IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:19-cv-03530-DDD-NYW

JOHN DOE;

Plaintiff;

v.

ROCKY MOUNTAIN CLASSICAL ACADEMY;

NICOLE BLANC, individually, and in her official capacity as Dean of Students of Rocky Mountain Classical Academy;

CULLEN MCDOWELL, individually, and in his official capacity as Executive Principal of Rocky Mountain Classical Academy;

Defendants,

PLAINTIFF'S Fed. R. Civ. P. 65 MOTION FOR A TEMPORARY RESTRAINING ORDER AND AN ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT BE GRANTED

Jane Doe, on behalf of her minor son John Doe, by and through counsel, Kishinevsky & Raykin, LLC, moves the Court for a temporary restraining order requiring Rocky Mountain Classical Academy ("Defendant" or "Rocky Mountain") to cease all actions of removal of B.T. from school, and for an Order to Show Cause as to why a preliminary injunction should be granted. In support thereof, Plaintiff states as follows:

D.C. Colo. L. R. 7.1(a) Conferral

Plaintiffs have conferred in good faith with counsel for Defendants Rocky Mountain and the individual Defendants who communicated that this motion is opposed.

CERTIFICATION PURSUANT TO F.R.C.P. 65(b)(1)(B)

The undersigned certifies that in an effort to ensure Defendants have notice of the request for a temporary restraining order and the contents of this motion, the undersigned has sent a courtesy copies of the Complaint in this matter, the exhibits to the complaint, and this motion and the Affidavit of Plaintiff's Mother to the attorney for Rocky Mountain and the attorney for District 49. The undersigned certifies that formal service of the Complaint in this matter, the exhibits to the Complaint, and this Motion and the Affidavit of Plaintiff's Mother will be accomplished as soon as possible, and as early as Monday, December 16, 2019.

I. BACKGROUND.

1. John Doe ("John") is a five-year-old boy who currently attends Rocky Mountain Classical Academy ("Rocky Mountain"). He has attended Rocky Mountain since August 2019.
2. In July 2019, prior to his enrollment into Rocky Mountain, John had his ears pierced. John's mother, Jane Doe ("Jane" or "Mother") enrolled her son into Rocky Mountain and signed off on the Parent-Student Handbook ("Handbook").
3. The Handbook describes the desired dress codes for both male and female students. It states that "[t]atoos and body piercings, other than girls' earrings, are not allowed. Earrings must be limited to one earring per ear. Large, dangling, or hoop-type earrings are not allowed. Jewelry other than watches for boys or girls, and small earrings on girls, may not be worn." *See Exhibit 1*.
4. Prior to beginning school, Rocky Mountain conducted various learning assessments on John, while he was wearing his earrings, and admitted him into school.
5. Since the beginning of the 2019-2020 school year, John has consistently worn earrings to school. These earrings are small, blue, and consistent with the dress code policy as regards to female students.
6. On August 27, 2019, Mother was contacted by Meg Pace ("Ms. Pace"), John's

kindergarten teacher, informing her that "per our dress code, boys can not [sic] wear earrings at school." *See Exhibit 2*. Mother thanked Ms. Pace for the email and indicated that she believed the dress code policy was discriminatory and violated John's equal protection rights.

7. That same day, Nicole Blanc ("Ms. Blanc"), Rocky Mountain Dean of Students, emailed Plaintiff, stating "When RMCA opened, the school board voted upon and implemented a conservative uniform policy that allows boys to wear watches, but no other jewelry." *Id*. No further justification was provided for the discrepancy in who may wear earrings.
8. Plaintiff requested a formal hearing with Ms. Blanc and the school to discuss the dress code. The meeting was held on August 30. The parties failed to resolve the matter at that time. Mother then requested a formal meeting with the RMCA Board Members to "discuss unlawful discrimination regarding the uniform policy." *Id*.
9. Between October and November, Mother was contacted several times regarding her son's dress code violation both via email and by four "Oops Slips," but he continued to attend school. Mother maintained that enforcing the dress code was discriminatory and a violation of John's rights, and she continued to await a formal meeting with the Board.
10. Finally, Mother was informed that her concerns would be heard at the December 3 Board meeting. Although Rocky Mountain claimed that Mother was given an opportunity to address the Board and declined to do so, Mother disagrees and states that the Board never addressed her during the meeting or offered her an opportunity to speak on the issue.
11. Mother was informed after the Board meeting that Rocky Mountain would continue to maintain its dress code in regard to males wearing earrings. Mother was informed that John must comply with the dress code policy by December 9. *Id*. John continued to wear earrings to Rocky Mountain.
12. On December 11, Rocky Mountain called Mother and informed her that John would need to be picked up from school because he was suspended. Mother was also given a letter indicating John was suspended for a day. *see Exhibit 3*.
13. On December 12, John again wore his earrings to school. School officials met with

Plaintiff to ask whether John would be removing his earrings. Mother stated that John would not remove his earrings, and the school again suspended John. *See Exhibit 4*. On this date, however, Rocky Mountain indicated that it was considering disenrolling John because he continued to wear earrings in violation of the dress code. Later that day, school officials emailed Mother, stating, "As of December 12, 2019 your family has still refused to comply with our Uniform Dress Code Policy. Due to this refusal, and in consultation with our attorney and District 49, we will begin the process of dis-enrollment for [John] from Rocky Mountain Classical Academy. He may attend school…December 16, 2019 through Friday, December 20, 2019. On December 20th, 2019 RMCA will dis-enroll [John] from our roster…[W]e will contact his home school…to have his records transferred." *See Exhibit 5*.

II. LEGAL ARGUMENT

The standards for issuing a temporary restraining order ("TRO") and a preliminary injunction are the same. Citizens Alliance to Protect Our Wetlands v. Wynn, 908 F. Supp. 825, 829 (W.D. Wash. 1995); Jeffrey v. St. Clair, 933 F. Supp. 963 (D. Hawaii 1996). Further, it is well settled that the "granting or denial of a preliminary injunction is a decision which lies within the trial court's sound discretion, and the trial court's ruling will be reversed only when there has been an abuse of discretion." American Television & Com. Corp. v. Manning, 651 P.2d 440, 443-44 (Colo. App. 1982).

As a general principle, injunctive relief should not be "loosely granted." Crosby v. Watson, 355 P.2d 958, 959 (Colo. 1960) (upholding trial courts denial of preliminary injunction because plaintiff had failed to establish a "clear right to a temporary injunction"). This initial threshold is overcome once the trial court is satisfied that injunctive relief is an "urgent necessity" to prevent irreparable harm to the movant. Rathke v. MacFarlane, 648 P.2d 648, 653 (Colo. 1982). The test for whether an injunction should be granted is a "continuum in which the required showing of harm varies inversely with the required showing of meritoriousness." Rodeo

Collection, Ltd. v. West Seventh, 812 F.2d 1215, 1217 (9th Cir. 1987).

"[O]nce the trial court has determined that the threshold requirement has been met for the issuance of a preliminary injunction . . . it must then determine whether the moving party has established the prerequisites for preliminary relief" pursuant to Fed. R. Civ. P. 65(a). Rathke, 653. In exercising its discretion to grant or deny a preliminary injunction, the trial court must find that the moving party has demonstrated:

> (A) a reasonable probability of success on the merits;
>
> (B) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief;
>
> (C) that there is no plain, speedy, and adequate remedy at law;
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> (D) that the granting of a preliminary injunction will not disserve the public interest;
>
> (E) that the balance of equities favors the injunction; and
>
> (F) that the injunction will preserve the status quo pending a trial on the merits.

Id. ("If each criterion cannot be met, injunctive relief is not available.") (citations omitted).

A. Plaintiff Has a Reasonable Probability of Success on the Merits.

In determining whether or not a movant has a reasonable probability of success on the merits, "the trial court [is] obliged to assess the proper legal standard and applicable burden of proof which would be required at a subsequent trial on the merits." Rathke, 655.

A plaintiff has a reasonable probability of success on the merits if the movant "has shown that it is more likely than not" to prevail at trial. Cooper Distrib. v. Amana Refrig., 1992 U.S. Dist. LEXIS 17918, *6 (D.N.J. 1992):

> It is not required that plaintiff make out a case that is certain to prevail on final hearing, it is enough if there is shown a fair question as to the existence of the rights claimed, so that the court is satisfied their present state should be

preserved until final hearing and disposition.

American Inv. Life Ins. Co. v. Green Shield Plan, 358 P.2d 473, 477 (Colo. 1960) (dissent), *citing*, Western Auto Supply Co. v. Chalcraft, 148 N.E.2d 5592, 593 (Ill. App. 1958).

As discussed below, John has a "reasonable probability of success on the merits" because the dress code policy at issue violates John's civil rights and federal law. Rocky Mountain's policy allowing for females to wear earrings but not males is, on its face, arbitrarily discriminatory and a violation of Title IX. In June 1972, Title IX of the Education Amendments was signed into law, stating that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. §1681(a). Rocky Mountain is a charter school operated as part of Colorado Springs School District 49 subject to Colorado laws and District policies that apply to all public schools, and has been since its inception in 2013. Because Rocky Mountain receives federal financial assistance, it is required to comply with the requirements of Title IX.

RMCA's dress code policy states that "[t]atoos and body piercings, other than girls' earrings, are not allowed. Earrings must be limited to one earring per ear. Large, dangling, or hoop-type earrings are not allowed. Jewelry other than watches for boys or girls, and small earrings on girls, may not be worn." *See Exhibit 1*.

Though the 10th Circuit is largely silent (especially regarding recent caselaw) concerning Title IX as it relates to dress codes, other districts have addressed the matter. In Hayden ex rel. A.H. v. Greensburg Community School Corp., 743 F.3d 569, 15 (2014), the Seventh Circuit Court of Appeals held that plaintiffs were entitled to judgment on their Title IX claim because the school district's policy regarding hair length on male athletes applied only to the male teams, with no evidence concerning the content of any comparable grooming standard that applied to female teams. Hayden also held that the discrimination was intentional because the policy in question was protested by plaintiff, the policy was sustained, and it remained in place unmodified. That, the Court found,

amounted to the school district showing deliberate indifference to a known act of sex discrimination. Id., *see also* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290-291, 118 S.Ct. 1989, 1999, 141 L.Ed.2d 277 (1998).

The present case bares several similarities to the facts in Hayden. Rocky Mountain's dress code policy is clearly discriminatory as it applies only to boys. Females attending Rocky Mountain are permitted to wear earrings, showing no evidence of comparable grooming standards. Mother informed several Rocky Mountain employees on several occasions that the policy was discriminatory, and the RMCA Board reviewed the policy. The RMCA Board ruled to keep the policy in place, thus showing an intent to discriminate that is attributable to the school. As such, John has a reasonable probability of success on the merits.

Plaintiff also argues an Equal Protection violation brought pursuant to 42 U.S.C. §1983. Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State…subjects or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. §1983. Rocky Mountain is a public charter school acting under the color of the State and is, therefore, a State actor subject to a §1983 claim.

The Equal Protection Clause of the Fourteenth Amendment protects individuals against intentional, arbitrary discrimination by government officials and states, "no state shall deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. "Although heightened scrutiny…applies when government actions treat people differently based upon a suspect classification (such as race or national origin) or interfere with fundamental rights (such as freedom of speech or religion), courts presume government action to be valid and will sustain classification if they are rationally related to a legitimate government interest. Derry v. Marion Community Schools, 790 F.Supp.2d 839, 849 (2008). Derry found that, although parents have a

fundamental right to make decisions concerning the care, custody and control of their children, that right is not unqualified. Id., *see also* Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 396 (6th Cir. 2005) (quoting Troxel v. Granville, 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)). The school curriculum, hours of the school day, discipline, extracurricular actives, and dress code are generally committed to the control of state and local authorities. Although parents do not have a fundamental right to direct school dress code policies, gender is considered a quasi-suspect classification, requiring intermediate scrutiny in the equal protection context. Hayden, 577. "The justification for a gender-based classification thus must be exceedingly persuasive." Id., *citing* United States v. Virginia, 518 U.S. 515, 533, 116 S.Ct. 2264, 2275, 135 L.Ed.2d 735 (1996).

To pass intermediate scrutiny, the policy in question must further an important government interest and must do so by means that are substantially related to that interest. Rocky Mountain has an important government interest in creating policies and procedures that ensure for a safe and appropriate education and educational environment for all students. However, whether male students may wear earrings is not substantially related to that interest, nor does it further that interest. If the school's earring policy was designed to further a safe and appropriate educational environment, then the ban on earrings would apply equally to boys and girls, but it most certainly does not. Moreover, there is no indication that allowing males to wear earrings impacts the content of education, the access to education, or the environment in which students are receiving education. RMCA's dress code policy does not further any interest and cannot pass intermediate scrutiny.

B. Plaintiff Will Suffer an Irreparable Harm Unless a Preliminary Injunction Is Issued.

"Preliminary injunctive relief is an extraordinary remedy designed to protect a plaintiff from sustaining irreparable injury and to preserve the power of the district court to render a meaningful decision following a trial on the merits." Rathke v. MacFarlane, 648 P.2d 648, 651

(Colo. 1982).

It is clear that, in the absence of an injunction, John will be deprived of a meaningful judgment because Rocky Mountain will remove him from the school. Despite this earrings issue, John and his Mother otherwise feel comfortable at the school and want to remain there. John has a strong relationship with school educators and kids. Moving him in the middle of the year would be immensely disruptive to him. To date, John has already been denied an education for two days, and Rocky Mountain has informed Mother that it has begun disenrollment procedures against John. An injunction in this case will prevent irreparable educational loss and allow John to continue building the foundational education provided in the kindergarten class he has been attending for the last four months. The true virtue of an injunction is the anticipation and prevention of injuries that are probable and threatened. Wyman v. Jones, 228 P.2d 158, 162 (Colo. 1951). Thus, an injunction in this case is particularly appropriate because John has already been threatened with removal from Rocky Mountain. By issuing an injunction in this case, John. may continue to receive an education while the legality of the Rocky Mountain dress code is litigated.

Pursuant to F.R.C.P. 65, Plaintiff supports this motion with a sworn Affidavit of Plaintiff's Mother. Plaintiff has filed the Affidavit of Plaintiff's Mother seeking Level 1 restriction. The affidavit attests to the fact that on December 20, 2019, Mr. Doe will be disenrolled from the school and removed from the school's roster, thus Plaintiff faces imminent irreparable harm if a restraining order is not issued.

C. Normal Judicial Process Is Inadequate to Safeguard Plaintiff's Interests.

The rule that an injunction will not be granted where the remedy at law is full, adequate, and complete is generally applied to suits for an injunction against a levy or sale under an execution. Hercules Equipment Co. v. Smith, 335 P.2d 255, 257 (Colo. 1959) (there is not an adequate remedy at law if the remedy is doubtful or obscure).

An irreparable damage can be protected by an injunction. Swart v. Mid-Continent Refrigerator Co., 360 P.2d 440, 442-43 (Colo. 1961) (injunction was appropriate to prevent mere

confusion among the minds of customers that might damage plaintiff's business); Carroll v. Stancato, 354 P.2d 1018, 1019 (Colo. 1960) (holding that injunction was needed to prevent further damage to plaintiff's business); Electrical Products Consol. v. Howell, 117 P.2d 1010, 1012 (Colo. 1941) (even though business would only be harmed and not destroyed, the court enjoined an employee from violating a covenant not to compete and sharing employer's business information). This damage includes not only damage to a business but also educational damage. In Alabama and Coushatta Tribes of Texas v. Trustees of the Big Sandy Ind. Sch. Dist., 817 F.Supp. 1319, 1336 (1993), the Court found that a lack of access to education is an irreparable and irrevocable harm requiring an injunction. In Alabama, several American Indian students were given varying school suspensions for refusing to cut their hair based on religious beliefs. The Court found that removing these students from the classroom setting denied them access to teachers for assistance or tutorial help that might result in their inability to attain the educational level enjoyed by other students. Id. As with the students in Alabama, each day that John is prevented from attending school he is denied access to teachers and materials that his peers enjoy. To allow the normal judicial process to proceed will result in a denial of an adequate education for John.

Further, Defendant cannot argue that it would be unreasonably or unduly burdened by providing the requested relief. There is no indication that John's earrings have been a source of disruption in the classroom, that they have caused other disciplinary problems to other students, or that allowing John to continue wearing earrings would impact them in any other manner. To the contrary, John has worn earrings to Rocky Mountain since August 2019 with no negative impact to his peers or the school in general.

D. A Preliminary Injunction Will Serve the Public Interests.

Granting injunctive relief is in the public interest, as it promotes tolerance for diverse viewpoints and encourages acceptance of all students regardless of their physical appearance. In protecting the interests of John from Rocky Mountain, the general interests of the public are

also well served. Alabama, 1335, *see also* American Television & Com. Corp. v. Manning, 651 P.2d 440, 446 (Colo. App. 1982); Howe v. Varity Corp., 1989 U.S. Dist. LEXIS 17521, * 51 (D. Iowa 1989) ("the public interest is better served by the issuance of an injunction than by its denial").

E. Equity Favors Granting an Injunction.

"[B]y also requiring a finding by the trial court that the balance of equities favors injunctive relief, the trial judge is able to consider fully whether the threatened injury to the plaintiff outweighs the threatened harm the preliminary injunction may inflict on the defendant." Rathke v. MacFarlane, 648 P.2d 648, 654 (Colo. 1982).

The threatened injury to Plaintiff in this case far outweighs any potential harm the preliminary injunction may inflict on Rocky Mountain. Although Rocky Mountain may claim that the dress code is justified by legitimate pedagogical interests, there has been no showing that those interests have been impacted at all during the time John has attended school while wearing earrings. Further, any alleged problems Rocky Mountain may claim to incur are insubstantial in comparison to the right of John to receive an education. Alabama, 1336, *see also* Howe v. Varity Corp., 1989 U.S. Dist. LEXIS 17521, * 50-51 (D. Iowa 1989) ("The harm to plaintiffs here is the risk to their health, and the resulting social and economic consequences, whereas the defendants will incur only minimal financial risk").

F. The Injunction Will Preserve the Status Quo Pending a Trial on the Merits.

"The underlying purpose of a temporary injunction is to prevent a tort or wrong and to preserve status quo until a final hearing and determination as to the controverted rights of the parties." Spickerman v. Sproul, 328 P.2d 87 (upholding trial courts denial of preliminary injunction because no change in the situation creating an emergency that would entitle a party to injunctive relief). Presently, the status quo will be preserved through an injunction by allowing John to attend Rocky Mountain as he's done, without causing a disruption, since the beginning

of the 2019-2020 school year. Rather, it is only the failure to grant an injunction that will permanently and irreparably alter the existing status quo.

III. CONCLUSION

All other efforts to facilitate a constructive resolution of this dispute have failed. If a preliminary injunction is not granted, then Plaintiff will be forever precluded from his rightful access to an education with RMCA.

WHEREFORE, in reliance on the argument and supporting facts set forth above, Plaintiff respectfully asks the Court to grant the Plaintiff's application for a TRO, and to issue an Order requiring Rocky Mountain to show cause why a preliminary injunction against Rocky Mountain to continue to allow John to attend RMCA and wear earrings during his attendance should not be ordered.

DATED this 18th day of December, 2019.

s/ Igor Raykin
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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2019, I electronically filed the foregoing **PLAINTIFF'S Fed. R. Civ. P. 65 MOTION** with the Clerk of Court using the CM/ECF and emailed the foregoing to:

Eric Hall
evh@sparkswillson.com

s/ Chris Mack
Chris Mack, Paralegal