IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

PLAINTIFF A, by his natural mother and general guardian, PARENT A, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 5:21-cv-6153-SRB
PARK HILL SCHOOL DISTRICT, et al.,	)	
Defendants.	)	

REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER, OR IN THE ALTERNATIVE, FOR PRELIMINARY INJUNCTION

Introduction

The District permitted a culture that valorized sharp-edged ethnic bantering, allowing it to flourish. Ethnic and racially charged exchanges and nicknaming long persisted at Park Hill South, especially on the football team. "Not Clean" Hip Hop music without boundaries that played loudly in the locker room worked to key-up and energize 14-year-old football players before a game. But when those same players with multi-racial consent and participation laughingly created their own racial bantering, a previously invisible boundary was unknowingly crossed. And some of those boundary-crossers were physically banished from the only ninth grade they will ever have. They may have participated in the on-going bantering, but did they cause the boundary-crossing or was the boundary moved? Who causes the collapse when a building owner knowingly places a fragile and weakened painter's scaffold on a sidewalk where some laughing passers-by carelessly stumble against the supporting beams? That these boys or other boys or some boys would sooner or later cross a racial bantering boundary invisible to

them was foreseeable by the adults who could see that boundary. They saw that boundary in the pop culture the boys prized and the adults permitted. And by failing to illuminate that boundary, the adults proximately caused the adult-driven consequences of which they now complain.

The harsh punishments here imposed for this unknowing boundary-crossing far exceed what the District has historically done. These parents and their sons report only limited knowledge of FERPA-protected disciplinary actions but they are aware that in recent years a student was suspended for ten days for repeatedly using the n-word on SnapChat.[1] Another was suspended for ten days for bringing drugs to school. Fights resulting in injuries reportedly occasion only ten day suspensions.[2]

That these Plaintiffs were expelled or given year-long suspensions must have arisen from something other than the poor judgment of an inappropriate joke. In the Tenth Circuit case cited by Defendants, *West v. Darby Unified School Dist. No. 269*, 206 F.3d 1358 (10th Cir. 2000), the student violated an explicit policy prohibiting acts that could be racially divisive.[3] That student was given a three-day suspension for drawing a Confederate flag, an act the Defendants go to

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[1]Apparently on or about October 3 there were social media postings by students at Lakeview Middle School using the variation of the n-word that ends in -ga and threatening violence at the school. A significant number of parents kept their children home the next day. The students involved are said by parents to have received one week suspensions for the disruptions they caused.

[2]Discovery before the next stage in this litigation should develop the facts underlying these reports and the District's disciplinary practices.

[3]The Defendant school district here had no such policy even though it acknowledges (Dfs' Suggestions, Doc. 27, at 15) the existence of racial tensions arising from prior experiences. If it had adopted such a policy, presumably it would have informed or trained its students in compliance. With a policy and some instruction for students, the boundary would have been known and this "petition" incident would not have occurred.

great length to compare in seriousness to what Plaintiffs did.[4] Here, these students immediately acknowledged their ill-considered acts and apologized. Had they been given three-day suspensions, or ten-day suspensions, they would have accepted those consequences. Consider a thought experiment. If a ten-day suspension were commensurate with past practices, what would account for the additional 170 days? The content of their expressions? The reaction of others to disfavored expressions, a "heckler's veto"? The embarrassment of the District that it was widely cast as again being caught unprepared to deal with racially-charged issues?

I. The First Amendment

Whether the admittedly expressive conduct of the Plaintiffs is protected by the First Amendment turns on the factual issue of whether their expressions caused a material disruption of the Defendants' educational mission. There are two separate aspects to that factual question. Was any disruption caused by the Plaintiffs, or was any disruption caused by adults outside of the District, adults misinformed by the District itself as to the nature and context of the expressive conduct of Plaintiffs? The acknowledged "massive"[5] disruption of that mission that occurred for weeks after the incident did not involve the Plaintiffs. They had all apologized and gone silent. The Plaintiffs did nothing to encourage such disruptions, and the District does not contend that they did. But the District itself did.

On the day after the bus incident the District interviewed all four Plaintiffs.[6] From those interviews the District then knew that all four boys had considered it a joke; that no one could consider the content to be literal; that a Black student had been involved in the creation of the

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[4]Dfs' Suggestions, Doc. 27, at 15-16.

[5]Dfs' Suggestions, Doc. 27, at 2.

[6]Dfs' Exs. B-4, B-5, B-6, B-7, Docs. 27-6, 27-7, 27-8, 27-9.

petition (Student X, whose name is redacted in Dfs' Ex. B-7); that the incident involved two biracial boys and one Black; and, that no one had been targeted for harassment or discrimination by the joke that the boys quickly realized was wholly inappropriate. Despite knowing these facts the District communicated by email to the entire "family" of Park Hill South High School on September 17[7] that the matter involved a "racist statement" but markedly omitting any context.[8] Not only were three of the four statements not racist by any definition, the fourth was literally racist but only out of context. The absence of any context left the reasonable inference that some white students had targeted some minority students with a "racist statement". [9] In keeping with the privacy rights of the students, but with facts within its knowledge[10], the District could have informed the public that the group of students involved was multi-racial[11]; that the students intended to create a joke; that not all students took it as a joke; that it referred to slavery in bad taste; that no one was targeted; and that the matter will be dealt with appropriately within the

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[7]Dfs' Ex. B-10, Doc. 27-12.

[8]Merriam-Webster defines "racist" as "having, reflecting, or fostering the belief that race . . . is a fundamental determinant of human traits and capacities and that racial differences produce an inherent superiority of a particular race." Merriam-Webster Online (visited Nov. 26, 2021) <https://www.merriam-webster.com/dictionary/racist>.

[9]Exhibit 6, Second Declaration of Plaintiff B's Mother. This Declarant captured much of the vitriol that saturated social media after the District publicly alluded to a "racist statement" and has put examples in the Timeline attached to her Declaration.

[10]The video and audio recordings from the school bus confirm what the students said in their interviews: it was a joke, Student X was involved, there was much laughter, and no one was targeted. The District has permitted Plaintiffs, their parents, and counsel to view the videos several times but has refused to make copies available, stating that the refusal was because of FERPA. Plaintiffs tendered a proposed protective order to counsel for Defendants on November 19. When such an order is in place, relevant clips of the recordings should be available for later stages of this litigation.

[11]Plaintiff A was indeed bi-racial Brazilian/Black. Exhibit 7, Declaration of Plaintiff A's mother.

policies and procedures of the District. That the District so misinformed the public and fueled the "massive" disruption that followed is on the District.

But the other question remains. Were the expressions of Plaintiffs responsible for any earlier educational disruptions? Defendants cite a single report, an email from a gym teacher that on the surface seems to establish that the expressions on the bus caused some real disruption in one teacher's class on September 17 – the day after the bus incident and hours before the Herren email to the school's "family" – with girls being scared and needing the teacher to counsel them.[12] There are reasons to be skeptical. It is hearsay. Principal Herren may have believed its truth but without the teacher's testimony, it is subject to doubt. Substantively, it does not causally link the plaintiffs to whatever frightened the "several girls". They had gone quiet except to apologize. *See* Dfs' Ex. B-2 (Plaintiff B posting at 9:25 p.m. on the evening of the bus incident, "What me [and, naming the other three] said was not funny at all, I have no idea what was going through my mind when I wrote it but I am extremely sorry that I did do it. we [sic] did it bc we thought it was funny in the moment but it really was not it was horrible."). Whatever was scaring the girls in gym the next day, there is no suggestion that it was caused by Plaintiffs. A more reasonable inference is that it was caused by some intervening events or conduct of others.

If they caused no material disruption to the educational mission of Defendants – and they did not – Plaintiffs' expressions on the bus, though thoughtless, ill-conceived, juvenile, and widely disapproved, are entitled to First Amendment protection and with that protection they are likely to prevail on the merits.

Long suspensions from public schools are extremely rare. They are used, for example,

[12]Dfs' Ex. B-9, Doc. 27-11, at 2.

for violations involving violence, and are contrary to the mission of public schools. Public schools pride themselves on fulfilling their mission to education all students. That mission includes finding ways to educate all children even if the District must find ways to solve the individual problems students bring to school. *See* Declaration of Dr. Nicole D. Price, Exhibit 8. If, however, this District imposed these extreme disciplinary measures because of the reactions of outside adults or patrons, or because the incident cast the District in an embarrassingly bad light[13], those harsh measures would impose a heckler's veto or arise from the content of the expressions in violation of the First Amendment. *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5 (1949) ("Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects . . .."); *Feiner v. New York*, 340 U.S. 315, 321 (1951) ("the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker"); *Cantwell v. State of Connecticut*, 310 U.S. 296, 308 (1940) ("A State may not unduly suppress free communication of views . . . under the guise of conserving desirable conditions.").[14]

> The freedom of speech guaranteed by our Constitution is in greatest peril when the government may suppress speech simply because it is unpopular. For that reason, it is a foundational tenet of First Amendment law that the government cannot silence a speaker because of how an audience might react to the speech. It is this bedrock principle – known as the heckler's veto doctrine – that the panel overlooks, condoning the suppression of free speech by some students because *other students* might have reacted violently.
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> . . . far from abandoning the heckler's veto doctrine in public schools, *Tinker* stands as a dramatic reaffirmation of it.

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[13]*See supra* at 2-3.

[14]*See generally* on the "heckler's veto", HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT (1965). Kalvin is credited with coining the term.

Dariano v. Morgan Hill Unified School Dist., 767 F.3d 764, 767, 769 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of rehearing *en banc*) (citing *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969)).

Additionally, imposing these long measures for those reasons would violate Due Process by sanctioning Plaintiffs for uncharged conduct without notice and an opportunity for a hearing.[15]

II. Plaintiffs Are Suffering Irreparable Harm

Defendants admit that Plaintiffs are suffering *some* injury, the "hardship" of online learning to which they have been relegated, as to which they admit that it is not "preferable".[16] And without citing a case, Defendants argue that Plaintiffs are not suffering irreparable harm. But they are wrong. Irreparable harm occurs when a party has no adequate remedy at law, typically because the injuries suffered cannot be *fully* compensated through an award of damages. *Grasso Enterprises, LLC v. Express Scripts, Inc.*, 809 F.3d 1033, 1040 (8th Cir. 2016). The harsh punishments of Plaintiffs deprives them of far more than merely the convenience of in-person instruction. Without the intervention of this Court they will miss almost their entire first year of high school, not just the in-person instruction. And since much of what is learned or retained in school arises from peer-to-peer learning or reinforcement, their educational opportunities will be materially hampered. But they will also miss everything else that is a part of the high school experience, making life long-friends who share the same joys and humiliations

[15]In a similar vein, Plaintiffs were charged with harassment and discrimination but with no identified victims. Disorderly conduct requires some disturbance by a plaintiff and the laughing on the bus was not anyone being disturbed, otherwise, it is the expressive content that is sanctioned. And discrimination and harassment require a victim, someone who suffers from unequal treatment by the offender, otherwise, it is the expressive content that is sanctioned.

[16]Dfs' Suggestions, Doc. 27, at 17.

of being freshmen together and the memories they make; the opportunities to engage in school activities or clubs; and since they are all good athletes – good enough to have made the ninth grade football team – they will miss all the experiences of athletic competition and the opportunities for personal growth that team sports provide. And they will miss all the social aspects for being freshmen in high school, meeting and making friends, dating, attending their first high school dance, or making new friends at school who become good friends out of school.

Defendants cannot seriously claim that Plaintiffs are not now being grievously and irreparably harmed by the disciplinary measures imposed on them.

III. The Balance of Harms

The balance of harms analysis examines the harm of granting or denying the injunction upon both of the parties to the dispute and upon other interested parties, including the public. *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 929 (8th Cir. 1994) (citing *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 372 (8th Cir. 1991)),

On one side of the balancing scales there are four 14- and 15-year old boys who would otherwise be in their first semester of their first year of high school but they are not. Their educations for a year are being handicapped – the "hardship" of online learning compared to preferred in-person – and they are missing for a lifetime all the attributes and traditions of a typical American high school experience. But while those are their immediate harms, they are not "demanding . . . immediate reinstatement" so that they might "just waltz back" into school.[17] Plaintiffs have offered, in person to the School Board at their disciplinary hearing, to be a part of whatever restorative process Defendants deem appropriate.

While Plaintiffs recognize in hindsight that their youthful racial joking was wholly

[17]Dfs' Suggestions, Doc. 27, at 18.

inappropriate, and have each expressed their remorse, they contend that the "massive" disruption was caused by others. *Supra* at 3-5. And they argue that the District must have neglected its growing teenage racial and ethnic school culture if it had become so fragile that four freshmen teenagers making inappropriate posts on a group SnapChat could bring the entire District to its knees. They each want to be part of the solution that the District certainly needs to implement over months and years. Their experiences and their deep remorse would add depth and realism to programs otherwise implemented by adults. They are willing and ready to be integrated into whatever diversity and inclusion programs the District adopts to address the issues that this incident has illuminated, shining a light on the racial and ethnic subcultures in the school, the existence of which the District does not deny. The Plaintiffs are prepared to offer specific suggestions as to how and when this process could begin. But however, and whenever, an early and thoughtful reintegration of the Plaintiffs into the District favors both the District and them, sharply tilting the balance of interests.

IV. The Public Interest

The "public interest" factor frequently invites the court to indulge in broad observations about conduct that is generally recognizable as costly or injurious. Other, more concrete considerations may include reference to purposes and interests underlying legislation, a preference for enjoining inequitable conduct, and minimizing unnecessary costs to be met from public coffers. *Prudential Ins. Co. of America v. Inlay*, 728 F.Supp.2d 1022, 1032 (N.D. Iowa 2010) (citing *Branstad v. Glick man*, 118 F.Supp.2d 925, 943 (N.D. Iowa 2000)).

It is always in the public interest when rights provided in the nation's founding charter

are implemented.[18] It is always in the public interest when state guarantees of access to free public education are fulfilled. It is always in the public interest when parties to disputes have those disputes resolved. And it is always in the public interest when four young teenagers with few resources of their own other than their experiences join with a large public institution to find ways together use those adverse individual experiences to enhance the experiences of 1,500 teenagers so that the entire Park Hill South "family" might advance together toward their mutual goals of graduating the future citizens and leaders of the world.[19]

Conclusion

The expulsion and suspensions of Plaintiffs were contrary to law and absent a temporary restraining order from this Court they will continue each day to experience irreparable harm to their lives.

Respectfully submitted,

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[18]*See* Suggestions in Support of Motion for Temporary Restraining Order or in the Alternative, for Preliminary Injunction, Doc. 8, at 5, citing *D.M. by BaoXiong v. Minnesota State High School League*, 917 F.3d 994 (8th Cir. 2019) (quoting *Phelps-Roper v. Nixon*, 545 F.3d 685, 694 (8th Cir. 2008), *overruled on other grounds by Phelps-Roper v. City of Manchester*, 697 F.3d 678, 692 (8th Cir. 2012 (*en banc*) and citing *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.") (quoting *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (8th Cir. 1994))).

[19]Defendants argue that Plaintiffs seek a TRO in part to interfere with a separate disciplinary matter involving Plaintiff B. Dfs' Suggestions, Doc. 27, at 23-24. They do not. The suggestion, however, that Plaintiff B engaged in any wrongful conduct, and describing that alleged conduct, is egregiously out of place in this proceeding. Given the type of accusation, the accused was arrested, and a subsequent police investigation occurred and no evidence was found to support the charge. Nonetheless, the District has publicly accused him. The detailed accusation was not necessary.

LAW OFFICE OF ARTHUR A. BENSON II

By s/ Arthur A. Benson II

By s/ Jamie Kathryn Lansford
Arthur A. Benson II #21107
Jamie Kathryn Lansford #31133
4006 Central Avenue
Kansas City, Missouri 64111
(816) 531-6565
(816) 531-6688 (telefacsimile)
abenson@bensonlaw.com
jlansford@bensonlaw.com

Attorneys for Plaintiffs A, B, C, and D

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was filed with and served via the Court's electronic filing system on counsel for Defendants listed below this 28th day of November, 2021.

Joseph Hatley #33189
Stephanie Lovett-Bowman #63045
Olawale O. Akinmoladun #63442
Spencer Fane
1000 Walnut Street
Suite 1400
Kansas City, Missouri 64106
(816) 292-8392
(816) 474-3216 (telefacsimile)

s/ Jamie Kathryn Lansford
Attorney for Plaintiffs A, B, C, and D