



June 23, 2022

BY E-MAIL AND MAIL

Re: Student Dress and Grooming Code Policy

Dear Superintendent and Members of the Board:

We understand your job is difficult and includes a variety of disparate priorities. We write on behalf of Mississippi parents and students who are, or may in the future be, impacted by the dress and grooming policies of your School District (“District”). It may be the first time this issue has been raised to your attention, so please look to us as a resource. Like all school districts in Mississippi, we want to ensure that all students have a school environment that allows them to thrive, learn, and become successful people.

It has come to our attention that your District’s student dress and grooming code raises legal concerns under federal law because it contains gendered policies which treat students differently based on sex. These types of provisions may also lead to bias and discrimination against students on the basis of race and religion. Additionally, selectively enforcing the dress code against girls reinforces invidious sex stereotypes in violation of federal law. Students and families in your district face unprecedented challenges, and it is imperative that you do not inadvertently add to their concerns by enforcing policies that discriminate on the basis of sex, race, or religion.

We therefore urge you to: 1) reexamine your District’s dress and grooming code to ensure that it complies with federal law and does not contain any restrictions that discriminate against students based on sex, race, or religion; and 2) take steps to guard against further discriminatory enforcement of dress and grooming code policies.

Legal Concerns

The District’s dress and grooming policy raises significant legal concerns under the Equal Protection Clause of the U.S. Constitution, Title IX, the First Amendment to the U.S. Constitution, and its own local policies prohibiting gender-based discrimination. Although sex stereotypes and overbroad generalizations based on gender may be “descriptive ... of the way many people still order their lives,” the Supreme Court has consistently “reject[ed] measures that classify unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn.”¹ It is especially telling that the Supreme Court has applied this heightened scrutiny to every government sex

¹ *Sessions v. Morales-Santana*, 136 S. Ct. 1678, 1686 (2017).

classification it has considered, without making any exception for the context of the military or public schools.²

1. The Dress and Grooming Policy Raises Significant Concerns Under the Equal Protection Clause

The Equal Protection Clause has long prohibited school officials from treating students differently based on, or forcing students to conform to, gender stereotypes or “overbroad generalizations about the different talents, capacities, or preferences of males and females.”³ A school may not set forth different requirements based on gender without an exceedingly persuasive justification, or rely on gender stereotypes when creating and enforcing dress code policies.⁴

The U.S. Constitution protects against discrimination on the basis of gender, which includes the enforcement of policies or practices that reflect and reinforce gender stereotypes by the government or government-funded entities. After the ACLU of Mississippi brought a lawsuit challenging gendered grooming policies, the Mississippi federal court held that a school’s requirement that girls wear drapes for senior portraits while allowing boys to wear tuxedos violated the Equal Protection Clause.⁵ Other courts across the country have also struck down public school dress and grooming codes that treat male and female students differently. The U.S. Court of Appeals for the Fourth Circuit recently held that a school violated the Equal Protection Clause by requiring girl students, but not boy students, to wear skirts.⁶ A federal court in Texas granted a preliminary injunction against the enforcement of a school grooming code requiring boys, but not girls, to wear short hair, and held that gender-specific grooming codes are subject to heightened scrutiny under the Equal Protection Clause, and that the school district provided no “exceedingly persuasive justification” for imposing different grooming requirements on boy and girl students.⁷ Similarly, another federal court in Texas granted a temporary restraining order against enforcement of the school district’s gender-based

² See, e.g., *United States v. Virginia*, 518 U.S. 515, 533 (1996); *Glenn v. Brumby*, 663 F.3d 1312, 1313–20 (11th Cir. 2011); *Sturgis v. Copiah Cnty. Sch. Dist.*, No. 3:10-CV-455-DPJ-FKB, 2011 WL 4351355, at *4–5 (S.D. Miss. Sept. 15, 2011); *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 150–52 (N.D.N.Y. 2011).

³ *United States v. Virginia*, 518 U.S. 515, 533 (1996).

⁴ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 131 (1994). See, e.g., *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 583 (7th Cir. 2014) (requiring male athletes to have short hair discriminated on the basis of sex in violation of the Equal Protection Clause and Title IX).

⁵ *Sturgis*, 2011 WL 4351355, at *1 (Court denied a motion to dismiss because a policy requiring boys to wear tuxedos and girls to wear drapes could violate the Equal Protection Clause).

⁶ *Peltier v. Charter Day Sch., Inc.*, No. 20-1001, 2022 WL 2128579 (4th Cir. June 14, 2022) (en banc) (requiring girls to wear skirts was an impermissible sex classification based on outdated stereotypes).

⁷ *De’Andre Arnold, et al. v. Barbers Hill Indep. Sch. Dist., et al.*, No. 4:20-CV-1802, 2020 WL 4805038, at *5-9 (S.D. Tex. Aug. 17, 2020).

hair policy.⁸ In each of these cases, the federal courts applied the same legal principles that apply with equal force to your District’s policies.

2. The Dress and Grooming Policy Raises Significant Legal Concerns Under Title IX

As a recipient of federal funding, the District also must comply with Title IX and the U.S. Department of Education’s Title IX implementing regulations, which prohibit differential treatment of students based on gender.⁹ In particular, Title IX regulations prohibit the District from “[s]ubject[ing] any person to separate or different rules of behavior, sanctions, or other treatment.”¹⁰ The U.S. Department of Education and the U.S. Department of Justice recently reiterated that Title IX prohibits discrimination in dress and grooming codes.¹¹ Here, the District’s code imposes different policies for boys and girls solely because of their gender and subjects students to differential treatment based on gender stereotypes.

In Title VII cases, which are often used to interpret Title IX, courts across the country have recognized that discriminating against men for wearing “traditional female clothing” is inherently grounded in the gender stereotype that men must look masculine and cannot wear typically feminine attire. In *Doe by Doe v. City of Belleville, Illinois*, the Seventh Circuit found that discriminating against men for wearing earrings is based on “stereotypical notions about how men and women should appear and behave.”¹² In finding such conduct to constitute impermissible sex discrimination, the court explained: “One need only consider for a moment whether [the plaintiff’s] gender would have been questioned for wearing an earring if he were a woman rather than a man. It seems an obvious inference to us that it would not.”¹³ The Eleventh Circuit has also noted that male “plaintiffs [in an employment lawsuit] cannot be discriminated against for wearing jewelry that [i]s considered too effeminate.”¹⁴

Recently, in *Bostock v. Clayton County, Georgia*, the Supreme Court lent further support to this legal conclusion in holding that sex discrimination occurs for purposes of Title VII when any “individual” is discriminated against “because of sex.”¹⁵ *Bostock*’s

⁸ *A.C. v. Magnolia Indep. Sch. Dist.*, No. CV H-21-3466, 2021 WL 5142764 (S.D. Tex. Nov. 4, 2021).

⁹ 20 U.S.C. § 1681(a); *see also* 34 C.F.R. §§ 106.31(a), 106.31(b)(4).

¹⁰ 34 C.F.R. §§ 106.31(a), 106.31(b)(4).

¹¹ *See* United States’ Statement of Interest, *Arnold v. Barbers Hill Sch. Dist.* NO. 4:20-cv-01802 (S.D. Tex. filed on July 23, 2021), available at <http://cdn.cnn.com/cnn/2021/images/07/26/usabarbershill.pdf>.

¹² 119 F.3d 563, 581–82 (7th Cir. 1997), *judgment vacated on other grounds by City of Belleville v. Doe by Doe*, 523 U.S. 1001 (1998).

¹³ *Id.* at 582 (internal citations omitted).

¹⁴ *Glenn v. Brumby*, 663 F.3d 1312, 1318 (11th Cir. 2011).

¹⁵ 140 S.Ct. 1731, 1737 (2020).

reasoning applies with equal force to Title IX,¹⁶ which bars discrimination “on the basis of sex” against any “person” in an education program or activity receiving federal financial assistance.¹⁷ Under *Bostock*, individual students who are adversely affected by gender-specific grooming codes may state a claim for gender discrimination.

Even prior to *Bostock*, at least one federal court of appeals had applied Title IX to invalidate a gender-specific grooming policy. In *Hayden ex rel. A.H. v. Greensburg Community School Corporation*, the Seventh Circuit held that a hair length requirement applying only to boy but not girl athletes was illegal sex discrimination that violated Title IX.¹⁸ In another Title IX case, a federal court recognized that discriminating against a male student for wearing nail polish may constitute evidence of impermissible gender stereotyping; so too for discrimination based on other grooming habits that are traditionally associated with gender stereotypes.¹⁹ And most recently, the Fourth Circuit concluded that Title IX “unambiguously applies to sex-based dress codes.”²⁰

The District may only impose a gender-specific grooming code if it has an “exceedingly persuasive justification” for treating students differently based on gender.²¹ However, the District’s dress and grooming code fails to provide a rationale for treating boy and girl students differently (and indeed it could not)—since each of these motivations applies with equal force to every student.

3. The Dress and Grooming Policy Raises Significant Concerns Under the First Amendment

The District’s dress and grooming code also raises First Amendment concerns. The Supreme Court has long held that students do not “shed their constitutional rights to

¹⁶ Exec. Order No. 14,021, 86 Fed. Reg. 13,803 (Mar. 8, 2021); *see also* Memorandum from Pamela S. Karlan, Principal Deputy Assistant Att’y Gen., U.S. Dep’t of Just. C. R. Div. to Fed. Agency C. R. Dirs. & Gen. Couns. (March 26, 2021) (discussing application of *Bostock* to Title IX); *see also* Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32,637 (June 22, 2021).

¹⁷ Title IX 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.” 20 U.S.C. § 1681(a).

¹⁸ 743 F.3d 569, 583 (7th Cir. 2014).

¹⁹ *S.E.S. as next friend of J.M.S. v. Galena Unified Sch. Dist. No. 499*, 446 F. Supp. 3d 743, 789 (D. Kan. 2020) (noting that “wearing make-up or eye-liner, using nail polish, dress[ing] in a skirt, carrying a purse or engaging in other behaviors that might be traditionally associated with being female” are all examples of evidence of impermissible gender stereotyping) (emphasis added); *see also Doe v. Triangle Doughnuts, LLC*, No. 5:19-CV-5275, 2020 WL 4013409, at *2 (E.D. Pa. July 16, 2020) (recognizing that for purposes of Title VII employment discrimination, prohibiting a transgender individual from wearing earrings may constitute impermissible gender stereotyping).

²⁰ *Peltier*, 2022 WL 2128579, at *14.

²¹ *United States v. Virginia*, 518 U.S. 515, 532-33 (1996).

freedom of speech or expression at the schoolhouse gate.”²² The Fifth Circuit, which reviews Mississippi federal court decisions, has recognized that “an individual’s choice of attire also may be endowed with sufficient levels of intentional expression to elicit First Amendment shelter.”²³ When students choose to dress or groom themselves to convey a particular message, express their identity, or show “affiliation to unique social groups,” the Fifth Circuit has found that such expression may be shielded by the First Amendment.²⁴ For instance, a federal court case brought by the ACLU of Mississippi found that a public school’s policy prohibiting a high school girl from wearing a tuxedo to the prom violated her First Amendment rights.²⁵ The First Amendment also prohibits schools from picking and choosing which views students are allowed to express. All views have to be treated equally, so long as they are not obscene or disruptive. This means that if a school permits items like t-shirts with slogans, buttons, or wristbands, it has to permit them no matter what message they express. The District may be violating students’ First Amendment by imposing gendered dress and grooming policies, discriminatory enforcement of dress and grooming policies, or disciplining students based on viewpoint discrimination.

4. The Dress and Grooming Policy Violates the District’s Own Policies

Finally, the District’s policy, addressing student welfare and freedom from discrimination and harassment, prohibits discrimination against any student on the basis of race, color, national origin, sex, disability, or age. Here, the District’s dress and grooming code discriminates based on gender in violation of its own District’s anti-discrimination policy. No student should be punished for failing to conform to gender stereotypes.

Conclusion

Apart from impeding the success of these students, maintaining discriminatory dress and grooming policies can also be expensive and cumbersome for the District. When the ACLU of Texas filed a grievance against Wimberley Independent School District in Central Texas to challenge district decisions that discriminated against LGBTQ students and parents, the district’s discriminatory actions cost local taxpayers nearly \$100,000 in attorney’s fees.²⁶ When the ACLU of Mississippi filed a lawsuit against Itawamba County School District, the court entered judgment against the school and awarded over \$81,000 in fees and expenses.²⁷ Your District currently has an

²² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

²³ *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 440 (5th Cir. 2001).

²⁴ *Id.*

²⁵ *McMillen v. Itawamba Cnty. Sch. Dist.*, 702 F. Supp. 2d 699, 705 (N.D. Miss. 2010).

²⁶ Christian Flores, *Wimberley ISD spent nearly \$100,000 in fight over rainbow-altered logo*, CBS Austin (June 8, 2020), available at <https://cbsaustin.com/news/local/wimberley-isd-spent-nearly-100000-in-fight-over-rainbow-altered-logo>.

²⁷ Chris Elkins, *Judge awards legal fees in Miss. Lesbian prom case*, Daily Journal (October 26, 2010), available at https://www.djournal.com/news/judge-awards-legal-fees-in-miss-lesbian-prom-case/article_cd8f23ff-7774-5b81-97b2-df216380cd35.html

opportunity to resolve this situation without the time or expense of litigation or the resources necessarily incurred in responding to an Office for Civil Rights investigation.

Recently, we advocated for a change to the Jones County School District dress and grooming code, which contained gendered policies and raised similar concerns under federal law. We sent the Jones County School District a letter in the spring semester, and they removed their gendered distinction in their dress and grooming code policy of their student handbook on May 23, 2022.

Through this letter, we urge you to revise the District's dress and grooming code to remove all provisions that are based on gender stereotypes and that treat students differently based on gender, race, and religion, and to take preemptive steps to prevent disproportionate or discriminatory enforcement of the dress code. If your District eliminates these gender-based restrictions from its policies and enforcement, it will avoid the discriminatory effects caused by gender-specific dress and grooming codes. These steps are necessary for the School District to ensure that its dress code is non-discriminatory in effect and on its face, and to come into compliance with federal and state law.

We know the District is aware of its ongoing obligation to ensure a safe and nondiscriminatory environment for its students and are happy to discuss how we can ensure that the District is inclusive of all students. Attached is a model policy that your District can use when revising the District's current dress and grooming policy. We welcome the opportunity to discuss this matter further or answer any questions that you have. Thank you for time and attention to this matter.

Sincerely,



McKenna Raney-Gray
LGBTQ Justice Project Staff Attorney
mraney-gray@aclu-ms.org
ACLU of Mississippi
P.O. Box 2242
Jackson, MS 39225
(601) 354-3408