

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
E.P., an Infant, by her mother and natural guardian,
JAMIE PROSPERO,

Plaintiff,

-against-

THE URSULINE SCHOOL OF NEW ROCHELLE,

Defendant.
-----X

DAMARIS E. TORRENT, A.J.S.C.

DECISION AND ORDER

Index No.: 63745/2021

Motion Date: 07/26/2022

Seq. No. 4

The following papers numbered 1 to 16 were read on plaintiff’s application by Order to Show Cause (Seq. No. 4) for a Temporary Restraining Order (TRO) and related preliminary injunctive relief; and an order granting plaintiff leave to amend the complaint:

<u>PAPERS</u>	<u>NUMBERED</u>
Proposed Order to Show Cause / Affidavit (E.P.) / Affidavit (Prospero) / Affirmation (Galgano) / Exhibits A – G / Memorandum of Law	1 – 12
Defense Counsel’s Letter dated July 27, 2022 / Exhibit A / Affidavit in Opposition (Melnik)	13 – 15
Plaintiff Counsel’s Letter dated July 29, 2022	16

Upon the foregoing papers, and upon the arguments of the parties heard on August 22, 2022, the motion is determined as follows:

Plaintiff E.P., a rising high school senior at the defendant private school, brings this application seeking an order enjoining the school from conducting any further disciplinary proceedings against her and ordering defendant to immediately permit her to return to school and register for the 2022-23 academic year and to permit her immediate access to her school e-mail

account and college applications, and otherwise resume all regular activities in good standing. Plaintiff additionally seeks to enjoin defendant from entering or maintaining a record of expulsion without further order of the Court or otherwise enforcing its expulsion of plaintiff. Plaintiff further seeks leave to amend the complaint.

Plaintiff brought a similar application for injunctive relief on or about September 28, 2021, after defendant notified plaintiff that she was expelled from school for certain conduct which defendant contends violates the school's mission and values and provisions of the applicable Student/Parent Handbook. The matter was assigned to Hon. James W. Hubert, J.S.C. By Order to Show Cause dated September 30, 2021, plaintiff's application for a TRO was granted. After submission of papers and an evidentiary hearing, by Decision and Order dated April 22, 2022, the TRO was replaced by a preliminary injunction, pursuant to which plaintiff remained enrolled at the school through the 2021-2022 school year.

Shortly after the end of the school year, defense counsel notified plaintiff counsel by letter that the preliminary injunction had expired, and that plaintiff thus was no longer a student at the school. Plaintiff now brings the instant application for a further TRO and preliminary injunction and seeks leave to amend the complaint. Defendant submitted limited opposition to the application for a TRO. A conference to address the application for a TRO was held on August 22, 2022, at which time both parties appeared by counsel and presented their arguments to this Court.

A party seeking a preliminary injunction pursuant to CPLR 6301 "must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and balance of equities in its favor" (*X & Y Dev. Group, LLC v Epic Tower, LLC*, 196 Ad3d 733, 733 [2d Dept 2021], quoting *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]).

The plaintiff has established a likelihood of success on the merits. The facts are sharply disputed and highly contested. Nevertheless, the existence of issues of fact alone will not justify

denial of a motion for a preliminary injunction, so long as plaintiff establishes a clear right to relief (*Cooper v Board of White Sands Condominium*, 89 AD3d 669 [2d Dept 2011], quoting *Matter of Advanced Digital Sec. Solutions, Inc. v. Samsung Techwin Co., Ltd.*, 53 AD3d 612, 613 [2d Dept 2008]). The plaintiff has made a sufficient showing, at least at this juncture, that (1) certain conduct involving posting of inappropriate content occurred before she became a student at the school,¹ (2) the other students engaged in creating an inappropriate video which plaintiff posted received a suspension, not expulsion, and (3) other students posted the same or similar videos without receiving any disciplinary sanctions.

Admittedly, the applicable standard governing private schools is whether the disciplinary sanction was arbitrary and capricious, which is an extremely deferential standard. As noted by the Appellate Division in *Matter of VanHouten v Mount St. Mary Coll.*, 137 A.D.3d 1293 [2d Dept 2016]:

""[P]rivate schools are afforded broad discretion in conducting their programs, including decisions involving the discipline, suspension and expulsion of . . . students' (*Hutcheson v Grace Lutheran School*, 132 AD2d 599, 599, 517 NYS2d 760 [1987]; see *Cavanagh v Cathedral Preparatory Seminary*, 284 AD2d 360, 361, 725 NYS2d 889 [2001]). Judicial review of the actions of a private school in disciplinary matters is limited to a determination as to whether the school acted arbitrarily and capriciously, or whether it substantially complied with its own rules and regulations (see *Tedeschi v Wagner Coll.*, 49 NY2d 652, 660, 404 NE2d 1302, 427 NYS2d 760 [1980]; *Matter of Khaykin v Adelphi Academy of Brooklyn*, 124 AD3d 781, 782, 1 NYS3d 356 [2015])."

Nevertheless, despite this deferential standard, plaintiff has sufficiently shown a likelihood of success on the merits. In this regard, it is certainly irrational to punish a student with expulsion for conduct which is carried on regularly by other students without similar repercussions.

It is further the plaintiff's burden to establish irreparable injury absent the grant of a preliminary injunction (see *Family-Friendly Media, Inc. v Recorder Tel. Network*, 74 AD3d 738,

¹ This conduct, which plaintiff admits, is deplorable and reprehensible. However, the conduct occurred before admission. Further, the contention that the plaintiff adhered to her racist and inappropriate remarks is sharply disputed and must be resolved by a trier of fact.

739-740 [2d Dept 2010]), and that the balance of the equities favor the plaintiff. In that regard, the Court notes that this matter was assigned to this Part on August 17, 2022, after another Judge recused himself. That former assigned Judge granted a preliminary injunction which expired by its own terms at the end of the past school year. This application was brought by proposed Order to Show Cause filed on July 26, 2022. After the recusal and reassignment, this Court was notified of the pending application for a TRO on Friday, August 19, 2022. Argument on the application for a TRO was heard on Monday, August 22, 2022.

The salient fact is that unless this Court grants relief, an expelled high school student will be forced to attempt to find a private school to accept her on the eve of the commencement of the school year.² Clearly, the absence of a resolution of these issues at an earlier date leaves the plaintiff in an untenable situation, whereas an earlier determination may have afforded the plaintiff the possibility of finding a suitable alternative school, or other arrangements. It cannot then be seriously disputed that in the absence of injunctive relief, the plaintiff will suffer grave injury and extreme prejudice, and thus that the balance of the equities favors plaintiff.

The Court has already conducted an evidentiary hearing on the prior application for a preliminary injunction, and all that has changed in the interim is that the injunction which was issued expired at the end of the prior school year. Given the time constraints presented by the reassignment of this matter to this Part on the eve of the new school year, and the already developed record, the Court finds that it would be imprudent to issue a TRO and order further briefing and hearing on the application for a preliminary injunction. Rather, the appropriate remedy at this stage is a modification of the prior preliminary injunction. The preliminary injunction issued in the Decision and Order dated April 22, 2022 thus is modified and shall remain in effect until further order of the

² It is not disputed that the plaintiff left her public school due to bullying, and that this circumstance was the impetus for her matriculation at the Ursuline School. Therefore, a return to public school is not a viable option for the petitioner.

Court. The undertaking ordered in the April 22, 2022 Decision and Order likewise shall remain in effect until further order of the Court.

As the defendant has not yet had an opportunity to be heard on plaintiff's application for an order granting leave to amend the complaint, decision on that branch of the motion is reserved pending further submission. Defendant shall file opposing papers, if any, to NYSCEF on or before September 9, 2022 and plaintiff shall file reply papers, if any, to NYSCEF on or before September 16, 2022. Finally, because the standard track for completion of discovery in this matter will expire on September 28, 2022, and no Preliminary Conference has been scheduled or held and thus no discovery schedule has been ordered by the Court, this matter is calendared for virtual Preliminary Conference as set forth below.

Accordingly, it is hereby

ORDERED that plaintiff's application for preliminary injunction is granted; and it is further ORDERED that the preliminary injunction contained in the Decision and Order dated April 22, 2022 is hereby modified as indicated herein so as to remain in effect until further order of the Court; to wit: defendant shall immediately (1) permit plaintiff E.P. to return to The Ursuline School and register for the 2022-2023 academic year; (2) permit plaintiff E.P. to access her school e-mail account, college applications, and application materials; and (3) permit plaintiff E.P. to otherwise resume all activities as a student in good standing; and defendant is hereby enjoined, until further order of the Court, from (4) conducting any further disciplinary proceedings against plaintiff E.P. with respect to the alleged conduct at issue in this litigation; and (5) entering or maintaining a record of expulsion with respect to plaintiff E.P. or otherwise attempting to enforce the expulsion of E.P.; and it is further

ORDERED that the parties shall submit further papers in connection with plaintiff's application for leave to amend the complaint according to the schedule set forth hereinabove; and it is further

ORDERED that, within ten (10) days of the date hereof, plaintiff shall serve a copy of this Decision and Order, with notice of entry, upon defendant; and it is further

ORDERED that within ten (10) days of service of notice of entry, plaintiff shall file proof of said service via NYSCEF; and it is further

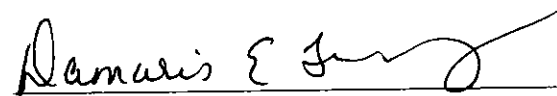
ORDERED that the parties shall complete and file to NYSCEF a Preliminary Conference Stipulation to be so ordered, a copy of which is available on the Court's web site at: https://www.nycourts.gov/LegacyPDFS/courts/9jd/civilCaseMgmt/12_6_PC.pdf; on or before September 2, 2022; and it is further

ORDERED that if the parties fail to file the Preliminary Conference Stipulation as directed, the parties shall appear for virtual Preliminary Conference on September 7, 2022 at 12:30 p.m.

The foregoing constitutes the Decision and Order of the Court.

Dated: August 23, 2022
White Plains, New York

E N T E R:



HON. DAMARIS E. TORRENT, A.J.S.C.

FILED VIA NYSCEF