

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

No. 7:06-CV-66-BR

BENJAMIN ARTHURS, a minor, by and)
 through his next friend, REBECCA ARTHURS,)
)
 Plaintiff,)
)
 v.)
)
)
 SAMPSON COUNTY BOARD OF EDUCATION;)
 DR. L. STEWART HOBBS, JR., in his official)
 capacity as SUPERINTENDENT OF SCHOOLS;)
 and GAYNOR CANADY, in her official capacity)
 as PRINCIPAL OF MIDWAY HIGH SCHOOL,)
)
 Defendants.)

ORDER

Benjamin Arthurs, a minor plaintiff, filed this action by and through his next friend, Rebecca Arthurs, on 4 May 2006, alleging that defendants violated his rights to free speech, free exercise, due process and equal protection. The court denied defendants' motion to dismiss on 2 October 2006, and defendants filed on answer on 18 October 2006.

On 28 August 2006, plaintiff filed a motion for preliminary injunction. Defendants filed a response on 19 September 2006. Plaintiff filed a reply on 5 October 2006, which he sought to amend by motion filed on 20 October 2006. As a preliminary matter, the motion to amend the reply is ALLOWED. The motion for a preliminary injunction is ripe for review.

Facts

This case arose as a result of plaintiff's desire and attempt to distribute materials pertaining to the Day of Truth at Midway High School on or about 27 April 2006 in response to the Day of Silence, which purportedly took place on 26 April 2006. The Day of Silence is an annual day of

action intended to protest the harassment and bullying of and discrimination and violence against gay, lesbian, bisexual and transgender students and their allies. See www.dayofsilence.org. The Day of Truth, a response to the Day of Silence, was designed to “counter the promotion of the homosexual agenda and express an opposing viewpoint from a Christian perspective.” See www.dayoftruth.org. Plaintiff, currently a 10th grade student at Midway, asserts that he sought permission to wear a Day of Truth T-Shirt and a piece of fence, and to distribute Day of Truth flyers in the hallways of his school on 27 April 2006, and that his principal forbade him to do so. He proceeded to wear the T-Shirt and distribute the flyers anyway, and his principal gave him one day of in-school suspension for “insubordination” and causing a disruption in the school. (Pl.’s Mem., Ex. 4.)

There are numerous facts in dispute in this case.¹ The majority of those factual disputes are not pertinent, however, to the resolution of this motion for a preliminary injunction. The injunction is necessarily concerned with the future – plaintiff’s interest in distributing literature expressing his religious views, and defendants’ interest in curtailing plaintiff’s right to distribute such literature if the school feels that the distribution would interfere with the learning environment it is required to provide.

Plaintiff asks this court to enter a preliminary injunction, without condition of bond,

¹ Important factual disputes pertain to the manner in which plaintiff distributed his literature, the nature of his interaction with other students, and the alleged ensuing disruption of the learning environment. The court makes no conclusions as to these particular disputed issues of fact in the context of this motion.

Defendants argue that once they have demonstrated that plaintiff’s speech intruded upon the rights of other students or caused a disruption, plaintiff’s claim that his free speech rights were violated must fail. See Defs.’ Mem. at 14. Plaintiff’s claim in the context of this preliminary injunction motion, however, is that his rights continue to be violated by the school’s policies on the distribution of literature. Whether defendants could demonstrate that plaintiff acted badly on 27 April 2006 in the course of his distribution of literature would not affect this court’s assessment of the facial constitutionality of the school policies at issue and the risk of continuing harm to plaintiff if those policies are enforced as written.

enjoining defendants from enforcing their written policies prohibiting the distribution of all literature, including religious literature, and requiring defendants to permit, by written policy, the wearing of religious clothing. Accordingly, this motion requires consideration of the alleged harms to both plaintiff and defendants and an assessment, within the parameters of the preliminary injunction standard of review, of the facial constitutionality of the policies that defendants claim to be applying to plaintiff's requests to wear clothing with religious messages and to distribute religious literature.

Standard of Review

In determining whether to grant a preliminary injunction, a court must balance: (1) the likelihood of irreparable harm to the plaintiff if the injunction is denied; (2) the likelihood of harm to the defendant if it is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest.

Child Evangelism Fellowship of Md., Inc. v. Montgomery County Public Schools, 373 F.3d 589, 593 (4th Cir. 2004).

The irreparable harm to the plaintiff and the harm to the defendant are the two most important factors. If, after balancing those two factors, the balance "tips decidedly" in favor of the plaintiff, . . . , a preliminary injunction will be granted if "the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation." As the balance tips away from the plaintiff, a stronger showing on the merits is required.

Rum Creek Coal Sales v. Caperton, 926 F.2d 353, 359 (4th Cir. 1991) (citing, inter alia, Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 196 (4th Cir. 1977)).

Discussion

A. T-Shirts with Religious Messages

Plaintiff asserts in his verified complaint that Principal Canady told him he could not wear a Day of Truth T-Shirt on 27 April 2006 and that he has been warned by defendants not to wear any

religious T-shirts. (Compl. ¶¶ 1, 24, 29, 31-33.) As plaintiff acknowledges in his preliminary injunction motion, however, defendants' dress code does not address religious clothing. (Pl.'s Mem. at 2; Pl.'s Ex. 5 at 16-17.) Accordingly, that code does not prohibit people from wearing religious clothing. The overwhelming majority of the evidence submitted to the court in conjunction with this motion supports the factual finding that defendants do not, as a matter of policy, forbid or prohibit the wearing of T-shirts with religious messages. Numerous affidavits submitted by students and teachers indicate that the school does not prohibit religious T-shirts. Canady has testified that she did not prohibit plaintiff from wearing his Day of Truth T-shirt, that she did not punish him for wearing the Day of Truth T-Shirt, and that she does not prohibit the wearing of religious T-shirts generally. (Canady Aff. ¶¶ 16, 26.) Defendants' counsel has communicated the fact that defendants do not have or enforce any such prohibition to plaintiff's counsel. (Pl.'s Mem., Ex. 9 (10 August 2006 Letter from Schwartz & Shaw, P.L.L.C. to Alliance Defense Fund ("It is our understanding that the Sampson County Schools [have] never prohibited Ben Arthurs, or any other student, from wearing religious clothing. . . . The school system will agree to continue to allow students to wear t-shirts that do not violate the dress code adopted by the Sampson County Board of Education, and applied by Gaynor Canady at Midway High School."))

Because the court cannot conclude that the school has prohibited or is prohibiting plaintiff from wearing T-shirts with religious messages at this time, the court cannot conclude that plaintiff has shown that he is being harmed by defendants' current dress code policy. In the absence of any such harm, the court will not grant an injunction requiring defendants to write a new policy expressly permitting the wearing of clothing with religious messages.

The issues presented with respect to the policy governing distribution of literature at the

school and its enforcement are more complicated, however, and the court will turn to the preliminary injunction analysis as it pertains to that policy.

B. Distribution of Literature Policies

1. Harm to Plaintiff if Injunction is Not Allowed

Plaintiff argues that he is experiencing irreparable harm each day that the school will not permit him to speak about his religion in school. He asserts that the school has banned students of Midway from distributing any religious literature in violation of the students' constitutional rights. He believes he will continue to suffer harm until he is permitted to express his religious beliefs in that particular, non-disruptive manner. Plaintiff specifically requests an order from this court enjoining defendants from prohibiting the distribution of all literature.

Plaintiff has provided copies of two policies that appear to be pertinent to this case: the policy on student publications, (Pl.'s Mem., Ex. 10, JHCC Student Publications), and the policy on free materials distribution in schools, (*id.*, Ex. 11, KI Free Materials Distribution in Schools). In their brief, defendants treat the Free Materials Distribution Policy as the policy relevant to plaintiff's claims. (See Defs.' Mem. at 3.) Defendants characterize the Free Materials Distribution Policy as a "constitutionally permissible time, place, and manner restriction[]", (Defs.' Mem. at 4), and summarize that policy as one that "allows for distribution of literature that is approved, by placing it in a designated area for students to pick up or retrieve, if they wish to do so." (*Id.* at 3.) In fact, however, the Free Materials Distribution Policy provides as follows:

The Sampson County Board of Education reserves the right to exercise approval of free material and services from commercial, political, religious, or other non-school sources before [that material is] used in the schools. Careful consideration shall be given to such materials and services' educational quality and value to their relationship to the school curriculum as defined by the Basic Course of Study developed by the North Carolina State Board of Education.

It is the policy of the Sampson County Board of Education to require any organization, company representative, or individual who wishes to place posters, brochure, flyers, pamphlets, or materials of any kind in the Sampson County Schools to:

1. Contact the principal of the school for permission to bring the materials to school.
2. Make no effort to distribute or cause to have distributed any materials at the school prior to complying with number one above.
3. Leave the materials in the office or place designated by principal where they may be picked up by students, teachers, and public on a volunteer basis.

The Board of Education or its representative will not approve materials that are

1. Racially or ethnically inflammatory
2. Politically identifiable (partisan or non-partisan)
3. Not promoting patriotism
4. *Addressing religious preference or beliefs*
5. Not keeping with locally accepted mores

(Id.) (emphases added).²

First, it is unclear that this is actually a policy designed to apply to material provided or offered by a student. It appears, rather, to be a policy regulating the distribution of materials from non-school sources.³ In any event, whatever the policy intends to regulate, defendants rely on it here. Application of this policy as written would clearly harm plaintiff because the policy explicitly states that any materials addressing religious preference or beliefs will not be approved by the Board of Education or its representative for distribution.

² Whether or not defendants believe the Free Materials Distribution Policy is a time, place, and manner restriction, by its own terms it is clearly not content-neutral. See, Hedges v. Wauconda Community Unit School Dist. No. 118, 9 F.3d 1295, 1297-98 (7th Cir. 1995) (school policy on distribution of literature by students unconstitutional where policy lumped religious speech together with obscenity and libel for outright prohibition in junior high school).

³ In conjunction with his reply, plaintiff has offered School Board Policy K entitled "Community Relations" which provides: "This series deals with the school system's community relations, e.g., with the media, with PTAs, with citizen groups, with community use of school buildings and grounds, with complaints concerning school personnel, and with other governmental and private groups concerned with education." (Reply, Ex. 16.) Plaintiff argues that Policy K shows that Policy KI does not apply to student speech.

To the extent that the Day of Truth Organization or the Alliance Defense Fund approached the school and requested permission to provide the materials in question to students, Policy KI would certainly apply. For purposes of this motion, the court will accept defendants' assertion that Policy KI applies to plaintiff's request.

Defendants do not expressly address the policy's explicit prohibition of materials addressing religious preferences or beliefs. (See Defs.' Mem. at 18 (generally referencing the fact that there are categories of materials the Board of Education will not approve).) In their brief, however, defendants argue that "*in this case*, the Sampson County Board of Education policy on distribution of materials in schools was not used to regulate the content of plaintiff's speech," and that "the content of the flyer was not the basis for defendants' prohibition on its distribution." (Defs.' Mem. at 9 (emphasis added).) In support, defendants offer the contested fact that Canady did not even review plaintiff's materials prior to prohibiting their distribution. Regardless of how defendants utilized the cited policy in this case, however, which remains a matter of debate, the language of the policy itself renders it constitutionally problematic. In the context of this injunction, the court is concerned with current and future application and enforcement of the policy as written.

The other school policy that might pertain to the school's conduct here is the Student Publications Policy, which broadly provides that "[t]he possession, publication, posting, or distribution of any type of printed matter which has not had the review of the principal or his delegate is prohibited." (Pl.'s Mem, Ex. 9.) There are no guidelines informing the required review, and the policy itself does not set forth the review process applicable to denials of student requests. Plaintiff asserts that he will be harmed if the court fails to enjoin the school from enforcing or applying this policy because he is and will be unable to distribute printed religious materials to his fellow students at school. Plaintiff also asserts that this policy is an overbroad prohibition and prior restraint of written speech.

Defendant maintains that plaintiff has not shown that he will suffer irreparable harm if the injunction is denied because plaintiff "remains free to speak his message and to submit his materials

for placement in a designated, visible area where other students can retrieve the materials, if they so desire.” (Defs.’ Mem. at 6.) Because defendants rely on the Free Materials Distribution Policy, (Pl.’s Mem., Ex. 11), in support of their argument, and because, as explained above, the text of that policy states that materials addressing religious preferences or beliefs will not be approved, defendants have not provided a persuasive or convincing argument that plaintiff will not be irreparably harmed by the continued enforcement of the policies at issue.

2. Harm to Defendants if Injunction is Allowed

Defendants appear to argue that enjoining them from enforcing the Free Materials Distribution Policy as written will cause them irreparable harm because they will be unable to provide an undisrupted school session conducive to the students’ learning; they will be unable to maintain order and discipline; and they will be unable to address allegedly disruptive conduct such as plaintiff’s. (Defs.’ Mem. at 7.) Enjoining a prior restraint on or outright prohibition of religious speech, however, would not have the enumerated effects. Such an injunction will not, in any way, prohibit defendants from dealing expeditiously or effectively with actual disruption in the hallways or classrooms of Midway High School.

3. Plaintiff has Raised Serious Question as to Constitutionality of Defendants’ Policies

Because the court concludes that the balance of the harms tips substantially toward plaintiff, plaintiff need only show that he has raised a serious question as to the constitutionality of the policies at issue in order to prevail on his motion for a preliminary injunction. Because it remains unclear which policy may ultimately apply, the court will consider both.

The one sentence Student Publications Policy is broad and does not provide guidelines according to which the discretion granted by the policy should be exercised. In Quarterman v. Byrd,

453 F.2d 54 (4th Cir. 1971), the court reviewed a policy similar to the Student Publications policy at issue here. The Quarterman policy provided as follows: “Each pupil is specifically prohibited from distributing, while under school jurisdiction, any advertisements, pamphlets, printed material, written material, announcements or other paraphernalia without the express permission of the principal of the school.” The Quarterman court opined: “What is lacking in the present regulation, and what renders its attempt at prior restraint invalid, is the absence of both criteria to be followed by the school authorities in determining whether to grant or deny permission, and of any procedural safeguards in the form of ‘an expeditious review procedure’ of the decision of the school authorities.” Id. at 59. The Fourth Circuit held that the regulation was invalid and that its enforcement should have been enjoined. Id. at 60.

In a subsequent case, the Fourth Circuit explained that “[i]n the secondary school setting First Amendment rights are not coextensive with those of adults and while such rules of prior restraint may be valid, they nevertheless come to this court with a presumption against their constitutionality.” Baughman v. Freienmuth, 478 F.2d 1345, 1348 (4th Cir. 1973) (holding prior restraint regulation pertaining to written materials students wished to distribute invalid where policy lacked the procedural safeguard of a specified and reasonably short period of time in which the principal was required to act on a student request, where it lacked an expeditious review procedure, and where the proscription against distribution was unconstitutionally vague). The Baughman Court specifically opined that “a regulation requiring prior submission of material for approval before distribution must contain narrow, objective and reasonable standards by which the material will be judged.” Id. at 1350.

In Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975), the court applied both Quarterman and

Baughman in its encounter with a far more detailed prior restraint policy that expressly permitted the distribution of materials by a student in designated areas “as long as the distribution of said literature does not reasonably lead the principal to forecast substantial disruption of or material interference with school activities.” Id. at 383. Addressing the facial constitutionality of the policy before it, the court found the policy invalid because the policy gave “no guidance whatsoever as to what amounts to a ‘substantial disruption of or material interference with’ school activities; and, equally fatal, it fail[ed] to detail the criteria by which an administrator might reasonably predict the occurrence of such a disruption.” Id. The Nitzberg court also found the procedures to be followed by the school administration unclear and the nature of the review itself too vague to pass constitutional muster. Id. at 384. See also Johnston-Loehner v. O’Brien, 859 F. Supp. 575 (M.D. Fla. 1994) (granting permanent injunction of content-based school policy requiring prior approval of written student speech).

The Student Publications Policy, which explicitly requires submission to and approval by the principal prior to possession or distribution of any type of printed matter, is precisely one sentence in length, and lacks criteria for approval or denial of a given student’s request, any time frame within which a decision will be rendered with respect to a student’s request, and any reference to or recitation of the relevant review procedure.⁴ Like the policies in the foregoing cases, this policy is a matter of constitutional concern.

While the Free Materials Distribution (or non-school source material) policy is more lengthy, it too apparently fails to meet the criteria set forth in the foregoing Fourth Circuit cases. The policy

⁴ While Sampson County Board of Education has a general student grievance procedure, (see Pl.’s Mem., Ex. 5, p. 39), it is not clear from the Free Materials Distribution Policy that the grievance procedure is applicable to decisions made under that policy. It is also unclear whether such a process would be sufficiently expeditious given the nature of the right at issue, free speech.

merely requires defendants to consider “such materials and services’ educational quality and value” and the relationship of such materials “to the school curriculum as defined by the Basic Course of Study developed by the North Carolina Board of Education.” (Pl.’s Mem., Ex. 11.) Such limited impositions on the exercise of discretion would not seem to provide an adequate protection against viewpoint discrimination. See Child Evangelism Fellowship of Maryland v. Montgomery County Public Schools, 457 F.3d 376, 387 (4th Cir. 2006) (“CEF”) (“even in cases involving nonpublic or limited public forums, a policy . . . that permits officials to deny access for any reason, or that does not provide sufficient criteria to prevent viewpoint discrimination, generally will not survive constitutional scrutiny”).⁵ Moreover, the Free Materials Distribution Policy’s attempt to provide specific criteria for disapproval, i.e., the list of materials that will not be approved for distribution, expressly prohibits the approval of religious materials.⁶ See CEF, 457 F.3d at 379 (describing as “well-taken” school’s concession that excluding an entity from the take-home flyer forum because of its proselytizing religious viewpoint was unconstitutional viewpoint discrimination); Burch v. Barker, 861 F.2d 1149, 1157 (9th Cir. 1988) (concluding that a policy which subjects all non-school sponsored communications to predistribution review for content censorship violates the First Amendment).

In light of the foregoing case law, the court concludes that plaintiff has, at the very least,

⁵ In CEF, where the policy at issue provided virtually unlimited discretion to control access to a take-home flyer forum and imposed no guidelines as to how that unlimited discretion should be exercised, the court sustained CEF’s challenge to the constitutionality of the policy.

⁶ Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 509 (1969), Quarterman, Baughman, and Nitzberg all support the proposition that “school authorities may by appropriate regulation, exercise prior restraint upon publications distributed on school premises during school hours in those special circumstances where they can ‘reasonably “forecast substantial disruption . . .”’ on account of such printed material.” See Quarterman, 453 F.2d at 58. The Free Materials Distribution policy does not mention the substantial disruption factor, but rather specifically preempts certain speech based on the content of that speech.

raised a serious question as to the constitutionality of the school's policies, and the court will enjoin defendants from enforcing both the JHCC Student Publications policy and the KI Free Materials Distribution in Schools Policy, as written, while this case is pending.

4. The Bond Requirement

Federal Rule of Civil Procedure 65(c) prohibits the court from issuing a preliminary injunction "except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." The Rule places the amount of the bond in the discretion of the court.

In Westfield High School L.I.F.E. Club v. City of Westfield, 249 F.Supp.2d 98, 128-29 (D. Mass. 2003), a case in which a high school bible club requested the court to enjoin their school's enforcement of its allegedly unconstitutional speech policies, imposition of in-school suspensions on club members, and prohibition of the club members' distribution of religious literature to other students during non-instructional time, the court granted an injunction and waived the bond requirement despite the language of Rule 65(c). In that case, the plaintiff parents had all submitted affidavits indicating their financial inability to post a security bond, and the defendants had not indicated, nor did the court find, any harm, financial or otherwise, that would result in case the preliminary injunction was later vacated. The Westfield court noted that the "the First Circuit has recognized an exception to the security bond requirement in Fed. R. Civ. P. 65(c) in suits to enforce important federal rights or public interests" and expressed its beliefs that the "public interest is served when public high school students seek to preserve their rights to free expression and free exercise of religion . . . [and that] requiring a security bond in this case might deter others from exercising their

constitutional rights.” 249 F.Supp.2d at 128-29.

In the absence of a Fourth Circuit case on this issue, the court will impose a bond as required by the language of Rule 65, but will set that bond at \$50.00 in light of the following factors: plaintiff’s request for waiver; plaintiff’s effort to enforce an important federal right; the serious and substantial questions about the constitutionality of defendants’ policies that plaintiff has raised; and the lack of any apparent financial harm to defendants in the event the preliminary injunction is vacated. See Citizens for a Responsible Curriculum v. Montgomery County Public Schools, et al., No. Civ. A. AW-05-1194, 2005 WL 1075634, *12 (D. Md. May 5, 2005) (awarding temporary restraining order enjoining defendants from distributing and teaching materials allegedly endorsing a homosexual lifestyle and waiving bond requirement where plaintiffs were non-profit organizations and issuance of order would not result in harm to defendants); Smyth v. Carter, 168 F.R.D. 28, 34 (W.D. Va. 1996) (granting preliminary injunction and waiving bond requirement in light of financial status of plaintiffs).

Conclusion

Plaintiff’s motion for a preliminary injunction is ALLOWED in part and DENIED in part. The motion is DENIED to the extent plaintiff requests that defendants be required to draft a dress code that explicitly permits the wearing of clothing with religious messages. The motion is ALLOWED with respect to the application or enforcement of school policies affecting the distribution of literature by students, i.e., the Student Publications Policy and the Free Materials Distribution Policy, and defendants are hereby ENJOINED from enforcing the JHCC Student Publications Policy and the KI Free Materials Distribution Policy, as written, for the pendency of these proceedings. This injunction will become effective upon plaintiff’s posting of a bond in the

amount of \$50.00.

The court's decision to enjoin the application or enforcement of these policies should not be construed as an indictment of defendants' decision to impose an in-school suspension on plaintiff for his activities on 27 April 2006. The court is not, in the context of this motion, taking any position whatsoever on the facts as they occurred with respect to the Day of Silence/Day of Truth incidents upon which this case is premised. The actions that defendants need to take to maintain order in the hallways of Midway High School raise issues separate and apart from the validity of the particular prior restraint policies that this court has temporarily enjoined defendants from enforcing. While the court enjoins the school from applying the policies as written, the court most emphatically does not prohibit defendants from taking reasonable and adequate steps to respond to disturbances or disruptions in the hallways of the Midway High School when and if such disruptions occur. Moreover, defendants remain free to draft policies governing distribution of materials by students that comport with the guidance provided by Fourth Circuit case law cited herein.

This 2 November 2006.



W. Earl Britt
Senior U.S. District Judge

ba/scbe/jcd