# TWENTIETH JUDICIAL CIRCUIT
# OF VIRGINIA


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June 8, 2021

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Re: *Byron Tanner Cross v. Loudoun County School Board, Scott A. Ziegler and Lucia Villa Sebastian*; CL21-3254

Dear Counsel,

This matter was before the Court upon the filing of Plaintiff's Emergency Motion for Temporary Restraining Order and Preliminary Injunction filed June 1, 2021. The Court granted the request for emergency relief and scheduled the Motion to be heard on Friday, June 4, 2021. The underlying Verified Complaint for Declaratory, Injunctive and Additional Relief was also filed on June 1, 2021 and has not been scheduled for a full hearing.

Defendants appeared specially through counsel to quash service and contest jurisdiction. The Court heard argument from both counsel whereupon the Motion was ***denied*** for the reasons stated on the record. The Court inquired of counsel for the Defendants if they wished to participate in the emergency hearing before the Court, and after consultation, the Defendants elected to proceed and participate, thereby making such issues regarding service moot.

## Facts / Evidence

The Court inquired of the parties how they wished to proceed as it related to the presentation of facts and evidence to be considered by the Court. The parties elected to submit evidence via documentary submission as well as via proffer, to which was not objected by either party.

The evidence before the Court consists of the facts contained in Plaintiff's Verified Complaint to include Exhibits A through F, three Declarations submitted by the Defendants, as well as some additional representations made orally by both counsel, some of which were based on inquiries made by the Court.

## Analysis

There was no dispute by the parties as to the broad authority of Circuit Courts to issue injunctive relief to the Plaintiff.[1] Additionally, the parties were in agreement as to the four factors that a Court is to assess when determining whether or not to issue a temporary injunction.[2] More specifically, they are:

I. Is the movant likely to prevail on the merits of the case,
II. Is the movant likely to suffer irreparable harm absent such relief,
III. Does the balance of equities tip in favor of the movant, and
IV. Is the relief sought in the public interest.

It is well settled in over a century of jurisprudence that injunctive relief is an extraordinary measure within the sound discretion of the Court, which "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Production Co. v. Gambell*, 480 U.S. 531, at 542 (1987).

The facts of this case are essentially not in dispute. The controlling caselaw referenced during the arguments of counsel was also largely not in dispute, with some exception on the application. This case turns on the respective application, assessment, and weight of the facts.

### I. Likelihood the Movant will Prevail on the Merits

Plaintiff first contends that his suspension was an act of retaliation following his exercise of his rights to free speech in that, 1) his speech was constitutionally protected, 2) the Defendants' retaliatory action adversely affected the Plaintiff's constitutionally protected speech, and 3) there was a causal relationship between the speech and the action.[3]

Whether the Plaintiff's speech at the School Board meeting was protected is determined by applying the standards set forth in *Pickering v Board of Education*; 391 U.S. 563 (1968). More specifically, was Plaintiff speaking as a citizen on a matter of public concern and do Plaintiff's interests in speaking outweigh Defendants' in restricting the Plaintiff.

Here, it is clear the Plaintiff was speaking as a citizen, not in his official capacity. His speech was not conducted at his usual place of employment, occurred during non-working hours and at a forum where public comment was invited. Plaintiff had to abide by the same process to speak as any other citizen. Although this was not formally conceded by the Defendants, analysis of this was not argued.

It is further apparent that the subject matter upon which the Plaintiff spoke was one that can only be described as a "matter of public concern." The enactment of a school policy as it relates to transgender issues, as well as the expected conduct of staff and students within the public school

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[1] Virginia Code §8.01-620.
[2] *Winter v National Resources Defense Council, Inc.*, 555 US 7 (2008).
[3] *Booker v South Carolina Dept. of Corrections*, 855 F.3d 533 (4th Cir. 2017); *Huang v. Board of Governors*, 902 F.2d 1134 (4th Cir. 1990).

system, falls squarely withing this scope. Additionally, Defendants referenced related school policies on this same subject matter as well as related Virginia statutes and Federal law. Laws and policies enacted by elected legislators, by their very nature, invite political discourse. They are on their face, matters of public, political and societal interest.[4]

Additionally, the Court finds that the Plaintiff's public comments do not fall within a class of unprotected speech as argued by Defendants, was not "solely a private dispute," or consistent with the standards for exceptions as outlined in *Brooks v Arthur*, 685 F.3d 367 (4th Circuit 2012).

Lastly, when assessing the *Pickering* balancing, the Court must determine whether the Plaintiff's First Amendment expression outweighs the Defendants' interest in restricting the speech. In order to assess this, "we must take into account the context of the employee's speech" and "the extent to which it disrupts the operation and mission" of the institution.[5] The thrust of Defendants' argument centers around the "disruption" caused by the Plaintiff's comments as being the catalyst which necessitated the Plaintiff's suspension. In support of this, Defendants point to the nine "*Ridpath* factors" in assessing this and whether the disruption

(1) impaired the maintenance of discipline by supervisors;
(2) impaired harmony among coworkers;
(3) damaged close personal relationships;
(4) impeded the performance of the public employee's duties;
(5) interfered with the operation of the institution;
(6) undermined the mission of the institution;
(7) was communicated to the public or to coworkers in private;
(8) conflicted with the responsibilities of the employee within the institution; and
(9) abused the authority and public accountability that the employee's role entailed.

The Court, in weighing all factors, notes that for many of them, there was simply an absence of evidence. For others, the evidence lacked the persuasiveness that would weigh in support of Defendants' actions. Defendants point to six emails received from five families of Leesburg Elementary School students requesting that their child not be instructed by the Plaintiff. Defendants' argument also pointed to the fact that Plaintiff had to be reassigned Morning Duty. On the morning of May 26, 2021 his supervisor reassigned him "to help avoid any confrontation or issues between Mr. Cross and parents."[6] However, it should be noted that, based on the time stamps of the emails, the first parental complaint was sent at 6:16 a.m. on May 26, 2021. The remainder were sent at 11:07 a.m., 12:01 p.m., 3:29 p.m., and 3:34 p.m. the same day, all well after Morning Duty would have concluded.[7] This suggests that no actual disruption to school operations occurred at the time the Plaintiff was reassigned duties.

The sixth email that Defendants reference was sent on June 2, 2021 at 10:36 p.m. Defendants also reference continuing emails and communication from parents not offered to the

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[4] While the underlying subject matter of transgender policies within the school system is the topic that precipitates this action, the Court specifically notes that this Opinion makes no finding with respect to the constitutionality or merits of the underlying policies. The content of such policies are the decision of the legislative branches of government and are not currently before the Court for review.

[5] *Ridpath v Board of Governors Marshall University*, 447 F.3d 292 (4th Circuit 2006); *McVey v. Stacy*, 157 F.3d 271 (4th Circuit 1998).

[6] See Declaration of Shawn Lacey.

[7] The Court notes that when reviewing the content of the emails sent to the school, some of the beliefs and assertions expressed by parents regarding Plaintiff's anticipated future conduct, are wholly inconsistent with his statements to the School Board. The Defendants acknowledge viewing the Plaintiff's statements and were readily aware of these same inconsistencies at the time the suspension was issued.

Court. The Court declines to give weight to the extent of disruption relied upon by the Defendants based on any communication received related to Plaintiff's speech after such time that Defendants took action to suspend Plaintiff from his employment. This includes the June 2, 2021 email. The determination to suspend Plaintiff was made on the evening of May 26, 2021. The Court makes this finding based on the facts contained in Plaintiff's Verified Complaint[8] as well as the letter of suspension issued the morning of May 27, 2021.

Upon inquiry to the parties by the Court, it was represented by the Plaintiff that the Leesburg Elementary School student population was approximately 500-600. The Defendants believed the student population to be 391, based on information published by the Virginia Department of Education for the Fall 2020. In either scenario, the Court views the magnitude of parental complaints to be *de minimis* given the size of the Leesburg Elementary School community and could not reasonably be construed to be so disruptive to school operations as to justify the action taken by Defendants.

These facts are not exclusive to the Court's consideration but are reflective of some that were given greater weight than others not specifically mentioned herein. The Court finds that in balancing all of the factors and weighing the facts presented, the Plaintiff's interest in expressing his First Amendment speech outweigh the Defendants interest in restricting the same and the level of disruption that Defendant asserts did not serve to meaningfully disrupt the operation or services of Leesburg Elementary School.

The question then turns to whether the Defendants' retaliatory action adversely affected the Plaintiff's constitutionally protected speech. Plaintiff is an employee within the LCPS system. Defendants are supervisors, administrators and/or policy makers with control over Plaintiff's employment. Defendants made the decision to suspend Plaintiff approximately 24 hours after the protected speech. In assessing whether similarly situation persons would be chilled by the government conduct, the Plaintiffs offer five Declarations from LCPS staff/employees, who each declare that they wish to make public comment regarding the same issues that Plaintiff spoke, but due to the actions of LCPS in suspending Plaintiff for his speech, they are afraid to speak publicly for fear of similar retaliation.

Of heightened concern in this analysis are the actions that Defendant took beyond the simple employment suspension. Defendants took the added, and seemingly unnecessary step to advise Plaintiff that he was "restricted from the buildings and grounds of all Loudoun County Public Schools (LCPS) property...."[9] Plaintiff points out that this language went beyond an ordinary employment suspension and additionally restricted his ability to have future public dialog with the School Board at public comment sessions. Despite the Defendants contention that a mechanism was in place to allow him access to LCPS property, that access was not absolute and rested on the subjective determination of his supervisor.

In opposition to Plaintiff argument that the suspension was retaliatory in nature, Defendant directs the Court to Plaintiff's May 16, 20201 email to School Board members and school administrators. This email was similar in content to Plaintiff's statements during the public comment period of the May 25, 2021 School Board meeting, albeit more lengthy and more detailed. Defendant argues that since they took no action upon receipt of the Plaintiff's May 16, 2021 email, that their subsequent action of suspension was not related to his speech or his faith, but simply due to the disruption that was created.

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[8] See Plaintiff's Verified Complaint, paragraphs 74-82

[9] See Declaration of Lucia Villa Sebastian, Ed.D., Exhibit A

While this is a circumstance that the Court can consider and weigh, the Court does so while noting that the forums of the two statements are largely different when assessing the public nature of each.

First, while the May 16, 2021 email may be made more public through the Freedom of Information Act, or by an independent act of one of the parties to the email, there is no evidence that the distribution of that email exceeded the scope of the recipients prior to the time that the Plaintiff was suspended. Thus, its public reach was for all practical purposes, contained.

Second, lack of action by the Defendants to suspend the Plaintiff, does not afford the Defendants a blanket of protection moving forward on actions against the Plaintiff for subsequent statements. The two matters are separate, distinct and unique.

The Court agrees with Plaintiff's analysis and concludes that Defendants' actions to suspend the Plaintiff, as well as the additional restrictions placed upon him, adversely affected his constitutionally protected speech.

Finally, the Court looks to whether the Defendants suspended Plaintiff due to his constitutionally protected speech. The application of the facts to a cause for retaliatory action of protected speech is uncontroverted. While the initial suspension letter of May 27, 2021 cites the reason as "allegations that you engaged in conduct that has had a disruptive impact on the operations of Leesburg Elementary School," further clarification and specificity is provided in an email communication from Defendants' counsel to Plaintiff's counsel, wherein it outlines that his suspension is based on his May 25 comments having caused disruption in the school the following day.[10,11]

While reliance on the disruption is cited as a basis for the employer action, the Court has found above that the disruption relied upon was insufficient.

Plaintiff's second contention when assessing whether he is likely to prevail on the merits is the assertion that Defendant has violated his free exercise of religion.

The direct facts in support of this claim are more vague on their face when compared to the Plaintiff's claim regarding his constitutionally protected speech.

The Court finds the two claims to be intertwined. The "comments" made by the Plaintiff have in their very core, proclamations of faith and how he is to apply them to his life. The expectation of the Defendants, in addition to the disruption previously relied upon, is the fear that Plaintiff will refuse to follow mandated school policy.[12] The leap that Defendants make was discussed in open Court. The Court noted that it was possible to not follow the expectations of the policy, and at the same time, not violate its mandates. As such, the anticipatory violation that Defendants expect, due to his faith, is misplaced.

The standard of assessing the first prong for issuing temporary injunctions is "likelihood" of success, which is a relatively low threshold when compared to other legal standards that fix a much higher bar. In further considering the arguments of both counsel in open court as well as the authority cited on brief, the Court concludes that the weight of the evidence supports a determination that the Plaintiff is likely to prevail on the merits.

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[10] See Plaintiff's Verified Complaint, Exhibit D

[11] It should be noted that throughout the documents related to this matter, the terms "suspension" and "administrative leave" are used interchangeably.

[12] See Declaration of Shawn Lacey, Exhibit A, email from Beth Barts to Defendant Ziegler.

II. Likelihood the Movant will Suffer Irreparable Harm

When assessing irreparable harm, the Court needs to look no further than the authority and holdings established in *Newsom v Albermarle County School Board*, 354 F.3d 249 (4th Circuit 2003), citing *Elrod v Burns*, 427 U.S. 347 (1976) which states "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitute irreparable injury."

Here, Plaintiff has been suspended due to his speech, barred from further speech, and similarly situated employees have been chilled from speech because of Defendants' actions.

III. Does the Balance of Equities Favor the Movant

The Court finds that the balance of equities favors the Plaintiff. Enjoining a retaliatory suspension will not serve to harm the Defendants. Further, it will serve to restore, to some degree, the reputation of the Plaintiff that may have been harmed by Defendants' actions. The Court considers the fact that the Plaintiff was suspended approximately three weeks before the end of the students' school year. Action could certainly have been taken by the Defendants that did not rise to this extreme. Further, the Defendants took the added action on May 27, 2021 to contact the Leesburg Elementary School community via email to advise them that the Plaintiff was placed on administrative leave, an action the Court sees as an unnecessary and vindictive act given the end of the school year was so close.

IV. Is the Relief in the Public Interest

Upholding constitutional rights serves the public interest. Affirming the unconstitutional action taken against the Plaintiff which has silenced others from speaking publicly on this issue, serves the public interest. The public's knowledge that Plaintiff's speech was permissible, is encouraged and is free from governmental oppression serves the public interest. Governmental bodies being held in check for violating a citizen's constitutional rights, serves the public interest.

**Conclusion**

The Court finds that the Plaintiff's speech and religious content are central to the determination made by the Defendants to suspend Plaintiff's employment. The Court further finds that the weight of the evidence and the totality of the circumstances, clearly show that the four prongs for issuance of temporary injunction have been satisfied.

The Plaintiff's request for a temporary injunction against the Defendants is hereby ***granted.*** Defendants shall immediately reinstate the Plaintiff to his position as it was prior to the issuance of his suspension and remove the ban that was placed upon him from all buildings and grounds of Loudoun County Public Schools. This injunction shall remain in full force until December 31, 2021 when it will dissolve, unless before the expiration thereof, it be enlarged. Should a trial on the merits mature prior to the expiration date, the temporary injunction shall be dissolved at such time. This temporary injunction may otherwise be dissolved by further order of this Court pursuant to Virginia Code §8.01-625.

Pursuant to the Virginia Supreme Court's Orders Declaring a Judicial Emergency as well as the Loudoun County Circuit Court's Second Transition Plan, matters involving temporary injunctive relief are among those given priority on the Court's docket. Given the nature and content of the issues before

the Court, the parties are directed to contact the Circuit Court Docket Manager or call calendar control no later than June 16, 2021 to schedule a trial on the merits.

The Court makes no ruling with respect to enjoining future actions of the Defendants or Plaintiff as it relates to the enforcement of current or draft policies or other personnel sanctions for conduct or speech that has yet to occur.

This letter opinion shall serve as the **ORDER** of this Court.

Pursuant to Virginia Code §8.01-626, an aggrieved party may petition for review of this Court's ruling within 15 days of this Order.

Very Truly Yours,

James E. Plowman, Jr.
Judge, 20th Judicial Circuit