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UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Derry Taxpayers Association

v. Civil No. 94-85-JD

Derry Cooperative School District

REPORT AND RECOMMENDATION

Before the court is plaintiff's verified motion for an ex parte temporary restraining order to prevent distribution of the Derry Cooperative School District's Annual Report. In its motion, the Derry Taxpayers Association asks the court to issue an order prohibiting further distribution of the Derry Cooperative School District's Annual Report so long as it contains (1) a statement by Superintendent of Schools David Brown advocating the passage of House Bill 1260 which prohibits the use of property tax to fund education, and (2) a statement by School Board Chairman Barbara A. Yelland that, "[r]ecently . . . an article appeared in the Boston Globe that seemed to address Derry's issues clearly and concisely. The following article has been reprinted with permission from the Boston Globe and Andrew Merton.", Report of School Board Chairman attached to Complaint as Appendix A. Attached to this statement is a reprint of a detailed article written by Andrew Merton titled "Derry taxpayers vs. Derry children," published in the Boston Globe on February 6, 1994. In the alternative, the plaintiff asks that the court allow for public distribution of two newspaper editorials presenting an opposing view.

English professor @ UNH.

The Annual Report is presently being provided to citizens of Derry in anticipation of the annual school district meeting

scheduled for March 5, 1994. The plaintiff alleges that the Derry Cooperative School District's Annual Report is published using public monies. Discussed in the Boston Globe article are the opposing views on the issue of educational funding taken by the plaintiff, Derry Taxpayers Association, and its attorney, Charles G. Douglas, III. The article goes on to promote attendance at the upcoming school board annual meeting and advocates passage of House Bill 1260 prohibiting use of a property tax to fund education.

Plaintiff prays for the relief being sought by arguing that its constitutional rights are being violated by the distribution of materials taking a position on a heated political issue at the expense of public funds. The Derry Taxpayers Association asks that the court either enjoin the further distribution of the material or allow for distribution of a February 23, 1994, Derry News editorial titled "Abuse of Power" and a February 24, 1994, Manchester Union Leader editorial titled "Educating the Educators," each opposing the position taken by the defendant.

Under Fed. R. Civ. P 65(a), the court may accept as true facts of an ex parte verified compliant and issue a temporary restraining order where irreparable injury is imminent. The standard to be applied by the court in considering a request for injunctive relief is well settled in the First Circuit. The court must find that (1) the plaintiff exhibits a likelihood of success on the merits; (2) the plaintiff will suffer irreparable harm if the injunction is not granted; (3) the injury to the

plaintiff in denying the injunction outweighs the injury to the defendant; and (4) the public interest will not be adversely affected by granting the injunction. Planned Parenthood League of Mass. v. Bellotti, 641 F.2d 1006, 1009 (1st Cir. 1983) (quoting Women's Community Health Ctr., Inc. v. Cohen, 477 F. Supp. 542, 544 (D. Me. 1979); Aoude v. Mobil Oil Corp., 862 F.2d 890 (1st Cir. 1988).

Based on the facts in the verified complaint, the plaintiff has demonstrated a likelihood of success on the merits. The use of public funds by individuals in governmental positions of authority to advocate a position taken on a political or legislative issue, without providing a similar opportunity to parties supporting the opposing position, presents a question of constitutional dimensions. This is especially true in the instant case where the material distributed names the plaintiff and its attorney and expressly disagrees with the position they support. There is authority to suggest that such deprivation is a constitutional violation. See Bynum v. Schiro, 219 F. Supp. 204 (E.D. La. 1963), aff'd 375 U.S. 395 (1964) (city violated First Amendment by denying use of public building to group with views inconsistent with city policy); Smith v. Dorsey, 599 So.2d 529 (Miss. 1992) (dissenters should be provided with means to present their position to community). The undersigned deems the potential constitutional violation presented in this case sufficient to establish a likelihood of success on the merits.

Next, the undersigned finds that if a constitutional violation does in fact exist, then irreparable harm will necessarily result if the injunction is not granted. See Lawrence U. Bicent. Com'n v. City of Appelton, Wis., 409 F. Supp. 1319, 1327 (E.D. Wisc. 1976) (infringement of First Amendment per se irreparable injury). The facts of this case alone establish irreparable injury considering the fact that including the Boston Globe article in the Annual Report presents an appearance of governmental support for the individual positions taken and presented by the Superintendent and Chairman of the School Board.

Next, the undersigned finds that the injury to the plaintiff in denying the injunction would outweigh any injury suffered by the defendant. The burden sustained by the taxpayer group through the potential deprivation of a constitutional right clearly outweighs the burden, if any, the school district may suffer if relief is provided.

Finally, the undersigned finds that the public interest will not be adversely affected by the granting of relief, but rather will be protected and furthered by the relief the court intends to provide.

It is recommended that the motion (document no. 2) be granted. After carefully weighing the factors to be considered in deciding whether a temporary restraining order is appropriate in this case, it is recommended that the Derry Taxpayers Association be granted alternative relief. The undersigned

believes it is in the interest of justice, and the citizens of Derry, that the plaintiff be allowed to distribute the above-referenced opposing editorial articles at the March 5, 1994 annual meeting, to help promote the fair consideration of the education funding issue. It is further recommended that the defendant not be prohibited from distributing the Annual Report in the form it now exists.

Any objections to this report and recommendation must be filed within ten days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the district court's order. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986).

William H. Barry, Jr.
United States Magistrate Judge

March 2, 1994

cc: Charles G. Douglas, III, Esq.
Gordon Graham, Esq.

Patricia BONNER-LYONS et al., Plaintiffs, Appellants,

v.

SCHOOL COMMITTEE OF the CITY OF BOSTON et al., Defendants, Appellees.

No. 73-1150.

United States Court of Appeals, First Circuit.

Argued June 7, 1973.

Decided June 29, 1973.

Action to enjoin members of committee from using internal distribution system of city schools for disseminating notices opposing use of bussing to achieve school integration or, in alternative, to compel members to allow plaintiffs to use same system to distribute communications publicizing probussing rallies. The United States District Court for the District of Massachusetts, Frank J. Murray, J., denied requests for preliminary injunctive relief, and plaintiffs appealed. The Court of Appeals, McEntee, Circuit Judge, held that defendant members would be enjoined unless fair and reasonable timely opportunity for use of system were afforded to those with differing views.

→ Remanded.

1. Constitutional Law ⊂90(1), 211

Once a forum is open for expression of views, regardless of how unusual the forum, under the mandate of First Amendment and equal protection clause neither government nor private censor may pick and choose between those views which may or may not be expressed. U.S.C.A.Const. Amends. 1, 14.

2. Injunction ⇐78.

Committee members, which utilized city school distribution system to support and promote views of group opposing use of bussing to achieve school desegregation and denied use of system to groups in favor of bussing, would be enjoined from such use of system unless fair and reasonable timely opportunity for use of system were afforded to those with differing views.

Jonathan Shapiro, Boston, Mass., with whom Max D. Stern, Boston, Mass., Jack Greenberg, and Sylvia Drew, New York City, were on memorandum, for plaintiffs-appellants.

Matthew T. Connolly, Boston, Mass., with whom DiMento & Sullivan, Boston, Mass., was on memorandum, for defendants-appellees.

Before COFFIN, Chief Judge, McENTEE and CAMPBELL, Circuit Judges.

McENTEE, Circuit Judge.

Plaintiffs, members of The Ad Hoc Parents' Committee for Quality Education, alleging violations of their first amendment and equal protection rights, initiated this action under 42 U.S.C. § 1983 to enjoin defendants, the members of the School Committee of the City of Boston, from using the internal distribution system of the City's schools to disseminate notices opposing the use of bussing to achieve school integration. In the alternative, plaintiffs sought an order compelling defendants to allow them to use this same system to distribute communications publicizing pro-bussing rallies. The trial court denied repeated requests for preliminary injunctive relief and this appeal followed. Since we conclude that by disseminating the notices in question the defendants utilized the school distribution system to support and promote the views of one group while denying the use of this system to groups representing other points of view, we reverse and grant the injunctive relief specified below.

The following facts are not in dispute. On March 29, 1973, defendants adopted an official resolution authorizing the distribution of notices to all Boston parents urging them to support a march and rally to be held at the Massachusetts State House on April 8. The purpose of this rally was to express opposition to the re-