

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**(1) KENNETH BUCKLEY, on behalf of D.D.B.,)
a minor child, (2) PHILLIP and ANDREA)
CONNELLY, on behalf of E.J.D.C., a minor)
child, (3) CLINT and CATHY STAPLETON,)
on behalf of K.N.S., a minor child,)
(4) BOBBY and RUTH SWEET, on behalf)
of M.N.S., a minor child,)
(5) MICHELLE SUMTER, on behalf of M.N.S.,)
a minor child,)**

Plaintiffs,

vs.

Case No. 10-CV-240-GKF-PJC

**(1) INDEPENDENT SCHOOL DISTRICT NO. 4)
of ROGERS COUNTY, OKLAHOMA, a/k/a)
OOLOGAH TALALA PUBLIC SCHOOLS,)
(2) CARA JONES, individually, (3) MELISSA)
GIBSON, individually, (4) KENNETH KINZER,)
individually, (5) RICK THOMAS, individually,)
(6) BOBBY SORTO, individually, (7) CITY OF)
OWASSO, a political subdivision,)
jointly and severally,)**

Defendants.

**RESPONSE BRIEF OF THE SCHOOL DEFENDANTS IN
OPPOSITION TO MOTION FOR INJUNCTIVE RELIEF**

The defendants, Independent School District No. 4 of Rogers County, Oklahoma, commonly known as Oologah-Talala Public Schools (the “School District”), Cara Jones (“Jones”), Melissa Gibson (“Gibson”), Kenneth Kinzer (“Kinzer”), and Rick Thomas (“Thomas”) (collectively the “School Defendants”), respectfully submit this response brief in opposition to the Motion for Injunctive Relief [Dkt. No. 1], filed by the Plaintiffs, Phillip and Andrea Connelly, on behalf of E.J.D.C., a minor child.

The Connellys and four (4) other sets of parents brought this suit after their children were called out of class following a drug dog sweep of the School District's middle school on February 18, 2010. All of the Plaintiffs allege that their children's jackets, backpacks and cellphones were searched and their children were questioned by School District officials and Defendant Bobby Sorto, a police officer employed by the City of Owasso who accompanied the drug dog. The Plaintiffs allege that the drug dog did not alert on any of their children but was merely a pretext to allow school officials to question certain children. The Connellys allege that Officer Sorto performed a field test on residue taken from the pocket of E.J.D.C.'s "hoodie"¹ and identified it as marijuana. E.J.D.C. was subsequently suspended out of school for the remainder of the school year, a total of 13 weeks.² None of the children of the other Plaintiff parents were subjected to any discipline.

The Connellys appealed their daughter's suspension to the School District's superintendent, Rick Thomas. By letter dated March 2, 2010, Thomas notified the Connellys of his decision to uphold the suspension. The Connellys then requested an appeal hearing before the School District's board of education. A due process hearing before the board was held on March 22, 2010, after which the board voted to uphold the suspension.

The day that she was suspended, E.J.D.C. was enrolled in Mustang.net, a virtual school operated by the School District. Mustang.net is a credit recovery program that

¹ A "hoodie" is a sweater or sweatshirt with a hood.

² School District policy provides that a student who is determined to have possessed prohibited drugs will be suspended for 18 weeks.

provides a means for students who are homebound, suspended out of school, at risk of dropping out of school or not completing graduation requirements, or otherwise unable to attend regular classes, to continue their course work on-line. Through Mustang.net, students may obtain academic credit that enables them to graduate on schedule or resume classes when they return to school without having to repeat a year or do extra work to “catch up” with their classmates.

On April 9, 2010, the Connellys and the other Plaintiff parents filed suit in the District Court of Rogers County. At the same time, the Connellys filed a separate motion seeking a preliminary injunction reinstating E.J.D.C. The Connellys’ motion alleges that the suspension of E.J.D.C. violated her rights to procedural and substantive due process under the Fourteenth Amendment.³ The Defendants timely removed the case to this court. The Connellys’ motion for a preliminary injunction is scheduled for a hearing before this court on May 6, 2010. Minute Order [Dkt. No. 16].

The Tenth Circuit has repeatedly observed that because a preliminary injunction “is an extraordinary remedy, the right to relief must be clear and unequivocal.” *Beltronics USA, Inc. v. Midwest Inventory Distribution, LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009), *quoting Greater Yellowstone Coal v. Flowers*, 321 F.3d 1250, 1256 (10th Cir. 2003). A preliminary injunction “constitutes drastic relief to be provided with caution ... [and] should be granted only in cases where the necessity for it is clearly established.”

³ Although the Petition contains a cause of action alleging that the search of the students violated the Fourth Amendment, the Connellys’ Motion for Injunctive Relief does not include any reference to the Fourth Amendment and relies solely on the alleged violation of E.J.D.C.’s procedural and substantive due process rights.

Beltronics, 562 F.3d at 1070, quoting *United States ex rel. Citizen Band Potawatomi Indian Tribe v. Enterprise Mgt. Consultants*, 883 F.2d 886, 888-89 (10th Cir. 1989).

Moreover, the Connellys seek a mandatory injunction requiring the School District to reinstate E.J.D.C. The Tenth Circuit has stated that mandatory injunctions are one of the types of injunction that are “specifically disfavored.” *Schrier v. University of Colorado*, 427 F.3d 1253, 1259 (10th Cir. 2005). For that reason, requests for mandatory injunctions are scrutinized even more closely than requests for other preliminary injunctions. *Id.*

The authorities set forth in this brief, together with the evidence to be presented at the May 6 hearing, will establish that the Connellys cannot carry their heightened burden of showing that they are entitled to a mandatory injunction reinstating E.J.D.C. The Connellys’ request for a preliminary injunction should, therefore, be denied.

Argument and Authorities

Introduction

In order to be entitled to a preliminary injunction, the moving party must establish that:

(1) [he or she] will suffer irreparable injury unless the injunction issues; (2) the threatened injury ... outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood [of success] on the merits.

Schrier, 427 F.3d at 1258.

The purpose of a preliminary injunction is “to preserve the relative positions of the parties until a trial on the merits can be held.” *Id.*, quoting *University of Texas v.*

Camenish, 451 U.S. 390, 395 (1981). For that reason, the Tenth Circuit has identified three (3) types of injunctions that are “specifically disfavored” because they exceed the normal, limited purpose of a preliminary injunction. Those are “(1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all of the relief that it could recover at the conclusion of a full trial on the merits.” *Id.* at 1259.

An injunction is mandatory if the requested relief “affirmatively require[s] the nonmovant to act in a particular way, and as a result ... place[s] the issuing court in a position where it may have to provide ongoing supervision to assure the nonmovant is abiding by the injunction.” *Schrier*, 427 F.3d at 1261 (citations omitted). In *Schrier*, the Tenth Circuit held that a motion for an injunction requiring the University to Colorado to reinstate the Plaintiff to his former position as Chair of the Department of Medicine sought a mandatory injunction. *Id.*

The same is true in this case. Because the injunction the Connellys seek would require the School District to reinstate E.J.D.C., they seek a disfavored mandatory injunction. “Such disfavored injunctions ‘must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course.’” *Id.* at 1259, quoting *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (*en banc*). A party seeking a mandatory injunction “must make a heightened showing” of the four factors listed above. *Attorney General of Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009). The Connellys cannot make such a showing.

Proposition I

The Connellys Cannot Show that E.J.D.C. Will Suffer Any Irreparable Harm if a Preliminary Injunction Is Not Entered

The Tenth Circuit has held that the likelihood of irreparable harm is the most important element in determining whether to enter a preliminary injunction. For that reason, a party seeking a preliminary injunction must establish that he or she will suffer irreparable harm before the court will consider the other elements. *Port City Properties v. Union Pacific Railroad Co.*, 518 F.3d 1186, 1190 (10th Cir. 2008), quoting *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004). The Tenth Circuit has noted that the task of establishing irreparable harm “is not an easy burden to fulfill.” *Dominion Video Satellite*, 356 F.3d at 1262. The injury “must be both certain and great, and ... it must not be merely serious or substantial.” *Id.* (citation omitted).

In this case, the Connellys cannot show any irreparable harm because E.J.D.C. is not being deprived of access to an education while she is suspended out of school. To the contrary, E.J.D.C. is enrolled in Mustang.net, the School District’s on-line virtual school, which will enable her to complete her academic requirements in four assigned classes: General Science, Math, Reading the Novel, and United States History. The evidence will show that students who are enrolled in Mustang.net may work on their assignments at home, or they may attend a computer lab located in the high school agriculture building. The computer lab is open from 8:00 a.m. to 2.45 p.m. Monday through Friday and is staffed by a certified teacher. The evidence will show that E.J.D.C. has elected to

do her academic work at home; however, she has called the middle school on several occasions to ask her teachers questions about her assignments.

Provided she successfully completes the course-work for which she is enrolled in Mustang.net, E.J.D.C. will be promoted with her peers at the end of the school year. When she has completed her suspension and returns to school at the beginning of the fall trimester in August of 2010, she will enroll as a freshman at the School District's high school, just as she would have if she had not been suspended.

Because E.J.D.C. is not being deprived of access to an education during her suspension out of school, her suspension has not caused an injury to any interest protected by the Constitution. The Tenth Circuit has recognized that although the right to a public education is a property interest protected by the due process clause of the Fourteenth Amendment, the right protected is to the general "educational process" and not to the individual components that make up that process. *Seamons v. Snow*, 84 F.3d 1226, 1235 (10th Cir. 1996).

Moreover, the evidence will show that classes for the School District's current school year will end on May 21, 2010. E.J.D.C. was suspended out of school at the end of the day on February 18. Her appeal was denied by the board of education on March 22. The Connellys did not seek a preliminary injunction until April 9, almost three (3) weeks after the board hearing and over seven (7) weeks after E.J.D.C. was suspended out of school. The Connellys' delay in seeking a preliminary injunction militates against their claim that E.J.D.C. will suffer irreparable injury if a preliminary injunction is not entered. *Kansas Health Care Assoc. v. Kansas Dept. of Soc. & Rehab. Services*, 31 F.3d

1536, 1543-44 (10th Cir. 1994) (noting that “[a]s a general proposition, delay in seeking preliminary relief cuts against finding irreparable injury”).

The Connellys cannot satisfy the heightened showing necessary for the entry of a disfavored mandatory preliminary injunction. As of the date of the hearing in this matter on May 6, E.J.D.C. will have served 11 weeks of her 13 week suspension out of school. The Connellys cannot “clearly and unequivocally” show that she will suffer any irreparable injury by also serving the final two (2) weeks of her suspension. Because the Connellys cannot show the likelihood of irreparable harm, the court need not consider whether they can satisfy the other elements of a preliminary injunction. Their motion for injunctive relief should be denied.

Proposition II

The Threatened Injury to E.J.D.C. Does Not Outweigh the Damage an Injunction Would Cause the School District

The Connellys are also unable to satisfy the second element necessary for a preliminary injunction: showing that the threatened harm to E.J.D.C. outweighs whatever damage the entry of an injunction would cause the School District. The foregoing section of this brief makes clear that E.J.D.C. will not suffer any significant harm if a preliminary injunction is not granted. She is not being deprived of access to an education because such access is available through Mustang.net. As she has already served 11 weeks of her 13 week suspension, she will not suffer any additional appreciable harm by serving the final two (2) weeks.

On the other hand, the entry of a preliminary injunction in this case would interfere with the School District’s legitimate efforts to detect and prevent the possession

and use of illegal drugs among its students. The Supreme Court has recognized in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 834 (2002) and *Vernonia School District 47J v. Acton*, 515 U.S. 646, 661 (1995), that public school districts have an important interest in combating drug use. As the Court stated in *Earls*, “the nationwide drug epidemic makes the war against drugs a pressing concern in every school.” *Earls*, 536 U.S. at 834. The entry of a mandatory injunction requiring the School District to reinstate E.J.D.C. would be inconsistent with the fight against drugs and would send a message to the students of the School District that the oft-repeated concern about avoiding drugs is neither valid nor sincere.

In addition, entry of a preliminary injunction would undermine the public’s confidence in the School District and interfere with the ability of school officials to discipline students for any inappropriate conduct. Parents of students found to have violated the School District’s disciplinary rules would be encouraged to file suit asking the courts to second guess the decisions of the board of education and administration. The Supreme Court has observed that “[t]he system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members” *Wood v. Strickland*, 42 U.S. 308, 326 (1975). Reinstating E.J.D.C. at this point in the school year would tell the patrons of the School District that parents and students should not rely upon “the discretion and judgment” of the School District’s administrators and board members.

Proposition III

The Public Interest Does Not Favor Entry of a Preliminary Injunction

As the Court explained in *Vernonia*, school districts have an obligation to take action to combat drug abuse because “this evil is being visited not just upon individuals at large, but upon children for whom [the school district] has undertaken a special responsibility of care and direction.” *Vernonia*, 515 U.S. at 662. One of the means the School District has adopted to combat drugs is by having a drug dog perform sweeps of the high school and middle school.

The evidence will show that the School District brought a drug dog to the middle school on January 19, 2010. Based on the drug dog’s alerts, seven (7) students were found to be in possession of drugs. A second sweep was conducted on February 18. As a result of the drug dog’s alerts during this sweep, three (3) students, including E.J.D.C., were found to be in possession of drugs.⁴

Because the Supreme Court has recognized the importance of combating drug use in the public schools, reinstating a student who was found to have marijuana in the pocket of her hoodie would be contrary to the public interest. The Connellys’ motion for a preliminary injunction should be denied.

⁴ The parents of the other two (2) students found to be in possession of drugs on February 18 are not parties to this lawsuit.

Proposition IV

The Connellys Cannot Show that They Have a Substantial Likelihood of Success on the Merits

The Tenth Circuit has explained that when the movant satisfies the first three elements in a normal preliminary injunction case, the fourth element is modified to enable the movant to satisfy it “by showing questions going to the merits so serious, substantial, difficult, and doubtful, as to make the issue ripe for litigation and deserving of more deliberate investigation.” *Walmer v. U.S. Dept. of Defense*, 52 F.3d 851, 854 (10th Cir. 1995). Because the three (3) disfavored types of preliminary injunctions “operate outside the normal parameters for interim relief,” however, the Tenth Circuit does not allow a movant seeking such a disfavored injunction to rely on this modified standard. *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d at 975-76. “Instead, a party seeking such an injunction must make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms” *Id.* at 976 (emphasis added). Thus, in order to prevail on their motion for a mandatory preliminary injunction, the Connellys must again satisfy a heightened standard by making a “strong showing” that they have a substantial likelihood of success on the merits. Once again, the Connellys cannot make such a showing.

A. Procedural Due Process

In *Goss v. Lopez*, 419 U.S. 565 (1975), the Supreme Court noted that where state law grants a legitimate entitlement to a public education, that entitlement is a property interest protected by the due process clause of the Fourteenth Amendment. But as the School Defendants noted at p. 7, *supra*, the Tenth Circuit has made clear that *Goss* does

not stand for the premise that every aspect of a student's public school education is constitutionally protected. Indeed, the Tenth Circuit has consistently rejected the suggestion that due process attaches to the individual components of a public school education. In *Seamons v. Snow, supra*, the Tenth Circuit explained: "We have interpreted *Goss* to speak only in general terms regarding the 'educational process' [T]he innumerable separate components of the educational process ... do not create a property interest subject to constitutional protection." *Seamons*, 84 F.3d at 1235.

In *Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1980), the Tenth Circuit rejected the claim that a disciplinary assignment to a different school triggered the protections of the due process clause. The Tenth Circuit affirmed the district court's grant of summary judgment, finding no due process violation:

In the present case the school authorities fashioned a remedy which was in harmony with the constitution. The student was not deprived of education. They went to some length to impose a sanction that would guarantee that he would continue his school work so that he could graduate. Also, after that year he was readmitted to Roswell High School, from which he did graduate. Zamora was not separated from the educational process; he completed it.

Id. at 669 (emphasis added).

The Fifth Circuit has relied on *Seamons* and *Zamora* in concluding that a student was not deprived of a property interest in education when he was removed from his school and assigned to an alternative school. *Nevares v. San Marcos Consolidated Independent School District*, 111 F.3d 25 (5th Cir. 1997).

The foregoing authorities demonstrate that because E.J.D.C. has had access to an education through Mustang.net, she has not suffered any deprivation of a property interest that would trigger the due process requirements of the Fourteenth Amendment.

The foregoing authorities leave no doubt that the Connellys cannot make a strong showing that they have a likelihood of success on the merits.

Moreover, even if the Connellys could establish that E.J.D.C. was deprived of a property interest in an education, the evidence will establish that she received more than adequate due process. The evidence will show that after Officer Sorto notified School District administrators that the drug dog had alerted to E.J.D.C., she was removed from class and questioned about possession of drugs. She initially denied having any drugs. Officer Sorto then asked to search the pockets of her hoodie and E.J.D.C. consented. In the pocket of the hoodie, Officer Sorto discovered what he believed to be residue of marijuana. He performed a field test and confirmed that the substance was, in fact, marijuana. E.J.D.C. then changed her story and claimed that she had loaned her hoodie to someone else earlier that day, although she could not identify who that person was.

School officials set up a meeting with the Connellys for the following day at the middle school. At the meeting, school officials advised the Connellys of the nature of the infraction and the evidence against E.J.D.C. The Connellys were provided an opportunity to present their side of the story. At the conclusion of the meeting, the Connellys were notified that E.J.D.C. was suspended for possession of an unlawful drug. The Connellys were advised of their due process rights under the School District's student suspension policy. The Connellys subsequently exercised their rights to appeal to the Superintendent, who affirmed the suspension. Thereafter, the Connellys exercised their right to appeal to the board of education. Following a due process hearing held on March 22, the board also upheld the suspension.

The evidence to be presented will establish that even if E.J.D.C. was deprived of a protected property interest, such deprivation was not accomplished without due process of law. E.J.D.C. was confronted with the evidence against her before she was suspended, and she was provided an opportunity to appeal (twice) the suspension. These facts establish beyond question that the Connellys cannot make a strong showing that they are likely to succeed on the merits.

B. Substantive Due Process

The Tenth Circuit has adopted the widely-accepted rule that in the absence of a protected property or liberty interest⁵, substantive due process grants no greater rights to an aggrieved plaintiff than does procedural due process. *Sipes v. United States*, 744 F.2d 1418, 1420 n.3 (10th Cir. 1984) (“in order to present a claim of denial of ‘substantive’ due process ..., a liberty or property interest must be present to which the protection of due process can attach”); *McGhee v. Draper*, 564 F.2d 902, 912 (10th Cir. 1977) (“where neither a liberty nor a property interest are implicated there is no basis for a claim of denial of substantive due process by a discharge for wholly arbitrary and capricious reasons”). Because the authorities discussed in the preceding section of this brief establish that E.J.D.C. has not been deprived of a protected property interest, she has no interest protected by the substantive component of the due process clause.

⁵ The Connellys do not allege that E.J.D.C. has been deprived of a liberty interest protected by the due process clause of the Fourteenth Amendment, nor have they identified any basis for asserting a liberty interest claim. The Tenth Circuit has held that damage to a student’s reputation alone, apart from an injury to some more tangible interest, does not give rise to claim for deprivation of liberty without due process of law. *Seamons*, 84 F.3d at 1235, citing *Paul v. Davis*, 424 U.S. 693 (1976).

Butler v. Rio Rancho Public School Board of Ed., 341 F.3d 1197 (10th Cir. 2003), which the Connellys cite in their motion, is not contrary to this principle. In that case, a student was suspended for driving a car to school that contained a knife, a gun, and drug paraphernalia. The car belonged to the student's brother, and the student claimed that he did not know any of those items were in the car. The Tenth Circuit rejected the student's claim that he was disciplined for "unknowingly" bringing a knife – which was in plain sight in the vehicle – to school. The court noted that the board of education had found that the student knew or should have known that he was in possession of a weapon and that the student knew or should have known that he was responsible for the vehicle he brought onto school property. *Id.* at 1201. The Tenth Circuit held that the foregoing facts established a rational basis for the school district to suspend the student. *Id.*

The same is true of this case. Like the student in *Butler*, E.J.D.C. was responsible for the contents of her hoodie. Her claim that she had loaned her hoodie earlier that day to someone she could not identify is simply not credible. The School District, like the school district in *Butler*, had a rational basis for its action. The Connellys cannot make a strong showing that they are likely to succeed on the merits.

Conclusion

The Connellys cannot make the showing required for the entry of a disfavored mandatory injunction. E.J.D.C. will suffer no irreparable harm by serving the final two (2) weeks of her suspension because she has access to the educational process through Mustang.net. The Connellys cannot make a strong showing of likelihood of success on the merits. Their motion for injunctive relief should be denied.

Respectfully submitted,

s/ Eric D. Wade

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CERTIFICATE OF DELIVERY

I hereby certify that on April 27, 2010, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrant:

Brendan M. McHugh
P.O. Box 1392
Claremore, OK 74018

I hereby certify that on April 20, 2010, I served the attached document by United States Certified Mail, Return Receipt Requested on the following, who are not registered participants of the ECF System:

s/ Eric D. Wade
Eric D. Wade