IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

ALOYSIUS DREAMING BEAR, Plaintiff, v. BERLINE FLEMING, BONNIE ANDERSON, JOHN COPE, LANCE TLUSTOS, LISA LOCKHART, and LAWRENCE JASKE, Defendants.	)	CIV. 10-5030-JLV **DEFENDANTS' BRIEF IN OPPOSITION TO MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION**

ARGUMENT

1. Plaintiff has shown no First Amendment Violation. It is not clear, on the face of his pleadings, exactly which "First Amendment" right Plaintiff believes to have been violated by Defendants' decision. Most of his argument is directed towards an alleged violation of his right to free speech, but the cases upon which he most heavily relies are those involving claims of an infringement of the right to religious freedom. Defendants, accordingly, will address both hypothetical claims, although under both the result is the same: Plaintiff has failed in his burden to show that either right has been infringed.

A. Free Speech. As a preliminary matter, the law is settled that:

> Although students do not "shed their constitutional rights of freedom of speech or expression at the schoolhouse gate," the Constitution does not compel "teachers, parents, and elected school officials to surrender control of the American public school system to public school students . . . ." The constitutional rights of public school students "are not automatically coextensive with the rights of adults in other settings," . . . and a school need not tolerate speech that is inconsistent with its pedagogical mission, even though the government could not suppress that speech outside the schoolhouse. . . . Therefore, courts must analyze First Amendment

> violations alleged by students 'in light of the special characteristics of the school environment.'

Henery v. City of St. Charles, 200 F3d 1128, 1131-1132 (8th Cir. 1999) (emphasis supplied). The essence of Plaintiff's claim here is that the First Amendment right to free speech protects his choice to wear whatever clothes he chooses at his high school graduation, and among the cases he cites for this proposition is Tinker v. Des Moines Independent Community School District, 393 US 503 (1969). But Plaintiff ignores the fact that, in characterizing a black arm band protesting war as "akin to 'pure speech,'" the Supreme Court explicitly contrasted that with permissible school "regulation of the length of skirts or the type of clothing." 393 US at 507-508 (emphasis supplied). "It is apparent that . . . clothing requirements originate from the governing authority's ability to regulate a student's appearance while at school, provided that the policy is facially neutral and generally applicable." Littlefield v. Forney Ind. Sch. Dist., 108 FSup2d 681, 693 (ND Tex 2000). Plaintiff does not contend this policy was not neutral and generally applied.

Plainly, "[n]ot every defiant act by a high school student is constitutionally protected speech," Bivens v. Albuquerque Public Schools, 899 FSupp 556, 560 (DNM 1995), and "it is the obligation of the person desiring to engage in assertively expressive conduct to demonstrate that the First Amendment even applies. To hold otherwise would be to create a rule that all conduct is presumptively expressive." Clark v. Community for Creative Non-Violence, 468 US 288, 293 n.5 (1985). And, the Supreme Court has made clear, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes – for example, walking down the street or meeting one's friends at a shopping mall – but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." City of Dallas v. Stanglin, 490 US 19, 25 (1989). Thus, "[i]n deciding whether particular conduct possesses sufficient communicative elements to

bring the First Amendment into play, [the Court must ask] whether '[a]n 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.'" Texas v. Johnson, 491 US 397, 404 (1989) (emphasis supplied).

Here, Plaintiff's complaint itself is silent as to the "particularized message" he claims to be contained in wearing Lakota clothing uncovered by a cap and gown. Plaintiff's Affidavit states only that he is "attached to my culture and beliefs," and the letter attached to that Affidavit, which is primarily concerned with personal attacks on Defendant Jaske, adds little beyond a vague claim that he believes he can only "honor" his "culture . . . by wearing what I wish to wear." The Cook-Lynn Affidavit, likewise, makes only the broad assertions that "clothing demonstrates identity. Clothing expresses who one is and what one believes." This, clearly, constitutes neither a "particularized message," nor one with a "great likelihood that it will be understood." As Stephenson v. Davenport Community School Dist., 110 F3d 1303, 1307 N.4 (8th Cir. 1997), makes clear, symbols intended to convey "self-expression" are not "imbue[d] . . . with first amendment protections." Likewise, "broad statement[s] of cultural values" also fail this test. Zalewska v. County of Sullivan, New York, 316 F.3d 314, 319 (2d Cir. 2003). In Zalewska, the plaintiff, "as a matter of familial and cultural custom . . . [had] never worn pants in her entire life," and claimed that "for her 'the wearing of a skirt constitutes . . . an expression of a deeply held cultural value.'" 315 F3e at 317-318. Zalewska ruled, citing East Hartford Educ. Ass'n. v. Bd of Educ. Of the Town of East Hartford, 562 F2d 838 (2d Cir. 1977), that this was scarcely a "particularized message":

> In *East Hartford* we reviewed a public school's decision to reprimand a teacher who violated the school's dress code by

> refusing to wear a necktie. *See id.* at 856. The plaintiff there contended, as Zalewska does here, that the school impermissibly deprived him of his rights to free speech and due process. On his First Amendment claim, the teacher asserted that his refusal to wear a tie was "speech" because it conveyed a message of non-conformity and a rejection of older traditions, by which he hoped to establish closer rapport with his students. *See id*. at 857. We ruled that even though plaintiff's actions were intended as expression, the message purportedly conveyed was a "comprehensive view of life and society" which was "sufficiently vague" to allow the school to regulate it without running afoul of the Constitution. Similarly, Zalewska's actions here seek to communicate a vague, overarching view of cultural tradition.

316 F3d at 320 (emphasis supplied). Or, as Blau v. Fort Thomas Public School Dist., 401 F3d 381, 389-390 (6th Cir. 2005), put it, while "[s]tyle and taste in clothing . . . may be one of the ways in which children learn to express their individuality . . . [and] how to challenge authority . . . the First Amendment does not protect such vague and attenuated notions of expression. . . . To rule otherwise not only would erase the requirement that expressive conduct have an identifiable message but also would risk depreciating the First Amendment in cases in which a 'particularized message' does exist." (emphasis supplied). Accord, e.g., Bivens, supra, 899 FSupp at 560-561 (wearing of baggy pants to show affinity with African American culture not "constitutionally protected speech under the First Amendment"); Bar-Navon v. Brevard County School Board, 290 Fed.App. 273, 275, 277 (11th Cir. 2008) (claim that body "piercings were an expression of [student's] individuality . . . non-conformity . . . [and] readiness to take on challenges in life" rejected; "Plaintiff has failed to meet her burden of showing that the First amendment protects right to express her individuality at school by wearing non-otic pierced jewelry.") Plaintiff's demand for different clothing is thus not entitled to protection as "speech," and his claim must fail.

Yet even if Plaintiff's desire to express solidarity with his culture at his graduation conveys a "particularized message," he still cannot show that Defendants' actions have unfairly infringed upon the message he wishes to convey. As noted before, Plaintiff makes no claim that the requirement that students wear a cap and gown while receiving a diploma was not "facially neutral and generally applicable." The Complaint itself alleges, at Paragraph 10, that "Defendants have imposed on all students the same requirements – that they wear a cap and gown over any other clothing," and this Court can plainly take judicial notice of the fact that this tradition existed long before Plaintiff was ever born. First Amendment case law leaves no doubt that

> even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restriction "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, an that they leave open ample alternative channels for communication of the information."

Ward v. Rock Against Racism, 491 US 781, 791 (1989).[1]

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[1]Although Chalifoux v. new Carey Ind. Sch. Dist., 976 FSupp 659, 666-667 (SD Tex. 1997), involving the display of the religious symbol of the rosary, suggested a more stringent test should apply under Tinker, supra, that reasoning is clearly inapplicable to a case involving a choice of clothes. As noted above, Tinker itself observed that there could be permissible school "regulation of . . . the type of clothing," 393 US at 507-508, as opposed to discrete, clearly understood symbols like arm-bands, or rosaries. As Canady v. Bossier Parish School Bd., 240 F3d 437, 443 (5th Cir. 2001), cited by Plaintiff himself held:

> Because (1) choice of clothing is personal expression that happens to occur on the school premises and (2) the School Board's uniform policy is unrelated to any viewpoint, a level of scrutiny should apply in this case that is less stringent than the school official's burden in *Tinker* . . . . Thus, the School Board's uniform policy will pass constitutional scrutiny if it furthers an important or substantial government interest; if the interest is unrelated to the suppression of student expression; and if the incidental restrictions on First Amendment activities are no more than is necessary to

Here, it is abundantly clear that the requirement of the gown is neutral, and was in no way adopted "because of disagreement with the message [any other clothing] conveys . . . . A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." Ward, supra. Likewise, there can be no doubt that imposing a requirement that all students follow a dress code, whether for an hour or for a year, "furthers important government interests. They include: bridging socio-economic gaps between families within the school district, focusing attention on learning, increasing school unity and pride . . . improving children's self-respect and self-esteem, helping to eliminate stereotypes and producing a cost savings for families." Blau, supra, 401 F3d at 391. In this regard, moreover, it cannot be overlooked that

> Public schools have an interest of constitutional dignity in being allowed to manage their affairs and shape their destiny free of minute supervision by federal judges and juries. Academic freedom, "a special concern of the First Amendment" . . . is not just the freedom of teachers, school authorities, and to an extent students to express ideas and opinions. "It includes the authority of the university to manage an academic community . . . free from interference by other units of government, including the courts". . . . Most of the cases that honor that interest involve colleges and universities, but their principle applies with equal if not greater force to lower schools as well . . . and implies that the principals of those schools have discretion to regulate students' conduct in order to maintain an atmosphere conducive to learning.

Brandt v. Board of Education of City of Chicago, 480 F.3d 460, 467 (7th Cir. 2007). See also, Canady v. Bossier Parish School Bd., 240 F3d 437 (5th Cir. 2001), cited by Plaintiff for the proposition that First Amendment can protect clothing choices, but which in fact ruled that a dress code did not violate the First Amendment, observing that "it is not the job of federal courts

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> facilitate that interest.

to determine the most effective way to educate our nation's youth." 240 F3d at 444.

This leaves for consideration the third factor under which government regulations on speech may be upheld: that "'they leave open alternative channels for the communication of the information.'" Ward, supra, 491 US at 791. See also, e.g., Canady, supra, 240 F3d at 443: "students may still express their views through other mediums during the school day. The uniform requirement does not bar the important 'personal intercommunication among students' necessary to an effective educational process," citing Tinker, supra; Littlefield, supra, 268 F3d at 287. Although Plaintiff is conspicuously silent on the point, there will in fact be ample opportunities for Plaintiff to publicly display his solidarity with his culture at his graduation proceedings. As the Affidavit of Dr. Lawrence Jaske (attached as Exhibit A) demonstrates in greater detail, it is anticipated that there will be a public feather and plume ceremony in the gymnasium prior to the issuance of diplomas, in which the Native American graduates' cultural traditions will be extensively honored and recognized. Moreover, immediately after Plaintiff receives his diploma, he will be allowed to remove his cap and gown on stage, and descend, in any traditional clothing he chooses to wear under the gown, from the stage to participate in a star quilt ceremony in front of the assembled audience. Thus, Plaintiff will be allowed extensive opportunities to express his apparent message of cultural pride, through alternative means. Even if during the few seconds that Plaintiff crosses the stage wearing the cap and gown he feels his "message" is diminished, this cannot invalidate Defendants' requirement that he wear the cap and gown: "[t]hat [Defendants'] limitations . . . may reduce to some degree the potential audience for [Plaintiff's] speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate." Ward, supra, 491 US at 802. "[T]he First

Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places . . . . To the extent [one forum] has advantages over [other] forums of expression . . . there is no reason to believe that these same advantages cannot be obtained through other means." Members of City Council v. Taxpayers for Vincent, 466 US 789, 812 (1984).

It is accordingly beyond dispute that Defendants were entitled to establish and enforce this reasonable regulation on the clothing to be worn at graduation, and that Plaintiff's rights to free speech will not be violated. The motion for preliminary injunction should be denied.

B. Religion. It is by no means clear that Plaintiff makes any claim under the free exercise clause of the First Amendment; at no point in his Complaint does he allude to any such claim. His brief in support of his motion, however, relies heavily on several cases in which the activity involved had clear religious overtones, as in the rosaries in Chalifaux, supra, 976 FSupp at 670 ("the facts clearly showed . . . that Plaintiffs wore their rosaries for religious reasons. Moreover, the rosary is deeply rooted in orthodox Catholic beliefs") or the long hair in Alabama and Coushatta Tribes v. Trustees, 817 FSupp 1319, 1329 (ED Tex 1993) ("'the wearing of long hair for religious reasons is a practice protected from government regulation'") and A.A. v. Needville Ind. Sch. Dist., 2009 WL 6318214 *9 (SD Tex 2009) (same). The law, however, is settled beyond dispute that "'[o]nly beliefs rooted in religion are protected by the Free Exercise Clause' . . . . Purely secular views do not suffice." Frazee v. Ill. Dept. of Employment Security, 489 US 829, 833 (1989). Or, as Wisconsin v. Yoder, 406 US 205, 215-216 (1978), put it,

> A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious

> belief. Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.

(Emphasis supplied).

Thus, in Teterud v. Burns, 522 F2d 357 (8th Cir. 1975), the court found hair style protected by the Free Exercise Clause, as opposed to "purely secular considerations of racial pride and personal preference," where the record clearly established its religious connotations. 522 F2d at 359-360. Here, by contrast, Plaintiff alleges only that his clothing choice is related to his wish to honor his people's heritage and "most of all our pride." Attachment to Dreaming Bear Affidavit at second page. Likewise, the Cook-Lynn Affidavit does not suggest, even in the most conclusory terms, that there is any religious significance here. She merely asserts that "[c]lothing demonstrates identity," and that obliging Native Americans to wear "'non-Indian' clothing is a form of cultural and psychological intimidation." Even accepting the truth of these rather broad assertions, it is impossible to decipher a religious subtext in them. Clearly, Plaintiff has not expressly alleged a Free Exercise claim because he has none, and the Court should disregard his authorities based on a non-existent claim.

C. Fourteenth Amendment. Although not referenced in his brief, Plaintiff's Complaint superficially alludes to the Fourteenth Amendment. Such a claim is lacking in merit. As Plater v. Toledo Public Schools, 2006 WL 3064096 *2 (ND Ohio 2006), held, citing Blau, supra, 401 F3d at 393-395,

> Plaintiff is also unlikely to succeed on a claim of due process violations under the Fourteenth Amendment. The right to wear clothing of one's choice is not a fundamental right, but is subject to a rational basis review. . . . Plaintiff does not indicate any reason

> why developing a uniform policy to support the educational process does not have a rational basis, and therefore it is unlikely that Plaintiff would succeed on a due process claim.

(Emphasis supplied). As established earlier with regard to Plaintiff's free speech claim, there is indeed a rational basis for Defendants' policy here, and Plaintiff's Fourteenth Amendment claim must fail.

CONCLUSION

It is settled that "[i]n deciding whether to grant a preliminary injunction, 'likelihood of success on the merits is most significant,'" Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp., 59 F3d 80, 83 (8t5h cir. 1995), and "[i]f a plaintiff's legal theory has no likelihood of success on the merits, preliminary injunctive relief must be denied." Newton County Wildlife Ass'n v. U.S. Forest Service, 113 F3d 110, 113 (8th Cir. 1997). That is clearly the situation here, and the Court should accordingly deny Plaintiff's motion.

Dated this 11th day of May, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing **Defendant's Brief in Opposition to Preliminary and Permanent Injunction** upon the following via e-filing on this the 11th day of May, 2010:

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