IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

ROSIE L. DAVIS, *et al*. PLAINTIFFS

v. Case No. 4:88-cv-4082

WILLIAM DALE FRANKS, *et al*. DEFENDANTS

ARKANSAS DEPARTMENT OF EDUCATION and
ARKANSAS STATE BOARD OF EDUCATION INTERVENORS

ORDER

Before the Court is the Hope School District's ("Hope") Motion for Temporary Restraining Order and Preliminary Injunction. (ECF No. 150). Plaintiffs have filed a response in support of the motion.[1] (ECF No 155). The Arkansas Department of Education and the Arkansas State Board of Education (the "ADE and SBE") have filed a response in opposition. (ECF No. 161). Hope has filed a reply. (ECF No. 164). On August 1, 2018, the Court held a hearing on the matter. The Court finds this matter ripe for consideration.

I. BACKGROUND

On August 5, 1988, this case was filed by African American individuals who were employed by or were parents of students who attended the Hope Public School District No. 1A in Hope, Arkansas. Plaintiffs sought to redress alleged racial discrimination regarding Hope's treatment of African American students and faculty. On November 16, 1989, the Court dismissed

[1] In their response, Plaintiffs state that they join Hope in the instant motion, and also independently move for a temporary restraining order or preliminary injunction enjoining Hope from participating in school choice. However, Plaintiffs have not briefed the issue and, therefore, the Court cannot consider Plaintiffs' independent request for preliminary injunctive relief. *See* Local Rule 7.2(e) (providing that motions for preliminary injunctions shall not be considered unless accompanied by a separate brief). Accordingly, the Court will simply consider the instant motion to be a joint motion for injunctive relief.

the case with prejudice subject to the terms of a consent decree entered into by the parties (hereinafter the "*Davis* Decree"). (ECF Nos. 37, 38). The *Davis* Decree provided, *inter alia*, that:

> [I]t is the intent of this Decree to remedy any past discrimination based upon race and to prevent any like discrimination from occurring in the future. Although this action is brought on behalf of named black individual pupils and staff, the parties hereby agree that this Decree shall be equally applied to all such students and staff now and hereafter within the Hope School District No. 1A . . .
>
> The Court, by consent of the parties, therefore enjoins, forbids and restrains the defendants from hereinafter engaging in any policies, practices, customs or usages of racial discrimination in any of its school operations including, but not limited to, faculty assignments, student assignments, and the treatment of black and other minority pupils within the school system . . .
>
> The Court shall have continuing jurisdiction of this Consent Decree in order to [e]nsure compliance with the spirit and terms of this Decree.

(ECF No. 38, ¶ 3, 4, 21). In dismissing the case, the Court retained jurisdiction to reopen this action upon cause shown that the settlement had not been completed and that further litigation is necessary. (ECF No. 37).

On May 14, 2018, Hope filed a Motion for Declaratory Judgment, or Alternatively, for Clarification of Previous Orders, or Alternatively, for Modification of Previous Orders (hereinafter "Motion for Declaratory Judgment"). (ECF No. 129). In that motion, Hope states that it is still subject to the obligations imposed by the *Davis* Decree. Accordingly, Hope asserts that it has a conflict with taking part in school choice pursuant to the Arkansas Public School Choice Act of 2015, as amended by Act 1066 of the Regular Session of 2017 (hereinafter the "2017 Act").[2] Hope states further that the ADE and SBE have ordered Hope to participate in school choice for the 2018-19 school year. Hope's Motion for Declaratory Judgment seeks, by various alternative

[2] The 2017 Act provides, in relevant part, that each Arkansas school district must participate in a school choice program wherein students may apply to attend a school in a nonresident district, subject to certain limitations. Ark. Code Ann. § 6-18-1903. School districts may apply for exemptions from participating in school choice by producing evidence that the district has a genuine conflict under a federal court's active and enforceable desegregation order or plan that explicitly limits the transfer of students between school districts. Ark. Code Ann. § 6-18-1906(a). The ADE decides a school district's application for an exemption from participating in school choice and the SBE hears appeals of the ADE's decisions on the same. *See id.*

means, a finding that Hope is prohibited from taking part in school choice and/or a declaration that portions of the 2017 Act are unconstitutional.

On May 23, 2018, the Court issued an order certifying Hope's constitutional challenge and sending notice to the Arkansas Attorney General's Office of the same, pursuant to Federal Rule of Civil Procedure 5.1(b). (ECF No. 29). On June 15, 2018, the ADE and SBE filed a motion to intervene in this case for the limited purpose of opposing Hope's Motion for Declaratory Judgment. (ECF No. 142). On June 22, 2018, the Court held a status conference in which Hope, Plaintiffs, and counsel from the Arkansas Attorney General's Office participated. On July 2, 2018, the Court granted the ADE and SBE's motion to intervene, thereby allowing those parties to intervene for the limited purpose of opposing Hope's Motion for Declaratory Judgment. (ECF No. 148). On July 16, 2018, the ADE and SBE filed their response in opposition to Hope's Motion for Declaratory Judgment. (ECF No. 149).

On July 19, 2018, Hope filed the instant motion. Hope seeks preliminary injunctive relief "restraining the [ADE] and the [SBE] from enforcing the [SBE's] March 26, 2018 order . . . requiring Hope to participate in the Arkansas Public School Choice Act of 2015, as amended by Act 1066 of 2017" or, alternatively, "that the Court enjoin Hope from participating in school choice pursuant to the SBE's Order." (ECF No. 150, ¶ 1). Hope requests that injunctive relief remain in effect until an evidentiary hearing may be held on the issue of whether Hope's desegregation obligations conflict with participation in school choice. Hope also requests that, if injunctive relief is granted, that the Court waive the bond requirement. On July 20, 2018, Plaintiffs filed a response in support of the instant motion. The ADE and SBE oppose the motion.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 65 governs preliminary injunctions and temporary restraining orders. "The primary function of a preliminary injunction is to preserve the status quo

until, upon final hearing, a court may grant full, effective relief." *Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 593 (8th Cir. 1984). It is well established that "a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original).

The determination of whether a preliminary injunction is warranted involves consideration of: "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties . . . ; (3) the probability that [the] movant will succeed on the merits; and (4) the public interest." *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). Although no single factor in itself is dispositive, the probability of success on the merits is the most significant. *Barrett v. Claycomb*, 705 F.3d 315, 320 (8th Cir. 2013). "The burden of proving that a preliminary injunction should be issued rests entirely with the movant." *Goff v. Harper*, 60 F.3d 518, 520 (8th Cir. 1995).

III. DISCUSSION

The Court will first address whether Hope has shown that it will be irreparably harmed absent an injunction, and then will turn to the other *Dataphase* factors, if necessary.

Although the probability of success on the merits is the predominant *Dataphase* factor, the Eighth Circuit has "repeatedly emphasized the importance of a showing of irreparable harm." *Caballo Coal Co. v. Ind. Mich. Power Co.*, 305 F.3d 796, 800 (8th Cir. 2002). A party seeking injunctive relief must demonstrate that the injury is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm. *Packard Elevator v. Interstate Commerce Comm'n*, 782 F.2d 112, 115 (8th Cir. 1986). To carry its burden, a party must demonstrate that a cognizable danger of a future violation exists and is more than a mere possibility. *See Rogers v. Scurr*, 676 F.2d 1211, 1214 (8th Cir. 1982) (citing *Connecticut v.*

Massachusetts, 282 U.S. 660, 674 (1931)). The failure to demonstrate irreparable harm is an independently sufficient ground to deny injunctive relief. *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003).

Hope argues that if students are allowed to transfer, it is unlikely those students will ever return to Hope. Hope claims that this will cause irreparable harm in that Hope will suffer a segregative impact, as well as the financial impact caused by the loss of sixty-nine students.[3] At the preliminary injunction hearing, Hope also argued that it could suffer irreparable harm by being required to participate in school choice until the Court rules on Hope's underlying Motion for Declaratory Judgment, thereby violating the *Davis* Decree during that period.

In response, the ADE and SBE argue that the harm Hope cites is "certainly not irreparable." (ECF No. 116, p. 22). The ADE and SBE assert that if Hope ultimately prevails on its underlying Motion for Declaratory Judgment, it is "entirely possible" that the Court would order that the students who transferred must return to Hope and "order the restitution of the per-student funding that Hope lost by virtue of the unconstitutional application of the school-choice law." (ECF No. 116, p. 22). Furthermore, the ADE and SBE assert that the only harm that would result from a denial of preliminary injunctive relief would be the loss of sixty-nine students and that—if Hope ultimately prevailed—future losses would be prevented through permanent injunctive relief. Finally, the ADE and SBE argue that the "difference a denial of injunctive relief [and, accordingly, the loss of sixty-nine students] would make is a less than 5% increase in the black percentage of its student body." (ECF No. 116, p. 22). According to the ADE and SBE, this change would be *de minimis*, no student would notice such a change, and no parent's "perception of Hope's racial identity would be affected." (ECF No. 116, p. 22).

[3] Although the instant motion states that sixty-nine students seek to leave Hope pursuant to school choice, Hope stated in the August 1, 2018, hearing that seventy students sought a transfer, and that twenty-three of those students were accepted by another school district.

Upon consideration, the Court finds that Hope has failed to carry its burden of establishing that it will suffer irreparable harm absent preliminary injunctive relief. The Court is not persuaded that Hope will suffer imminent financial harm if the approved student transfers leave Hope. Bobby Hart, superintendent at Hope, testified at the August 1, 2018, hearing that Hope's funding for the 2018-2019 school year is already in place. Likewise, Mr. Hart testified that Hope will not suffer any immediate financial harm. Taken together with the testimony offered by other superintendents in the other school desegregation cases before the Court, it becomes clear that Hope will not suffer imminent financial harm from the loss of certain transferring students. Although Mr. Hart's testimony suggests that Hope might suffer financial harm in several years due to the reduction in students, this potential harm is too far removed from the present to support a finding of irreparable harm. *See Rogers*, 676 F.2d at 1214 (stating that a preliminary injunction "may not be used simply to eliminate a possibility of a remote future injury").

Moreover, the Court is not convinced that the loss of certain students, in and of itself, constitutes irreparable harm to Hope. Hope cites no authority supporting this proposition, and the Court is unaware of any. Absent any such authority, the Court cannot find that Hope will suffer irreparable harm solely from the loss of certain students.

The Court is also unpersuaded by Hope's argument that it will suffer irreparable harm by being required to participate in school choice until the Court rules on Hope's underlying Motion for Declaratory Judgment. At the preliminary injunction hearing, Hope argued that if the Court were to eventually rule in Hope's favor on the underlying Motion for Declaratory Judgment, Hope will have violated the terms of the *Davis* Decree by participating in school choice in the meanwhile. To be fair, this could constitute harm in certain circumstances. However, this notion is predicated on the idea that the Court will eventually grant Hope's Motion for Declaratory Judgment. If, on the other hand, the Court denies the instant motion and eventually denies Hope's

Motion for Declaratory Judgment, Hope will not have suffered any harm from participating in school choice, as the Court will have determined that Hope may do so without violating the *Davis* Decree. It is well established that irreparable harm must be certain and cannot be speculative. *See S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 779 (8th Cir. 2012) ("Speculative harm does not support a preliminary injunction."). This argument, at this point, is too speculative, as the mere possibility of harm is inadequate to support a finding of irreparable harm.

In sum, the Court finds that Hope has not satisfied its burden of making a clear showing that it would suffer irreparable harm absent preliminary injunctive relief. *Mazurek*, 520 U.S. at 972. Accordingly, the Court need not proceed to the remaining *Dataphase* factors, as failure to show irreparable harm is an independently sufficient ground to deny injunctive relief.[4] *Watkins*, 346 F.3d at 844.

IV. CONCLUSION

For the foregoing reasons, the Court finds that Hope School District's Motion for Temporary Restraining Order and Preliminary Injunction (ECF No. 150) should be and hereby is **DENIED**.

IT IS SO ORDERED, this 8th day of August, 2018.

/s/ Susan O. Hickey
Susan O. Hickey
United States District Judge

[4] The Court also finds that Hope has not satisfied its burden to obtain a temporary restraining order, as the *Dataphase* factors are also used to determine whether to issue a temporary restraining order. *See Williams v. Silvey*, No. 4:09-cv-211-FRB, 2009 WL 1920187, at *1 (E.D. Mo. July 1, 2009) (applying the *Dataphase* factors in denying a motion for a temporary restraining order). Thus, the Court's analysis for whether to grant a request for a temporary restraining order is the same as for a preliminary injunction.