UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

A.C., C.P., T.T., T.M., T.B., R.P., and C.W., Plaintiffs, by and through their next friends and guardians, v. Magnolia Independent School District, Defendant.	Civil Action No. 21-cv-3466

Reply in Support of Plaintiffs' Motion for a Temporary Restraining Order

Plaintiffs respectfully urge the Court to grant their motion for a temporary restraining order (Dkt. 6) and file this reply to Defendant's response (Dkt. 13). Magnolia ISD has provided no constitutionally permissible justification for subjecting Plaintiffs to differential treatment based on gender, nor has the district provided any reason for this Court to delay in temporarily enjoining these harms. The Court's immediate intervention is necessary to allay the severe, ongoing, and escalating injuries that the district continues to inflict on Plaintiffs every day solely due to their gender and gender stereotypes, and to preserve the status quo in order to allow Plaintiffs to receive an education at Magnolia ISD while this case continues.

I. Plaintiffs Have a Substantial Likelihood of Success on the Merits

A. Magnolia ISD Is Violating the Equal Protection Clause

The district concedes that its hair policy facially discriminates against Plaintiffs based on gender but does not put forth any justification that could meet heightened scrutiny required under

the Equal Protection Clause. Magnolia ISD calls Plaintiffs' argument "overly simplistic." (Dkt. 13 at 2). But this case is simple: the government has drawn an explicit gender classification and cannot establish an "exceedingly persuasive justification" for this policy. *United States v. Virginia*, 518 U.S. 515, 533 (1996). Instead, Magnolia ISD's only justification rests on "overbroad generalizations about the different talents, capacities, or preferences of males and females," and is therefore unconstitutional. *Id.*

1. The District's Gender-Based Hair Policy Is Subject to Heightened Scrutiny

Magnolia ISD misapplies Supreme Court case law when it asserts that "Plaintiffs will be required to show that Magnolia ISD enacted its hair length policy specifically to injure male students." (Dkt. 13 at 3). This specific intent requirement does not exist where a facial gender classification is at issue. On the contrary, even where the government has benign motives for drawing gender classifications, the Supreme Court subjects "*all* gender-based classifications" to heightened scrutiny, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) (emphasis added), and has consistently "reject[ed] measures that classify unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn." *Id.* at 1693 n.13 (collecting cases); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) ("Traditionally, [gender] discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."). When the government imposes a facial gender classification, the burden to justify disparate treatment is in fact "demanding and it rests entirely on the State." *Virginia*, 518 U.S. at 531.

The only case that Magnolia ISD cites for claiming that Plaintiffs must establish a specific discriminatory intent is *Personnel Administrator of Massachusetts v. Feeney*, where the Supreme Court considered a law giving preferential treatment to veterans that *did not* explicitly

differentiate based on gender. 442 U.S. 256, 274 (1979). Because the plaintiffs in that case only alleged a disparate impact claim, the Court embarked on an analysis to discern discriminatory intent, pursuant to *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977). That analysis is not required in circumstances, as here, where the government has drawn an explicit gender classification. The district's attempted reliance on *Karr v. Schmidt*, 460 F.2d 609 (5th Cir. 1972), is also misguided for the reasons stated in Plaintiffs' motion, (Dkt. 6 at 22), and the district does not attempt to distinguish the unbroken line of Supreme Court and Fifth Circuit precedent requiring heightened scrutiny for *all* government-imposed gender classifications. *See, e.g.*, *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 136 (1994); *McKee v. City of Rockwall, Tex.*, 877 F.2d 409, 422 (5th Cir. 1989). Under binding precedent, Magnolia ISD's gender-based hair policy is subject to heightened scrutiny, which it cannot withstand.

2. Magnolia ISD's Gender-Based Hair Policy Fails Heightened Scrutiny

Magnolia ISD bears the burden of showing that treating students differently based on gender serves "important governmental objectives" and that the means employed for this differential treatment are "substantially related to the achievement of those objectives." *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 724 (1982). Here, the district fails this standard.

Magnolia ISD's central argument is that it may permissibly rely on "the values of [the Magnolia] community at large" in promulgating and enforcing gender-based policies. (Dkt. 13 at 3). Purported community values, however, cannot be used to justify discrimination, since that would effectively nullify the Equal Protection Clause. *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) ("It is plain that the electorate as a whole, whether by

referendum or otherwise, could not order city action violative of the Equal Protection Clause."); *United States v. Scotland Neck City Bd. of Educ*., 407 U.S. 484, 491 (1972) (finding that race-based preferences of parents "cannot . . . be accepted as a reason for achieving anything less than complete uprooting of the dual public school system"); *Virginia*, 518 U.S. at 545 (rejecting the state's proffered justification that the Virginia Military Institute should remain exclusive to men since most women would prefer not to attend).[1]

Without asserting any justification that comes close to meeting heightened scrutiny, Magnolia ISD tries to call into question the dozens of photographs in the record showing high school football players in Magnolia ISD wearing long hair.[2] But despite these quibbles, the

---

[1] The district incorrectly relies on dicta in *Hayden ex rel. A.H. v. Greensburg Community Sch. Corp.,* 743 F.3d 569 (7th Cir. 2014), to argue that community values could be used to justify "a comprehensive, *evenly-enforced* grooming code that imposes *comparable burdens on both* males and females alike." *Id.* at 581 (emphasis added). This framework does not apply here because it is inapposite to the equal protection context, where the Supreme Court has never permitted "comparable burdens" to be a justification for discrimination. The Title VII case law that *Hayden* cited for this theory has also now been entirely undermined by *Bostock v. Clayton County, Georgia*, where the Supreme Court made clear that the focus in sex discrimination cases is "on individuals rather than groups." 140 S. Ct. 1731, 1741 (2020) ("So an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in both cases the employer fires an individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it.").

The district also cites two state court cases to argue that a facially discriminatory policy can be justified by community preferences, but these cases are distinguishable and unpersuasive, and have also been abrogated by the reasoning of *Bostock*. *See Hines v. Caston Sch. Corp*., 651 N.E.2d 330, 335 (Ind. Ct. App. 1995) (analyzing an earring policy that facially applied both to boys and girls); *Jones on Behalf of Cooper v. W.T. Henning Elementary Sch. Principal*, 720 So.2d 530, 532 (La. App. [3d Cir.] 1998) (finding evidence in the record where a boy wearing an earring was disruptive of the school environment).

[2] The district asserts that only one photograph shows a boy wearing hair "longer than the bottom of a dress shirt collar." (Dkt. 13 at 3–4). Even if this were true under the subjective standard of where a dress shirt collar might happen to be, Magnolia ISD somehow ignores the other provisions of its own gender-based hair policy, requiring hair "for male students" to be "no longer than the bottom of a dress shirt collar, *bottom of the ear*, and out of the eyes." Declaration of Nina Kumar ("Kumar Decl.") at ¶ 3 and Ex. 1 at 42 (emphasis added).

record demonstrates that Magnolia ISD's gender-based hair policy has been arbitrarily or preferentially applied at the same time that Plaintiffs have been vigorously punished, threatened with punishment, and pushed out of school entirely based solely on their gender. There is no constitutionally adequate justification for this policy, and Magnolia ISD does not—and cannot—point to a single harm that occurred from permitting students of any gender from wearing long hair. Plaintiffs T.T. and T.B. were permitted to wear long hair well before the start of the COVID-19 pandemic, all students at Magnolia ISD could wear long hair last year, and still today all girls in the district and some high school football players continue to wear long hair with no discernable effect. There is no justification for discriminating against Plaintiffs based on gender.

B. Magnolia ISD Is Violating Title IX

Magnolia ISD's Title IX arguments fare no better. The district does not address Plaintiffs' Title IX claim under the plain language of the statute, the federal regulations interpreting it, or the Fifth Circuit and other appellate court decisions applying it. Instead, Magnolia ISD again wrongly asserts that Title IX, like it did with Plaintiffs' equal protection claim, requires Plaintiffs to show that the gender-based hair policy is "intended to harm male students because they are male." (Dkt. 13 at 6). This requirement does not exist under Supreme Court or Fifth Circuit case law. Rather, a "claim under Title IX requires a plaintiff to allege that the defendant (1) received federal financial assistance, and (2) excluded the plaintiff from participating in the defendant's educational programs because of the plaintiff's sex." *Manley v. Texas S. Univ.*, 107 F. Supp. 3d 712, 725 (S.D. Tex. 2015) (Rosenthal, J.). Plaintiffs have made that showing here, since it is undisputed that Magnolia ISD receives federal funds, and the record

---

Many photographs in the record clearly show boys in Magnolia ISD wearing hair that extends well below the bottom of their ears. *See* Kumar Decl. at ¶¶ 6–26 and Exs. 4–47.

shows that the District is depriving Plaintiffs of educational opportunities and discriminating against them because of their gender in violation of Title IX.

II. Plaintiffs Are Facing Imminent and Irreparable Harm

Magnolia ISD does not seriously dispute the severe and escalating harms that are being imposed on Plaintiffs every day because of their gender: they have been denied classroom instruction, barred from extracurricular activities, separated and ostracized from their peers and siblings, and faced with the agonizing choice of either being forced to cut their hair and conform to gender stereotypes or being subjected to in-school suspension (ISS), the disciplinary alternative education program (DAEP), and other harsh consequences imposed by the district. *See* (Dkt. 6 at 29–30).[3] Magnolia ISD's only argument is that Plaintiffs could have brought this case sooner. (Dkt. 13 at 6–7). Plaintiffs have in good faith availed themselves of the district's grievance process and tried repeatedly to persuade Magnolia ISD to stop discriminating against them by speaking at school board meetings and with school administrators. *See, e.g.,* Loredo Decl. at ¶¶ 16–17; Berger Decl. at ¶ 17; Waugh Decl. at ¶ 9. Plaintiffs turn to this Court as a last resort after it became clear that Magnolia ISD had rejected their pleas and was only intensifying punishments against them. The harms that Magnolia ISD continues to impose on Plaintiffs have reached a point that is now untenable, and these harms compound and worsen every day.

III. Magnolia ISD Would Suffer No Harm from a Temporary Restraining Order

The harms to Plaintiffs of being pushed out of school and deprived of educational, extracurricular, and social opportunities that Magnolia ISD affords to other students who wear

[3] The district's assertion that DAEP would still provide *some* opportunity for learning does not make this punishment any less severe or discriminatory. (Dkt. 13 at 7). Magnolia ISD does not dispute that Plaintiffs would still be required to cut their hair in DAEP or face even harsher consequences, so the punishments against Plaintiffs while in DAEP would continue to intensify. *See* (Dkt. 6 at 15).

long hair far outweigh any interest that the district has in continuing to enforce this policy. Magnolia ISD erroneously asserts that a temporary restraining order would harm the district because it could result in "numerous infractions of the hair length policy in a short period of time." (Dkt. 13 at 7). But this argument is a non-starter because Magnolia ISD previously allowed Plaintiffs T.T. and T.B. to wear long hair in the district for years, permitted all students last year to wear long hair, and still allows girls (and some boys) to wear long hair today—all without any impact on the school environment. If the district ultimately prevails in establishing a constitutionally permissible justification for its gender-based hair policy and survives Title IX, then the district can resume requiring students to cut their hair at that time, which is exactly the same position that the district was in at the start of this school year after not enforcing its gender-based hair policy for all of last year. Granting Plaintiffs' request for a temporary restraining order imposes no harm on the district but is urgently needed to protect Plaintiffs' constitutional and statutory rights to be free from gender discrimination.

IV. Granting a Temporary Restraining Order Is in the Public Interest

Magnolia ISD asserts that "the public interest is best served when a school district is permitted to uniformly and consistently enforce the policies set forth by its elected officials." (Dkt. 13 at 8). But arbitrarily enforcing a gender-based hair policy that is unconstitutional and inflicts serious harm on students does not and cannot serve the public interest. *See Arnold v. Barbers Hill Indep. Sch. Dist.*, 479 F. Supp. 3d 511, 531 (S.D. Tex. 2020) (Hanks, J.).

CONCLUSION

Plaintiffs respectfully ask this Court to grant their motion for a temporary restraining order. (Dkt. 6). Every element for injunctive relief weighs strongly in Plaintiffs' favor and a temporary restraining order is needed to allow Plaintiffs to receive the same access to educational opportunities as other students at Magnolia ISD while this case continues.

Respectfully submitted,

/s/Brian Klosterboer
Brian Klosterboer, *attorney-in-charge*
TX Bar No. 24107833, SDTX No. 3314357
Adriana Pinon
TX Bar No. 24089768, SDTX No. 1829959
Andre Segura
TX Bar No. 24107112, SDTX No. 3123385
ACLU FOUNDATION OF TEXAS, INC.
P.O. Box 8306
Houston, TX 77288

Linda Morris*
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street, 18th Floor
New York, NY 10004

Monica Uddin
TX Bar No. 24075195, SDTX Bar No. 1138459
Jane Robinson
TX Bar No. 24065700, SDTX Bar No. 1063725
AHMAD, ZAVITSANOS, ANAIPAKOS, ALAVI
& MENSING PC
1221 McKinney, Suite 2500
Houston, TX 77010

* *pro hac vice* pending

CERTIFICATE OF SERVICE

This reply has been served upon Defendant electronically pursuant to the U.S. District Court for the Southern District of Texas's electronic court filing system (ECF).

/s/Brian Klosterboer
Brian Klosterboer