IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

EYVINE HEARN and NASHALA HEARN, a minor, suing through her next friend, EYVINE HEARN,	)	
Plaintiffs,	)	
UNITED STATES OF AMERICA,	)	
Plaintiff-Intervenor,	)	**C.A. No.: CIV 03-598-S**
v.	)	
MUSKOGEE PUBLIC SCHOOL DISTRICT 020; et al.,	)	
Defendants.	)	

UNITED STATES' MEMORANDUM OF LAW
IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND
IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

At issue in this case is whether a school district can bar a Muslim student from wearing a religious headscarf, known as a hijab, under the district's dress code. As a matter of equal protection, free exercise of religion, and free speech, the school district cannot do so because the undisputed facts show: (1) the dress code is not a generally applicable policy, and the district has reserved for itself the right to make exceptions to the dress code on a case-by-case basis, and in fact has permitted other students to wear head coverings for various non-religious reasons; (2) Nashala has worn her hijab throughout the 2003-2004 school year without any material disruption; (3) the district permitted Nashala to wear her hijab until September 11, 2003; and (4) the district permits non-Muslim students to wear religious clothing and accessories. Thus, the United States moves for summary judgment on its Fourteenth Amendment claim, and opposes Defendants' motion for summary judgment.

STATEMENT OF UNDISPUTED FACTS[1]

The Parties

1. Defendant Muskogee Public School District, Independent School District No. I-20 of Muskogee County, Oklahoma ("district"), is a public school district created and existing under the laws of the State of Oklahoma. (Defs.' Mot. for Summ. J. ¶ 1 [hereinafter Defs. Br.]; Defs.' Answer ¶ 2.3 (Nov. 24, 2003); Pls.' 1st Am. Compl. ¶ 2.3.)

2. Individual defendants are administrators employed by the district and are sued in their official capacities. (Pls.' 1st Am. Compl. ¶¶ 2.4-2.6; Defs.' Answer ¶¶ 2.4-2.5.)

3. Plaintiff Nashala Hearn is a sixth grade student at Benjamin Franklin Science Academy ("Franklin") in the district. (Pls.' 1st Am. Compl. ¶ 2.2.)

4. Plaintiff Eyvine Hearn is Nashala's father. (Id.)

5. The United States is a plaintiff-intervenor. (Minute Order (Apr. 12, 2004).)

Defendants' Dress Code Policy

6. The district has adopted a dress code policy for Franklin and other elementary schools which states, in relevant part, "[s]tudents shall not wear . . . hats, caps, bandannas, plastic caps, or hoods on jackets inside the building . . . ." (Defs. Br., Ex. A at 4.)

7. The dress code does not state that hijabs are prohibited. (Id.)

8. The dress code does not provide for exceptions for religious garb. (Id.)

9. The purposes of the dress code are to preserve safety and discipline at the school and to maintain the school as a "religion-free zone." (Defs. Br. at Ex. A ¶ 6, Ex. B ¶¶ 8-9, Ex. C ¶ 12; Gleichman Dep. 67:22-70:21, 76:16-77:25 (Ex. 2); Pls.' Response to Defs.' Mot. for Summ. J.,

[1] The United States' Response to Defendants' Statement of Undisputed Material Facts is attached as Exhibit 1.

Cross Mot. for Summ. J., and Br. in Supp. at Ex. A ¶ 12 [hereinafter E. Hearn Aff.], Ex. B ¶ 6 [hereinafter N. Hearn Aff.].)

10. The district's dress code gives principals discretion to interpret particular provisions and to make exceptions for students on a case-by-case basis. (Hallum Dep. 53:8-54:8 (Ex. 3).)

11. The district has in the past granted, and would grant in the future, exceptions to the dress code for head coverings for students with medical problems resulting in hair loss, in recognition that such students may want to do so to deflect attention away from themselves. (Letter from Hayes to Kassabian of 12/9/03, at 2 [hereinafter Hayes Ltr.][2] (Ex. 4); Gleichman Dep. 60:20-61:13; (Defs. Br. at 19).)

12. The district reserves the right to make exceptions to the policy in order to respond to exigencies that arise from time to time. (Defs. Br. at 19.)

13. The district has granted exceptions to the dress code for costumes worn during school plays held in school buildings. (Gleichman Dep. 59:15-60:19; Hallum Dep. 31:18-32:2.)

14. The district has granted exceptions to the dress code to permit students to wear "Cat in the Hat" hats in school buildings on Dr. Seuss's birthday during Read Across America Week. (Hallum Dep. 32:3-32:11; Gleichman Dep. 59:18-60:19.)

15. The district has permitted students to wear hats in school buildings during "hat days" in support of programs such as the "Put a Cap on Drugs" Program. (Hayes Ltr. ¶ 3.)

16. The district has permitted students to wear head coverings on Halloween. (Gleichman Dep. 61:14-61:22.)

Nashala's Religious Practice

[2] The Hayes Letter also is attached as Exhibit A to Defendants' Response to the United States' Motion to Intervene and Memorandum of Law in Support of that Motion to Intervene.

17. Nashala is an adherent of the Islamic faith. (N. Hearn Aff. ¶¶ 1, 3; E. Hearn Aff. ¶ 3.) She converted to Islam during the summer of 2002. (E. Hearn Aff. ¶ 3.)

18. Adherents of the Islamic faith, known as Muslims, share a belief in Allah as the sole deity and in Muhammad as his prophet. (E. Hearn Aff. ¶ 3; Merriam-Webster's Collegiate Dictionary 620-21 (10th ed. 1993).)

19. As a demonstration of modesty and respect for Allah, Muslim girls and women wear head coverings called "hijabs," particularly when in public. (N. Hearn Aff. ¶¶ 1, 2; E. Hearn Aff. ¶¶ 3, 4; The Institute of Islamic Information and Education, The Question of Hijab: Suppression or Liberation?, at www.iiie.net/Brochures/Brochure-23.html [hereinafter "III&E website"][3] (Ex. 5).)

20. Muslim women wear hijabs in a variety of styles and colors. (N. Hearn Aff. ¶¶ 9, 12; E. Hearn Aff. ¶ 9; The Seattle Times, Interpreting Veils, (2001), at http://seattletimes.nwsource.com/news/nation-world/crisis/theregion/veils.html (Ex. 6).)

21. In June 2003, Nashala began wearing a hijab as part of her Muslim faith. (E. Hearn Aff. ¶ 3.)

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[3] "[A] district court may utilize the doctrines underlying judicial notice in hearing a motion for summary judgment substantially as they would be utilized at trial. Thus, a court may consider stipulations, concessions of counsel, transcripts, exhibits and other papers . . . ." St. Louis Baptist Temple v. FDIC, 605 F.2d 1169, 1171-72 (10th Cir. 1979) (citations omitted). The Court may also take judicial notice of information in the public record. See, e.g., Laborers' Pension Fund v. Blackmore Sewer Constr., 298 F.3d 600, 607-08 (7th Cir. 2002) (taking judicial notice of website); Ieradi v. Mylan Labs., 230 F.3d 594, 598 n.2 (3d Cir. 2000) (taking judicial notice of newspaper article).

22. Nashala has worn a hijab every day that she has been permitted to attend Franklin. (N. Hearn Aff. ¶ 7.)

23. At all times while attending Franklin, Nashala has worn a hijab that leaves her face visible. (N. Hearn Aff. ¶ 6; E. Hearn Aff. ¶ 4.)

The District's Reaction to Nashala's Hijab

24. In August 2003, Eyvine Hearn advised Diane Walker, Nashala's home room teacher, that Nashala was a Muslim and would wear a hijab in school. (Defs. Br. at Ex. E ¶ 2.)

25. Walker informed Mr. Hearn that Nashala would be permitted to wear a hijab during school. (Id.)

26. Principal Hallum, although aware that Nashala was wearing a hijab to school, did not ask Nashala to remove it or advise her that she was violating the district's dress code. (Hallum Dep. 8:5-8:18, 38:1-38:22; Hayes Ltr. at 015.)

27. From August 18, 2003 to September 10, 2003, Nashala wore a hijab to Franklin, without incident and with full knowledge of her teacher and principal. (E. Hearn Aff. ¶ 7; Hayes Ltr. at 015 ("The first two headdresses [Nashala] wore did not [create a disruption].").)

28. On September 11, 2003, the second anniversary of the 2001 terrorist attacks, Walker and another teacher were discussing the attacks and spotted Nashala wearing her hijab. (Hayes Ltr. at 014.)

29. Walker approached Nashala and told her that she should not be wearing a hijab and sent her to Hallum's office. (N. Hearn Aff. ¶ 10.)

30. During that meeting, Hallum informed Nashala for the first time that her hijab was prohibited by the school dress code. (Defs. Br. at 4; N. Hearn Aff. ¶ 11.)

31. On September 29, 2003, Superintendent Gleichman informed the Hearns that, pursuant to the district's dress code, Nashala would no longer be permitted to wear a hijab at school. (Defs. Br. at 5.)

32. Nashala declined to remove her hijab, and as a result, on or about October 1, 2003, the district suspended Nashala for three days. (Defs. Br. at 5; N. Hearn Aff. ¶ 14; E. Hearn Aff. ¶ 13.)

33. When Nashala returned to Franklin, she again wore her hijab. As a result, on or about October 7, 2003, the district suspended Nashala for five days. (Defs. Br. at 5; N. Hearn Aff. ¶ 15; E. Hearn Aff. ¶ 15.)

34. Prior to each of these suspensions, Nashala's father informed Hallum that Nashala's wearing of the hijab was a requirement of her religious beliefs. (Pls.' 1st Am. Compl. ¶ 3.11.)

35. On October 15, 2003, the district and the Hearns reached an interim agreement, which allowed Nashala to return to school wearing her hijab until a determination could be made as to the constitutionality of the district's dress code. (Defs. Br. at 6.)

36. Nashala has since worn her hijab to Franklin every day without any incident or disruption to the instructional setting. (E. Hearn Aff. ¶ 18.)

The District's Exceptions to the Dress Code

37. The district either granted an exception to the dress code for Nashala at the beginning of the school year or interpreted the dress code policy as not prohibiting hijabs. (Hallum Dep. at 38:1-39:1; Hayes Ltr. at 015.)

38. The district granted an exception to the dress code for Nashala as a result of the interim agreement reached between the district and the Hearns. (Defs. Br. at Ex. G.)

The District's Justifications for Prohibiting Nashala's Wearing of Hijab

39. The district offers several justifications for prohibiting Nashala from wearing her hijab to school: (1) to further school safety and discipline; (2) to promote a learning environment free of "unnecessary" disruption; (3) to maintain a "religion-free zone" in schools; and (4) because the district believes it is required to do so under a set of 1998 U.S. Department of Education ("DOE") guidelines. (Defs. Br. at 8; N. Hearn Aff. ¶ 4; E. Hearn Aff. ¶ 12; Gleichman Dep. 67:22-70:21, 76:16-77:25; Religious Expression in Public Schools, U.S. Dep't of Educ. (1998), available at http://www.ed.gov/Speeches/08-1995/religion/html [hereinafter 1998 Guidelines] (Ex. 7).)

40. The district has not provided any evidence regarding safety- or gang-related concerns connected to hijabs. (Hayes Ltr. ¶ 4.)

41. The district has not provided any evidence regarding crime or criminal activity at Franklin

or any other school in the district. (Id.)

42. The only "disruptions" caused by Nashala's hijab were "comments by students and teachers" regarding the hijab, and one incident during which another student pulled off Nashala's hijab. (Hayes Ltr. at 015; N. Hearn Aff. ¶ 17; E. Hearn Aff. ¶ 17.)

43. Gleichman and Hallum stated that these students reported being "frightened" or "concerned " by Nashala's hijab. (Gleichman Dep. 53:22-55:4; Hallum Dep. 16:6-18:12.)

44. The district permits Franklin students to wear religious clothing and accessories, including crucifixes and shirts with Christian messages. (E. Hearn Aff. ¶ 6; N. Hearn Aff. ¶ 5.)

45. The 1998 DOE guidelines state that a school district may not discriminate against

religion

in general or a particular religion in applying student dress codes: "Students generally have no Federal right to be exempted from religiously-neutral and generally applicable school dress rules based on their religious beliefs and practices; however, schools may not single out religious attire in general, or attire of a particular religion, for prohibition or regulation." (1998 Guidelines at 7.)

ARGUMENT

The core legal dispute on summary judgment is the appropriate level of judicial scrutiny applicable to Defendants' enforcement of a no-headwear rule against Nashala Hearn. Defendants contend that their dress code is a neutral, generally applicable rule, and rational basis review therefore should apply. As set forth below, however, the dress code being applied to Nashala is neither neutral nor generally applicable, and strict scrutiny applies for any one of several reasons. *First*, the dress code does not apply equally to all students, and thus is not generally applicable. Defendants have reserved for themselves the prerogative of making case-by-case exceptions to the policy, and have indeed made many such exceptions, including exceptions for students suffering hair loss due to chemotherapy treatment. Thus, a student, like Nashala, who seeks to wear a head covering for reasons of modesty based on religious reasons like Nashala cannot do so, but a student who seeks to wear a head covering for reasons of modesty based on secular reasons can. This is not a generally applicable rule, and Defendants thus must show a compelling interest, pursued in a narrowly tailored fashion, for failing to extend the same exemption to Nashala's religious request that is given to others. See Argument at 11-14, infra. *Second*, Nashala's claim involves free exercise rights coupled with expressive

rights, and therefore heightened scrutiny is warranted under the case law of the Supreme Court and the Tenth Circuit. See id. at 14-16. *Third*, the undisputed facts show that Defendants' actions were not neutral toward religion, but rather singled out Nashala based on her Muslim faith, and strict scrutiny therefore applies to her Free Exercise and Equal Protection claims for this reason as well. See id. at 16-17. Finally, strict scrutiny is also warranted under the Free Speech Clause. See id. at 21-23.

Accordingly, Defendants must show that their conduct toward Nashala advances interests of the highest order and is narrowly tailored in pursuit of those interests. They cannot do so. As set forth below, Defendants' various rationales posited for enforcing the no-headwear policy against Nashala are not compelling; indeed they are so lacking in factual support that they would not even meet the minimal requirement of rational basis scrutiny. They also are not narrowly tailored. See id. at 16-19. Therefore, summary judgment for Plaintiffs and the United States is warranted.

I. Legal Standard

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

In the context of Rule 56, the court's function is not to decide disputed questions of fact, but only to determine whether genuine issues of fact exist. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). The movant bears the burden of showing the propriety of summary judgment, and the court "must view the evidence and any inferences that may be drawn from the evidence in the light most favorable to the nonmoving party." Gray v. Phillips Petroleum Co.,

858 F.2d 610, 613 (10th Cir. 1988).

As shown below, the United States is entitled to judgment as a matter of law on its Fourteenth Amendment claim because there are no genuine issues as to any material facts.

II. The District's Conduct Violates The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment, upon which the United States' complaint-in-intervention is premised, has been violated by Defendants in two ways. First, the district has violated Nashala's right to freely exercise her religion, a "fundamental constitutional right" under the Equal Protection Clause. Johnson v. Robinson, 415 U.S. 361 n.14 (1974) ("Unquestionably, the free exercise of religion is a fundamental constitutional right."). The Supreme Court has considered claims alleging a burden on the fundamental right of religious exercise in violation of the Equal Protection Clause by looking to whether the plaintiff's rights under the Free Exercise Clause were violated. See id.; see also Locke v. Davey, – U.S. –, 124 S.Ct. 1307, 1313 n.3 (2004). Cf. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring) ("[T]he Free Exercise Clause . . . and the Equal Protection Clause as applied to religion – all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits."); West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1365 (10th Cir. 2000) ("[Plaintiff's] equal protection claim is more properly considered together with his First Amendment challenge.").

Second, the district, in singling out Nashala because of her Islamic faith, has intentionally discriminated against her. See Buckley Constr. v. Shawnee Civic & Cultural Dev. Auth., 933 F.2d 853, 859 (10th Cir. 1991) (a violation of equal protection occurs "when the government treats someone differently than another who is similarly situated").

A. The District Impinged Nashala's Fundamental Right To Practice Her Religion in Violation of the Equal Protection Clause

The First Amendment's Free Exercise Clause, made applicable to the States by incorporation through the Fourteenth Amendment, see Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." Employment Div. v. Smith, 494 U.S. 872, 877 (1990). The Supreme Court has found that it is impermissible to restrict the free exercise right in a variety of contexts, including "imposing special disabilities on the basis of religious views or religious status." Id. The level of judicial scrutiny applied to a Free Exercise claim depends on the nature of the challenged governmental act.

When "prohibiting the exercise of religion . . . is not the object of [a governmental policy] but merely the incidental effect of a generally applicable and otherwise valid provision," the policy need only be rationally related to a legitimate governmental objective to pass constitutional muster. Smith, 494 U.S. at 878-79; Thiry v. Carlson, 78 F.3d 1491, 1496 (10th Cir. 1996) (citing Smith). But strict scrutiny will apply when (1) the policy provides for individualized exemptions and those exemptions are not afforded to religious practices, (2) the policy violates constitutional rights in addition to free exercise, or (3) the state actor singles out a particular faith in applying the policy. Smith, 494 U.S. at 877-78, 882, 884; Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540-41 (1993); Axson-Flynn v.

Johnson, 356 F.3d 1277, 1295 (10th Cir. 2004).[4] Under those circumstances, a defendant must show that the policy in question "advance[s] interests of the highest order" and "is narrowly tailored in pursuit of those interests." Lukumi, 508 U.S. at 546.

1. The District's Policy and Conduct Trigger Strict Scrutiny

The district's dress code policy merits strict scrutiny for any one of three reasons. *First*, the policy allows school principals to make exceptions on a case-by-case basis. The Supreme Court has held that a policy affecting religious practice is not generally applicable if it "has in place a system of individual exemptions." Smith, 494 U.S. at 884. Smith derives this principle from Sherbert v. Verner, 374 U.S. 398 (1963), and later Supreme Court cases applying Sherbert. See Smith, 494 U.S. at 884. Sherbert held that a State could not constitutionally deny unemployment benefits to a member of the Seventh-day Adventist Church who was discharged from her job as a mill worker and could not find equivalent work because her religious convictions prevented her from working on Saturdays. Because the statute's distribution of benefits permitted "individualized exemptions" based on "good cause," the Court explained in Sherbert, the State could not refuse to accept the plaintiff's religious reasons for not working on Saturdays as good cause without violating the Free Exercise Clause, unless the State could show that the denial of the exemption furthered a compelling interest and did so by the least restrictive means available. See 374 U.S. at 405-07.

Accordingly, "in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of

[4] As set forth more fully below, the Tenth Circuit's decision in Axson-Flynn directly controls this case. The United States notes that Defendants failed to cite this decision in their Memorandum in Support of Summary Judgment.

religious hardship without compelling reason." Lukumi, 508 U.S. at 537 (internal quotation marks omitted); see also Axson-Flynn, 356 F.3d at 1297; FOP v. City of Newark, 170 F.3d 359, 365 (3d Cir.) (holding police department could not refuse to consider exception to "no beards" rule for religious reasons where exceptions for medical reasons were permitted).

In the Tenth Circuit, an individualized system will be found to exist where "case-by-case inquiries are routinely made, such that there is an 'individualized governmental assessment of the reasons for the relevant conduct' that 'invite[s] consideration of the particular circumstances' involved in the particular case." Axson-Flynn, 356 F.3d at 1297 (quoting Smith, 494 U.S. at 884). The "system of individualized exemptions" does not need to be a written policy, but may be found by "show[ing] a pattern of ad hoc discretionary decisions amounting to a system." Id. at 1299.

In Axson-Flynn, a theater major sued the University of Utah, alleging, inter alia, that her free exercise rights were violated by the university's policy that required strict adherence to a script as written. 356 F.3d at 1294. As a Mormon, she objected on religious grounds to taking God's name in vain and using a certain profanity, and sought an exemption from doing so while participating in the university's Actor Training Program. Id. at 1280. In reversing a grant of summary judgment for the university, the court held that she had raised a material fact issue as to whether the university had a "system of individualized exemptions" to its script requirement, based on two exemptions: the university had permitted a Jewish student, without lowering his grade, to miss an improvisational class on Yom Kippur that could not be made up, and the university had "sometimes granted" Axson-Flynn herself an exemption from the script adherence requirement. Id. at 1298-99.

The record here shows – with greater clarity than in Axson Flynn – that the district had an informal system of individualized exceptions to its student dress code policy. By Defendants' own admission, the principals have the discretion to make exceptions to the dress code policies, and the district reserves the right to be flexible and make exceptions for "exigen[t]" circumstances. (Defs. Br. at 19; United States' Statement of Undisputed Facts ¶¶ 10, 12 [hereinafter Statement of Facts].) And principals have done so in a number of contexts, including permitting students to wear head coverings in school for "medical" reasons such as students undergoing chemotherapy treatment (Statement of Facts ¶ 11); Halloween celebrations (Id. ¶ 16); Read Across America Week (Id. ¶ 14); and "hat days" affiliated with other events like the "Put a Cap on Drugs" program (Id. ¶ 15). Moreover, the district permitted Nashala to wear the hijab for several weeks until September 11, the day that she was directed to remove it, and has permitted her to continue wearing a hijab since the parties reached an interim agreement in October 2003. (Id. ¶¶ 22-36.) As the Tenth Circuit held in Axson-Flynn, not only exceptions made for other people, but exceptions made in the past for the individual who is presently challenging a policy, constitute evidence of a system of individualized exceptions. 356 F.3d at 1298-99.

The district's discretionary application of its dress code policy is most striking in its conceded disparate treatment of Nashala and a student who seeks to wear a head covering to conceal the loss of hair resulting from chemotherapy. Both students are motivated by a desire to deflect attention away from their personal appearance. The only difference is Nashala seeks modesty for religious reasons – to show her devotion to Allah – and the cancer patient seeks it for secular reasons, most likely out of understandable self-consciousness.

Second, the dress code policy, as applied to Nashala, violates her free speech and free exercise rights under the "hybrid rights" principle. When a free exercise claim is coupled with some other constitutional claim, such as free speech, strict scrutiny is triggered. Smith, 494 U.S. at 881; Axson-Flynn, 356 F.3d at 1295. This principle applies "where the plaintiff establishes a 'fair probability or likelihood' but not a certitude of success on the merits" of the companion claim. Axson-Flynn, 356 F.3d at 1295, 1297.[5]

This case presents such a hybrid-rights claim. The Hearns' causes of action combine the free exercise claim with violations of Nashala's free speech rights. As shown below, at 21-23, this claim is more than colorable; it entitles the Hearns and the United States to summary judgment. For example, courts have found the wearing of rosaries and hair exceeding a certain length to be protected student speech. Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659, 664-65 (S.D. Tex. 1997); Alabama & Coushatta Tribes of Tex. v. Trs. of Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319, 1334 (E.D. Tex. 1993); see also Isaacs v. Bd. of Educ. of Howard County, Md., 40 F. Supp. 2d 335, 338 (D. Md. 1999) ("If the wearing of headgear constitutes speech and also represents an exercise of religion, a student would have 'hybrid' constitutional protection arising out of both the free speech and free exercise. This fact alone would provide ample basis for the school system's decision to exempt religious headgear from its 'no hats' policy.").

Defendants attempt to dismiss the free speech claim as simply derivative – "the purported speech, wearing a religious scarf, derives directly from the fact that the scarf is a religious symbol." (Defs. Br. at 10.) The short answer to this contention is that religious speech is still

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[5] Thus, Defendants' formulation that the hybrid-rights analysis can be triggered by simply "invoking" a separate constitutional claim (Defs. Br. at 11) is wrong.

speech. The Supreme Court has consistently held that religious speech is entitled to the same protection under the Free Speech Clause as secular speech. Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (plurality opinion) ("Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression"); see also Good News Club v. Milford Cent. Sch., 533 U.S. 98, 111-12 (2001); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393-94 (1993). Accordingly, courts have properly found, in cases similar to this one, a free speech right independent of any free exercise right. Chalifoux, 976 F. Supp. at 664-67; Coushatta Tribes, 817 F. Supp. at 1333-34. Since Nashala has demonstrated that she has a valid hybrid-rights claim, strict scrutiny is thus appropriate for this reason as well.

And third, strict scrutiny under the Free Exercise Clause is warranted on the basis that the policy has not been applied in a religion-neutral manner. As the Supreme Court held in Lukumi: "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs." 508 U.S. at 532. The undisputed facts here lead to the conclusion that the school district has singled out Nashala because of her Islamic faith. Nashala was permitted to wear her hijab without sanction until 9/11's second anniversary when two teachers discussing the attacks spotted Nashala and told her that she would have to remove her scarf. (Statement of Facts ¶¶ 28-29.) Prior to that date, the district had allowed Nashala to wear her hijab for several weeks without any intimation that doing so violated the dress code. (Id. ¶¶ 25-26.) Furthermore, school officials have asserted that Nashala's hijab was frightening to some students and should be barred for this reason. (Id. ¶ 43.) Finally, the district cites concern about gang symbols as a primary reason for enforcing its policy against Nashala, yet permits non-Muslim students to wear various religious symbols and clothing with various

religious messages that could just as readily be used as gang symbols. (Id. ¶ 44.) Under the circumstances, the district's dress code and its application to Nashala is not religion-neutral and is properly subject to strict scrutiny for this reason as well.

2. The District's Policy Fails Strict Scrutiny

The dress code policy fails because it is not narrowly tailored to further a compelling governmental interest. Such a policy cannot survive strict scrutiny review. See FOP, 170 F.3d at 365.

The district proffers the following justifications for its interpretation of the dress code policy, none of which are compelling or even supported by the record:

- **The dress code policy is "necessary for student discipline and safety," particularly because of gang-related incidents in the district.**[6] The district provides no support for its claim that applying the dress code to bar religious headcoverings is necessary to prevent disruptions or maintain order, or that other less-intrusive means were unavailable. They have failed to show that the hijab is a gang-related symbol or that Nashala has been involved in gang-related or criminal activity. In fact, the hijab has not caused disruption at Franklin, with the exception of the principal's account of some amorphous fright and curiosity of other students on or near September 11, 2003. (Statement of Facts ¶ 43; Hallum Dep. 16:6-18:12 ("I've had students frightened. I think . . . because [the hijab] was black, it was the color . . . .").)

- **The dress code policy ensures that the district is a "religion-free zone."** The superintendent stated that the dress code policy was necessary because "once you move the [hijab] in school . . . it would bring religion into the school." (Statement of Facts ¶ 39; Gleichman Dep. 67:22-70:21.) This rationale is not compelling for two reasons. First, discrimination against student expression on the basis of religious viewpoint is forbidden by the Constitution. See, e.g., Good News Club, 533 U.S. at 107; Widmar v. Vincent, 454 U.S. 263, 277 (1981). This rationale is thus not merely not compelling, it is illegal. Second, this "religion-free zone" rationale has not been applied uniformly. Students are permitted to wear religious symbols and messages, such as crucifixes and Christian messages on their t-shirts. (Statement of Facts ¶ 44.) The failure of the school

[6] For example, the district cited to statistics indicating that crime generally is a problem in the greater Muskogee community (Defs. Br. at Ex. C ¶¶ 8-10), but they have made no connection between these statistics and the dress code, let alone a connection that would justify impinging on Nashala's right to free exercise.

to take efforts to stop this (which also would be unconstitutional) expression undercuts their assertion, however misguided, that this rationale is compelling. [7]

- **The district's ban on hijabs is required by the U.S. Department of Education's guidelines on "Religious Expression in Public Schools."** The district's interpretation of the 1998 guidelines is patently wrong. The guidelines were simply a recitation of the current state of constitutional law,[8] and as discussed above, the district's policy, as interpreted, is not consistent with the law. The guidelines note that there is no right to be exempted on religious grounds from "religiously-neutral and generally applicable school dress rules." But dress codes that are not religion neutral or which are not generally applicable are subject to strict scrutiny when applied to religious objectors. See Smith, 494 U.S. at 877-78, 882, 884. The district's dress code is neither. The district has a practice of exempting students from the policy on a case-by-case basis, but refuses to consider an exception for the hijab. It is thus not generally applicable. The district also has singled out Nashala based on her particular religious beliefs. It is thus not neutral, either. This evidence puts the district's policy at odds both with the guidelines and the current law.[9]

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[7] Defendants argue that accommodating Nashala's hijab would amount to favoritism toward a particular religion, and hint that such accommodation would violate the Establishment Clause of the First Amendment. (Defs. Br. at 2.) This argument is without legal support. As the Supreme Court announced in Kiryas Joel, the Religion Clauses do not require "the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice." 512 U.S. at 705. Rather, the Court held, "there is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." Id. (internal quotations omitted). See also Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 334 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practice and that it may do so without violating the Establishment Clause.")

[8] See Statement of Facts ¶ 45. The Department of Education guidelines were created to assist "school officials, teachers, students and parents find a new common ground on the important issue of religious freedom *consistent with constitutional requirements.*" 1998 Guidelines at 1 (emphasis added). The guidelines also state that the principles therein "derive[] from the First Amendment." Id. at 3.

[9] Defendants, relying on a dissenting opinion by Justice Scalia, assert that "[t]he USDOE guidelines on dress codes are substantive rules and as such are held to carry the 'force of law.'" U.S. v. Mead Corp., 533 U.S. 218, 245 (2001). Indeed, some substantive rules are held to carry the force of law, see Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984), but as Mead makes clear, such rules are only given "force of law" deference if they have been created as a result of a "relatively formal administrative procedure" such as "notice-and-comment rulemaking or formal adjudication." 533 U.S. at 230-31. As explained in the United States' Motion for Protective Order at 3-4 (Apr. 26, 2004), the guidelines have not undergone

Even if the Court finds the district's vague and unsubstantiated justifications to be compelling state interests, the policy still fails because it is not narrowly tailored. The district does not claim that the hijab is gang-related apparel. In addition, the district arbitrarily makes exceptions to the dress code policy, without explaining why a student undergoing chemotherapy is entitled to wear a head covering, but a Muslim is not. The two students may have different motivations for desiring to wear a head covering, but ultimately they have the same goal: to cover their head in public to deflect attention away from themselves. The district can make an exception to the dress code for religious head coverings such as yarmulkes or hijabs just as easily as it can make exceptions for other reasons.[10]

In sum, strict scrutiny is warranted for any one of three reasons: the policy is subject to ad hoc exceptions for various secular head coverings and thus is not generally applicable; the policy burdens Nashala's "hybrid right" of religious exercise coupled with religious expression; and the policy has been enforced against Nashala on a discriminatory basis because of her particular religious faith, and thus is not religion-neutral. Because the policy as enforced against

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such a review and in fact are simply guidelines explaining the current state of constitutional jurisprudence on the subject.

[10] Other school districts across the country, including the Tulsa Public Schools, have carved out religious exceptions in their dress codes:

> Caps, hats or other similar head coverings shall not be worn to class or within school buildings unless prescribed by a physician, *previously approved by the school's administration for religious reasons*, or approved by the school's administration for a special school activity. . . .
>
> Approved coverings worn as part of a student's *bona fide religious practices or beliefs* shall not be prohibited under this policy.

Tulsa Public Schools, TPS Student Dress Code, at 2-3, available at http://www.tulsaschools.org/dresscode.shtm at 2-3 (emphasis added) (Ex. 8). See also Isaacs, 40 F. Supp. 2d at 336 ("Both schools make exceptions for religious headgear such as yarmulkes and Muslim hijab, including head-scarves.").

Nashala is not supported by any compelling justification, and is in any event, not narrowly tailored to achieve the school's goals, it violates Nashala's Free Exercise Clause rights, and therefore infringes her fundamental right of religion in violation of the Equal Protection Clause.[11]

B. The District's Disparate Treatment of Nashala Based on Her Religion Violates the Equal Protection Clause

The Equal Protection Clause is violated "when the government treats someone differently than another who is similarly situated." See Buckley Constr., 933 F.2d at 859 (citing City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985)). Religion can be a suspect classification subject to strict scrutiny where a particular religious faith is singled out for different treatment. Burlington N. R.R. Co. v. Ford, 504 U.S. 648, 651 (1992).

As described in detail in section II.A., supra, the facts here show that the district intentionally discriminated against Nashala because she wore a hijab pursuant to her Islamic faith. Briefly restated, the district decided to bar Nashala's hijab on the second anniversary of 9/11 after two teachers discussing the attacks spotted her wearing the hijab, and a teacher subsequently approached her and told her to remove it; the district has relied on statements of school officials that other children are afraid of the hijab as a justification for continuing to bar Nashala from wearing it; and the district has claimed that the school should be a religion-free zone but nonetheless has permitted other students to wear various types of religious symbols and clothing. Such disparate treatment is forbidden by the Equal Protection Clause.

III. The District's Conduct Violates The Free Speech Clause Because Wearing A Hijab Constitutes Religious Speech

[11] This complete lack of factual support for the district's proffered justifications dooms the dress code policy even under the rational basis review test urged by Defendants.

Public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969). To the contrary, "pure student expression" is fully protected under the First Amendment unless a defendant can show that the speech being regulated caused a substantial disruption of or material interference with school activities. Chalifoux, 916 F. Supp. at 666 (citing Tinker, 393 U.S. at 513). More than mere speculation about disruption and interference are required: "undifferentiated fear or apprehension of disturbance" is not enough to overcome the right to freedom of expression. Tinker, 393 U.S. at 508.

Nashala's practice of wearing a hijab is akin to pure speech and therefore is entitled to the highest protection. The hijab "is a pure symbol, such as the cross, the Star of David, the crescent, the swastika, . . . or the black armband in Tinker [and] any individualized activity with regard to it outside of the purely logistical activity of maintaining or storing of it is bound to convey a message of fealty or revulsion and is 'closely akin to pure speech.'" Goguen v. Smith, 471 F.2d 88, 99 (1st Cir. 1972); see Chalifoux (rosaries worn by Catholic students were akin to pure speech); Coushatta Tribes (hair length worn by American Indian students was akin to pure speech).

As Defendants concede, Nashala has worn a hijab for virtually the entire school year, save for when she was suspended for doing so, without causing any substantial disruption of or material interference with school activities:

> Q. Tell me about all the incidents that you have heard of where significant disruptions or violence have broken out in relation to the wearing of hijabs.
>
> A. *I don't think I know of any*.

(Hallum Dep. 75:22-76:2) (emphasis added). Nevertheless, the district claims that the hijab caused "disruption" because a few students complained about Nashala's hijab, which in turn created an "uncomfortable" situation for the principal. Id. at 11:15-15:4. As an initial matter, the "mere desire to avoid the discomfort and unpleasantness" of handling issues regarding the hijab is not enough to justify restricting student speech under Tinker. West, 206 F.3d at 1366. More to the point, the students' comments do not rise to the level of a "substantial disruption" envisioned by Tinker. The reaction to Nashala's hijab centered around the students' curiosity and concern about seeing an unfamiliar object. Statement of Facts ¶ 43. Rather than instruct students on what Nashala was wearing and why she was wearing it -- information easily ascertained -- Defendants chose the path of suppression of speech. The Constitution does not permit this.[12]

Defendants have nothing more than an "undifferentiated fear or apprehension of disturbance" if Nashala is permitted to wear her hijab. Tinker, 393 U.S. at 508. This fear is not enough to overcome her right to free expression. Id.; Coushatta Tribes, 817 F. Supp. at 1334

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[12] As the Seventh Circuit aptly stated in a case invalidating a school's censorship of a student's religious leaflets:

> [The school] proposes to throw up its hands, declaring that because misconceptions are possible it may silence its pupils, that the best defense against misunderstanding is censorship. What a lesson [the school] proposes to teach its students! Far better to teach them about the first amendment, about the difference between private and public action, about why we tolerate divergent views. Public belief that the government *is* partial does not permit the government to *become* partial. Students therefore may hand out literature even if the recipients would misunderstand its provenance. *The school's proper response is to educate the audience rather than squelch the speaker*.

Hedges v. Wauconda, 9 F.3d 1295, 1299 (7th Cir. 1993) (emphasis added).

(holding that mere speculation that American Indian student's hair length will lead to disruption in the school was insufficient to overcome the right to freedom of expression).

Finally, Defendants fail to show that the hijab is a gang-identifier or has ever, in any way, been linked to gang-related apparel. Statement of Facts ¶ 40; see, e.g., Chalifoux, 976 F. Supp. at 667 (finding that defendant had failed to show any link between rosaries and gang-related activity where they could point to only one unconfirmed incident over the span of several months). There is of course nothing indicating that Nashala is a gang member or that she has been involved in gang-related activity.[13] She is simply a sixth-grader trying to exhibit the modesty of dress that her faith requires.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court grant its motion for summary judgment on the Fourteenth Amendment claim and deny Defendants' motion for summary judgment.

Respectfully Submitted,

SHELDON J. SPERLING

R. ALEXANDER ACOSTA

[13] The cases cited by Defendants to defeat Nashala's free speech claim, Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986) and Littlefield v. Forney Independent School District, 108 F. Supp. 2d 681 (N.D. Tex. 2000), are, quite simply, inapposite. See Defs. Br. at 13-14. Bethel involved a student's use of lewd and offensive language at a student assembly. Littlefield involved a mandatory student uniform policy that unlike Defendants' policy here contained an express religious exception.

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