

ENDORSED

JUL -2 2007

Clerk of the Napa Superior Court
By: M. M. FIELDS
DeputySUPERIOR COURT FOR THE STATE OF CALIFORNIA,
COUNTY OF NAPA

DONNELL SCOTT, et al.

Plaintiffs,

vs.

NAPA VALLEY UNIFIED SCHOOL
DISTRICT, et al.,

Defendants

Case No.: 26-37082

Ruling on Submitted Motion for
Preliminary Injunction

Plaintiffs' motion for preliminary injunction came on for hearing on May 23, 2007 at 8:30 a.m. in Department A. The court having read and considered all papers submitted in support of and in opposition to plaintiffs' motion, having heard and considered the arguments of counsel, and having taken the matter under submission, now rules as follows:

INTRODUCTION

In 1998 Redwood Middle School adopted a dress code policy, entitled "Appropriate Attire Policy" (hereafter referred to as the "attire policy") which has continued with various revisions until the present. The claimed impetus for adopting the attire policy was to control an emerging problem with gangs in the schools. The latest revision took place in 2005, and continued in effect during the 2006-2007 school year.

During the 2006-2007 school several students were disciplined for violating the attire policy by wearing non-conforming clothing and/or accessories. Plaintiffs are several Redwood Middle School students disciplined under the attire policy and their parents, who seek to enjoin defendants Napa Valley Unified School District, the Board of Education, the Superintendent of School, the Board of Education Trustees and the principal of Redwood Middle School from continued enforcement of the attire policy. Plaintiffs maintain that the attire policy violates free speech rights guaranteed by the United States and California Constitutions and by section 48907 of the California Education Code and that it violates other Education Code provisions pertaining to school uniforms.

DISCUSSION

Exhaustion of Administrative Remedies/Administrative Mandate

Preliminarily, defendants raise various procedural objections to the court's consideration of plaintiffs' motion for preliminary injunction. Defendants assert that before bringing this action plaintiffs were required to exhaust their administrative remedies by either filing a complaint through the school district's Complaint Policy or by transferring to a different middle school with a less restrictive dress code. As to the former assertion, defendants have not shown that the referenced complaint policy or any other complaint procedure applies to the claims presented here. (See *Henry George School of Social Science v. San Diego Unified School Dist.* (1960) 183 Cal. App. 2d 82 [the rule requiring exhaustion of administrative remedies has no application where no specific remedy provided, permitted or authorized by statute or by rule of the administrative agency].) In any event, the record is replete with attempts by plaintiffs to obtain the requested relief directly from the school district, to no avail.

As to the defendants latter assertion, to suggest that the remedy for a claimed constitutional or statutory wrong is to "go someplace else" does not warrant extended discussion. If the policy is wrong plaintiffs deserve to have it righted; if it is not and the plaintiffs still do not like it, they can go elsewhere. Until such a determination is made, however, they have the absolute right to seek redress in the courts.

To that end and contrary to defendants assertion, the filing of this complaint rather than a petition for writ of mandate is no bar. Defendants have not identified a legally cognizable agency that would be subject to this court's mandamus power,¹ nor have they identified an administrative decision subject to review. Furthermore, as noted by plaintiffs and as evident by the authorities cited and relied upon by the parties, actions brought pursuant to Education Code section 48907 and actions seeking to enjoin allegedly unconstitutional provisions are routinely brought as State court actions and not as petitions for writ of mandate.

The Attire Policy

The stated purpose of the attire policy for the 2006-2007 school year (a copy of which is attached hereto as Appendix A) is "to insure the safety and protect the instructional time of all students and is part of a larger 'positive and safe school climate' program which includes discipline, facilities, school day and curriculum. Nothing which promotes drugs, alcohol, violence, gangs, racists, immoral ideas, profane or inappropriate ideas may be worn at any time." The attire policy requires in relevant part that "all clothes will be plain (no pictures, patterns, stripes or logos of any size or kind)." It allows clothing in solid colors only, with acceptable

¹ Defendants refer to the decision made by the committee that reviewed the attire policy. The record shows that this committee was put together by the Redwood Middle School principal to discuss concerns about the policy, and held no official status.

colors being blue, white, green, yellow, khaki, gray, brown and black. No jeans, sweat pants, sports nylon or fleece are permitted – only cotton twill, chino or corduroy.

Under this attire policy, the student plaintiffs have been disciplined for wearing, inter alia, blue jeans, socks with the image of Winnie-the-Pooh's Tigger character, an American Cancer Society pink ribbon for breast cancer awareness, a Vintage High School sweatshirt, a backpack with the brand name "Jansport" written in red, a heart sticker on Valentine's Day, a T-shirt with the words "D.A.R.E to resist drugs and violence," and a t-shirt reading "Jesus Freak."²

Constitutional Claims

Plaintiffs assert that the attire policy violates the students' free speech rights as guaranteed by the United States and California Constitutions. Indeed, it has long been held that under the First Amendment to the Constitution of the United States student expression is protected, so long as it does not "materially and substantially disrupt the work and discipline of the school." (*Tinker v. Des Moines Independent Community School Dist.* 393 U.S. 503, 513 (1969) [school district could not prevent students from wearing black armbands to protest the Vietnam war]). This well settled principle has just been reconfirmed by the United States Supreme Court in *Morse v. Frederick* 551 U.S. ____ (June 25, 2007). There, the Supreme Court recognized and did not stray from the principle that students do not "shed their constitutional rights...at the schoolhouse gate," but affirmed a student's suspension for displaying a banner reading "Bong Hits 4 Jesus" on the express ground that the school had a right to restrict disruptive student expression that it reasonably viewed as promoting drug abuse.

² The student plaintiffs have submitted declarations describing the types of attire for which they have been disciplined under the attire policy. Defendants have interposed what can only be described as boiler plate objections to virtually every statement made in each of plaintiffs' declarations. For purposes of this decision, the court has found the need to consider the student declarations only to the extent that they describe what was worn that resulted in discipline under the policy. As to this evidence, the objections are overruled. The court declines to rule on the remaining objections.

Plaintiffs maintain that the attire policy constitutes an absolute ban on expressive content, and thus violates constitutional precepts as set forth in *Tinker*. They contend that the overbroad nature of the attire policy has resulted in students being disciplined for wearing items that articulate protected expressive content, such as the "D.A.R.E. to resist drugs and violence" and "Jesus Freak" t-shirts and the pink breast cancer awareness ribbon pin for which three of the student plaintiffs were disciplined. Plaintiffs assert that the broad restrictions on speech imposed by the attire policy bear no substantial relationship to the claimed purpose of the policy of deterring gang related problems at school.

Defendants assert that *Tinker* and its progeny stand for the proposition that students have a right to protection for purely political speech, but that recent Federal case law makes clear that students have no constitutionally protected right to make a fashion statement, which defendants claim is all that is shown by the evidence in this case. Defendants rely on *Blau v. Fort Thomas Public School Dist.* (6th Cir. 2005) 401 F.3d 381, which involved a constitutional challenge to a middle school dress code similar to the attire policy at issue here. There, the court held that the First Amendment did not cover the claims raised by the student plaintiff and her father, because the student was admittedly not seeking to express any particularized message through her dress. She merely wanted to wear clothes that "look nice" and that "she feels good in." (*Id.* at pp. 388-389.) Thus, the court held that "the First Amendment does not protect such vague and attenuated notions of expression - namely, self expression through any and all clothing that a 12-year old may wish to wear on a given day." The court went on to explain, however, that "[t]o meet the modest requirements for bringing an expressive-conduct claim within the umbrella of protection provided by the First Amendment, the claimant at a minimum must show that the desired conduct (*e.g.*, the desired clothing) can fairly be described as 'imbued with elements of

communication' [citation] which 'conveys[s] a particularized message' that will 'be understood by those who view it.'" (*Id.* at p. 390.)

While it does appear that at least some of the student plaintiffs in the instant matter merely wish to wear clothes that express their personality, with nothing more, the evidence also establishes that certain clothing and accessories prohibited by the attire policy – the D.A.R.E t-shirt, the Jesus Freak t-shirt, and the breast cancer awareness pin – did convey a particularized message subject to First Amendment protection even under the *Blau* court's reasoning.

In light of this, the burden is on the defendants to produce evidence that justifies a policy that abridges a student's Constitutional free speech rights.³ (See *Tinker, supra*, 393 U.S. at 514 [to justify suppression of protected speech school must show "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities."].) Defendants assert that the attire policy furthers the important governmental interests of providing a safe school environment and of preventing gang activity on campus. Redwood principal Michael Pearson declares that Redwood Middle School experiences gang activity in the form of gang "tagging" and "occasional attempts by Redwood students to identify themselves as gang members." He asserts that the attire policy helps the school to combat gang activity on campus and to keep the campus safe by making it easy to distinguish Redwood students from campus intruders. He presents a single example from the 2005-2006 school year

³ At oral argument defendants contended that this action is premature, and that they should be given more time to obtain discovery and "fully meet" the issues presented. Defendants have not suggested what additional evidence they might obtain if given more time. The record shows that they have been aware of plaintiffs' concerns about the attire policy since 2005, when counsel for the ACLU first wrote to the Superintendent of the school district. Additionally, the primary evidence needed to meet the issues is evidence concerning the school's justifications for imposing the attire restrictions, evidence that would be peculiarly within the defendants' own control without need for discovery.

when a group of boys from another school came on campus to start a fight, but were promptly recognized as outsiders because they were wearing blue jeans. Pearson also claims that the attire policy renders it easier to detect and remove from campus gang-related signs, symbols and regalia.

First, the court wishes to be clear that an appropriately tailored regulation of attire to prohibit gang related apparel, symbols, etc. is constitutionally permissible and authorized by statute. (Educ. Code, § 35183(b) [school district may adopt reasonable dress code policy that prohibits students from wearing gang-related apparel].) A close reading of Pearson's declaration makes clear, however, that while the broad reach of the attire policy may encompass gang-related wear, the justification given shows only that it may facilitate the identification of outsiders who happen to come on campus wearing non-approved clothing. That this has happened only once, and without any showing that the boys from another school had any gang affiliation, suggests that the policy is not tailored to meet the defendants' legitimate gang-prevention concerns.

"When a conflict arises between a public school student's right of free speech and the authority of officials to prescribe and control conduct in the schools, a student's free speech right may not be abridged in the absence of facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." (*Jeglin v. San Jacinto Unified School Dist.* (C.D. Cal. 1993) 827 F.Supp. 1459). The defendants' evidence of tagging at the school with no showing that the tagging was done by students, and the evidence that one group of campus intruders was identified by their blue jeans simply does not support a finding that Redwood's restrictive attire policy is justified under either Federal or State constitutional principles.

Education Code section 48907

Plaintiffs assert that the attire policy also violates the protection afforded by Education Code section 48907, which provides in relevant part as follows:

Students of the public schools shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges and other insignia, and the right of expression in official publications...except that expression shall be prohibited which is obscene, libelous, or slanderous. Also prohibited shall be material which so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school.

Defendants' opposition does not address plaintiffs' statutory claim, but at oral argument defendants suggested that the section does not apply to dress codes. While it is true that no case has specifically applied this statute in the context of a dress code, the plain language of the statute makes clear that it applies to any form of student expression whether listed or not ("including, but not limited to"). It strikes the court as illogical to say that the section protects a student's right to exercise free speech by wearing a button or an insignia, but not that same student's right to wear a t-shirt bearing a message that is not otherwise obscene, libelous, slanderous or likely to incite the commission of unlawful acts, the violation of school regulations, or the substantial disruption of the orderly operation of the school.

For the reasons discussed in connection with plaintiffs' constitutional challenge to the statute, the court concludes that the attire policy violates Education Code section 48907.

Education Code section 35183

Plaintiffs also contend that the attire policy is, in reality, a school wide uniform policy, which does not meet the requirements of Education Code section 35183. As relevant under that section:

(b) The governing board of any school district may adopt or rescind a reasonable dress code policy that requires pupils to wear a schoolwide uniform or prohibits pupils from wearing 'gang-related apparel' if the governing board of the school district approves a plan that may be initiated by an individual school's principal, staff, and parents and determines that the policy is necessary for the health and safety of the school environment."

...

(d) A dress code policy that requires pupils to wear a schoolwide uniform shall not be implemented with less than six months' notice to parents and the availability of resources to assist economically disadvantaged pupils.

...

(e) The governing board shall provide a method whereby parents may choose not to have their children comply with an adopted school uniform policy.

Defendants have not addressed the applicability of this section. However, as set forth above, defendants have failed to justify and support the attire policy's broad and restrictive sweep. As such, if the defendants wish to continue enforcement of their attire policy, they must provide six months' notice of the policy and they must provide parents with an opt-out provision. (Educ. Code, § 35183(d) and (e).

Injunctive Relief

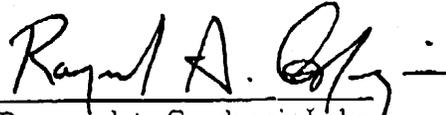
In deciding whether to issue a preliminary injunction under Code of Civil Procedure section 526 courts must weigh the likelihood that the moving party will prevail on the merits against the relative harm to each side should the injunction be granted or denied. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 441-442.) In opposing plaintiffs' motion, defendants expressed concern for the harm that would result should this court grant a preliminary injunction while school was still in session. Given that school is now out for the summer, that risk of harm, if one existed, is no longer of concern. As has been discussed herein, the court concludes that the plaintiffs are likely to prevail on the merits in this matter. The court therefore finds that the weight of the issues preponderates in favor of issuing the injunction. That the injunction will alter the status quo does not dictate a different result. Rather, as noted by

plaintiffs, the decision may be subject to a higher level of scrutiny on appeal. (*Novartis Vaccines & Diagnostics v. Stop Huntington Animal Cruelty USA, Inc.* (2006) 143 Cal.App.4th 1284.)

CONCLUSION

For the reasons discussed above, the court finds that the plaintiffs have established a substantial likelihood of prevailing on their constitutional and statutory claims against defendants. Defendants have shown no harm that is likely to arise from the issuance of a preliminary injunction during summer vacation. The court will therefore GRANT plaintiffs' motion for a preliminary injunction. Defendants, and each of them, are hereby enjoined from enforcing the Redwood Middle School "Appropriate Attire Policy" as currently written (see copy attached hereto as Appendix A). In the alternative, defendants shall comply with Education Code section 35183 (d) and (e). This order shall take effect upon the posting by plaintiffs of an undertaking in the amount of \$10,000. (Code Civ. Proc., § 529.)

Dated: 7/2/07


Raymond A. Guadagni, Judge

**REDWOOD MIDDLE SCHOOL
APPROPRIATE ATTIRE POLICY
2006-2007**

This policy was developed to insure the safety and protect the instructional time of *all* students and is part of a larger 'positive and safe school climate' program which includes discipline, facilities, school day and curriculum. Nothing which promotes drugs, alcohol, violence, gangs, racist, immoral ideas, profane or inappropriate ideas may be worn at any time.

APPROPRIATE ATTIRE PROCEDURES

- All clothes will be plain (no pictures, patterns, stripes or logos of any size or kind).
- **COLORS – SOLID COLORS ONLY** - Acceptable colors are blue, white, green, yellow, khaki, gray, brown and black for all apparel including jackets (students are encouraged to also not dress in the same color i.e. all black or all blue). School colors apply to all items of clothing or accessories including shoes, shoelaces, socks, belts, scarves, mufflers, hair ties, etc.
- **FABRICS** – No jeans, denim, denim-looking, knit, sweat pants, sports-nylon or fleece material may be worn. All pants, shorts, skirts or dresses must be cotton twill, chino or corduroy.
- **SHIRTS** – Must have sleeves that cover a student's shoulder and the mid part of an upper arm, and be long enough to be tucked in and remain tucked in with normal movement. Shirts must be worn right side out and can not be turned inside out to hide a graphic etc.
- **PANTS/SHORTS/SKIRTS** – Must fit appropriately in the waist and the length (i.e. appropriate size for the students' height and weight) be fitted at the waist and/or hips and must not sag or drag and must be hemmed. Shorts and skirts must be no higher than mid thigh.
- **SHOES** – All shoes must follow the school colors. The heels of shoes must NOT be higher than 2", as measured by the back of the heel, and must have a back or strap. Shoes may not have any red/pink/burgundy, gang symbols or numbers on them. Sandals or flip flops are not considered shoes.
- **SWEATERS/SWEATSHIRTS/VESTS** – Must follow all dress code rules regarding colors and logos. Sweatshirts and sweaters may not be worn inside out.
- **JACKETS** – All jackets must follow the school colors and fabrics outlined above. Jackets may have a college or 'small' brand logo. They must not contain ANY red or burgundy inside or out. Jackets and sweatshirts may not hide non-dress acceptable items or be worn inside out. A jacket is classified as any material other than cotton/polyester that has a full zipper or set of buttons and is usually waist long. Cotton/polyester sweatshirts or sweaters with a zipper ARE NOT considered a jacket. Jean jackets are not allowed.
- **BACKPACKS** – All backpacks must follow the school colors outlined above.
- **ANY REDWOOD SCHOOL, REDWOOD TEAM LOGO or RMS club activity CLOTHING IS ACCEPTABLE.**
- **RESTRICTED ITEMS – PROFESSIONAL SPORTS TEAMS** and any **GANG SYMBOLS** such as, but not limited to, bandanas or rags, belt buckles with the initials S, N, West Side or BP clothing with old English style writing, low riders, drama masks, laugh now-cry later, prison insignia, tears, the numbers 13, 14, XIV, XIII and the brand names Homey, No Fear, Eight Ball, BK, CK, Ben Davis and Dickey.
- **OTHER RESTRICTED ITEMS** – Black trench coats, non-authorized *hats or head coverings, any unusual/unnatural (non-traditional) hair color or hair style that is distractive to the learning environment or takes away from the educational process, hair nets, excessive piercing such as nose, eyebrow, lip, tongue and chin, shaved eyebrows, spiked jewelry, hanging belts, or chains. Graffiti or writing on backpacks, buttons or jewelry with inappropriate pictures, colors, sayings or writing which cause or threaten to cause a disruption of the educational process or school activities are prohibited.

*Appropriate school hats which follow the school attire policy may be worn during PE or other non-protected outside activities.

Financial support for school clothes is available through the Redwood Middle School Parent Faculty Club Scholarship Clothing Fund. Applications are available in the front office. Revised 4/01/06

CERTIFICATE OF MAILING

Napa Courts

Civil, Probate, Criminal

DONNELL SCOTT, et al.

CASE NO: 26-37082

Plaintiffs,

vs.

NAPA VALLEY UNIFIED SCHOOL DISTRICT,
et al.,

Defendants

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I hereby certify that I am not a party to this cause and that copies of the attached **RULING ON SUBMITTED MOTION FOR PRELIMINARY INJUNCTION** mailed (first class postage pre-paid) to the above parties at Napa, California on this date and that this certificate is executed at Napa, California this date.

JUL - 2 2007

M.M. FIELDS

DATE

Deputy Court Executive Officer