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## CHALK TALKS—

### Eliminating Gender Stereotypes in Public School Dress Codes: The Necessity of Respecting Personal Preference

Ceara Sturgis was an honor student and a member of several sports teams and organizations at her high school in Wesson Mississippi, where she attended for her entire primary (K-12) education. Ceara is a popular student, academically accomplished, and openly gay. During her senior year, when it came time to take yearbook photos, Ceara was informed that the students were required to wear formal attire in their senior portraits. Male students were required to wear tuxedos and female students were required to wear drapes, which gives the appearance of a dress. At the photography studio, Ceara initially posed in the drape, but was extremely uncomfortable and self-conscious. Ceara consistently dresses in clothing traditionally associated with the male gender, and having to now wear such “feminine” clothing made her deeply uncomfortable. Witnessing her discomfort, the photographer allowed Ceara to instead wear the tuxedo, which gave Ceara immediate relief.

Months later when Ceara received her yearbook, she flipped through the pages to discover that her photo was nowhere to be found. Because of her choice of clothing the school administration had refused to print Ceara’s photo, or even her name, in the senior yearbook.<sup>1</sup>

Adolescence is a peculiar and important stage in the development of self-identity. It is the time at which we begin to define ourselves, how we relate to others, and how we fit within the world around us. One very important way in which we present ourselves to the world is through dress and appearance. Young people in particular often relish their ability to express themselves through their dress and appearance because they typically have few outlets where they can truly express themselves

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1. *Sturgis v. Copiah County Sch. Dist.*, 2011 U.S. Dist. LEXIS 105065 (S.D. Miss. 2011); see generally ACLU, *ACLU Sues Mississippi School for Excluding Teenager Wearing Tuxedo from Yearbook*, <http://www.aclu.org/lgbt-rights/aclu-sues-mississippi-school-excluding-teenage-wearing-tuxedo-yearbook> (Aug. 17, 2010).

and feel comfortable doing so. Dress is one way in which a young person can establish a sense of identity, to herself and to others.

Unfortunately, this method of self-expression is frequently at odds with school dress codes that regulate what students can and cannot wear at school. School officials have a responsibility to provide students with a safe, secure, and productive learning environment free from as many distractions and pressures as possible. The proffered intent of school dress codes is to keep students safe and focused on their work. While this is a valid and necessary objective, there is a fine line between preventing distractions and infringing upon constitutional rights. The intent of this Note is not to encourage unbridled student expression because, understandably, certain things should be contained if they pose a threat to safety or a productive learning environment. However, the rigidity with which many school dress codes are constructed in return threaten the development of self-identity. This rigidity is the incessant perpetuation of archaic gender-based classifications and stereotypes present in most school dress codes. Policies that require students to conform to gender stereotypes and customs, regardless of their personal preference, infringe upon a student's First Amendment right to free speech and expression, as well as equal protection under the Fourteenth Amendment.

This Note will analyze the constitutionality of school dress codes through the lens of Ceara Sturgis' case. Part I will discuss the framework for First Amendment challenges to gender-based dress codes established in *Tinker v. Des Moines School District*. Part II will discuss the equal protection framework established by the Supreme Court in *United States v. Virginia*. Part III will provide various justifications that have been accepted for upholding gender-based dress codes and examine the strengths and weaknesses of those justifications. Part IV will explore the limited circumstances in which courts have recognized acceptable deviation from school dress codes, and how even those exceptions completely disregard personal preference. Part V will conclude that school dress codes must respect students self-identity and should be constructed to allow for personal preference.

## I. FIRST AMENDMENT

The late 1960s and early 1970s was a time of revolution, self-expression, and challenge to the status quo. It is no surprise that at this

time school dress codes enforced conservative, traditional images of males and females. Men were expected to be clean-shaven and have well-kept short hair and women were to only wear dresses or skirts, not slacks. Students soon began to challenge these rigid stereotypes. Between 1968 and 1977 there were over 150 reported cases involving male student hair-length policies.<sup>2</sup> Likewise, female students began to realize that there was no valid justification for prohibiting them from wearing pants, and thus several challenges arose.<sup>3</sup>

In the landmark case of *Tinker v. Des Moines Independent Community School District*,<sup>4</sup> a group of students were suspended from school for wearing black armbands to publicize their objections to the hostilities in Vietnam. The Supreme Court ruled that public school officials could not censor student expression unless they could reasonably forecast that the student expression would cause substantial disruption or material interference with school activities or would invade the rights of others.<sup>5</sup> The Court correctly acknowledged that “it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>6</sup> Hence, students have a constitutionally protected right to free speech and expression in school. This means that schools cannot restrict or censor student speech simply because the content of that speech is controversial or unpopular.<sup>7</sup> In other words, restrictions on speech that are “content-based” are unconstitutional.<sup>8</sup>

School dress code restrictions that are based on content are subjected to the *Tinker* standard. On the other hand, when a school dress code is content-neutral the *Tinker* standard does not apply. Rather, a content-neutral dress code is subject to intermediate scrutiny.<sup>9</sup> That is, the dress

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2. Jennifer L. Greenblatt, *Using the Equal Protection Clause Post-VMI to Keep Gender Stereotypes Out of the Public School Dress Code Equation*, 13 U.C. Davis J. Juv. L. & Pol’y 281, 283 (2009) (citing Mary Julia Kuhn, *Student Dress Codes in the Public Schools: Multiple Perspectives in the Courts and Schools on the Same Issues*, 25 J.L. & EDUC. 83, 93 (1996)).

3. *Scott v. Bd of Educ.*, 305 N.Y.S.2d 601 (N.Y.Supp. 1969); *Johnson v. Joint Sch. Dist.*, 508 P.2d 547 (Idaho 1973).

4. 393 U.S. 503 (1969).

5. *Id.* at 513.

6. *Id.* at 506.

7. *Id.* at 509.

8. *Turner Broadcasting System Inc. v. F.C.C.*, 512 U.S. 622 (U.S. Dist. Col. 1994). (“The First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals. Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage or impose differential burdens upon speech because of its content.”)

9. *Jacobs v. Clark County School Dist.*, 526 F.3d 419 (9th Cir. 2008).

restriction will be valid if 1) it furthers an important government interest, 2) the governmental interest is unrelated to the suppression of free expression, and 3) the restriction is “no greater than is essential to the furtherance of that interest.”<sup>10</sup> Content-neutral dress restrictions must pass all of these in order to be valid under the First Amendment.

## II. EQUAL PROTECTION

Title IX prohibits educational institutions receiving federal funds from discriminating on the basis of sex.<sup>11</sup> This legislation was once a very powerful tool in the fight against discriminatory school dress codes because it originally contained a provision, prohibiting “discriminat[ion] against any person in the application of any rules of appearance” on the basis of sex.<sup>12</sup> However, the Reagan Administration revoked this provision citing a need to focus on “more serious allegations of sex discrimination.”<sup>13</sup> Thus, since Title IX no longer specifically addresses appearance policies it is a much less powerful tool for confronting discriminatory dress codes. Instead, the Equal Protection Clause of the Fourteenth Amendment is currently the most effective weapon used to challenge school dress codes that enable gender stereotypes and classifications.<sup>14</sup>

The First Amendment cases show that schools are not completely restricted from enforcing gender-based classifications. If a school administration wishes to do so it must comply with certain Equal Protection Clause mandates illustrated in *United States v. Virginia*,<sup>15</sup> in which the Court addressed the constitutionality of the male-only admission policy at the Virginia Military Institute (VMI). VMI was a school designed to produce “citizen-soldiers” and prepare men (but not women) for leadership positions in civilian life and military service.<sup>16</sup> The United States sued VMI, alleging that the male-only admission policy violated the Equal Protection Clause of the Fourteenth Amendment. The Court held that the justifications for gender classifications “must be genuine, not hypothesized or invented post hoc in response to litigation,” and also,

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10. *Jacobs*, 526 F.3d at 434.

11. Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 (West 2009).

12. 34 C.F.R. §106.31(b)(5) (1974); see also *supra* n. 2 at 285-86.

13. Greenblatt, *supra* n. 2 at 285.

14. *Id.*

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

16. *Id.* at 515.

they “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.”<sup>17</sup> Thus, school officials must show that there is a “legitimate and important” basis for gender-based restrictions in order to satisfy the Equal Protection Clause.

### III. ACCEPTED JUSTIFICATIONS FOR GENDER-BASED RESTRICTIONS

Several courts have accepted certain school objectives as justification for gender-based school dress codes. For example, curtailing gang related activities has been held to be a compelling school objective. In *Olesen v. Board of Education*,<sup>18</sup> the court upheld the school’s anti-gang dress policy that prohibited male students but not female students from wearing earrings. The court held that this restriction was rational and did not unconstitutionally curtail a student’s freedom to choose his own appearance. Disagreeing with the student’s claim that the rule violated his First Amendment rights, the court explained that, in order to claim the protection of the First Amendment, the student was required to demonstrate that his conduct was intended to convey a particularized message and that the likelihood was great that the message would be understood by those who observed the conduct.<sup>19</sup> The court concluded that the student’s only message – his individuality – was not within the scope of the amendment.<sup>20</sup>

With a quick stroke of the pen, the court juxtaposed the presentation of a “particularized message” and the expression of self-identity. Although preventing gang activity at school is undeniably an important interest, the court’s declaration that individuality is insufficient to constitute a “particularized message” is careless and unjustifiable. What message could be more genuine or “particularized” than the expression of self-identity? A more effective approach than attempting to classify the sufficiency of self-expression would be to balance that expression with the compelling school interest.

Prevention of distraction is another objective that courts have accepted as a rational justification for gender-based dress codes. In a case deal-

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17. *Id.* at 553.

18. 676 F. Supp. 820 (ND Ill 1987).

19. *Id.* at 822.

20. *Id.*

ing with hair length, *Ferrell v. Dallas Independent School District*,<sup>21</sup> the court held that avoiding disruption at school was a compelling reason for requiring male students to keep their hair short while attending school. Assuming without deciding that a hairstyle was a constitutionally protected mode of expression, the court observed that the right to free expression are not absolute and "can be infringed by the state if there is compelling reasons to do so."<sup>22</sup> The compelling reason for the regulation was obvious, the court said, as "the interest of the state in maintaining an effective and efficient school system was of paramount importance."<sup>23</sup>

While preventing distractions during school hours is a legitimate school interest, it is quite revealing that the *Ferrell* court never required the school to demonstrate how male student hairstyles (in this case Beatle-style haircuts known as "mop-tops") "interfered or hindered the state in providing the best education possible for its people."<sup>24</sup> This lack of connection demonstrates the weakness in the court's rationale and signifies the need to balance school objectives with student free expression rather than treating these two factors as unrelated.

Perhaps the most sweeping justification courts have recognized for gender-based dress codes is a school's ability to teach community values and enforce school discipline. In *Harper v. Edgewood*,<sup>25</sup> the court upheld a school's refusal to allow a female student and a male student to attend their prom dressed in clothes traditionally of the opposite sex. The court concluded that the school board's dress regulations were reasonably related to the valid educational purposes of teaching community values and maintaining school discipline.<sup>26</sup> Rejecting the students' claim that the school board discriminated on the basis of sex by allowing female students, but not male students, to wear dresses, and male students, but not female students, to wear tuxedos, the court replied that the school dress code did not differentiate based on sex because it required all students to dress in conformity with the accepted standards of the community.<sup>27</sup>

This justification is indeed the most dangerous of all. The court permits the school board to enforce generalized "community values" on individual students, without regard to individual ideals or preferences.

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21. 392 F.2d 697 (Tex. App. 1968).

22. *Id.* at 702.

23. *Id.* at 703.

24. *Id.*

25. 655 F. Supp. 1353 (S.D. Oh 1987)

26. *Id.* at 1355.

27. *Id.* at 1356.

The court effectively adopts a “majority rules” approach in determining what are appropriate values they must recognize and protect; granting the “majority” of the community the power to define what is appropriate for everyone. When the majority holds all the power, what is to stop it from tyrannizing and oppressing a minority belief? The tyranny-of-the-majority approach the court takes in determining that a school administration may impose its own views on what are appropriate “community values” regarding dress is truly disheartening. Certainly, with all the power in the hands of the majority, there is no room for dissenting individual interests or diverse viewpoints. The court in *Harper* completely and indefensibly ignored the First Amendment’s protection against content-based (or viewpoint) censorship.

#### IV. EXCEPTIONS: NONCONFORMITY ACCEPTABLE FOR SOME

In contrast to *Harper*, courts have occasionally been persuaded to invalidate gender-based restrictions when a student is diagnosed with a “mental disorder.”<sup>28</sup> For instance, in *Doe v. Yunits*<sup>29</sup> a male student was diagnosed with “gender identity disorder,” which means that, although the student was born biologically male, she has a female gender identity.<sup>30</sup> The student began expressing her female gender by wearing make-up and traditionally “female” clothing. The school claimed this was a violation of the dress code that prohibited, among other things, “clothing which could be disruptive or distracting to the educational process or which could affect the safety of students.”<sup>31</sup> The court held that prohibiting a student suffering with gender identity disorder from wearing traditional female clothes violated the First Amendment. The court found that guided by a two-prong test, it must first determine whether the student’s symbolic acts constitute expressive speech, and if so, whether the school’s conduct was impermissible because it was meant to suppress that speech.<sup>32</sup>

According to the *Yunits* court, symbolic acts constitute expression if the actor’s intent to convey a particularized message is likely to be

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28. *Doe v. Yunits*, 2000 WL 33162199 (Jan. 10, 2003).

29. *Id.*

30. *Id.* at 1.

31. *Id.*

32. *Id.* at 3.



understood by those perceiving the message.<sup>33</sup> The court concluded that the student's message was likely to be understood by her peers because they were aware of her gender identity. The court also held that this conduct was not disruptive because if a biologically female student wore the same clothes she would be unnoticed by school officials.<sup>34</sup> Furthermore, the court determined (sympathetically, but ironically problematic) that her ability to express herself through dress is "important to her health and well-being ... and therefore [plaintiff's] expression is not merely a personal preference but a necessary symbol of her very identity."<sup>35</sup> Thus, the court established that an appropriate justification for gender nonconformity exists. However, the court strictly limited its application and undermined personal preference by restricting it to those diagnosed with a gender identity disorder.

This is troubling because it creates such a high standard for students who feel more comfortable in the traditional "opposite-sex" style of clothing, but have not been diagnosed with any "disorder." The court in *Yunits* stated that this conduct was undisruptive because it was not her clothes *per se*, but rather the fact that she was biologically male. So the court was willing to forgive her nonconformity because it was a "necessary symbol of [her] very identity."

However, under *Tinker*, mere fear or apprehension of a particular expression is not enough to suppress that expression: "school officials must show something more than mere desire to avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint."<sup>36</sup> Thus, if wearing clothing conventionally of the "opposite sex" is not disruptive, and the same clothing would be completely acceptable - even overlooked - if worn by the opposite sex, then there is no need to restrict the nonconformity exception to situations when it is a "necessary symbol of [a student's] very identity." Furthermore, who is to say what is "necessary" to one's very identity? In the case of the student in *Yunits*, her necessity derived (according to the court at least) from her gender identity disorder. However, for the rest of us, necessity seems to be pre-determined by societal norms. Thus, necessity has no objective form in relation to one's expression of gender identity; it is (and ought to be) a

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33. *Id.*

34. *Id.* at 4.

35. *Id.*

36. *Tinker*, 393 U.S. at 508-509.

completely subjective standard. Therefore, the foundation of what is “necessary” to one’s identity must be personal preference.

## V. CONCLUSION

According to the American Civil Liberties Union, “when school officials exclude or deny benefits to girls who do not conform to gender stereotypes from school activities, they ratify and reinforce outdated views of the relative qualities of men and women.”<sup>37</sup> In the case of Ceara Sturgis, the school sent her a message that her “masculine” appearance was so unacceptable that she was literally not fit to appear alongside her fellow classmates. Perpetuating gender conformity not only causes severe emotional distress to young people by forcing them to compromise their feelings in order to satisfy what is deemed acceptable, but also stifles the growth of our society as a whole, limiting people’s ability to see beyond rigid gender roles and classifications.

Courts only seem willing to invalidate gender-based dress codes when they are able to “remove” the particular student from his or her own gender group and place him or her in the “other” group. Consequently, gender-based dress codes are likely to be enforced against students who are able to “remain” in their own gender group, yet wish to transcend gender norms. Personal preference ought to be the deciding factor in determining what is “necessary” to one’s gender identity. Restricting dress preferences that do not interfere or disrupt school activities and do not invade the rights of others – as in the case of Ceara Sturgis – should be classified as unconstitutional.

Natalie Smith

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37. *Ceara Sturgis v. Covich County School Dist.*: complaint.

