UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

BELEN GONZALES, *et al*,	§	
	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. 2:18-CV-43
	§	
MATHIS INDEPENDENT SCHOOL DISTRICT,	§	
	§	
	§	
Defendant.	§	

ORDER GRANTING PRELIMINARY INJUNCTION AS TO C.G.

Before the Court is Plaintiffs' Motion for Entry of Preliminary Injunction (D.E. 33). On September 5, 2019, the Court called the motion for hearing and Plaintiffs, Belen Gonzales, C.G., and D.G. appeared personally and through counsel. Defendant Mathis Independent School District (MISD) appeared by counsel. The Court has already granted a preliminary injunction in favor of D.G. D.E. 50.

After the hearing, the Court took under advisement the request of C.G. in order to give the parties additional time to address MISD's challenge to the Court's jurisdiction. Additional briefing and evidence have been submitted and given due consideration. D.E. 53, 55, 56. Plaintiffs also filed their Motion to Strike Defendant's Answer (D.E. 57), which challenges MISD's affirmative defenses of immunity, lack of jurisdiction over state law claims, and statute of limitations. *See* D.E. 38. For the reasons set out below, the Court carries the motion to strike with the case and GRANTS the preliminary injunction in favor of C.G.

JURISDICTION

The Texas Religious Freedom Restoration Act (TRFRA) contains a provision that waives sovereign immunity. Tex. Civ. Prac. & Rem. Code § 110.008. The first part addresses the government agency's immunity. The second part addresses the jurisdiction of the court in which suit is brought. In addition, Plaintiffs claim waiver pursuant to MISD's failure to timely raise its immunity and challenge to jurisdiction by affirmative defense in the course of this litigation. Each issue is addressed in turn.

Government Agency Immunity. According to the TRFRA, "Subject to Section 110.006, sovereign immunity to suit and from liability is waived and abolished to the extent of liability created by Section 110.005, and a claimant may sue a government agency for damages allowed by that section." *Id*., § 110.008(a). Section 110.006(a) requires that notice be provided by certified mail, return receipt requested (CMRRR). While it is undisputed that Plaintiffs gave notice of their complaints and that MISD received such notice prior to filing suit, the argument is that it was not done by CMRRR.

Plaintiffs concede that they did not provide notice by CMRRR. However, they argue that they fall into the exception of Section 110.006(b). The 60-day CMRRR requirement does not apply if:

> (1) the exercise of governmental authority that threatens to substantially burden the person's free exercise of religion is imminent; and
>
> (2) the person was not informed and did not otherwise have knowledge of the exercise of the governmental authority in time to reasonably provide the notice.

Tex. Civ. Prac. & Rem. Code § 110.006(b). The parties do not dispute that the first

requirement for the exception is satisfied: that MISD intended to immediately bar C.G. from extracurricular activities with academic consequences (prohibiting him from participating in a band concert, which initially resulted in a failing grade).

What is at issue is whether notice that MISD provided to C.G. prior to November 10, 2017, eliminates his ability to satisfy the second requirement of the exception: that he did not have time to give 60-day CMRRR notice prior to seeking relief. MISD points to its August 2017 decision to deprive C.G. from playing on the football team and the grievance activity that ended with the Superintendent's November 7, 2017 decision affirming the ban. All of that activity took place more than 60 days before Plaintiffs filed suit.

According to Plaintiffs, all of that activity addressed only C.G.'s desire to play football. It was not until after December 1, 2017, that they learned that MISD intended to apply the decision to all extracurricular activities of both boys. This belief is supported by the language of Plaintiffs' grievance (D.E. 53-6), which complained of C.G.'s ban from football, and the MISD letters setting out the decisions on Plaintiffs' grievances. For instance:

- "Your request to have your son participate in extra-curricular programs, specifically football, while being allowed to keep his hair long in violation of District policy is denied . . . ." D.E. 56-1.
- "Page 12 of the Mathis ISD Extra-Curricular Handbook states 'student will be required to follow the sponsor/coach's rules, which may be stricter than those stated in the handbook.' Thus, the football program

is governed by the Extra-Curricular Handbook and the rules established by the football coach." *Id*.

- After referencing the rules, including the page 12 requirement to follow the coach's requirements, the Superintendent wrote,

> As much as we would like for your son to be part of the Pirate football program, compliance with the rules is mandatory for all football players and to allow him to keep his hair long is not permissible. The decision to participate in any extra-curricular activity is solely on a voluntary basis; therefore, participation includes the willingness to comply with all requirements of the extra-curricular activity chosen.

D.E. 56-2.

Nothing in these MISD letters eliminates the interpretation that it was the football coach's specific decision, not the general MISD grooming policy, that mandated the result.

Belen Gonzales' testimony is uncontroverted that, prior to December 1, 2017, she believed that only C.G.'s participation in football was at issue. D.E. 56. It was not until December 1, 2017, that MISD applied any adverse decision to the extracurricular activities of D.G. (who was actively participating in the Science Club at the time he was called down to receive his letter of prohibition). And only after that was the decision extended to prohibit C.G. from participating in a band concert affecting his grade.

Plaintiffs had little incentive to challenge MISD's decision as it related to C.G.'s participation in football after the November 7, 2017 decision. Any additional grievance or legal action could not be expected to be resolved before the end of the football season.

A new urgency triggered by imminent harm arose when the decision was applied outside of the football context and not only affected both boys, but also affected C.G.'s academic grading.

The Court holds that Plaintiffs did not have knowledge of the exercise of the governmental authority that was imposing imminent harm in time to reasonably provide 60-day CMRRR notice. Therefore, the exception of Section 110.006(b) applies and MISD's sovereign immunity is waived under Section 110.008(a).

Court Jurisdiction. The statutory waiver, however, "does not waive or abolish sovereign immunity to suit and from liability under the Eleventh Amendment to the United States Constitution." *Id.*, § 110.008(b). The Eleventh Amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . ." United States Const. Amend XI. In other words, nothing in the TRFRA allows a federal court to adjudicate an individual's TRFRA claim against a nonconsenting state governmental agency. *See Edelman v. Jordan*, 415 U.S. 651, 662–63 (1974). Thus, MISD claims that this Court is prohibited from considering the TRFRA claim.

However, Eleventh Amendment immunity can be waived, and is waived, when the governmental agency voluntarily removes a state court case to federal court, as happened here. *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 250 (5th Cir. 2005). Such a waiver applies to claims against the governmental agency under both state and federal law. *Id.* And the principle is applied to ensure fairness and consistency, noting that it is

unacceptable to afford the state the ability to remove and then enforce a favorable judgment as res judicata or, at will, appeal an unfavorable judgment contending that it is unsupported by jurisdiction.

The Court holds that MISD has waived Eleventh Amendment immunity by invoking this Court's jurisdiction.

Pleading Amendment. In its original answer, MISD conceded jurisdiction and did not raise any affirmative defenses related to immunity or jurisdiction. D.E. 4. That answer remained active until MISD ostensibly filed its amended answer on August 30, 2019. D.E. 38. The amended answer includes conclusory claims of a lack of jurisdiction and MISD's immunity. *Id*. Plaintiffs have moved to strike the amended answer as having been filed after the Rule 12 deadline and without leave of court. D.E. 57.

Plaintiffs filed their first amended complaint—the claim for relief prompting a responsive pleading—on March 9, 2018. D.E. 8. MISD timely filed a Rule 12 motion, thus extending its deadline to answer to 14 days after the disposition of the motion. D.E. 9; Fed. R. Civ. P. 12(a)(4). The Court ruled on the motion on May 30, 2018. D.E. 19. Therefore, the deadline for filing an answer to the first amended complaint was June 13, 2018. Thus the amended answer was filed more than a year and two months late. In addition, the pleading deadline, September 3, 2019, expired without MISD filing a motion for leave to permit the previously filed untimely amended answer.

Plaintiffs complain that immunity from liability is an affirmative defense that MISD did not timely raise. If the amended answer is stricken, then MISD is not permitted to rely on that affirmative defense. As set out above, it is apparent that MISD's

immunity and jurisdictional defenses are without merit as to the TRFRA claim currently before the Court. The Court therefore need not, and does not, address the timeliness of MISD's pleading in this context. The Court carries the motion with the case to the extent that it may govern other issues.

PRELIMINARY INJUNCTION

A. Substantial Likelihood of Success.

C.G. demonstrated a substantial likelihood of success on the merits. Plaintiffs request a preliminary injunction under the TRFRA, which provides that "a government agency may not substantially burden a person's free exercise of religion." § 110.003(a). It is undisputed that MISD qualifies as a government agency. Therefore, the statute will require proof that: (1) C.G.'s maintenance of an uncut shock of hair in a braid down his back is a religious exercise; and (2) that MISD's refusal to give C.G. a religious exemption from the hair grooming policy in order to participate in extracurricular activities is a substantial burden on his free exercise of religion. *Id*.

Religious Exercise. The witnesses, Belen Gonzales, C.G., and D.G., gave compelling testimony that they made and observe a *promesa*—a prayerful promise that is a devotion to God in appreciation for His healing hand. First, the parents asked God to heal C.G. as an infant struggling with illness. Then they sought His aid with respect to Belen's pregnancy with, and delivery of, D.G. after she had previously undergone an emergency C-section for C.G.'s birth.

Each of the witnesses testified that their *promesa* has been, and continues to be, a sacred promise and an outward sign of their religious belief. They believe that God

would be disappointed in them and could withdraw his healing protection if they were to break the *promesa* by cutting the long strands of hair. Belen stated that the braids constituted a symbol of faith and the family's dedication to God in their hearts and in their home, as well as a part of raising good children. To cut the braids would be to give up on God or would represent the false suggestion that she does not need Him anymore.

The *promesas*, since the childrens' births, have been sanctioned by Catholic priests, who provided verification to MISD to support Plaintiffs' religious exemptions to enroll in school while maintaining their braids, which do not comply with the MISD hair grooming policy. *See* Plaintiffs' Exhibits 2A and 2B. Since kindergarten through 2017, C.G. has been permitted to attend school and participate in extracurricular activities while maintaining his braid, on the basis of his long held *promesa* and the religious exemption MISD granted.

In the children's sixth grade year, their parents gave them the freedom to choose whether to continue to observe the *promesa* as a promise of their own to God or to cut their braids. After discussing the matter between themselves, both children adopted the *promesa* as their own sacred promise and continue to affirm it to this day.

The TRFRA defines "free exercise of religion" as "an act or refusal to act that is substantially motivated by sincere religious belief." Tex. Civ. Prac. & Rem. Code § 110.001(a)(1). The Court FINDS that the witnesses testified credibly that the braids are worn pursuant to a sincere religious belief.

Substantial Burden. The witnesses testified that being denied participation in extracurricular activities significantly saddened the children. They feel excluded and

ostracized. The football coach took C.G.'s helmet and equipment away, telling him publicly in front of the team that he would not be permitted to be on the football team because of his braid. D.G. and C.G. are hurt because they cannot contribute to the success of their school teams and therefore have difficulty celebrating wins.

Belen testified about her concerns that extracurricular activities are stepping stones for the children realizing who they can and want to be. Such group endeavors help children unlock their potential, dabbling in different types of work to learn what fits best with their needs and talents. Not being exposed to that has deprived them of opportunities for learning, growth, and socialization with friends they have grown up with.

This is consistent with MISD's own representation of the benefits of extracurricular activities. According to the MISD Extra-Curricular Handbook:

> We believe that [ ] properly controlled well organized academic, athletic, vocational, and technology programs meet the needs for self-expression, mental alertness, and physical growth. We endeavor to maintain a program that is sound in purpose and will further each student's educational maturity. It is our desire that through competition, our students realize that they can determine the course of their own lives. We believe that through our program we can help our students grow into mature, responsible citizens that contribute to our society. **The primary objective of our program is to develop a sense of responsibility and accountability in all of our students.**
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> . . .

Why are Extracurricular Activities Important?

- They promote self-discipline, responsibility, leadership, teamwork, self-confidence, commitment, and student wellness.
- They enhance and enrich curricular educational offerings.
- They offer participants the opportunity to be leaders and role models on campus and in the community.
- They enable participants to represent the School District in a positive manner.

Plaintiffs' Exhibit 1, p. 3 (emphases in original). Along those same lines, Belen worries that continued exclusion will deny her children of accomplishments necessary for presenting effective college application resumes. In particular, C.G. testified that he has been interested in football in the past and would like to participate in baseball and track.

Excluding C.G. from participation in extracurricular activities because he refuses to cut his hair and break his *promesa* places a substantial burden on C.G.'s religious expression. MISD is depriving C.G. of the real and significant benefits of high school extracurricular life. *See, A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist*., 611 F.3d 248, 264 (5th Cir. 2010).

Government Interest and Least Restrictive Means. Even if C.G. has a substantial likelihood of success on the issue of the substantial burden placed on his free exercise of religion, MISD can still prevail if it demonstrates that it has imposed the burden in furtherance of a compelling governmental interest and the burden is the least restrictive means for doing so. Tex. Civ. Prac. & Rem. Code § 110.003(b). The burden of proof for this defense is placed on the government agency, MISD. *Id*.

MISD chose not to offer any evidence on these defensive issues. Nothing in Plaintiffs' evidence revealed a compelling interest supporting MISD's decision to deny C.G. and D.G. participation in extracurricular activities because they wore narrow braids down their backs, tucked inside their shirts. MISD failed to satisfy its burden of proof to show that it took reasonably restricted measures to advance their interests. Therefore, C.G. has sustained his burden to demonstrate a likelihood of success on the merits.

B. Irreparable Injury

C.G. demonstrated a substantial threat of irreparable injury if the requested injunction is not issued. The MISD school year began July 31, 2019, and extracurricular activities are getting started. This action is not scheduled for trial until March 16, 2020. MISD has not indicated any intention to moderate its stance on this issue and C.G. has already been denied the opportunity to participate in football. If an injunction is not entered, C.G. will lose three-quarters of his high school freshman year's opportunity for participation. This is a formative time for students to integrate into the life of the school and the time cannot be regained.

C. Harm of Injunction

C.G. demonstrated that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted. MISD declined to offer any evidence of harm to the school or the district if C.G. is permitted to participate and compete in extracurricular activities. Thus C.G.'s evidence of the harm he will suffer offers the sole weight in favor of issuing the injunction.

D. Public Interest

C.G. demonstrated that the grant of an injunction will not disserve the public interest. It appears to the Court that C.G. is a good student and was, prior to the ban on his participation, an asset to his extracurricular teams in middle school. The same benefits extolled in MISD's Extra-Curricular Handbook support a finding that the public interest is served by having students, including C.G., participate in those activities.

E. Bond

There is no evidence that MISD risks suffering any monetary harm by way of the requested injunctive relief. Therefore, no bond is required to secure the injunction. *Steward v. West*, 449 F.2d 324, 325 (5th Cir. 1971).

CONCLUSION

For the reasons set out above, the Court GRANTS Plaintiffs' motion for a preliminary injunction (D.E. 33) in favor of C.G. The Court ENJOINS MISD from excluding C.G.—based on his continued growth of a braid of hair running down his back and tucked in his shirt in violation of the MISD hair grooming policy—from any extra-curricular activities identified in the MISD Extra-Curricular Handbook, including:

- Any University Interscholastic League (UIL), School District, or campus-sponsored or related public performances, events, contests, demonstrations, displays, club activities, athletics, whether on- or off-campus;
- Any elected offices and honors (such as student council and homecoming king);
- All co-curricular activities, which are those held in conjunction with a credit-bearing class, but that may take place outside of school and outside of the school day (such as band and choir);

- All national organizations (such as National Honor Society or Future Farmers of America); and
- Any activity held in conjunction with another activity that is considered to be an extracurricular activity (such as a meeting, practice, or fundraiser).

ORDERED this 11th day of September, 2019.

NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE