

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

<i>ELWOOD STROUT, et al.,</i>)	
)	
<i>Plaintiffs</i>)	
)	
<i>v.</i>)	<i>Civil No. 97-259-B-H</i>
)	
<i>MAINE DEPARTMENT OF</i>)	
<i>EDUCATION, et al.,</i>)	
)	
<i>Defendants</i>)	

**RECOMMENDED DECISION ON MOTION TO DISMISS OF DEFENDANTS MINOT
SCHOOL COMMITTEE, SCHOOL UNION NO. 29 AND ROBERT E. WALL**

This action, which arises under 42 U.S.C. § 1983, seeks to test the constitutionality of a Maine statute governing reimbursement of private school tuition expenses to students who live in school districts that lack a public high school. At issue is 20-A M.R.S.A. § 2951(2), the provision that limits such reimbursement to tuition for “nonsectarian” schools. According to the complaint, the plaintiffs are all parents who reside in the same school district and who have children attending the same parochial high school. They seek relief against the Maine Department of Education and its commissioner, J. Duke Albanese, as well as the Minot School Committee, School Union No. 29, and Robert E. Wall, superintendent of School Union No. 29. The Department of Education and Albanese have answered the complaint. Now before the court is a motion to dismiss for failure to state a valid claim pursuant to Fed. R. Civ. P. 12(b)(6) filed by the remaining defendants, hereinafter referred to as the “Minot defendants.” For the reasons that follow, I recommend that the motion of the Minot defendants be granted.

I. Applicable Legal Standard

“When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff[s] every reasonable inference in [their] favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). However, the court need not accept “bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like.” *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996). A defendant is entitled to dismissal for failure to state a claim “only if it clearly appears, according to the facts alleged, that the plaintiff[s] cannot recover on any viable theory.” *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993). Review is limited to allegations in the complaint; the court may not consider factual allegations, arguments and claims that are not included therein. *Doyle v. Hasbro, Inc.*, 103 F.3d 186, 190 (1st Cir. 1996).

II. Factual Scenario

The relevant allegations in the complaint are as follows: Each of the plaintiffs resides in Minot, Maine and is the parent of a student at St. Dominic’s Regional High School — a private, sectarian Catholic school located in Lewiston, Maine. Complaint (Docket No. 1) at ¶¶ 3-5, 17.¹ Each plaintiff sends his or her child to St. Dominic’s in part because defendant School Union No. 29 lacks a public high school. *Id.* at ¶¶ 3-5. School Union No. 29 is an entity formed by defendant Minot School Committee and the school committees of two other municipalities for the purposes of providing administrative services and employing a superintendent. *Id.* at ¶ 7. The Minot School

¹ Plaintiffs John and Belinda Eulitt state that they live in West Minot, and the Complaint refers to West Minot as a separate town. Complaint at ¶¶ 4, 9, 11. However, as the Minot defendants point out, although West Minot is geographically distinct it is part of the municipality of Minot.

Committee is responsible for making decisions concerning the provision of primary and secondary school education to Minot residents and for directing School Union No. 29 to effectuate such decisions. *Id.* at ¶ 9. Defendant Robert E. Wall is superintendent of School Union No. 29. *Id.* at ¶ 8.

Pursuant to 20-A M.R.S.A. § 5204(4), and because the Minot School Committee does not operate a secondary school, it fulfills its obligation under Maine law to provide public school education through grade 12 to town residents by paying the tuition for students to attend “a private school approved for tuition purposes, a public school in an adjoining [school administrative] unit which accepts tuition students, or a school approved for tuition purposes in another state or country.” *Id.* at ¶¶ 11, 12. The Minot School Committee does not determine which schools receive the tuition payments. *Id.* at ¶ 13. Parents are responsible for choosing which school their child will attend. *Id.* However, pursuant to 20-A M.R.S.A. § 2951(2), a school may not be approved for tuition purposes unless it is a “nonsectarian school in accordance with the First Amendment of the United States Constitution.” *Id.* at ¶ 16. Accordingly, School Union No. 29 and the Minot School Committee lack the authority under Maine law to reimburse the plaintiffs for the cost of sending their children to St. Dominic’s. *Id.* at ¶ 29.

In July and September 1996 plaintiffs Elwood and Deborah Strout wrote to defendant Maine Department of Education (the “Department”) to request reimbursement for the tuition required to send their daughter to St. Dominic’s for the 1996-97 academic year. *Id.* at ¶¶ 22, 24. In each instance, Albanese denied the request on behalf of the department, explicitly referring on the second occasion to section 2951. *Id.* at ¶¶ 23, 25 and Exhs. 2 and 3. The Strouts also wrote to School Union No. 29 in October 1996 to request tuition reimbursement. *Id.* at ¶ 20. On behalf of School Union

No. 29, Wall denied their request a week later, referring them to a letter from the Department stating that such reimbursement would be “unconstitutional and illegal.” *Id.* at ¶ 21. The Strouts renewed their request for tuition reimbursement in connection with the 1997-98 academic year, to no avail. *Id.* at ¶ 27. Plaintiffs John and Belinda Eulitt did not make a formal request for tuition reimbursement in connection with their daughter because, in light of the Strouts’ experience, they believed such a request would be futile and because Wall had told them their tuition would not be reimbursed. *Id.* at ¶ 26. Plaintiffs Richard and Patricia Roy attended a parents meeting in the fall of 1997 on the subject of high school placement and were informed at that time that tuition reimbursement would not be forthcoming if they enrolled their daughter at St. Dominic’s. *Id.* at ¶ 28.

III. Discussion

Section 1983 provides a plaintiff with a cause of action at law or in equity against

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws

42 U.S.C. § 1983. The Supreme Court’s decision in *Monell v. Department of Soc. Servs. of the City of New York*, 436 U.S. 658 (1978), established that a municipality is a “person” within the meaning of section 1983 and thus amenable to suit thereunder. *Id.* at 690.

Local governing bodies, therefore, can be sued directly under § 1983 . . . where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers.

Id. The same principle applies to officials of local governments, sued in their official capacities.

Id. at n. 55. The “touchstone” of any such action “is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution.” *Id.* at 690-91 (noting that a section 1983 action may also be maintained for unofficial governmental “custom”).

The plaintiffs and the Minot defendants are in agreement that *Monell* forms the basis of any liability of the Minot defendants.² The Minot defendants contend that no valid section 1983 complaint is stated against them because the provision at issue is a state statute rather than a municipal policy, ordinance, regulation or decision. The plaintiffs take the position that *Monell* permits a municipal entity and its officers to be sued under section 1983 by virtue of their execution, as distinct from adoption, of a constitutionally defective state statute, and because the Minot defendants are necessary parties if the plaintiffs are to receive the complete relief to which they are entitled.

Monell itself does not explicitly resolve the question. It simply reverses a prior Supreme Court decision to the effect that a municipality was absolutely immune from section 1983 liability. *See id.* at 662-663 (overruling *Monroe v. Pape*, 365 U.S. 167 (1961)). In referring to officially promulgated policies, ordinances, regulations or decisions as the basis of liability, as well as customs that become the functional equivalent of officially adopted policies, the Court was making clear that a municipality cannot be itself subject to section 1983 liability “solely because it employs a tortfeasor.” *Id.* at 690-91 (emphasis in original); *see also Board of the County Commissioners of Bryan County, Oklahoma*, 117 S.Ct. 1382, 1388 (1997) (discussing and summarizing *Monell*); *Silva v. Worden*, 130 F.3d 26, 30 (1st Cir. 1997) (so construing *Monell*); *Nobby Lobby, Inc. v. City of*

² The plaintiffs have explicitly so conceded, *see* Plaintiffs’ Opposition to Motion to Dismiss, etc. (“Plaintiffs’ Memorandum”) (Docket No. 6) at 2, notwithstanding the recitation in the complaint that Wall is sued both in his official and personal capacities, *see* Complaint at 1.

Dallas, 767 F.Supp. 801, 810 (N.D.Tex. 1991), *aff'd*, 970 F.2d 82 (5th Cir. 1992). Left unanswered was the question of whether a municipality is liable under section 1983 by virtue of a policy that is unquestionably official but that was imposed on the municipality by a state.

There appear to be no published cases from the First Circuit that address this specific issue.³ A review of case law from other circuits reveals two somewhat divergent views.

In *Surplus Store & Exch., Inc. v. City of Delphi*, 928 F.2d 788 (7th Cir. 1991), the Seventh Circuit flatly rejected the precise argument the plaintiffs advance here. The plaintiffs in *Surplus Store & Exchange* took two distinct but related positions: (1) that a municipality can be subject to section 1983 liability because it has a policy of enforcing certain statutes that the plaintiffs challenge as unconstitutional, and (2) that municipalities can be charged with having adopted as their official policy all state laws they do not ignore. *Id.* at 790-91 & n. 4. According to the Seventh Circuit, the former argument is wrong because “[i]t is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, than the ‘policy’ of enforcing state law.” *Id.* at 791. The latter argument, said the court,

would render meaningless the entire body of precedent from the Supreme Court . . . that requires culpability on the part of a municipality and/or its policymakers before the municipality can be held liable under § 1983, and would allow municipalities to be nothing more than convenient receptacles of liability for violations caused entirely by state actors — here, the Indiana legislature.

Id. at n.4; *cf. Caminero v. Rand*, 882 F.Supp. 1319, 1325 (S.D.N.Y. 1995) (agreeing with *Surplus Store & Exchange* but drawing “reasoned distinction” between “simply enforcing state law” and

³ I note, however, that Circuit Judge Stahl has recently suggested that a municipality cannot be held liable under section 1983 based on “an action taken in what appears to have been good faith reliance upon state law.” *Yeo v. Town of Lexington*, 1997 WL 748667 at *18 (1st Cir. Dec. 9, 1997) (en banc) (Stahl, J., concurring) (describing this principle as “obvious”).

“adopting an unconstitutional policy that was in some way authorized or mandated by state law”).⁴

In contrast, the Ninth Circuit has held that

the *Monell* doctrine did not intend to limit the reach of plaintiffs seeking prospective relief under § 1983 against the further exercise of governmental authority under an allegedly unconstitutional state statute. The availability of such relief is necessary to permit the vindication of important federal rights.

Chaloux v. Killeen, 886 F.2d 247, 251 (9th Cir. 1989) (citation and internal quotation marks omitted). It bears emphasizing that *Chaloux* applies only to prospective relief; in holding such relief to be available based on municipal enforcement of state law, the court observed that “[t]he justification for limiting an action for damages is notably absent when the relief sought is an injunction halting the enforcement of an unconstitutional state statutory scheme.” *Id.* I also note that a subsequent Ninth Circuit case casts at least some doubt on the persuasiveness, if not the viability, of the *Chaloux* rule even in that circuit. See *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1472 n.1 (9th Cir. 1993) (as to suggestion that *Chaloux* wrongly decided, “[h]owever meritorious that argument may be, we are bound by *Chaloux* under *United States v. Mandel*, 914 F.2d 1215, 1221 (9th Cir. 1990))⁵; *id.* at 1477 (Fletcher, J., concurring) (*Chaloux* is “in conflict” with *Monell*, which “does not distinguish among cases based on the type of relief sought”).

There is thus no authority for the proposition that a plaintiff may recover damages under section 1983 against a municipal entity, or an individual sued in his or her official capacity within

⁴ The Minot defendants also rely on *Pusey v. City of Youngstown*, 11 F.3d 652 (6th Cir. 1993). This case is of little assistance. All the Sixth Circuit said on the issue is that, for purposes of section 1983, a prosecutor’s allegedly improper actions could not be attributed to a municipality because the prosecutor was acting on behalf of the state at the time. *Id.* at 659.

⁵ Under *Mandel*, the Ninth Circuit “may reconsider an earlier Circuit precedent only when an intervening Supreme Court decision undermines an existing precedent . . . and both cases are closely on point.” *Mandel*, 914 F.2d at 1221 (citations and internal quotation marks omitted).

such an entity, when the theory of liability is that the municipality and/or its officials simply enforced a state statute that the municipality has not adopted as its own policy or custom.⁶ It only makes sense that this would be the law. To paraphrase the point made in *Surplus Store & Exchange*, it would offend notions of fairness and common sense to impose a damages award against a municipality or a municipal officer whose culpability is so utterly lacking.

As to the availability of prospective relief against the Minot defendants in the present circumstances, I find the approach of the Seventh Circuit to be by far the more persuasive one. Although *Monell* itself does not rule out such relief, the Supreme Court has subsequently characterized the *Monell* principle as one requiring that the municipal entity have been “a moving force behind the deprivation” of constitutional rights at issue for any section 1983 liability to attach. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (citations and internal quotation marks omitted). Implicit in this formulation is the notion that *any* municipal liability under section 1983, regardless of the relief sought, must be premised on some culpable act that can fairly be attributed to the municipality. For the same reason that merely employing a tortfeasor lacks such a quality, merely following the dictates of Maine statutory law is not actionable as against a municipal entity under section 1983.⁷

⁶ The plaintiffs’ memorandum is inconsistent on the question of whether they seek purely prospective relief against the Minot defendants. See Plaintiffs’ Memorandum at 2 n.1 (“In addition to seeking payment of tuition reimbursement for the 1997-98 school year, Plaintiffs seek reimbursement for the legally-established amount of tuition, plus interest, for each year that their children have attended St. Dominics [sic.]”); *id.* at 4 (“the Plaintiffs are only seeking a declaration of the unconstitutionality of [the] statute . . . and an injunction against its enforcement by the [Minot] Defendants.”).

⁷ Only one paragraph after asserting that the plaintiffs are “only seeking a declaration of the unconstitutionality” of section 2951(2), the plaintiffs go on to suggest in their memorandum that the
(continued...)

Moreover, the notion that the Minot defendants are somehow necessary parties to the litigation does not withstand scrutiny. As already noted, there is no reason for the court to indulge the speculation that these defendants might not abide by a determination that the statute at issue is unconstitutional. Beyond that, as another district court has observed, construing section 1983 in such a manner as to place units of local government, or municipal officers sued in their official capacities, in a position of defending statutes they did not enact would actually cast in such a role precisely the wrong parties. *See James v. Jones*, 148 F.R.D. 196, 204 n.11 (W.D.Ky. 1993) (noting that such parties “might have little reason to defend” the statute at issue).

IV. Conclusion

For the foregoing reasons, I recommend that the motion to dismiss filed by defendants Minot School Committee, School Union No. 29 and Robert E. Wall be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court’s order.

Dated this ___th day of January, 1998.

⁷(...continued)

court should consider the possibility that the Minot defendants would refuse to reimburse tuition for St. Dominic’s regardless of any applicable statutory guidance. *See* Plaintiffs’ Memorandum at 4. These allegations, which appear to be wholly speculative in nature, do not appear in the complaint and are thus not properly considered in evaluating the motion to dismiss.

David M. Cohen
United States Magistrate Judge