to school because they are not vaccinated for COVID-19" (FAC ¶ 55). When M.M. and M.H.M. were again quarantined in late January, the emails from the school stated that the policy was being enforced "in cooperation" with FCHD, which would determine if they were exempt (due to having been vaccinated) and eventually clear them to return to school (Attachment A of FAC, Exs. 11, 13).

Plainly, the school board has delegated to FCHD responsibility for making decisions about whether or not a child may return to school following a "potential close contact." And, FCHD denied M.M. and M.H.M. permission to return to school because they are not vaccinated. *See Bennett v. Spear*, 520 U.S. 154, 168-69 (1997) ("[Government's position] wrongly equates injury fairly traceable to the defendant with injury as to which the defendants' actions are the very last step in the chain of causation. While … it does not suffice if the injury complained of is the result of the *independent* action of some third party … that does not exclude injury produced by determinative or coercive effect upon the action of someone else.") (internal citations and quotation marks omitted); *Rogers v. United States Department of Health and Human Services*, 466 F.Supp.3d 625, 642-43 (D.S.Carolina 2020) (holding that, because state agency's policies led to the alleged injury—discrimination on the basis of religion and sexual orientation—the agency could be sued).

This is the injury the children and their parents allege, and that FCHD participated substantially in inflicting. *See id.* at 645 ("Defendants caused Plaintiffs' injuries by creating a system that permits religiously-affiliated CPAs to use religious eligibility criteria to deny federally- and state-funded public services to prospective foster families" and a change to this policy would "make Plaintiffs whole."); *Kadel v. Folwell*, 446 F.Supp.3d 1, 10-11 (M.D.N.C. 2020) (even if, as University Defendants claimed, only state Defendants could lift exclusion policy that Plaintiffs challenged, there were "other ways in which a favorable ruling … could give [the Plaintiffs] the relief they seek," so court denied University Defendants' motion to dismiss.). At the very least, FCHD's recommendations had a "determinative or coercive effect," *Bennett*, 520 U.S. at 169-70, upon FCPS's actions.

Defendant's contention that "Dr. Ayensu does not have authority to make FCPS policy" so the "relief requested by Plaintiffs lies exclusively in the control of the School Board and FCPS, and no amount of guidance from Dr. Ayensu or FCHD … changes that ultimate legal fact" is unavailing (Def. MTD at 9). A government actor who implements or enforces an unconstitutional policy—even one she did not create—may be named a defendant in an action challenging the policy. *See Rogers v. United States Department of Health and Human Services*, 466 F.Supp.3d 625, 642 (D.S.Car. 2020) ("the relevant inquiry to determine traceability is simply whether the Defendants' alleged actions are 'at least in part responsible for' Plaintiffs' injuries"); *Kadel*, 446 F.Supp.3d at 11 (that University administered a health plan Plaintiffs alleged violated their constitutional rights sufficed to fend off motion to dismiss) (citing *Tovar v. Essentia Health*, 857 F.3d 771, 778 (8th Cir. 2017) (concluding that two entities—one designated as plan administrator, the other named as claim recipient—were both appropriately named as defendants at the pleading stage because neither was "wholly uninvolved" in operation of the healthcare plan)).

The fact that individuals can be sued in their official capacity for enforcing unconstitutional policies enables § 1983 lawsuits. *See Wilson v. United States*, 332 F.R.D. 505, 529 (S.D.W.Va. 2019) (allowing prison librarian to be sued in her official and personal capacities because she "implement[ed] and enforce[d]" unconstitutional practices.). Section 1983 grants a right action against *every* person "who, under color of any statute, ordinance, regulation, custom, or usage … *subjects, or caused to be subjected*" any person to the deprivation of a right, privilege, or immunity secured by federal law (emphasis added). The statute includes no requirement that the person be a policymaker. Indeed, suit will often lie against the state actor implementing or enforcing an unconstitutional policy rather than the person authorized to make that policy. *See*, *e.g.*, *Whole Women's Health v. Jackson*, 595 U.S. ___, ____ (2021) (permitting a § 1983 action to proceed against only Texas's executive licensing officials "who may or must take enforcement actions" against the plaintiffs if they violate the state policy). In sum, FCHD plays a significant role in enforcing FCPS's discriminatory policies, and Dr. Ayensu, the agency's director, is an appropriate defendant in this action.

II. THE REMOVAL OF FCHD FROM ENFORCEMENT OF THE QUARANTINE POLICY RESULTED FROM VOLUNTARY CESSATION, SO THE CASE AGAINST AYENSU IS NOT MOOT

The February 4 policy change removing FCHD from determination of whether and when a child returns to school does not absolve Dr. Ayensu of responsibility (*see* Def. MTD at 8-9). This is a mootness claim: even if Dr. Ayensu was validly named initially, she is no longer a proper defendant. *See North Carolina State Conference of NAACP v. North Carolina State Board of Elections*, 283 F.Supp.3d 393, 405 (M.D.N.C.) ("a federal court may cease to have jurisdiction when subsequent events render a claim moot.").

"[T]he doctrine of mootness constitutes a part of the constitutional limits of federal court jurisdiction," *Simmons v. United Mortg. & Loan Inv., LLC*, 634 F.3d 754, 763 (4th Cir. 2011) (alteration in original) (internal quotation marks omitted) (quoting *United States v. Hardy*, 545 F.3d 280, 283 (4th Cir. 2008)), which extends only to actual cases or controversies, U.S. Const. art. III, § 2. When a case or controversy ceases to exist—either due to a change in the facts or the law—"the litigation is moot, and the court's subject matter jurisdiction ceases to exist also." *Porter v. Clarke*, 852 F.3d 358, 363 (4th Cir. 2017) (quoting *S.C. Coastal Conservation League v. U.S. Army Corps of Eng'rs*, 789 F.3d 475, 482 (4th Cir. 2015)).

Plaintiffs' claims against Dr. Ayensu are not moot. As an initial matter, Plaintiffs seek retrospective relief, in the form of nominal damages, for violations of their rights that are already complete and that FCHD played a significant role in inflicting. For that reason alone, Dr. Ayensu is a proper defendant and the claims against her are not moot. *See Uzuegbunam v. Preczewski*, 141 S.Ct. 792 (2021) ("nominal damages provide the necessary redress for a completed violation of a legal right.").

Moreover, even as to Plaintiffs' claims for prospective relief, there are exceptions to the mootness doctrine that "allow claims to remain live even when events occur after litigation commences that would deprive a plaintiff of standing to bring those claims at the outset of a lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81 (2000). The exception, pertinent here, applies when:

> a defendant voluntarily ceases the challenged conduct at issue. Voluntary cessation of challenged conduct "does not deprive a federal court of its power to determine the legality of the practice."

NAACP, 283 F.Supp.3d at 405 (quoting *Porter*, 852 F.3d at 363 *and City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). Otherwise, courts would "necessarily 'permit a

resumption of the challenged conduct as soon as the case is dismissed.'" *NAACP*, 283 F.Supp.3d at 406 (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 306 (2012)). The voluntary cessation exception "traces to the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001).

Accordingly, the exception seeks to prevent "a manipulative litigant immunizing itself from suit indefinitely, altering its behavior long enough to secure a dismissal and then reinstating it immediately after." *ACLU of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 54–55 (1st Cir. 2013). *See Knox*, 567 U.S. at 307 ("The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed."). A party who contends that a claim is moot on the basis of voluntary cessation "bears the formidable burden of showing that it is absolutely clear the alleged wrongful behavior could not reasonably be expected to recur." *Porter*, 852 F.3d at 364 (quoting *Laidlaw*, 528 U.S. at 180–81).

Dr. Ayensu has not met her burden. It is not "absolutely clear" that the "wrongful behavior" about which Plaintiffs complain will not recur. To the contrary, given FCPS's constantly shifting policy, as evidenced by multiple changes even since the filing of the initial complaint at the end of December 2021, it is plausible that next month or in several months FCHD will resume the role of clearing children to return to school (or refusing to clear them). *See Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014) (holding that an action is not moot when government retains authority to "reassess … at any time" the change and revert to the challenged policy.); *Freedom from Religion Foundation, Inc. v. Mercer County Board of Education*, 451 F.Supp.3d 639, 643 (S.D.W.Va. 2020) ("a defendant does not meet its burden of demonstrating mootness

when it retains authority to 'reassess' the challenged policy 'at any time.'") (quoting *Pashby v. Delia*, 709 F.3d 307, 316 (4th Cir. 2013)).

The Health Department has not entered into a legally binding or any other sort of agreement not to reinsert itself into the process in the future. *Cf. Already, LLC v. Nike, Inc*., 568 U.S. 85, 91 (2013) (holding that "heavy burden" satisfied when government had entered into an "unconditional and irrevocable" agreement that prohibits it from returning to the challenged conduct.); *Telco Commc'ns, Inc. v. Carbaugh*, 885 F.2d 1225, 1231 (4th Cir. 1989) (finding that government had met its burden where it had not "asserted its right to enforce [the challenged policy] at any future time.").

Indeed, it has not even issued an express statement recognizing the error in its former conduct or committing not to reinsert itself in the process (a statement which nonetheless would be insufficient to satisfy the Government's burden). *See United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) ("here we have only appellees' own statement that it would be uneconomical for them to engage in any further joint operations. Such a statement, standing alone, cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon those in appellees' shoes.").

Further, the February 4 policy change may well have been prompted by a desire to avoid litigation in this case. Defendants should not be able to evade responsibility by changing the offending policy when facing a legal challenge. Otherwise, there is no incentive to ensure that government actors do not violate people's constitutional rights, knowing that they can simply change course without repercussions after being sued. *See ACLU*, 705 F.3d at 54-55 (voluntary cessation exception to mootness doctrine exists to prevent defendants from manipulating the

system by changing behavior long enough to secure a dismissal and then reverting to former policy).

To the extent that there may be a factual dispute over the degree of control FCHD exercised over FCPS's quarantine policy and its participation in creating that policy, that dispute can be resolved at subsequent stages of the litigation. Dismissal at this stage is inappropriate, in light of Plaintiffs' factual allegations that FCHD played an active enforcement role; additional information may surface during the discovery process that resolves the issue. *See Kadel*, 446 F.Supp.3d at 11 (factual dispute as to whether university defendants had the ability to lift exclusion policy that Plaintiffs challenged meant that dismissal of complaint was not warranted at that stage of litigation).

Finally, Defendant's contention that the relief requested is "outside of her control" is inapposite. This is a Section 1983 action in which the Plaintiffs seek, *inter alia*, nominal damages and a declaratory judgment that what Defendants did to the affected children was unlawful, in order to deter future harm and acknowledge the injury they already have suffered. *See Carey v. Piphus*, 435 U.S. 247, 266 (1978) ("[n]ominal damages are not compensation for loss or injury, but rather recognition of a violation of rights.").

CONCLUSION

Because FCHD designed, implemented, and enforced FCPS's quarantine policy, and because it participated substantially in inflicting the injury on Plaintiffs in this case by refusing to clear M.M. and M.H.M. for return to school because they had not been vaccinated, Dr. Ayensu, who is the Director of the Health Department, is properly named as a defendant in this action. Accordingly, this Court should deny Defendant's Motion to Dismiss and allow Plaintiffs to prosecute their claims.

Dated: March 7, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2022, a copy of the foregoing was filed electronically. Service of this filing will be made on all ECF-registered counsel of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Dated: March 7, 2022

s/ Jenin Younes
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