

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

(1) CHESTER AND (2) NADIA)
SMALKOWSKI, as individuals, and as)
husband and wife, and their children,)
(3) N.S. and (4) C.S.,)

and)

(5) AMERICAN ATHEISTS, INC.,)
a Texas non-profit corporation,)

Plaintiffs,)

vs.)

Case No. CIV-06-845-M

(1) HARDESTY PUBLIC SCHOOL)
DISTRICT, Independent School District,)
#15, an Oklahoma public school district,)

(2) THE COUNTY OF TEXAS)
COUNTY, OKLAHOMA, an Oklahoma)
political subdivision, (3) THE TOWN OF)
HARDESTY, OKLAHOMA, an)
Oklahoma municipal government,)

(4) DAVID DAVIDSON, I.S.D. #15)
Superintendent, in his official and)
individual capacity, (5) DAVID)
BREWER, Hardesty High School)
Principal, in his official and individual)
capacity, (6) LLOYD BUCKLEY,)
Hardesty High School Principal, in his)
official and individual capacity,)

(7) ERNEST COOK, Hardesty High)
School athletic coach, in his official and)
individual capacity, (8) CLINTON)
MARTIN, I.S.D. #15 School Board)
Member, in his official and individual)
capacity, (9) CASSIE FUENTES, I.S.D.)
#15 School Board Member, in her)
official and individual capacity,)

(10) BENJI FUENTES, Texas County)
Sheriffs Deputy, in his official and)
individual capacity, (11) MEGAN)
KENNEDY, Texas County Assistant)
District Attorney, in her official and)

individual capacity, (12) MATT)
 McCORMICK, Texas County Sheriffs)
 Deputy, in his official and individual)
 capacity, (13) GUY KOCH, Hardesty)
 Police Officer, in his official and)
 individual capacity, (14) ARNOLD)
 PEOPLES, Texas County Sheriff, in his)
 official and individual capacity,)
 (15) BEVERLY RICHARDS, Hardesty)
 Elementary School Principal, in her)
 official and individual capacity,)
 (16) BECKY GILBERT, Hardesty)
 School Secretary, in her official and)
 individual capacity,)
)
)
 Defendants.)

**ANSWER OF DEFENDANTS,
 HARDESTY PUBLIC SCHOOL DISTRICT, DAVID DAVIDSON,
 DAVID BREWER, LLOYD BUCKLEY, ERNEST COOK, CLINTON MARTIN,
 CASSIE FUENTES, BEVERLY RICHARDS AND BECKY GILBERT**

The Defendants, Independent School District No. 15 of Texas County, Oklahoma, a/k/a Hardesty Public Schools (the “School District”), David Davidson (“Davidson”), David Brewer (“Brewer”), Lloyd Buckley (“Buckley”), Ernest Cook (“Cook”), Clinton Martin (“Martin”), Cassie Fuentes (“Fuentes”), Beverly Richards (“Richards”) and Becky Gilbert (“Gilbert”) (collectively referred to as the “Defendants”), for their Answer to the Complaint filed by the plaintiffs, Chester Smalkowski (“Mr. Smalkowski”), Nadia Smalkowski (“Mrs. Smalkowski”) and their minor children “N.S.” and “C.S.,” and the American Atheists, Inc., a Texas Non-Profit Corporation (“Atheists Inc.”), collectively all of which will be referred to as the Plaintiffs unless the context otherwise requires, deny each allegation that is not admitted below and further state:

1. The Defendants admit that Plaintiffs have referred or cited to the constitutional and statutory provisions noted in paragraph 1 of the Complaint, but deny that the Plaintiffs have stated viable claims under those laws or that the Defendants are in any way liable to them.

2. The Defendants deny the legal conclusion of paragraph 2 that 28 U.S.C. Section 1367 or 28 U.S.C. Section 2201 independently confers subject matter jurisdiction on this Court over the entire action. The Defendants admit that Plaintiffs attempt to assert federal claims under 28 U.S.C. § 1331 and 28 U.S.C. § 1343, but deny that they are in any way liable to Plaintiffs under such statutory provisions.

3. The Defendants admit that venue for this action is proper in this Court as alleged in paragraph 3 of the Complaint, but deny that the factual claims and allegations asserted in the Complaint give rise to liability against the Defendants.

4. Based on information, the Defendants admit the allegations of paragraph 4 of the Complaint.

5. Defendants admit the allegation of paragraph 5 of the Complaint.

6. The Defendants admit the allegation of paragraph 6 of the Complaint that “Texas County” is located within the Western District of Oklahoma. The remaining allegations of paragraph 6 are legal conclusions going to claims against other parties in the case to which no response is required. If the allegations are intended to assert a claim against these Defendants, they are denied.

7. The Defendants admit the allegation of paragraph 7 of the Complaint that the “Town of Hardesty” is located within the Western District of Oklahoma. The remaining allegations of paragraph 6 are legal conclusions going to claims against other parties in the case to which no response is required. If the allegations are intended to assert a claim against these Defendants, they are denied.

8. The Defendants have insufficient information to admit or deny the factual allegations and legal conclusions of paragraph 8 of the Complaint and, therefore, those

allegations and legal conclusions are specifically denied. The Defendants further state that until the filing of this lawsuit they were not aware that members of Atheists Inc. resided in the town of Hardesty or that a member or members of the Smalkowski family were members of that organization.

9. The Defendants have insufficient information to admit or deny the factual allegations of paragraph 9 of the Complaint and, therefore, those allegations and legal conclusions are specifically denied.

10. Since a precise timeframe is not identified in paragraph 10 of the Complaint, Defendants have insufficient information to admit or deny the allegations of paragraph 10 of the Complaint and, therefore, they are denied.

11. Since a precise timeframe is not identified in paragraph 11 of the Complaint, Defendants have insufficient information to admit or deny the allegations of paragraph 11 of the Complaint and, therefore, they are denied.

12. Since a precise timeframe is not identified in paragraph 12 of the Complaint, Defendants have insufficient information to admit or deny the allegations of paragraph 12 of the Complaint and, therefore, they are denied.

13. Since a precise timeframe is not identified in paragraph 13 of the Complaint, Defendants have insufficient information to admit or deny the allegations of paragraph 13 of the Complaint and, therefore, they are denied.

14. Since a precise timeframe is not identified in paragraph 14 of the Complaint, Defendants have insufficient information to admit or deny the allegations of paragraph 14 of the Complaint and, therefore, they are denied. As a member of the Board of Education for Hardesty Public Schools, Defendant Martin admits he is and has been a resident of Texas County,

Oklahoma.

15. Since a precise timeframe is not identified in paragraph 15 of the Complaint, Defendants have insufficient information to admit or deny the allegations of paragraph 15 of the Complaint and, therefore, they are denied. As a member of the Board of Education for Hardesty Public Schools, Defendant Fuentes admits she is and has been a resident of Texas County, Oklahoma.

16. Since a precise timeframe is not identified in paragraph 16 of the Complaint, Defendants have insufficient information to admit or deny the allegations of paragraph 16 of the Complaint and, therefore, they are denied. Based on information, Benji Fuentes, as the husband of Cassie Fuentes, is a resident of Texas County, Oklahoma.

17. The Defendants have insufficient information to admit or deny the allegations of paragraph 17 of the Complaint and, therefore, they are denied.

18. The Defendants have insufficient information to admit or deny the allegations of paragraph 18 of the Complaint and, therefore, they are denied.

19. The Defendants have insufficient information to admit or deny the allegations of paragraph 19 of the Complaint and, therefore, they are denied.

20. The Defendants, in response to the allegations and legal conclusions of paragraph 20 of the Complaint, incorporate their responses to paragraphs 1-19 above and the affirmative defenses set out below.

21. The Defendants, in response to the allegations and legal conclusions of paragraph 21 of the Complaint, incorporate their responses to paragraphs 1-20 above and the affirmative defenses set out below.

22. The factual allegations of paragraph 22 of the Complaint involve Defendant

School District and Defendant Cook and they admit that Plaintiff N.S. was going to play basketball for Hardesty Public Schools in November of 2004 as alleged in paragraph 22 of the Complaint, but the remaining allegations and legal conclusions of paragraph 22 of the Complaint are denied by them and, therefore, are also denied by the remaining Defendants filing this Answer.

23. The factual allegations of paragraph 23 of the Complaint involve Defendants Davidson, Buckley and Cook. The allegations and legal conclusions of paragraph 23 of the Complaint are denied by them and, therefore, also by the remaining Defendants filing this Answer, with the exception of the allegation that N.S. was removed from the basketball team, which is admitted.

24. The factual allegations and legal conclusions of paragraph 24 of the Complaint involve the Defendant School District. The allegations and legal conclusions of paragraph 24 of the Complaint are denied by Defendant School District and, therefore, also by the remaining Defendants filing this Answer. The Defendants specifically deny that N.S. had any constitutionally grounded procedural due process rights to an "investigation" before being removed from the basketball team.

25. The Defendants specifically and categorically deny the allegations of paragraph 25 of the Complaint.

26. The factual allegations and legal conclusions of paragraph 26 of the Complaint involve Defendant Buckley and Mr. Smalkowski. The allegations and legal conclusions of paragraph 26 of the Complaint are categorically and specifically denied by Defendant Buckley and, therefore, also by the remaining Defendants filing this Answer.

27. The factual allegations and legal conclusions of paragraph 27 of the Complaint go

to other parties in the lawsuit and not these answering Defendants. Accordingly, the Defendants have insufficient information to admit or deny the allegations and legal conclusions of paragraph 27 of the Complaint and, therefore, they are denied.

28. The factual allegations and legal conclusions of paragraph 28 of the Complaint go to other parties in the lawsuit and not these answering Defendants. Accordingly, the Defendants have insufficient information to admit or deny the allegations and legal conclusions of paragraph 28 of the Complaint and, therefore, they are denied.

29. The Defendants admit that the School District's attorney, Larry Lewis, sent the Smalkowskis a letter as alleged in paragraph 29 of the Complaint, but generally deny all other allegations in that paragraph and specifically the allegation that Plaintiff N.S.'s lack of participation in a religious ceremony formed any basis for her removal.

30. The Defendants deny the allegations and legal conclusions of paragraph 30 of the Complaint.

31. The Defendants deny the allegations of paragraph 31 of the Complaint.

32. The Defendants deny the allegations and legal conclusions of paragraph 32 of the Complaint. Defendants Brewer and Richards specifically deny that they entered in to any kind of agreement or conspiracy to suspend N.S. or that that N.S. was denied any applicable procedural due process. Defendant Gilbert specifically denies that she was working in "concert" or in any kind of conspiracy with any other named parties in this lawsuit to withhold police reports and specifically alleges that the State District Court Judge rejected such claims during Mr. Smalkowski's criminal trial.

33. The Defendants deny the allegations and legal conclusions of paragraph 33 of the Complaint, and specifically deny that there was any conspiracy under color, usage or custom of

state law or otherwise. Defendants Martin and Fuentes specifically deny the allegation that they were involved in the suspension of N.S. or that they ever entered into any kind of conspiracy or agreement between themselves or other school officials or employees to unlawfully suspend N.S. from school or deny her any federally protected rights.

34. The allegations and legal conclusions of paragraph 34 of the Complaint go to the conduct of Defendant School District. The School District denies the allegations and conclusions in paragraph 34 of the Complaint and, therefore, they are also denied by the remaining Defendants filing this Answer, with the exception of the allegation that Mr. and Mrs. Smalkowski were, informed by the superintendent of schools in a letter dated November 28, 2005, not to return to the Hardesty School District property for a period of six months without prior written approval of the superintendent, which is admitted.

35. The Defendants deny the allegations and legal conclusions of paragraph 35 of the Complaint.

36. The Defendants deny the allegations and legal conclusions of paragraph 36 of the Complaint.

37. The Defendants deny the allegations and legal conclusions of paragraph 37 of the Complaint. It is additionally asserted that Defendant School District specifically advised the Smalkowskis in writing on or about December 1, 2005, that they could bring their children back to the School District if they so chose after the six months suspension ran its course but the Smalkowski's unilaterally determined to not exercise that option.

38. As to the Defendants filing this Answer, the allegations of paragraph 38 of the Complaint go to the alleged conduct and statement of Defendant Fuentes, who denies the allegations and legal conclusions of that paragraph, with the exception of the allegation that she

is married to Benji Fuentes, which is admitted. To the extent the allegations of paragraph 38 are intended to serve as a basis for liability against the other Defendants filing this Answer, they are denied.

39. The factual allegations and legal conclusions of paragraph 39 of the Complaint go to other parties in the lawsuit and not these answering Defendants. Accordingly, the Defendants have insufficient information to admit or deny the allegations and legal conclusions of paragraph 39 of the Complaint and, therefore, they are denied.

40. The factual allegations and legal conclusions of paragraph 40 and all subparts of that paragraph of the Complaint go to other parties in the lawsuit and not these answering Defendants. Accordingly, the Defendants have insufficient information to admit or deny the allegations and legal conclusions of paragraph 40 of the Complaint and, therefore, they are denied.

41. The factual allegations and legal conclusions of paragraph 41 of the Complaint go to other parties in the lawsuit and not these answering Defendants. Accordingly, the Defendants have insufficient information to admit or deny the allegations and legal conclusions of paragraph 41 of the Complaint and, therefore, they are denied.

42. The factual allegations and legal conclusions of paragraph 42 go, in part, to the conduct of Defendant Buckley and another party to the lawsuit (Police Officer Koch) not included in the group of these answering Defendants. Defendant Buckley denies the allegations and legal conclusions of paragraph 42 as they pertain to him and, accordingly, they are also denied by the remaining Defendants filing this Answer. The Defendants specifically deny the allegation of paragraph 42 of the Complaint that any of them acted in concert with Police Officer Koch for any reason or purpose.

43. The factual allegations and legal conclusions of paragraph 43 of the Complaint go to other parties in the lawsuit and not these answering Defendants. Accordingly, the Defendants have insufficient information to admit or deny the allegations and legal conclusions of paragraph 43 of the Complaint and, therefore, they are denied.

44. The Defendants deny the allegations and legal conclusions of paragraph 44 of the Complaint, including specifically the allegation that they have taken any actions against Atheists Inc., N.S., C.S., Mr. Smalkowski or Mrs. Smalkowski as alleged in paragraph 44 of the Complaint.

45. The Defendants deny the allegations and legal conclusions of paragraph 45 of the Complaint.

46. The Defendants deny the allegations and legal conclusions of paragraph 46 of the Complaint.

47. The Defendants deny the allegations and legal conclusions of paragraph 47 of the Complaint.

48. The Defendants deny the allegations and legal conclusions of paragraph 48 of the Complaint.

49. The Defendants deny the allegations and legal conclusions of paragraph 49 of the Complaint.

50. The Defendants deny the allegations and legal conclusions of paragraph 50 of the Complaint.

51. The Defendants deny the allegations and legal conclusions of paragraph 51 of the Complaint.

52. The Defendants deny the allegations and legal conclusions of paragraph 52 of the

Complaint.

AFFIRMATIVE DEFENSES

Answering the Complaint further by way of affirmative defenses, the Defendants state:

1. Plaintiffs fail to state a claim upon which relief can be granted under Title IX as no discrimination based on sex or race is alleged or occurred.

2. Plaintiffs fail to state a claim upon which relief can be granted under 42 U.S.C. § 1983 as no constitutionally protected rights secured under the First, Fifth and Fourteenth Amendments have been violated by any of the Defendants.

3. Plaintiffs fail to state a claim since 42 U.S.C. § 1983 does not independently provide for a cause of action upon which relief can be granted against the Defendants for "constitutional torts."

4. Plaintiffs fail to state a claim upon which relief can be granted for discrimination based on religion or other impermissible factors as there was no intent on the part of the Defendants to discriminate against N.S., C.S. or Mr. or Mrs. Smalkowski.

5. The Defendants generally and the School District specifically took no steps individually or in concert to endorse or improperly promote one religion over another or one set of religious practices over another concerning N.S., C.S. or anyone else and, therefore, Plaintiffs fail to state claim for relief under the religion clauses of the First Amendment of the United States Constitution.

6. The Defendants generally and the School District specifically District took no steps to improperly interfere with N.S.'s, C.S.'s or the Smalkowski's practice of any "religion" and, therefore, no free exercise of religion claim is stated.

7. To the extent that N.S., C.S., Mr. Smalkowski or Mrs. Smalkowski did not engage

in protected religion they fail to state a claim for relief under the First Amendment.

8. The Defendants took no steps to improperly, illegally or unconstitutionally prohibit or interfere with any religion on the part of N.S., C.S. or their parents and, therefore, they fail to state a claim for relief under the First Amendment.

9. Plaintiffs' claims are barred to the extent they have failed to mitigate any claimed damages.

10. Plaintiffs fail to state a claim for discrimination under Title IX as they were not denied educational benefits by the School District or any conduct of the Defendants.

11. Plaintiffs fail to state a claim for relief under 42 U.S.C. § 1983 or other federal law as there was no official custom, policy or practice of the School District to intentionally discriminate or retaliate against or otherwise violate federally protected rights of N.S., C.S., Mr. Smalkowski or Mrs. Smalkowski on the basis of race, speech or religion or any other rights or privileges guaranteed under the United States Constitution or federal law.

12. Plaintiffs fail to state a claim for relief under 42 U.S.C. § 1983 as there was no causal connection between any claimed damages and an official policy, custom or practice on the part of the School District.

13. Plaintiffs fail to state a claim for punitive damages since punitive damages barred under federal law, and under Oklahoma's Governmental Tort Claims Act, Okla. Stat. tit. 51, § 151 et. seq.

14. The Defendants acted in good faith, without ill-will, improper animus and on a content neutral basis, and without discriminatory intent or deliberate indifference in its dealings with N.S., C.S., Mr. Smalkowski and Mrs. Smalkowski.

15. Plaintiffs' claims are barred in whole or in part by the statute of limitations.

16. Plaintiffs' federal claims are barred to the extent they are based on conduct on the any Defendant that rises only to level of negligence or recklessness.

17. To the extent Plaintiffs' state law claims are based on torts under Oklahoma's Governmental Tort Claims Act, those claims are barred for failure to provide appropriate and timely notice or to commence a lawsuit within the statutory time period as required under that Act.

18. Plaintiffs' state law claims against the individual Defendants filing this Answer are barred under Oklahoma's Governmental Tort Claims Act, which prohibits individuals acting within the scope of their employment from being sued or held liable.

19. To the extent Plaintiffs' state law claims are based on torts under Oklahoma's Governmental Tort Claims Act, the claims are barred based on exemptions to liability established under Okla. Stat. tit. 51, § 155.

20. To the extent Plaintiffs' state law claims are based on torts under Oklahoma's Governmental Tort Claims Act, any damages available are limited in type, scope and amount by provisions of that Act, including but not limited to the liability caps, apportionment requirements and provisions relating to the enforcement of judgments against political subdivisions.

21. Plaintiffs fail to state a claim upon which relief can be granted for conspiracy as there was never an improper agreement, meeting of the minds or understanding reached between any of Defendants filing this Answer to take improperly, unlawful or wrongful conduct against the Plaintiffs.

22. Plaintiffs fail to state a claim upon which relief can be granted for conspiracy as the Complaint only makes conclusory allegations about a conspiracy.

23. The individually named Defendants filing this Answer took no overt acts and had

no personal participation in any conduct that would give rise to a conspiracy, an underlying violation of any federally protected rights of the Plaintiffs or a state law claim.

24. The Plaintiffs fail to state a claim for relief to the extent any federal claims are based on conduct that does not rise to the level of “state action” for purposes of 42 U.S.C. § 1983 or other statutes relied upon by the Plaintiffs to impose liability.

25. The Plaintiffs fail to state a claim for relief under 42 U.S.C. § 1983 or otherwise as there was neither any intent on the part of any of the Defendants to violate Plaintiffs’ federally protected rights, nor conduct by any of them that actually violated Plaintiffs’ federally protected rights.

26. Plaintiffs fail to state a claim for relief against any of the Defendants by virtue of their supervisory capacity since liability cannot attach under 42 U.S.C. § 1983 on the basis of respondeat superior.

27. The Plaintiffs fail to state a claim for relief against the School District to the extent their claims are based on the actions or conduct of individuals who are not the final policymakers for Hardesty Public Schools.

28. The Plaintiffs fail to state a claim for relief against the School District since the alleged injuries and damages did not arise from any unconstitutional official policy or custom passed and then implemented by the School District.

29. Plaintiffs fail to state a claim for federal relief to the extent the requested damages or injuries are premised on libel, slander or other rights secured or protected under Oklahoma state law such claims are not actionable under 42 U.S.C. } 1983 or applicable federal law.

30. The individual Defendants filing this Answer are entitled to qualified immunity from suit and damages.

31. Plaintiffs fail to state a claim for injunctive relief as they have adequate remedies at law, do not have a reasonable level of success on the merits.

32. Plaintiffs fail to state a claim for relief based on a violation of equal protection as they are not members of a protected class or federally protected class of one.

33. Plaintiffs fail to state a claim for relief based on a violation of equal protection as there was no intent by any Defendant to discriminate by virtue of any protected class status or any action that operated to actually discriminate against the Plaintiffs on the basis of some protected class.

34. Plaintiffs fail to state a claim for relief against the individual Defendants filing this Answer to the extent they played no role in any act, omission, decision, conduct or activity on the part of the School District or any other party in this lawsuit against N.S or C.S. claimed to give rise to liability.

35. Plaintiffs fail to state a federal claim for relief based on claimed violations of procedural due process, including but not limited to any claim that N.S. had a constitutional right to participate in extracurricular school activities, since Plaintiffs were afforded proper due process as required and to the extent required by law.

36. The Court should decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367 because Plaintiffs fail to specify the precise nature of any purported state law claims.

37. The Court should decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367 to the extent all of Plaintiffs' federal claims are disposed of in favor of the Defendants.

38. The Defendants are not legally responsible in damages to the plaintiffs for the acts or omissions of either the Plaintiffs or third parties over which it has no control.

39. Mr. and Mrs. Smalkowski are estopped to request injunctive or equitable relief

relating to the reinstatement of the children into Hardesty Public Schools by virtue of their own unilateral decision to home-school their children from and after any suspensions or other deadlines imposed on them had run.

40. Plaintiffs' request for equitable relief, including injunctive relief, is barred to the extent they have acted in bad faith and with unclean hands or have created unsafe environments at school by their own actions, comments and threats.

41. Plaintiffs' fail to state a claim for federal relief as no federally protected liberty interests or property interests have been implicated or injured by any conduct of any Defendants.

42. The Defendants acted with due and reasonable care in overseeing and supervising the health, safety and well-being of all students in Hardesty Public Schools based on the information made known to them at all relevant times to this lawsuit.

43. Plaintiffs fail to state a claim for relief against any of the Defendants under the doctrine of absolute judicial immunity by virtue of their conduct associated with and/or participation in any criminal trial proceedings or prosecutions against Mr. Smalkowski in Texas County, Oklahoma District Court.

44. Plaintiffs fail to state a claim for relief against the Defendants under the Fourth, Sixth, Eighth or Ninth Amendment to the United States Constitution.

45. Plaintiffs claims for defamation are barred as a matter of law since the statements alleged to be defamatory were in fact true, spoken or written without actual malice as is required for public figure defendants or in the alternative, were privileged and made in good faith.

46. Plaintiff CS fails to state a claim for relief against any Defendant.

47. Plaintiffs fail to state a claim for declaratory judgment relief under 28 U.S.C. Section 2201.

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