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RE: Evaluating the relationship between a school district's authority within its schools and a student's choice of dress and hair grooming preferences.

Text

The Supreme Court has not decided the constitutionality of uniform dress code policies in primary and secondary public schools. Despite an array of constitutional attacks stemming mainly from the First Amendment, the Equal Protection Clause, and the Due Process Clause of the Fourteenth Amendment, lower federal courts generally defer greatly to school districts and their chosen dress code policies.

The focus of this analysis is the constitutional impermissibility of highly restrictive standardized uniform policies. The crux of my argument in opposition to strict uniform dress code policies is grounded in the notion that one of the main functions of a primary and secondary education is to prepare students to be citizens in a democratic society of diverse thought. Many school districts assert that uniform policies prepare students for their future endeavors; however, this interest forces students to conform to the acceptable style of dress approved by a few administrators.¹ In recognizing the function of schools, the Supreme Court stated, "The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out

¹ See *Crews v. Cloncs*, 432 F.2d 1259, 1265 (7th Cir. 1970) (noting that a student was excluded from a school because he failed to conform to society's norms as perceived by the school district).

of a multitude of tongues rather than through any kind of authoritative selection.”² Ideas and thoughts are expressed through a variety of channels, including through one’s appearance.

Although my focus is on uniform policies, I will also discuss hair grooming policies. Federal courts give less deference to school districts in their decision to enforce strict hair grooming policies. In challenges to hair length policies, many federal courts have concluded that students have a right to reasonably style their hair to their liking . In *Richards v. Thurston*, the First Circuit held “that within the commodious concept of liberty, embracing freedoms great and small, is the right to wear one’s hair as he wishes.”³ The court reasoned that the right to one’s appearance is so fundamental that the notion was not necessary to mention explicitly in the constitution.⁴ This reasoning is not without any boundaries, I will conclude this analysis with a model dress code policy that balances a student’s right to his or her appearance with a school district’s interest in creating a learning environment conducive to learning.

First, I analyze the constitutionality of uniform policies in light of the First Amendment. Second, I analyze the issue in light of the Equal Protection Clause. Third, I discuss the potential for uniform policies to be constitutionally void for vagueness. Finally, I construct a test regarding uniform policies and offer an example of a dress code policy that complies with current Supreme Court jurisprudence.

I. First Amendment

Dress code policies are not uncommon in public schools across the United States and an increasing number of public schools are adopting uniform dress code policies. The main

² *Tinker v. Des Moines Central School District*, 393 U.S. 503, 512 (1969).

³ *Richardson v. Thurston*, 424 F.2d 1281, 1285 (1st Cir. 1970).

⁴ *Id.*

difference between basic dress codes policies and uniform dress code policies is the degree of expression permitted. In Kissimmee, Florida, the Osceola County School District adopted a uniform policy which limits student body's styles and colors of attire. Only navy blue or white collared shirts and navy blue or khaki shorts are permitted with very few alternatives.

The First Amendment protects pure speech and expressive speech. Expressive conduct is protected as symbolic speech if (1) the expression intends to convey a particularized message⁵, (2) the likelihood is great that the message would be understood by those who viewed it⁶, (3) and the message is created by the conduct itself, not by explanatory speech that accompanies it⁷. This test suggest that a student's choice of attire may be protected as symbolic speech. Arguably, everyday clothing conveys notions of personal choice. Students may intend to blatantly or subtly convey a particularized message through their attire. Colors, patterns, and design can be used as means to express a distinct opinion or view. A student's personal appearance may "symbolize ethnic heritage, religious beliefs, and political and social views."⁸

Although student dress may be symbolic speech, its protection is not absolute. In *Tinker v. Des Moines Central School District* the Supreme Court recognized a school district's authority to "prescribe and control conduct in the schools."⁹ The issue regarding public school uniforms has not been addressed directly by the Supreme Court. However, the Supreme Court and lower federal courts have addressed the issue of public school speech using various constitutional approaches. In addressing the issue of school uniform policies many federal courts have decided

⁵ See *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

⁶ *Id.*

⁷ See *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006).

⁸ *Canady v. Bossier Parish School Board*, 240 F.3d 437, 440-41 (5th Cir. 2001).

⁹ *Tinker*, 393 U.S. at 506.

that this issue does not fit squarely with any of the student speech cases decided by the Supreme Court.¹⁰ However, in the conclusion of this analysis I argue that *Tinker* and its progeny provides a sufficient test to determine whether a school district's dress code policy impermissibly infringes on student's rights. Alternatively, some lower federal courts use a content-neutral approach when determining whether a particular uniform policy violates the First Amendment.

Public school uniform policies are generally classified as content-neutral restrictions since such policies do not make content distinctions. Such content-neutral uniform policies warrant intermediate scrutiny. Restrictions on expressive conduct, such as personal appearance, are permissible if the restrictions (1) are justified without reference to the content of the of the regulated speech or the communicative impact of the symbolic speech,¹¹ (2) serve a substantial interest,¹² (3) are narrowly tailored,¹³ (4) and leave open ample alternative channels for communicating the information.¹⁴

Although some federal courts have held that public school uniform policies satisfy intermediate scrutiny, I argue to the contrary. First, public school uniform policies do not leave open ample alternative channels for communicating expression through attire. In *City of Laude v. Gilleo*, a city ordinance prohibited residents from displaying certain signs on their property.¹⁵ The Court held that the ordinance was not a permissible content-neutral restriction since the ordinance "almost completely foreclosed a venerable means of communication that is both

¹⁰ See *Canady*, 240 F.3d at 442.

¹¹ See *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968).

¹² *Id.*

¹³ *Id.*

¹⁴ See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

¹⁵ See *City of Laude v. Gilleo*, 512 U.S. 43, 45 (1994).

unique and important.”¹⁶ The unique nature of expression via personal appearance precludes the availability of any equivalent mediums of expression. In *Blau v. Fort Thomas Public School District*, the Sixth Circuit upheld a school district’s dress code policy.¹⁷ It reasoned that students have alternative outlets of expression including the school newspaper, extracurricular activities, school assignments, association with others, and buttons.¹⁸ An individual’s attire is distinguishable from these alternatives. A student cannot express their desire to look a particular way by way of any of these channels. Similar to the means of expression in *Gilleo*, student attire is both unique and important.¹⁹ An important aspect of culture is clothing which cannot be adequately expressed in an equivalent manner. Expressing culture through writing and association is fundamentally different than expressing culture through dress.

Hair grooming policies also fail this prong since such policies affect “the student twenty-four hours a day, seven days a week, nine months a year.” In a similar respect, students spend a significant portion of their time at school over a period of at least eighteen years which suggests that mere afterschool hours and weekends do not remedy the extensive restriction on students during school hours.

Second, the incidental restriction on First Amendment freedoms is greater than is essential to the furtherance of the various educational interests. Uniform policies result in the prohibition of an entire medium of expression. The Osceola County School District Student Appearance and Dress Code Policy states that the purpose of the uniform dress code policy is to “enable all of the public elementary, middle, and high schools in Osceola County to experience a

¹⁶ *Id.* at 54.

¹⁷ *Blau v. Fort Thomas Public School Dist.*, 401 F.3d 381, 392 (6th Cir. 2005).

¹⁸ *Id.*

¹⁹ *Gilleo*, 512 U.S. at 45.

safer learning environment.” A uniform policy is far greater than essential to further an interest in a safer learning environment. The Osceola County School Board would be hard-pressed to argue that a white polo shirt is more conducive to a safer school environment than a plain white t-shirt. School districts are not required to choose the least restrictive alternative; however, a strict uniform policy in order to further a safe environment is greater than necessary to further this interest.

School districts should be prohibited from creating highly restrictive uniform dress code policies without showing a greater link between the restriction and the school district’s proposed interest. The current highly deferential attitude of the courts permits school districts to assert any interest to justify a highly restrictive uniform policy. The Osceola School Board ought to explain how the mere color in a student’s shirt is conducive to a safe learning environment.

Assuming one’s attire constitutes an act of “expressive conduct” or speech, then uniform dress code policies may also constitute impermissible speech compulsion. In *West Virginia State Board of Education v. Barnette* the Supreme Court held that school districts cannot force students to salute the United States flag.²⁰ The reasoning of the Court can be applied in the context of mandatory uniform policies. The Court focused on notions of coercion, person, personal autonomy, self-governance, and the right not to speak. Uniform dress code policies force students to adopt an appearance through attire dictated by what is deemed appropriate by a school district.

II. Equal Protection

²⁰ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

Apart from First Amendment challenges, uniform dress codes and grooming policies are also challenged as violative of the Fourteenth Amendment. Some dress code provisions have different dress and grooming standards that differ base on the sex of the student. The Osceola County School District divides its uniform policy based on the sex of the student without offering a rationale for the distinction in the policy. The basic uniform clothing for girls permits skirts, walking shorts, slacks, skorts, jumpers, and similar clothing. The basic uniform clothing for boys is much more restricted and fails to incorporate a catch-all. Male students are permitted to wear only long pants or walking shorts.

In order to pass constitutional muster, gender-based policies are subject to intermediate scrutiny. Gender classifications “must serve important governmental objectives and must be substantially related to achievement of those objectives.”²¹ These important government objectives “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”²²

The uniform policy in Osceola County fails to offer any justification or interest furthered by having gender-based uniform policies. The school district ought to assert a genuine interest in having two different uniform policies and show how the different policies further that interest.

Apart from gender distinctions, some dress code policies are race-neutral, but have a discriminatory effect when enforced.²³ For example, some school districts have banned braids, afro hairstyles, and dreadlocks. These types of prohibitions are problematic since certain ethnic

²¹ *Craig v. Boren*, 429 U.S. 190, 197 (1976).

²² *U.S. v. Virginia*, 518 U.S. 515, (1996).

²³ *See Washington v. Davis*, 426 U.S. 229 (1976) (holding that a racial disparity alone without a discriminatory intent does not violate the Equal Protection Clause).

minorities are more likely to style their hair in this manner. School districts should enforce hair grooming policies that are reasonably sensitive to the traditions of certain groups.

III. Vagueness Doctrine

The Osceola County School District Student Appearance and Dress Code Policy contains various provisions that prohibit vague and generalized classifications of attire. Students are not allowed to wear “offensive” attire or “extreme” or “unusual” hairstyles. The Policy also states that “it will be a violation of this Policy for a student to wear makeup that is not within the acceptable standards for the school or community.”

In *Bethel School Dist. No. 403 v. Fraser*, in a dissenting opinion, Justice Stevens stated, “It does seem to me, however, that if a student is to be punished for using offensive speech, he is entitled to fair notice of the scope of the prohibition and the consequences of its violation.”²⁴ Vague provisions violate the Due Process Clause.²⁵ First, the aforementioned provisions cannot be defined with sufficient clarity to provide fair notice to students. The language fails to draw reasonably clear lines between permissible attire and impermissible attire. Second, vague policies provide insufficient guidance to school officials who enforce the rules which may result in an arbitrary or inconsistent exercise of discretion. Third, vague policies result in a chilling effect which means that students will steer away from permissible behavior in an attempt to avoid a violation.

If a student is to be punished for a dress code violation, he or she should be entitled to fair notice of the prohibition and the potential consequences. Rather than prohibiting “offensive” attire, the dress code policy should define the school district's definition of offensive and then provide various examples of what constitutes offensive attire. The same solution applies to dress

²⁴ *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 691 (1986) (Justice, J. dissenting).

²⁵ *Id.*

codes policies prohibiting “extreme” or “unusual” hairstyles. The school district should define those terms and provide students with photographs or other examples of what constitutes a hairstyle in violation of the dress code policy.

Due to the subjective nature of such policies, I also propose that school districts include a “good faith” provision to their dress code policies. Student populations are diverse due to various ethnicities, races, traditions, and cultures. Diverse populations inevitably result in a diversity of thought and opinion. A tradition that embraces a particular hairstyle may be “unusual” or “extreme” to a different culture. A student may not intend to violate a dress code policy in choosing a particular hairstyle since the hairstyle is one that has been deemed appropriate in his or her tradition or culture. The “good faith” provision would allow the student to adequately conform to the dress code policy without being punished for an unintentional violation.

Students should also be notified of the various consequences that follow from a particular dress code violation. The dress code policy for a Middle School in the Salt Lake City School District states that “school administrators will determine consequences for student who violate the dress code.” Not only are some of the dress codes prohibitions vague, but vague consequences accompany these provisions. Such provisions that are both vague and do not provide specific consequences are fodder for arbitrary enforcement.

IV. Conclusion

Although the Supreme Court has not decided the constitutionality of uniform dress code policies, it has addressed various student speech issues. The government acting as K-12 educator may restrict speech if the speech: (1) “materially and substantially interferes with the

requirements of appropriate discipline in the operations of the school,²⁶ (2) invades the rights of others,²⁷ (3) is vulgar and offensive because of its particular wording and not because of its viewpoint,²⁸ (4) would be interpreted by a reasonable observer as advocating illicit illegal drug use.²⁹ Although the facts of these cases do not involve uniform dress code policies, I believe this test should apply to school districts when implementing a dress code policy. The third prong of this test may require further detail to avoid a vagueness problem.

The aforementioned test precludes the option of implementing a strict dress code policy since such policies would be impermissibly overbroad in light of this test. The Osceola County School District Student Appearance and Dress Code Policy is overbroad since its restriction sweeps in a substantial amount of speech that has not been deemed impermissible according to the Supreme Court. The Osceola County School District's Policy would fail the first prong of this test. The Policy only permits students to wear navy blue or white collared shirts and navy blue or khaki shorts. Allowing students to wear pink, yellow, or purple would not materially and substantially interfere with the requirements of appropriate discipline in the operations of the school. Further, allowing students to wear a plain yellow t-shirt rather than a polo style shirt would not materially and substantially interfere with the requirements of appropriate discipline in the operations of the school.

Northwest Middle School in the Salt Lake City School District is a model dress code that both complies with *Tinker* and its progeny and embraces a student's right to personal appearance. Northwest Middle School asserts, "How you dress says who you are." The school benefits from

²⁶ *Tinker*

²⁷ *Id.*

²⁸ *Bethel School District v. Fraser*, 478 U.S. 675 (1986).

²⁹ *Morse v. Frederick*, 551 U.S. 393 (2007).

its diversity since the student body is comprised of “people from different cultures, races, languages, religions, perspectives and styles.” At school, dress to show that you are focused on learning. The school does not have any gender based provision or any any prohibitions on hair styles. Rather than implementing a standardized uniform policy, the school’s dress code policy merely prohibits clothing or accessories that: advertise drugs or violence, are related to gangs, have sexual or offensive language, cover the student’s head, are shorts or skirts more than 4 inches above the middle of the student’s kneecap, are tank tops or crop tops that show your shoulders or waist, and are low-waist pants showing your underwear. The goal of Northwest Middle School’s dress code policy is to create an environment conducive to learning. The school’s dress code policy sufficiently balances the interests of the school while minutely infringing on the student body’s right to its appearance.