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**“DRESS CODED” A DISTRACTION AND DISRUPTION:
SEX-AND-RACE-BASED DISCRIMINATION AND SPEECH
RESTRICTION IN PUBLIC SCHOOL DRESS CODES**

By
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Submitted to Education Law Professor Lia Epperson
American University Washington College of Law
In Fulfilment of the Upper-Level Writing Requirement (ULWR)
Fall 2020

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I. INTRODUCTION

“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate” – Supreme Court Justice Abe Fortas, *Tinker v. Des Moines* (1969).¹

As I walked through the schoolhouse gate of my New Hampshire public high school on the first day of junior year, my clothing caught the principal’s attention. Standing by a row of lockers near the front entrance of the school, he motioned to me to approach him. Suddenly guarded, I stepped forward. He asked if I knew that the shirt I was wearing was in violation of the newly revised dress code policy prohibiting sleeveless attire. The tiny sleeves on my leopard print top had been pushed up by my backpack straps, exposing my bare shoulders. I adjusted my top to show him it was not sleeveless, but cap sleeved, and therefore in compliance with the dress code. He said my top “was close” and told me to be prepared to be stopped by other teachers before sending me on my way. I hurried off to class with a quickness in my step, scanning the halls for the teachers who would surely pull me aside. I noticed my ballet flats clacking against the tile floor, my skirt fluttering below my fingertips, and my cap sleeves brushing my shoulders. I spent the rest of the school day feeling afraid that I would get in trouble for what I was wearing. No teacher ever stopped me.

About a month before school started, the principal had mailed a letter to parents about the new dress code policy.² The letter stated that “inappropriate student dress” was an issue “causing disturbances and/or distractions to the learning environment.”³ The new dress code stated:

¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

² Letter from Timberlane Regional High School Principal Don Woodworth to Parents and Guardians (July 18, 2012), available at https://web.archive.org/web/20120806193324/http://www.timberlanehs.com/NewsReleases/20120718_ParentLetter.pdf.

³ *Id.*

Timberlane’s dress code ensures all students will have the right to learn and all teachers have the right to teach without being disturbed or distracted in the learning process by the inappropriate dress of others. . . . All students both males and females will be required to wear tops (shirts/blouses/dresses) that have sleeves, a modest neckline, i.e. no cleavage, and that are long enough to cover beyond their waist.⁴

Furthermore, the dress code specified that “inappropriate school attire” included “sleeveless shirts/top/dresses” and “exposed shoulders.” It also stated, “Students are reminded that the school has the legal right to forbid articles or modes of dress that disrupt the educational mission of the school.”⁵

When I came home from my first day of school, I reflected on how wrong it was that I had been stopped by my principal. I was shamed for showing my shoulders. It was mortifying, and I didn’t want another girl to be objectified. I logged on to Facebook to turn my frustration into action. With a few clicks, I created a page entitled “The Right to BARE Arms Campaign,” a pun on the Second Amendment of the U.S. Constitution. A photograph of Audrey Hepburn in *Breakfast at Tiffany’s* wearing her character’s sleeveless black dress served as the page’s icon. The “Right to BARE Arms” Campaign Facebook page was the start of a grassroots movement to reinstate sleeveless attire into the Timberlane Regional High School dress code. Its mission was clear: “This is a page dedicated solely to the young women of Timberlane who feel victimized and oppressed by not being able to wear sensible sleeveless dresses and tops to school. Like the suffragettes before us, we must unite and become one voice for our Right to BARE Arms.”⁶

The following day, I was pulled out of chemistry class by an assistant principal and escorted to an office across the hall where another school administrator was waiting. They proceeded to interrogate me about the “Right to BARE Arms” Campaign. The assistant principal

⁴ *Id.*

⁵ *Id.*

⁶ Bitsy Skerry, *The Right to BARE Arms Campaign*, Facebook (Sept. 2012), https://www.facebook.com/events/496944810334746?active_tab=about.

first asked if the campaign was my creation, and I admitted it was with a newfound sense of pride. My affirmative response shocked her and unleashed a barrage of questions and comments. I was advised to take down the Facebook page and end my campaign since it was a “reflection of me.” I was told that I would not get a job and that an Ivy League school would not even consider my application because of what I had created. The assistant principal mimed a college admissions officer picking up my application and throwing it in the garbage.

Surprisingly, I left that meeting feeling more empowered than frightened. The administrators’ scare tactics were far more telling of their attitude toward student resistance than the integrity of the peaceful protest that was just beginning to grow. I decided to take the “Right to BARE Arms” Campaign a step further and circulate in-school and online petitions. I enlisted student volunteers to help circulate hard copies during lunch periods. A digital version collected “likes” on Facebook. In all, the petitions received nearly 300 student signatures.

With a copy of the petition and a tri-fold presentation board featuring photos of sleeveless role models such as Michelle Obama, Audrey Hepburn, and Taylor Swift in tow, I took my case to the next school board meeting. Dressed in the cap sleeved blouse that started it all, I advocated against the dress code’s “no sleeveless” policy. I objected to the school administration’s archaic and sexist belief that a girl’s bare arms are a distraction to boys in the classroom. Gesturing to the tri-fold, I proclaimed that many well-respected women, including then First Lady Michelle Obama, wear sleeveless clothing. Furthermore, I highlighted how the high school has limited air conditioning, and, for optimum learning to take place, students need to be comfortable. The “no sleeveless” rule was unfair, impractical, and discriminatory. It sent the message that a girl’s body is nothing more than a distraction to a boy’s education. As part of my closing argument, I read the petition aloud:

We, the undersigned students of Timberlane Regional High School have come together to request that administration take all necessary action to reinstate sleeveless tops and dresses into the Timberlane Regional High School dress code. This includes all sleeveless shirts and dresses that cover the bra strap and Timberlane sports jerseys. In a school with limited air conditioning, for optimum learning to take place, the students need to be comfortable. We do not consider our arms (particularly those of young women), offensive to anyone, nor do we believe they are a distraction in the classroom. The new dress code specifically targets female students disproportionately to male students and is a form of discrimination and gender bias. The signatures below represent those who want to get back something that was once ours: the right to BARE arms. By signing this petition, no disrespect is meant toward the school board, administration, and staff. Kindly consider our request for the 2012-2013 academic school year and amend the dress code for our right to BARE arms.

Because of my speech, the Superintendent of Schools assembled a Student Voice Committee to get student input on the dress code. Out of the Student Voice Committee emerged a Dress Code Committee. I spoke to the press about the “Right to BARE Arms” Campaign,⁷ successfully advocated for a dress code portion to be added to the school climate survey, and wrote an amendment to the dress code that would not ban sleeveless attire.

Although no action was taken while I was in high school, the school year after I graduated, the dress code was heavily revised. “Tank tops” are prohibited instead of “sleeveless shirts/tops/dresses,” and gendered language that sexualizes teenage girls such as “no cleavage” and “a modest neckline” has been removed.⁸ The dress code remains unchanged as of the 2020-2021 school year.⁹ However, it is unclear whether the term “tank tops” as applied to the dress code is a sleeveless top in tank top’s clothing, or if students have somewhat regained the “right to bare arms” and can wear sleeveless attire, so long as it is not a tank top. Cambridge Dictionary defines “tank top” as “a piece of clothing that covers the upper part of the body but not the arms,

⁷ Brenda J. Buote, *New Hampshire High School Student Opposes High School Dress Code*, Bos. Globe (Oct. 14, 2020), <https://www.bostonglobe.com/metro/regionals/north/2012/10/13/new-hampshire-student-opposes-school-dress-code/j5ZCEjLZAsy7lPIWekhDLL/story.html>.

⁸ Timberlane Regional High School Student Handbook 2014-2015, at 42 (2014), *available at* <http://www.timberlane.net/hs/files/Student-Handbook-14-15-8-21.pdf>.

⁹ Timberlane Regional High School Student Handbook 2020-2021, at 36 (2020), *available at* <http://www.timberlane.net/wp-content/uploads/TRHS-Student-Handbook-20-21.pdf>.

and usually has a U-shaped opening at the neck.”¹⁰ The Merriam-Webster Dictionary definition of “tank top” describes the article of clothing as “a sleeveless collarless shirt with usually wide shoulder straps and no front opening.”¹¹ Regardless of the interpretation of “tank top,” the “Right to BARE Arms” Campaign gave students the opportunity to let their voices be heard and its influence brought necessary change to a sexist dress code.

Creating the “Right to BARE Arms” Campaign was a defining moment in my life that inspired me to attend law school. My personal experience getting “dress coded” and speaking out against sex-based discrimination is the reason why I am writing this paper. Unfortunately, challenging a discriminatory dress code is not a unique experience. Nevertheless, it is a form of student activism that can be a catalyst for positive change and young women’s empowerment.

Inspired by *Dress Coded: Black Girls, Bodies, and Bias in D.C. Schools*, a report by the National Women’s Law Center, in 2018, students at a D.C. public high school protested their sexist and racist dress code in an effort to put pressure on school administration to reconvene its dismissed dress code task force and change the policy.¹² In response, the school administrators reconvened the task force and adopted a revised dress code policy at the end of the school year.¹³ In 2017, Grace Goble, a senior at an Illinois public high school, started a change.org petition in response to being told to retake her yearbook photo because she wore a shirt that showed her shoulders in violation of the school’s dress code policy.¹⁴ Grace’s activism was a success. The

¹⁰ *Tank Top*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/tank-top> (last visited Dec. 14, 2020).

¹¹ *Tank Top*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/tank%20top> (last visited Dec. 14, 2020).

¹² Nia Evans et al., *Dress Coded II: Protest, Progress, and Power*, Nat’l Women’s Law Ctr. 9, 20-23 (2019), https://nwlc.org/wp-content/uploads/2019/09/final_nwlc_DressCodedII_Report.pdf.

¹³ *Id.*

¹⁴ Grace Goble, *Maine South High School: End the Over-Sexualization of Young Women’s Bodies*, change.org <https://www.change.org/p/maine-south-high-school-maine-south-high-school-end-the-over-sexualization-of-young-women-s->

principal included the photo in the yearbook and informed her that he planned to “organize a student group dedicated to updating and revising this policy.”¹⁵ In 2014, a group of middle school girls in New Jersey started the campaign #Iammorethanadistracted in response to hearing frequent warnings from school administration about girls’ noncompliance with the dress code.¹⁶ The campaign went viral on social media, where young women used the hashtag to share their own dress code stories.¹⁷

While school dress codes have negative effects on all students, they uniquely impact young women and girls, Black students, and LGBTQ+ students. The sexualization of girls and girlhood across the U.S. is a pervasive and very harmful problem.¹⁸ According to the American Psychological Association (“APA”), sexualization is defined as “when a person's value comes only from [their] sexual appeal or behavior, to the exclusion of other characteristics, and when a person is sexually objectified, e.g., made into a *thing* for another's sexual use.”¹⁹ By regulating what girls cannot wear on their bodies—such as sleeveless shirts, skirts/shorts/dresses shorter than mid-thigh, tight-fitting clothing, and necklines that show cleavage—school dress codes are one way in which sexualization manifests itself. The APA states that the sexualization of girls has negative effects on cognitive and emotional functioning (i.e., discomfort, shame, and anxiety about one’s body), physical and mental health (i.e., eating disorders, low self-esteem, and

bodies?recruiter=486314246&utm_source=share_petition&utm_medium=copylink&utm_campaign=share_petition&utm_term=share_petition (last updated July 25, 2017, 8:40 AM).

¹⁵ *Id.*

¹⁶ Cecilia D’Anastasio & StudentNation, *Girls Speak Out Against Sexist School Dress Codes*, *The Nation* (Aug. 27, 2014), <https://www.thenation.com/article/archive/girls-speak-out-against-sexist-school-dress-codes/>

¹⁷ <https://www.buzzfeednews.com/article/krishrach/young-women-are-protesting-against-dress-codes-with-iammoret>.

¹⁸ Meredith Johnson Harbach, *Sexualization, Sex Discrimination, and Public School Dress Codes*, 50 *U. Rich. L. Rev.* 1039, 1041 (2016), available at <https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=2275&context=law-faculty-publications>.

¹⁹ Press Release, Am. Psychol. Ass’n, *Sexualization of Girls is Linked to Common Mental Health Problems in Girls and Women—Eating Disorders, Low Self-Esteem and Depression; An APA Task Force Reports* (2007), available at <https://www.apa.org/news/press/releases/2007/02/sexualization>.

depression), sexuality (i.e., unrealistic and/or negative expectations surrounding sexuality), and attitudes and beliefs about femininity (i.e., defining self-worth based on attractiveness).²⁰

Black girls experience twofold discrimination in school dress codes based on racial and gender bias.²¹ Black girls get suspended for wearing natural hairstyles and “face adults’ stereotyped perceptions that they are more sexually provocative because of their race, and thus more deserving of punishment for a low-cut shirt or short skirt.”²² Furthermore, girls who are curvier or more physically developed may be seen as more promiscuous by adults, which can result in them “being punished more often for tight or revealing clothing.”²³ When girls receive suspensions and other forms of punishment because of their appearance, it interrupts their education by causing them to miss critical classroom time.²⁴ Furthermore, dress codes promote sexual harassment in schools by communicating to students that girls are at fault for distracting boys, instead of that boys need to respect girls.²⁵

Dress codes also reinforce white-centric ideas of appearance and professionalism, and thus Black students are often discriminated against when they wear hairstyles that do not conform to these racist policies.²⁶ Black students have been asked to cut their dreadlocks and have received detentions for wearing hair extensions.²⁷ LGBTQ+ students also face

²⁰ Eileen L. Zurbriggen et al., *Report of the APA Task Force on the Sexualization of Girls: Executive Summary*, Am. Psychol. Ass’n 2-3 (2007), available at <https://www.apa.org/pi/women/programs/girls/report-summary.pdf>.

²¹ Alexandra Brodsky et al., *Dress Coded: Black Girls, Bodies, and Bias in D.C. Schools*, Nat’l Women’s Law Ctr. 1 (2018), https://nwlc.org/wp-content/uploads/2018/04/5.1web_Final_nwlc_DressCodeReport.pdf.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ See Andre Perry, *Dress Codes are the New ‘Whites Only’ Signs*, Hechinger Rep. (Feb. 5, 2020), <https://hechingerreport.org/dress-codes-are-the-new-whites-only-signs/>.

²⁷ *Id.*

discrimination in dress codes when policies prohibit these students from dressing in a way that allows them to express themselves freely.²⁸

Through the examination of case law and within the context of the First Amendment, the Fourteenth Amendment, and Title IX, this paper analyzes how public school dress code policies: (1) restrict students' freedom of speech and expression; (2) discriminate on the basis of sex by implementing gendered policies and regulating girls' bodies; and (3) discriminate on the basis of race by upholding racist stereotypes and promoting white-centric ideas of appearance and professionalism. This paper recommends that dress codes in public schools across the U.S. either be abolished or fundamentally overhauled to rid dress codes of their intrinsic censorship, sexism, racism, homophobia, and transphobia.

II. BACKGROUND

Dress codes have been challenged by students and their parents within a legal framework that includes the First Amendment, the Fourteenth Amendment, and Title IX. Before delving into the heart of dress code litigation, it is important to first understand this legal framework that defines students' rights in public schools.

A. The First Amendment: Speech and Expression

The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."²⁹ These rights can collectively be referred to as the freedom of

²⁸ See Julia Montiel, *Discriminatory Dress Codes Have No Place in Texas Schools*, Am. Civ. Liberties Union Tex. (Sept. 3, 2020, 11:30 AM), <https://www.aclutx.org/en/news/discriminatory-dress-codes-have-no-place-texas-schools>.

²⁹ U.S. Const. amend. I.

expression.³⁰ The Supreme Court has held that students have First Amendment rights at school, but these freedoms are limited.³¹ Pertaining to freedom of speech, which implicates dress codes, the Supreme Court has held that public schools have a right to restrict this freedom depending on the type of speech at issue.³²

Student speech that takes place at public schools is protected unless it will either interrupt school activities or “intrude in the school affairs or the lives of others.”³³ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). However, the Supreme Court has granted public schools free rein to restrict student speech that is “offensively lewd and indecent.”³⁴ See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). Furthermore, public schools can restrict student speech that is communicated through “school-sponsored expressive activities,” such as a school newspaper, for any reason that is “reasonably related to legitimate pedagogical concerns.”³⁵ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). The Supreme Court has also granted public schools the authority to restrict student speech that is “reasonably viewed as promoting illegal drug use.”³⁶ See *Morse v. Frederick*, 551 U.S. 393 (2007). Such sweeping restriction of student speech by the Supreme Court undermines the assertion by Justice Fortas in *Tinker* that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”³⁷

i. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* (1969)

³⁰ *Freedom of Expression*, Am. Civ. Liberties Union, <https://www.aclu.org/other/freedom-expression#:~:text=Freedom%20of%20speech%2C%20of%20the,to%20as%20freedom%20of%20expression> (last visited Dec. 14, 2020).

³¹ Derek W. Black, *Education Law: Equality, Fairness, and Reform* 653 (Rachel E. Barkow et al. eds., 2nd ed. 2016).

³² *Id.*

³³ *Tinker*, 393 U.S. 503.

³⁴ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

³⁵ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

³⁶ *Morse v. Frederick*, 551 U.S. 393 (2007).

³⁷ *Tinker*, 393 U.S. at 506.

Tinker is a seminal student speech case. It is the first and only time the Supreme Court has addressed a quasi-dress code issue. The Court has yet to directly address public school dress codes.³⁸ In *Tinker*, students in the Des Moines Independent Community School District planned to protest the Vietnam war by wearing black armbands to school.³⁹ When school principals across the district found out about the plan, they met and adopted a policy stating that students who wore armbands to school would be asked to remove them, and, if they refused to do so, they would be suspended until they returned to school without wearing their armbands.⁴⁰ Despite knowing about the new policy, two siblings in the School District wore black armbands to school.⁴¹ They were sent home and suspended until they would return to school without wearing their armbands.⁴² The siblings did not return to school until the planned period for wearing the armbands had expired.⁴³

The Court in *Tinker*, led by liberal Justice Abe Fortas, stated that the issue before them “lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.”⁴⁴ Justice Fortas further opined, “The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to ‘pure speech.’”⁴⁵ “Pure speech” means communication that is written or spoken, or instead is expressive conduct that should be

³⁸ See Ronna Greff Schneider, 1 *Education Law: First Amendment, Due Process and Discrimination Litigation* § 2:23 (Oct. 2019 Update).

³⁹ *Tinker*, 393 U.S. at 504.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 507.

⁴⁵ *Id.* at 507-8.

treated as if it were the written or spoken word.⁴⁶ “Pure speech” is fully protected as speech.⁴⁷

Regarding Justice Fortas’ allusion to dress codes, it is worth noting that an armband is nevertheless worn on the body like any piece of clothing. Justice Fortas appears to distinguish a dress code problem from a “pure speech” problem, signaling that these are separate matters of jurisprudence concerning student expression.

In the eyes of the *Tinker* Court, wearing an armband to protest the Vietnam war speaks as loud as words and is analogous to “pure speech.”⁴⁸ The Court stated that the school district, by banning black armbands, had prohibited the “expression of one particular opinion,” specifically opposition to the United States’ involvement in Vietnam.⁴⁹ The Court held that this prohibition of student speech was unconstitutional without evidence that the students’ protest would “intrude in the school affairs or the lives of others.”⁵⁰ The few students who wore armbands to school did not interfere with school activities, cause disorder, or incite threats or acts of violence.⁵¹ Justice Fortas eloquently writes:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are “persons” under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.⁵²

ii. *Bethel Sch. Dist. No. 403 v. Fraser* (1986)

⁴⁶ See James M. McGoldrick, Jr., *Symbolic Speech: An Expression from Mind to Mind*, 61 Okla. L. Rev. 1, 5 (2008).

⁴⁷ See *id.* at 2.

⁴⁸ See *Tinker*, 393 U.S. at 508.

⁴⁹ *Id.* at 510-11.

⁵⁰ *Id.* at 514.

⁵¹ See *id.* at 508, 514.

⁵² *Id.* at 511.

In *Fraser*, the Court, led by conservative Chief Justice Warren E. Burger, ruled on the issue of “whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly.”⁵³ The high school student gave a speech nominating one of his peers for student government to a crowd of approximately 600 students. In his speech, he “referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.”⁵⁴ He spoke with two of his teachers about the contents of his speech in advance of the assembly.⁵⁵ They advised him not to give the speech, which they believed was inappropriate, and expressed that if he did choose to deliver it, there might be “severe consequences.”⁵⁶

The day after the assembly, the student was called into the assistant principal’s office and was told that his speech violated the school rule prohibiting the use of “obscene language, profane language.”⁵⁷ The student admitted to intentionally using sexual innuendo and received two days of suspension.⁵⁸ The student’s father sued the School District, arguing that his son’s First Amendment right to freedom of speech had been violated.⁵⁹

The Court in *Fraser* sided with the School District, which asserted in the lower court that the lewd speech given by the student was unlike the armbands worn by students protesting the Vietnam war in *Tinker* because the speech had a “disruptive effect on the educational process.”⁶⁰ Justice Burger ruled that although the First Amendment “guarantees wide freedom in matters of adult public discourse,” the “constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,” and therefore “surely it is a

⁵³ *Fraser*, 478 U.S. at 677.

⁵⁴ *Id.* at 677-78.

⁵⁵ *Id.* at 678.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 678-79.

⁵⁹ *Id.* at 679.

⁶⁰ *Id.*

highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.”⁶¹ This ruling contradicts the precedent set by *Tinker* that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁶² By allowing public schools to restrict student speech that is “offensively lewd and indecent,” the Burger Court tinkered with the scope of students’ free speech rights.⁶³ This consequential cut to the student liberties afforded by *Tinker* opened the schoolhouse gate to a new class of student speech challenges for the Court to consider.

iii. *Hazelwood Sch. Dist. v. Kuhlmeier* (1988)

In *Hazelwood*, the Court, led by liberal Justice Byron White, addressed the issue of whether public schools may “exercise editorial control over the contents” of a school newspaper.⁶⁴ The high school newspaper at issue in *Hazelwood*, entitled *Spectrum*, was written and edited by students in a journalism class.⁶⁵ The protocol prior to the publication of each issue was for the journalism teacher to submit page proofs to the principal for review.⁶⁶ When the principal reviewed two articles slated to appear in the newspaper—one about three students’ experiences with pregnancy, and the other about the impact of parental divorce on students at the school—he objected to their publication.⁶⁷ The principal believed these two articles were problematic. He was concerned that even though the pregnancy story used fake names to conceal the identity of the pregnant students, they might still be identifiable, and also thought the references to sexual activity and birth control were inappropriate for younger students.⁶⁸

⁶¹ *Id.* at 682-83.

⁶² *See Tinker*, 393 U.S. at 506.

⁶³ *Fraser*, 478 U.S. at 685.

⁶⁴ *Hazelwood*, 484 U.S. at 262.

⁶⁵ *Id.*

⁶⁶ *Id.* at 263.

⁶⁷ *Id.*

⁶⁸ *Id.*

Furthermore, the principal was concerned that the divorce story, which exposed personal details of a parental divorce, identified the student by name, though he was unaware that the journalism teacher removed the student's name from the final version.⁶⁹

Ultimately, the two articles were not published in the issue of *Spectrum*.⁷⁰ Former high school students who worked on the newspaper sued the School District, arguing that their First Amendment rights has been violated.⁷¹ The Court held that public schools educators can “exercise editorial control over the style and content” of student speech that is communicated through “school-sponsored expressive activities,” such as school newspapers and plays, for reasons that are “reasonably related to legitimate pedagogical concerns.”⁷² Justice White explains:

Educators are entitled to exercise greater control over this . . . form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may in its capacity as publisher of a school newspaper . . . “disassociate itself,” . . . not only from speech that would “substantially interfere with [its] work . . . or impinge upon the rights of other students,” but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.⁷³

Here, the Court ruled that the restriction of student speech was reasonable, and thus constitutional, because the school newspaper was a “school-sponsored expressive activity” and the two articles on pregnancy and divorce were of a controversial and adversarial nature.⁷⁴ The Court's decision in *Hazelwood* makes yet another cut to students' free speech rights at school

⁶⁹ *Id.*

⁷⁰ *Id.* at 264.

⁷¹ *Id.* at 262, 264.

⁷² *Id.* at 273.

⁷³ *Id.*

⁷⁴ *Id.* at 276.

that builds upon the jurisprudential curriculum established by the Burger Court in *Fraser* two years prior.

iv. *Morse v. Frederick* (2007)

In *Frederick*, the Court, led by conservative Chief Justice John Roberts, addressed the issue of whether public schools have the authority to restrict student speech at a school event that is “reasonably viewed as promoting illegal drug use.”⁷⁵ In *Frederick*, a high school senior and his friends held up a large banner that read “BONG HiTS 4 JESUS” during the Olympic Torch Rally in Juneau, Alaska.⁷⁶ The school principal had allowed students and staff to leave school to watch the Olympic Torch pass through as part of an “approved social event or class trip.”⁷⁷ When the principal saw the banner, she told the student and his friends to take the banner down, and everyone except for him obeyed the order.⁷⁸ The offending banner was confiscated, and the student was suspended from school for ten days.⁷⁹ The principal told the student that the reason why she wanted the banner taken down was because she felt it violated the school policy prohibiting the display of “material that advertises or promotes use of illegal drugs.”⁸⁰ Furthermore, the principal believed that the phrase “bong hits” would be widely recognized by students as a reference to smoking marijuana.⁸¹

The Court held that public schools have the authority to restrict student speech at a school event that is “reasonably viewed as promoting illegal drug use.”⁸² Chief Justice Roberts writes:

It was reasonable for [the principal] to conclude that the banner promoted illegal drug use—in violation of established school policy—and that failing to act would send a powerful message to the students in her charge, including [the student], about how

⁷⁵ *Frederick*, 551 U.S. at 403.

⁷⁶ *Id.* at 396-97.

⁷⁷ *Id.* at 397.

⁷⁸ *Id.* at 397-98.

⁷⁹ *Id.* at 398.

⁸⁰ *Id.* at 401.

⁸¹ *Id.*

⁸² *Id.* at 403.

serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.⁸³

In the spirit of *Fraser*, the Court cut back on students' speech rights at school and sided with the administration, granting the interests of the school more protection than the rights of its students.

Justice John Paul Stevens, in his dissent joined by Justices David Souter and Ruth Bader Ginsburg, writes:

the school's interest in protecting its students from exposure to speech "reasonably regarded as promoting illegal drug use," . . . cannot justify disciplining [the student] for his attempt to make an ambiguous statement to a television audience simply because it contained an oblique reference to drugs. The First Amendment demands more, indeed, much more.⁸⁴

B. The Fourteenth Amendment: Due Process and Equal Protection

Dress codes have been challenged under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the U.S. Constitution.⁸⁵ The Due Process Clause ("DPC") provides that no state shall "deprive any person of life, liberty, or property, without due process of law."⁸⁶ The Equal Protection Clause ("EPC") of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."⁸⁷ The Supreme Court held for the first time in *Brown v. Bd. of Educ.* (1954) that race-based discrimination in public education is unconstitutional under the Fourteenth Amendment EPC.⁸⁸ The Supreme Court held for the first time in *Reed v. Reed* (1971) that the Fourteenth

⁸³ *Id.* at 410.

⁸⁴ *Id.* at 434 (Stevens, J., dissenting).

⁸⁵ See Ronna Greff Schneider, 1 *Education Law: First Amendment, Due Process and Discrimination Litigation* § 2:23 (Oct. 2019 Update).

⁸⁶ U.S. Const. amend. XIV, § 1.

⁸⁷ *Id.*

⁸⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

Amendment EPC prohibits discrimination on the basis of sex.⁸⁹ The Court in *Reed* found an Idaho Code requiring that “of several persons claiming and equally entitled to administer [a decedent’s estate], males must be preferred to females” to be unconstitutional.⁹⁰ These two landmark decisions paved the way for future EPC challenges on the basis race and on the basis of sex inside and outside the schoolhouse gate.

Eleven years after the *Reed* decision, the Court in *Miss. Univ. for Women v. Hogan* (1982) addressed gender classifications in education under the intermediate scrutiny standard articulated in *Craig v. Boren* (1976).⁹¹ The intermediate scrutiny standard requires that “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”⁹² Led by conservative Justice Sandra Day O’Connor, the Court in *Hogan* ruled that the state-sponsored all-women’s college violated the Fourteenth Amendment EPC by denying men admission to its nursing school exclusively on the basis of sex.⁹³

The State argued that its policy of admitting only women, and consequentially excluding men from the nursing program on the basis of sex, was justified because it compensates for discrimination against women.⁹⁴ Applying intermediate scrutiny, the Court rejected this argument and concluded that the State failed to satisfy the first part of the EPC test, which requires that the sex-based classification serve important governmental objectives.⁹⁵ Justice

⁸⁹ See *Reed v. Reed*, 404 U.S. 71, 76-77 (1971); see also *U.S. v. Virginia*, 518 U.S. 515, 532 (1996) (writing the opinion for the Court, Justice Ginsburg observed, “In 1971, for the first time in our Nation’s history, this Court ruled in favor of a woman who complained that her State had denied her the equal protection of its laws.”).

⁹⁰ See *Reed*, 404 U.S. at 73.

⁹¹ See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 719 (1982); see also *Craig v. Boren*, 492 U.S. 190, 197 (1976).

⁹² See *Craig*, 492 U.S. at 197.

⁹³ *Hogan*, 458 U.S. at 719-20, 733.

⁹⁴ *Id.* at 727.

⁹⁵ *Id.*

O'Connor writes, "Rather than compensate for discriminatory barriers faced by women, MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."⁹⁶ Justice O'Connor highlights that in "limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of that sex that is disproportionately burdened," but the "mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."⁹⁷ Although the State specified a "benign, compensatory purpose" (compensating for discrimination against women), it failed to persuade the Court that this was the real reason underlying the denial of admission to male applicants.⁹⁸

The Court also held that the State failed to satisfy the second part of the EPC test because the State "made no showing that the gender-based classification is substantially and directly related to its proposed compensatory objective."⁹⁹ Justice O'Connor writes that the school's policy of allowing men to audit nursing classes without receiving credit contradicts the assertion that women in the nursing school would be deprived of educational opportunities if men were admitted.¹⁰⁰ Because the State failed to satisfy both parts of the EPC test, the Court ruled that denying men for-credit admission to the nursing school was a violation of the EPC.¹⁰¹

Fourteen years later, in *U.S. v. Virginia* (1996), the Court, led by liberal Justice Ginsburg, once again used intermediate scrutiny as the constitutional standard for analyzing gender-based

⁹⁶ *Id.* at 729.

⁹⁷ *Id.* at 728.

⁹⁸ *Id.* at 730.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 721, 730.

¹⁰¹ *Id.* at 731.

classifications.¹⁰² At the time the case was decided, Virginia Military Academy (“VMI”) was the only single-sex school out of Virginia’s fifteen public colleges.¹⁰³ VMI, which uses an adversarial method to train their students to be “citizen-soldiers” in military service and civilian life, refused to admit women.¹⁰⁴ Virginia argued that VMI offers a single-sex education as part of the State’s “overarching and undisputed policy to advance ‘autonomy and diversity.’”¹⁰⁵ Instead of granting women admission to VMI, the State proposed to open a new program just for women at Mary Baldwin College, a private women’s liberal arts college, called Virginia Women’s Institute for Leadership (“VWIL”).¹⁰⁶ VWIL would not be of the same educational caliber as VMI, as it would differ in its teaching method, academic offerings, and financial resources.¹⁰⁷

In the opinion, Justice Ginsburg makes a powerful statement about discrimination against women that emphasizes the importance of this groundbreaking case:

“Inherent differences” between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women “for particular economic disabilities [they have] suffered,” . . . to “promot[e] equal employment opportunity,” . . . to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women.¹⁰⁸

The Court was not convinced by the State’s ingenuine reasoning for denying women admission to VMI and held that since the State’s sex-based classification did not withstand intermediate scrutiny, the school’s discriminatory admissions policy was in violation of the EPC.¹⁰⁹ Recalling

¹⁰² See *Virginia*, 518 U.S. at 533 (stating that “The State must show ‘at least that the [challenged] classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”).

¹⁰³ *Id.* at 519.

¹⁰⁴ *Id.* at 520, 523.

¹⁰⁵ *Id.* at 525.

¹⁰⁶ *Id.* at 526.

¹⁰⁷ See *id.*

¹⁰⁸ *Id.* at 533-34.

¹⁰⁹ *Id.* at 534.

the *Reed* decision, Justice Ginsburg shines a bright light on the empowering legal truth that women cannot be denied, by federal or state government, “equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.”¹¹⁰ VMI’s proposed VWIL program did not “cure the constitutional violation,” meaning it did not provide women “equal opportunity” to their own educations.¹¹¹ Since the State did not present an “exceedingly persuasive justification” for denying women admission to VMI, Justice Ginsburg ruled that “the Constitution’s equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords.”¹¹²

C. Title IX

Title IX of the Education Amendments of 1972 states, “No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”¹¹³ The law, perhaps most notorious for prohibiting sexual harassment and violence in schools, has also been used to prohibit sex discrimination in school dress codes.¹¹⁴ To assert a Title IX claim, plaintiffs must show that “(1) they were excluded from participation in, denied the benefits of, or subject to discrimination of an educational program or activity; (2) that the educational institution was receiving federal financial assistance at the time; and (3) that the discrimination caused harm.”¹¹⁵ Unfortunately, in 1982, the U.S. Department of Education (“ED”) under the Reagan administration amended Title IX to revoke the provision, known as 34

¹¹⁰ *See id.* at 532.

¹¹¹ *Id.* at 534.

¹¹² *Virginia*, 518 U.S. at 519, 534.

¹¹³ 20 U.S.C. § 1681(a).

¹¹⁴ Ronna Greff Schneider, 1 *Education Law: First Amendment, Due Process and Discrimination Litigation* § 4:3 (Oct. 2019 Update).

¹¹⁵ *Peltier v. Charter Day Sch., Inc.*, No. 7:16-CV-30-H, 2017 WL 1194460, at *3 (E.D.N.C. Mar. 30, 2017).

CFR § 106.31(b)(5), that had “prohibit[ed] discrimination in the application of codes of personal appearance.”¹¹⁶

According to ED, the revocation of this provision allowed issues involving dress codes to be “resolved at the local level,” meaning with schools themselves.¹¹⁷ ED further articulated that “[t]here is no indication in the legislative history of Title IX that Congress intended to authorize Federal regulations in the area of appearance codes.”¹¹⁸ Moreover, ED stated that because of the revocation, ED would be able to “concentrate its resources on cases involving more serious allegations of sex discrimination.”¹¹⁹ This condescending statement by Reagan’s ED dismisses the act of determining whether a dress code is discriminatory—and thus a violation of students’ civil rights—as a frivolous exercise. The Title IX regulation prohibiting discrimination in school dress codes remains revoked today and has been a subject of discussion (and a hurdle for plaintiffs) in court.¹²⁰ A United States District Court recently held that ED’s assertion that Congress did not intend to regulate dress codes when it wrote Title IX survives *Chevron* deference.¹²¹

III. CASE CLOTHED: LEGAL CHALLENGES TO DRESS CODES

¹¹⁶ Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting From Federal Financial Assistance, 47 FR 32526-02 (July 28, 1982).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See *Peltier v. Charter Day Sch., Inc.*, 384 F. Supp. 3d 579, 590 (E.D.N.C. 2019).

¹²¹ See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984) (stating that the test for “when a court reviews an agency’s construction of the statute which it administers” involves determining “whether Congress has directly spoken to the precise question at issue,” or “Congress has not directly addressed the precise question at issue,” and citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974), which held that “[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”); see also *Peltier*, 384 F. Supp. 3d at 590 (holding that ED’s assertion that Congress did not intend to regulate dress codes under Title IX survives *Chevron* deference.).

Dress codes have faced many legal challenges in the years following the landmark decisions of *Brown*, *Tinker*, and *Reed* and the enactment of Title IX, all which took place during and on the heels of the civil rights movement. Students and their parents have brought First Amendment challenges, Fourteenth Amendment challenges, and Title IX challenges against public school dress codes to varying degrees of success, signaling that it is not yet “case clothed” on the prohibition of stringent, sexist, racist, homophobic, and transphobic dress code policies.

A. Speech and Expression Challenges

i. Testing *Tinker* and its Progeny

As previously discussed, in *Tinker*, the Court held that student speech that occurs at public schools is protected unless it will either interrupt school activities or “intrude in the school affairs or the lives of others.”¹²² *Tinker* has been put to the test in a number of recent dress code cases. In 2015, the Supreme Court denied certiorari in the public school dress code case *Dariano ex rel. M.D. v. Morgan Hill Unified Sch. Dist.*, meaning the Court refused to hear the case.¹²³ In *Dariano v. Morgan Hill Unified Sch. Dist.* (N.D. Cal. 2011), an assistant principal at Live Oak High School, a public school in California, asked three students to either remove or turn inside out their American flag shirts on Cinco de Mayo.¹²⁴ The students sued, arguing that the school prohibiting them from wearing the American flag shirts violated their rights to freedom of expression, due process, and equal protection.¹²⁵ The court held that none of these rights had been violated.¹²⁶

¹²² *Tinker*, 393 U.S. at 503.

¹²³ See *Dariano ex rel. M.D. v. Morgan Hill Unified Sch. Dist.*, 575 U.S. 935, 935 (2015) (denying petition for writ of certiorari to the U.S. Court of Appeals for the Ninth Circuit); see also *Dariano v. Morgan Hill Unified Sch. Dist.*, 822 F. Supp. 2d 1037, 1038 (N.D. Cal. 2011).

¹²⁴ *Dariano*, 822 F. Supp. 2d at 1038-39.

¹²⁵ *Id.* at 1038.

¹²⁶ *Id.* at 1046-48.

As to the students’ freedom of expression challenge, the court stated this case is unlike *Tinker* because there was a concern that wearing the offending clothing could cause a substantial disruption—violence—at the school.¹²⁷ The students were warned by two classmates that wearing American flag shirts would lead to violence due to “ongoing racial tension and gang violence within the school.”¹²⁸ Furthermore, there had been a “near-violent altercation” at the school on the last Cinco de Mayo over the display of an American flag.¹²⁹ The court stated that even though no actual violence occurred due to the wearing of the American flag shirts, the concern about violence was sufficient cause because “*Tinker* unequivocally did not establish an ‘actual disruption’ standard.”¹³⁰ Therefore, the court held that the students’ rights to freedom of expression had not been violated by the school asking them to “turn their shirts inside out to avoid physical harm.”¹³¹

Similar to *Dariano*, in *B.W.A. v. Farmington R-7 Sch. Dist.* (8th Cir. 2009), the court held that students’ free speech rights were not violated by the public high school dress code policy prohibiting attire that displayed the Confederate flag.¹³² The school’s policy satisfied the *Tinker* standard because administrators “had reason to believe that students displaying the Confederate flag would cause a substantial and material disruption” at the school.¹³³ The School District had a history of white students threatening, harassing, and assaulting Black students and using racial slurs.¹³⁴ Elaborating on the application of the *Tinker* standard, the court explained, “*Tinker* and its progeny allow a school to ‘forecast’ a disruption and take necessary precautions before racial

¹²⁷ *Id.* at 1045.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 1046.

¹³² *B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734, 735-36 (8th Cir. 2009).

¹³³ *Id.* at 735-36, 738-39.

¹³⁴ *Id.* at 736.

tensions escalate out of hand. As a result of race-related incidents both in and outside of the school, the administration reasonably denied the display of the Confederate flag within the school.”¹³⁵ To further support its reasoning, the court cited the declaration made by the court in *Fraser* that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”¹³⁶ Schools have the right to ban certain types of student speech if such a ban “would be necessary to avoid substantial disruptions” to the educational environment.¹³⁷

In contrast to *Dariano* and *B.W.A.*, the court in *C.H. v. Bridgeton Bd. Of Educ.* (D.N.J. 2010), applying the *Tinker* standard, held that a public high school violated the First Amendment rights of a student who wanted to wear a Pro-Life armband as part of a Pro-Life protest, which was prohibited under the school’s dress code policy.¹³⁸ The court stated that the school did not meet its burden under the *Tinker* standard to show that the student’s speech “would substantially disrupt or interfere with the work of the school or the rights of other students.”¹³⁹ The school argued that if it allowed a student to wear the armband, and thus violate the dress code policy that they alleged was vigorously enforced, it would “undermine enforcement” of the policy and therefore cause disruption.¹⁴⁰ The school asserted it had adopted a dress code several years prior to litigation because “girls were dressing provocatively, and many of the boys were displaying gang colors and insignia that incited daily fights.”¹⁴¹ The court pointed out the hypocrisy of the school’s argument by mentioning that the school had allowed students to violate the dress code policy on a separate occasion for a different protest (by wearing black shirts over their uniforms,

¹³⁵ *Id.* at 739.

¹³⁶ *Id.* at 740 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

¹³⁷ *Id.* at 740.

¹³⁸ *C.H. v. Bridgeton Bd. of Educ.*, No. CIV09-5815(RBK/JS), 2010 WL 1644612, at *1 (D.N.J. Apr. 22, 2010).

¹³⁹ *Id.* at *6, *8.

¹⁴⁰ *Id.* at *7-*8.

¹⁴¹ *Id.* at *2.

painting their faces, and wearing signs around their neck telling the story of someone who was killed by a drunk driver), and the school was apparently not disrupted by the school-approved dress code violation then.¹⁴²

In *B.H. v. Easton Area Sch. Dist.* (3rd Cir. 2013), the court tested the *Fraser* standard, which gives public schools the authority to restrict student speech that is “offensively lewd and indecent.”¹⁴³ In *B.H.*, two middle school girls bought and wore to school bracelets that said “I ♥ Boobies! (KEEP A BREAST)” as part of a national breast-cancer-awareness campaign.¹⁴⁴ The girls purchased the bracelets with their mothers and wore them to honor their friends and family who had been diagnosed with breast cancer and promote breast-cancer-awareness within their friendship circles.¹⁴⁵ The day before Breast Cancer Awareness Day, the school announced a ban on bracelets with the word “boobies” on them.¹⁴⁶ At lunchtime on Breast Cancer Awareness Day, when a school security guard asked the girls to remove their bracelets, they refused, citing their right to free speech.¹⁴⁷ Although the girls’ righteously rebellious actions caused no disruption in the cafeteria, they were suspended and forbidden from attending the school’s Winter Ball.¹⁴⁸ Furthermore, the school notified the girls’ parents that their daughters were being disciplined for “disrespect,” “defiance,” and “disruption.”¹⁴⁹

The school administration believed that “middle-school boys did not need the bracelets as an excuse to make sexual statements or to engage in inappropriate touching.”¹⁵⁰ Administration’s

¹⁴² See *id.* at *2, *6, *8.

¹⁴³ See *B.H. v. Easton Area Sch. Dist.*, 725 F.3d 293, 297-98 (3rd Cir. 2013) (citing *Bethel Sch. Dist. No. 43 v. Fraser*, 478 U.S. 675).

¹⁴⁴ *B.H.*, 725 F.3d at 297-99.

¹⁴⁵ *Id.* at 299.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 300.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

thinking seems to recognize the patriarchal idea rooted in rape culture that women who dress a certain way are “asking for it.”¹⁵¹ In court, the School District based the bracelet ban on both the school’s dress code policy and the bracelets’ alleged sexual innuendo.¹⁵² The court ultimately held that “*Fraser* does not permit a school to restrict ambiguously lewd speech that can also plausibly be interpreted as commenting on a social or political issue,” thereby ruling that the School District violated the girls’ right to freedom of speech.¹⁵³

ii. *U.S. v. O’Brien: Draft Cards to Dress Codes*

Some courts have used *U.S. v. O’Brien* (1968), a case in which four men burned their draft cards on the steps of the South Boston Courthouse and were then attacked by the crowd of onlookers, to assess the constitutionality of general dress codes from a free speech standpoint.¹⁵⁴ The four-pronged *O’Brien* test, which regulates conduct, not content, states that a government regulation is sufficiently justified if it: (1) “is within the constitutional power of the government;” (2) “furthers an important or substantial government interest;” (3) “if the governmental interest is unrelated to the suppression of free expression;” and (4) “if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”¹⁵⁵ Likewise, a general school dress code is justified if it meets these four prongs, thereby upholding what is being regulated as nonspeech conduct (thus unprotected under the First Amendment) that does not implicate freedom of expression.¹⁵⁶

¹⁵¹ See *16 Ways You Can Stand Against Rape Culture*, UN Women (Nov. 18, 2019), <https://www.unwomen.org/en/news/stories/2019/11/compilation-ways-you-can-stand-against-rape-culture> (stating, “Rape-affirming beliefs are embedded in our language: “She was dressed like a slut. She was asking for it.”).

¹⁵² *B.H.*, 725 F.3d at 301.

¹⁵³ *Id.* at 310.

¹⁵⁴ See *U.S. v. O’Brien*, 391 U.S. 367, 369 (1968); see also Ronna Greff Schneider, 1 *Education Law: First Amendment, Due Process and Discrimination Litigation* § 2:23 (Oct. 2019 Update).

¹⁵⁵ *O’Brien*, 391 U.S. at 377.

¹⁵⁶ See *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 389 (6th Cir. 2005) (citing *U.S. v. O’Brien*, 391 U.S. 367, 382, 388, 391); see also Ronna Greff Schneider, 1 *Education Law: First Amendment, Due Process and Discrimination Litigation* § 2:23 (Oct. 2019 Update).

In *Blau v. Fort Thomas Pub. Sch. Dist.* (6th Cir. 2005), the court applied the *O'Brien* test to uphold a middle school's general dress code policy prohibiting: blue jeans; too tight or too baggy clothing; shorts, skirts, skorts, and dresses shorter than "mid-thigh;" and sleeveless shirts as a regulation of nonspeech conduct.¹⁵⁷ The father of a 12-year-old girl brought the case against the School District on his daughter's behalf, arguing that the dress code violated "(1) her First Amendment right to freedom of expression (2) her substantive-due-process right to wear the clothes of her choosing and (3) [his] substantive-due-process right to control the dress of his child."¹⁵⁸ The middle school girl stated that rather than wanting to convey a particular message through her clothing, she wanted to wear clothes that she thinks "look nice" on her and that "she feel[s] good in."¹⁵⁹

Applying the *O'Brien* test, the court concluded that "[t]he *Blaus* cannot satisfy [the *O'Brien*] test, much less show that the dress code suppresses a 'substantial' amount of protected conduct."¹⁶⁰ The court reasoned that, as to the prong that upholds a regulation if "it is unrelated to the suppression of expression," the dress code at issue "exists in spite of, not because of, its impact on speech or expressive conduct."¹⁶¹ The court pointed out that the dress code's purpose was to "create unity, strengthen school spirit and pride, and focus attention upon learning and away from distractions."¹⁶² As to the *O'Brien* test prong requiring that the restriction "further an important or substantial government interest," the court stated that the dress code does further substantial government interests, including:

bridging socio-economic gaps between families within the school district, focusing attention on learning, increasing school unity and pride, enhancing school safety,

¹⁵⁷ See *Blau*, 401 F.3d at 385, 391, 397-399.

¹⁵⁸ See *id.* at 385.

¹⁵⁹ See *id.* at 389.

¹⁶⁰ See *id.*

¹⁶¹ See *id.*

¹⁶² See *id.*

promoting good behavior, reducing discipline problems, improving test scores, improving children's self-respect and self-esteem, [and] helping to eliminate stereotypes and producing a cost savings for families.¹⁶³

Finally, the court stated that the dress code satisfies the *O'Brien* prong requiring that the regulation “does not burden substantially more speech than is necessary to further [the] interest” because the middle school student and her father did not provide many examples of how the dress code “affects cognizable expressive conduct—except, as noted at oral argument, that the code limits the ability of students to wear t-shirts expressing their interest in music, the arts or politics.”¹⁶⁴ Furthermore, the court notes that the dress code only applies to students during school hours and there are other outlets for student expression at school, such as through writing for the school newspaper or wearing buttons that are permitted by the dress code.¹⁶⁵

Similarly, in *Isaacs ex rel. Isaacs v. Bd. of Educ. of Howard Cty., Md.* (D. Md. 1999), the court held that a public high school’s “no hats policy” did not violate a high school student’s free speech rights by prohibiting her from wearing a headwrap in celebration of her African American and Jamaican heritage.¹⁶⁶ The school made an exception to the policy for religious headgear such as yarmulkes and hijabs.¹⁶⁷ Applying the *O'Brien* test, the court concluded that although the student’s headwrap did amount to protected symbolic speech, the school’s “no hats” policy furthers the school’s legitimate interests.¹⁶⁸ The court agreed that hats can:

(i) cause increased horseplay and conflict in the hallways, (ii) obscure the teacher's view of the student wearing the hat or view of the students sitting behind that student (and as a result can cause the teacher to miss signs of substance abuse or other health problems), (iii) obscure students' view of the blackboard, (iv) allow students to hide contraband, and (v) foster a less respectful and focused climate for learning.¹⁶⁹

¹⁶³ See *id.* at 391-92.

¹⁶⁴ See *id.* at 392.

¹⁶⁵ See *id.*

¹⁶⁶ *Isaacs ex rel. Isaacs v. Bd. of Educ. of Howard Cty., Md.*, 40 F. Supp. 2d 335, 335-36 (D. Md. 1999).

¹⁶⁷ *Isaacs*, 40 F. Supp. 2d at 336-38.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 338.

The court, rather ironically, writes, “The right to self-expression is one which we cherish. However, it is not absolute and here must yield to the legitimate interests and concerns that have led to the adoption of the school's ‘no hats’ rule.”¹⁷⁰

The *Isaacs* decision highlights the lack of cultural competency and implicit racism in school dress codes and in the court system. The court decided that the interests of the school outweighed the interest of the student in proudly expressing a part of her African American and Jamaican culture.¹⁷¹ Her mother, aunt, and grandmother all wore headwraps and she wanted to follow in their footsteps.¹⁷² This case was decided by a white male judge. The court insensitively writes:

[The student’s] headwrap (which from the photo in the record appears to rise several inches above the top of her head) would clearly obstruct other students' view of the blackboard and the teacher's view of students seated behind [her]. Despite the fact that a headwrap is harder to pull off than a hat or a cap, the very nature of middle and high-school students makes them relatively likely to attempt to pull off or unwrap the headwrap and use it as a toy. Finally, while there is no indication that [she] (an excellent student with an exemplary disciplinary record) would engage in such activity, it would be entirely possible for other students to hide drugs, beepers or cheat sheets in a similar headwrap.¹⁷³

Referring to a culturally significant headwrap as a “toy” and a means to hide contraband disrespects and discriminates against Black women and girls. Black women and girls have reclaimed the headscarf, which was used as a tool of oppression by white slave owners, as a part of the natural hair movement and a symbol of empowerment.¹⁷⁴ Banning headwraps in school is a form of misogynoir (hatred, dislike, distrust, and prejudice toward Black women) and oppression.¹⁷⁵

¹⁷⁰ *Id.* at 336.

¹⁷¹ *See id.*

¹⁷² *See id.*

¹⁷³ *See id.* at 340.

¹⁷⁴ Eman Bare, *Head Wraps Aren't Just a NYFW Accessory*, Teen Vogue (Sept. 15, 2017), <https://www.teenvogue.com/gallery/head-wraps-nyfw-history-cultural-appropriation>.

¹⁷⁵ *Misogynoir*, Dictionary.com, <https://www.dictionary.com/browse/misogynoir> (last visited Dec. 14, 2020).

B. Fourteenth Amendment and Title IX Challenges

i. *Bannister v. Paradis* (D.N.H. 1970)

In *Bannister v. Paradis* (D.N.H. 1970), the court held that a New Hampshire public middle school's dress code policy for boys that prohibited blue jeans violated the Fourteenth Amendment DPC.¹⁷⁶ A boy was sent home from school for wearing blue jeans in violation of the policy.¹⁷⁷ In defense of the dress code, the school principal argued that "discipline is essential to the educational process, and that proper dress is part of a good educational climate."¹⁷⁸ Furthermore, the principal believed that if students wear "working or play clothes," such as jeans, to school, it "leads to a relaxed attitude and such an attitude detracts from discipline and a proper educational climate."¹⁷⁹ The principal also stated that students wearing dirty clothes should be sent home.¹⁸⁰

The court pointed out that nothing in the dress code required clothes to be neat and clean and noted that the school did not show that wearing jeans "inhibited or tended to inhibit the educational process."¹⁸¹ The court ruled that "a person's right to wear clothes of his own choosing provided that, in the case of a schoolboy, they are neat and clean, is a constitutional right protected and guaranteed by the Fourteenth Amendment."¹⁸² Although this ruling seems like a victory for students' Fourteenth Amendment rights, the court negates itself by justifying the regulation of what girls can wear and deeming girls' bodies a distraction, writing:

We realize that a school can, and must, for its own preservation exclude persons who are unsanitary, obscenely or scantily clad. . . . Nor does the Court see anything unconstitutional in a school board prohibiting scantily clad students because it is obvious

¹⁷⁶ *Bannister v. Paradis*, 316 F. Supp. 185, 188 (D.N.H. 1970); See Ronna Greff Schneider, 1 *Education Law: First Amendment, Due Process and Discrimination Litigation* § 2:23 (Oct. 2019 Update) (footnote 15).

¹⁷⁷ *Bannister*, 316 F. Supp. at 186.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 186, 188.

¹⁸² *Id.* at 188.

that the lack of proper covering, particularly with female students, might tend to distract other pupils and be disruptive of the educational process and school discipline.¹⁸³

The court does not contradict itself when it states that “a person’s right to wear clothes of his own choosing provided that . . . they are neat and clean, is a constitutional right protected and guaranteed by the Fourteenth Amendment” because the court literally meant “*his* own choosing,” and not “hers.”¹⁸⁴ The dress code policy for girls prohibited blue jeans as well, yet the constitutionality of the girls’ dress code is not questioned in this case.¹⁸⁵ Boys have the choice to wear blue jeans, but girls cannot wear blue jeans at all.¹⁸⁶ This is a sexist double standard. In today’s world, 50 years after the *Bannister* decision, dress codes cannot prohibit girls from wearing something that boys can and vice versa because that is a form of sex-based discrimination.¹⁸⁷

However, in *Byars v. City of Waterbury* (Conn. Super. Ct. 1999), the court held that *Bannister* did not apply because the dress code policy at a public middle school in Connecticut, which prohibited blue jeans for girls and boys, had caused disruptions and distractions to the school environment.¹⁸⁸ Four students who violated the dress code by wearing jeans were suspended from school, and one of the girls, a Black girl, who was only 12 years old, was arrested and charged with criminal trespass for attending class despite her suspension.¹⁸⁹ The court found that the dress code policy “promotes a more effective learning climate by eliminating clothing distractions,” such as baggy jeans that fall down, show underwear, pose a tripping

¹⁸³ *Id.* at 188-89.

¹⁸⁴ *Id.* at 188 (emphasis added).

¹⁸⁵ *Id.* at 189.

¹⁸⁶ *Id.* at 188-89.

¹⁸⁷ See *Know Your Rights: School Dress Codes, Gender, and Self-Expression*, Am. Civ. Liberties Union (2016), <https://www.aclu.org/files/kyr/MKG17-KYR-DressCode-OnePagers-English-v01.pdf>.

¹⁸⁸ *Byars v. City of Waterbury*, No. CV99-0152489S, 1999 WL 391033, at *1, *10 (Conn. Super. Ct. June 4, 1999).

¹⁸⁹ *Id.* at *1.

hazard, and often have pockets big enough to hold a weapon, and designer jeans.¹⁹⁰ Furthermore, the court found that the policy “improves students’ school spirit and pride, places poor and rich students on an even footing regarding appearances, and assures appropriate dress in school.”¹⁹¹

The most disturbing part of the *Byars* case is that a 12-year-old Black girl was arrested and charged with trespass because she wanted to spend her time in the classroom—classroom time that the school took away from her when she was suspended for wearing jeans.¹⁹² This is yet another example of the misogynoir that is embedded in the U.S. education system. Black girls are over five times more likely to get suspended from school at least once, seven times more likely to receive multiple out-of-school suspensions, and three times more likely to receive referrals to law enforcement than white girls.¹⁹³

ii. *Peltier v. Charter Day Sch., Inc.* (E.D.N.C. 2019)

In *Peltier v. Charter Day Sch., Inc.* (E.D.N.C. 2019), the court held that a school uniform policy at a public charter school in North Carolina requiring girls to wear “skirts, skorts or jumpers” and boys to wear “shorts or pants” violated the Fourteenth Amendment EPC but not Title IX.¹⁹⁴ The girls who brought the lawsuit argued that the skirts requirement “forces them to wear clothing that is less warm and comfortable than the pants their male classmates are permitted to wear” and “restricts [their] physical activity, distracts from their learning, and limits their educational opportunities.”¹⁹⁵ In ruling that the skirts requirement violated the EPC, the court stated that the girls:

are subject to a specific clothing requirement that renders them unable to play as freely during recess, requires them to sit in an uncomfortable manner in the classroom, causes

¹⁹⁰ *Id.* at *10-*11.

¹⁹¹ *Id.* at *10.

¹⁹² *Id.* at *1.

¹⁹³ Erica L. Green et al., ‘*A Battle for the Souls of Black Girls*,’ N.Y. Times (Oct. 1, 2020), <https://www.nytimes.com/2020/10/01/us/politics/black-girls-school-discipline.html>.

¹⁹⁴ *Peltier*, 384 F. Supp. 3d at 584, 589-91, 597.

¹⁹⁵ *Id.* at 584.

them to be overly focused on how they are sitting, distracts them from learning, and subjects them to cold temperatures on their legs and/or uncomfortable layers of leggings under their knee-length skirts in order to stay warm, especially moving outside between classrooms at the School. [The School District has] offered no evidence of any comparable burden on boys.¹⁹⁶

The court held the Title IX claim failed because the amendments ED made to Title IX in 1982 revoked the provision prohibiting discrimination in the application of dress codes.¹⁹⁷ The court further stated that since Title IX does not “directly speak to the ‘precise question’ of school uniform policies or appearance codes,” it suggests that Congress left this issue to ED’s discretion.¹⁹⁸ The court also noted that “Congress has never overridden ED’s interpretation of the statute.”¹⁹⁹ Relying on the concept of *Chevron* deference, the court concluded that ED’s interpretation of Title IX is not “arbitrary, capricious, or manifestly contrary to the statute,” and therefore Title IX does not regulate school uniform or dress code policies.²⁰⁰ The *Peltier* case demonstrates how a dress code can violate the EPC, but not Title IX, and serves as a message to plaintiffs challenging sexist dress codes on a Title IX basis to additionally bring a challenge under the EPC.

iii. *Logan v. Gary Cmty. Sch. Corp.* (N.D. Ind. 2008)

In *Logan v. Gary Cmty. Sch. Corp.*, the court addressed the issue of whether a school principal prohibiting a transgender student from attending prom in a dress violated the student’s rights under the First Amendment, as well as the Fourteenth Amendment EPC and Title IX.²⁰¹ Although the student wore “girls’ clothes and accessories” throughout the school year—and was not disciplined or ostracized for wearing such attire—the principal did not allow the student to

¹⁹⁶ *Id.* at 597.

¹⁹⁷ *Id.* at 589.

¹⁹⁸ *Id.* at 590.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 589-90 (citing *Chevron*, 467 U.S. at 844).

²⁰¹ *Logan v. Gary Cmty. Sch. Corp.*, No. CIV.A. 207-CV-431JVB, 2008 WL 4411518, at *1-*2 (N.D. Ind. Sept. 25, 2008).

enter the prom wearing a dress.²⁰² The school dress code prohibits “[c]lothing/accessories that advertise sexual orientation, sex, drugs, alcohol, tobacco, profanity, negative social or negative educational statements.”²⁰³ Before going to prom, the student was told by an assistant principal that they had the right to wear a dress.²⁰⁴ The student then spoke with the school principal, who expressed her opposition to the student wearing a dress to prom and suggested a women’s pants suit instead.²⁰⁵ The two of them “did not reach an agreement” on what could be worn to prom.²⁰⁶

The court ruled that the student’s Fourteenth Amendment EPC, Title IX, and First Amendment claims needed further factual and legal development but did not dismiss the claims.²⁰⁷ The court further stated that “both parties’ arguments regarding the First Amendment require additional development, and detailed facts and explanations such as these are best left to the discovery process.”²⁰⁸

When the parties went back to court, the School District did not produce enough documents in response to discovery, and the court held that the School District’s “scant document production” violated the Federal Rules of Civil Procedure and demonstrated “a lack of good faith effort to locate and produce documents.”²⁰⁹ When the parties went back to court for a third time, the School District still did not produce enough documents and was sanctioned by the court as a result.²¹⁰ Ultimately, the student and the school district settled out of court in 2011 for

²⁰² *Id.* at *1-*2.

²⁰³ *Id.* at *2.

²⁰⁴ *Id.* at *1.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at *3-*5.

²⁰⁸ *Id.* at *5.

²⁰⁹ *Logan v. Gary Cmty. Sch. Corp.*, No. 2:07-CV-431-JVB-PRC, 2008 WL 5062802, at *1, *3 (N.D. Ind. Nov. 21, 2008).

²¹⁰ *Logan v. Gary Cmty. Sch. Corp.*, No. 2:07CV431JVBPRC, 2009 WL 187811, at *2 (N.D. Ind. Jan. 23, 2009).

an undisclosed amount of money.²¹¹ The settlement included “revisions to the school district's dress code and non-discrimination policies such that both policies now include specific protections for lesbian, gay, bisexual and transgender students,” and “training for the [School District] administration and school board members on lesbian, gay, bisexual and transgender (LGBT) issues and respectful treatment of LGBT people.”²¹²

iv. *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp. (7th Cir. 2014)*

In *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.* (7th Cir. 2014), the court ruled that an “unwritten hair-length policy” at a high school and a written hair-length policy at a public junior high school in Indiana requiring that boys who play basketball and other sports keep their hair cut short violated the Fourteenth Amendment EPC and Title IX.²¹³ Because girls who wanted to play sports were not subject to a hair-length policy but boys were, the court held that the policy discriminated on the basis of sex and therefore was in violation of the EPC.²¹⁴ The court also held that the hair-length policy also violated Title IX because: (1) the hair-length policy only applied to boys sports teams; and (2) the discrimination was intentional since the hair-length policy had an intent to treat boys differently from girls, therefore “draw[ing] an explicit gender line.”²¹⁵

v. *Arnold v. Barbers Hill Indep. Sch. Dist. (S.D. Tex. 2020)*

In *Arnold v. Barbers Hill Indep. Sch. Dist.* (S.D. Tex. 2020), the court held that a Black student who challenged his former public high school’s hair-length policy was “likely to succeed on the merits of his cause of action for sex discrimination in violation of the Equal Protection

²¹¹ *Logan v. Gary Community School Corporation*, Lambda Legal, <https://www.lambdalegal.org/in-court/cases/logan-vs-gary-community-school> (last visited Dec. 14, 2020).

²¹² *Id.*

²¹³ *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 571-72, 579 (7th Cir. 2014).

²¹⁴ *Id.* at 579.

²¹⁵ *Id.* at 579, 583.

Clause.”²¹⁶ The court also held that the student had a “substantial likelihood of success on the merits of his cause of action” for race-based discrimination in violation of the EPC.²¹⁷ The student transferred out of the School District to a different high school during his sophomore year because of his former school’s discriminatory hair-policy, which prohibited him from wearing his long locs.²¹⁸ The student has worn locs since seventh grade and has not cut them “because it is part of his Black culture and heritage” and “because he wants to emulate ‘[his] loved ones, including extended family members with West Indian roots, [who] have locs.’”²¹⁹

When the student started his freshman year at his former high school, the hair-length policy only applied to boys and stated, “Boys’ hair will not extend, at any time, below the eyebrows, below the ear lobes, or below the top of a t-shirt collar. Corn rows and/or dread locks are permitted if they meet the aforementioned lengths.”²²⁰ To make his long locs in compliance with the policy, the student tied his locs up in a headband so they “did not extend past [his] earlobes, neck, or eyebrows.”²²¹ Despite always being in compliance with the policy, he received verbal warnings about his hair length and the assistant principal removed him from class at least once per week to ensure his locs were in compliance with the hair-policy.²²²

Part-way through his sophomore year, the school changed its hair-length policy, stating that:

[m]ale students’ hair will not extend, at any time, below the eyebrows, or below the ear lobes. Male students’ hair must not extend below the top of a t-shirt collar or be gathered or worn in a style that would allow the hair to extend below the top of a t-shirt collar, below the eyebrows, or below the ear lobes when let down.²²³

²¹⁶ *Arnold v. Barbers Hill Indep. Sch. Dist.*, No. 4:20-CV-1802, 2020 WL 4805038, at *6 (S.D. Tex. Aug. 17, 2020).

²¹⁷ *Id.* at *9.

²¹⁸ *Id.* at *1.

²¹⁹ *Id.*

²²⁰ *Id.* at *2.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

The “when let down” language in the new policy made it impossible for the student to make his locs in compliance because it prohibited him from trying up his locs and in a headband.²²⁴ The student did not cut his locs and he was punished with in-school suspension, which he said was “what [he would] image prison to be like.” He was taught by teachers who were not certified, was isolated, and was not allowed to leave the room, talk to other students, or take part in extracurriculars.²²⁵ The student transferred to a different high school—where he could wear his long locs without punishment—so he could actually get an education.²²⁶

The court reasoned that the student was likely to succeed on his sex discrimination challenge because both he and the School District agree that the hair-length policy only applies to boys and “was explicitly intended to create a gender-based distinction.”²²⁷ The court reasoned that the student would also likely succeed on his race discrimination challenge because although the policy does not “make explicit distinctions based on race,” it was “enacted with a racially discriminatory motive.”²²⁸ The student provided evidence that the hair-length policy was disproportionately enforced against Black students.²²⁹ Black students at the high school were three times more likely than white students “to lose at least one day of instruction to hair-related in-school suspension.”²³⁰

The student who brought the lawsuit, Deandre Arnold, appeared on *The Ellen Show* in January 2020 before taking legal action.²³¹ On the show, Ellen DeGeneres told the school to

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at *4.

²²⁸ *Id.* at *9-*10.

²²⁹ *Id.* at *10.

²³⁰ *Id.*

²³¹ Samara Lynn, *Texas Teen in School Dreadlock Controversy Gets \$20,000 Scholarship, High-Profile Support*, ABC News (Jan. 30, 2020, 4:26 PM), <https://abcnews.go.com/US/texas-teen-school-dreadlock-controversy-20000-scholarship-high/story?id=68644062>.

change its policy. Arnold also received a \$20,000 check from the company Shutterfly—which was handed to him by singer Alicia Keys—to use toward his college education.²³²

IV. THE FASHION POLICE: STUDENT ARRESTS FOR IMPROPER DRESS

Students have not only faced in-school suspension in recent years as a punishment for dress code violations; they have been arrested. In 2018, a Black boy refused to take off his blue bandana after a teacher at his Arizona public high school asked him to remove it.²³³ The teacher called the police and the student was arrested.²³⁴ The 17-year-old student stated that he had previously complied when asked to remove his bandana, but this time he refused because he had watched for several months as other students, “who [were] usually white,” wore bandanas without retribution.²³⁵ He told the teacher that he would “remove the bandana if others did the same,” who replied that if he didn’t remove it, she would call the police.²³⁶ The student responded, “If you need to call them, you should.”²³⁷

The school’s code of conduct prohibits “the use of hand signals, graffiti, or the presence of any apparel, jewelry, accessory, or manner of dress or grooming that, by virtue of its color, arrangement, trademark, symbol, or any other attribute indicates or implies membership or affiliation with such a group.”²³⁸ The student said that when he asked a police officer what was wrong with his bandana, the officer replied, “It’s blue and other people have ruined that color.”²³⁹ The student denied wearing the bandana as a gang symbol, stating that he wore it as a

²³² *Id.*

²³³ Elise Solé, *Arrested Teen Says His Teacher Called the Police on Him for Wearing a Bandana to School*, Yahoo! (Aug. 15, 2018), <https://www.yahoo.com/lifestyle/arrested-teen-says-teacher-called-police-wearing-bandana-school-233457491.html>.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

reminder of his difficult childhood.²⁴⁰ The student was handcuffed, arrested, and spent six hours at the police station before being released. He was suspended from school for nine days.²⁴¹

Also in 2018, a white 15-year-old girl at a public high school in Kentucky was arrested, sent to juvenile detention for six days, and then put under house arrest for allegedly “assaulting a school resource officer during a dispute over a dress code violation.”²⁴² The student had worn a T-shirt featuring the saying “Do my shoulders turn you on? If so, go back to the 1920’s” in protest of her school’s dress code policy prohibiting sleeveless attire.²⁴³ She had previously been punished by the school principal for wearing an off-the-shoulder top. Before the arrest happened, the school principal approached the student about her T-shirt, and, according to a police report, she was allegedly being “uncooperative” and “loud” during their interaction.²⁴⁴ In response, the school resource officer handcuffed her, which she allegedly physically resisted.²⁴⁵

The police report alleged that while she was handcuffed, the SRO attempted to take her phone out of her hands, and she kicked the SRO in the shin.²⁴⁶ The student’s mother alleged that her daughter was “trained in self-defense” and that while trying to take her phone away, the SRO left red marks on her neck, chest, and arms.²⁴⁷ When the student’s mother asked the principal why her daughter was stopped by him in the first place, he allegedly explained that her daughter’s T-shirt protesting the dress code was a violation of the school’s dress code policy

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² Amira Rasool, *A Student Was Sent to Juvenile Detention for Violating Her School Dress Code*, Teen Vogue (Sept. 5, 2018), <https://www.teenvogue.com/story/student-juvenile-detention-dress-code>.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

because it contained “sexual content,” and he also mentioned how her daughter had been disciplined for wearing an off-the-shoulder top before.²⁴⁸

V. DRESS CODES AND INTERSECTIONALITY

Whether explicitly or implicitly, school dress code policies regulate student appearance at the intersects of race and gender. These policies are written through the lens of the white, cisgender, and heteronormative male gaze. Dress codes communicate to students what the school believes is appropriate, often with sexist, racist, homophobic, and transphobic overtones and undertones. As a result, dress code policies disproportionality target Black, LGBTQ+, and other marginalized students at their intersecting identities.²⁴⁹

A. D.C. Schools, Dress Codes, and Black Girls

In 2018 and 2019, the National Women’s Law Center (NWLC) published the reports *Dress Coded: Black Girls, Bodies, and Bias in D.C. Schools* and *Dress Coded II: Protest, Progress, and Power in D.C. Schools*, which analyze how dress codes in D.C. public schools (“DCPS”) and charter schools unfairly target Black girls based on sexist and racist stereotypes (a.k.a. misogynoir), and what activists and policymakers are doing to make these dress codes nondiscriminatory, respectively.²⁵⁰ Of the 29 (out of a total of 35) DCPS and charter schools NWLC analyzed: 79 percent required a uniform; 59 percent regulated the length of skirts and shorts; 55 percent commented on the tightness, sizing, or fit of clothing; and 48 percent prohibited hair wraps, hats, or head coverings.²⁵¹ Furthermore, over half of DCPS and charter

²⁴⁸ *Id.*

²⁴⁹ Nadra Nittle, *Students are Waging War on Sexist and Racist School Dress Codes – and They’re Winning*, Vox (Sept. 13, 2018, 7:10 AM), <https://www.vox.com/the-goods/2018/9/13/17847542/students-waging-war-sexist-racist-school-dress-codes>.

²⁵⁰ *Resource: Dress Coded II: Protest, Progress and Power in D.C. Schools*, Nat’l Women’s Law Ctr. (2018), <https://nwlc.org/resources/dresscoded-ii/>; Press Release, *Racist, Sexist School Dress Codes Examined in New NWLC Report*, Nat’l Women’s Law Ctr. (Sept. 4, 2019), <https://nwlc.org/press-releases/nwlc-reacts-to-mcdonalds-announcement-of-training-program-to-address-sexual-harassment-2/>.

²⁵¹ Evans et al., *supra* note 12.

schools mention “disruptive consequences for dress code violations, such as parents or guardians being notified and asked to bring replacement items to school or detention.”²⁵² On a positive note, NWLC states that as of the 2020-2021 school year, DCPS and charter schools are prohibited from giving students out-of-school suspension for dress code violations.²⁵³

Despite the positive and necessary change that was made regarding out-of-school suspension, D.C. dress codes are nevertheless rife with racism. NWLC writes:

Data shows that the racial makeup of the student body correlates with the strictness of high school dress codes. Specifically, high schools that are majority Black (i.e., schools where Black students make up at least 51 percent of students enrolled) on average have more dress code restrictions than other high schools.²⁵⁴

NWLC also noted a glaring discrepancy in dress code policies among DCPS and charter schools. D.C. charter schools were more likely than DCPS to “ban hair wraps, hats, or other headwear (73 percent versus 21 percent), regulate the length of skirts or shorts (80 percent versus 36 percent), and require belts (67 percent versus 7 percent).”²⁵⁵

NWLC emphasizes how often times it is the activism of girls themselves that brings the most change to sexist and racist school dress codes.²⁵⁶ In response to NWCL’s 2018 *Dress Coded* report, students in D.C. schools organized protests and campaigns against their dress codes.²⁵⁷ They spoke out against the “racist and sexist stereotypes embedded in dress codes, needless rules that deny girls class time, and the culture of harassment that paints girls as ‘distractions.’”²⁵⁸ Some students have had success, leading school administrators to convene dress code committees and write new policies.²⁵⁹ However, as NWCL aptly states, “Their

²⁵² *Id.* at 6.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 8.

²⁵⁶ *Id.* at 12.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

actions, while inspiring, are a reminder of another way dress codes place a burden on students — requiring students to spend time and energy protesting unfair dress codes instead of other academic or extracurricular pursuits.”²⁶⁰

B. Dress Codes and Dreadlocks

Black students frequently face discrimination in school when they wear natural and protective hairstyles such as Afros, locs, braids, twists, and knots.²⁶¹ According to Patricia Okonta, a legal fellow at the NAACP Legal Defense and Education Fund, “In recent years, there has been a troubling uptick of stories surrounding children being targeted for natural hair textures and styles prohibited in school dress codes.”²⁶² Okonta states, “Students are having educational opportunities disrupted for simply being themselves. For embracing their Blackness.”²⁶³

Thankfully, CROWN Acts are presenting a legislative solution to this prejudiced problem.²⁶⁴ CROWN is an acronym for “Creating a Respectful and Open World for Natural Hair.”²⁶⁵ In 2019, Dove and the CROWN Coalition created the CROWN Act to “ensure protection against discrimination based on race-based hairstyles by extending statutory protection to hair texture and protective styles such as braids, locs, twists, and knots in the workplace and public schools.”²⁶⁶ So far, seven states have signed CROWN Acts into law: California, Colorado, Maryland, New Jersey, New York, Virginia, and Washington state.²⁶⁷ In September 2020, the U.S. House of Representatives passed the CROWN Act to end hair

²⁶⁰ *Id.*

²⁶¹ Janelle Griffith, *When Hair Breaks Rules: Some Black Children are Getting in Trouble for Natural Hairstyles*, NBC News (Feb. 23, 2019, 4:47 AM), <https://www.nbcnews.com/news/nbcblk/when-hair-breaks-rules-some-black-children-are-getting-trouble-n973346>.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Home*, CROWN Act, <https://www.thecrownact.com/> (last visited Dec. 14, 2020).

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ Griffith, *supra* note 261.

discrimination in the workplace and at school.²⁶⁸ If the CROWN Act is passed by the U.S. Senate and signed into law by the President, it will ban hair discrimination nationwide.²⁶⁹

C. Dress Codes, Gender Identity, and Gender Expression

School dress codes reinforce stereotypical gender norms and the gender binary. As a result, these policies often force transgender, nonbinary, gender-nonconforming, and other LGBTQ+ students to conform to a style of dress that does not suit their gender identity and/or expression. Gender identity is defined as “[o]ne’s innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves. One’s gender identity can be the same or different from their sex assigned at birth.”²⁷⁰ Gender expression is defined as “[e]xternal appearance of one’s gender identity, usually expressed through behavior, clothing, haircut or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine.”²⁷¹

According to the GLSEN 2019 National School Climate Survey, 18.3 percent of LGBTQ students reported being “prevented from wearing clothes considered ‘inappropriate’ based on gender.”²⁷² However, the survey found that transgender and nonbinary students “in schools with transgender/nonbinary student policies or guidelines” were “less likely to be prevented from wearing clothes thought to be ‘inappropriate’ based on gender” than students in schools without

²⁶⁸ Emily Tannenbaum, *The Crown Act Was Just Passed by the House of Representatives*, Glamour (Sept. 22, 2020), <https://www.glamour.com/story/the-crown-act-banning-hair-discrimination>.

²⁶⁹ *Id.*

²⁷⁰ *Sexual Orientation and Gender Identity Definitions*, Hum. Rts. Campaign, <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions> (last visited Dec. 14, 2020).

²⁷¹ *Id.*

²⁷² Joseph G. Kosciw et al., *The 2019 National School Climate Survey: Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation’s Schools*, GLSEN, at xx (2020), available at <https://www.glsen.org/sites/default/files/2020-11/NSCS19-111820.pdf>.

these policies and guidelines (6.9 percent vs. 23.9 percent).²⁷³ The data proves that LGBTQ-inclusive policies make all the differences in students' educational experiences.

VI. CONCLUSION

*“There’s a land that I see where the children are free. And I say it ain’t far to this land from where we are” – “Free to Be...You and Me,” performed by The New Seekers (1972).*²⁷⁴

In conclusion, by preserving racism, sexism, and speech restriction in education through archaic, arbitrary, and discriminatory policies, school dress codes undermine the groundbreaking precedents set by the *Brown*, *Reed*, and *Tinker* decisions. To solve this problem, dress codes in public schools must either be abolished or fundamentally overhauled. Hair discrimination at school can be ended through the passage of CROWN Acts at the State and Federal levels of government.²⁷⁵ Congress can override ED’s Reagan era interpretation of Title IX to once again prohibit sex discrimination in the application of dress codes.²⁷⁶ Furthermore, schools and school districts can write nondiscriminatory dress codes that: (1) do not reinforce gender stereotypes (i.e., “Girls must wear dresses”); (2) do not prohibit hijabs and other religious head coverings, bandanas and hair wraps, natural hair styles (Afros, locs, twists, knots, etc.), or long hair for boys; (3) allow students to dress in a way that is comfortable for them and in accordance with their gender identity; (4) “simply mandate which body parts must be covered and what items must be worn (tops, bottoms, shoes) for all students”; and (5) do not call for discipline that

²⁷³ *Id.* at xxiv.

²⁷⁴ The New Seekers, *Free to Be...You and Me* (Arista Records LLC 1972, 2006).

²⁷⁵ See Tannenbaum, *supra* note 268.

²⁷⁶ *Peltier*, 384 F. Supp. 3d at 590; Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting From Federal Financial Assistance, 47 FR 32526-02 (July 28, 1982).

removes students from the learning environment or shames students (i.e., wearing “Dress Code Violation” T-shirts or measuring strap widths and skirt lengths).²⁷⁷

According to Human Rights Campaign (“HRC”), Portland Public Schools (“PPS”) in Portland, Oregon provides a model school dress code policy.²⁷⁸ The PPS school dress code policy states:

The District Dress Code policy applies to all schools in Portland Public Schools grades PK-12, with the exception of schools with a Uniform Dress Code policy.

The responsibility for the dress and grooming of a student rests primarily with the student and his or her parents or guardians.

Allowable Dress & Grooming

- Students must wear clothing including both a shirt with pants or skirt, or the equivalent and shoes.
- Shirts and dresses must have fabric in the front and on the sides.
- Clothing must cover undergarments, waistbands and bra straps excluded.
- Fabric covering all private parts must not be see through.
- Hats and other headwear must allow the face to be visible and not interfere with the line of sight to any student or staff. Hoodies must allow the student face and ears to be visible to staff.
- Clothing must be suitable for all scheduled classroom activities including physical education, science labs, wood shop, and other activities where unique hazards exist.
- Specialized courses may require specialized attire, such as sports uniforms or safety gear.

Non-Allowable Dress & Grooming

- Clothing may not depict, advertise or advocate the use of alcohol, tobacco, marijuana or other controlled substances.
- Clothing may not depict pornography, nudity or sexual acts.
- Clothing may not use or depict hate speech targeting groups based on race, ethnicity, gender, sexual orientation, gender identity, religious affiliation or any other protected groups.
- Clothing, including gang identifiers, must not threaten the health or safety of any other student or staff.

²⁷⁷ See Guest Contributor, *The Importance of Inclusive School Dress Codes*, Hum. Rts. Campaign (Jan. 30, 2017), <https://www.hrc.org/news/the-importance-of-inclusive-school-dress-codes>.

²⁷⁸ *Id.*

- If the student’s attire or grooming threatens the health or safety of any other person, then discipline for dress or grooming violations should be consistent with discipline policies for similar violations.²⁷⁹

The PPS dress code is a progressive model code for other public schools across the U.S. to follow, and a big step in the right direction. If all public schools adopted this policy, students would be able to express themselves and focus on learning, not “what not to wear.”

Discriminatory dress code policies have been the real “distraction” and “disruption” all along.

²⁷⁹ Portland Public Schools, *School Dress Code*, <https://www.pps.net/Page/5888> (last visited Dec. 14, 2020).