

FILED PAGE

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MAR 21 2003
LUTHER
63
Shaw
Deputy Clerk

JEFFREY MICHAEL SELMAN,)
)
Plaintiff,)
)
v.)
)
COBB COUNTY SCHOOL DISTRICT,)
et al.,)
)
Defendants.)
_____)

CIVIL ACTION NO.
1:02-CV-2325-CC

MOTION TO INTERVENE

COMES NOW Larry Taylor, on behalf of himself and as next friend of his three children¹ who are students in Cobb County public schools, and Allen Hardage, on behalf of himself and as next friend of his child who is a student in Cobb County public schools (“Intervenors”), and move this Court for an order allowing them to intervene on behalf of the Defendants in this case pursuant to Fed. R. Civ. P. 24, both as a matter of right and permissively. As grounds for this motion, Intervenors would state the following:

¹The names of minor children are not disclosed pursuant to the directive of this Court’s Standing Order 02-01, October 17, 2002.

1. Intervenors seek to protect their parental rights to direct the upbringing and education of their children;
2. Intervenors seek to protect their children's free speech rights as students to have access to information regarding the theory of evolution;
3. If the Plaintiff is successful, important information necessary to a complete education regarding the origin of living things will be withheld from Cobb County students;
4. Censorship of this educational speech will directly affect the parental rights and free speech rights of the Intervenors;
5. Defendants have not asserted parental rights and the free speech rights of students in defending this case.

Based upon the foregoing, as well as the brief in support and declarations filed contemporaneously herewith, Intervenors respectfully move this Court to grant their motion to intervene as a matter of right, or in the alternative, by permission.

Dated: March 21, 2003

By signature below, it is hereby certified that this document was prepared in 14 point, times new roman font.

Respectfully submitted,



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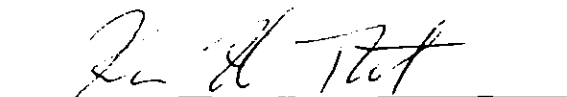
I hereby certify that the foregoing document was served upon the following individuals, via first class mail, on this the 21st day of March, 2003:

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ORIGINAL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

de
MAR 21 2003
Shaw
O'Leary

JEFFREY MICHAEL SELMAN,)
)
 Plaintiff,)
)
 v.)
)
 COBB COUNTY SCHOOL DISTRICT,)
 et al.,)
)
 Defendants.)
)

CIVIL ACTION NO.
1:02-CV-2325-CC

BRIEF IN SUPPORT OF MOTION TO INTERVENE
OF LARRY TAYLOR, ET AL.

Larry Taylor, on behalf of himself and as next friend of his three children¹ who are students in Cobb County public schools, and Allen Hardage, on behalf of himself and as next friend of his child who is a student in Cobb County public schools (“Intervenors”), have moved this Court to intervene on behalf of the Defendants in this case.² Intervenors have moved for intervention in this case to protect their

¹The names of the minor children are not disclosed pursuant to the directive of this Court’s Standing Order 02-01, October 17, 2002.

²Parents have standing to challenge state action that affects the right to educate their children, *Newdow v. U.S. Congress*, 292 F.3d 597, 602 (9th Cir. 2002), as well as the free speech rights of their children. *Vines v. Bd. of Ed. of Zion School Dist.*, 2002 U.S. Dist. LEXIS 382 (N.D. Ill. 2002) (a copy of this opinion is attached).

parental rights, as well as their children's free speech rights to have access as students to information. If the Plaintiff is successful, Defendants will be forced to censor speech regarding evolutionary theory that will allow students to approach this topic with an open mind, and study it carefully and critically. This will directly affect the parental rights and free speech rights of the Intervenors. Since Defendants have not asserted these rights in defending this case, the Intervenors' interests are not adequately represented at this time. The motion to intervene should therefore be granted.

Statement of Facts and Proceedings

Jeffrey Michael Selman ("Plaintiff") filed a complaint on August 21, 2002 against the Cobb County School District (as well as the Board of Education and Superintendent) ("Defendants"). This complaint seeks to enjoin Defendants from placing a statement in science books advising students that evolution is a theory and should be carefully considered. Complaint at ¶ 13. The statement, in its entirety, is as follows:

This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered.

Complaint at ¶ 13.

Defendants filed an answer to the complaint on October 22, 2002. The answer asserts several defenses, none of which include the parental or free speech rights of the Intervenors. *See Answer at pp.1-2; Defendants' Initial Disclosures at ¶ 3.*

Since the filing of the answer, no documents were filed in this case until February 24, 2003, at which time the Defendants filed their Responses to Initial Disclosures. To date, Plaintiff has not filed a motion for a temporary restraining order, although he did request such an injunction in his complaint.

The Intervenors are parents of students attending Cobb County public schools who believe their children should not be prevented from learning both the arguments and evidence in favor of Darwinian evolution as well as the arguments and evidence that is critical of Darwinian theory. Declaration of Larry Taylor at ¶ 8 (“Taylor Dec.”); Declaration of Allen Hardage at ¶¶ 6-7 (“Hardage Dec.”). In exercising their right to control the education of their children, it is vital for Intervenors and their children not to be compelled to accept Darwinian evolution as though it were an unchallenged scientific principle. Taylor Dec. at ¶¶ 9-10; Hardage Dec. at ¶¶ 7-8.

As next friend of their children who attend Cobb County schools, Intervenors are also asserting the free speech rights of their children to pursue the evidence on the origins question without artificial restraints based upon establishing a particular

scientific theory as an orthodoxy that may not be subjected to critical scrutiny. Taylor Dec. at ¶ 11; Hardage Dec. at ¶¶ 9-10. If Plaintiff prevails, the students' right to pursue the origins question with an open mind will be jeopardized. Intervenors seek leave to intervene in order to assert their constitutional right to freedom of thought and freedom of expression, as well their parental right to direct the education of their children.

Argument

“Under Federal Rule of Civil Procedure 24, a party may seek to intervene [as] of right or with the permission of the district court.” *Loyd v. Alabama Dept. of Corrections*, 176 F.3d 1336, 1339 (11th Cir. 1999), *cert. den.*, 528 U.S. 1061 (1999). The Intervenors' motion should be granted because, as demonstrated below, they satisfy all of the elements for both of these types of intervention.

I. INTERVENORS ARE ENTITLED TO INTERVENE IN THIS CASE AS A MATTER OF RIGHT.

Parties whose interests are at stake in a case have a right to participate in proceedings concerning them. *See* Fed. R. Civ. P. 24(a)(2). To intervene as of right, a party must establish:

- (1) The application for intervention is timely;

(2) The applicant has an interest relating to the transaction that is the subject of the action;

(3) The applicant is so situated that the disposition of the action may, as a practical matter, impair or impede its ability to protect that interest; and

(4) The applicant's interest is inadequately represented by existing parties to the suit.

Loyd, 176 F.3d at 1339. *See also Athens Lumber Co., Inc. v. Fed. Election Comm'n*, 690 F.2d 1364, 1366 (11th Cir. 1982).³

A. The Motion to Intervene is Timely.

The Intervenors' application for intervention satisfies the first prong of the test in that it was timely filed. On or about August 21, 2002, Plaintiff filed the underlying complaint against Defendants, so this matter has been pending for only seven months.

“The mere passage of time, in itself, does not render an application untimely; rather, the important question concerns actual proceedings of substance on the

³Intervenors are not required to demonstrate that they have standing to actually bring a lawsuit themselves, so long as the original parties in the matter have Article III standing. *Loyd*, 176 F.3d at 1339 (“a party seeking to intervene need not demonstrate that he has standing in addition to meeting the requirements of Rule 24 as long as there exists a justiciable case and controversy between the parties already in the lawsuit”).

merits.” 6 MOORE’S FEDERAL PRACTICE, § 24.21 (2002). For instance, in *Mountain Top Condominium Ass’n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 369-70 (3d Cir. 1995), the court found intervention was proper because, even though some discovery had been exchanged and settlement negotiations had taken place, no “proceedings of substance on the merits” had occurred. Although the case had been pending four years before the motion to intervene was filed, there had been “no depositions taken, dispositive motions filed, or decrees entered.” *Id.*

The same is true in this case, which has only been pending seven months. Other than the complaint (accompanied by a document titled “Plaintiff’s Responses to Mandatory Interrogatories”) and Defendants’ answer, the only document that has been filed to date is the Defendants’ mandatory disclosures, which was just filed on February 24, 2003. A Joint Preliminary Report and Discovery Plan as required by Local Rule 16.1, has not been filed as of the date of this motion. Since active discovery has not even begun, Intervenors are not requesting any delay in the proceedings pending before this Court. Thus their intervention does not cause any hardship nor prejudice to the Plaintiff. As such, Intervenors have satisfied the first prong for intervention under Federal Rule of Civil Procedure 24(a)(2).

B. Intervenor's Have an Interest in This Litigation.

Intervention in this case is needed in order to protect the Intervenor's constitutional rights. The second prong of the test for intervention requires the applicant to have an interest relating to the transaction that is the subject of the action. Intervenor's have constitutional rights, including parental rights, and the right to free speech, that will be restricted if Plaintiff prevails.

1. Parental Rights

The Supreme Court has long recognized the liberty rights of parents to control the education of their children.

More than 75 years ago, in *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 67 L. Ed. 1042, 43 S. Ct. 625 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "**to control the education of their own.**" Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535, 69 L. Ed. 1070, 45 S. Ct. 571 (1925), we again held that the "liberty of parents and guardians" includes the right "**to direct the upbringing and education of children** under their control." We explained in *Pierce* that "the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S. at 535.

Troxel v. Granville, 530 U.S. 57, 65 (2000) (emphasis added); *see also Ginsberg v. New York*, 390 U.S. 629 (1968) (recognizing that parents' right "to direct the rearing of their children is basic in the structure of our society"). The Eleventh Circuit has

recognized the Supreme Court's "willingness to protect from unjustified state interference the parental right to structure the education ...of one's children." *Arnold v. Bd. Ed. Escambia Cnty.*, 880 F.2d 305, 313 (11th Cir. 1989) (cataloguing Supreme Court cases regarding parental rights). *See also Riley v. Camp*, 130 F.3d 958, 986 (11th Cir. 1998) (recognizing parental rights as fundamental).

Defendants are obligated to protect parental rights in deciding what will be taught in the classroom. *Wisconsin v. Yoder*, 406 U.S. 205, 213-214 (1972) ("a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as ...the traditional interest of parents").

The Intervenors in this case have testified that they have an interest in making sure that their children "are informed of the full range of scientific views on the theory of evolution," including "being advised of the evidentiary challenges and scientific critiques of contemporary evolutionary theory." Taylor Dec. at ¶¶ 8-9; Hardage Dec. at ¶¶ 6-7. The Defendants' provision of this information in science curricula is vital for insuring that the students are not misled by government sponsored schools when being presented with information regarding evolution.

It is beyond contention that Defendants have an interest in making sure that science curricula do not violate the fundamental parental rights of parents to direct the education of their children. Since Defendants have not asserted this interest, Intervenor should be allowed to intervene in order to make sure their parental rights are preserved.

2. Student Free Speech Rights

It is well settled that students at public schools do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines Independent Comm. School Dist.*, 393 U.S. 503, 506 (1969). The right to free speech and expression includes the right to have access to information. In fact, the Supreme Court has determined that, for public school students, “the right to receive ideas is a necessary predicate to the *recipient’s* meaningful exercise of his own rights of speech, press, and political freedom.” *Bd. of Ed., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982). Therefore, Supreme Court

precedents have focused not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate and the dissemination of information and ideas. And we have recognized that the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. In keeping with his principle, we have held that in a variety of contexts the Constitution protects the right to receive information and ideas.

Pico, 457 U.S. at 866-67 (citations and quotation marks omitted). See *Virgil v. School Bd. of Columbia Cnty., Fla.*, 862 F.2d 1517, 1523 n. 8 (11th Cir. 1989) (holding that a school board cannot restrict students' right to receive information in books because of opposition to their content (citing *Pico* at 871-72)).

The rationale underlying a student's right to receive information is that "the First Amendment...does not tolerate laws that cast a pall of orthodoxy over the classroom." *Pico*, 457 U.S. at 870 (quoting *Epperson v. Arkansas*, 393 U.S. 97 104-105 (1968)). Under Plaintiff's view, it would be unconstitutional for students to be advised of the evidentiary challenges and scientific critiques of contemporary evolutionary theory, or even for students to be told that the scientific evidence for Darwinian theory should be approached with an open mind, studied carefully, and critically considered. This is an attempt to impose an orthodoxy of the type the Supreme Court sought to prohibit in *Pico*. Defendants therefore have a rational and even compelling interest in avoiding a possible violation of a student's right to receive information regarding criticisms of evolution.

Defendants have chosen not to assert this interest as a defense in this case. Therefore, Intervenor's motion should be granted so that they can protect the free speech rights of students to receive information. See *Adler v. Duval County Sch. Bd.*,

851 F.Supp. 446 (M.D. Fla. 1994), *affirmed in part, vacated and remanded in part on other grounds*, 112 F.3d 1475 (11th Cir. 1997), vacated on other grounds, 531 U.S. 801 (2000) (district court allowed non-party students leave to intervene to protect free speech claims against suit requesting invalidation of school policy on student messages at graduation).

C. THE INTERVENORS' PARENTAL RIGHTS AND FREE SPEECH RIGHTS WILL BE IMPEDED IF PLAINTIFF PREVAILS.

The Plaintiff's proposed remedy would violate the constitutional rights of Intervenor, and thus the third prong of the test for intervention is satisfied. The third prong requires the applicant to be so situated that the disposition of the action may, as a practical matter, impair or impede its ability to protect that interest. Since Defendants have not raised their interests in protecting parental and free speech rights, the Intervenor is so situated that there is absolutely no other way to protect their interests other than allowing them to intervene in this case. If the Intervenor is not allowed to intervene, they may be irreparably harmed as their parental and free speech rights will be violated, if Plaintiff prevails. *Elrod v. Burns*, 427 U.S. 347 (1976) (any violation of an individual's constitutional rights, even for a moment, results in irreparable injury). This case should not be disposed of without arguments being heard that only the Intervenor will make. Clearly, the disposition of this action

may impair or impede the Intervenor's ability to protect their interests. As such, Intervenor has satisfied the third prong of Federal Rule of Civil Procedure 24(a)(2).

D. THE SCHOOL DISTRICT HAS NOT RAISED PARENTAL RIGHTS AND FREE SPEECH RIGHTS AS DEFENSES IN THIS CASE.

If an Injunction is granted to the Plaintiff, the Intervenor will be deprived of their parental and free speech rights as outlined above. In the absence of intervention, these rights will not be adequately protected because the Defendants have chosen not to assert these defenses. The Intervenor has great interest in the outcome of this action, would be adversely affected by a decision granting an injunction, and thus need to intervene to protect crucial constitutional freedoms.

II. INTERVENORS SATISFY THE REQUIREMENTS FOR PERMISSIVE INTERVENTION.

In order to successfully move for permissive intervention in a case, a party need only show that its motion is timely, and that a common question of law or fact exists. 6 MOORE'S FEDERAL PRACTICE, § 24.11 (2002); Fed. R. Civ. P. 24(b)(2). Intervenor has already demonstrated that their motion is timely. *See* § I(A), *infra*.

That there is a common question of fact with regard to the subject matter of this lawsuit and the Intervenor's interests is indisputable. Plaintiff seeks to enjoin the statement Defendants have placed in school science books and Intervenor has set

forth their constitutional rights that would be violated if Plaintiff succeeds. Intervenor has therefore satisfied all the requirements for permissive intervention and their motion should be granted.

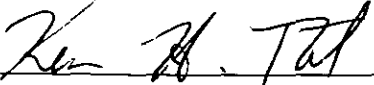
CONCLUSION

Defendants have chosen not to assert their interests in protecting the parental and free speech rights of Intervenor in this case. Plaintiff could therefore prevail without these constitutional rights being considered by the Court - thus impairing the fundamental freedoms of Intervenor. Intervenor has shown the Court that they satisfy all the requirements for intervention, both as of right and permissive. Their motion to intervene should therefore be granted.

Dated: March 21, 2003

By signature below, it is hereby certified that this document was prepared in 14 point, times new roman font.

Respectfully submitted,



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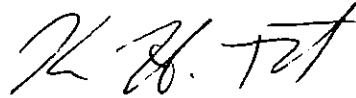
I hereby certify that the foregoing document was served upon the following individuals, via first class mail, on this the 21st day of March, 2003:

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LEXSEE 2002 U.S. Dist. LEXIS 382

**BARBARA H. VINES and ROBERT W. VINES, on behalf of Kathryn Vines and
Themselves, Plaintiffs, v. BOARD OF EDUCATION OF ZION SCHOOL
DISTRICT NO. 6, Defendant.**

Case Number: 01 C 7455

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
ILLINOIS, EASTERN DIVISION**

2002 U.S. Dist. LEXIS 382

January 10, 2002, Decided

January 14, 2002, Docketed

DISPOSITION:

[*1] Judgment entered for defendant. Case dismissed.

COUNSEL:

BARBARA H VINES, plaintiff, Pro se, Zion, IL.

ROBERT W VINES, plaintiff, Pro se, Zion, IL.

For BOARD OF EDUCATION FOR ZION SCHOOL
DISTRICT NO. 6, defendant: Nancy Fredman Krent,
Robert Edmund Swain, Hodges, Loizzi, Eisenhammer,
Rodick & Kohn, Arlington Heights, IL.

JUDGES:

JOHN W. DARRAH, United States District Judge.

OPINIONBY:

JOHN W. DARRAH

OPINION:

**AMENDED MEMORANDUM OPINION AND
ORDER** n1

n1 The caption of the Memorandum Opinion
and Order issued on January 8, 2002, incorrectly
identified plaintiff as Robert W. Hines.

Plaintiffs, Barbara and Robert Vines (Vines), filed suit,

pro se, against defendant, the Board of Education of Zion
School District No. 6 (Board), on behalf of themselves and
their daughter, Kathryn Vines (Kathryn), alleging that the
Board's dress code violates the United States Constitution.
Presently before this Court are the parties' motions for
judgment [*2] on the pleadings. n2

n2 Plaintiffs filed a motion for judgment on the
pleadings in response to the Board's motion for
judgment on the pleadings.

A motion for judgment on the pleadings pursuant to
Federal Rule of Civil Procedure 12(c) is subject to the
same standard as a motion to dismiss under Federal Rule of
Civil Procedure 12(b). *Gatx Leasing Corp. v. National
Union Fire Ins. Co.*, 64 F.3d 1112, 1114 (7th Cir. 1995).
The court reviews all facts alleged in the complaint and any
inferences reasonably drawn therefrom in the light most
favorable to the plaintiff. See *Marshall-Mosby v.
Corporate Receivables, Inc.*, 205 F.3d 323, 326 (7th Cir.
2000). Judgment is warranted "only if it is clear that no
relief could be granted under any set of facts that could be
proved consistent with the allegations." *Hishon v. King &
Spalding*, 467 U.S. 69, 81 L. Ed. 2d 59, 104 S. Ct. 2229,
2232 (1984).

Central Junior High School instituted a dress code
effective the 2001-2002 school [*3] year. The dress code
states that it was instituted "to create a school environment

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2002 U.S. Dist. LEXIS 382, *

that fosters the academic and social growth of its students." The students are required to dress in solid black, solid white, or a combination of black and white clothing. Logos, patches, pins, imprinted slogans, words and designs on the clothing are not permitted. Allowable tops include T-shirts, blouses and shirts. Black and/or white jeans, shorts, and appropriate skirts are allowed. Students who violate the dress code may be asked to return home and change, may be required to wear their gym uniform, and may be "subject to additional consequences".

Students new to the school are permitted a "grace period" to comply with the dress code. Students who are unable to comply with the dress code due to financial hardship are accommodated or otherwise provided "appropriate resources". Students whose parents or legal guardians object to the dress code on religious grounds are not required to comply with the dress code provided that the parent or legal guardian present a signed statement of objection detailing the grounds for the objection to the Board.

Plaintiffs allege that the Board's dress code violates [*4] Kathryn's First Amendment right of free speech and freedom of religion and infringes upon the Vines' "right to self-regulation".

A. Standing

The Board first argues that plaintiffs lack standing to bring the cause of action because they lack an "injury in fact".

A plaintiff must demonstrate "injury in fact" in order to establish standing in a cause of action. *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 771, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000) (*Vermont*). Injury in fact is harm that is both "concrete" and "actual or imminent, not conjectural or hypothetical". *Vermont*, 529 U.S. at 771 (internal quotations and citation omitted). Injury in fact is more than an injury to a cognizable interest -- it requires that the party seeking relief be itself among the injured. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) (*Lujan*).

Here, the cognizable interest of the plaintiffs includes both the freedom of speech and the parents' interest in the care, custody, and control of their children. At the pleading stage, general allegations of injury resulting from defendant's conduct are sufficient [*5] because the court

presumes that the 'general allegations embrace those specific facts that are necessary to support a claim.' *Lujan*, 504 U.S. at 561, quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990). Here, if the allegations of the complaint are true, then the plaintiffs are arguably among the injured. See *Tinker v. Des Moines Independent Comm. School Dist.*, 393 U.S. 503, 506, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969) (freedom of speech right applied to schools) (*Tinker*); *Troxel v. Granville*, 530 U.S. 57, 65-66, 147 L. Ed. 2d 49, 120 S. Ct. 2054 (2000) (Due Process Clause protects parents' right to make decisions concerning their children). Accordingly, the plaintiffs have standing to bring these causes of action.

Plaintiffs also allege that the dress code impairs their free exercise of religion. In the complaint, plaintiffs allege that the dress code does not have an "opt out" clause based on religious beliefs. The dress code does have an opt out clause based on religious beliefs, and plaintiffs admit such in their response. Plaintiffs assert for the first time [*6] in their response to defendant's motion that the dress code still violates the free exercise of religion because they were informed that the letter needed to opt out for religious beliefs must be on official church stationery; therefore, only "officially recognized" churches can apply for the exemption. Plaintiffs' complaint contains no such allegations; plaintiffs' response cannot properly be considered to be an amended complaint. See *Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984).

Even if plaintiffs' new allegations could be so construed, plaintiffs do not allege that Kathryn cannot comply with the dress code because of her, or her parents', religious beliefs or that they attempted to opt out of the dress code based on their religious beliefs. Therefore, plaintiffs still have not asserted any injury in fact of their free exercise of religion, and that claim shall be disregarded in deciding the motion.

B. First Amendment Claim

The First Amendment forbids the abridgment of speech, including the spoken or written word and some forms of conduct. *Texas v. Johnson*, 491 U.S. 397, 405, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989) [*7] (*Texas*). In determining whether particular conduct possesses sufficient communicative elements to fall within the

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2002 U.S. Dist. LEXIS 382, *

protection of the First Amendment, the court focuses on whether "an intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410-11, 41 L. Ed. 2d 842, 94 S. Ct. 2727 (1974). For example, the Supreme Court recognized the expressive nature of students wearing black armbands to protest the American military involvement in the Vietnam War. See *Tinker*, 393 U.S. at 505-06.

Defendant argues that the dress code does not regulate speech, citing to *Olesen v. Board of Education of School Dist. No. 228*, 676 F. Supp. 820 (N.D.Ill. 1987). In *Olesen*, the court held that a student's expression of "individuality" through the wearing of an earring did not constitute a message protected by the First Amendment. *Olesen*, 676 F. Supp. at 822. Importantly, that court also found that the student did not credibly claim that the wearing of an earring made any other statement. *Olesen*, 676 F. Supp. at 821. [*8]

In the instant case, the plaintiffs do not set out a particularized message that Kathryn intends to convey by wearing clothing not permitted by the dress code. Kathryn apparently wishes only to express her individuality. But, assuming arguendo, that she has alleged a choice of dress that could constitute speech, a further determination must be made.

The initial step in determining if the content neutral dress code impermissibly restricts Kathryn's speech is the determination of the character of forum where the restriction is in effect. See *Muller v. Jefferson Lighthouse School*, 98 F.3d 1530, 1537 (7th Cir. 1996) (*Muller*). Speech in a nonpublic forum is subject to significantly greater regulation than speech in a traditional public forum. *Muller*, 98 F.3d at 1537. "School facilities may be deemed to be public forums only if school authorities have by 'policy or by practice' opened those facilities 'for indiscriminate use by the general public' or by some segment of the public, such as student organizations." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267, 98 L. Ed. 2d 592, 108 S. Ct. 562 (1988) (*Hazelwood*), citing *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983). [*9] Where "school facilities have been 'reserved for other intended purposes, communicative or otherwise', and no public forum has been created", the school may impose reasonable restrictions on the speech of students and

teachers. *Muller*, 98 F.3d at 1537, quoting *Hazelwood*, 484 U.S. at 267. Speech restrictions in a nonpublic forum school that are 'reasonably related to legitimate pedagogical concerns' do not violate a student's free speech. *Muller*, 98 F.3d at 1537-38, quoting *Hazelwood*, 484 U.S. at 273.

A school is generally considered a nonpublic forum for purposes of the First Amendment. See *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 124 L. Ed. 2d 352, 113 S. Ct. 2141, (1993); *Hazelwood*, 484 U.S. at 267; *Muller*, 98 F.3d at 1539; *Hedges v. Wauconda Comm. Sch. Dist. No 118*, 9 F.3d 1295, 1302 (7th Dist. 1993).

In the instant case, plaintiffs do not allege, nor can it be inferred, that Central Junior High School has been opened for "indiscriminate use" by the general public. Accordingly, Central Junior High School is a nonpublic [*10] forum, and the appropriate test is whether the dress code is "reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273; *Muller*, 98 F.3d at 1537-38.

"Pedagogical concerns" include the structured transmission of a body of knowledge in an orderly environment and the inculcation of civility and traditional moral, social, and political norms. *Muller*, 98 F.3d at 1540. Here, the Board's policy states that a student's dress must meet health and safety standards and may not be disruptive to the educational program. School uniforms may be instituted if uniforms "would contribute to attaining and maintaining a positive and productive school learning environment." The Board states that the students' dress code improves the safety of schools and the academic and social growth of students by discouraging gang affiliations, reducing peer pressure and socio-economic competition; by improving students' self-concepts, classroom behavior, and academic performance; and by reducing vulgar, profane, or obscene disruptions to the educational process. These constitute legitimate pedagogical concerns, and the dress code's restrictions [*11] of Kathryn's expression are reasonably related to these legitimate pedagogical concerns. Accordingly, the Board's dress code constitutionally regulates Kathryn's First Amendment free speech rights in the nonpublic forum of her school. See *Hazelwood*, 484 U.S. at 273, *Muller*, 98 F.3d at 1539-40; see also *Littlefield v. Forney Independent Sch. Dist.*, 268 F.3d 275, 287 (5th Cir. 2001); See *Canady v. Bossier Parish School Bd.*, 240 F.3d 437, 443 (5th Cir. 2001);

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Phoenix Elementary Sch. Dist. No. 1 v. Green, 189 Ariz. 476, 943 P.2d 836, 839 (Ct. of App. Ariz. 1997) (collectively finding school dress code did not violate students' right to free speech).

C. Fourteenth Amendment Claim

The Vines also allege that the dress code "constitutes an unreasonable infringement upon our family's right to self-regulation". In their response to the Board's motion, the Vines argue that the school must share the responsibility of dressing and grooming with a student's parents.

The Fourteenth Amendment's Due Process Clause includes the fundamental liberty "interest of parents in the care, custody, and control of [*12] their children". *Troxel v. Granville*, 530 U.S. 57, 65-66, 147 L. Ed. 2d 49, 120 S. Ct. 2054 (2000). However, parental rights are not absolute in the public school context and can be subject to reasonable regulation. *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 177, 49 L. Ed. 2d 415, 96 S. Ct. 2586 (1976) (recognizing no parental right to educate children in private segregated academies); *Fleischfresser v. Directors of Sch. Dist. 20*, 15 F.3d 680, 690 (7th Cir. 1994). A rational-basis review is the appropriate standard in analyzing parental rights in the context of public education and school dress codes. *See Littlefield*, 268 F.3d at 291; *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 177-

79 (4th Cir. 1996); *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 461 (2nd Cir. 1996).

As found above, the Board's dress code is rationally related to the Board's interest in fostering the education of its students and furthering the legitimate goals of improving student safety.

For the foregoing reasons, the Board's Motion for Judgment on the Pleadings is granted. Plaintiffs' Motion [*13] for Judgment on the Pleadings is denied. Judgment is entered for the Board, and the case is dismissed.

Dated: January 10, 2002

JOHN W. DARRAH

United States District Judge

JUDGMENT IN A CIVIL CASE

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered for the Board of Education of Zion School District No. 6 and against plaintiffs Barbara H. Vines and Robert W. Vines on behalf of Kathryn Vines and themselves.

Date: 1/10/2002