IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DEREK HAMILTON, et. al.,

Plaintiffs,
v.

ASHLAND COUNTY
BOARD OF ELECTIONS ,

Defendants

Case No. 1:08-CV-02546

Judge Nugent

Magistrate Judge _____________

RESPONSE TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

Pursuant to Fed. R. Civ. P. 65(b)(4), Defendants Ashland County Board of Elections, Dennis Ragle, Bonnie Manos, George Bringman, and David Samsel, respectfully oppose Plaintiffs' motion for a temporary restraining order in the above-captioned case. A memorandum is attached hereto and incorporated by reference.

Respectfully submitted,

RAMONA FRANCESCONI ROGERS (0031149)
Prosecuting Attorney

/s/ Ramona Francesconi Rogers
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MEMORANDUM IN OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER

Initially, Defendants Dennis Ragle, Bonnie Manos, George Bringman, David Samsel, and the Ashland County Board of Elections (collectively, "the Board") note that Plaintiffs have erroneously assumed that the challenge filed with the Board of Elections by Michael Barrett was filed pursuant to R.C. 3503.24. In fact, Mr. Barrett sent a letter to the board, which is adequate to file a challenge under R.C. 3505.19, and the Board followed the procedures set forth in the Secretary of State's Directive 2008-79 (Exhibit A) to hold a hearing within ten days of the date that the challenge was filed. Moreover, the Board has broad authority, and indeed the duty, under R.C. 3503.25, to "conduct investigations, summon witnesses, and take testimony under oath regarding the registration of any voter," regardless of whether a challenge has even been filed.

A court considers the same factors in determining whether to grant a temporary restraining order that it considers in determining whether to grant a preliminary injunction. *Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006). These factors are:

> (1) whether the movant has a 'strong' likelihood of success on the merits, (2) whether the movant would otherwise suffer irreparable injury, (3) whether issuance of a preliminary injunction would cause substantial harm to others, and (4) whether the public interest would be served by issuance of a preliminary injunction.

Summit Cty. Democratic Central and Executive Committee v. Blackwell, 388 F.3d 547, 550 (6th Cir. 2004).

A. **Plaintiffs are not likely to prevail on the merits.**

1. Plaintiffs have not established residency in Ashland County under state voter registration laws.

Plaintiffs have argued that the Board based its entire decision on R.C. 3503.02, completely ignoring the effect of R.C. 3503.04. (Plaintiffs' memorandum, p. 14). To the contrary, Board Member Dennis Ragle specifically cited both R.C. 3503.02 and R.C. 3503.04 when the board rendered its decision. (Transcript, p. 9). Moreover, Plaintiffs have incorrectly suggested that R.C. 3503.04 is an "exception" to the general residency rule of R.C. 3503.02. (Complaint, ¶49.) In fact, nothing in R.C. 3503.04 is in any way inconsistent with the general rule of R.C. 3503.02, and Plaintiffs have cited no case law to the contrary.

In any case, considering both statutes together, it appears that R.C. 3503.04 does not apply to the situation at hand because juveniles confined to a juvenile correctional facility are not "inmates" as contemplated by the statute. Just as juvenile delinquents who commit offenses that would be felonies if committed by adults are not considered to be convicted felons under the law, the Revised Code avoids calling youths committed to the Department of Youth Services (DYS), such as the youths at the Mohican Juvenile Correctional Facility, by the name "inmates." It is instructive that the word "inmate" is used in thirty-one different sections of R.C. Chapter 5120, which governs the Department of Rehabilitation and Correction, which in turn is responsible for the state's adult prisons. Among these, in R.C. 5120.16(B)(3), the term "inmate" is used to refer to persons under eighteen years of age who are transferred from juvenile courts for prosecution as adults and who are sentenced to a state correctional institution where adults are also incarcerated. In contrast, R.C. Chapter 5139 governs the Department of Youth Services, which is responsible for all juvenile correctional facilities, including Mohican. The word "inmate" is

not used a single time in that chapter, even with respect to persons who commit offenses as juveniles and are committed to DYS custody beyond their eighteenth birthday. Rather, by way of example, R.C. 5139.30 permits DYS to transfer "any child committed to the department" to other facilities[1]. There are various other sections of the Revised Code that refer to "inmates" either in the context of persons incarcerated in adult jails and prisons or even in the context of persons in benevolent or charitable institutions such as nursing homes. See e.g. R.C. 9.15 (providing for burial of an indigent decedent who was not an "inmate of a correctional, benevolent, or charitable institution of this state.") This is fully supported by the portion of R.C. 3503.04 that discusses residency of inmates in an institution "for temporary treatment only." Again, however, none of the statutes referring *specifically* to persons in DYS custody use the word "inmate" at all. Given the legislature's policy of preventing juvenile offenders from being subjected to the stigma commonly associated with a criminal conviction, *see In re Anderson*, 92 Ohio St.3d 63, 65 (2001), it is clear that the legislature does not use the word "inmate" when it refers to children committed to DYS. Accordingly, R.C. 3503.04, which refers to "inmates of a public or private institution," does not encompass children committed to the Department of Youth Services, and the residency of such individuals must be determined solely pursuant to R.C. 3503.02.

Assuming, *arguendo*, that individuals confined to a juvenile correctional institution *are* "inmates" as that term is defined in R.C. 3503.04, Plaintiffs have completely misrepresented the meaning of the statute by leaving out the portions that are problematic to their argument. The full text of the statute reads:

[1] Pursuant to R.C. 5139.01(A)(10), R.C. 2152.02(C)(6), and R.C. 2152.02(F), a "delinquent child" includes persons between the ages of eighteen and twenty-one who remain under the jurisdiction of the juvenile court. This would include Plaintiffs.

> "Persons who are inmates of a public or private institution who are citizens of the United States and have resided in this state thirty days immediately preceding the election, and who are *otherwise* qualified as to age and residence within the county shall have their lawful residence in the county, city, village, and township in which said institution is located *provided, that the lawful residence of a qualified elector who is an inmate in such an institution for temporary treatment only, shall be the residence from which he entered such institution.*"

R.C. 3503.04. (Emphasis added.) Clearly, if the persons confined to the juvenile correctional facility are, in fact, inmates, they are only there temporarily. Ohio law does not provide for lifetime confinement of persons adjudicated to be juvenile delinquents; they may only stay in a juvenile correctional facility until the conclusion of their court-imposed commitment, which may not extend beyond their twenty-first birthday. Even while they remain in the custody of the Department of Youth Services, in fact, nothing precludes the Department from moving them to other juvenile correctional facilities elsewhere in the state. R.C. 5139.30. Furthermore, the juveniles are there largely for treatment and education. R.C. 2152.01 provides that the overriding purposes for juvenile court dispositions include "provid[ing] for the care, protection, and mental and physical development of children . . . and rehabilitat[ing] the offender," and R.C. 5139.04(B) provides for DYS to "issue orders for the *treatment*" of children committed to the department for delinquency. (Emphasis added.) Accordingly, persons confined to a juvenile correctional facility, if they are properly termed "inmates," are there for the purpose of temporary treatment, and their residence, for the purpose of registering to vote, is the residence from which such individuals entered the institution.

Furthermore, aside from the fact that they have been involuntarily confined to the correctional facility, there is no evidence that Plaintiffs are "*otherwise* qualified as to . . . residence within the county," as R.C. 3503.04 requires. In other words, under R.C. 3503.04, there must be some indicia of residence within the county *other than* Plaintiffs' confinement to

the state institution for the person to call that county his or her residence. It is R.C. 3503.02 that establishes the qualifications as to residence within a given county. Even the affidavits that Plaintiffs filed with their motion, however, give absolutely no indication that Plaintiffs' presence in Ashland County falls within any of the categories of residency set forth in R.C. 3503.02. R.C. 3503.02(A) provides, "That place shall be considered the residence of a person in which the person's habitation is fixed and to which, whenever the person is absent, the person has the intention of returning." Moreover, R.C. 3503.02(B) provides, "A person shall not be considered to have lost the person's residence who leaves the person's home and goes into another state or county of this state, for temporary purposes only, with the intention of returning." Finally, R.C. 3503.02(C) provides, "A person shall not be considered to have gained a residence in any county of this state into which the person comes for temporary purposes only, with the intention of returning." There is absolutely no evidence in the record, even with Plaintiffs' affidavits, to suggest that the juveniles have any intention of returning to Ashland County once they are released or that their presence in the county is anything but temporary. The registrants are all at the juvenile correctional facility involuntarily, which contradicts the notion that they have any intention of establishing residence there. None of them intend to be there, and at the conclusion of their involuntary commitment, they would not be permitted to stay there even if they so desired.

Of course, if any of the individuals confined to the facility entered from a residence in Ashland County, or if they intended for any other reason to remain in the county indefinitely, Ashland County would almost certainly qualify as their residence for voting purposes. Even when given a chance in their affidavits to explain the basis for calling themselves Ashland

County residents, however, none of them have cited any reason for being in the county other than the fact that the Department of Youth Services happened to assign them to a facility there.

In summary, R.C. 3503.02 applies to the Plaintiffs regardless of whether they are "inmates" as that term is used in R.C. 3503.04. In either case, the record does not contain sufficient facts to show that any of the Plaintiffs fall within the residency criteria contained in R.C. 3503.02 with respect to Ashland County, and none of them have established residency there.

Finally, contrary to Plaintiffs' assertion that "the Board heard only from Barrett" at the hearing, (Plaintiffs' memorandum, P. 11) the Board also heard testimony from Kathy Howman, Deputy Director of the Board of Elections. Ms. Howman testified that one of the plaintiffs, Raymond Welcher, was already registered to vote in Hamilton County when he attempted to register to vote with the Ashland County Board of Elections. (Transcript, P. 8.) Despite that, he failed to complete Box 12 on his voter registration form, which is clearly marked in all capital letters: "PREVIOUS ADDRESS IF UPDATING CURRENT REGISTRATION." (Exhibit B: Voter Registration Form of Raymond Welcher.) As such, he did not complete the requirements to change his address to Ashland County (even if Ashland County had been his proper residence), and any new voter registration would have been invalid since he was already registered elsewhere in the state. Based on the foregoing, the plaintiffs are not likely to succeed on their state law claims.

2. <u>Plaintiffs are not likely to succeed on the merits of their due process claim.</u>

Initially, Plaintiffs have argued that the new registrants at the juvenile correctional facility did not receive their notices of the administrative hearing until the day before the hearing,

preventing them from obtaining a court order to transport them to the proceeding or hiring legal counsel to represent their interests at the hearing. It is well established that a person confined to state custody has no absolute right to attend a civil proceeding in person. *Price v. Johnston*, 334 U.S. 266, 180-181. (1948), *overruled on other grounds by McCleskey v. Zant*, 499 U.S. 467 (1991); *Holt v. Pitts*, 619 F.2d 558, 560 (1980). Much weight is given, in determining whether such a person is to be transported for a civil proceeding, to the state's interest "in avoiding risks of escape, and in economical administration of custody without incurring expenses which the state reasonably deems unnecessary." *In re Warden of the Wisconsin State Prison v. Zajackowski*, 541 F.2d 177, 180 (1976). The same state interests apply in a case such as this, where the person seeking to be transported is not an inmate at an adult prison, but an adult in the custody of the Department of Youth Services for offenses committed while the person was a juvenile, and particularly where DYS would have been required to make secure arrangements to transport twenty-one people in custody to the hearing and keep them there for the duration of the hearing.

In any case, the Board complied as nearly as possible with Directive No. 2008-79 of the Ohio Secretary of State as to providing notice of the hearing, and in doing so, the Board exceeded the statutory requirements for sending notice to the juveniles. R.C. 3505.19, in itself, provides no procedure for giving advance notice to electors on a voter registration hearing. In order to prevent a deprivation of due process rights in challenges under that statute, however, Directive 2008-79 requires boards of elections to follow procedures for notice and a hearing similar to those provided in R.C. 3503.24. That section requires the Board to *send* the notice of the hearing by first class mail at least three days in advance of the hearing. Page 5 of the directive "strongly encourages" the Board to send notice at least eight to ten days prior to the

scheduled hearing in order to assure compliance with due process requirements, notwithstanding the three-day limit in the statute, and Page 6 directs that the hearing "shall be held, and the challenge decided, no later than ten days after the board receives the challenge." The Board received the challenge near the end of the day on October 15, 2008, and sent the notices on October 19, 2008. In the interim, the Board had to convene, determine how to proceed with the challenge and when to schedule it within the ten-day limit, and prepare the notices to be sent. October 19 was the earliest practicable date that the notices could be sent. (Exhibit C: Affidavit of Shannon Leininger.) The hearing was held on the afternoon of Friday, October 24, five days after the written notices were mailed. The director of the Board of Elections first spoke with staff at the Mohican Juvenile Correctional Facility about the hearing on October 16, 2008. On October 23, 2008, an Attorney with the Ashland County Prosecutor's Office spoke with DYS legal staff in Columbus, who stated that the youths would not be released for the hearing absent a court order. (Exhibit D: Affidavit of Michael Donatini.) Of course, Directive No. 2008-79 likely never contemplated the logistical concerns of providing a hearing for juveniles committed to a secure facility, but the Board took great steps to attempt to secure Plaintiffs' attendance at the hearing given the deadline for holding the hearing within ten days after receiving the challenge. The written notices were mailed to Plaintiffs well in advance of the hearing, well within the statutory time requirements, and as close as possible to the Secretary of State's recommendation, and the juvenile correctional facility had even more notice to begin making preparations for the possibility of transporting the Plaintiffs to the hearing.

Furthermore, the Ohio Justice and Policy Center, which represents Plaintiffs in this proceeding, was in a position to obtain a continuance of the hearing from the Board in order to allow ample time to obtain a court order for the release of the Plaintiffs. The Center caused the

signatures of the juveniles to be procured for the registration forms, and they were in communication with the Department of Youth Services within hours before the hearing. Knowing that the residency qualifications of the juveniles were questionable (as is detailed under the heading of irreparable injury hereinbelow), the Center should have thought about the possibility of contingencies and been ready to obtain a continuance of the hearing for the purpose of obtaining a court order.

Based on these facts and the lack of a due process right for a person in state custody to be present at a civil proceeding, Plaintiffs are not likely to succeed on their due process claims.

3. <u>Plaintiffs have not demonstrated a violation of their rights under the Equal Protection Clause.</u>

Plaintiffs have argued that the Board violated the Equal Protection Clause because, "[t]o the knowledge of Plaintiffs' counsel, [Department of Youth Services] residents who registered to vote in other counties . . . have not had their registrations cancelled." Plaintiffs have presented no evidence to support this claim, and the Board, having no more knowledge than Plaintiffs' counsel does as to whether other counties' Boards of Elections accepted the registration forms of individuals in Department custody in those counties, will not be so reckless as to admit or deny Plaintiffs' factual assertion to this effect without some supporting evidence.

On the other hand, even assuming Plaintiffs' assertion to be true, Plaintiffs have not indicated whether any electors in other counties with juvenile correctional facilities have *challenged* such registrations under R.C. 3503.24 or R.C. 3505.19. It is crucial to note that the Board initially added the new registrants at the juvenile correctional facility to the voter

registration list, just as Plaintiffs assume the boards of elections in other counties have done, and the Board only removed the registrants when Mr. Barrett challenged their registrations.

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). At a minimum, therefore, to sustain an Equal Protection claim, Plaintiffs must demonstrate that they were similarly situated to other individuals in other juvenile correctional facilities and that they were treated differently from those other individuals. No evidence has been presented as to either prong.

Insofar as Plaintiffs allege that other boards of elections accepted the registrations of juvenile delinquents in other facilities, the Board in Ashland County did exactly the same thing, and Plaintiffs cannot show, from these facts, that the juveniles in Ashland County were treated differently. Unless Plaintiffs can demonstrate that the registrations of persons in other juvenile correctional facilities were challenged in the same manner as theirs and that the outcome of the challenge in other counties was different, Plaintiffs cannot claim that they were similarly situated in relation to the registrants at the Mohican Juvenile Correctional Facility in Ashland County.

Even if other boards had rejected other challenges, Plaintiffs would be hard-pressed to show from the differing decisions of different boards of elections, with nothing more, that the decision of the Ashland County Board of Elections deprived Plaintiffs of their rights under the Equal Protection Clause. Plaintiffs have cited absolutely no law to support the proposition that the arrival at different conclusions by different quasi-judicial administrative panels, which must consider the specific facts of each case and apply the law accordingly, necessarily yields an equal protection violation by the government. The two cases cited in Plaintiffs' briefs were cited for only the most general policy statements, not for any specific point of law, and both cases dealt

with the constitutionality of *statewide laws* that had the effect of treating similarly situated individuals differently. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (holding the poll tax mandated by Virginia's *state constitution* to be unconstitutional); *Reynolds v. Simms*, 377 U.S. 533 (1964) (holding the procedures for reapportioning seats in the state legislature pursuant to Alabama's *state constitution* to be unconstitutional). Therefore, Plaintiffs are not likely to prevail on their equal protection claim.

B. <u>Plaintiffs did not take adequate precautions to minimize any harm that would result from the cancellation of their Ashland County voter registration and therefore cannot claim irreparable injury.</u>

Plaintiffs have argued that "tampering with [their] right to vote immediately before an election threatens a quintessential form of harm. . . ." (Plaintiffs' memorandum, P. 16.) In considering the harm that could accrue to litigants by granting or denying a provisional remedy, courts may take into consideration the possibility that one of the parties could have avoided or minimized such harm. See e.g. *McCourt v. California Sports, Inc.,* 600 F.2d 1193, 1218 (6th Cir. 1979); *Caplan v. Fellheimer, Eichen, Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995). In this case, the new registrants, with the assistance of the Ohio Justice and Policy Center, waited until the very last possible day to fill out their registration forms and submit them, with full reason to know that questions could be raised about the validity of their registrations since they were arguably not residents of Ashland County.

Plaintiffs have alleged, in ¶65 of the amended complaint, that the office of Defendant Jennifer Brunner told a representative of the Ohio Justice and Policy Center that Plaintiffs should register to vote in the counties where they are confined. If, in fact, the Secretary of State did instruct the Ohio Justice and Policy Center to have the youths vote from the address of the

correctional facility (a factual proposition for which the record contains no supporting evidence), this is no defense to an invalid voter registration if, as the Board contends, the secretary's advice to the Justice and Policy Center was contrary to law. See *In re Election of Member of Rock Hill Bd. of Edn.,* 76 Ohio St.3d 601, 609-610. Furthermore, if the Secretary of State felt that the issue was a clear one, she would have issued a directive to the boards of elections in the state – which would have carried the weight of law, *see* R.C. 3501.05(B) – rather than just her memorandum of October 23, which instructed boards of elections to make the residency determination on a "case-by-case basis." (Exhibit E.)

Clearly, the Ohio Justice and Policy Center knew, when it was assisting the juveniles in registering to vote, that concerns could be raised about residency, which could cause the voter registrations to be invalid, and that gray area is what resulted in their inquiry to the Secretary of State. Had the organization taken the safer path of registering the juveniles at the addresses from which they entered the facility and to which they planned to return, which would meet the requirements of R.C. 3503.02 practically without question, there would have been no problem with the voter registrations. Had the registrations been filed sooner than the day of the deadline, there might have been enough time to register the juveniles properly before the deadline in the event of a challenge. Instead, the riskiest possible path was taken to register the juveniles, leaving a serious question about their proper residency and very little time to resolve the question. For these reasons, Plaintiffs cannot claim irreparable harm as a basis for injunctive relief.

C. **Issuance of the temporary restraining order will cause substantial harm to others, and the public interest will not be served by granting the temporary restraining order.**

Plaintiffs have flippantly dismissed the possibility that any third parties or the public at large will suffer any harm from the court granting the temporary restraining order. The Supreme Court has recognized, however, the importance of assuring that the lawful votes of qualified electors are not improperly diluted. "Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. '[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006), quoting *Reynolds v. Simms*, 377 U.S. 533, 555 (1964). While there is no suggestion that Plaintiffs are attempting to perpetrate a fraud on the electoral system, the same policy concerns cited in *Purcell* hold equally true when individuals attempt to vote in a county where they do not meet the residency requirements provided by law.

The Mohican Juvenile Correctional Facility is located in Hanover Township, a relatively small township in a relatively small county. Particularly in local elections, the votes of lawful residents of the township, who fully intend to remain in the township for the foreseeable future, are especially susceptible to vote dilution when those who have no legal basis for establishing residence in the county – who, in fact, have no connection to the county other than the fact that they were involuntarily committed to a DYS facility there – cast ballots for local officials, tax issues, and other ballot issues. The very same federal statute quoted by Plaintiffs for the purpose of showing a Congressional policy of increasing the number of eligible voters clearly demonstrates that the government also has an interest in "protect[ing] the integrity of the electoral process" and "ensur[ing] that accurate and current voter registration rolls are

maintained." 42 USC 1873gg(3)-(4). There is no question that the government recognizes a public interest in maximizing the number of eligible citizens who register to vote, but this interest in no way undermines the government's interest in assuring that electors vote in the proper place, where they have established residence under the law. For these reasons, the public interest will not be served by granting the temporary restraining order, and issuance of the order could certainly cause substantial harm to the lawful residents of Hanover Township and Ashland County by diluting the votes and diminishing the voter confidence of proper electors therein.

CONCLUSION

For the reasons stated hereinabove, the Board respectfully asks that the motion for a temporary restraining order be denied.

Respectfully submitted,

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Prosecuting Attorney

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appearance was filed electronically on October 30, 2008. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Ramona Francesconi Rogers__________
RAMONA FRANCESCONI ROGERS
Prosecuting Attorney