

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

JESSICA FELCHLE; BEAU WRIGHT;
THE MONTANA QUALITY
EDUCATION COALITION; THE
LEAGUE OF WOMEN VOTERS OF
MONTANA; SHARON CARROLL;
SUZANNE McKIERNAN; LINDA
ROST; PENELOPE COPPS; LANCE
EDWARD; and CORINNE DAY,

Plaintiffs,

v.

THE STATE OF MONTANA; GREG
GIANFORTE, in his official capacity as
Governor of the State of Montana; and
ELSIE ARNTZEN, in her official
capacity as Superintendent of Public
Instruction

Defendants.

Cause No.: DDV-2023-425

**ORDER ON MOTION FOR
TEMPORARY RESTRAINING
ORDER AND ORDER
SETTING HEARING**

1 Plaintiffs, a collection of current and former teachers, parents, and
2 nonprofit organizations, ask this Court to temporarily enjoin enforcement of
3 House Bill 562, 2023 Mont. Laws 513, which is slated to take effect July 1, 2023.
4 The certificate of service states that the State of Montana and counsel for the
5 Governor and the Superintendent of Public Instruction have been given notice.
6 For the reasons that follow, the Court declines to enter a temporary restraining
7 order but will set a hearing on Plaintiffs’ request that the Court enter a
8 preliminary injunction while litigation pend.

9 A temporary restraining order with notice and a preliminary
10 injunction are both governed by the following standard:

- 11 (1) A preliminary injunction order or temporary restraining order may
12 be granted when the applicant establishes that:
13 (a) the applicant is likely to succeed on the merits;
14 (b) the applicant is likely to suffer irreparable harm in the absence of
15 preliminary relief;
16 (c) the balance of equities tips in the applicant’s favor; and
17 (d) the order is in the public interest.

18 Mont. Code Ann. § 27-19-201(1) (2023).

19 Although the standard is the same, its application varies because
20 the time horizon of a temporary restraining order differs from that of a
21 preliminary injunction: whereas the latter generally applies for the whole length
22 of the litigation—which can last years in some cases—the former is applied for a
23 shorter duration meant to apply only until all parties can be heard. *See, e.g.,*
24 *Innovation Law Lab v. Nielsen*, 310 F. Supp. 3d 1150, 1156 (D. Or. 2018).

25 For the limited purposes of the request for a temporary restraining
order, the Court need not consider whether Plaintiffs are likely to succeed on the

1 merits because it does not find that enjoining the statute’s enforcement before a
2 preliminary injunction hearing is necessary to avert irreparable injury.

3 Although House Bill 562 will take effect July 1, 2023, its impact
4 will not be felt until the State has had time to implement the structure it
5 contemplates. The newly created community choice school commission with
6 authority to approve authorizers of “community choice schools” must first be
7 appointed and then meet and organize itself. *See* HB 562 § 4. Once it is
8 organized, school boards must apply for authority to organize community choice
9 schools within the boundaries of its district, and the Commission has sixty days
10 to act on these applications. *Id.* § 5. And before community choice schools are
11 established and funded, the authorizers must issue requests for proposals. *Id.*
12 § 9. It is only after at least some choice schools are established that public school
13 district’s face a loss of their BASE aid funding. *Id.* § 15. The bill itself notes that
14 July 1, 2023, merely demarcates the starting point for these various tasks. *Id.*
15 § 18.

16 To be sure, constitutional injury typically *is* irreparable injury.
17 *Riley’s A. Heritage Farms v. Elsasser*, 32 F.4th 707, 731 (9th Cir. 2022). And
18 here, Plaintiffs’ claims are constitutional: they contend HB 652 violates the
19 Montana Constitution by undermining the constitutional authority of local boards
20 of trustees and the statewide Board of Public Education; by violating the suffrage
21 and equal protection rights of voters who, Plaintiffs claim, are excluded from
22 participation in community choice school governing boards; by violating the
23 right to a quality public education through community choice school exemptions
24 from certain standards and requirements; and by appropriating public funds for
25 //

1 schools to what Plaintiffs contend are privatized entities. But none of the
2 Plaintiffs will suffer any of these alleged deprivations of rights until, at a
3 minimum, the community choice school commission is organized and accepting
4 and approving applications or requests for proposals, or until the funds slated for
5 public school districts are diverted pursuant to the provisions of Section 15 of HB
6 562. Plaintiffs have not shown that these events will come to pass so quickly after
7 July 1, 2023, that the Court should intervene without first giving the State a full
8 opportunity for hearing.

9 Plaintiffs argue that as soon as the law takes effect, the
10 Commission could begin operations and incurring expenses. The relevant alleged
11 injury, however, is the loss of funding to or disparate treatment of public-school
12 districts, pupils, and families. At least based on the Court’s reading of HB 562,
13 Section 15 provides for reduction of BASE funding to public school districts only
14 after a choice school is sufficiently established that enrollment estimates can be
15 reported to the Superintendent of Public Instruction. *See* HB 562 §15(2), (4). It is
16 not practically feasible to expect that any choice schools will be authorized—or
17 that the mechanism in §15 for funding them will be put in motion—before
18 Plaintiffs’ request for a preliminary injunction can be heard.

19 In so holding, the Court emphasizes that it offers no opinion on the
20 merits of Plaintiffs’ claims or whether they can demonstrate a likelihood of
21 success on the merits. The Court also offers no opinion or prediction on how
22 Plaintiffs’ request for a preliminary injunction will fare. The Court holds simply
23 that this is not a case where a temporary restraining order is necessary to avert
24 irreparable injury before the State can be heard in (presumed) opposition.
25

1 Accordingly,

2 **IT IS ORDERED:**

3 1. Plaintiffs' request for a temporary restraining order (Dkt. is
4 **DENIED.**

5 2. A hearing on Plaintiffs' motion for preliminary injunction
6 will be held **July 17, 2023, at 1:30 p.m...** Two hours, to be divided equally
7 between the adverse parties, is reserved for the hearing. If any party believes the
8 hearing will require more time or if any party intends to call witnesses, that party
9 shall promptly notify the Court.

10
11 /s/ Christopher D. Abbott
12 **CHRISTOPHER D. ABBOTT**
13 **District Court Judge**

14 cc: Rylee Sommers-Flanagan, via email at rylee@uppersevenlaw.com
15 Niki Zupanic, Po Box 31; Helena, MT 59624
16 Constance, Van Kley, via email at constance@uppersevenlaw.com
17 Austin Knudsen, via email at Christian.Corrigan@mt.gov; Po Box
18 201401; Helena, MT 59601
19 Anita Milanovich, via email at Anita.Milanovich@mt.gov
20 Rob Stutz, via email at rob.stutz@mt.gov

21 CDA/rp/DDV-2023-425 – Order on Motion for Temporary Restraining Order and Order Setting Hearing.doc