

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

KYMBERLY L. WIMBERLY	*	
	*	
Plaintiff,	*	
	*	
vs.	*	No. 5:11CV00186 SWW
	*	
MCGEHEE SCHOOL DISTRICT;	*	
THOMAS GATHEN; DARRELL	*	
THOMPSON; and DOES, Individually and	*	
in their Official Capacities;	*	
	*	
Defendants.	*	

Memorandum and Order

This matter is before the Court on a motion for summary judgment filed by defendants: the McGehee School District; Thomas Gathen, Superintendent of the McGehee School District; Darrell Thompson, Principal of McGehee Secondary School; and the Directors of the McGehee School District (“Does”). Plaintiff filed a response to the motion, and defendants filed a reply to the response. For the reasons stated below, the Court finds the motion should be granted.¹

Background²

Plaintiff, an African-American female student, attended McGehee secondary school all four years of high school. She made one B in a regular class, three As in three Advanced Placement (“AP”) classes, and all As in her remaining regular classes. Another student, a white female, attended McGehee secondary school for all four years of high school. She made one B in a regular class, three As in three AP classes, and all As in her remaining classes. Regular courses are based upon a grading

¹Defendants Thompson and Directors of the McGehee School District filed a motion to dismiss for failure to serve. The Court finds the motion should be denied because defendants failed to raise the defense in a timely manner.

²The background facts are taken largely from the parties’ statements of undisputed facts.

point scale set up by the Arkansas Department of Education (“ADE”): A=4, B=3, C=2, D=1, and F=0. AP courses are also based on an ADE grading point scale: A=5, B=4, C=3, D=2, and F=0. Plaintiff had twenty-seven and one-half course credits and a grade point average of 4.0943. The other student had twenty-nine course credits and a grade point average of 4.0893.

The 2010-11 McGehee High School Handbook (“Handbook”) provides the following policy for determining class rank:

The determination of class rank will be:

Students will be ranked by grade point averages.

Grades from all four years of an accredited high school will be used; including Algebra 1 taken in the 8th grade.

The final senior ranking will be figured at the end of the school year.

If two or more students take the same or equivalent course work and receive the same grades of “A”, a student with a greater number of courses will not be penalized.³

According to Ann Stobaugh, the school counselor, the 2005-2006 school year was the first year the District offered AP courses, which required a different grading scale than regular courses. In 2006, four white students who had taken AP courses had all As but different grade point averages (“GPAs”) depending on the number of course credits taken. Ms. Stobaugh testified that in order not to penalize the students who had taken more courses, the four students were named valedictorians.⁴ On May 26, 2006, the McGehee School District Board of Education adopted the class rank policy and made it part of the Handbook starting in the 2006-07 school year.⁵

³Defs.’ Mot. Summ. J., Ex. 4.

⁴*Id.*, Ex. 6 at 34-35.

⁵Defs.’ Reply to Pl’s. Resp. to Mot. Summ. J., Exs. 1-4.

Ms. Stobaugh testified that she calculated the final grade point averages for the class of 2011 and determined that plaintiff had the highest GPA and would be the valedictorian.⁶ She notified plaintiff's mother, who worked in the school library, and contacted the local newspaper to announce that plaintiff was the valedictorian. Ms. Stobaugh said she also contacted the mother of the student who had the second highest GPA and told her that her daughter was not going to be the valedictorian based on her GPA. Later, the student's mother contacted Defendant Darrell Thompson, the principal, and asked him whether the number of courses her daughter had taken had something to do with her class ranking or designation of valedictorian. After the mother's call, Thompson said he consulted the Handbook's class rank policy and then went to see Stobaugh, who told him both students had the same grades. Defendant Thompson said he decided that based on the class rank policy, plaintiff and the other student should be named co-valedictorians. He said he went to see Defendant Thomas Gathen, the superintendent, to ask him if he supported the decision. Defendant Gathen said he did.

On July 21, 2011, plaintiff filed her complaint for violation of civil rights under 42 U.S.C. § 1983. She contends defendants violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the laws and Constitution of the State of Arkansas by naming a white student as co-valedictorian. She also claims defendants violated her right to a free and equal public education under the Arkansas Constitution.⁷

⁶According to Thompson, grade point averages are actually calculated by the State's APSCN network. Defs.' Mot. Summ. J., Ex. 9 at 20.

⁷Plaintiff alleges in Count I that Gathen denied her the right to appeal defendants' decision to name co-valedictorians. Compl. at ¶ 34. According to the allegations of the complaint, plaintiff met with Gathen to protest his decision, and plaintiff's mother tried to appeal Thompson's decision to the School Board at the May 2010 meeting. Allegedly plaintiff's mother filled out a form for "public comment" when she should have submitted a form asking for "public participation," and so she was not allowed to speak at the meeting. Superintendent Gathen allegedly told her she had to wait until the June meeting to appeal the decision. Graduation was on May 13. Compl. at ¶21. Neither party addresses this claim and there is no evidence in the record to support it.

Standard of Review

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party demonstrates that it is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). A fact is material if it might affect the outcome of the suit, and a dispute is genuine if the evidence is such that it could lead a reasonable jury to return a verdict for either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A court considering a motion for summary judgment must view the facts in the light most favorable to the non-moving party and give that party the benefit of all reasonable inferences that can be drawn from those facts. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is appropriate “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Discussion

Plaintiff claims defendants’ actions violated the Equal Protection Clause of the United States Constitution; the Arkansas Constitution, the Arkansas Civil Rights Act of 1993 and other unnamed statutory and common laws; and Arkansas Constitution Article 14, section 1, and Article 2, sections 2,3, and 18.

I.

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. 14, § 1. This is “essentially a direction that all similarly situated persons should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). “Unequal treatment is not enough

absent proof of an unlawful intent to discriminate against the plaintiff for an invalid reason.” *Martin v. City of Brentwood, Missouri*, 200 F.3d 1205, 1206 (8th Cir. 2000)(internal quotation and citation omitted). As evidence that defendants’ decision was motivated by an intent to discriminate on the basis of race, plaintiff points out that it was Stobaugh’s job to determine students’ grade point averages, determine the valedictorian and salutatorian, and to announce the designation in the local newspaper. The fact that Stobaugh’s decision was overruled after a white student’s parent complained is evidence, plaintiff argues, that defendants’ applied the school policy in a racially discriminatory manner.

Plaintiff complains that the school policy, which was developed before Gathen or Thompson were employed by the school district, does not support defendants’ decision to name co-valedictorians. The policy provides that class rank is determined by grade point average. Plaintiff argues that the policy does not indicate which course work is “the same or equivalent” and does not explain how the student with the greater number of courses “will not be penalized.” Plaintiff complains that when Gathen and Thompson checked the two students’ transcripts, they did not calculate grade point averages to determine whether she and the other student would have had the same grade point average if they had taken the same number of courses and instead used the “Class Rank” policy to discriminate against plaintiff by naming a co-valedictorian. Plaintiff further argues that she suffered emotional distress by having to share the valedictorian designation with another.

The Court finds plaintiff has not come forward with evidence from which a reasonable jury could find that defendants’ decision to name co-valedictorians was intentional race discrimination. The evidence is clear that the addition of AP courses to the curriculum in 2006 revealed a situation where students who earned the same grades in their course work could end up with different GPAs depending on the number of course credits they received. The District’s response in 2006 was to

name four valedictorians and to adopt a Class Rank policy which stated a student would not be penalized for taking more courses. The evidence shows defendants applied that policy in 2011 when plaintiff and another student each had one B and the rest As in the same or equivalent course work but because the other student had 1.5 more credits, her GPA was lower than plaintiff's.

II.

Plaintiff claims defendants' actions violated "the Constitution of the State of Arkansas, the Arkansas Civil Rights Act of 1993 as well as various provisions of statutory law and common law of the State of Arkansas . . ." ⁸ She also claims defendants violated Article 14, § 1 and Article 2, §§ 2, 3, and 18 of the Arkansas Constitution which direct the State to provide substantially equal educational opportunities. ⁹

The Arkansas Civil Rights Act states in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of this state or any of its political subdivisions subjects, or causes to be subjected, any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Arkansas Constitution shall be liable to the party injured in an action in circuit court for legal and equitable relief or other proper redress.

Ark. Code Ann. § 16-123-105(a). The Act further provides: "When construing this section, a court may look for guidance to state and federal decisions interpreting the federal Civil Rights Act of 1871, as amended and codified in 42 U.S.C. § 1983, as in effect on January 1, 1993, which decisions and act shall have persuasive authority only." Ark. Code Ann. § 16-123-105(c). For the reasons stated above, the Court finds plaintiff presents no facts showing there is a genuine issue for trial. There is

⁸Pl's. Compl. at ¶36.

⁹*Id.* at ¶38.

no evidence that plaintiff was deprived of her constitutional rights as a result of defendants' selection of two valedictorians for the 2011 graduating class.

Plaintiff alleges in Count III of her complaint that defendants violated her right to a free and equal public education, claiming that “[d]efendants’ disparate treatment of African American students of McGehee School District including Wimberly based on their race as well as the intentional creation of a hostile educational environment is a violation of their rights under the laws of the State of Arkansas.”¹⁰

Article 14, Section 1 of the Arkansas Constitution states: “Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education.” Article 2, §§ 2, 3, and 18 provide:

§ 2. Freedom and independence.

All men are created equally free and independent, and having certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property, and reputation; and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.

§ 3. Equality before the law.

The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity; nor exempted from any burden or duty, on account of race, color or previous condition.

§ 18. Privileges and immunities - Equality.

The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

¹⁰*Id.* at ¶ 39.

The Court finds plaintiff offers insufficient evidentiary support for her claim that she was denied a free and equitable education or that she was treated unequally when defendants applied the school's class rank policy and named plaintiff and another student co-valedictorians of their graduating class.

Conclusion

IT IS THEREFORE ORDERED that defendants' motion for summary judgment [docket entry 20] is granted. Judgement will be entered accordingly.

DATED this 1st day of April, 2013.

/s/Susan Webber Wright

UNITED STATES DISTRICT JUDGE