

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

A.M., by and through his parents and natural guardians, Christopher Messineo and Jill Messineo, E.M., by and through her parents and natural guardians, Christopher Messineo and Jill Messineo, CHRISTOPHER MESSINEO, individually, JILL MESSINEO, individually; A.S., by and through her parents and natural guardians, Russell Senesac and Selena Senesac; RUSSELL SENESAC, individually; SELENA SENESAC, individually; A.H., by and through her parents and natural guardians, James Hester and Darlene Hester; JAMES HESTER, individually; DARLENE HESTER, individually; and the ROMAN CATHOLIC DIOCESE OF BURLINGTON, VERMONT,

No. 20-1772

Plaintiffs-Appellants,

v.

DANIEL M. FRENCH, in his official capacity as Secretary of the Vermont Agency of Education,

Defendant-Appellee.

APPELLANTS' MOTION FOR EXPEDITED REVIEW

Plaintiffs-Appellants A.H., James Hester, Darlene Hester, and the Roman Catholic Diocese of Burlington, Vermont, move under Fed. R. App. P. 2 for expedited review of their appeal from the District Court's denial of their motion for preliminary injunction.¹ A.H. is a rising senior at Rice Memorial High School in Burlington who seeks to participate in Vermont's Dual Enrollment Program, which provides vouchers for dual-credit college courses to Vermont high school juniors and seniors at public and private schools. The State of Vermont has unconstitutionally excluded A.H. and Rice from the Program because Rice is a religious school.

A.H. faces her last chance to participate in the Dual Enrollment Program before graduation. Accordingly, she is separately moving for an injunction pending appeal seeking an order compelling Vermont to allow her to participate in the Program for the college fall semester, which begins August 31, 2020. And she seeks expedited review in this motion to definitively resolve her Program status before the college spring semester, which begins January 19, 2021.

¹ Appellants filed their Notice of Appeal with the District Court on June 8, 2020, and is attached as Addendum A. A copy of the District Court's Opinion and Order Denying Plaintiffs' Motion for Preliminary Injunction is attached as Addendum B. 28 U.S.C. § 1292(a)(1) provides this Court with jurisdiction.

Good cause to expedite review of this appeal exists because without the expedited review requested here and the injunctive relief requested in the parallel motion, A.H. will miss all opportunities to take dual credit college classes while in high school. She will be deprived of invaluable educational opportunities, suffer a competitive disadvantage in her college applications, and be deprived of the opportunity to challenge Vermont's discriminatory Program. Accordingly, Appellants respectfully request that the Court schedule this case according to the expedited appeals calendar described in Local Rule 31.2(b).

BACKGROUND

A.H. is a rising senior at Rice Memorial High School, which is a ministry of the Roman Catholic Diocese of Burlington Vermont. *See* Addendum B at 5. A.H. exercises her Catholic faith by attending Rice and her parents, James and Darlene Hester, exercise their faith by sending her there. *Id.* at 6. To bolster her college applications and meet her educational goals, A.H. seeks to take dual credit college courses while in high school. *Id.* But absent outside financial support, A.H.'s family lacks the resources to dual enroll her in college courses. *Id.*

The State of Vermont provides vouchers to high school juniors and seniors to take dual credit classes through its Dual Enrollment Program. 16 V.S.A. §944. The Program allows students to participate if they attend (1) a public high school in Vermont, (2) are home schooled, or (3) participate in Vermont's Town Tuitioning Program. *Id.*

The Town Tuitioning Program allows school districts, in lieu of operating a public high school, to pay tuition on behalf of their students to private schools. 16 V.S.A. § 822. A.H.'s school district does not operate a public high school; accordingly, she is eligible for the Town Tuitioning Program. But her school district refuses to pay her Rice tuition because of the school's religious status and the Vermont Constitution's Compelled Support Clause. *See* Addendum B at 6; *see also* Vt. Const. ch. I, art. 3.

There is no constitutional or other bar to Vermont paying for A.H.'s dual-enrollment tuition at a secular Vermont college. But because Vermont chose to tie Dual Enrollment Program eligibility to Town Tuitioning Program eligibility, the effect in every school district that does not operate a public high school—like A.H.'s—is to allow district students attending secular private schools to participate in the Dual Enrollment Program while barring students at religious private schools.

A.H. and her parents joined this action on December 20, 2019, challenging Vermont's Dual Enrollment Program's exclusion of students attending religious private schools in districts that do not have a public high school. To remove any doubt about her eligibility, A.H. submitted a Town Tuitioning Program request to her school district, the Grand Isle Supervisory Union. *See* Addendum B at 6. Predictably, Grand Isle rejected that request on February 26, 2020. *Id.* A.H. also applied to the Dual Enrollment Program. But because A.H. wasn't participating in the Town Tuitioning Program, the Vermont Agency of Education rejected her application on March 5.

On March 20, 2020, Appellants sought injunctive relief. After oral argument on the motion on May 11, the District Court denied Appellants' motion on May 29. Addendum B at 2.

Appellants filed a timely Notice of Appeal in the District Court on June 8, 2020 pursuant to 28 U.S.C. § 1292(a)(1). *See* Addendum A. She will separately move for an injunction pending appeal, seeking to participate in the Dual Enrollment Program during the fall 2020 semester. Here, she requests expedited consideration so she can at least participate in the Program during the winter 2021 semester.

ARGUMENT

When good cause requires an expedited decision, this Court may suspend the typical appellate scheduling procedures and order briefing and argument proceedings, as necessary. Fed. R. App. P. 2. An expedited review of this appeal is appropriate because without this Court's decision—either on the merits or on A.H.'s parallel request for an injunction pending appeal—the time for dual enrolling will pass, A.H. will graduate, and she will forever lose the opportunity to participate in the Dual Enrollment Program. Vermont will have successfully denied to A.H. an opportunity that it freely gives to her secular-school peers from her district: to take college classes while in high school. And the Hesters will be unable to vindicate their First Amendment rights.² The loss of the Hesters' constitutional rights underscores the need for expedited review because the denial of those rights, “for even minimal periods of time, unquestionably constitutes irreparable injury.” *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 71 (2d Cir. 1996).

² As the District Court recognized, money damages are unavailable because Defendant has been sued in his official capacity and Vermont has not waived sovereign immunity. *See* Addendum B at 13.

Rice also suffers irreparable harm because Vermont excludes it from the Dual Enrollment Program. Vermont's discrimination imposes a competitive disadvantage on Rice as students choose to attend other schools that are allowed to participate in Dual Enrollment. Each lost student is a lost ministry opportunity for the diocesan school.

As a rising senior, A.H.'s last semester to participate in the Dual Enrollment Program is spring 2021. So any relief this Court grants must arrive before she is required to register for and start classes in January 2021. A copy of the University of Vermont's academic calendar is attached as Addendum C.

Without expedited review, any decision granting A.H. relief on the ordinary briefing schedule will likely come *after* the dual-credit course registration deadlines pass and classes begin for the spring 2021 semester. *See* Addendum C. For example, Local Rule 31.2(a)(1)(B) allows Appellee up to 91 days to submit his brief after Appellants' brief is filed and served. After adding in time for Appellant's reply, oral argument, and this Court's consideration of the appeal, proceeding on the normal appeal schedule will effectively deprive A.H. of participating and

succeeding in the dual credit college courses. In sum, A.H. will be severely damaged without this Court's timely intervention.

Conversely, Appellee will suffer no unfair prejudice if this Court expedites this appeal and Appellee's counsel does not oppose this motion.³ The parties have fully briefed the issues in this case for both Appellee's motion to dismiss and Appellants' motion for preliminary injunction. *See* Addendum B at 2. The record is limited to the exhibits the parties filed for the motion for preliminary injunction. Additionally, the hearing transcripts and the District Court's order reflect all the evidence considered below. Because the issues on appeal are clear and discrete, neither party will be unduly burdened by preparing an appellate brief in a shortened period of time.

CONCLUSION

For these reasons, Appellants ask the Court to grant their motion to expedite consideration of this appeal.

Dated: June 26, 2020

Respectfully submitted,

s/ David A. Cortman

³ Pursuant to Local Rule 27.1, Counsel for Appellants conferred with Appellee's counsel, who does not oppose this motion.

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2020, a copy of this response was filed electronically with the Clerk of the Second Circuit Court of Appeals. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

s/ David A. Cortman
Attorney for Appellants