IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

PARENTS, FAMILIES, AND FRIENDS OF LESBIANS AND GAYS, INC., et al.,	)	
Plaintiffs,	)	
v.	)	**Case No. 2:11-cv-04212**
CAMDENTON R-III SCHOOL DISTRICT, et al.,	)	
Defendants.	)	

DEFENDANTS' SUGGESTIONS IN OPPOSITION
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

COME NOW Defendants Camdenton R-III School District ("District") and Timothy E. Hadfield, in his individual and official capacity, by and through their undersigned counsel, and hereby submit their Suggestions in Opposition to Plaintiffs' Motion for Preliminary Injunction. In opposition to Plaintiffs' Motion, Defendants state as follows:

INTRODUCTION

Plaintiffs' lack standing to continue this litigation and have failed to state a claim upon which relief can be granted and thus, their Amended Complaint and the instant Motion for Preliminary Injunction must be dismissed. *See* Defendants' Motion to Dismiss and Suggestions in Support thereof filed contemporaneously herewith and incorporated herein by reference. However, subject to and without waiving said objection to the jurisdiction of this Court to hear this matter, Defendants respond to Plaintiffs' Motion for a Preliminary Injunction herein.

As Plaintiffs cannot demonstrate a threat of irreparable harm, overcome the harm that would be imposed on the District's students by grant of their request for injunctive relief, demonstrate a likelihood of success on the merits, or establish that the public interest weighs in their favor, their Motion for a Preliminary Injunction must be denied.

FACTUAL BACKGROUND

The District is required under the Children's Internet Protection Act ("CIPA") to block student access to online images that constitute obscenity, child pornography, and material that is "harmful to minors". 47 U.S.C. § 254 (h)(5)(B). In order to comply with CIPA, the District blocks certain categories of web material through the use of Internet filtering software which the District's Network Administrator customizes for the District. *See* Affidavit of Defendant Timothy E. Hadfield ("Hadfield Aff.") at ¶ 5, attached hereto as **Exhibit A**, and incorporated herein by reference; *see also* Affidavit of Randal Cowen ("Cowen Aff.") at ¶ 6, attached hereto

as **Exhibit B**, and incorporated herein by reference. One of the categories which the District blocks is web material that falls under the category of "sexuality". *See* Hadfield Aff. at ¶ 6; Cowen Aff. at ¶ 7. This category is intended to capture inappropriate material not captured by the District's filters which block pornography and adult material. *See* Hadfield Aff. at ¶ 7; Cowen Aff. at ¶ 8. The District does not block the categories of "LGBT", "Gay or Lesbian or Bisexual Interest," "Alternative Lifestyles", or "Social Issues". *See* Hadfield Aff. at ¶ 8; Cowen Aff. at ¶ 9. Indeed, websites which support LGBT rights and provide information such as http://gayrights.change.org, http://www.aclu.org/lgbt-rights, http://lgbtweekly.com, http://lgbt.wisc.edu, www.itgetsbetter.org, among many others are not blocked by the District**.** *See* Hadfield Aff. at ¶ 9; Cowen Aff. at ¶¶ 11-12 and Examples of Open District Websites attached thereto as Exhibit 1.

The District's sexuality filter is targeted to and does block sexually inappropriate material which is not captured by the "porn" or "adult" filters. Specifically, some of the websites blocked by the sexuality filter include the-penis.com/gay, imasturbate.org, and givingwomenorgasms.com, among many others. *See* Cowen Aff. at ¶¶ 8, 10. Indeed, the District ran a test and if the "sexuality" filter was disabled the following sampling of websites became available on the District's system within minutes: http://barebacksexinsf.com, http://iphis.com, and http://about-swinging.co.uk. *See* Cowen Aff. at ¶ 13. Therefore, to disable the "sexuality" filter would be to allow student access to highly inappropriate websites to minors in violation of CIPA.

Due to the dynamic nature of the Internet, some websites which are appropriate for access by District students are blocked by the filtering software. Accordingly, the District has had a practice in place since 2004 which allows students to make an anonymous electronic

request that a website which has been blocked by the filter be unblocked for access by District students. *See* Hadfield Aff. at ¶ 10; Cowen Aff. at ¶ 14. This system has successfully utilized by students and employees on numerous occasions to access websites which were "over-blocked" by the system. *See* Hadfield Aff. at ¶ 11; Cowen Aff. at ¶ 15. Specifically, on November 12, 2008, the District received an anonymous electronic request that the following website be unblocked: www.rainbowdomesticviolence.itgo.com. *See* Hadfield Aff. at ¶ 12; Cowen Aff. at ¶ 16. This website was immediately unblocked and has remained unblocked ever since. *See* Hadfield Aff. at ¶ 12; Cowen Aff. at ¶ 16. When the ACLU wrote a letter to the District noting that student access to the websites for: GSA Network, GLSEN, Day of Silence, and the Trevor Project were blocked, the District also unblocked these websites without delay. *See* Hadfield Aff. at ¶ 15; Cowen Aff. at ¶ 17.

To further ensure that an easy and discernable process is in place for students to request that particular websites be unblocked, the District's Board of Education revised Board Policies to clarify its practices and to provide alternative avenues for District students and employees to make requests for access to particular websites. *See* Hadfield Aff. at ¶ 13, and action of the Board of Education attached thereto as Exhibit 1. Through the procedures in currently in place and the revised Board of Education policies, students of the District have concrete procedures in place which allow for ease and the option of anonymous request for unblocking websites as well as an avenue for appeal of a decision to deny access to particular websites. *See* Hadfield Aff. at ¶ 13, and Board Policies EHB-AP and IIAC-R attached thereto as Exhibit 2.

The Camdenton R-III School District does not discriminate against its students and has demonstrated a respect for their right to access information which supports their viewpoints while also balancing the need to protect students from harmful material on the Internet.

LEGAL ARGUMENT

As a preliminary matter, Plaintiffs do not have legal standing to proceed with the Amended Complaint and the instant Motion for Preliminary Injunction as the organizational Plaintiffs have no right to access District students through the Internet and Plaintiff Jane Doe has not suffered an "injury in fact" which satisfies the requisite elements of standing. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-105 (1983) (noting that in cases where injunctive relief is sought, the injury-in-fact element requires that the plaintiff faces a real and immediate threat of harm). *See* Defendants' Motion to Dismiss and Suggestions in Support thereof filed contemporaneously herewith and incorporated herein by reference.

Further, Plaintiffs have not met the burden of demonstrating that the issuance of a preliminary injunction is warranted in this matter. A preliminary injunction is an extraordinary remedy, and the burden of establishing the propriety of an injunction is on the movant." *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003) (internal citation omitted). Plaintiffs have not and cannot establish the elements necessary to grant the "extraordinary remedy" of a preliminary injunction in this matter as Plaintiffs are unable to establish any of the following factors: (1) a threat of irreparable harm; (2) the balance between the alleged harm to Plaintiffs and the injury to the District that would result from a preliminary injunctive tips in Plaintiffs' favor; (3) the probability of success on the merits; or (4) that the public interest weighs in favor of removing the "sexuality" filter on District computers. *See Dataphas Systems, Inc. v. CL Systems, Inc.*, 640 F. 2d 109, 113 (8th Cir. 1981) (en banc).

I. Plaintiffs Cannot Demonstrate a Threat of Irreparable Harm

In the instant matter, all factors weigh in favor of denying Plaintiffs' request for injunctive relief. More specifically, with respect to the first factor for injunctive relief as set

forth in *Dataphas*, Plaintiffs will not be irreparably harmed if their request for injunctive relief is denied. *Id.*

In Plaintiffs' Suggestions in Support of their Motion for Preliminary Injunction (hereinafter "Plaintiffs' Suggestions in Support), Plaintiffs state, "[a]bsent an injunction, students will be prevented from accessing Plaintiffs' websites that are supportive of LGBT rights and individuals…." (Plaintiffs' Suggestions in Support p. 30). Certainly, the fact that District students are currently prevented from accessing Plaintiffs' websites does not serve as a basis for grant of the "extraordinary remedy" of a preliminary injunction as nowhere in Plaintiffs' Amended Complaint do the organizational Plaintiffs state that *any* District student, including Jane Doe has *ever* actually expressed desire or made an attempt to access Plaintiffs' particular websites. *See generally* Amended Complaint. Further, the organizational Plaintiffs have no constitutional right to communicate with District students through the Internet in the first place. Additionally, taking into account the sheer volume of websites available on the Internet, there is not even a minimal guarantee that any student will ever seek access of their websites if an injunction of this Court is granted.

Similarly, Plaintiff Jane Doe has not alleged that she has ever requested or been denied access to Plaintiffs' websites or that she has been denied access to any particular website which supports LGBT rights. *See generally* Amended Complaint. Therefore, Plaintiff Jane Doe's alleged "injury" is far too speculative to warrant a grant of injunctive relief. "The dramatic and drastic power of injunctive force may be unleashed only against conditions generating a presently-existing actual threat; it may not be used simply to eliminate a possibility of remote future injury, or a future invasion of rights." *Rogers v. Scurr*, 676 F. 2d 1211, 1214 (8th Cir. 1982). Further, since the 2004-2005 school year, the District has had a procedure in place which

provides students and employees an easy and (if they choose) anonymous, avenue for requesting that a particular website be unblocked. *See* Hadfield Aff. at ¶ 10; Cowen Aff. ¶ 14. This procedure has been successfully utilized by students in the District and can be utilized by Plaintiff Jane Doe if she seeks access to a particular website which has not already been unblocked by the District. *See* Hadfield Aff. at ¶ 11; Cowen Aff. ¶ 15. This procedure has been confirmed and strengthened by action of District's Board of Education. *See* Hadfield Aff. at ¶ 13. Accordingly, Plaintiff Jane Doe cannot demonstrate that she will suffer irreparable harm if an injunction is not granted in this matter as she can anonymously request access to any appropriate website through the District's procedures already in place.

Further, contrary to the overbroad and inaccurate wording of the Amended Complaint, the Camdenton School District *does* currently allow access to age appropriate websites which promote and provide information about LGBT rights which Plaintiff can currently access to receive information. *See* Hadfield Aff. at ¶ 8; Cowen Aff. at ¶ 9. Indeed, Plaintiff Campus Pride's website as well as many other websites which provide information and support LGBT rights have never been blocked by the District. *See* Hadfield Aff. at ¶ 14, ¶ 9; Cowen Aff. at ¶11, ¶ 18. Further, when the ACLU wrote a letter to the District notifying it that websites such as GSA Network, GLSEN, Day of Silence, and the Trevor Project were blocked, the District also unblocked these websites without delay. *See* May 31, 2011, letter from ACLU to the District as attached to Plaintiffs' Suggestions in Support. Therefore, Plaintiffs' statement that they will be irreparably harmed if an immediate injunction is not issued, is unreasonable, at best.

Accordingly, as Plaintiffs cannot sufficiently establish that they will suffer irreparable harm if a preliminary injunction is not granted, and failure to show irreparable harm is, by itself, a sufficient ground upon which to deny a preliminary injunction, Plaintiffs' Motion for a

preliminary injunction must be denied. *See Adam-Mellang v. Apartment Search, Inc.*, 96 F.3d 297, 299 (8th Cir. 1996) (quoting *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987)).

II. Plaintiffs Cannot Demonstrate the Balance between the Alleged Harm to Plaintiffs and the Injury to the District that would Result from a Preliminary Injunctive Tips in Plaintiffs' Favor.

Even if Plaintiffs could demonstrate irreparable harm, which they cannot, Plaintiffs still cannot prevail because they cannot show that the hardship scales tip sharply, or even minimally, in their favor. Through their Motion for Preliminary Injunction Plaintiffs seek removal of the District's "sexuality" filter. (Motion for Preliminary Injunction p. 3). Plaintiffs audaciously state that "there is no harm to Defendants if an injunction issues." (Suggestions in Support p. 30). This statement is far from reality and inflammatory to the interests of the Defendants who work every day to protect the children in their District.

The District's filtering system, put in place to comply with CIPA, blocks web material that falls under the category of "sexuality". *See* Hadfield Aff. at ¶ 6; Cowen Aff. at ¶ 7. The sexuality filter blocks such websites as the-penis.com/gay, imasturbate.org, and givingwomenorgasms.com, among many others. *See* Cowen Aff. at ¶ 10*; see also* Document 9-6, attached to Plaintiffs' Suggestions in Support of their Motion for Preliminary Injunction. An order directing immediate suspension of the District's "sexuality" filter would place the District in direct violation of federal law which requires that the District block student access to such sexually explicit websites. Indeed, the District ran a test and if the "sexuality" filter was disabled the following sampling of websites became available on the District's system, and thus available to District students of any age, within minutes: http://barebacksexinsf.com, http://iphis.com, and http://about-swinging.co.uk. *See* Cowen Aff. at ¶ 13. Certainly the content of these websites

meets the definition of information that is "harmful to minors" as defined by CIPA. 47 U.S.C. § 254(h)(5)(B). Therefore, to disable the "sexuality" filter would allow student access to highly inappropriate websites in violation of CIPA as well as potentially cause great harm to impressionable District students who should not be exposed to sexually explicit material.

The resultant harm to the District and District students by disabling the sexuality filter greatly outweighs any potential harm that may be suffered by Plaintiffs. As discussed herein, Plaintiffs cannot demonstrate any actual or particularized harm that would result if an injunction were denied. Indeed, Plaintiffs sought out this lawsuit through the ACLU's "Don't Filter Me" initiative and searched the country to find a school district which blocked their websites in order for the opportunity to fight this fight. *See* May 24, 2011, letter to Mr. Hadfield from the ACLU attached to Plaintiffs' Suggestions in Support. Accordingly, Plaintiffs' alleged injury is highly speculative and phantasmal at best and thus, their Motion for Preliminary Injunction must be denied.

III. Plaintiffs Cannot Demonstrate a Likelihood of Success on the Merits.

The probability that Plaintiffs will succeed on the merits of their Complaint is unlikely. First, as set forth in Defendants' Suggestions in Support of their Motion to Dismiss, Plaintiffs cannot and will not be able to demonstrate that they have standing to raise the issues in their Amended Complaint and the instant Motion for Preliminary Injunction. Further, the position of Defendants is supported by governing law and the Plaintiffs do not have a likelihood of success on the merits of this issue.

Internet terminals at public school districts are neither "traditional" nor "designated" public forums. *United States et al., v. American Library Association, Inc. et al.*, 539 U.S. 194, 205 (2003) (noting that Internet terminals at public libraries are non-public fora). Therefore,

school officials may impose reasonable restrictions on the content accessible to students through the District's Internet system. *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 46 (1983). The District can demonstrate that the restrictions placed on access to websites through the District's system, put in place in effort to comply with CIPA, are reasonable and not intended to discriminate or prohibit access to information about particular viewpoints.

In *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982), a school board's removal of several books from the school's libraries was challenged. Writing for the plurality, Justice Brennan opined that the motivations of school officials would be unconstitutional if the school officials, "*intended* by their removal decision to deny respondents access to ideas with which [the officials] disagreed, and if this intent was the decisive factor in [the removal] decision." *Id.* at 871. In the instant case, it is clear that the District did not act with intent to block access to social or political viewpoints. Rather, the District's motivation was to protect its students from material on the Internet which was not age appropriate and "harmful material" as defined by CIPA.

The fact that some websites which are appropriate for access by District students are blocked under the "sexuality" filter does not make the District's filtering system unreasonable. Indeed, is entirely reasonable for the District to "exclude certain categories of content, without making individualized judgments that everything they do make available has requisite and appropriate quality." *American Library Association, Inc. et al.*, at 208. The Defendants made decisions regarding how to categorize and capture web content which it deemed inappropriate for its students and the Defendants are entitled to deference for these decisions. It is well-established that a public school district's decisions over what materials are available to students within their libraries are curricular decisions to which the courts owe substantial deference.

Pico, 457 U.S. at 863. As the Supreme Court has recognized that the "Internet is no more than a technological extension of the book stack" the same deference owed to a school district's decisions over what material to make available in its library should be applied to its decisions regarding what material is accessible via the Internet. *American Library Association, Inc. et al*., at 207.

Plaintiffs state in their Amended Complaint that the District could "manually block sexually explicit content" instead of relying on the "sexuality" filter. (Amended Complaint p. 9 ¶ 28). However, this would be an unreasonable and burdensome undertaking for the District. "Because of the vast quantity of material on the Internet and the rapid pace at which it changes, libraries cannot possibly segregate, item by item, all the Internet material that is appropriate for inclusion from all that is not." *American Library Association, Inc. et al*., at 207. Indeed, the District could not keep up with the sheer volume of websites which are newly created every day and would undoubtedly be unable to identify and block all inappropriate websites before student exposure to such websites was created. Plaintiffs also suggest that the District should switch to a more "accurate and reputable" Internet filtering service. (Amended Complaint p. 9, 29). However, Plaintiffs have no right to dictate which filtering service the District utilizes. Further, the Supreme Court has held that the decision to restrict access to a nonpublic forum "need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation," and that reasonableness must be assessed "in light of the purpose of the forum and all the surrounding circumstances." *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 808 (1985). The District's process for filtering online images is reasonable, especially in light of the purpose of the forum of public school computers which are accessible by students of all ages.

The Supreme Court in *American Library Association, Inc. et al*., looked at the issue of when a filtering software program on a public library's Internet system "over-blocks" or erroneously blocks web pages containing content that is appropriate. 539 U.S. 194. Although Plaintiffs attempt to vigorously distinguish the *American Library Association* case, the parallel analysis and importance of this case cannot be overlooked. The Supreme Court in *American Library Association* noted, "[a]ssuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled." *Id.* at 209. Accordingly, the ease in which District students may have the filtering system disabled to access appropriate websites is highly significant to the outcome of the instant matter.

The District's process for seeking access to "over-blocked" websites which has been in place for years and which has been confirmed and streamlined by Board of Education Policy, provides an easy process for District students to make a request for access to websites blocked by the District's filtering system. Jane Doe states "that she would not feel comfortable requesting access to a website that is supportive of LGBT people to be unblocked because she is afraid doing so will draw attention to her…" (Supplemental Suggestions in Support p. 7). However, the allowance for anonymity through the District's procedure eliminates such concern. *See* Board of Education Policies EHB-AP and IIAC-R attached to Hadfield Affid. as Exhibit 2. Further, although the District does not desire to cause embarrassment to any of its students, even if anonymous process was not in place, the Supreme Court has rejected the notion that the Constitution guarantees the right to acquire information without the risk of embarrassment. *See American Library Association, Inc. et al*., at 209.

Plaintiffs claim that it is "no defense for Camdenton R-III to unblock individual websites upon request…..requiring plaintiffs and other organizations with pro-LGBT websites to make requests with the District for their websites to be unblocked places a burden on Plaintiffs' speech…" (Plaintiffs' Suggestions in Support p. 28). However, as noted in the concurring opinion in *American Library Association, Inc. et al*., by Justice Kennedy, that if upon request by a public library patron a librarian will unblock filtered material without significant delay, "there is little to this case." *Id.* at 214. Similarly, there is little to this case as Defendants have demonstrated a reasonable process for blocking harmful material on the Internet while balancing the rights of its students to receive information which supports their viewpoints and beliefs. Accordingly, Plaintiffs have little chance of success on the merits of this case.

IV. Plaintiffs Cannot Demonstrate that the Public Interest Weighs in Favor of Disabling the Sexuality Filter.

Public interest weighs strongly in favor of denying the preliminary injunction. The general public and the patrons of the Camdenton R-III School District have a strong and overriding interest in protecting District students from harmful material on the Internet.

CONCLUSION

The balance of interests militates decidedly in the Defendants' favor, Plaintiffs will not suffer irreparable harm in the absence of this injunction, public interest weighs against the issue of the injunction, and Plaintiffs have little likelihood of succeeding on the merits. Accordingly, Plaintiffs' Motion for Preliminary Injunction must be denied.

MICKES, GOLDMAN, O'TOOLE, LLC

By: /s/ Thomas A. Mickes

Thomas A. Mickes, #28555
tmickes@mickesgoldman.com
Elizabeth A. Helfrich, #58891
bhelfrich@mickesgoldman.com
555 Maryville University Drive, Suite 240
St. Louis, Missouri 63141
Telephone: (314) 878-5600
Facsimile: (314) 878-5607

ATTORNEYS FOR DEFENDANTS
CAMDENTON R-III SCHOOL DISTRICT
AND TIMOTHY E. HADFIELD

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of September, 2011, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which sent notification of filing to the following:

A. Elizabeth Blackwell
eblackwell@thompsoncoburn.com
Mark Sableman
msableman@thompsoncoburn.com
Thompson Coburn LLP
One U.S. Bank Plaza
St. Louis, MO 63101

and

Anthony E. Rothert
tony@aclu-em.org
Grant R. Doty
grant@aclu-em.org
American Civil Liberties Union of Eastern MO
454 Whittier Street
St. Louis, MO 63108

and

Joshua A. Block
jblock@aclu.org
James Esseks
jesseks@aclu.org
LGBT Project
ACLU Foundation
125 Broad Street, Floor 18
New York, NY 10004
Pro Hac Vice – Pending

Attorneys for Plaintiffs

/s/ Thomas A. Mickes