To the Clerk: THIS IS A FINAL APPEALABLE ORDER. Please serve upon all parties not in default for failure to appear; Notice of the Judgment and its date or entry upon the Journal

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date Nov. 25, 2020 Case No. 20CV201228

SHERRIE ANN LANGIN, *et al.*
Plaintiffs

Brent English
Plaintiff's Attorney

VS

SHEFFIELD-SHEFFIELD LAKE BOE
Defendant

Mark Fusco
Defendant's Attorney

This matter is now before the Court on Defendant's Motion to Dismiss; the Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss; and the Defendant's reply in Support of Its Motion to Dismiss.

For the reasons that follow, the Court hereby grants the Defendant's Motion to Dismiss Plaintiffs' complaint. This dismissal shall operate as a dismissal on the merits.

See Judgment Entry.

This is a **Final Appealable Order**. See: App. R. 4(B).

IT IS SO ORDERED. No Record.

JUDGE D. Chris Cook

THIS IS A FINAL APPEALABLE ORDER

cc: All counsel of record

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INTRODUCTION & PROCEDURAL HISTORY

This is the third in a series of cases filed by the lead plaintiff, her spouse and children, dating back to 2016. The underlying basis of each concerns the constitutionality of the Sheffield-Sheffield Lake City School District Board of Education's (hereafter "BOE") decision to implement a policy of random drug testing of certain high school students, explained further below.

The first case, filed in 2016[1], included the Plaintiffs' then-minor son and Brookside High School student, Zackory Langin, as the affected party. The case was voluntarily dismissed without prejudice by the Plaintiff on November 21, 2017 prior to the Court's ruling on the BOE's Motion for Summary Judgment.

The second case, filed the next month in 2017[2], again named Zackory Langin as the affected student. Defendant removed the case to the U.S. District Court for the Northern District of Ohio; however, the case was subsequently returned to this Court. BOE filed a Motion for Summary Judgment on March 1, 2019. Discovery ensued, an attempt at a settlement conference was unsuccessful and the case was involuntarily dismissed without prejudice by the Court pursuant to Civ. R. 41(A)(2) on January 7, 2020, subject to the refiling of an amended complaint that included their other son, Joshua Langin.

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[1] *Sherrie Ann Langin, et.al., v BOE*, 16CV190139, filed August 1, 2016.
[2] *Sherrie Ann Langin, et. al., v BOE*, 17CV194118, filed December 22, 2017.

The instant case was filed on June 20, 2020[3], naming Joshua Langin as an additional Plaintiff. The complaint requests relief for alleged constitutional violations of equal protection and search and seizure provisions, as well as declaratory judgments alleging the unconstitutionality of the BOE's drug testing policy. Money damages and reasonable attorney fees are also sought.

This ruling addresses a pre-answer Motion to Dismiss the Complaint that was filed by the BOE on mootness and jurisdictional grounds pursuant to Civ. R. 12(B)(1) and 12(B)(6).

STATEMENT OF FACTS

At issue is the policy[4] of BOE's Brookside High School, instituted prior to this series of cases, that permits the random drug testing of students who choose to park a vehicle on school property, participate in athletics and/or participate in extracurricular activities (hereafter "Policy"). To be allowed to do any of these things, students and parents must sign a consent form agreeing to the terms and conditions of the Policy. Students and parents who refuse to agree to the Policy and sign the consent form, forfeit the ability to park vehicles on school property, participate in athletics and/or engage in extracurricular activities. But, such non-consenting students are also not subject to testing under the Policy.

Zackory Langin, Joshua Langin and their parents refused to sign the consent forms on the basis that the Policy violated the students' constitutional rights and sought a declaratory judgment that the policy was unenforceable.

Zackory Langin did previously engage is some or all of the activities for which Policy consent was required while Joshua Langin wanted to but did not, ostensibly because of his principles. [5]

The Policy, pursuant to its terms, is purposed to provide for the health, safety and general well-being of students and is stated to be non-disciplinary in nature: no suspension or expulsion; no academic penalties; and no documentation of any positive results for banned substances are placed in a student's academic record[6].

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[3] *Sherrie Ann Langin, et.al., v. BOE*, filed June 1, 2020.

[4] *See*, Plaintiffs' complaint at ¶ 8 and Exhibit "A", attached thereto. See, also page 3, et.seq., of Defendant's Motion to Dismiss.

[5] *See*, pages 2 & 3 of Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss.

[6] Although, by its terms, the Policy does have other consequences for positive testing.

DECISION

For the reasons discussed below, Plaintiffs' claims are moot, fail to state a claim and/or are barred pursuant to R.C. §§ 2744.01 & 2744.02.

Justiciability and Mootness

Present in the instant case are the same basic issues that resulted in the involuntary dismissal of the 2017 case. There, in raising its concerns that Zackory no longer attends the BOE's high school and thus is no longer subject to the Policy, the Court directed the parties to focus on the issue of justiciability. Justiciability and mootness continue to remain as issues, are closely intertwined but not identical.

The First District Court of Appeals has stated,

> It is well-established that "[t]he role of courts is to decide adversarial legal cases and to issue judgments that can be carried into effect." *Cyran v. Cyran,* 152 Ohio St.3d 484, 2018-Ohio-24, 97 N.E.3d 487, ¶ 9, citing *Fortner v. Thomas*, 22 Ohio St.2d 13, 14, 257 N.E.2d 371 (1970). "Under the mootness doctrine, American courts will not decide cases in which there is no longer an actual legal controversy between the parties." *Id.*, citing *In re A.G.*, 139 Ohio St.3d 572, 2014-Ohio-2597, 13 N.E.3d 1146, ¶ 37. Since the challenged provisions are no longer in effect, the first issue raised by the city is moot and we do not address it. *The City of Cincinnati v. The State of Ohio,* 1st Dist., Hamilton No. C-170593, 2018-Ohio-4498, at ¶ 2.

The Court continued,

> Article IV, Section 4(B) of the Ohio Constitution gives the courts of common pleas original jurisdiction "over all justiciable matters" properly before them. **Justiciability is a concept related to mootness**, in that there must be an actual controversy between the parties. *Burger Brewing Co. v. Liquor Control Comm.*, 34 Ohio St.2d 93, 97-98, 296 N.E.2d 261 (1973); *Waldman v. Pitcher*, 2016-Ohio-5909, 70 N.E.3d 1025, ¶ 20-21 (1st Dist.). "Actual controversies are presented only when the plaintiff sues an adverse party." *State ex rel. Barclays Bank PLC v. Court of Common Pleas of Hamilton Cty.*, 74 Ohio St.3d 536, 542, 660 N.E.2d 458 (1996). *The City of Cincinnati, supra,* at ¶ 3, emphasis added.

For an exception to the mootness doctrine to exist, the matter must be either capable of repetition but yet evades review or a matter of public or great general interest. In the case of *In re. Suspension of Huffer from Circleville High School,* 47 Ohio St.3d 12

(1981), the Supreme Court discussed the doctrine of mootness and these two exceptions. There, a student who had graduated challenged the district's drug policy. The Supreme Court noted,

> The issue before us is certainly "capable of repetition," yet it may "evade review," since students who challenge school board rules generally graduate before the case winds its way through the court system.

And, in *Baire v. Board of Education,* 9th Dist., Lorain No. 99CA007293, 2000 WL 372324, the Ninth District used a bifurcated analysis of 'capable of repetition, yet evading review" and stated,

> A situation is capable of repetition, yet evading review where two elements combine: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford* (1975), 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350, 353. Second, a court may review a case if it "involves a matter of public or great general interest." *In re Appeal of Suspension of Huffer,* 47 Ohio St.3d at 14, 546 N.E.2d 1308.

Here, the 2016 case, 16CV190139, was voluntarily dismissed by Plaintiffs' on November 21, 2017. The 2017 case, 17CV194118, was admittedly filed while Zackory Langin was a student; however, he graduated in 2019 before an involuntary dismissal of that case on January 7, 2020. Joshua Langin was not a party in the 2017 case. Additionally, when the present case was refiled on June 1, 2020, adding Joshua Langin as a plaintiff, neither Zackory Langin nor Joshua Langin were students of BOE's Brookside Highs School[7].

The second prong that must be satisfied to overcome mootness mandates *". . . there was a reasonable expectation that the same complaining party would be subjected to the same action again."* See also, a matter from the United States Supreme Court: *Weinstein v. Bradford* (1975), 423 U.S. 147, syllabus,

> ". . . the case is moot, and does not present an issue "capable of repetition, yet evading review," since . . . there is no demonstrated probability that respondent will again be subjected to the parole system. *Super Tire Engineering Co. v. McCorkle,* 416 U. S. 115, distinguished.

[7] *See,* Complaint at ¶ 62 and 68: Zackory graduated in 2019 and Joshua graduated on May 28, 2020.

Therefore, the second prong of the *Baire* 'capable of repetition, yet evading review' analysis was not met. Neither former student was reasonably subject to the same school Policy, whether at the time of filing or during the pendency of the present case. Both Zackory and Joshua Langin had graduated when the present case was filed. Nothing in the record or pleadings indicates that either of the former students would be attending Brookside in the future. Therefore, there is no possibility that either will be "subjected to the same action again".

A case is moot where the passage of time renders the issue moot. Here, the issues presented are no longer 'live'. See, *State ex.re. Citizens for Community Values, Inc, et. al. v. Dewine.* Slip Opinion No. 2020-OHIO-4547, decided September 24, 2020.

There is no live controversy in the present case. The facts here do not support either prong of the test as to whether the situation is one that was capable of repetition, yet evading review. As the movant notes in its memorandum in support of its motion, the Plaintiffs' have had almost four years within which to seek review. It cannot be said that *'the challenged action was in its duration too short to be fully litigated'.* Moreover, the filing of the present suit, on June 1, 2020 was days after Joshua Langin graduated from high school (and years after Zackory had graduated). Accordingly, there is *no reasonable expectation that the same complaining party would be subjected to the same action again. Baire*, supra.

The *Baire* case discusses the other exception to mootness and explains that in certain cases that are moot, a court may nevertheless decide the matter: ". . . a court may review a case if it 'involves a matter of public or great general interest.'"[8]

Relative to student discipline cases, the Ninth District notes, as a general proposition in *Baire, supra, "Moreover, "[t]he issue of the authority of local school boards to make rules and regulations is of 'great general interest."*

However, as to random student drug testing, the present Policy of the BOE is not so novel or unique as to captivate the public's great general interest. Student drug testing has become commonplace and the authority[9] to make such rules and regulations has been settled. .See, *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995), (drug addiction among students was compelling and student athletes had a decreased expectation of privacy and urinalysis and accompanying disclosure requirements were not significant invasions of privacy); *Bd. of Edn. v. Earls*, 536 U.S. 822, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002), (Testing students who

[8] Interestingly, the Ohio Supreme Court Case, *Huffer,* does not discuss this exception.

[9] R.C. §3313.20 enables boards of education to make such rules as are necessary relative to school students.

participate in extracurricular activities is a reasonably effective means of addressing a school district's legitimate concerns in preventing, deterring, and detecting drug use); *In re Huffer from Circleville High School*, 47 Ohio St.3d 12, 546 N.E.2d 1308 (1989), (School board policy that led to suspension of student who attended wrestling practice while "under the influence" of alcohol was not overbroad; board had authority to pass reasonable regulations to maintain and enforce discipline in school setting).

The Policy concerning the random, non-disciplinary testing of students operating motor vehicles on campus or participating in extracurricular activities, is settled and not one involving any issue of public or great general interest.

Additionally, Ohio Courts of Appeal have viewed the exception for an issue that involves a matter of public or great general interest, as one that is to be narrowly construed. *See, CT Ohio Portsmouth, LLC v. Ohio Dept. of Medicaid*, 10th Dist. Franklin No. 19AP-588, 2020-Ohio-5091 (Ordinarily, only the highest, policy-making court of the state adopts this procedure rather than a court whose decision does not have binding effect over the entire State); In accord: *Lariscy v. Franklin Park Mall, Inc.*, 6th Dist. Lucas C. A. NO. L-85-245, 1986 Ohio App. LEXIS 5547 (Feb. 7, 1986) (quoting *CT Ohio Portsmouth, supra*); *Blank v. Allenbaugh*, 11th Dist. Ashtabula No. 2018-A-0022, 2018-Ohio-2582; *State v. Haines*, 4th Dist. Highland Case No. 01CA16, 2002-Ohio-4255; *State ex rel. City of Englewood Dir. of Law v. Red Carpet Inn*, 2d Dist. Montgomery No. 27590, 2018-Ohio-1224; *AKP Properties, LLC v. Rutledge*, 5th Dist. Stark No. 2018CA00058, 2018-Ohio-5309; *McBee v. City of Toledo*, 6th Dist. Lucas No. L-13-1101, 2014-Ohio-1555; *Schreyer v. Bd. of Commrs. of Preble Cty.*, 12th Dist. Preble No. CA2012-12-018, 2013-Ohio-3087;

Plaintiffs' claims for declaratory and injunctive relief are moot.

Damage Claim

This third complaint in this series of cases alleges the same set of facts prayed in all three but is the first to include a damage claim, alleging a private right of action[10]. As the movant correctly notes, Plaintiffs have not cited any applicable authority for their claim for damages arising from an alleged violation of their sons' rights under the Ohio Constitution.[11]

The BOE is a political subdivision and conducts a legitimate governmental function of operating a school through its employees. See, R.C. §§2744.01(F), 2744.01(C)(2)(c)

[10] See Complaint at ¶ 92-93

[11] See, Complaint at ¶ 76-77, 80-81 & 90-93.

and 2744.01(B). Therefore, it is immune from damage liability if any one of more provisions of R.C.§2744.03(A) apply.

R.C. §2744.02(A)(3) provides: "The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

Additionally, R.C.§2744.03(A)(5) provides: "The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner".

Therefore, pursuant to (A)(3) and/or (A)(5) of 2744.03, BOE is immune from liability inasmuch as (i) the Policy was within its duties and responsibilities and/or (ii) any alleged loss resulted from the proper exercise of the BOE's judgment or discretion in determining how to use its personnel, facilities and other resources. Additionally, Plaintiffs have not alleged the Policy was a result of malice, bad faith or wanton or reckless conduct.

Moreover, neither *Oh. Const. Art. I, § 2 (equal protection)* nor *Oh Const. Art. 1, §14 (search and seizure)* create any private right of action. The Ohio Supreme Court stated in *Provens v. Stark Cty. Bd. of Mental Retardation & Dev. Disabilities*, 64 Ohio St.3d 252, 1992-Ohio-35, 594 N.E.2d 959, that the Ohio Constitution does not provide for a civil damage remedy. See also, *PDU, Inc. v. City of Cleveland*, 8th Dist. Cuyahoga No. 81944, 2003-Ohio-3671 (The language of Oh. Const. Art.1, §2 does not create a private right of action);

Oh. Const. Art. 1, §14, likewise, does not confer a private right of action. Federal courts, in reviewing Ohio's constitutional provision on search and seizure note that no such private constitutional tort exists. In *Grimm v. Cappelli*, S.D.Ohio No. 3:20-cv-3, 2020 U.S. Dist. LEXIS 62675 (Apr. 6, 2020) the court stated,

> "...Courts have routinely noted that "violations of rights secured under the Ohio Constitution do not, in and of themselves, confer a private right of damages[.]" *Wesaw v. City of Lancaster*, No. 22005CV0320, 2005 U.S. Dist. LEXIS 36691, 2005 WL 3448034, at *5 (S.D. Ohio Dec. 15, 2005). (see also *Provens v. Stark Cnty. Bd. of Mental Retardation & Developmental Disabilities*, 64 Ohio St. 3d

252, 1992- Ohio 35, 594 N.E.2d 959, 966 (Ohio 1992) (finding "no private constitutional remedy for the plaintiff-appellant's claims in that the Ohio Constitution itself does not provide for a civil damage remedy")".

Plaintiffs' Desire to Seek Other Plaintiffs

Plaintiffs advance a final reason in opposing dismissal, citing a notional effort to obtain new, additional plaintiff(s) potentially affected by the Policy. As an initial matter—without touching on the propriety of any method whereby such a quest would be initiated—it should be noted that the direct solicitation of potential clients by lawyers has long been viewed as having the potential for abuse. See, *Ohio Rules of Professional Conduct, Rule 7.3*, effective February 1, 2007, and the comments thereunder.

Plaintiffs have neither moved for class certification nor fulfilled the basic prerequisites for maintaining a class action. *See, Oh Civ. R. 23.* So too, the Plaintiffs have not cited any applicable authority justifying the continued viability of their case for the sole purpose of seeking others to join in their claims.

Moreover, Plaintiffs cannot now assert a claim on behalf of unnamed third parties. They lack standing to do so. "A plaintiff generally must assert his own legal rights, and cannot rest his claim to relief on the legal rights or interests of third parties". *Buckeye Community Hope Found. v. City of Cuyahoga Falls*, 970 F.Supp. 1289 (N.D.Ohio 1997), citing *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

In *Galbraith v. City of Medina*, 9th Dist. Medina No. 05CA0051-M, 2006-Ohio-4410, the Court stated,

> "[I]t is axiomatic, as a prudential standing limitation, that a party is limited to asserting his or her own legal rights and interests, and not those of a third party." *State v. Yirga*, 3rd Dist. No. 16-01-24, 2002 Ohio 2832, at P38, citing *Warth v. Seldin* (1975), 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343".

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The case is moot and fails to state a claim upon which relief can be granted. Defendant's motion to dismiss the complaint is granted.

IT IS SO ORDERED. No Record.

JUDGE D. Chris Cook

THIS IS A FINAL APPEALABLE ORDER