IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION

MOMS FOR LIBERTY – BREVARD COUNTY, FL, et al.

Plaintiffs, CASE NO.: 6:21-cv-1849-RBD-GJK

vs.

BREVARD PUBLIC SCHOOLS, et al.,

Defendants.

_____/

DEFENDANTS' RESPONSE TO PLAINTIFFS' TIME SENSITIVE MOTION FOR A TEMPORARY RESTRAINING ORDER AND INCORPORATED MEMORANDUM OF LAW

Defendants, BREVARD PUBLIC SCHOOLS ("BPS") and MISTY HAGGARD-BELFORD ("Belford") (collectively, "Defendants"), by and through undersigned counsel, hereby respond in opposition to the Time Sensitive Motion for a Temporary Restraining Order ("Motion") filed by Plaintiffs, MOMS FOR LIBERTY – BREVARD COUNTY, FL, ASHLEY HALL, AMY KNEESSY, KATIE DELANEY, and JOSEPH CHOLEWA (collectively, "Plaintiffs"), and state:

INTRODUCTION

Plaintiffs cannot establish that a temporary restraining order or preliminary injunction is necessary because they lack an imminent threat of irreparable harm. As described below, Defendants are in the process of

amending the current Public Participation Policy ("Policy") pursuant to the 11th Circuit's rulings. The requisite rulemaking process to implement such an amendment is detailed and time-consuming. In the meantime, BPS' Board—and in particular, its Chair—has refrained, and will continue to refrain, from applying the portions of the current Policy with which the 11th Circuit took issue.

BACKGROUND

A. BPS Must Follow the APA's Rulemaking Process to Amend the Policy.

BPS is an agency governed by Florida's Administrative Procedures Act ("APA"). *See* § 120.52(1)(a), Fla. Stat. (2024) ("'Agency' means the following officers or governmental entities if acting pursuant to powers other than those derived from the constitution: . . . educational units . . . ."); *id.* at (6) ("'Educational unit' means a local school district . . . ."). BPS' Policy at issue in this case is an agency rule that BPS may only adopt, repeal, or amend per the rulemaking procedures of the APA. *See id.* at (16) ("'Rule' means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule."); *see also* § 120.54(3), Fla.

Stat. (2024) (describing procedures for adopting, amending, or repealing agency rules); BPS Policy Manual Ch. 0000, § po0131 (Oct. 15, 2024) (BPS bylaw providing that BPS policies must adhere to APA rulemaking procedure) (available at https://go.Boarddocs.com/fl/brevco/Board.nsf/Public# (last accessed Jan. 18, 2025)).

Amending or repealing a rule under the APA is no easy feat for BPS. Prior to adopting a policy (*i.e.*, a rule), BPS' Superintendent must first publish notice that the BPS Board intends to develop a policy, after which the BPS Board may conduct workshops to develop the proposed policy. *See* BPS Policy Manual Ch. 0000, § po0131, at "Policy Development." Once the Board determines that it will consider a proposal to adopt, repeal, or amend a policy, the Superintendent must publish written notice of the intended action with, *inter alia*, the full text of the proposed rule or amendment and a summary thereof. *See* § 120.54(3)(a)(1), Fla. Stat. (2024); *see also* BPS Policy Manual Ch. 0000, § po0131, at "Adopting Policies" subsection (A). The notice must be published at least 28 days prior to the intended action. § 120.54(3)(a)(2), Fla. Stat. (2024); *see also* BPS Policy Manual Ch. 0000, § po0131, at "Notices." Then, upon the request of any affected person, BPS' Board must conduct a public hearing within 21 days after the date of publication. § 120.54(3)(c)(1), Fla. Stat. (2024); *see also* BPS Policy Manual Ch. 0000, § po0131, at "Adopting Policies" subsection (B). BPS may not adopt a policy "less than 28 days" after the

publication of notice. § 120.54(3)(e)(2), Fla. Stat. (2024); *see also* BPS Policy Manual Ch. 0000, § po0131, at "Adopting Policies" subsection (D). A rule becomes effective upon adoption by the BPS Board. *See* BPS Policy Manual Ch. 0000, § po0131, at "Adopting Policies" subsection (F).

To illustrate the process to which BPS must adhere, BPS' Board adopted the most recent version of the Policy on October 15, 2024 at a final approval hearing. *See* https://www.youtube.com/watch?v=VxhaUsrj19Y at 16:32-17:41 (last accessed Jan. 18, 2025). The adoption of this iteration of the Policy followed the rulemaking procedure described above. The Policy revisions were first raised as a possibility in June 2024 at a workshop. *See* https://agenda.brevardschools.org/publishing/june-18-2024-work-session/minutes.html (last accessed Jan. 18, 2025) (meeting minutes of June 18, 2024 workshop); https://agenda.brevardschools.org/content/files/policies-for-october-15th-approval-sept-10-sept-17th-worksession-and-october-1st-rule-development-public-hearing-1_1.pdf at 10-12 (last accessed Jan. 18, 2025)); https://agenda.brevardschools.org/content/files/summary-of-proposed-policy-revisions-volume-25-number-1-june-2024-policy-update_4.pdf (last accessed Jan. 18, 2025). The BPS Board conducted a public workshop on September 10, 2024 to discuss changes to the proposed revisions. *See* https://agenda.brevardschools.org/publishing/september-10-2024-work-session-policy-only/minutes.html (last accessed Jan. 18, 2025) (meeting

minutes of September 10, 2024 workshop). On October 15, 2024, the Board conducted a final hearing on the proposed amendment, at which the Board allowed public comment on the amendment and then voted to adopt it. *See* https://agenda.brevardschools.org/publishing/october-15-2024-special-Board-meeting-final-public-hearing-adoption-of-policy-changes/minutes.html (last accessed Jan. 18, 2025) (meeting minutes of October 15, 2024 final adopting hearing meeting).

The aforementioned statutes and bylaws preclude BPS from simply providing "written confirmation" through an email from counsel that BPS will revise its Policy. Also, as previously explained to Plaintiffs' counsel, Defendants' counsel cannot just pick up the phone or send a quick email to BPS' in-house counsel to obtain BPS Board approval to confirm the implementation of certain changes to the Policy in settlement of Plaintiffs' demands. Not only must BPS must follow the APA's rulemaking process to amend the Policy, but under Florida's Sunshine Law, any privileged sessions between undersigned counsel and BPS' attorney to discuss settlement and strategy related to litigation expenditures—known as "shade sessions"—must adhere to the requirements of § 286.011(8), Florida Statutes (2024). Those requirements include BPS' attorney announcing during a public meeting that he or she wishes to obtain the advice of outside counsel; giving public notice of the attorney-client session; and having the session transcribed by a court

reporter. *See id.* In short, the process for responding to Plaintiffs' demands is more complex than might otherwise be the case when a local government agency and its policies are not at issue.

That being said, the rulemaking process that the Board must follow to amend the Policy in accordance with the 11th Circuit's ruling is already underway, with BPS having conducted a publicly-noticed shade session with counsel on January 7, 2025. *See* Declaration of Gene Trent ("Trent Decl.") attached hereto at ¶ 15. Additionally, BPS' Board plans to hold a public workshop meeting prior to its regular meeting on January 21, 2025 and intends to utilize the workshop to discuss revisions to the Policy. *Id.*

B. Plaintiffs Lack any Evidence that Defendants have Applied the Portions of the Policy Deemed Unconstitutional by the 11th Circuit.

Plaintiffs do not point to any instances in which Defendants applied the portions of the Policy deemed unconstitutional by the 11th Circuit since the issuance of the 11th Circuit's opinion. That is because no such instances occurred. Defendants have not applied the Policy to interrupt any public speakers during any Board meeting since the entry of the 11th Circuit's ruling. *See* Trent Decl. at ¶ 12.

For example, a public speaker discussing a proposed amendment to a policy unrelated to this case implied that the amendment was for the personal benefit of Board members Matt Susin and Gene Trent, stating, "Looking at

you, Mr. Susin. Looking at you, Mr. Trent." *See* https://www.youtube.com/watch?v=VxhaUsrj19Y at 38:30-39:58 (last accessed Jan. 18, 2025). That same speaker directly criticized Matt Susin for including student depictions on his campaign page without interruption. *Id.* 1:01:30-1:02:10. Another public speaker read deposition testimony given by Matt Susin in an unrelated case and addressed questions directly to Mr. Susin. *See* https://www.youtube.com/live/Wbxvffv_POI at 1:08:44-1:11:49 (last accessed Jan. 18, 2025). Another directly addressed Board members Matt Susin, Gene Trent, Megan Wright, and the Superintendent concerning the firing of BPS' communications director, calling the named Board members and Superintendent inept and corrupt and accusing them of a lack of transparency, integrity, and honesty. *See* https://www.youtube.com/watch?v=nvXB4vy4bZc at 44:44-45:25 (last accessed Jan. 18, 2025). A subsequent speaker also accused Matt Susin of unjustly firing BPS' communications director and criticized the Superintendent, directly spoke to Jennifer Jenkins, and addressed Megan Wright for posting a "conspiracy theory" to social media, again without interruption. *Id.* at 46:55-49:22. These comments were personally directed to Board members and some were abusive, but the BPS Chair did not interrupt any of the comments.

BPS' Board Chair interrupted three speakers at BPS Board meetings since the 11th Circuit issued its opinion, and none of the occurrences involved

application of the Policy's prohibitions on abusive, personally directed, or obscene language. *See* Trent Decl. ¶ 12. The BPS Chair interrupted one speaker on October 15, 2024 when he began to provide comments on a policy amendment that was not yet up for discussion, stating that the amendment on which the speaker was commenting was next up on the agenda. *See* https://www.youtube.com/watch?v=VxhaUsrj19Y at 59:50-1:00:30 (last accessed Jan. 18, 2025). The speaker then delivered his comments uninterrupted when the relevant policy amendment was brought up for discussion. *Id.* at 1:00:48-1:02:10.

A second interruption occurred on October 22, 2024, when a speaker directly addressed Matt Susin, stating, "Hey Matt, you like my t-shirt? How does it make you feel? It's kinda tight?" The Chair then stated, "It's irrelevant." *See* https://www.youtube.com/watch?v=nvXB4vy4bZc at 54:39-55:00. This was an application of the Policy's prohibition on irrelevant speech, which was not at issue in this case and was not addressed in the 11th Circuit's opinion. The speaker then continued without further interruption, still speaking directly to Mr. Susin and discussing texts that he allegedly sent to a county commissioner, calling Mr. Susin a "hypocrite" and a "joke," and asking if he was tan because he was "running around campaigning." *Id.* at 55:00-57:25.

The third interruption occurred on December 10, 2024, when the Board Chair briefly requested that a speaker not identify a student by name when

the speaker accused the student of sexually abusing the speaker's child. *See* https://www.youtube.com/live/Wbxvffv_POI at 1:14:18-35. This was for purposes of protecting the safety and well-being of the named student and not because the comment in question was abusive, personally directed, or obscene. *See* Trent Decl. ¶ 9.

As described in the attached Declaration of Gene Trent, BPS' current Board Chair, neither Mr. Trent nor, to his knowledge, any BPS Board member intends to apply the Policy in any future meeting to prevent comments that might be considered abusive, personally-directed, or, insofar as a speaker reads from a public school library book, obscene. *Id.* at ¶ 16. The opening statement made by Mr. Trent at the November 2024 and December 2024 meetings regarding application of the Policy to public comments was part of a standard script that was not updated because the Policy has not yet been amended per the rulemaking process. *Id.* at ¶ 8. Mr. Trent intends to refrain from citing to the current version of the Policy in any way going forward. *Id.*

ARGUMENT

A. A Temporary Restraining Order is Unnecessary Because Plaintiffs Lack an Imminent Risk of Irreparable Harm.

Plaintiffs lack an imminent risk of irreparable harm. Therefore, a temporary restraining order or preliminary injunction is unnecessary.

A preliminary injunction or temporary restraining order is an extraordinary and drastic remedy not to be granted unless the movant can establish each of the four prerequisites. *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000). To be entitled to a temporary restraining order or preliminary injunction, Plaintiffs must demonstrate the imminent and irreparable nature of a threatened injury. *See Nken v. Holder*, 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L. Ed. 2d 550 (2009); Fed. R. Civ. P. 65(b)(1)(A); M.D. Fla. L.R. 6.01(b)(2). "Importantly, the possibility of an irreparable injury is not enough." *State of Fla. v. Dep't of Health & Human Servs.*, 19 F.4th 1271, 1291 (11th Cir. 2021) (citing *Winter v. NRDC*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L. Ed. 2d 249 (2008)); *see also Nken*, 556 U.S. at 434-35. "[E]ven if Plaintiffs establish a likelihood of success on the merits, the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper." *Siegel*, 234 F.3d at 1176

An alleged violation of constitutional rights does not conclusively establish irreparable harm. *Id.* at 1177. "The only areas of constitutional jurisprudence where we have said that an on-going violation may be presumed to cause irreparable injury involve the right of privacy and certain First Amendment claims establishing an imminent likelihood that pure speech will be chilled or prevented altogether." *Id.* at 1178.

Plaintiffs have not established an "imminent likelihood" that their speech will be chilled. Plaintiff Amy Kneessy contends that the Board Chair's blanket recitation of the current iteration of the Policy when opening public comments in the November and December 2024 Board meetings prevents her from speaking. However, as described above and reflected in the videos of these meetings, numerous speakers made personally directed and even abusive statements toward Board members without interruption. By refraining from implementing the current Policy's restraints on personally directed and abusive comments, the BPS Board Chair demonstrated that there is no imminent threat to Kneessy if she wishes to present personally directed or abusive statements against particular BPS staff members at future meetings.

Furthermore, even if Kneessy's speech was chilled at the November and December 2024 meetings due to the Chair's opening references to the current version of the Policy, that is insufficient to establish the need for a preliminary injunction or temporary restraining order. Injunctions serve to "forestall future violations" rather than punish for actions that occurred in the past. *See U.S. v. Ore. State Med. Soc'y,* 343 U.S. 326, 333, 72 S.Ct. 690, 96 L. Ed. 2d 978 (1952). As established by the attached Declaration of Gene Trent, the current BPS Board Chair, Mr. Trent—the only member of the Board authorized to preside over meetings—has no intention of applying the Policy's proscriptions against abusive, personally directed, or, to the extent that a commenter reads from a

school library book, obscene speech to public comments at Board meetings. In other words, Mr. Trent intends to adhere to the rulings issued by the 11th Circuit in applying the Policy during future Board meetings (and already adhered to the 11th Circuit's rulings in the November and December meetings). It is also Mr. Trent's understanding that other Board members intend to act in the same manner to the extent that they have any ability to apply the Policy. Mr. Trent plans to forego mentioning the Policy whatsoever in future Board meetings to avoid any confusion or chilling effect that a citation to the Policy may have on public commenters.

The Board's previous actions in not applying the current Policy, together with Mr. Trent's stated intentions, demonstrate that there is not an imminent threat of irreparable harm to Plaintiffs. Accordingly, the Court should find that Plaintiffs cannot establish the need for a temporary restraining order or preliminary injunction and deny Plaintiffs' Motion.

CONCLUSION

Because Plaintiffs lack any imminent threat of irreparable harm, a temporary restraining order or preliminary injunction is unwarranted. The Court should therefore deny Plaintiff's Motion.

Respectfully submitted this 20th day of January, 2025.

/s/ Gennifer L. Bridges
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of January, 2025, a true and correct copy of the foregoing was filed via the CM/ECF system, which will provide electronic notice to the following counsel of record:

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