UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

H.W., a minor, by and through her parent Next friend Phil Wells, Plaintiff vs. BREWER SCHOOL DEPARTMENT, et als, Defendants	)	CASE NO. 1:24-cv-00062-LEW

MEMORANDUM OF LAW DEFENDANTS BREWER SCHOOL DEPARTMENT, GREGG PALMER, AND BRENT SLOWIKOWSKIIN OPPOSITION TO MOTION FOR TERMPORARY RESTRAINING ORDER

INTRODUCTION

Phil Wells, the parent of Brewer High School student HW, brings this case on behalf of his daughter who, it is alleged, wishes to distribute a petition advocating against the rights of a transgender student and fears that if she does so, she might be subject to "prosecution or other punishment." ECF Doc. 1-2. PageID #: 20 (HW Decl. ¶ 12). As a threshold matter, the Brewer School Department and its administrators, including individual defendants Gregg Palmer and Brent Slowikowski, support the right of HW and all students to communicate their views to the school committee, the administration, the student body, and all others to whom they wish to advocate, and what happened here, had nothing to do with trying to silence HW. Indeed, when a petition relating to bathroom use was first distributed, Brewer administration did nothing to prevent it. It was only after it became clear that the petition was not about a political position but rather was a targeted attack on one specific student that not only constituted bullying but led to additional bullying of that student in the school, that school administration limited where HW

could distribute the petition. Even then, all they did was meet with the sponsors of the petition, including Mr. Wells and his daughter to explain their concerns about the harm that the petition was causing the targeted student and to suggest other venues where HW might distribute the petition. Brewer's intention in meeting with Plaintiff and his daughter was to educate, not to punish. HW has not been disciplined and there is no present intention to discipline her or anyone else over the petition. Her motion for a temporary restraining order should be denied.

STATEMENT OF FACTS

In January 2024, Brewer High School students gathered signatures for approximately one week to advocate that school bathrooms should be segregated based on biological sex. Slowikowski Decl. ¶ 2; Palmer Decl. ¶ 12. Principal Slowikowski was aware of the signature gathering and permitted students to collect signatures in school. Slowikowski Decl. ¶ 2; Palmer Decl. ¶ 12. On or about January 24, 2024, HW went to talk with Principal Slowikowski about another student who she refers to as "HD" using the girls' bathroom. Slowikowski Decl. ¶ 3. HW was adamant that HD was a male and that HD should not be allowed to use the girl's bathroom. Slowikowski Decl. ¶ 3.

The next day, on January 25, 2024, there was an incident involving HD and the petition in the High School cafeteria. Slowikowski Decl. ¶ 4. While HD was discussing the petition with CG, another student went up to HD and told them they were using the wrong bathroom. Slowikowski Decl. ¶ 4; Palmer Decl. ¶ 14. That student proceeded to loudly ask the students in the cafeteria to raise their hands if they thought HD should not use the girls' bathroom and students raised their hands. Slowikowski Decl. ¶ 4; Palmer Decl. ¶ 14; KD Decl. ¶ 9. The cafeteria incident was devastating to HD. KD Decl. ¶ 10. Because of what happened in the cafeteria, HD left school. Slowikowski Decl. ¶ 5; Palmer Decl. ¶ 15. The following day, on

January 26, 2024, Superintendent Palmer and Principal Slowikowski met with HD who was still visibly upset about the student in the cafeteria making the petition about HD's use of the girls' bathroom and upset that the student told HD they were using the wrong bathroom. Slowikowski Decl. ¶ 6. In discussing what happened, HD shared "[t]here's a level of pain that goes along with this" but "I'm not going to let others control me and who I am." Palmer Decl. ¶ 17. HD also told Superintendent Palmer and Principal Slowikowski about rumors that they were going to be beaten up. Palmer Decl. ¶ 13. HD never signed the petition and did not express delight at the petition. KD Decl. ¶ 15.

It was clear to both the Superintendent and the Principal that the petition was targeting HD and causing them harm. Slowikowski Decl. ¶ 7; Palmer Decl. ¶¶ 16-17. Superintendent Palmer talked with HD's mother about her concerns for the safety and mental health of her child in light of the targeted efforts to exclude them from the bathroom that is consistent with their gender identity. Palmer Decl. ¶ 18. The administrators agreed that they had to prevent HD from being harmed further and ensure that HD could continue to exercise their right to use the bathroom that corresponds with their gender identity and to access their education at the High School. Slowikowski Decl. ¶ 9; Palmer Decl. ¶ 20. Accordingly, Principal Slowikowski and Assistant Principal Lower met with HW and CG and explained that they were no longer going to allow them to circulate the petition in school because it had become clear to that it was about one student, HD, and that it was harming HD. Slowikowski Decl. ¶ 9; Palmer Decl. ¶ 20. In addition to telling HW and CG that they could circulate the petition outside of the school, Principal Slowikowski explained that if they wanted to change the Brewer School Department's bathroom policy, then they could advocate for that change to the Brewer School Committee. Slowikowski

Decl. ¶ 10. The administrators never punished HW or CG and never suggested that they would be punished for the petition. Slowikowski Decl. ¶ 10; Palmer Decl. ¶ 23.

A couple of days later, on January 31, 2024, Superintendent Palmer and Principal Slowikowski met with HW and her father Phil Wells to explain that the petition could no longer be circulated in school because it singled out a specific student, HD, who suffered harm because of the petition. Slowikowski Decl. ¶ 11; Palmer Decl. ¶¶ 21-22. Superintendent Palmer and Principal Slowikowski explained that they did not want HW or other girls to feel uncomfortable in the bathroom and that if HW wanted to use one of the gender neutral bathrooms she could do so. Slowikowski Decl. ¶ 11; Palmer Decl. ¶ 23. At the end of the meeting, the administrators thought that Mr. Wells and HW understood and accepted Brewer's decision. Slowikowski Decl. ¶ 12. The meeting was educational and not punitive. Palmer Decl. ¶ 24.

On February 11, 2024, Superintendent Palmer and Principal Slowikowski sent a letter to Brewer School Department families, students, and staff to address HD's right to use the bathroom of their choice, the right of everyone to have their own views on this issue, and the need to ensure that there is no bullying or harassment on connection with these issues. Palmer Decl. ¶ 25; Slowikowski Decl. ¶ 16. This letter referenced Maine law and the School Department's policies. Palmer Decl. ¶ 22, Ex. 2. One of the relevant policies is Board Policy JB – Transgender and Gender Expansive Students. Palmer Decl. ¶ 2, Ex. 1. Policy JB was adopted based, in part, on Brewer's understanding that the policy is required under the Maine Human Rights Act. Palmer Decl. ¶ 5. Policy JB provides, in part, that: "Students shall be permitted to use restrooms, locker rooms and changing facilities corresponding to the gender identity which the student asserts at school… A student shall not be required to use a separate, non-communal facility over their objection." Palmer Decl. ¶ 3, Ex. 1. Policy JB also provides that

"[d]iscrimination, harassment and bullying are prohibited within the district. Brewer School Department staff should be sensitive to the fact that transgender students are at higher risk for discrimination, harassment and bullying, and should immediately notify the appropriate administrator if they become aware of a problem." Palmer Decl. ¶ 4, Ex. 1.

ARGUMENT

I. Standard for Injunctive Relief

A preliminary injunction is an "extraordinary and drastic remedy," that is never awarded as of right. *Munaf v. Geren,* 553 U.S. 674, 689-90 (2008) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, p. 129 (2d ed.1995)). Rather, "the Court is to bear constantly in mind that an injunction is an equitable remedy which should not be lightly indulged in, but used sparingly and only in a clear and plain case." *Saco Defense Sys. Div. Maremont Corp. v. Weinberger*, 606 F. Supp. 446, 450 (D. Me. 1985).

In order to be entitled to preliminary injunctive relief, the plaintiff "must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that the injunction is in the public interest." *Voice of the Arab World, Inc. v. MDTV Med. News Now, Inc.,* 645 F.3d 26, 32 (1st Cir. 2011). "While all these factors must be weighed, the cynosure of this four-part test is more often than not the movant's likelihood of success on the merits." *Borinquen Biscuit Corp. v. M.V. Trading Corp.*, 443 F.3d 112, 115 (1st Cir. 2006) (citing *Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir. 1993) ("The *sine qua non* of [the four-factor] formulation is whether the plaintiffs are likely to succeed on the merits.")).

Finally, the standard for issuing a temporary restraining order is the same as for a preliminary injunction and is provided by traditional equity doctrines. However, "[p]reliminary

injunctions will, in the usual case, be decided only after the parties have presented testimony in support of their respective positions." *Doe on behalf of Doe v. Portland Pub. Sch.*, No. 2:23-CV-00409-JAW, 2023 WL 7301072, at *10 (D. Me. Nov. 3, 2023). That is particularly important here, where the underlying facts of the Plaintiff's claims are very much in dispute.[1]

II. Plaintiff Failed to Establish a Reasonable Likelihood of Success on the Merits

A. HW Has Not Been Punished or Threatened with Punishment, Thus the Claims Are Not Ripe or Plaintiff Lacks Standing

In the First Amendment pre-enforcement context, the doctrines of standing and ripeness both involve the same inquiry under Article III's limitation of federal courts' jurisdiction to "Cases" and "Controversies, and thus "boil down to the same question." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, n.5 (2014) (internal quotation omitted). While standing is concerned with "who" is bringing the challenge and ripeness is concerned with "when," the constitutional core of each requires that a plaintiff show that "threatened injury is certainly impending." *New Hampshire Lottery Comm'n v. Rosen*, 986 F.3d 38, 50, 52 (1st Cir. 2021). The test is not met here, where there has been no threat of punishment, let alone criminal prosecution.

Even when a student is punished for speech related reasons, their claim is not immediately ripe for federal court review. *Marin v. Univ. of Puerto Rico*, 346 F. Supp. 470, 480 (D.P.R. 1972) (In a claim by student who was suspended from a regional college for reasons they alleged violated their First Amendment rights, the Court dismissed the case as not ripe: "expulsion decision is not ripe for adjudication absent the denial of relief to the student by the school board or the designee of the school board, for such purposes"); *Press v. Pasadena Indep.*

[1] In addition to the disputes of fact, which include that HD did not sign the petition, did not express delight at the petition, KD Decl. ¶ 15, and does not have a documented history of sexual assault in Brewer, Palmer Decl. ¶ 9, the facts as set forth by Plaintiff include irrelevant rhetoric and stereotypes that have nothing to do with what happened in this case. ECF Doc. 4, PageID #: 38 (Pl. Br. 3).

Sch. Dist., 326 F. Supp. 550, 561 (S.D. Tex. 1971) (In an action by an eighth grade student, who was suspended from school for wearing a pantsuit in violation of dress code, the Court held the claim was not ripe: "As the plaintiff's parents have not presented their grievance to the superintendent of schools, in compliance with the procedure directed by the board of trustees, the state action is not final in the institutional sense and this suit is not ripe for adjudication.")

Where no punishment has occurred, there is an even higher bar to establishing an imminent violation of First Amendment rights. *See, e.g.*, *Dariano v. Morgan Hills Unified Sch. Dist.*, 767 F.3d 764, 777 (9th Cir. 2014) ("School officials have greater constitutional latitude to suppress student speech than to punish it.") Thus, in the context of a pre-enforcement case regarding student speech, there must be some concrete allegations of imminent punishment. *Morrison v. Bd. of Educ. of Boyd Cnty.,* 521 F.3d 602, 610 (6th Cir. 2008) (A student alleging a chill of their speech rights lacks standing when their subjective belief assumes "without any specific action by the Board—that were he to speak, punishment would result."). *Cf. Norris on behalf of A.M. v. Cape Elizabeth School District*, 969 F.3d 12, 14 (1st Cir. 2020) (a post-punishment case identifying school's punishment of student as three-day suspension). Here, no punishment occurred, and there is no specific allegation of what punishment was feared. Indeed, the facts establish that—far from a threat of punishment—the students were provided express guidance on where and how they could circulate the petition, as well as where and how they could raise policy concerns with the school board. Slowikowski Decl. ¶ 10.

B. Plaintiff Cannot Meet the Burden of Establishing the Elements of a Section 1983 Claim

Although not pled with precision, it appears that Plaintiff is asserting claims under 42 U.S.C. § 1983 for retaliation in violation of HW's First Amendment rights.[2] To prevail on a First Amendment retaliation claim under Section 1983, Plaintiff bears the burden of showing that (1) HW engaged in constitutionally protected conduct, (2) she was subjected to adverse actions by the school, and (3) the protected conduct was a substantial or motivating factor in the adverse actions. *Doe v. Hopkinton Pub. Sch.*, 19 F.4th 493, 504 (1st Cir. 2021) (citing *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 43 (1st Cir. 2012)). In this case, Plaintiff falls short on the first and second factors, so the third factor is inapplicable.

1. The School Department Had the Right to Stop the Petition Inside the School Because it Caused Substantial Disruption and Constituted Bullying

Plaintiff cannot show that at the time he and his daughter met with Brewer administrators, the petition was protected speech. In *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969), the United States Supreme Court famously stated that teachers and students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." However, "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). "A school need not tolerate student speech that is inconsistent with its basic educational mission, [] even though the government could not censor similar speech outside the school." *Hazelwood Sch. Dist. V. Kuhlmeier*, 484 U.S. 260, 266 (1988). "The primary duty of school officials and teachers ... is the education and training of young people…

[2] The complaint also includes as Count II a claim under the Maine Constitution and the Maine Civil Rights Act. Plaintiff does not discuss these claims in his motion so they are apparently not the basis of his request for injunctive relief.

Without first establishing discipline and maintaining order, teachers cannot begin to educate their students." *New Jersey v. T.L.O.*, 469 U.S. 325, 350 (1985) (Powell, J., concurring).

Thus, as the *Tinker* court recognized, a school may regulate speech that is in "collision with the rights of others to be secure and be let alone" or "would substantially interfere with the work of the school or impinge upon the rights of other students." *Tinker*, 393 U.S. at 508, 509. The *Tinker* court also recognized that "conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior…involves substantial disorder or invasion of the rights of others, is of course, not immunized by the constitutional guarantee of freedom of speech." *Id.* at 513.

Furthermore, "[t]his interest in regulating speech is at its strongest when the speech occurs under the school's supervision, where the school stands *in loco parentis* towards all students, and of lesser interest where the speech or expression occurs outside of school." *L.M. v. Town of Middleborough*, No. 1:23-CV-11111-IT, 2023 WL 4053023, at *5 (D. Mass. June 16, 2023), *appeal filed* (1st Cir., Aug. 11, 2023) (citing *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038, 2046 (2021)). As set for the in *Defoe ex rel. Defoe v. Spiva*,

> Anger, hostility and contempt are not elements of a sound learning strategy, or school administrators could at least so conclude. In addition, students do not generally attend public schools by choice – they have to be there. They cannot avoid racially demeaning slogans and symbols by staying elsewhere; they can only rely on school administrators to create a learning environment clear of racial hostility and contempt.

625 F.3d 324, 340 (Rogers, J., concurring); *see also Parents Defending Educ.v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, No. 2:23-CV-01595, 2023 WL 4848509, at *12 (S.D. Ohio July 28, 2023) ("[S]tudents cannot escape such [anti-transgender] comments. They are, in effect, a captive audience").

a. The petition caused substantial disruption.

In this case, Brewer administrators were entitled to prevent in school distribution of the petition under the *Tinker* substantial disruption standard. In the first place, there can be no serious dispute that being the sole subject of a petition seeking their exclusion from a school bathroom adversely affected HD's ability to access their educational benefits. HD had to leave school, they have expressed their hurt, and KD has further described the distress that her child endured. And although in many cases, the "substantial disruption" that occurred involved school wide disruption, interference with the education of a single student is sufficient to constitute substantial disruption under *Tinker*. *See Castro v. Clovis Unified Sch. Dist.*, 604 F. Supp. 3d 944, 952 (E.D. Cal. 2022) ("Nothing in the Supreme Court's decision in *Tinker* suggests that more than one student's right to be secure and to be let alone need be materially invaded before school officials may take regulatory action.).

Moreover, to regulate speech, "it is clear that school authorities need not wait for a potential harm to occur before taking protective action." *Trachtman v. Anker*, 563 F.2d 512, 517 (2d Cir. 1977); *see also Castro*, 604 F. Supp. 3d at 950 (administrators "may act prophylactically if it is reasonable under the circumstances"). Given what happened in the cafeteria, where the petition drew students into orally and through a show of hands expressing their opinions about a single student, and the rumors about HD being beaten up, school administrators reasonably feared further disruption and were therefore entitled under *Tinker*, to restrict distribution of the petition inside the school. *See* Palmer Decl. ¶¶ 13-14, 19; KD Decl. ¶ 11.

b. The petition constitutes bullying and interfered with the rights of HD.

Even if this Court were to determine that the disruption, and likelihood of future disruption was insufficient to justify restriction, Brewer had the authority to regulate the petition

because it interfered with the rights of HD. The petition was directed specifically at HD,[3] and not only itself constitutes bullying of that student but fostered bullying of them within Brewer High School. The First Circuit stated in *Norris on behalf of A.M. v. Cape Elizabeth School District,* 969 F.3d 12, 29 (1st Cir. 2020):

> We agree with the school that bullying is the type of conduct that implicates the governmental interest in protecting against the invasion of the rights of others, as described in *Tinker*. *See Kowalski* [v. *Berkely County Schools*] 652 F.3d at 572; *see also C.R. v. Eugene Sch. Dist.*, 41 835 F.3d 1142, 1152-53 (9th Cir. 2016).

Echoing the United States Supreme Court's admonition that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board," *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986), the Court went on to acknowledge that "school administrators must be permitted to exercise discretion in determining when certain speech crosses the line from merely offensive to more severe or pervasive bullying or harassment." *Norris*, 969 F.3d at 29, n.18. *See also Epperson v. Arkansas,* 393 U.S. 97, 104 (1968) ("public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."); *Goss v. Lopez*, 419 U.S. 565, 589–90 (1975) ("[S]chool authorities must have broad discretionary authority in the daily operation of public schools. This includes wide latitude with respect to maintaining discipline and good order."); *Solmitz v. Maine Sch. Admin. Dist. No. 59*, 495 A.2d 812, 816 (Me. 1985) ("It is beyond question that 'local school boards have broad discretion in the management of school affairs.'") (quoting *Board of Education,*

[3] Although Plaintiff argues in his brief that the petition is "hardly offensive to any reasonable person," ECF Doc. 4, PageID # 39 (Pl. Br. 4), that is not true. The petition calls into question the authenticity of a transgender person and suggests that they do not exist. That, of course, is extremely offensive to gender expensive individuals and those who love and support them.

Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853, 863 (1982)); *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 671 (7th Cir. 2008) ("A heavy federal constitutional hand on the regulation of student speech by school authorities would make little sense.").

When using their professional judgment and discretion to determine whether speech crosses the line into bullying and, thus, can be restricted, the *Norris* Court explained that "there must be a reasonable basis for the administration to have determined both that the student speech targeted a specific student and that it invaded that student's rights." *Norris*, 969 F.3d at 29.[4] In *Norris*, the First Circuit affirmed this Court's entry of injunctive relief on behalf of the student because the district court did not find as a fact that the speech at issue there was directed at a specific student. However, the situation in *Doe v. Hopkinton Public Schools*, 19 F.4th 493, 506 (1st Cir. 2021) was different because the school there found that the plaintiffs' speech had created a hostile environment for another student, caused him emotional harm, and infringed on his rights in school. There, the First Circuit affirmed the district court's entry of judgment in favor of the school district on the student plaintiffs' First Amendment claims in part because the plaintiffs' speech was not protected. *See also L.M.*, 2023 WL 4053023, at *6 (holding plaintiff failed to establish likelihood of success of section 1983 claim that school violated First Amendment rights when it prohibited student from wearing t-shirt stating "THERE ARE ONLY TWO GENDERS" where administrators reasonably determined speech interfered with rights of transgender and gender expansive students and the school's actions were undertaken to protect those students); *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178 (9th Cir. 2006), *cert.*

[4] In his brief, Plaintiff erroneously argues that the School Department's restrictions on his speech are subject to strict scrutiny. ECF Doc. 4, PageID #: 45 (Pl. Br. 10). That analysis applies to statutory challenges not to the conduct complained of here.

granted, judgment vacated sub nom. Harper ex rel. Harper v. Poway Unified Sch. Dist., 549 U.S. 1262 (2007)[5] (holding that anti-gay slurs were not protected speech because they interfered with the rights of students to learn).

This case presents a situation similar to *Doe v. Hopkinton Public Schools*. There can be no doubt that the petition, which advocates against biological males using female restrooms, is directed at the only transgender student at Brewer High School who has been using facilities consistent with their gender identity in accordance with school policy and Maine law. *See* Palmer Decl. ¶¶ 2-7. And if there were any doubt, that doubt is dispelled by the incident that took place in the Brewer High School cafeteria, HW's statements to administrators that she did not want HD using the girls' restroom, Slowikowski Decl. ¶ 3, as well as the Declaration of HW who states as much, s*ee* ECF Doc. 1-2, PageID #: 18 (HW Decl. ¶¶ 9-12).[6] The evidence is clear that the petition adversely affected HD's ability to access educational opportunities given that they were unable to attend school and expressed the pain that the petition was causing them. Palmer Decl. ¶ 17; KD Decl. ¶ 10. The evidence is also clear that the petition created a hostile education environment where there were rumors going around the High School that HD was going to be beaten up for their use of the girls' bathroom and a student went up to HD in the cafeteria, told them that they were using the wrong bathroom, and asked all other students who agreed to raise their hands. Palmer Decl. ¶¶ 13-14.

[5] The decision was vacated by the Supreme Court on the ground of mootness but its legal reasoning was not questioned and remains good law.

[6] The declarations in support of Plaintiff's motion state that HW and CG support full civil liberties, equal treatment for all persons, and that they do not tolerate bullying on the basis of sexual identity or sexual orientation. ECF Doc. 1-1, PageID #: 14 (CG Decl. ¶ 5); ECF Doc. 1-2, PageID # 17 (HW Decl. ¶¶ 5-6). Setting aside the irony of these statements from individuals trying to prevent a fellow student from using the bathroom that corresponds with their gender identity in accordance with Maine law and school policy, their intent in all of this is irrelevant to Brewer's determination that the petition ended up invading the rights of HD. *L.M.*, 2023 WL 4053023, at *6, n.3.

The actions undertaken by Brewer administrators were entirely reasonable where the petition targeted a specific student and both the Superintendent and the Principal believed that the petition constituted bullying as specifically defined by Maine law and school policy. Under Maine law, "bullying" includes but is not limited to:

> [W]ritten, oral or electronic expression or a physical act or gesture or any combination thereof directed at a student or students that . . . (1) Has, or a reasonable person would expect it to have, the effect of: … (b) Placing a student in reasonable fear of physical harm . . . (2) Interferes with the rights of a student by: (a) Creating an intimidating or hostile education environment for the student; or (b) Interfering with the student's academic performance or ability to participate in or benefit from the services, activities or privileges provided by a school; or (3) Is based on a student's actual or perceived characteristics identified in Title 5, section 4602 or 4684-A[7] . . . and that has the effect described in subparagraph (1) or (2).

20-A M.R.S. § 6554(2)(B). Even more generally, courts have held that administrators can take action where school administrators are concerned about student safety and well being. *See, e.g.*, *L.M.*, 2023 WL 4053023, at *6 (upholding school's prohibition on t-shirt saying there are only two genders even when speech did not target specific student but because "a group of potentially vulnerable students will not feel safe") (collecting cases, including *Scott v. Sch. Bd. of Alachua Cnty.*, 324 F.3d 1246, 1247 (11th Cir. 2003) (holding that students' free speech rights were not infringed by administrator's unwritten ban on confederate flags at school where administrator's professional judgment was that flag caused racial tensions and could lead to unhealthy or unsafe learning environment)).[8]

[7] Both of these statutory cross references include "sexual orientation or gender identity" as a characteristic.

[8] Plaintiff cites to Oklahoma law requiring bathrooms to be single-sex in support of his suggestion that transgender individuals make bathrooms unsafe. ECF Doc. 4, PageID #: 47 (Pl. Br. 12). Yet Plaintiff fails to include anything about the safety concerns for transgender individuals even though just last month an Oklahoma teenager who identified as non-binary was assaulted for using the girls' bathroom in a high school and later died from the assault. *See, e.g.* Regulators to Review Death of Nex Benedict, a Nonbinary Student, in Oklahoma - The New York Times (nytimes.com). The tragic events in Oklahoma demonstrate why school administrators need to be allowed to exercise their professional judgment and limit or stop speech when that interferes with the rights of other students.

And importantly, courts have recognized that protection against psychological harm can be equally as important as protection against physical harm. *Trachman v. Ankar*, 563 F.2d 512, 517 (2d Cir. 1977), *cert denied* 435 U.S. 925 (1978); *id.* at 520 (Gurfein, J., concurring) ("a blow to the psyche may do more permanent damage than a blow to the chin"); *Nuxoll ex rel. Nuxoll*, 523 F.3d at 671, 675 (observing that avoiding violence is not a school's only concern and that comments "can strike a person at the core of his being" and acknowledging the need for schools to be able to act otherwise "the school will be placed on a razor's edge, where if it bans offensive comments it is sued for violating free speech and if it fails to protect students from offensive comments by other students it is sued for violating laws against harassment").

The Brewer School Department recognized the need to allow students to share their viewpoints on bathroom use in schools so long as such activity did not bully HD. *See, e.g., C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1148 (9th Cir. 2016) ("[s]chools must achieve a balance between protecting the safety and well-being of their students and respecting those same students' constitutional rights.") (internal citations omitted)). To balance these needs, when Brewer stopped the distribution of the petition in school so that HD would not be subject to more incidents like the one in the cafeteria, Brewer allowed the distribution of the petition outside of school on the sidewalk. Palmer Decl. ¶ 20. *See, e.g., Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 210 (3d Cir. 2001) ("speech may be more readily subject to restrictions when a school or workplace audience is 'captive' and cannot avoid the objectionable speech"); *Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, No. 2:23-CV-01595, 2023 WL 4848509 (S.D. Ohio July 28, 2023) (explaining "students cannot escape such [anti-transgender] comments. They are, in effect, a captive audience . . . And the consequences that such comments can have on students are not abstract, faraway concerns.") (internal citations omitted)). Principal

Slowikowski advised HW and CG on alternative ways to advocate for change in front of the school committee. Slowikowski Decl. ¶ 10. Not to mention the School Department allowed the students to petition until such activity started to harm HD and interfere with their right to be at school. For all these reasons, Brewer's limited restriction on the petition, for the purpose of protecting HD's rights, does not violate HW's constitutional rights.

C. HW Was Not Subjected to Adverse Action

Plaintiff cannot meet the second requirement for Section 1983 liability because he cannot prove that he or HW were subjected to adverse action in connection with the petition. As an initial matter, as noted above, "[s]chool officials have greater constitutional latitude to suppress student speech than to punish it." *Dariano*, 767 F.3d at 777. Here, at most, Brewer limited HW's speech by preventing the petition from being circulated inside the school but did not suppress it in its entirety, and there are no allegations of punishment. Mr. Wells's declaration states that the Superintendent and Principal stated that the petition could not be circulated (in school), and then merely states that "[t]hey implied that there would be adverse action taken against H.W. and another student, C.G., on account of the petition. I also believed that those implied threats were aimed at me." ECF Doc. 1-3, PageID #: 24 (Wells Decl. ¶ 7). HW's declaration is similarly deficient in only alleging her perception that "Superintendent Palmer and Principal Slowikowski implied that there would be adverse action taken." ECF Doc. 1-2, PageID #: 19 (HW Decl. ¶ 27). Mr. Wells's and his daughter's alleged perception of "implied threats" is not sufficient to constitute an adverse action. *Cf. Norris*, 969 F.3d at 14 (identifying school's punishment of student as three-day suspension).

This is particularly true where there is not a single allegation of any adverse action actually taken—school discipline, civil prosecution, or criminal prosecution. *Cf.* ECF Doc. 1-3,

Page ID #: 24 (Wells Decl. ¶ 8) & ECF Doc. 1-2, Page ID #: 19 (HW Decl. ¶ 28) (describing subjective and imagined fears). It is also worth noting that while Brewer certainly has the authority to impose school discipline for HW (which it has not threatened to do or done), Brewer has no authority to prosecute Mr. Wells or HW civilly or criminally.

Finally, HW can still express her viewpoint that bathroom use should correspond with one's biological sex by circulating her petition outside of the school building, presenting her viewpoint to the school committee, or in any other way that does not specifically target and interfere with HD's ability to access their education. There is simply no actionable adverse action in this case.

III. Plaintiff has Not Established Irreparable Harm Absent an Injunction

This Court has explained, "a showing of irreparable harm must be 'grounded on something more than conjecture, surmise, or a party's unsubstantiated fears of what the future may have in store.'" *Maine Educ. Ass'n Benefits Tr. V. Cioppa*, 842 F. Supp. 2d 386, 387–88 (D. Me.), *aff'd,* 695 F.3d 145 (1st Cir. 2012) (quoting *Charlesbank Equity Fund II v. Blinds to Go,* 370 F.3d 151, 162 (1st Cir. 2004)). "Thus, a preliminary injunction will not be issued simply to prevent the possibility of some remote future injury. A presently existing actual threat must be shown." Grounds for Granting or Denying a Preliminary Injunction—Irreparable Harm, 11A Fed. Prac. & Proc. Civ. § 2948.1 (3d ed.).

Plaintiff's analysis of the irreparable harm prong is simply that any deprivation of First Amendment rights is an irreparable harm, and because he is likely to succeed on the merits, he has met his burden of establishing irreparable harm. As set forth above, Plaintiff does not have a likelihood of success on the merits where the administrators reasonably determined that the petition created a substantial disruption, was targeting a particular student and invaded upon their

legal right to use the bathroom that corresponds with their gender identity, and where no adverse action was taken against HW for the petition.

This case really is one of education, where the administrators met Mr. Wells and HW, as well as other students, to explain the harm the petition was causing for a specific student, and explain that because of the harm, it could no longer be circulated in school. When Superintendent Palmer and Principal Slowikowski shared this information with Mr. Wells and HW, they accepted it and the conversation did not go any further. At no time did Brewer impose any discipline or even threaten to impose any discipline on HW or other students for the petition. Consistent with this is the fact that HW can advocate for her viewpoint that bathroom use should correspondence with someone's biological sex so long as she does it in a way that does not bully another student or otherwise interfere with their rights. Such a limited restriction on the petition does not rise to the level of irreparable harm.

IV. The Balance of the Equities and the Public Interest Weigh Against an Injunction

The record shows that the equities and the public interest are in the School Department's favor. HW's petition has only been restricted inside the school for the purpose of preventing substantial disruption and HD from suffering further harm and, thus, she is free to express her viewpoints by circulating the petition outside of the school, among other things. Indeed, this lawsuit is one way in which HW has been able to express her viewpoints.

By contrast, if an injunction issues and the petition is recirculated in the high school, it would cause a significant hardship for Brewer. Where it is clear that the petition targets HD, its recirculation within the school would result in continued harm, including the pain HD previously experienced in connection with the petition, and is likely to cause HD to leave school and not be able to access their education. *See* KD Decl. ¶¶ 10, 12. Moreover, an injunction would interfere

with Brewer's obligations under Maine law and school policy to prohibit bullying (and discrimination and harassment) in its schools. The Maine legislature has established the public policy of the State with respect to bullying:

> All students have the right to attend public schools that are safe, secure and peaceful environments. The Legislature finds that bullying and cyberbullying have a negative effect on the school environment and student learning and well being. These behaviors must be addressed to ensure student safety and an inclusive learning environment.

20-A M.R.S. § 6554(1). [9]

The Court must allow school administrators like Superintendent Palmer and Principal Slowikowski to exercise their professional judgment and determine when speech crosses the line into bullying or otherwise "colli[des] with the rights of others to be secure and be let alone." *Tinker*, 393 U.S. at 508. In a case such as this, where there is well documented evidence that the petition and its targeting of HD cause them harm and interfered with their ability to be at school, the Court should not second guess their decision to limit the distribution of the petition to outside the school building and to have the students advocate for their viewpoints on bathroom usage in different ways, such as presenting their viewpoints to the school committee. In sum, the limited restriction on HW's ability to circulate the petition in school is outweighed by HD's right to be free from harm during the school day and Brewer's responsibility to prohibit bullying under state law and school policy.

[9] Given Brewer's obligations under Maine law to protect its students from bullying, Plaintiff's request to post minimal security if he is granted an injunction should be rejected. There is a very real possibility not only of irreparable damage to HD but also of monetary damages including defense costs that are recoverable under 42 U.S.C. § 1988 to Defendants. Rule 65(c) mandates the giving of "security in an amount the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." This Court should therefore order substantial security in the event it enters injunctive relief.

Finally, where Plaintiff is not likely to succeed on the merits, and Brewer has identified real, present, and existing harms to a particular student and its obligation under state law and school policy to prevent those harms, an injunction is not in the public interest.

V. Plaintiff is Not Entitled to an Injunction Pending Appeal

Plaintiff argues that if he is unsuccessful in his motion – in other words if this Court finds that he has not met the four factor test for injunctive relief – this Court should grant him the relief he has requested pending appeal under Fed. R. Civ. P. 62(d). As an initial matter, this request is premature given that no appeal has yet been filed. Moreover, to permit Plaintiff to distribute the petition at Brewer High School with all the attendant harm it would produce to HD and to the school at large while an appeal is pending would be to provide Plaintiff with the relief he requested notwithstanding his failure to show a likelihood of success on the merits or any of the other three prongs of the test as discussed above. His request for an injunction pending appeal should be denied.

CONCLUSION

In analyzing the Plaintiff's claim in this case, it is important to keep in mind what really happened here: Students passed around a petition seeking to have one specific student – the identity of whom was known to all – out of a restroom that that student had a right to use under state law and school board policy. The petition went from names on a piece of paper to a show of hands in the school cafeteria causing the target of the petition to have to leave school. That is a situation that school administrators clearly had to stop and that is what they did. They did it for the protection of the targeted student and for the safety and security of the school and in so doing they did not violate HW's rights. Plaintiff's motion for a temporary restraining order should be denied.

Dated: March 8, 2024

/s/Melissa A. Hewey

/s/ Jeana M. McCormick

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