

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

PEN AMERICAN CENTER, INC., ET AL., PLAINTIFFS, VS. ESCAMBIA COUNTY SCHOOL BOARD, DEFENDANT.	CASE NO.: 3:23-CV-10385-TKW- ZCB
--	---

**PLAINTIFFS' PARTIAL OPPOSITION TO
DEFENDANT'S MOTION TO STAY PROCEEDINGS**

For the reasons stated below, this Court should deny Defendant's Motion to Stay Proceedings (ECF 158; "Motion" or "Mot.") with respect to Plaintiffs' claims related to the Restricted Books and Plaintiffs' pending Motion for Sanctions (ECF 159), and permit the claims based on the Restricted Books (and the related remaining discovery) to proceed at least to summary judgment. Plaintiffs do not oppose a stay of the Court's Amended Order on their Rule 72(a) Objection (ECF 155) pending Defendant's appeal of that order, nor do they oppose a stay of the claims relating to the Removed Books.

I. PRELIMINARY STATEMENT

Plaintiffs' claims relate to two distinct categories of books: the Removed Books and the Restricted Books. Defendant affirmatively voted to eliminate the Removed Books from school libraries, against the recommendations of its District Materials Review Committees ("DMRCs"). Plaintiffs seek to depose the Board Members about these votes if the Eleventh Circuit affirms this Court's order on legislative privilege. However, the Board never voted on any of the Restricted Books, and how their challenges were handled by the Board is quite different from the process surrounding the Removed Books.

The Board first relegated the 119 Restricted Books to restricted sections of school libraries due to community challenges, then took them off the shelves pending completion of the challenge review process. However, the review process for the Restricted Books has not yet even begun, as the Board put the DMRC process on hold in April of 2023. *See* Declaration of Shalini Goel Agarwal ("Agarwal Decl."), attached as Exh. A, Exh. 1 (M. White email to V. Baggett, Apr. 17, 2023). Although the Board did resume the DMRC process this fall, it elected not to review the Restricted Books first, thus prolonging their restriction purgatory. Accordingly, many of the Restricted Books have been completely unavailable to students for over two years. The Board's inaction, which should not be prolonged by a stay, has resulted in a *de facto* removal of the Restricted Books and an ongoing, indefinite

violation of Plaintiffs' First Amendment rights. *See* Mot. Dismiss Order at 8 n.12, ECF 65 (“[I]f the review process has not been completed in a reasonable period of time and the book has effectively been placed in an indefinite ‘restriction purgatory’ (as the amended complaint alleges), it would seem that the restriction could be considered a *de facto* removal”); Agarwal Decl., Exh. 2 (Mot. Hr’g Tr. 21:19–22, Nov. 15, 2024) (“[A]t some point, if the challenge isn’t resolved soon enough, I’m going to assume that the answer is, from the School Board’s perspective, it stays off the shelves.”).

The claims relating to the Restricted Books do not depend on Board Members’ depositions and are ripe for resolution; thus, they should not be stayed pending appeal. Proceeding as to the Restricted Books while staying the Removed Books part of the case would cause Defendant no appreciable harm. But Plaintiffs are suffering and will continue to suffer substantial harm from the restriction of over one hundred books with no timely plan for review. In contrast, staying the case in its entirety will allow the Board to continue to delay any decision-making or review of the Restricted Books for months or even years, exacerbating harm to both the Plaintiffs and the public interest in resolving the Restricted Books’ status.

Further, this Court has broad discretion to bifurcate the Restricted Books claims to allow them to proceed because such an action would promote judicial economy, convenience, and avoid prejudice. Moreover, the Court need not decide at

this juncture to hold separate trials, but can allow the Restricted Books claims to proceed through summary judgment and determine at a later date whether to hold a trial as to the Restricted Books alone.

II. BACKGROUND

On October 18, 2024, Magistrate Judge Bolitho granted Defendant's Motion for Protective Order Asserting Legislative Privilege. (ECF 138.) Plaintiffs objected, and this Court heard oral argument on the issue on November 15, 2024. At the conclusion of the hearing, this Court sustained Plaintiffs' objections and issued an Order, subsequently amended, quashing the magistrate judge's order. (ECF 155.) On November 26, 2024, Defendant filed a notice of appeal of this Court's order (ECF 157), and moved to stay the entire case (ECF 158).

Plaintiffs oppose a stay with respect to the Restricted Books and ask the Court to allow those claims (and associated remaining discovery) and their Motion for Sanctions (ECF 159) to proceed. Specifically, with respect to the Restricted Books, Plaintiffs seek to complete the depositions of two Board witnesses that were left open—that of the Superintendent, based on his unproduced notes about his review of Restricted Books, *see* Agarwal Decl., Exh. 3 (Leonard Dep. Tr. 99:9–100:13), and the Board's Rule 30(b)(6) corporate representative, based on late-produced

documents relating to HB 1069 and inter-library loans.¹ *See* Agarwal Decl., Exh. 5 at 3 (L. Oberlander email to N. Smith, Oct. 31, 2024). Additionally, Defendant has yet to produce text messages ordered produced by the Magistrate (ECF 154) and documents Defendant agreed to produce to resolve portions of Plaintiffs' Motion to Compel Discovery.² *See* ECF 141; ECF 148, at 2; ECF 150, at 1; Agarwal Decl., Exh. 4 (S. Agarwal email to N. Smith, Dec. 10, 2024). Following the completion of this discovery and the resolution of Plaintiffs' Motion for Sanctions, Plaintiffs ask the Court to allow the Restricted Books claims to proceed to summary judgment.

The only issue involved in Defendant's appeal is whether Board Members' votes on the Removed Books are subject to legislative privilege and, therefore, the Board Members are not subject to being deposed about their motivations for those votes.

The Restricted Books claims do not depend on Board Members' depositions and should proceed, along with the discovery Defendant has yet to produce. Similarly there is no reason to wait to resolve Plaintiffs' Motion for Sanctions. Its

¹ The parties have agreed that these continued depositions are appropriate and were in the process of scheduling them before the Court's order on legislative privilege was issued. Agarwal Decl., Exh. 5 at 2 (S. Agarwal email to N. Smith, Nov. 7, 2024; N. Smith email to S. Agarwal, Nov. 8, 2024).

² In its Order Granting Partial Stay, the Court noted that discovery closed on November 27, 2024, but Plaintiffs are still waiting for Defendant to produce this outstanding discovery. *See* ECF 160, at 1.

resolution will impact the scope and nature of possible Board Member depositions relating to document preservation, which do not fall under the legislative privilege, as well as summary judgment briefing. Even if the rest of the case were stayed, resolution of the Motion for Sanctions would expedite ultimate resolution of the case, as it would allow the case to proceed more expeditiously no matter what the Eleventh Circuit rules.

III. ARGUMENT

A. Defendant has not met its burden of establishing need for a stay as to the Restricted Books.

In deciding whether to stay proceedings, courts consider: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). “The proponent of a stay bears the burden of establishing its need,” *Clinton v. Jones*, 520 U.S. 681, 708 (1997), and the applicant “must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else.” *Landis v. North Am. Co.*, 299 U.S. 248, 257 (1936). The district court has discretion to decide whether and how to issue a stay, depending “upon the circumstances of the particular case.” *Nken*, 556 U.S. at

433. Here, Defendant has failed to establish a stay of the Restricted Books claims is needed because it has not shown it would suffer irreparable injury; it ignores Plaintiffs’ substantial injury from the continued restriction and failure to review the Restricted Books; and the public interest favors prompt resolution of the Restricted Books claims.³

1. Defendant has not shown that it will suffer irreparable harm if the claims relating to the Restricted Books are not stayed.

Defendant first claims it will suffer irreparable harm by its Members being deposed. Mot. at 7. But Plaintiffs need not depose the Board Members to proceed with their claims relating to the Restricted Books. Thus, no harm—let alone *irreparable* harm—would befall Defendant on that basis.

Defendant also argues it will be irreparably harmed because some deadlines will move forward, resulting in “multiple rounds of summary judgment briefing, two trials . . . and possibly two appeals.” Mot. at 8–9. But this is an argument about judicial economy, which affects both parties equally, not irreparable harm *to Defendant*. “[I]f there is even a fair possibility that the stay . . . will work damage to some one else,” absent “a clear case of hardship *or inequity* [to the movant] in being required to go forward,” a stay is not warranted. *Landis v. North Am. Co.*, 299 U.S.

³ Plaintiffs do not agree that Defendant is likely to succeed on the merits of its appeal. But because Plaintiffs only oppose the Motion in part, they address only the three remaining factors.

248, 255 (1936) (emphasis added). While proceeding with part of the case could result in multiple deadlines or additional costs that both parties will face, this does not establish an inequity to the Board. *See United States v. Fed. Ins. Co.*, No. , 2020 WL 9455638, at *4 (M.D. Fla. Apr. 10, 2020) (finding no hardship or inequity if stay denied where movant offered only “a perfunctory argument that some hardship is possible” and “both parties would be subject to costs and ... risk”). Further, the continued depositions of the Superintendent and Defendant’s corporate representative will occur, whether now or after Defendant’s appeal; those depositions do not present an irreparable harm.⁴

Moreover, before the Court sustained Plaintiffs’ objection to Magistrate Judge Bolitho’s grant of a protective order based on legislative privilege, *see* ECF 155, at 3–7, Defendant “anticipated filing summary judgment solely on the restricted

⁴ Defendant’s unsupported supposition that Plaintiffs would seek to re-depose these witnesses following Plaintiffs’ deposition of the School Board members, Mot. at 9, is nothing more than speculation, as those depositions relate primarily to the Restricted Books. Agarwal Decl., Exh. 3 (Leonard Dep. Tr. 99:9–100:13) (discussing notations Superintendent made on challenge forms for Restricted Books that were not produced to Plaintiffs), Exh. 5 at 3 (L. Oberlander email to N. Smith, Oct. 31, 2024) (describing late-produced documents to be discussed at 30(b)(6) deposition). Plaintiffs do agree that if the entirety of the case is stayed, the continued deposition of the Superintendent and Defendant’s corporate representatives should be stayed as well, as the underlying factual circumstances relevant to the Restricted Books may change while the appeal is pending, and in that event it would make sense to continue those depositions once the Restricted Book claims are proceeding in this Court.

books,” Agarwal Decl., Exh. 2, Mot. Hr’g Tr. 50:15-16, Nov. 15, 2024. Thus, Defendant was already planning on preparing a summary judgment motion only on the Restricted Books on the current record. There is no irreparable harm in allowing that process to move forward.

As to the possibility of holding two separate trials, the Court need not decide now whether to do so. Plaintiffs ask the Court allow the parties to complete discovery, including the depositions of the Board’s Superintendent and corporate representative, and summary judgment briefing on the Restricted Books. If, after summary judgment, the Restricted Books claims must proceed to trial, the Court can decide then, based upon the outcome of summary judgment and the status of the appeal, whether the case is best served by one trial or two. *See Wells v. XPEDX*, No. 8:05-CV-2193-T, 2006 WL 8440175, at *2 (M.D. Fla. Mar. 1, 2006) (bifurcating validity of release from claims issue from liability at time of discovery and declining to address bifurcation request as to trial, “subject to reconsideration if circumstances warrant”).

Finally, the evidentiary basis for the claims relating to the Restricted Books and the Removed Books for summary judgment are largely distinct. The factual circumstances surrounding how and why books have been restricted in school libraries, that there has been no review of those books for a lengthy period, whether that indefinite restriction constitutes a *de facto* removal, and whether the books

should be returned to the shelves or an age- or grade-level appropriate review must be conducted promptly are all issues largely separate from the reasons for the Board's decisions to remove the nine Removed Books from school libraries. While there necessarily will be some duplicative evidence between the claims at summary judgment, that is not a unique hardship or inequity *to Defendant*, nor does it outweigh the harm to Plaintiffs if the restriction purgatory is allowed to continue, as discussed below.

2. Issuance of a stay with respect to the Restricted Books claims will substantially harm Plaintiffs.

The Motion wholly ignores the harm Plaintiffs are suffering and will continue to suffer with respect to the Restricted Books if this case is stayed in its entirety. The books are completely removed from student access while they are awaiting review. Many of these books have now been off the shelves, awaiting review, for over two years. Any continued delay will substantially harm Plaintiffs. Additionally, since this litigation began, Defendant suspended DMRCs for sixteen months, ensuring the purgatory would continue with no end in sight. *See* Agarwal Decl., Exh. 1 (M. White email to V. Baggett, Apr. 17, 2023). And, once the DMRCs began to be reconstituted earlier this Fall, they did not take up the Restricted Books. *See* Escambia County Public Schools, *ECPS 22-23 Reconsiderations (website)*, Google Sheets, <https://docs.google.com/spreadsheets/d/1hv6Wtu55zY3t5bmbksY2ie7Q-L3zAQdjrtFh4duLC4/edit?gid=0#gid=0> (last visited Dec. 6, 2024) (tracking

restricted and removed books and showing no DMRCs have been constituted with respect to the Restricted Books).

“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable” and substantial injury. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). As this Court has recognized, the Board has “got to have a time frame to get this resolved. The answer can’t be, [Plaintiffs’] words, restriction purgatory forever. The answer can’t be four books per year.” Agarwal Decl., Exh. 2, Mot. Hr’g Tr. 62:12-15, Nov. 15, 2024. The solution should not be to stay resolution of these claims while awaiting the Eleventh Circuit’s decision on an issue unrelated to the Restricted Books claims. This is especially so where Defendant *still* has no plans to timely review the Restricted Books to determine if they are age- or grade-level appropriate or resolve their challenges.

Further, the harm from delay will be exacerbated further should either party request a rehearing *en banc* or seek certiorari to the Supreme Court. *See Garmendiz v. Capio Partners, LLC*, No. 8:17-cv-009987, 2017 WL 3208621, at *2 (M.D. Fla. July 26, 2017) (“[T]he potential for either party, in [a separate case in another jurisdiction], to request a review by the circuit court *en banc* and/or seek a writ of *certiorari* to the United States Supreme Court will further delay any concrete resolution to the issue.”). Resolution of the Board’s legislative privilege appeal will

take months at a minimum; but it could take years. And yet, the Board's conduct has made clear that book restrictions will not be resolved without a court order. The continued restriction of these books from student access without review constitutes an ongoing First Amendment violation and substantial harm to Plaintiffs, and it is a harm that this Court can alleviate by allowing the Restricted Books claims to proceed.

3. The public interest requires that the Restricted Books claims proceed.

Defendant only argues the public interest favors delaying the depositions of its Board Members, not that it favors staying the case in its entirety. Mot. at 10–11. Thus, Defendant has not remotely met its burden. *Clinton*, 520 U.S. at 708 (“The proponent of a stay bears the burden of establishing its need.”). *See also FTC v. IAB Mktg. Assocs., LP*, 972 F. Supp. 2d 1307, 1311 (S.D. Fla. 2013) (denying motion to stay where movant's opening brief did not argue they were likely to succeed on appeal and remaining three factors favored denial).

Nonetheless, it is clear the public interest *favors* allowing the Restricted Books claims to proceed. Public school students across Escambia County have been unable to access books while they await a review that seemingly will never come. In *Kingseal, LLC v. Arch Specialty Insurance Company*, the district court denied a stay pending interlocutory appeal of its denial of a motion to dismiss, where it found the public interest would best be served by prompt resolution of the case to ensure

continued operation of the only nursing home in the county. No. 2:23-cv-77-SPC-NPM, 2023 WL 4235458, at *2 (M.D. Fla. June 8, 2023). Similarly, Defendant operates the only public schools in the county and has restricted these books from *all* of their libraries. Students, parents, and community members alike have a strong interest in ensuring that the school district does not indefinitely restrict access to books without review in all of its public schools. The public interest is best served by prompt resolution of the Restricted Books claims.

B. This Court’s broad discretion to bifurcate claims supports allowing the Restricted Books claims to proceed.

Formally, Plaintiffs are partially opposing a stay motion, not moving to bifurcate the case. However, under Rule 42(b) of the Federal Rules of Civil Procedure, the district court has broad discretion to separate a claim “[f]or convenience, to avoid prejudice, or to expedite and economize.” Fed. R. Civ. P. 42(b); *see also Harrington v. Cleburne Cnty. Bd. of Educ.*, 251 F.3d 935, 9338 (11th Cir. 2001) (finding “a colorable reason for directing separate trials” to be sufficient for the district court to bifurcate claims under Rule 42(b)). The standards governing bifurcation are relevant to the Court’s stay determination.

Although in ordinary circumstances, bifurcation is the exception and not the rule, *Doe v. Hudson Specialty Ins. Co.*, No. 16-24176-CIV, at *1 (S.D. Fla. Feb. 13, 2017), this case is unique. Defendant is seeking interlocutory appeal of an issue

unrelated to the Restricted Books but has moved to stay the case in its entirety—a result that will only delay a process that has already dragged on for too long.

When determining whether bifurcation is appropriate, “[t]he Court’s ‘paramount consideration must remain a fair and impartial trial to all litigants through a balance of benefits and prejudice.’” *Odom v. Royal Caribbean Cruises, Ltd.*, No. 18-24780-CIV, 2019 WL 8275160, at *1 (S.D. Fla. Nov. 1, 2019) (citation omitted) (bifurcating liability issues from damages because it would be more efficient to address straightforward issues of liability separately). Bifurcation would be appropriate here because the balance of benefits and prejudice weigh strongly in favor of Plaintiffs.

First, Defendant will not be prejudiced if the Restricted Books claims are allowed to proceed for the same reasons Defendants will not be harmed by a stay. *See* Section III.A.1, *supra*. Next, plaintiffs have already been prejudiced by Defendant’s delay tactics—its refusal to produce discovery, *see* ECF 159; Agarwal Decl., Exh. 4 (S. Agarwal email to N. Smith, Dec. 10, 2024), and its refusal to conduct *any* review of the Restricted Books. Plaintiffs will continue to be prejudiced if the claims are stayed pending the 11th Circuit appeal. *See* Section III.A.2, *supra*.

Finally, allowing the Restricted Books claims to proceed would promote convenience and economy. Resolving the issues of the Restricted Books at summary judgment could streamline the case if the Court is able to dispose of the claims

relating to some or all of the 119 books before trial. Nor does separation of the claims at this stage require two separate trials. The Court may decide at a later date whether one or two trials are warranted. *See Hudson Specialty Ins. Co.*, 2017 WL 6949263, at *1. Moreover, delaying the remaining discovery and Plaintiffs' Motion for Sanctions will only result in further delays upon resolution of Defendant's unrelated appeal. Thus, it is more efficient and more convenient for the Court to decide the Motion for Sanctions and for the parties to complete discovery on the Restricted Books and proceed to summary judgment for the Restricted Books claims now.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court deny Defendant's Motion to Stay Proceedings with respect to the Restricted Books (including the associated remaining discovery) and Plaintiffs' Motion for Sanctions, ECF 159.

CERTIFICATE OF WORD COUNT

The undersigned certify that this Motion complies with the word count limitation set forth in Local Rule 7.1(F) because it contains 3,794 words, excluding the parts exempted by said local Rule.

Respectfully submitted,

Dated: December 10, 2024

/s/ Lynn B. Oberlander

Lynn B. Oberlander*
BALLARD SPAHR LLP
1675 Broadway, 19th Floor
New York, NY 10019-5820
Telephone: 212.223.0200
Facsimile: 212.223.1942

Mike Kilgariff*
Catherine Warren*
Ballard Spahr LLP
1225 17th Street, Suite 2300
Denver, CO 80202
Telephone: 303.292.2400
Facsimile: 303.296.3956

Matthew G. Kussmaul*
Facundo Bouzat*
BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
Telephone: 215.864.8500
Facsimile: 215.864.8999

Kirsten Fehlan*
BALLARD SPAHR LLP
999 Peachtree Street, Suite 1600
Atlanta, GA 30309

Telephone: 678.420.3000

Facsimile: 678.420.9401

Goldie Fields*

BALLARD SPAHR LLP

2029 Century Park East, Suite 1400

Los Angeles, CA 90067

Telephone: 424.204.4338

Facsimile: 424.204.4350

Shalini Goel Agarwal (FBN 90843)

Ori Lev*

PROTECT DEMOCRACY PROJECT

2020 Pennsylvania Ave. NW, Suite 163

Washington, DC 20006

Telephone: 202.579.4582

Facsimile: 929.777.8428

**Admitted pro hac vice*

Attorneys for Plaintiffs