UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

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

MEMORANDUM OF DEFENDANT MICHELLE MacDONALD IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I. Introduction.[1]

Defendant Michelle McDonald hereby opposes the motion of Plaintiff H.W. for a temporary restraining order and preliminary injunction. In considering the Plaintiff's motion, it is important to be clear first about what the Plaintiff is asking the Court to do. In her motion, Plaintiff H.W. requests "an injunction restraining the government from restricting or seeking to restrict her First Amendment rights through intimidation and threats of legal or administrative action," Plaintiff's Motion for TRO ("Motion") at 1 (ECF Doc. 4, PageID #: 36), or "a preliminary injunction against the Defendants from taking action against her on account of circulating the petition . . . ." Motion at 14 (ECF Doc. 4, PageID #: 49). Those are the only descriptions the Plaintiff offers of the action she is asking the Court to take.

[1] In addition to the arguments set forth in this submission, Ms. McDonald adopts and incorporates here by reference the arguments made by her co-defendants in opposition to the motion.

The Plaintiff's motion fails because: (1) her request for injunctive relief is too vague to be actionable; and (2) Her submissions are not sufficient to carry her burden on any of the four essential factors the Court considers in deciding whether to issue a temporary restraining order or a preliminary injunction.

II. Argument.

A. The Plaintiff's Motion Fails to Satisfy Rule 65's Specificity Standards.

F.R. Civ. P. 65(d)(1) requires that "[e]very order granting an injunction and every restraining order must . . .state its terms specifically; and . . . describe in reasonable detail . . . the act or acts restrained or required."

> The Supreme Court has emphasized that "the specificity provisions of Rule 65(d) are no mere technical requirements." *Schmidt v. Lessard*, 414 U.S. 473, 476, 94 S. Ct. 713, 38 L. Ed. 2d 661 (1974). Rather, these provisions serve "two 'important' functions: (1) 'prevent[ing] uncertainty and confusion on the part of those faced with injunctive orders' . . . and (2) enabl[ing] 'an appellate tribunal to know precisely what it is reviewing.'" *Union Home Mortg. Corp. v. Cromer*, 31 F.4th 356, 362 (6th Cir. 2022) (quoting *Schmidt*, 414 U.S. at 476-77). In light of those interests, "an injunction must be couched in specific and unambiguous terms, such that 'an ordinary person reading the court's order [would be] able to ascertain from the document itself what conduct is proscribed.'" *Id.* (quoting *Scott v. Schedler*, 826 F.3d 207, 211 (5th Cir. 2016)).

Bates v. Ohio Dep't of Rehab., No. 1:22-cv-337, 2023 U.S. Dist. LEXIS 24485, at *14 (S.D. Ohio Feb. 13, 2023).

The relief requested by the Plaintiff is too vague to satisfy the standards of Rule 65(d)(1). *See id.*, at *15 (request for injunction prohibiting Defendants from harassing or assaulting plaintiff, allowing him to be assaulted, tampering with his mail, retaliating against him, destroying/taking his property without just cause, and subjecting him to

cruel and unusual punishment was "simply too vague to meet Rule 65(d)(1)'s strictures"). On this basis alone, the Plaintiff's Motion must be denied.

B. The Plaintiff has Failed to Show that She Should Prevail on Any of the Four Factors to be Considered in a Request for Injunctive Relief.

All forms of injunctive relief are extraordinary remedies, "never awarded as of right." *Winter v. NRDC, Inc.*, 555 U.S. 7, 24, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). In deciding whether to issue a temporary injunction, courts consider the same four factors that apply to requests for preliminary injunctions:

> (1) the likelihood of success on the merits; (2) the potential for irreparable harm [to the movant] if the injunction is denied; (3) the balance of relevant impositions, i.e., the hardship to the nonmovant if enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect (if any) of the court's ruling on the public interest.

Esso Std. Oil Co. v. Monroig-Zayas, 445 F.3d 13, 18 (1st Cir. 2006) (quoting *Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8, 11 (1st Cir. 2004)).

Here, the Plaintiff cannot meet her burden on any of the factors as they apply to Ms. McDonald.

1. H.W. has failed to demonstrate a likelihood of success on the merits.

The legal basis on which the Plaintiff claims to be entitled to injunctive relief is a governmental infringement of her First Amendment right to free speech that gives rise to an action under 42 U.S.C. §1983. To succeed against a defendant on the merits of an action under 42 U.S.C. §1983, a plaintiff must establish "(1) a violation of rights protected by the Constitution or created by federal statute; (2) proximately caused by a 'person'; (3) who was acting under color of state law." *Crumpton v. Gates*, 947 F.2d

1418, 1420 (9th Cir. 1991). The Plaintiff cannot demonstrate that he is likely to succeed on the merits of her claim against Ms. McDonald, because her submissions fail to demonstrate that Ms. MacDonald was a proximate cause of the injury she claims to have suffered.

The fundamental issue H.W. raises is the Brewer School Department's interference with her circulation of a petition demanding that "things such as bathrooms, locker rooms, sports, and types of changing areas or sanitary stations should all be based on whether you are a biological girl or boy." Motion at 4 (ECF Doc. 4, PageID#: 39).[2] She offers no evidence, however, to suggest that Ms. MacDonald had any decision-making authority regarding the circulation of the petition, and Ms. MacDonald has declared affirmatively that she had no role in any decision related to the petition. Declaration of Michelle MacDonald (Exhibit A), ¶11.

In fact, the only assertion anywhere in the Plaintiff's submissions regarding any action she claims Ms. MacDonald took is in Paragraph 29 of her Complaint (ECF Doc. 1, PageID #: 5). There, the Plaintiff asserts "Brewer High School teacher, Defendant Michelle MacDonald, learned of the petition and informed C.G. that she would have them charged with hate crimes if they continued to let students sign the petition." Notably, there is no claim anywhere that Ms. MacDonald threatened the Plaintiff in any way. Moreover, Ms. MacDonald has no recollection of ever having spoken with Plaintiff

[2] Ms. MacDonald notes that under circumstances such as those presented here, the Maine Law Court has held that failure to permit a student who legitimately identifies as female, regardless of biological sex, to use the school bathroom designated for girls constitutes discrimination forbidden by the Maine Human Rights Act. *Doe v. Reg'l Sch. Unit 26*, 2014 ME 11, ¶22, 86 A.3d 600. Moreover, the United States Supreme Court has said that schools have a special interest in regulating speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 513 (1969). Against that background, while H.W.'s speech may have been regulated, it remains to be seen whether her rights were violated.

H.W. MacDonald Declaration, ¶ 2. Ms. MacDonald also disputes H.W.'s claim that she told C.G. that C.G. or H.W. would or could be prosecuted for a hate crime, or would be in trouble at all, in connection with the petition. MacDonald Declaration, ¶¶5-9.

It is notable that all the Plaintiff offers in support of the claim that Ms. MacDonald threatened anyone with prosecution for a hate crime is H.W.'s statement in Paragraph 18 of her Declaration (ECF Doc. 1, Ex. 2, PageID #: 19) about a purported conversation between Ms. MacDonald and C.G., a non-party. The statement is plainly hearsay and inadmissible. The Plaintiff's showing on this issue is made more suspect by the fact that, although C.G. submitted a Declaration in support of H.W.'s Motion (ECF Doc. 1, Ex. 1, PageID #: 14-15), that Declaration makes no mention of any such conversation.

In short, the Plaintiff has provided no credible basis for any conclusion that Ms. MacDonald proximately caused any infringement of any of H.W.'s rights, so H.W. cannot succeed on the merits of her claim.

2. The Potential for Irreparable Harm.

As H.W. notes (Motion, ¶ 4.3 (ECF Doc. 4, PageID #: 48)), "[A] plaintiff's irreparable harm is inseparably linked to the likelihood of success on the merits of plaintiff's First Amendment claim." *WV Ass'n of Club Owners v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009). Since she cannot succeed on the merits against Ms. MacDonald, she also has failed to demonstrate any potential for irreparable harm.

3. The Balance of Relevant Impositions.

"The third factor in the preliminary injunction analysis requires plaintiffs to show that the irreparable harm that they will suffer in the absence of the entry of a preliminary

injunction outweighs any harm that granting injunctive relief would inflict on defendant." *Rocket Learning, Inc. v. SÁnchez*, No. 10-2252 (FAB), 2011 U.S. Dist. LEXIS 167960, *50-51 (D.P.R. Feb. 12, 2011) (*citing Boston Duck Tours, LP v. Super Duck Tours, LLC*, 531 F.3d 1, 11 (1st Cir. 2008)).

Because H.W. has failed to demonstrate that she would suffer any irreparable harm in the absence of an injunction against Ms. MacDonald, she is not entitled to a finding that the balance of impositions favors her.

4. The effect (if any) of the Court's ruling on the public interest.

"[T]he public has an interest in the free flow of ideas and opinions and in prohibiting prior restraints." *Lemons v. Mycro Group Co.*, 667 F. Supp. 665, 668 (S.D. Iowa 1987).

> "The regulation of a communicative activity . . . must adhere to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance." *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 315, 63 L. Ed. 2d 413, 100 S. Ct. 1156 (1980) [*per curiam*]. "The burden of supporting an injunction against a future [communication] is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication." *Id.* at 315-16. "[A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Id.* at 316 n.13 [*emphasis in original*].

Bangor Baptist Church v. Me., 576 F. Supp. 1299, 1326 (D.Me. 1983).

H.W. seeks to enjoin Ms. MacDonald directing her to refrain from "intimidation and threats of legal or administrative action," or "from taking action against her on account of circulating the petition." Those descriptions very clearly encompass communicative activity. Yet nothing in H.W.'s submissions supports a finding that Ms.

MacDonald has abused her rights of speech. For this reason, the injunctive relief H.W. seeks would not be in the public interest.

III. Conclusion.

For all the foregoing reasons, as well as the reasons set forth in the submissions of Ms. McDonald's co-defendants in opposition to the Motion, the Motion must be denied.

Dated at Portland, Maine this 8th day of March 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2024, I filed a true and correct copy of the foregoing document with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent by e-mail to all counsel of record through the CM/ECF system.

/s/ James B. Haddow

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