

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(NORTHERN DIVISION)

LISA M.F. KIM, et al.,	:	
	:	
<i>Plaintiffs,</i>	:	
	:	
vs.	:	Case No. 1:21-cv-655-DKC
	:	
BOARD OF EDUCATION OF HOWARD COUNTY,	:	
	:	
<i>Defendant.</i>	:	
	:	

DEFENDANT’S SUPPLEMENTAL BRIEF

Plaintiffs’ Equal Protection Clause challenge to the selection of the Howard County student board member fails if the selection process is not an “election.” *See, e.g., Hadley v. Junior Coll. Dist. of Metro. Kansas City* , 397 U.S. 50, 56 (1970) (Equal Protection Clause is implicated only if “a state or local government decides to select persons by popular election to perform governmental functions”); *Sailors v. Bd. of Educ.*, 387 U.S. 105, 108 (1967) (“We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election.”). The Maryland Court of Appeals’ recent decision in *Spiegel v. Howard County Board of Education*, --- A.3d ---, 2022 WL 3643341 (Md. 2022), confirms that the process for selecting the student board member is not an election, and thus Plaintiffs’

Equal Protection Clause challenge to the selection process must fail.¹

BACKGROUND

Seven of the eight Howard County school board members are “elected members” chosen through general elections, Md. Code, Educ. § 3-701(a)(1)(i), while one of the eight members is a “student member,” *id.* § 3-701(a)(1)(ii). This student member is not allowed to vote on certain matters, and is selected through a multi-step process where two candidates are nominated and selected by delegates, after which Howard County students in grades six through eleven cast confidential ballots for their preferred choice. *Id.* § 3-701(f)(1)-(7); Compl. Ex. B.

Plaintiffs sued, unhappy with the Maryland General Assembly’s legislative judgment to give Howard County students even a limited voice in their education, claiming that the selection process for the student board member violates the First and Fourteenth Amendments. The Board filed a Rule 12(b)(6) Motion to Dismiss the Complaint in its entirety, arguing that Plaintiffs’ claims are without legal merit. *See generally* Def.’s Mem. in Supp. of Mot. to Dismiss (“MTD”), ECF No. 18. The Board argued that Plaintiffs’ Equal Protection Clause theories fail because 1) the student member’s office is not elective, and, in the alternative, 2) even if it were, the selection process for the student member comports with constitutional standards for elections.

¹ As further explained in the motion to dismiss briefs, Plaintiffs’ theories are wrong even if the student board member were considered “elective.” *See* Def.’s Mem. in Supp. Mot. to Dismiss at 18-26, ECF No. 18; Def.’s Reply in Supp. of Mot. to Dismiss at 9-15, ECF No. 22.

MTD at 4-15. The Board also argued that the Free Exercise Clause claim fails because the selection of the student member involved a neutral rule of general applicability.²

MTD at 15-19. Plaintiffs filed a brief responding to these arguments, MTD Opp'n, ECF No. 20, but did not dispute the premise that the Equal Protection Clause only applies if the student member's selection constitutes an "election." *See id.* at 6-15.

Different plaintiffs filed a parallel challenge in Maryland state court, arguing that the selection of the Howard County student school board member violates the Maryland Constitution and Declaration of Rights for similar reasons to Plaintiffs' federal constitutional claims here. The trial court entered a ruling in favor of the Board, *Spiegel v. Howard County Board of Education*, No. C-13-CV-20-000954 (Md. Cir. Ct. Howard Cty. Mar. 25, 2021), and the Maryland Court of Appeals granted certiorari. 474 Md. 721, 255 A.3d 1091 (2021).

In February of this year, this Court entered a stay of proceedings until the Court of Appeals issued its decision in *Spiegel*. The Court found that the decision "is likely to affect the analysis necessary to resolve the motions pending here." Letter Order Granting Stay at 1, Feb. 9, 2022, ECF No. 37. The Court concluded that "even if the federal issues raised in this case do not entirely turn on the labels the state applies to its elections, an opinion from the highest court in Maryland is likely to

² Plaintiffs' First Amendment argument is fully addressed in the Motion to Dismiss briefing, *see* MTD at 28-30; Def.'s Reply Supp. Mot. Dismiss at 15-19, and will not be further discussed here.

clarify . . . the practices at issue.” *Id.*

On August 24, 2022, the Court of Appeals unanimously ruled in favor of the Board, rejecting each of the *Spiegel* plaintiffs’ claims against the student board member selection process. *Spiegel v. Howard County Board of Education*, --- A.3d ---, 2022 WL 3643341 (Md. 2022). This Court has now provided the parties with the opportunity to file supplemental briefs to address the significance of that decision.

ARGUMENT

The Court of Appeals’ unanimous decision in *Spiegel* strongly supports the Board’s position that the student member is not an elective position, and thus there is no viable Equal Protection Clause challenge to the selection process.

First, as a matter of state law, the Court of Appeals determined that the student board member is *not* an elective office. *Spiegel*, 2022 WL 3643341, at *5. This decision is authoritative as to the meaning of Maryland law. *See, e.g., Riley v. Kennedy*, 553 U.S. 406, 425 (2008) (“A State’s highest court is unquestionably ‘the ultimate exposito[r] of state law.’” (citation omitted; alteration in original)). The Court emphasized the language of Md. Code Ann., Educ. § 3-701(a), which distinguishes between the “[s]even *elected* members” and the “[o]ne *student* member.” *Spiegel*, 2022 WL3643341, at *5 (emphasis added by Court). This distinction was significant: “The Court cannot conclude that the legislature intended to create a student member position that was elected and yet wholly incapable of complying with constitutional law. Rather the Court’s view is that the General Assembly explicitly set apart the student member of

the board position and the selection process for same.” *Id.* at *5 (quoting Howard County Circuit Court in *Spiegel*, No. C-13-CV-20-000954, at *10). As a matter of state law, therefore, the student board member is not “elective.” *Id.*

Plaintiffs offer no compelling reason why there should be a different result under the U.S. Constitution. *See also* MTD Opp’n at 8-14; Def.’s Reply Supp. Mot. Dismiss at 4-8, ECF 22. Indeed, in their brief opposing the Board’s Motion to Dismiss, Plaintiffs themselves relied on Maryland law, arguing that “[t]he statutory framework by which the General Assembly created the Student Member seat is . . . informative.” MTD Opp’n at 7. That very framework has now been authoritatively construed by Maryland’s highest court, which rejected the same statutory arguments that Plaintiffs make here. *See Spiegel*, 2022 WL 3643341, at *5 (discussing statute and rejecting argument “that the legislature intended to create a student member position that was elected”).

The *Spiegel* decision is binding over questions of state law, *see Riley*, 553 U.S. at 425, and it is highly persuasive on questions of federal law. Because “the federal and state ‘courts [are] equally bound to guard and protect rights secured by the Constitution,’” *Rose v. Lundy*, 455 U.S. 509, 518 (1982) (citation omitted), the decision of the State’s highest court is “entitled to great respect, and perhaps completely persuasive” weight on questions of federal constitutional law, *Joseph v. Blair*, 482 F.2d 575, 580 n. 4 (4th Cir. 1973). Although the Court of Appeals did not directly address a federal voting-rights challenge in its decision, its analysis under Maryland’s

constitutional equivalents is entitled to persuasive weight.

In rejecting the *Spiegel* plaintiffs' parallel challenge under Maryland's constitution, the Court of Appeals drew on federal precedent. *Spiegel*, 2022 WL 3643341, at *6. The Court gave particular consideration to the U.S. Supreme Court's decision in *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50, 56 (1970), a Fourteenth Amendment voting-rights case. The Court of Appeals concluded that, "as expressly permitted by *Hadley*, the General Assembly [chose] not to use the general election process to select the student member," such that constitutional voting-rights protections are not implicated by the selection of the student board member. *Spiegel*, 2022 WL 3643341, at *6. The Court emphasized the Supreme Court's instructions in *Hadley*, which "speak[] directly to" the appointment of the student member:

We have also held that where a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not represent the same number of people does not deny those people equal protection of the laws. And a State may, in certain cases, limit the right to vote to a particular group or class of people. As we said before, viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation.

Id. (quoting *Hadley*, 397 U.S. at 58-59 (internal citations and quotation marks omitted)). *Hadley*'s exception for non-elective offices applies directly to the federal constitutional claims here.

Plaintiffs may argue, as they did in their opposition to the Board’s Motion to Dismiss, that this Court should be suspicious of the Maryland Court of Appeals’ decision, analogizing the selection of the student board member to attempts by the State of Texas to run a Whites-only primary election. *See* MTD Opp’n at 11. The analogy is without basis in law or fact. There is not the slightest hint of pretext or improper motive in the legislature’s decision to give students a role in overseeing their education, a legislative choice now ratified by the state judiciary. Far from being exclusionary, Maryland has *expanded* the range of people who have a voice in school board governance to those most impacted by the decisions. It is a sound policy choice to give the next generation the opportunity to learn and practice citizenship skills, readying students for full participation in their democracy when they come of age. More importantly, as the Court of Appeals persuasively observed, it is a policy choice that the legislature had the discretion to make. *See Spiegel*, 2022 WL 3643341, at *9 (“[T]he General Assembly has broad discretion to control and modify the composition of local boards of education, which includes the creation and selection process of student board members as it sees fit”).

In sum, the Court of Appeals’ decision confirms that the student board member is not “elected,” and that the legislature acted within its constitutional purview when it chose to give students a role in selecting one of the eight board members overseeing their education. For this reason, and the reasons further discussed in the Board’s Motion to Dismiss and Reply Brief, the court should dismiss

the Plaintiffs' Complaint for failure to state a claim.

Dated: September 26, 2022

Respectfully Submitted,

/s/ Joseph W. Mead

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