IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ANDREA HERNANDEZ, a minor, by and through her father and next friend, Steve Hernandez,	)	
Plaintiff,	)	
v.	)	**Case No. 5:12-cv-01113**
NORTHSIDE INDEPENDENT SCHOOL DISTRICT, by and through its Board of Trustees;	)	
ROBERT HARRIS, in his individual capacity and in his official capacity as Principal of John Jay High School; and	)	
JAY SUMPTER, in his individual capacity and in his official capacity as Principal of John Jay Science & Engineering Academy,	)	
Defendants.	)	

PLAINTIFF'S APPLICATION FOR PRELIMINARY INJUNCTION

TO THE HONORABLE COURT:

COMES NOW the Plaintiff, Andrea Hernandez, by her father and next friend, Steve Hernandez, by and through their attorney, and in support of her Application for a Preliminary Injunction alleges and avers as follows:

Factual Summary

In an effort to increase public funding for Northside Independent School District, the District has chosen to pilot a "Student Locator Project" in John Jay High School and John Jay Science and Technology Academy. The Project requires students to wear

around their necks "SmartID" badges, which are implanted with chips that transmit radio signals, thus allowing school officials to track the location of students wearing the badges on campus.

Andrea is an academically gifted, Christian student who earned a place in the Academy through completion of an application process which required, among other things, an excellent academic and disciplinary record. Andrea objects to participating in the Project on the basis of Scriptures found in the book of Revelation. According to these Scriptures, an individual's acceptance of a certain code, identified with his or her person, as a sign of submission to government authority and as a means of obtaining certain privileges from a secular ruling authority, is a form of idolatry or submission to a false god.

When Andrea and her father communicated to Defendants their religious objection to Andrea's participation in the Project, Andrea was offered an "accommodation" whereby the radio chip would be removed from her badge. Under this "accommodation," however, Andrea would still be required to wear the badge around her neck as an outward symbol of her "participation" in the Project. Such an "accommodation" does not resolve the essential conflict with Andrea's religious beliefs because, under these circumstances, the badge itself is a form of government "mark," and because wearing it would give the appearance of her participation in the program. By expressing support for the Project through wearing its visible symbol on her person, Andrea would be expressing support for a program to which she adamantly objects on the basis of her sincere religious beliefs.

Oblivious to the impact on students' fundamental rights, Defendants have embarked upon a crusade to achieve full student compliance with the financially-motivated Student Locator Project. As part of this effort, Defendants have sought to stigmatize students who have passively expressed dissent from the program and to reward students who submit to it. For instance, District officials have offered students gifts and pizza parties in exchange for their submission to the program, while students who refuse to wear the SmartID badge are forced to stand in separate lunch lines, denied participation in student government and activities, and prohibited from making certain commercial exchanges at school.

Andrea and her father have invoked the District's duly-enacted procedures to resolve their grievance with school officials. Meanwhile, Andrea has continued to carry (but not to wear or display on her person) her old student identification card, which has, in the past, achieved the District's legitimate interest in identifying students but does not entail any outward mark of submission nor the use of technology to subject students to government surveillance.

On September 25, 2012, Defendant Harris interfered with Andrea's distribution of fliers and petitions to her peers on school property after school hours. The documents expressed Andrea's objections to the Student Locator Project. Defendant Harris stated that because the materials she was distributing to peers "went against" a program supported by the District, she was prohibited from distributing the materials on school property.

Defendants Harris and Sumpter abruptly interfered with the on-going grievance proceedings by informing Mr. Hernandez by letter that because of Andrea's refusal to

don the SmartID badge, she would be banished from the Academy on November 26th. The letter did not cite any duly-enacted District rules, policies or procedures regarding the badges. Despite the fact that a large number of other students at John Jay High School and/or the Academy have similarly failed or refused to wear the SmartID badges, Defendants have not removed and/or transferred any other students from their academic programs as a result of such actions.

Legal Standard

In order to obtain a preliminary injunction, Andrea must demonstrate: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that the injunction might cause to the defendant; and (4) that the injunction will not disserve the public interest. *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 288 (5th Cir. 2012).

However, where a plaintiff alleges harm that is inseparably linked to her First Amendment rights, this is sufficient to indicate irreparable harm, because "Violations of [F]irst [A]mendment rights constitute 'per se irreparable injury.'" *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *See also Nat'l People's Action v. Village of Wilmette*, 914 F. 2d 1008, 1013 (7th Cir. 1990) (even temporary deprivation of First Amendment rights is sufficient proof of irreparable harm). Because Andrea claims that Defendants seek to punish her for her religious exercise and speech, the irreparable harm requirement is satisfied as a matter of law.

It is axiomatic, moreover, that "upholding constitutional rights serves the public interest." *Newsom ex rel. Newsom v. Albemarle County School Bd.*, 354 F.3d 249, 261 (4th Cir. 2003). Thus, if the Court finds that Andrea is likely to succeed on the merits of any one of her claims, then the Court should grant the preliminary injunction unless it finds that some harm that the injunction will cause to Defendants' interests outweighs the threatened injury to Andrea's fundamental rights.

Argument

I. Andrea is likely to succeed on the merits of her claim that the Defendants' application of the Project to her is in violation of the First Amendment's Free Exercise Clause and the Texas Religious Freedom Act, Tex. Civ. Prac. & Rem. Code § 110.001 *et seq.*

The United States Supreme Court has explicitly ruled that government authorities may not condition the availability of benefits upon a citizen's willingness to violate principles of her religious faith, as this amounts to penalizing the free exercise of constitutional liberties. *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (*quoting Sherbert v. Verner*, 374 U.S. 398, 406 (1963)).

Under the Texas Religious Freedom Act, school officials may not substantially burden an individual's free exercise of religion unless the burdening is the least restrictive means of furthering a compelling government interest. Tex. Civ. Prac. & Rem. Code § 110.003. Likewise, the Fifth Circuit applies strict scrutiny to free exercise claims where, as here, they are combined with claimed violations of other fundamental rights, such as the right to free speech. *Society of Separationists v. Herman*, 939 F.2d 1207, 1216 (5th Cir. 1991). *See also Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F.Supp. 659, 667 (S.D.Tex.1997) (rejecting a dress code exemption which required students to

wear rosaries under their shirts, because it burdened "a sincere expression of their religious beliefs"); *Alabama and Coushatta Tribes of Texas v. Big Sandy Sch. Dist.*, 817 F.Supp. 1319 (E.D.Tex.1993) (policy's reasonable relationship to substantial state interest was insufficient to overcome hybrid rights claim).

The District's requirement is a substantial burden on Andrea's free exercise.

Andrea and Mr. Hernandez have repeatedly explained to school officials and have pleaded in their Petition their sincere, religious belief that conflicts with the Project. Specifically, they believe that the book of Revelation warns Christians against receiving on their persons a governmental "mark," where the mark indicates submission to government and determines access to commerce and other societal rights and privileges. Andrea and Mr. Hernandez sincerely believe that the District's requirement for Andrea to wear the SmartID badge, with or without the imbedded chip, is akin to her receipt of a governmental "mark" such as the one described in Revelation.

Neither Defendants nor this Court may question the validity or "correct-ness" of this sincerely held religious belief. *See Barr v. City of Sinton*, 295 S.W.3d 287, 300 (Tex. 2009) (*quoting Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 886-87 (1990)). It is, quite simply, beyond the province of government officials to determine the plausibility of religious claims or the validity of an individual religious adherent's interpretation of a particular religious creed. *See id.*; *Smith*, *supra*, 494 U.S. at 886-87; *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). In determining whether government action "substantially burdens" a person's free exercise, Texas courts examine the "degree to which a person's religious conduct is curtailed and the resulting impact on his religious expression." *Barr*, 295 S.W.3d at 301. If the government action "truly

pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs," it constitutes a substantial burden. *Id.* (*quoting Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004)). Importantly, the burden must be measured from the individual's perspective, not from the government's. *Id.*

Applying these standards, the District's requirement that Andrea wear a badge indicating her participation in a program from which her religious beliefs compel her to refrain unquestionably constitutes a substantial burden upon her free exercise of religion. While Andrea believes the Bible forbids her to wear the District's "mark" in the form of the badge, the District's alleged policy compels her to wear it nonetheless. Andrea cannot comply with the District's alleged policy without violating her sincerely held religious beliefs.

The District's refusal to provide an exemption for Andrea cannot survive strict scrutiny.

Because the District's requirement substantially burdens Andrea's free exercise of her religious beliefs, the District can only justify its refusal to exempt Andrea from the requirement if it can demonstrate that such refusal is the least restrictive means of furthering a compelling government interest. *Society of Separationists*, *supra*, 939 F.2d at 1216 (applying strict scrutiny to hybrid free exercise claims); Tex. Civ. Prac. & Rem. Code § 110.003. Religious exercise is, of course, a fundamental right, so only government interests of the highest order will be considered relevant to the analysis. *See Barr*, *supra*, 295 S.W.3d at 306 (*quoting Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

The relevant inquiry, moreover, is not whether the government has compelling interests in implementing a program or policy generally, but rather the magnitude of its

interests in applying the challenged policy to the particular claimant whose sincere exercise of religion is being burdened. *Id.* (*quoting Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006)). In other words, Defendants may not justify their denial of an exemption for Andrea on their general interests in implementing the Project in the first instance, but must instead identify compelling interests in denying the exemption for her, in particular.

Defendants have not, to date, asserted any government interests achieved by denying Andrea an exemption from the Project apart from general notions of uniformity in policy application. Such an interest does not, as a matter of law, rise to the level of a "compelling government interest" that will justify burdening an individual's religious exercise. *See A.A. Ex. Rel. Betenbaugh v. Needville Indep. Sch.*, 611 F.3d 248 (5th Cir. 2010) (rejecting, in public school context, asserted compelling interests in discipline, authority, and uniformity). Indeed, if an interest in maintaining "uniformity" were deemed a compelling government interest, the Free Exercise Clause and Texas' Religious Freedom Restoration Act would be rendered effectively meaningless, as government officials would always be able to justify denials of religious exemptions from generally applicable policies by asserting this interest.

Finally, Defendants' argument that they have a compelling interest in denying an exemption for Andrea is absolutely undermined by the fact that they have allowed a large number of students to continue attending John Jay High School and the Academy despite the fact that these students have failed or refused to wear the badges. *See Needville*, *supra*, 611 F.3d at 271-72 (any connection between school's asserted interests and denial

of exemption for Native American student from policy requiring short hair for males was weakened by the fact that females were allowed to wear long hair).

Defendants' requirement that Andrea wear the badge, in violation of her personal religious beliefs, is not the least restrictive means of furthering any compelling government interest. Therefore, Andrea will probably succeed on the merits of this claim.

II. Andrea is likely to succeed on the merits of her claim that the requirement that she wear a chip-less badge to create an illusion of participation in the Project constitutes compelled speech and therefore violates the First Amendment to the United States Constitution.

The District has sought to compel Andrea to express a message that is repugnant to her.

District officials have repeatedly stated that Andrea is required to wear the SmartID badge—with or without the imbedded chip—in order to signal to others that she supports and/or participates in the Student Locator Project. This constitutes compelled speech and violates Andrea's free speech rights under the First Amendment.

In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), the United States Supreme Court held that a public school board violated a student's First Amendment rights by compelling him to salute the American flag. The Court explained that "To sustain the compulsory flag salute we [would be] required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." *Id.* at 634. The Court went on to describe the importance of rigorous protection of students' rights of conscience:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of

> Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Id. at 637.

Only threats of grave and immediate danger to interests the state may lawfully protect will justify interference with students' First Amendment rights to refrain from expressing agreement with government programs or policies. *Id.* at 639. "If there is any fixed star in our constitutional constellation," it is that government may not coerce citizens "to confess by word or act" their agreement with governmental programs, policies or ideologies. *Id.* at 642.

Just as the compulsory flag salute in *Barnette* impermissibly coerced students to signal their support of the American flag, so the compulsory wearing of the SmartID badge (with or without the imbedded chip) impermissibly coerces Andrea to signal her support for a government program that violates her religious beliefs. Indeed, the necessity of Andrea's "falling in line" with other students and showing support for the program is the only reason District officials have given to justify the requirement. This is coerced expression, and it is unconstitutional.

The Court should reject any argument that Defendants may insist upon Andrea's wearing the badge because the only consequence of her refusal to do so is her removal from the Academy to her regular high school. Under the United States Supreme Court's doctrine of unconstitutional conditions, "[T]he right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to

a condition prescribed by the state which is hostile to the provisions of the federal Constitution." *United States v. Chicago, M. St. P. & P. R. Co.*, 282 U.S. 311, 328-29 (1931). *See also McDaniel v. Paty, supra*; *Barron v. Burnside*, 121 U.S. 186 (1887) (state cannot impose, as condition of doing business, requirements that are repugnant to federal Constitution). Thus, it is no answer for Defendants to suggest that Andrea can avoid expressing the District's message by sacrificing the right she has earned to attend the Academy.

Defendants have unconstitutionally sought to silence Andrea's own viewpoint.

Finally, Defendants have acted in direct contravention of the First Amendment by forbidding Andrea to distribute literature to her peers after school hours based solely on the fact that the materials are critical of the Student Locator Project. In *Tinker v. Des Moines Independent School District*, the United States Supreme Court held, unequivocally, that school officials may not punish or prohibit peaceful student expression that does not interfere with the educational process or the rights of other students. 393 U.S. 503, 508-510 (1969). School officials may not interfere with a student's free speech rights merely to avoid controversy or criticism of official government policies. *Id.* at 510.

Defendants have trampled Andrea's First Amendment right of free speech in both seeking to compel her to express an official message that is repugnant to her faith and seeking to silence her from sharing her views on the issue in a non-disruptive manner. Therefore, Andrea is likely to succeed on the merits of her First Amendment claims.

III. Andrea is likely to succeed on the merits of her claim that Defendants have violated her due process rights under the Fourteenth Amendment because they have not cited any duly-enacted District

policy providing her with notice that failure to wear the SmartID badge could result in her removal from the Academy.

The District has interfered with Andrea's protected liberty and property interests.

The Fourteenth Amendment prohibits state governmental entities from depriving individuals of liberty or property interests without providing due process. Due process protections are triggered in this case because the District has sought to deprive Andrea of her fundamental liberty interests in free speech and free exercise of religion.

Additionally, Andrea has a property interest in her continued enrollment in the Academy because, unlike enrollment at an ordinary school, Andrea has *earned* the right to be enrolled in the Academy through her high academic achievements and excellent disciplinary record. This fact distinguishes this case from those in which students were found to have no property interests in taking particular courses of study, participating in extracurricular activities, or continuing their enrollment in one ordinary public education program as opposed to being transferred to another program. *See Nevares v. San Marcos Conslidated Indep. Sch. Dist.*, 111 F.3d 25 (5th Cir. 1997) (transfer from ordinary school to alternative school); *Esparza v. Board of Trustees*, 182 F.3d 915, 1999 WL 423109 (5th Cir. 1999) (in-school suspension). In *Esparza*, the Fifth Circuit explained that in order to establish a property interest, a plaintiff must show a legitimate claim of entitlement as opposed to an abstract need or desire. 182 F.3d at *4. Here, because Andrea has earned her place in the Academy, she has a legitimate claim of entitlement to her position there.

Defendants have not provided Andrea with the required notice under the Due Process Clause.

It is well-established that the guarantee of due process provided by the Fourteenth Amendment forbids government entities to punish citizens without first providing them

with fair notice of prohibited conduct. *See Giaccio v. Pennsylvania*, 382 U.S. 399, 402-3 (1966); *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *United States v. Williams*, 553 U.S. 285, 304 (2008). The Due Process Clause prohibits, moreover, the imposition of grossly excessive or arbitrary punishments upon a person. *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 433-35 (2001); *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416-17 (2003). As the Supreme Court has explained, "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996).

Other courts have recognized that, even in the special setting of public schools, these "elementary notions of fairness" serve as limitations on the otherwise broad discretion that schools enjoy with regard to student discipline. *See, e.g., Monroe County Bd. of Ed. v. K. B.*, 62 So. 3d 513, 516 (Al. Civ. App. 2010) ("[R]ules and regulations governing the conduct of students 'must be sufficiently definite to provide notice to reasonable students that they must conform their conduct to its requirements.'")(*quoting* 67B Am. Jur. 2d *Schools* § 285 (2010)); *James P. v. Lemahieu*, 84 F.Supp.2d 1113, 1121 (D. Haw. 2000)("[I]t is clear that the Due Process Clause requires statutes to clearly set forth the type of conduct that is forbidden by its provisions); *Stephenson v. Davenport Comm. Sch. Dist.*, 110 F.3d 1303, 1310 (8th Cir. 1997)(holding district regulation void because it failed "to provide adequate notice of prohibited conduct…").

Because Defendants have purported to deprive Andrea of her protected property interest in continued enrollment at the Academy and her protected liberty interests in free

speech and free exercise, their actions are subject to the Fourteenth Amendment's due process requirements. In light of the fact that Defendants Harris and Sumpter cited no law or policy whatsoever concerning students' wearing or refusal to wear the SmartID badges, nor any law or policy apprising students that they might be subject to removal from their academic programs as a result of failing to wear the badges, Andrea is likely to succeed on her due process claim.

IV. Andrea is likely to succeed on the merits of her claim that Defendants have violated her equal protection rights under the Fourteenth Amendment by singling her out for retaliation and denial of equal access and opportunities based on her assertion of a religious objection.

To succeed on an equal protection claim, a plaintiff must demonstrate that a state actor intentionally discriminated against her based on her membership in a protected class. *Williams v. Bramer*, 180 F.3d 699, 705 (5th Cir. 1999). Alternatively, an equal protection claim may be based on a government entity's treating the plaintiff differently from others who are similarly situated where the differential treatment has no rational basis. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

While a large number of other students at John Jay High School and/or John Jay Science and Engineering Academy are situated similarly to Andrea in that they have also failed or refused to wear the SmartID badge, Andrea is not aware of any other students being removed from their academic programs as a result of such failure or refusal. Rather, it appears that Andrea has been singled out by District officials for retaliation as a result of her expression of religious beliefs that conflict with the District's program.

Additionally, Defendants have denied Andrea equal opportunities to participate in school activities by denying her the opportunity to vote for homecoming queen and king

on the basis that she was not wearing the SmartID badge, but rather possessed only her old student identification card. Defendants have further indicated that if she does not conform to their demands regarding the SmartID badge, Andrea will be unable to purchase tickets to extracurricular activities. She is subjected to disparate treatment when she seeks to access the cafeteria, school library and even the restroom based on her refusal to wear the SmartID badge. In short, Andrea is treated as a second-class student because of her adherence to her faith.

Andrea's refusal to wear the SmartID badge is not a rational basis for the school's differential treatment of her, because she continues to carry her old student identification card, which achieves the school's legitimate interest in confirming her identity. Therefore, Defendants' disparate treatment of Andrea from others who are similarly situated as a result of her expression of her religious objections to the program and without any rational basis constitutes a denial of Andrea's equal protection rights.

V. The harm Andrea will suffer if the preliminary injunction is not entered outweighs any harm to Defendants if the preliminary injunction is granted.

As indicated above, Defendants' interference with Andrea's fundamental rights constitutes irreparable harm, *per se*. But as a practical matter, Andrea's academic progress will be substantially disrupted unless injunctive relief is granted. Among other things, Andrea's removal from the Academy would preclude her from completing her Web Technology class, as no such course is available at her regular school. Other, similar courses, which allow her to focus specifically on the field she intends to pursue professionally, will not be available to Andrea at her regular school.

Further, Defendants' retaliation against Andrea, if not enjoined, will result in her academic record showing her as having been "withdrawn" from this prestigious Academy for purportedly breaking a "rule," the existence and text of which are yet unknown. This withdrawal will be recorded on her transcript and will be reviewed by prospective colleges and others who grant scholarships.

Finally, final exams will begin in less than two months, and it is thus extremely likely that Andrea's overall grades will suffer if she is moved from her current program into entirely new classes at her regular school. In short, a temporary injunction is the only way to preserve the status quo in this matter pending final adjudication of Andrea's claims.

On the other hand, Defendants will suffer no harm whatsoever if they are enjoined from removing Andrea from the Academy. Andrea is an excellent student with an excellent disciplinary record, and she poses no threat to the school's learning environment.

Prayer for Relief

WHEREFORE, Plaintiff prays that a preliminary injunction be entered pursuant to Rule 65 (a) in order to preserve the status quo during the pendency of this action by forbidding Defendants, their officers and agents from withdrawing Plaintiff from Academy on account of her refusal to participate in the Student Locator Project and from undertaking any other means, whether directly or indirectly, of intimidating or retaliating against Plaintiff as a result of Plaintiff's:

a. Exercise of her right to adhere to her sincerely held religious beliefs and to be free from coercion to express approval of government programs by refusing to wear the SmartID badge; and

b. Exercise of her protected free speech rights by peacefully distributing literature to her peers during non-instructional time.

;

Dated: November 30th, 2012

RESPECTFULLY SUBMITTED,

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF CONFERENCE

"On the 30th day of November 2012, the undersigned counsel conferred with opposing counsel concerning the relief sought in this Motion, and was advised that opposing counsel opposed this Motion."

/s/ Jerri Lynn Ward
Jerri Lynn Ward

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of November, 2012, I electronically filed the foregoing instrument with the clerk of court using the CM/ECF and hereby certify that I have mailed a copy of the above and foregoing document by certified mail, return receipt receipted to the following participant:

D. Craig Wood
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CERTIFIED MAIL RETURN RECEIPT REQUESTED No.7012 1010 0001 0578 7064

/s/ Jerri Lynn Ward
Jerri Lynn Ward