

STATE OF MAINE  
CUMBERLAND, ss

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Cumberland ss. Clerk's Office

JAN 15 2016

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SUPERIOR COURT  
CIVIL ACTION  
DOCKET NO. AP-15-44

HARPSWELL COASTAL ACADEMY,  
et al.,

Petitioners

v.

ORDER

M.S.A.D. 75,

Respondent

Before the court is a motion by petitioners Harpswell Coastal Academy, Wesley Withers, Carrie Withers, and John Doe for a stay under Rule 80B and/or for a preliminary injunction.<sup>1</sup>

At the outset, given the specific nature of the relief sought by petitioners, the court concludes that petitioners must demonstrate the standard prerequisites for preliminary equitable relief in order to be entitled to a stay or a preliminary injunction: (1) that they will suffer irreparable harm in the absence of an injunction, (2) that such harm outweighs any injury that an injunction would cause to the respondent or others, (3) that they have shown a likelihood of success on the merits, and (4) that the public interest will not be adversely affected. *See Bangor Historic Track Inc. v. Department of Agriculture*, 2003 ME 140 ¶ 9, 837 A.2d 129.<sup>2</sup>

To the extent that petitioners are seeking affirmative relief rather than an injunction that would simply maintain the status quo, petitioners must show a “clear likelihood of success on the merits” in order to obtain a preliminary injunction. *Department of Environmental Protection v.*

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<sup>1</sup> In a footnote, respondent MSAD 75 questions the standing of Harpswell Coastal Academy to seek review of the action that is challenged in this case. Because the standing of the remaining petitioners is not being challenged, that issue need not be reached in deciding the pending motion.

<sup>2</sup> This is the same standard petitioners would have to meet if they were seeking a stay while appealing the action of a state agency. *See* 5 M.R.S. § 11004.

*Emerson*, 563 A.2d 762, 768 (Me. 1989). In this case MSAD 75 instituted the policy that is being challenged by petitioners in July 2015, and it is perhaps debatable whether a stay of that policy would constitute affirmative relief or maintain the status quo. This issue need not be reached in order to decide the pending motion.

Petitioners are seeking an injunction requiring MSAD 72 to allow students at Harpswell Coastal Academy, a charter school, to try out for athletic teams and other extracurricular activities at Mt. Ararat Middle School and Mt. Ararat High School. *See* Plaintiffs' motion for stay and preliminary injunction dated November 17, 2015 at 11-12. The specific dispute that gave rise to this action was a decision by MSAD 75 Superintendent Bradley Smith that the son of petitioners Wesley and Carrie Withers, a student attending Harpswell Coastal Academy who is designated as "John Doe" in this action, would not be allowed to try out for the 8th grade basketball team at Mt. Ararat Middle School.

The governing statute provides in pertinent part as follows:

If a public charter school student applies for and receives written approval from the superintendent of the school administrative unit of the noncharter public school or the superintendent's designee, who may withhold such approval, the public charter school student is eligible to participate in extracurricular activities not offered by the student's public charter school at the noncharter public school within the attendance boundaries of which the student's custodial parent or legal guardian resides or the noncharter public school from which the student withdrew for the purpose of attending a public charter school. The superintendent of the school administrative unit or the superintendent's designee may withhold approval only if the public charter school the student attends provides the same extracurricular or interscholastic activity or if the noncharter public school does not have the capacity to provide the public charter school student with the opportunity to participate in the extracurricular or interscholastic activity.

20-A M.R.S. § 2415(2) (emphasis added).

There is no dispute that Harpswell Coastal Academy does not have an 8th grade basketball team. In withholding approval for John Doe to try out for the Mt. Ararat 8th grade basketball team, Superintendent Smith was acting pursuant to a July 2015 policy adopted by MSAD 75 which states that an MSAD 75 school

does not have capacity to provide a charter school student the opportunity to participate in extracurricular activity when all available slots and positions for the activity are taken by regularly enrolled students. A student enrolled in MSAD 75 schools will not be denied the opportunity to participate in favor of a student enrolled in a charter school.

Because the number of MSAD 75 students who tried out for the 8th grade basketball team exceeded the number of positions on the team, Superintendent Smith informed Mr. and Mrs. Withers that their son would not be allowed to try out.

Petitioners argue that the MSAD policy and Superintendent Smith's decision are based on an incorrect interpretation of state law and violate equal protection.

The statutory interpretation issue may be resolved by comparing the statutes governing participation in public school extracurricular activities by students who attend charter schools, by students who attend private schools, and by home-schooled students. The statute governing the eligibility of private school students to participate in public school extracurricular activities is virtually identical with the statute applicable to charter school students. It provides that private school students are eligible to participate in extracurricular activities at the local public school with the approval of the public school principal, who may withhold approval "only if the school does not have the capacity to provide the student with the opportunity to participate in the extracurricular activity." 20-A M.R.S. § 5021-A(1)(A).

In contrast, the statute governing participation in local school extracurricular activities by home schooled students expressly provides that "[s]tudents receiving home-school instruction

are eligible to try out for extracurricular activities sponsored by the local school unit . . .” 20-A M.R.S. § 5021(5) (emphasis added). Although home-schooled students must apply in writing to engage in extracurricular activities, home-schooled students are not required to obtain any approval from a principal or school superintendent nor does their ability to try out depend on whether the local school has the capacity to provide home-schooled students with the opportunity to participate.<sup>3</sup>

The difficulty with petitioners’ argument is that they are interpreting section 2415(2) as if it were identical to section 5021(5), affording charter school students the same unconditional right to try out for local school teams and other extracurricular activities as home schooled students. This interpretation would essentially eliminate the statutory ability of a local school to withhold approval when the local school “does not have the capacity to provide the public charter school student with the opportunity to participate.” That statutory language cannot be overlooked. If the legislature had meant for charter school students to be able to try out for public school extracurricular activities without regard to the capacity of the local school to provide for such participation, it would have used the same language as it used in section 5021(5).

Left to its own devices, the court would be inclined to allow charter school students to try out for local school teams and play on those teams if they succeed at the tryouts. However, it is obliged to honor the intent of the legislature as made evident in the language of the statute.

Petitioners argue that their interpretation is shared by the Department of Education, citing a September 2, 2015 letter from then Acting Education Commissioner Desjardin. The court is not prepared to give deference to the interpretation of § 2415(2) set forth in the Desjardin letter for several reasons. First, an agency’s interpretation of a statute cannot prevail if contrary to the

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<sup>3</sup> All that is required is that home schooled students agree to abide by the same rules applicable to regularly enrolled students. *See* 20-A M.R.S. § 5021(5)(A)-(D).

statutory language. *E.g.*, *Guilford Transportation Industries v. PUC*, 2000 ME 31 ¶ 11, 746 A.2d 910. Second, deference to an agency interpretation is most appropriate where statutory language is ambiguous and the agency has been charged with administration of the statute. In this case, as the Desjardin letter admits, the Department of Education does not have a role in administering 20-A M.R.S. § 2415(2).

Finally, the court is obliged to note that the language allowing school superintendents to withhold approval if the local public school “does not have . . . capacity” was enacted in 2014 over the Governor’s veto. Laws 2013, c. 601 § 1. The Governor vetoed the bill because he thought it was an unwarranted restriction on charter schools and their students and “would allow public school superintendents to deny charter school students from their districts the opportunity to participate in extracurricular or interscholastic activity.” Veto Message dated April 28, 2014, found at Legislative Record H-2-22 May 1, 2014 (House).<sup>4</sup> It appears, therefore, that Commissioner Desjardin’s interpretation is based at least in part on his administration’s disagreement with the statute. In that event, his interpretation cannot be allowed to overcome legislative intent.

Petitioners’ final argument is that the MSAD policy and Superintendent Smith’s decision violate the constitutional guarantee of equal protection. However, charter school students do not constitute a suspect classification under the equal protection clause, and the right to participate in extracurricular activities is not a fundamental right. As a result, MSAD 75’s policy need only be rationally related to a legitimate state interest in order to survive an equal protection attack.

While the court would not have adopted the policy in question, it is constrained to conclude that the policy is rationally related to the legitimate governmental interest of balancing

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<sup>4</sup> The Veto Message went on to argue that the concept of “capacity” was overly vague and would leave the door open to wholesale denials.

the competing interests of regular MSAD students and those of charter school students with respect to the opportunity to participate in extracurricular activities. For every charter school student who might be given a place on a Mt. Ararat team, a regular Mt. Ararat student would have to be excluded.<sup>5</sup> It is not irrational to conclude that, unless not enough regular students try out for all the available places on the team, the school team should be composed of classmates at the school.

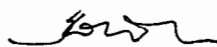
Since the *sine qua non* of the four part standard for a preliminary injunction is likelihood of success on the merits, see *National Organization for Marriage v. Commission on Governmental Ethics and Election Practices*, 2015 ME 103 ¶ 28, 121 A.3d 792, and since the court does not find on this record that petitioners have demonstrated a likelihood of success on the merits, petitioners' motion must be denied.

The final brief on petitioners' Rule 80B appeal has not been filed and the discovery deadline has not expired. The court is prepared to reconsider its views as to the merits in the light of further filings and evidence that may be presented in the case.

The entry shall be:

Petitioners' motion for a stay and/or preliminary injunction is denied. The clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: January 16, 2016



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Thomas D. Warren  
Justice, Superior Court

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<sup>5</sup> On this record, the court cannot conclude that there would be no difficulty in simply expanding the team – although that was apparently done on an interim basis in a prior year. Moreover, to survive rational basis scrutiny, a governmental entity is not required to adopt the best solution so long as the solution it adopts is rational.

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