

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

Appeal No. 03-1364

EDWARD R. MYERS,

Plaintiff-Appellant,

v.

LOUDOUN COUNTY SCHOOL BOARD and
COMMONWEALTH OF VIRGINIA,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

**SUPPLEMENTAL BRIEF FOR DEFENDANT-APPELLEE
LOUDOUN COUNTY SCHOOL BOARD**

E. William Chapman
Reed Smith LLP
44084 Riverside Parkway,
Suite 300
Leesburg, VA 20176
(703) 729-8530

Charles L. Becker
Reed Smith LLP
2500 One Liberty Place
1650 Market Street
Philadelphia, PA 19103
(215) 251-5660

Jason H. Ballum
Reed Smith LLP
Riverfront Plaza
West Tower
901 East Byrd Street,
Richmond, VA 23219
(804) 344-3400

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STATEMENT OF ISSUES

1. Whether Myers should have been permitted to represent his minor children *pro se* in federal district court.

Suggested answer: No

2. Whether this Court retains jurisdiction over the preserved claims in this case if the above question is answered “no.”

Suggested answer: Yes

ARGUMENT

I. Myers should not have been permitted to represent his children *pro se* in the district court.

Federal courts have consistently held that when a child sues by a non-attorney parent, the parent must be represented by counsel. See, e.g., Collinsgru v. Palmyra Bd. of Educ., 161 F.3d 225, 231 (3d Cir. 1998); Gallo v. United States, 331 F. Supp.2d 446, 447-48 (E.D. Va. 2004); Brown v. Ortho Diagnostic Systems, Inc., 868 F. Supp. 168, 170-71 (E.D. Va. 1994). These cases compel the view that Myers should not have been permitted to represent his children *pro se* in the district court.¹

The rule barring a non-attorney parent from acting *pro se* on his child's behalf is grounded entirely in prudential concerns. First, there is a strong state interest in regulating the practice of law. See Collinsgru, 161 F.3d at 231. "Requiring a minimum level of competence protects not only the party that is being represented but also his or her adversaries and the court from poorly drafted, inarticulate, or vexatious claims." Id. (citing Brown, 868 F. Supp. at 172). Second, the prudence of obtaining counsel is underscored by "the importance of

¹ See also Wenger v. Canastota Central Sch. Dist., 146 F.3d 123 (2d Cir. 1998); Johns v. County of San Diego, 114 F.3d 874 (9th Cir. 1997); Devine v. Indian River County Sch. Bd., 121 F.3d 576 (11th Cir. 1997); Osei-Afriyie v. Medical College, 937 F.2d 876 (3d Cir. 1991); Cheung v. Youth Orchestra Foundation of Buffalo, Inc., 906 F.2d 59 (2d Cir. 1990); Meeker v. Kercher, 782 F.2d 153 (10th Cir. 1986).

the rights at issue during litigation and the final nature of any adjudication on the merits.” Id. “Not only is a licensed attorney likely to be more skilled in the practice of law, but he or she is also subject to ethical responsibilities and obligations that a lay person is not. In addition, attorneys may be sued for malpractice.” Id. (citing Brown, 868 F. Supp. at 172). These prudential concerns assume even greater importance where the rights of children are concerned. As the Third Circuit wrote, “[t]he infant is always the ward of every court wherein his rights or property are brought into jeopardy, and is entitled to the most jealous care that no injustice be done to him.” Osei-Afriyie, 936 F.3d at 883 (internal quotations omitted).

This reasoning illustrates that the “no counsel” rule stems from the inherent power of courts to regulate who appear before them, not from jurisdictional rules or standing doctrine. In Brown, the defendant moved to dismiss a products liability case on grounds that the parent-plaintiff was acting *pro se* on his child’s behalf. The district court denied the motion and appointed counsel for the child, citing the “general supervisory power of federal courts to determine whether a nonlawyer will be allowed to represent another person in court.” Brown, 868 F. Supp. at 170, 172 n.15. Likewise, in Gallo, the defendant moved to dismiss a negligence claim asserted by a parent-plaintiff on the same ground; the district court denied the motion and ordered the parent to secure counsel for the child. See

Gallo, 331 F. Supp.2d at 449. Both courts focused entirely on preventing the unauthorized practice of law and protecting children's rights; neither opinion discussed jurisdiction or standing.

The Fourth Circuit has not directly addressed this issue. The closest case is Doe v. Board of Educ. of Baltimore County, 165 F.3d 260 (4th Cir. 1998), which holds that an attorney-parent bringing suit under the Individuals with Disabilities Education Act may not recover attorneys' fees under the statute's fee-shifting rule. Doe did not decide whether a *non-attorney* parent such as Myers may act *pro se* on his children's behalf.

II. This Court has appellate jurisdiction over the preserved claims in this case.

This Court has inquired what impact Myers' failure to obtain counsel has on its appellate jurisdiction. Because Myers properly noticed an appeal from the district court's final order, appellate jurisdiction exists under 28 U.S.C. § 1291 provided federal jurisdiction was otherwise proper. This leaves a single issue on the question of jurisdiction: whether Myers had standing to assert the Establishment Clause claims before this Court. This Court has acknowledged that standing is a jurisdictional issue of constitutional dimension, and it may be addressed for the first time on appeal. See Hodges v. Abraham, 300 F.3d 432, 443 (4th Cir. 2002) (citation omitted).

Initially, Myers' children possessed ample constitutional standing to assert the Establishment Clause claims before this Court. Standing doctrine ensures that federal litigants possess a sufficiently personal stake in the outcome of any litigation they pursue. See Hodges, 300 F.3d at 443. In order to possess standing to sue, a plaintiff must show that (1) he has suffered an injury-in-fact that is concrete and particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) the injury will likely be redressed by a favorable decision. See id. Under this test, the children undoubtedly had standing to assert their Establishment Clause claims; they simply lacked the capacity to proceed on their own behalf. Lacking only capacity, they could and did sue by their parent, whose standing to sue on the children's behalf is derivative of the children's own standing.

The children's standing (and hence Myers' standing) was not undermined because Myers failed to obtain counsel to pursue the children's claims. As noted above, the cases barring non-attorney parents from acting *pro se* on a child's behalf reach that conclusion entirely on prudential grounds. Only one decision even mentions the word "standing:" the Ninth Circuit's decision in Johns, when the Court initially characterizes whether the minor-plaintiff could sue *in his own right* as a standing question but then decides it applying capacity rules. See Johns, 114 F.3d at 877-78. The silence on standing confirms the prudential and supervisory

nature of the analysis. As the Second Circuit wrote in Cheung, “the sole policy at stake concerns the exclusion of non-licensed persons to appear as attorneys on behalf of others.” Cheung, 906 F.2d at 61. Because of the prudential foundation for the “no counsel” rule, Myers’ children were not deprived of standing on account of his proceeding *pro se*. Hence, this Court retains appellate jurisdiction over the children’s claims.

What is before for the Court is only a prudential analysis about whether it will remand the children’s claims in light of the principles enunciated in such cases as Brown, Gallo, and Collinsgru. As to that subject, the School Board respectfully suggests that remand is not warranted given the purely legal issues in the case, this Court’s *de novo* standard of review, and the presence of counsel to represent Mr. Myers on appeal. These factors ensure that the children’s claims have been and will be properly handled. They render this case distinct from Gallo and Brown, which involved complex factual issues of negligence and where the children’s claims were put at risk by non-attorney parents attempting to practice law.

Even if the Court were to remand the children’s claims, it would still be obliged to reach the merits of the Establishment Clause claims in this case. Myers himself has standing to assert the Establishment Clause claims asserted in the Complaint. In Abington Sch. Dist. v. Schempp, 374 U.S. 203, 224, 83 S. Ct. 1560, 1572, 10 L. Ed. 2d 844 (1963), the Supreme Court held that parents had standing to

assert an Establishment Clause challenge to school-sponsored religious activities that affected their children; the Court reasoned that the parents were “directly affected by the laws and practices against which their complaints are directed.” Id. Numerous cases have confirmed that rule of law. See, e.g., Littlefield v. Forney Independent Sch. Dist., 268 F.3d 275, 284 n.7 (5th Cir. 2001); Fleischfresser v. Directors of Sch. Dist. 200, 15 F.3d 680, 683-84 (7th Cir. 1994); Steele v. Van Buren Public Sch. Dist., 845 F.2d 1492, 1495 (8th Cir. 1988). In light of the rule enunciated in Schempp, Myers could have filed the Establishment Clause claims by himself and only on his own behalf. The only question would be whether indeed he did file the claims on his own behalf, and a fair reading of the Complaint leads to the conclusion that he did. Accordingly, this Court has jurisdiction over and must decide the Establishment Clause claims asserted in this case.

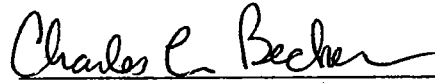
The conclusion that Myers himself has standing is not undermined by the Supreme Court’s decision in Newdow v. Elk Grove Unified Sch. Dist., 124 S. Ct. 2301 (2004), in which the Court held that a father acting *pro se* lacked standing to assert Establishment Clause claims on his and his daughter’s behalf. The Court had no quarrel with the general rule that “a parent has standing to challenge a practice that interferes with his right to direct the religious education of his daughter.” See id. at 2307 (citation omitted). The Court focused instead on the particular facts of the case: the parents were divorced; the mother had “exclusive

legal custody” of the child; the mother had intervened in the case to disavow the father’s claim and to express her belief that the daughter would be harmed if the litigation were permitted to proceed; and a state court had expressly enjoined the father from suing as the daughter’s “next friend.” See id. The Supreme Court reasoned that the father’s standing “derives entirely from his relationship with his daughter, but he lacks the right to litigate as her next friend.” Id. at 2311. As such, the father “lacks prudential standing to bring this suit in federal court.” Id. at 2312. None of these factual issues are present in this case, and the Schempp rule applies to confer standing on Myers in his individual capacity.

CONCLUSION

While Myers should have been required to obtain counsel on his children’s behalf, this Court retains jurisdiction over the preserved Establishment Clause claims and should decide them on their merits.

Respectfully submitted,



E. William Chapman

Reed Smith LLP

44084 Riverside Parkway, Suite 300

Leesburg, VA 20176

(703) 729-8530

Charles L. Becker

Reed Smith LLP

2500 One Liberty Place

1650 Market Street

Philadelphia, PA 19103

(215) 251-5660

Jason H. Ballum

Reed Smith LLP

Riverfront Plaza - West Tower

901 East Byrd Street, Suite 1700

Richmond, VA 23219-4068


(804) 344-3400

*Attorneys for Appellee Loudoun County
School Board*

Dated: April 11, 2005

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. Civ. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 97 in Times New Roman 14 pt. .



Charles L. Becker

Dated: April 11, 2005

CERTIFICATE OF SERVICE


The undersigned hereby certifies he served two copies of the foregoing
Supplemental Brief for Defendant-Appellee Loudoun County School Board
via Federal Express on the following counsel of record:

Alison Paige Landry
Maureen Riley Matsen
William Eugene Thro
Office of the Attorney General of
Virginia
900 East Main Street
20th Floor Erievue Tower
Richmond, VA 23219
*Attorneys for Defendant-Appellee
Commonwealth of Virginia*

David H. Remes
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
*Attorneys for Plaintiff-Appellant
Edward R. Myers*

Andrew A. Ruffino
Christine I. Magdo
Covington & Burling
1330 Avenue of the Americas
New York, NY 10019-5400
*Attorneys for Plaintiff-Appellant
Edward R. Myers*

Lowell V. Sturgill, Jr.
Robert M. Loeb
U.S. Department of Justice
Room 7258
Civil Division, Appellate Section
950 Pennsylvania Ave.
Washington, DC 20530
*Attorney for Intervenor the United
States of America*



Charles L. Becker

Dated: April 11, 2005