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TRANSGENDER STUDENT DRESS: FREE SPEECH AND PROTECTED EXPRESSION IN PUBLIC SCHOOLS

INTRODUCTION

On February 12, 2008 fifteen-year-old Larry King was fatally shot by a classmate in the computer lab of his junior high school, allegedly because of his sexual orientation and gender identity.¹ Brandon McInerney pled guilty to King's murder in November of 2011 and was sentenced to twenty-one years in prison.² King was openly gay and had recently begun dressing in women's boots and accessories as well as wearing nail polish to school.³ Gay students have long faced discrimination at school. Larry King's case brings into focus another marginalized group—transgender students. While it is not clear that King identified as transgender, his style of dress did not conform to gender norms. At trial, the prosecution focused on King's gender presentation as a partial reason for his murder.⁴ School districts have challenged the rights of students like King to dress as they wish mainly because the choice can result in harassment and other disruptions to the classroom. Despite these very real concerns, transgender students have a constitutionally protected right to express their identities through dress.⁵

Transgender individuals who want to live openly face serious discrimination.⁶ This paper examines the First Amendment right of transgender public school students to dress as they choose in school. The paper further explores the legal methods by which schools may protect this right while maintaining a healthy, safe, and productive environment for all students. The First Amendment protects the free speech rights of students so long as the speech does not substantially interfere with the work of the school or impinge upon the rights of others.⁷ The choice of a student to dress as he or she pleases is an issue of free speech and expression which does not infringe upon the rights of fellow classmates and is therefore constitutionally

1. Catherine Saillant, *Gay Teen's Killer Takes 21-Year Deal*, L.A. TIMES, Nov. 22, 2011, <http://articles.latimes.com/2011/nov/22/local/la-me-1122-gay-shooting-20111122>.

2. *Id.*

3. Catherine Saillant, *Jury Unable to Reach Verdict in Killing of Gay Student, Larry King*, L.A. TIMES BLOG (Sept. 1, 2011), <http://latimesblogs.latimes.com/lanow/2001/09/gay-slaying-jury.html>.

4. *Id.*

5. "Sex assigned at birth" will be used throughout this paper to refer to biological sex.

6. See Stephanie Innes, *Meet Josie, 9: No Secret She's Transgender*, ARIZ. DAILY STAR, July 25, 2010, http://azstarnet.com/news/science/health-med-fit/meet-josie-no-secret-she-s-transgender/article_62e8719b-5b8d-5f99-80f3-71f00a41c334.html (noting that Josie is now homeschooled because of the discrimination she experienced at school).

7. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

permissible and protected.

However, the current reality for many transgender students cannot be ignored. Many of these children face serious harassment, and that reality often creates real danger and disruption within a school. The reactions of other students to a transgender student's dress may indeed create an impermissible substantial disturbance.⁸ The First Amendment generally does not allow the suppression of speech based on the reaction of the listener,⁹ but in the context of public schools this doctrine is less strict.¹⁰ Schools must work to implement policies which reach a balance between the protection of speech, the safety of students, and effective functioning of the school.

Other methods of protecting transgender students at school can be found outside the First Amendment, though each has its flaws. Schools may be liable for harassment of or injury to transgender students under the Title IX Education Amendments of 1972, which prohibit discrimination based on sex in schools that receive federal funding.¹¹ This approach is difficult, first, because it is unclear that transgender people are protected under sex discrimination statutes and, second, because the standards for Title IX sex discrimination are difficult to meet.¹² States and local governing bodies can enact legislation which specifically prohibits discrimination against or harassment of transgender students. Additionally, schools themselves may

8. See *Pinard v. Clatskanie Sch. Dist.*, 467 F.3d 755, 769 (9th Cir. 2006) (finding that boycotting a high school basketball game substantially disrupted and materially interfered with a school activity under the *Tinker* standard); *West v. Derby Unified Sch. Dist.*, 206 F.3d 1358, 1365 (10th Cir. 2003) (explaining that drawing a picture of the Confederate flag during class in violation of the school district's harassment and intimidation policy created a substantial disturbance under *Tinker*); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 990 (9th Cir. 2001) (finding that writing a poem about committing a school shooting followed by suicide constituted a substantial disturbance under *Tinker*); *Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield*, 134 F.3d 821, 828 (7th Cir. 1998) (explaining that an article about how to hack the high school's computer system would lead to a substantial disruption under *Tinker*); *Karp v. Becken*, 477 F.2d 171, 176 (9th Cir. 1973) (finding that carrying signs protesting the high school's refusal to renew the contract of an English instructor created a substantial disturbance under *Tinker* since officials reasonably feared provocation of an incident).

9. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

10. See *Tinker*, 393 U.S. at 507 (explaining that the Court has repeatedly emphasized the comprehensive authority of school officials to control conduct in the schools).

11. See 20 U.S.C. § 1681(a) (2006) (prohibiting federally-funded entities from discriminating on the basis of sex).

12. See *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1219 (10th Cir. 2007) (holding that Title VII sex discrimination prohibitions were inapplicable to a transgender bus driver who lived as a woman but had male genitalia); *Smith v. City of Salem*, 378 F.3d 566, 578 (6th Cir. 2004) (holding that a transgender person is protected under Title VII when discriminated against for nonconforming gendered behavior); *Schwenk v. Hartford*, 204 F.3d 1187, 1203 (9th Cir. 2000) (finding protection for a transgender person who brought a sex discrimination claim under California's Gender Motivated Violence Act); *Schroer v. Billington*, 424 F. Supp. 2d 203, 213 (D.D.C. 2006) (denying the defendant's motion to dismiss because there were facts that could demonstrate that the employer discriminated on the basis of sex when refusing to hire a woman because of her transgender status).

adopt policies preventing harassment and bullying of students based on their transgender status. The law regarding these types of school policies remains unsettled, and their adoption is not without risk.¹³ Courts should also embrace a standard set forth in the Supreme Court's seminal student speech case, *Tinker v. Des Moines Independent Community School District*,¹⁴ and prohibit speech that interferes with the rights of others,¹⁵ although this presents its own challenges.¹⁶ Considering all alternatives, transgender students should look to the First Amendment's Free Speech Clause for protection of their clothing choices at school.

I. BACKGROUND

A. What Does Being Transgender Mean for Children?

Transgender is an umbrella term used to describe individuals whose gender identity and expression do not match their biological sex.¹⁷ Gender identity refers to the way a person perceives himself or herself as male or female.¹⁸ Gender expression is the way a person conveys his or her gender identity through dress, speech, behavior, and other characteristics.¹⁹ There is no exact answer as to why some people are transgender, and no concrete statistics exist on how many people identify as transgender because the group is so varied.²⁰ Some transgender individuals elect to live as the gender opposite of their biological sex and often make the transition between genders both in their personal and professional lives.²¹

A person may know that he or she is transgender from childhood.²² In recent years the media has covered many public school children who, with the support of their parents, choose to dress in a manner that does not

13. See *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 202 (3d Cir. 2001) (holding a school district's antidiscrimination policy to be invalid).

14. 403 U.S. 503 (1969).

15. *Id.* at 509.

16. See *Saxe*, 240 F.3d at 205-06 (explaining that like the high burden in Title IX claims, which requires the school to act with "deliberate indifference to known acts of harassment," speech that interferes with the rights of others in the school may still be protected under the First Amendment).

17. See HUMAN RIGHTS CAMPAIGN, TRANSGENER VIBILITY GUIDE 1 (2009), http://www.hrc.org/files/assets/resources/transgender_visibility_guide.pdf (explaining what the term "transgender" means and providing resources for understanding transgender individuals); AM. PSYCHOL. ASS'N, ANSWERS TO YOUR QUESTIONS ABOUT TRANSGENER PEOPLE, GENDER IDENTITY, AND GENDER EXPRESSION 1 (2011), <http://www.apa.org/topics/sexuality/transgender.pdf> (defining and explaining transgender status).

18. *Id.*

19. *Id.*

20. *Id.* at 5-6.

21. *Id.* at 4.

22. Innes, *supra* note 6.

conform to their sex assigned at birth.²³ This realization may be diagnosed as Gender Identity Disorder,²⁴ but not all transgender children are considered to have this condition.²⁵ As public awareness grows about transgender children and transgender people more generally, increasing numbers of transgender youth are choosing to dress in a way that does not conform to the norms of their sex assigned at birth.²⁶ Parents are beginning to recognize transgender individuals' identities as valid and acceptable.²⁷ Some children begin hormone therapy to prevent the development of secondary sex characteristics while still in school.²⁸ Many choose to express their gender identity through clothing, hairstyle, and accessories.²⁹ This new emergence of the expression of gender variance in school age children has become a serious issue for schools struggling to balance the rights of their students with safety concerns.

Individuals who identify as transgender sometimes seek to be perceived by society in a way that may fall outside of the traditional male-female gender binary. Often this goal is frustrated by societal pressure to remain within the existing strict gender construction. S. Bear Bergman describes this idea in the book, *Butch is a Noun*.³⁰ Ze³¹ writes, "I am not in control of my

23. See, e.g., Innes, *supra* note 6 (noting that Josie and her family have been featured on a variety of major television networks and programs and a documentary on transgender children); Alan B. Goldberg & Joneil Adriano, 'I'm a Girl' – *Understanding Transgender Children*, ABC NEWS (Apr. 27, 2007), <http://abcnews.go.com/2020/story?id=3088298&page=1> [hereinafter Goldberg & Adriano, *Understanding Transgender Children*] (describing the life of Jazz, a transgender child); Hanna Rosen, *A Boy's Life*, THE ATLANTIC, Nov. 2008, <http://www.theatlantic.com/magazine/archive/2008/11/a-boys-life/307059/> (describing the life of a transgender child named Brandon).

24. *Gender Identity Disorder*, PUBMED HEALTH (Feb. 13, 2012), <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002495/>.

25. See AM. PSYCHOL. ASS'N, *supra* note 17, at 11 (explaining that a psychological state is considered a mental disorder only if it causes significant stress or disability).

26. See Innes, *supra* note 6 ("Josie is unique not only because she transitioned from being biologically male to identifying as female at such a young age, but because she and her family are so public about it.").

27. See, e.g., Goldberg & Adriano, *supra* note 23 (discussing the transition from living as male to living as female at home and at school); Alan B. Goldberg & Joneil Adriano, *I Want to be Seen as Male*, ABC NEWS (Apr. 26, 2007), <http://abcnews.go.com/2020/story?id=3077906&page=1> [hereinafter Goldberg & Adriano, *I Want to be Seen as Male*] (discussing the transition from living as female to living as male at home and at school); Madison Park, *Transgender Kids: A Painful Quest to be Who They Are*, CNN HEALTH (Sept. 27, 2011), <http://www.cnn.com/2011/09/27/health/transgender-kids/> (describing the choice of several families to allow their children to live as the opposite sex at home and at school).

28. Park, *supra* note 27.

29. See Goldberg & Adriano, *I Want to be Seen as Male*, *supra* note 27 (noting that when a teenager began his transition from female to male, he immediately cut his hair short and purchased all clothing and accessories from the men's department).

30. S. BEAR BERGMAN, *BUTCH IS A NOUN* (2006).

31. Bergman chooses not to use traditional gendered pronouns and prefers "hir" and "ze." *Id.* "Ze" is a subjective pronoun while "hir" is an objective and possessive pronoun. *Id.* at 10.

identity. I am being identified by others and living with the results. . . . I can get people to see me as whatever gender I want. But that's if I'm willing to perform a recognizable identity, a recognizable gender."³² Expression of gender through dress is a means of enabling transgender individuals to be perceived as they desire.³³ This gendered expression is a means of conveying one's identity and a way of controlling the perceptions of others in order to live fully as the gender one chooses. Such expression allows transgender individuals to communicate identity.³⁴ This kind of identity communication has long been constitutionally protected in varied forms ranging from free speech to freedom of religion to freedom of association by the First Amendment.³⁵

B. Title IX Protections

Transgender students may also have some protection of their clothing choices at school under the 1972 Education Amendments of Title IX.³⁶ This law provides that "[n]o person in the United States 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."³⁷ Transgender students may have a right to dress how they choose at school if policing their dress is considered sex-based discrimination under Title IX. However, transgender people do not always fit into the male-female sex binary. Some individuals identify with the sex opposite that of their biological sex, some physically change their bodies to reflect gender identity, and still others fall somewhere between male and female in their self-perception.³⁸ As a result of these varied expressions, the law is unsettled on how to deal with cases of sex discrimination involving transgender people.³⁹ This is true when transgender plaintiffs bring claims under any statute which prohibits sex discrimination, though Title IX is most relevant to the public school context.⁴⁰

Courts have taken several different approaches to transgender plaintiffs

32. *Id.*

33. *Id.* at 14.

34. *Id.*

35. U.S. CONST. amend. I.

36. 20 U.S.C. § 1681(a).

37. *Id.*

38. AM. PSYCHOL. ASS'N, *supra* note 17, at 1-2.

39. Compare *Schroer*, 577 F. Supp. 2d at 300 (holding that an employer discriminated on the basis of sex when not hiring a woman because of her transgender status), *Schwenk*, 204 F.3d at 1205 (finding protection for a transgender person who brought a sex discrimination claim under California's Gender Motivated Violence Act), and *Smith*, 378 F.3d at 570 (holding that a transgender person is protected under Title VII when discriminated against for nonconforming gendered behavior), with *Etsitty*, 502 F.3d at 1220 (holding that Title VII sex discrimination prohibitions were inapplicable to a transgender bus driver who lived as a woman but had male genitalia).

40. 20 U.S.C. § 1681(a).

and sex discrimination. Under the lens of employment discrimination the D.C. Circuit held that discrimination against a transgender individual is sex discrimination because the negative treatment is based on the person's choice to live as a particular sex.⁴¹ The Ninth Circuit followed this approach when addressing a claim brought under the Gender Motivated Violence Act.⁴² The Tenth Circuit, however, held that a transgender individual who has not undergone sex reassignment surgery does not qualify for protection under sex discrimination employment statutes.⁴³ Finally, taking yet another position, the Sixth Circuit held that a transgender person is protected under sex discrimination employment statutes if the person is discriminated against because of gendered behavior that does not conform to his or her biological sex.⁴⁴

There has been recent progress for the rights of transgender individuals in sex discrimination cases both through case law and executive policy. In *Glenn v. Brumby*,⁴⁵ the plaintiff, Glenn, sued her employer alleging that she was fired after disclosing plans to undergo sex reassignment surgery.⁴⁶ Glenn brought suit under the Equal Protection Clause because her employer was a government agency.⁴⁷ Glenn alleged she was discriminated against because of her sex and her medical condition, Gender Identity Disorder.⁴⁸ The Eleventh Circuit looked to *Price Waterhouse v. Hopkins*⁴⁹ in which the Supreme Court held that action against a female employee because of her masculine characteristics is sex discrimination.⁵⁰ Based on this decision, the Eleventh Circuit held that because gender stereotyping is considered sex discrimination, discrimination against transgender individuals is also necessarily sex discrimination.⁵¹ This is because, by definition, transgender individuals are adopting identities and behaviors outside the gender binary and discrimination against such behavior is impermissible discrimination based on gender stereotypes.⁵² The court concluded that "discriminatory state action could not stand on the basis of gender stereotypes," and that "a government agent violates the Equal Protection Clause's prohibition of sex-

41. See *Schroer*, 577 F. Supp. 2d at 308 (holding that discrimination based on sex stereotypes against a transgender person in an employment decision is illegal under Title VII sex discrimination prohibition).

42. *Schwenk*, 204 F.3d at 1200.

43. See *Etsitty*, 502 F.3d at 1220 (holding that Title VII sex discrimination prohibitions were inapplicable to a transgender bus driver who lived as a woman but had male genitalia).

44. See *Smith*, 378 F.3d at 570 (holding that a transgender person is protected under Title VII when discriminated against for nonconforming gendered behavior).

45. 663 F.3d 1312 (11th Cir. 2011).

46. *Id.* at 1314.

47. *Id.*

48. *Id.*

49. 490 U.S. 228 (1989).

50. *Id.* at 251.

51. *Glenn*, 663 F.3d at 1317.

52. *Id.* at 1316.

based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity.”⁵³

In addition, the Obama administration has embraced the inclusion of discrimination based on sexual orientation or gender identity in its interpretation of Title IX.⁵⁴ The Department of Education circulated a letter explaining the federal laws schools must follow when addressing the issue of bullying.⁵⁵ The letter specifically indicates that gender-based harassment is actionable under Title IX.⁵⁶ The Obama administration defined impermissible harassment based on gender as “acts of verbal, nonverbal, or physical aggression, intimidation or hostility based on sex or sex-stereotyping.”⁵⁷ The letter specifically notes that Title IX discrimination includes both harassment for “exhibiting what is perceived as a stereotypical characteristic for [the student’s] sex, or for failing to conform to stereotypical notions of masculinity or femininity.”⁵⁸ The administration specifically found that harassment of transgender students is prohibited under Title IX.⁵⁹ The letter also notes that schools consequently have an obligation to remedy the harassment and eliminate the hostile environment that it creates.⁶⁰

Public schools, as state-funded entities, must comply with Title IX.⁶¹ However, because the law is unsettled on whether to treat transgender-based discrimination as sex-based discrimination, plaintiffs are left with a potentially problematic recourse. Employment discrimination cases involving transgender plaintiffs are not per se actionable; a significant circuit split remains on the issue of whether or not transgender plaintiffs should be afforded sex discrimination protections.⁶² While the Obama administration has interpreted sex discrimination claims in schools under Title IX to include transgender students’ cases,⁶³ it is not clear that the Supreme Court or

53. *Id.* at 1319-20.

54. Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. Office for Civil Rights, to Colleagues (Oct. 26, 2010), *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

55. *Id.*

56. *Id.* at 7.

57. *Id.*

58. *Id.* at 7-8.

59. *Id.*

60. Ali, *supra* note 54, at 8.

61. 20 U.S.C. § 1681(a).

62. Compare *Schroer*, 424 F. Supp. 2d. at 213 (denying the defendant employer’s motion to dismiss because there were facts that, if proven, would support a finding that the employer discriminated on the basis of sex when refusing to hire a woman because of her transgender status), *Schwenk*, 204 F.3d at 1203 (finding protection for a transgender person who brought a sex discrimination claim under California’s Gender Motivated Violence Act), and *Smith*, 378 F.3d at 572 (holding that a transgender plaintiff sufficiently stated a claim for sex discrimination under Title VII when the discrimination stemmed from the plaintiff’s nonconforming gendered behavior), with *Etsitty*, 502 F.3d at 1220 (holding that Title VII sex discrimination prohibitions were inapplicable to a transgender bus driver who lived as a woman but had male genitalia).

63. Ali, *supra* note 54, at 8.

subsequent presidential administrations will agree.

In light of this uncertainty, transgender students should also look to the First Amendment for protection of gender expression. By looking to free speech protections, transgender students may better characterize the way they dress as a protected right. Approaching nonconforming dress as expressive speech allows students to bring their rights within a constitutional realm. By so doing, public schools as state actors will be obligated to respect the clothing choices of their transgender students.

C. Free Speech Rights and Public Schools

In order to understand the Free Speech rights of transgender public school students, we must first examine Free Speech rights of public school students more generally. The First Amendment of the Constitution provides that “Congress shall make no law . . . abridging the freedom of speech.”⁶⁴ This prohibition is extended to the states, and therefore to local public school authorities, through the Fourteenth Amendment.⁶⁵

The First Amendment protects both pure speech and expressive conduct.⁶⁶ Pure speech refers to the actual use of words to advocate for a message and is afforded high constitutional protection⁶⁷ even where the actor is physically silent.⁶⁸ Pure speech conveys a message, often but not always political, to its observers. The content of pure speech is protected by the First Amendment and the government may only regulate the time, place, and manner of the speech.⁶⁹ Conduct, which is often used in conjunction with pure speech, may be more closely regulated by the government.⁷⁰ The Supreme Court made this distinction in *United States v. O'Brien*⁷¹ when it held the act of burning draft cards in protest of the Vietnam War was not

64. U.S. CONST. amend. I.

65. See *Schneider v. New Jersey (Town of Irvington)*, 308 U.S. 147, 160 (1939) (“The freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state.”).

66. *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

67. See *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (finding unconstitutional a law forbidding even vague advocacy of violence).

68. See *Cohen v. California*, 403 U.S. 15, 26 (1971) (holding that the state violated plaintiff’s speech rights by convicting him for wearing a jacket which read “F-ck the draft” in a state courthouse without engaging in other speech).

69. See *Ward v. Rock Against Racism*, 491 U.S. 781, 798-800 (1989) (explaining the standard for permissible time, place, and manner restrictions on speech).

70. See *Johnson*, 491 U.S. at 403-04 (discussing the constitutional scrutiny applied to government regulations intended or not intended to suppress free expression); *O'Brien*, 391 U.S. at 377 (“[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”).

71. 391 U.S. 367 (1968).

protected by the First Amendment.⁷² The *O'Brien* court cautioned it would not "accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."⁷³ The Court then held that conduct may be regulated where the government can show an important or substantial interest in the regulation "unrelated to the suppression of free expression," and where the regulation is no greater than is necessary to reach the government's interest.⁷⁴

Following *O'Brien*, the Court more clearly explained what constitutes protected expressive conduct under the First Amendment. In *Spence v. Washington*,⁷⁵ a man taped a peace sign to and displayed an American flag upside down outside his residence as a commentary on the United States invasion of Cambodia and the Kent State massacre.⁷⁶ He was convicted of violating a statute in Washington which prohibited modification of the flag.⁷⁷ The Court held that Spence's speech was protected under the First Amendment as expressive conduct.⁷⁸ Under the *Spence* ruling, conduct is considered expressive whenever it is intended to convey a particularized message and the message is likely to be understood by those who view it.⁷⁹ In this case, Spence was clearly conveying his disapproval with recent government actions in a way observers were likely to understand.⁸⁰

The First Amendment applies differently in a public school setting. While school students are not afforded the same level of First Amendment protection as adults in other contexts, they also do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁸¹ The Supreme Court first ruled on speech in schools in *Tinker v. Des Moines Independent Community School District*. John Tinker, along with two other students, planned to wear black armbands to school to protest the Vietnam War.⁸² In response to this plan, school officials specifically adopted a policy banning the armbands.⁸³ Tinker and his friends wore the bands and were suspended.⁸⁴ The Supreme Court described the wearing of the

72. *Id.* at 372.

73. *Id.* at 376; see also *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.").

74. *O'Brien*, 391 U.S. at 377.

75. 418 U.S. 405 (1974).

76. *Id.* at 408.

77. *Id.* at 407-08.

78. *Id.* at 406.

79. *Id.* at 410-11.

80. *Id.* at 408, 415.

81. *Tinker*, 393 U.S. at 506.

82. *Id.* at 504.

83. *Id.*

84. *Id.*

armbands as “closely akin to ‘pure speech’”⁸⁵ and held that students are entitled to free speech protection at school so long as the speech does not “materially and substantially interfere[] with the requirements of appropriate discipline in the operation of the school”⁸⁶ and does not “collid[e] with the rights of others.”⁸⁷ Additionally the Court noted that schools may not bar student expression because of a “fear or apprehension of disturbance”⁸⁸ and must show that any restrictive action they take “was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”⁸⁹ Here the Court upheld Tinker’s right to engage in a “passive expression of opinion.”⁹⁰

The Court limited student speech in *Bethel School District v. Fraser*,⁹¹ holding that schools may prohibit lewd and offensive student speech.⁹² In this case, public school student Mathew Fraser gave a speech supporting his friend’s candidacy for student government employing a graphic extended metaphor for sexual intercourse.⁹³ The school suspended Fraser for three days and made him ineligible to give a graduation address for his class.⁹⁴ The Court held that, even though Fraser’s speech did not cause a substantial disturbance, it was not protected under the First Amendment.⁹⁵ Schools may prohibit “vulgar,” “lewd,” or “indecent” speech because to permit such speech “would undermine the school’s basic educational mission.”⁹⁶

In *Hazelwood School District v. Kuhlmeier*⁹⁷ the Supreme Court again limited public school student speech rights.⁹⁸ The Court held that the school was within its rights to prevent the publication of material in the school newspaper that could implicate students’ right to privacy.⁹⁹ The Court additionally held that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”¹⁰⁰

The Court most recently dealt with public school First Amendment rights in *Morse v. Frederick*.¹⁰¹ Frederick was at a school event to watch the

85. *Id.* at 505.

86. *Id.* at 513 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

87. *Tinker*, 393 U.S. at 513.

88. *Id.* at 508.

89. *Id.* at 509.

90. *Id.* at 508, 514.

91. 478 U.S. 675 (1986).

92. *Id.* at 685-86.

93. *Id.* at 677-78.

94. *Id.* at 678.

95. *Id.* at 685.

96. *Id.*

97. 484 U.S. 260 (1988).

98. *Id.* at 273.

99. *Id.* at 276.

100. *Id.* at 273.

101. 551 U.S. 393 (2007).

Olympic Torch pass through his town when he unfurled a large banner, which read, "BONG HiTS 4 JESUS" across the street from his school.¹⁰² The school's principal demanded that Frederick take down the banner and suspended him for ten days.¹⁰³ Frederick sued alleging his free speech rights were violated.¹⁰⁴ The Court held that because Frederick's banner could reasonably be interpreted as promoting the use of illegal drugs,¹⁰⁵ and because the school had a compelling interest in deterring drug use by students,¹⁰⁶ the school did not violate Frederick's free speech rights by prohibiting the banner's display at the school event.¹⁰⁷

II. DISCUSSION

A. Transgender Students' Dress is Expressive Conduct Protected by the First Amendment

The right of transgender public school students to dress in a way that does not conform to gender norms is protected expressive speech. The Supreme Court in *Spence* held that protected expressive conduct must send a message understood by those who observe it.¹⁰⁸ Dress is an example of sending such protected message; through dress human beings communicate fundamentally who they are.¹⁰⁹ Men and women who dress according to gender norms implicitly communicate to others their gender, which is a discrete, fundamental identifying characteristic.¹¹⁰ In the same way, a transgender individual conveys a fundamental message of self when he or she chooses to dress in a way that expresses gender identity. This expression is distinct from other, unprotected forms of self-expression in public schools. Transgender students are not seeking to convey their unique selves through hair color or eccentric clothing styles; they are instead showing their classmates and community their true gender identities. Unlike traditional

102. *Id.* at 397.

103. *Id.* at 398.

104. *Id.* at 399.

105. *Id.* at 402.

106. *Id.* at 407.

107. *Morse*, 551 U.S. at 409-10.

108. *Spence*, 418 U.S. at 410-11.

109. Janet Ainsworth, *What's Wrong with Pink Pearls and Cornrow Braids?: Employee Dress Codes and the Semiotic Performance of Race and Gender in the Workplace*, in *Law, Culture, and Visual Studies*, in *LEGAL VISUAL SEMIOTICS* (Anne Wagner & Richard K. Sherwin, eds.) (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1601033, at 4-5.

110. See *id.* at 13 ("Specifically, characteristically 'feminine' clothing and grooming choices do, in fact, cause other people to react to those signals. . . . [O]thers draw conclusions about an individual's biological sex from gender-linked appearance cues"); cf. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that laws dealing with members of discrete, insular categories might be subject to a higher level of constitutional scrutiny than rational basis review).

adolescent expressions of self, transgender students use clothing to express to others one of the most fundamental aspects of who they are.¹¹¹

Human beings have long used dress to express gender identity.¹¹² For transgender people, dressing to express gender identity helps to align one's inner self with one's outer appearance and enables others to see and treat the person in the way he or she desires.¹¹³ In her work on identity and dress, Janet Ainsworth explains the importance of congruence between one's inner sense of self and outward appearance.¹¹⁴ People who are unable to communicate their inner identities through dress and other physical expressions often suffer low self esteem, alienation, and depression.¹¹⁵ These feelings are exacerbated when the person is forced to conform to social norms such as dressing as a male when one identifies as female or vice versa.¹¹⁶

Ainsworth explains,

Dress as a coded symbolic system both locates an individual within a social matrix and serves as an expressive device to communicate to others the wearer's sense of personal identity. . . . Adopted personal appearance—dress, jewelry, and grooming—provide an ever-present resource for the non-verbal communication of identity and social position. . . . Dress is never neutral and meaningless¹¹⁷

Like the workplace for adults, school is perhaps the most important space of social interaction for children. Ainsworth describes this idea writing, "workers think of the workplace as a primary venue for the realization and projection of their authentic selves."¹¹⁸ Similarly, children understand that school is the place where they most strongly interact with others and project a sense of self to the larger world.¹¹⁹ This sense of self and its healthy projection for transgender students is protected by the First Amendment.

The law requires that in order for expressive conduct to be

111. See Ainsworth, *supra* note 109, at 5 ("Dress is never neutral and meaningless but is inextricably culturally coded. When a coded signal of identity is displayed through dress and appearance, observers react based on what they infer about that person on the basis of their appearance.").

112. Jill Goodman et al., *Doing Dress and the Construction of Women's Gender Identity*, 14 J. OCCUPATIONAL SCI. 100, 102 (2007).

113. See Ainsworth, *supra* note 109, at 13 ("Gender-linked dress and grooming also encourages others to infer traditional gender-role compliance by the wearer.").

114. *Id.* at 2.

115. *Id.* at 4.

116. *Id.*

117. *Id.* at 4-5.

118. *Id.* at 19.

119. See Innes, *supra* note 6 (discussing a young transgender girl's sharing her gender identity despite her mother's fear of harassment in school); Rosen, *supra* note 23 (describing a young transgendered child's wish to live as a girl, despite years of attending school as a boy).

constitutionally protected it must send a message.¹²⁰ A transgender student's choice to dress in a way that does not conform sends a message by conveying his or her identity to others. The Supreme Court has acknowledged that a person's identity, in and of itself, can send a message understood by others and society more generally.¹²¹

In *Boy Scouts of America v. Dale*,¹²² the Court held that the Boy Scouts could prohibit a gay person from being a scout leader because the presence of a gay leader conflicted with the organization's message.¹²³ The Boy Scouts endorse "morally straight" and "clean" behavior in their code of conduct, and feel that homosexual behavior does not meet these standards.¹²⁴ The organization sought to prevent Dale, an openly gay man, from leading a scout troop because having a gay leader conflicted with the message the Boy Scouts wished to convey to the public.¹²⁵ Under a Freedom of Association analysis the Court noted that, "Dale's *presence* in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct"¹²⁶ From the principle that identity itself sends a message understood by others, methods of expressing that identity are arguably protected by the First Amendment as expressive conduct. Methods of conveying identity, such as the clothing worn by transgender students, fall into this category of protected speech.

Transgender student dress closely resembles the speech at issue in the *Tinker* case. The students in *Tinker* sought to express a message through their clothing. They wore armbands to communicate their disapproval of the war in Vietnam.¹²⁷ The Court considered this expression through clothing worthy of First Amendment free speech protection.¹²⁸ In a similar way, transgender students use their clothing to convey a particular message to others: "this is who I am." The clothing itself is protected expression fairly considered political, though it need not be in order to receive First Amendment protection.

The development of rights for transgender individuals is an evolving area of law and the very act of dressing in a way that does not conform to one's sex assigned at birth may be understood as political.¹²⁹ Regardless of

120. *Spence*, 418 U.S. at 410-11.

121. See *Boy Scouts of America v. Dale*, 530 U.S. 640, 693 (2000) (Stevens, J., dissenting) (explaining that the Court has opined that a gay and lesbian group's participation in a parade would likely be perceived by others as the parade owners' approval of the group's message).

122. *Id.* at 640 (majority opinion).

123. *Id.* at 655-56.

124. *Id.* at 649.

125. *Id.* at 644.

126. *Id.* at 653 (emphasis added).

127. *Tinker*, 393 U.S. at 504.

128. *Id.* at 514.

129. See *Spence*, 418 U.S. at 410 (finding that the context in which an article of clothing is worn can give meaning to the article of clothing that consequently categorizes the act as a form

whether or not a transgender student is attempting to communicate a political message, his or her dress expresses a message to others akin to the pure speech of Tinker and his classmates. Such a message, absent a substantial disturbance, may not be restricted by school officials.

Courts have recognized other forms of dress as expressive, protected First Amendment activity. This is especially true when the clothing in question is a fundamental expression of the wearer's identity and interference with the clothing choice comes directly from a state institution. In *Forde v. Zickefoose*,¹³⁰ a Muslim prisoner sued alleging she was forced to have her identification card photo taken without her hijab and was made to display this photo regularly within the prison.¹³¹ This contradicted her belief that no man outside her family should see her without the hijab.¹³² The court refused to dismiss the plaintiff's First Amendment claims because the prison did not demonstrate that the policy was the most valid and least restrictive means of promoting security.¹³³

In *Forde*, the dress at issue was an expression of the plaintiff's religious identity, and the restriction upon it came directly from the state.¹³⁴ Religious identity expression, the court understood, is protected by the First Amendment.¹³⁵ Similarly, in 2003, a sixth grade student in Oklahoma was suspended from school twice for wearing a hijab.¹³⁶ With the aid of a civil liberties organization she brought a suit that settled in 2004.¹³⁷ As part of the settlement, the court upheld the student's right to wear a hijab in school.¹³⁸ Currently, there are no state laws forbidding public school students from wearing religious symbolic clothing.¹³⁹ The only existing restrictions on religious dress in schools are designed to keep teachers from endorsing a particular religion in violation of the Establishment Clause.¹⁴⁰

While the above cases highlight constitutional protections for expression of identity through dress, they also involve First Amendment protection of freedom of religion. This class of protection is separate from free speech rights.¹⁴¹ Courts have also considered free speech rights in the context of

of protected speech).

130. 612 F. Supp. 2d 171 (D. Conn. 2009).

131. *Id.* at 175.

132. *Id.*

133. *Id.* at 179.

134. *Id.* at 177.

135. *Id.* at 180.

136. Stefanie Walterick, *The Prohibition of Muslim Headscarves from French Public Schools and Controversies Surrounding the Hijab in the Western World*, 20 TEMP. INT'L & COMP. L.J. 251, 268 (2006).

137. *Id.*

138. *Id.*

139. *Id.* at 267.

140. *See id.* at 264-65 (explaining that some states have statutes prohibiting public school teachers from wearing religious clothing in the classroom).

141. *See* U.S. CONST. amend. I (describing the prohibition on Congress from making any law respecting an establishment of religion or prohibiting the free exercise of religion, as well as

dress independent of religious freedom. In *Chalifoux v. New Caney Independent School District*,¹⁴² a Texas federal district court recognized that expressive speech and freedom of religion are often combined into a greater First Amendment claim.¹⁴³ In the case, students at a public high school sued alleging a violation of their First Amendment rights when the school prohibited them from wearing rosaries as necklaces.¹⁴⁴ The court found that this expression through dress was protected both under freedom of religion and free speech First Amendment rights.¹⁴⁵ The court treated the school's policy barring rosaries as an impermissible restriction on pure speech.¹⁴⁶ Further, the court found that the rosaries were intended to communicate a message to others and were similar to protected symbolic speech.¹⁴⁷

The dress of transgender students, like clothing worn for a religious reason, communicates a symbolic message. This message is protected regardless of whether or not it has a particular religious context. Choosing to dress in a way that conveys one's gender identity sends a message to others that is readily understood. Transgender students have a right to send this message and are protected by the First Amendment's free speech clause.

However, courts do not always interpret choices in dress as expressive conduct. In a variety of employment contexts, plaintiffs have unsuccessfully argued that a prohibition on certain types of expression through dress violated their rights to identity expression.¹⁴⁸ In *Rogers v. American Airlines, Inc.*,¹⁴⁹ the plaintiff claimed that her employer's rule forbidding corn row braids discriminated against African American women. The plaintiff argued that corn rows were traditionally worn as a unique expression of racial identity.¹⁵⁰ The court denied the plaintiff's claim and noted that corn rows were "not the product of natural hair growth but of artifice."¹⁵¹ While the court did not employ a free speech analysis, it did reject the idea that hair

from abridging the freedom of speech).

142. 976 F. Supp. 659 (S.D. Tex. 1997).

143. See *id.* at 664-65 (explaining that the First Amendment protects symbolic speech as a form of religious expression).

144. *Id.* at 664.

145. *Id.* at 667.

146. *Id.* at 666.

147. *Id.*

148. See, e.g., *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1106 (9th Cir. 2006) (holding that a requirement that only female employees wear makeup did not form the basis of a sex discrimination case); *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 233 (S.D.N.Y. 1981) (stating that an employee's allegations regarding a corporate hairstyle policy did not discriminate against the plaintiff's ethnicity, race, or identity); *Doe v. Boeing Co.*, 846 P.2d 531, 538 (Wash. 1993) (finding that an employer did not need to alter its dress code to accommodate a transgender employee when such accommodation was not reasonably necessary for that employee to complete the job).

149. 527 F. Supp. 229 (S.D.N.Y. 1981).

150. *Rogers*, 527 F. Supp. at 231-32.

151. *Id.* at 232.

braiding sends a message of identity.¹⁵²

In *Jespersen v. Harrah's Operating Company*,¹⁵³ the plaintiff alleged that her employer discriminated against her by firing her after she refused to comply with a policy requiring all female employees to dress in a feminine style and to wear makeup.¹⁵⁴ The plaintiff, while female, preferred to dress in a more masculine style.¹⁵⁵ The court held that the policy did not constitute sex discrimination.¹⁵⁶ Further, the *Jespersen* court dismissed the plaintiff's argument that the policy hindered her expression of self.¹⁵⁷

Finally in *Doe v. Boeing*,¹⁵⁸ plaintiff Jane Doe, a transgender employee, sued alleging she was fired because of her transgender status.¹⁵⁹ Jane was fired because she wore a pink pearl necklace after having been specifically directed not to dress in an overtly female fashion.¹⁶⁰ The court looked to Jane's diagnosis of Gender Dysphoria¹⁶¹ and concluded that it was not a disability her employer had a duty to accommodate.¹⁶² The court did not believe Jane's choice to dress in a female fashion was a protected expression of identity.¹⁶³

Looking to the greater context of constitutional law, transgender student dress in public schools *is* protected by the First Amendment. The aforementioned cases are statutory¹⁶⁴ and involve private employers not subject to constitutional standards.¹⁶⁵ Public schools, as state actors, are held

152. *Id.*

153. 444 F.3d 1104 (2006).

154. *Id.* at 1107.

155. *Id.* at 1108.

156. *Id.* at 1106.

157. *Id.* at 1108, 1113.

158. 846 P.2d 531 (Wash. 1993).

159. *Id.* at 534.

160. *Id.*

161. This is not the correct term. The current version of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) identifies this condition as Gender Identity Disorder. DSM-V, due to be published in May 2013, will rename the condition Gender Dysphoria. See J. Bryan Lowder, *Being Transgender Is No Longer a Disorder: The American Psychiatric Association Salutes The T In LGBT*, SLATE (Dec. 3, 2012), http://www.slate.com/articles/health_and_science/medical_examiner/2012/12/dsm_revision_and_sexual_identity_gender_identity_disorder_replaced_by_gender.html ("[I]n the DSM-5, which is due to be published in May 2013, GID will be replaced with the more neutral term *gender dysphoria*.").

162. *Doe*, 846 P.2d at 537-38.

163. *Id.* at 538.

164. The cases all arise under Title VII and state employment discrimination laws. See *Jespersen*, 444 F.3d at 1106 (arising under Title VII); *Rogers*, 527 F. Supp. at 231 (arising under Title VII); *Doe*, 846 P.2d at 534 (arising under Washington's Law Against Discrimination).

165. See *Doe*, 846 P.2d at 538 (holding that an employer did not have the duty to accommodate an employee with Gender Identity Disorder); see also *Jespersen*, 444 F.3d at 1113 (holding that an employer did not discriminate based on sex when it required a female employee to dress in a more feminine style); *Rogers*, 527 F. Supp. at 231 (involving a private employer discrimination action).

to stricter standards under the Constitution.¹⁶⁶ Through *Tinker*, the Supreme Court set forth distinct free speech protections for students which include expression through dress.¹⁶⁷ While the message Tinker and his friends conveyed to their peers is quite different than that sent by transgender students, the case supports the premise that dress can send a message of identity.¹⁶⁸

A distinction exists between the identity expression of transgender students and less fundamental expressions of self through dress. Many jurisdictions have upheld school dress codes and uniform requirements ruling such regulations do not violate free speech rights.¹⁶⁹ Courts have enforced restrictions against baggy jeans,¹⁷⁰ male students wearing earrings,¹⁷¹ male students wearing long hair,¹⁷² and even against traditional Native American dress.¹⁷³

However, in an unreported case, a Massachusetts court specifically found that a school violated a transgender student's right to expression by forbidding her to dress as a female at school.¹⁷⁴ The court upheld a preliminary injunction prohibiting the school from prohibiting the student's clothing choices.¹⁷⁵ The school's dress code did not allow "clothing which could be disruptive or distracting to the educational process or which could affect the safety of students."¹⁷⁶ On numerous occasions, the school principal asked the student to go home and change whenever she dressed as a female.¹⁷⁷ The student continued to wear bras, skirts, wigs, and makeup to school.¹⁷⁸ Finally, the school refused to allow the student to enroll the following year unless she agreed to dress as a male, but agreed to provide her a home tutor.¹⁷⁹ The plaintiff sued under a Massachusetts statute and the state constitution and the court employed a First Amendment free speech

166. See U.S. CONST. amend. I (applying only to government actors).

167. *Tinker*, 393 U.S. at 507-08.

168. *Id.* at 508.

169. See *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 438 (9th Cir. 2008) (holding that the school's dress code did not violate students' expressive conduct free speech rights); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 393 (6th Cir. 2005) (same); *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 443-44 (5th Cir. 2001) (same); *Littlefield v. Forney Indep. Sch. Dist.*, 108 F. Supp. 2d 681, 695 (N.D. Tex. 2000) (same).

170. *Bivens v. Albuquerque Pub. Schs.*, 899 F. Supp. 556, 561 (D.N.M. 1995).

171. *Olesen v. Bd. of Educ. of Sch. Dist. No. 228*, 676 F. Supp. 820, 823 (N.D. Ill. 1987).

172. *Karr v. Schmidt*, 460 F.2d 609, 613-14 (5th Cir. 1972).

173. See *Bear v. Fleming*, 714 F. Supp. 2d 972, 990 (D.S.D. 2010) (holding that a school did not violate the student's expressive conduct First Amendment rights by requiring him to wear a graduation robe over traditional Native American dress).

174. *Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *1 (Mass. Super. Ct. Oct. 11, 2000).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at *2.

analysis.¹⁸⁰ The court found that the student's conduct was expressive within the meaning of the free speech clause of the Massachusetts constitution:

Plaintiff in this case is likely to establish that, by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with that gender. In addition, plaintiff's ability to express herself and her gender identity through dress is important to her health and well-being. . . . Therefore, plaintiff's expression is not merely a personal preference but a necessary symbol of her very identity.¹⁸¹

The court also determined, through a close examination of the facts, that the student was conveying a message of gender identity understood by others.¹⁸² Finally, the court held that the student's dress was protected because it did not cause a substantial disturbance under the *Tinker* standard.¹⁸³ While *Yunits* does not have far reaching influence, it provides a strong model for courts to approach the issue of transgender student dress in the future.

B. Transgender Student Dress and the "Substantially Disruptive" Standard

The Supreme Court's approach to free speech in schools has evolved beyond the standard it first established in *Tinker*.¹⁸⁴ The Court has thus come to recognize four distinct, and often muddled, areas in which student speech may be restricted: 1) where the speech causes a substantial disturbance or interferes with the rights of others; 2) where the speech is lewd or offensive; 3) where the speech is tied to a school activity; and, 4) where the speech conflicts with a school's message.¹⁸⁵ Transgender student speech through nonconforming dress falls under the first category of student speech, regulated by *Tinker*. The act of dressing in a way that does not conform to sex assigned at birth is not lewd, vulgar, associated with school activities, nor does it contradict the educational messages of public schools.

Courts have examined a variety of situations to determine what

180. *Yunits*, 2000 WL 33162199, at *2-3.

181. *Id.* at *3.

182. *Id.* at *4.

183. *Id.* at *4-5 (citing *Tinker*, 393 U.S. at 503).

184. See *Frederick*, 551 U.S. at 409 (holding that a school may restrict student speech that it "reasonably viewed as promoting illegal drug use"); *Hazelwood Sch. Dist.*, 484 U.S. at 271-73 (holding that schools have the ability to censor "school-sponsored express[ion]" when that speech does not meet the school's standards and values, if the censorship is "reasonably related to legitimate pedagogical concerns"); *Fraser*, 478 U.S. at 685-86 (distinguishing protected political speech from "vulgar and lewd speech").

185. See generally Frederick Schauer, *Abandoning the Guidance Function: Morse v. Frederick*, 2007 SUP. CT. REV. 205 (2007) (outlining student speech cases from *Tinker* to *Frederick* and concluding that the Supreme Court has failed to provide a working standard for student speech by dividing the doctrine along confusing and easily misinterpreted lines).

constitutes a “substantial disturbance” at school. Cases involving everything from student walkouts,¹⁸⁶ protest buttons,¹⁸⁷ and anti-gay tee shirts¹⁸⁸ to displays of Confederate flags,¹⁸⁹ violent poems,¹⁹⁰ and shirts inscribed with Jeff Foxworthy’s redneck jokes¹⁹¹ have been considered under a “substantial disturbance” analysis.¹⁹² School officials do not have to wait for the disturbance to actually occur in order to restrict student speech.¹⁹³ In each case, the court considers the circumstances surrounding the speech, including the climate of the school and the speech itself, to determine whether or not the speech is permissible under *Tinker*.¹⁹⁴ The result of this line of cases is the reality that courts must undertake a highly fact-specific inquiry when the issue of substantial disturbance arises.

Generally, transgender student dress will not rise to the *Tinker* level of substantial disturbance and thus should not be restricted by schools. The cases in which courts found an actual substantial disturbance involved facts where the speech caused a danger to others.¹⁹⁵ Courts look to the

186. See *Karp*, 477 F.2d at 175 (holding that schools do not have to wait for a *Tinker* disturbance to occur before preventing student speech).

187. *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 530 (9th Cir. 1992) (holding that a school district failed to present evidence that students wearing buttons to protest replacement teachers during a district strike were disruptive under the *Tinker* standard).

188. *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist.* # 204, 523 F.3d 668, 676 (7th Cir. 2008) (holding that the school district had not shown a valid reason under *Tinker* to prevent a student from wearing a shirt that read “Be Happy, Not Gay”).

189. *West*, 206 F.3d at 1365-67 (holding that a school could ban the wearing of tee shirts with Confederate flags on them because of past disturbances at the school).

190. *La Vine*, 257 F.3d at 989-90 (holding that a student who wrote a poem describing a school shooting could be punished because of the potential *Tinker* disturbance the poem could cause).

191. *Sypniewski v. Warren Hills Reg’l. Bd. of Educ.*, 307 F.3d 243, 254-58 (3d Cir. 2002) (holding that a tee shirt with redneck phrases on it could not be banned because there was no history of *Tinkertype* disturbances surrounding the term “redneck” at that school).

192. See generally Ronald D. Wenkart, *Disruptive Student Speech and the First Amendment: How Disruptive Does it Have to Be?*, 236 ED. L. REP. 551 (explaining *Tinker*’s holding that student speech must invade the rights of others or disrupt the educational process to justify suppression of that speech, and describing the cases that have gone on to decide what constitutes sufficient “disruption”).

193. *Karp*, 477 F.2d at 175.

194. See, e.g., *Nuxoll*, 523 F.3d at 676 (arguing that the language in question was “only tepidly negative” rather than “derogatory” and reasoning that the language would not provoke harassment of other students or “poison the educational atmosphere”); *Sypniewski*, 307 F.3d at 255-57 (examining the history of discrimination among different racial and ethnic groups in that school); *La Vine*, 257 F.3d at 989-90 (considering the student speaker’s mental health and family history, past disciplinary problems, the graphic imagery of the poem, and the “backdrop of actual school shootings”); *West*, 206 F.3d at 1366 (considering incidences of past racial tension at the school); *Chandler*, 978 F.2d at 526, 530 (noting that the school only forbid students from wearing protest buttons containing what was arguably insulting language but allowed them to wear buttons with non-insulting protest language); *Karp*, 477 F.2d at 175-76 (considering the presence of the media that came to the high school the day of the proposed walk-out, the possibility of violence, and the effect the walk-out would have on the junior high students who shared facilities with the high school).

195. See, e.g., *La Vine*, 257 F.3d at 990 (holding that student conduct rose to the level of

circumstances surrounding the speech to make a determination about whether or not a substantial disturbance would occur.¹⁹⁶ Only in the most extreme circumstances, where a danger exists leading to a substantial disturbance, may the restriction of transgender student dress be permissible.¹⁹⁷

Tinker specifically noted that student speech cannot be restricted because of “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”¹⁹⁸ Even if peers or parents are made uncomfortable by the student’s clothing, the school may not restrict the dress absent a disturbance. So long as the student is following the school’s dress code generally, the fact that he or she chooses a style of dress outside gender norms should not merit punishment. Schools must distinguish between the actual dress of the transgender student and his or her behavior. Certainly children, including transgender children, will sometimes experience discipline problems at school. Poor behavior may be restricted because it is in opposition to school policies and rules.¹⁹⁹ However, schools must take care to punish or restrict the behavior that actually violates its rules, and not merely punish the student who has chosen to dress in a nonconforming manner. Like the armbands in *Tinker*, transgender student dress is a passive expression generally unaccompanied by any disorder or disturbance.

Realistically, the potential for a substantial disturbance involving transgender students exists in public schools. Transgender students may be bullied for dressing in a gender nonconforming fashion or merely for acting in a way that does not conform to gender norms. Bullying those who are different has long been a part of American culture; however, the rise in access to technology among school children has contributed to the increasing frequency and seriousness of these incidents.²⁰⁰ By allowing transgender students to embrace their identities, schools take a very real risk. Administrators face the possibility that the student will be verbally or physically assaulted and suffer isolation.²⁰¹

substantial disturbance under *Tinker* because of violence potentially stemming from the speech); *West*, 206 F.3d at 1366-67 (same).

196. *West*, 206 F.3d at 1366-67; *LaVine*, 257 F.3d at 990.

197. *See LaVine*, 257 F.3d at 990 (finding substantial disturbance amidst the well substantiated danger of substantial disturbance); *West*, 206 F.3d at 1366-67 (same).

198. *Tinker*, 393 U.S. at 509.

199. *See, e.g., Frederick*, 551 U.S. at 408-09 (holding that a school can censor student speech “promoting illegal drug use” because “part of a school’s job is educating students about the dangers of illegal drug use”).

200. *See generally* Martha McCarthy, *Student Expression That Collides with the Rights of Others: Should the Second Prong of Tinker Stand Alone?*, 240 ED. L. REP. 1 (2009) (describing the rise in bullying and cyberbullying as well as ways of combating this behavior using *Tinker* as a guide).

201. EMILY A. GREYAK, GAY, LESBIAN AND STRAIGHT EDUC. NETWORK, *HARSH REALITIES: THE EXPERIENCES OF TRANSGENDER YOUTH IN OUR NATION’S SCHOOLS* 1 (2009), http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1375-1.pdf (examining the experiences of transgender students and finding that they face discrimination and

Ongoing harassment can cause a substantial disturbance to the educational mission of schools. All students are distracted by an environment in which bullying behavior occurs, and physical altercations obviously interrupt the successful functioning school. There are, however, methods of reconciling a school's obligation to recognize the rights of transgender students while preventing dangerous disturbances.

III. ANALYSIS

The law provides several potential solutions for the protection of transgender students' rights to nonconforming dress under the First Amendment. These ideas work with and around *Tinker's* substantial disturbance standard. First, schools have a legal duty under Title IX to prevent incidents of harassment and bullying which create the risk of a substantial disturbance. Schools also have an obligation under Title IX to address harassment that creates a hostile environment.²⁰² Second, state and local legislatures should enact laws which prohibit harassment in schools based on a student's race, ethnicity, national origin, sex, gender identity, or sexual orientation. Finally, courts should place emphasis on the second *Tinker* prong, which allows schools to restrict speech which interferes with the rights of others.²⁰³

A. Schools Have an Obligation to Prevent Substantial Disturbances Under Title IX

While Title IX does not provide definite protections for a transgender student's free expression rights, it may provide a remedy for, and thereby a safeguard against, harassment. Under the Education Amendments of Title IX, students may bring a sexual harassment claim against a school receiving federal funds.²⁰⁴ This law allows claims where the harassment has created a "hostile environment."²⁰⁵ Hostile environment harassment includes "unwelcomed sexual activity, whether based on physical actions, verbal discourse . . . [or] written material . . . [and it] must be both subjectively and objectively objectionable."²⁰⁶ The suit may be based on the failure of school personnel to address known harassment that occurs at the hands of other students.²⁰⁷ This sort of peer-based harassment can cause a *Tinker* substantial

violence in school).

202. See 20 U.S.C. § 1681(a) (explaining the obligations schools have to their students under Title IX); Ali, *supra* note 54 (same).

203. *Tinker*, 393 U.S. at 513.

204. 20 U.S.C. § 1681(a).

205. Diane Heckman, Fitzgerald v. Barnstable School Committee: *The Supreme Court and the Axis of Section 1983, Title IX and the Fourteenth Amendment Equal Protection Clause in Seeking Redress of Education-Related Sexual Harassment*, 246 ED. L. REP. 1, 7 (2009).

206. *Id.* at 8.

207. *Id.*

disturbance. Under Title IX, schools are obligated to remedy hostile environment situations. By making schools aware of this obligation and the potential legal consequences for disregarding it, administrators will have an incentive to create policies which protect transgender students.

However, several problems exist for transgender students who might wish to pursue a Title IX action to prevent harassment. As discussed earlier, there is some question as to whether transgender people are protected under sex discrimination statutes.²⁰⁸ Under Title IX jurisprudence, which draws largely from harassment in the employment context, the harassment itself must be sexual in nature.²⁰⁹ Even if transgender students do qualify for Title IX protection, the standard for finding schools liable under this law is very difficult to satisfy. In order for the school to be liable, for both teacher-on-student or student-on-student harassment, it must display “deliberate indifference” to the harassment, and the harassment must be so severe that it “effectively bars the victim’s access to an educational opportunity or benefit.”²¹⁰ Many cases in which plaintiffs are able to recover for peer-on-peer harassment arise from extreme situations²¹¹ and thereby do not provide a solution for the prevention of more typical bullying behaviors and consequent disturbances. Despite these difficult thresholds for recovery, Title IX protections for students give schools a strong incentive to respond quickly and appropriately to instances of harassment. This in turn will prevent bullying situations from escalating into *Tinker* substantial disturbances. Transgender students may find some protection to dress as they please because their schools are obligated to prevent substantial disturbances arising out of harassment from ever occurring.

B. Schools, States, and Local Governments Should Embrace Anti-Discrimination Laws and Anti-Harassment Policies

In recent years, many state and local governments have enacted laws prohibiting discrimination at school based on fundamental identifying

208. See *supra* text accompanying notes 36-63 (explaining the stances that federal courts and the Department of Education have taken on whether discrimination against transgender individuals is actionable under sex discrimination statutes).

209. Heckman, *supra* note 205, at 7.

210. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999); see also *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (holding that in order to succeed in a Title IX action, there must be a showing of the school district’s “deliberate indifference” to the teacher-on-student discrimination).

211. See *Davis*, 526 U.S. at 633-34 (describing a pattern of harassment against a female student culminating in a sexual battery charge); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1134-38 (9th Cir. 2011) (applying a § 1983 analysis, but finding evidence of deliberate indifference by school administrators in a series of incidents that included beatings, threats, and other physical altercations); *Carroll K. v. Fayette Cnty. Bd. of Educ.*, 19 F. Supp. 2d 618, 620 (S.D. W. Va. 1998) (noting that an incident where a student was thrown into a steel pole as part of a pattern of gender-based harassment).

characteristics, including gender identity.²¹² Such laws aim to protect transgender students who choose to dress in a nonconforming fashion from harassment or other negative treatment. For example, the California Student Safety and Violence Prevention Act of 2000 prohibits discrimination against transgender and other minority students.²¹³ These laws are often written very broadly. For example, Wisconsin's statute forbids discrimination based on "sex, race, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability, or which perpetuates the effects of past discrimination."²¹⁴ This broad drafting may pose problems for the validity of these laws and policies.²¹⁵

Courts have not always supported local anti-discrimination policies. In *Saxe v. State College Area School District*,²¹⁶ the Third Circuit invalidated a school's policy prohibiting harassment of students based on race, religion, sex, national origin, disability, sexual orientation, and other characteristics.²¹⁷ In this case, the district's policy included harassment based on "clothing, physical appearance, social skill, peer group, intellect, educational program, hobbies or values, etc."²¹⁸ The court struck down the policy because it impermissibly abridged the free speech rights of students by curtailing protected speech.²¹⁹ The court reasoned that speech against groups not constitutionally protected, such as peer groups and educational programs, is actually protected by the First Amendment.²²⁰ While the court noted that preventing harassing speech is a compelling government interest, and that students at school are a captive audience with few means of avoiding the speech,²²¹ it nevertheless found the policy "substantially overbroad."²²² While *Saxe* is not binding on the majority of United States jurisdictions, it does provide some insight into how courts will approach challenges to anti-discrimination laws, particularly those that are intended to apply to public schools.

212. See *U.S. Jurisdictions with Anti-Bullying or Anti-Discrimination Laws That Specifically Enumerate Gender Identity*, TRANSGENDER LAW & POL'Y CTR., <http://www.transgenderlaw.org/ndlaws/index.htm#jurisdiction> (last visited Jan. 29, 2013) (providing lists and maps displaying American jurisdictions with laws prohibiting discrimination on the basis of gender identity or expression).

213. School Safety and Violence Prevention Strategy Program, CAL. ED. CODE § 35294.11 (West 2011).

214. WIS. ADMIN. CODE PI § 9.01 (2004), available at www.legis.state.wi.us/rsb/code/pi/pi009.pdf.

215. See *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 210, 214-17 (3d Cir. 2001) (holding that the school district's anti-bullying policy was invalid because it was overbroad).

216. 240 F.3d 200 (3d Cir. 2001).

217. *Id.* at 210, 216-17.

218. *Id.* at 203.

219. *Id.* at 216-17.

220. See *id.* at 210 (noting that the policy's reach is much broader than traditional Title VI and IX protections based on sex, race, color, national origin, age and disability).

221. *Id.* at 210.

222. *Saxe*, 240 F.3d at 216.

Despite the *Saxe* court's ruling, anti-discrimination laws and policies are viable options to protect transgender student in public school. The Third Circuit specifically noted that "[its ruling does] not suggest . . . that a public school may never adopt regulations more protective than existing law; it may, provided that those regulations do not offend the Constitution."²²³ When adopting policies that protect expressions of gender identity from discrimination, legislators will be considering a fundamental characteristic of identity that is protected by the constitution: gender.²²⁴ A law focusing on this traditionally protected characteristic is more narrowly focused than policies which seek to prevent *all* speech that might be considered discriminatory. Such laws are more likely to stand up to challenges of overbreadth and unconstitutional vagueness.

Anti-discrimination laws directed at public schools follow a broader pattern of state anti-discrimination laws protecting gender identity.²²⁵ These laws and policies also provide administrators with another method of curbing harassment and bullying. If the school enacts an anti-discrimination rule and then makes clear that it will not tolerate bullying behaviors based on gender identity, it is arguably restricting speech that contradicts the school's policy and mission.²²⁶ This type of restriction is constitutionally permissible according to *Morse v. Frederick*.²²⁷

Finally, anti-discrimination laws that protect gender identity are fundamentally in keeping with the Supreme Court's goal in *Tinker*. The *Tinker* court wrote that "[t]he classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas"²²⁸ The Court further noted that "this kind of openness . . . is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society."²²⁹ The marketplace of ideas cannot thrive in a classroom where students are afraid to give voice to their particular viewpoints because of harassment by peers.

By allowing transgender students the right to dress as they wish and be free from harassment at school, this national strength is able to grow. Students can learn from the experiences of a transgender classmate and

223. *Id.* at 211.

224. *See, e.g.,* *United States v. Virginia*, 518 U.S. 515, 532-33 (1996) (reaffirming that gender is a protected class under the Equal Protection Clause of the Constitution and will be treated with intermediate scrutiny).

225. *Nondiscrimination Laws That Include Gender Identity and Expression*, TRANSGENDER LAW & POL'Y CTR., <http://www.transgenderlaw.org/ndlaws/index.htm#jurisdiction> (last visited Jan. 29, 2013).

226. *Frederick*, 551 U.S. at 399-400.

227. *See id.* at 403 (holding that a school principal's restriction of student speech reasonably viewed as promoting illegal drug use at a school event was consistent with the First Amendment).

228. *Tinker*, 393 U.S. at 512.

229. *Id.* at 508-09.

develop an understanding of someone different from themselves. While students are allowed to voice their opinions regarding a fundamental characteristic of another student, they may not do so in a way that harasses that person when anti-discrimination policies are in effect. This balance allows a variety of ideas to be heard and debated while still protecting the rights of all students.

C. Courts Should Utilize the Second Prong of Tinker to Protect Transgender Students

In *Tinker*, the Court held that students may exercise their First Amendment speech rights in school so long as they do so “without ‘materially and substantially interfer[ing] with . . . the operation of the school’ and without *colliding with the rights of others*.”²³⁰ This prong of the *Tinker* standard could be used to prevent student speech which harasses or otherwise interferes with the right of a transgender student to free expression through dress at school. Courts have not yet widely adopted *Tinker*’s second prong in public school student speech cases. In *West v. Derby Unified School District*,²³¹ the Tenth Circuit held displaying a Confederate flag at school “might . . . interfere with the rights of other students to be secure and let alone.”²³² However, the court went on to apply the substantial disturbance analysis, basing its holding on the existing tensions between black and white students at the school.²³³ Other *Tinker* cases also fail to use the “rights of others” prong when addressing student speech.²³⁴

The Ninth Circuit looked to the second portion of the *Tinker* standard when it decided *Harper v. Poway Unified School District*²³⁵ in 2006. In this case, a student wore a tee shirt to school which read “I Will not Accept What God has Condemned” and “Homosexuality Is Shameful ‘Romans 1:27.’”²³⁶ Harper was protesting the school’s “Day of Silence” activities, which were meant to teach tolerance of gay and lesbian individuals.²³⁷ Harper’s teacher referred him to the principal who asked Harper to remove the shirt citing past incidents of violence and conflict between gay and straight student

230. *Id.* at 513 (alteration in original) (emphasis added).

231. 206 F.3d 1358 (10th Cir. 2000).

232. *Id.* at 1366.

233. *Id.*

234. See, e.g., *Frederick*, 551 U.S. at 397 (distinguishing *Tinker* from the facts involving pro-drug speech); *Hazelwood*, 484 U.S. at 273 (holding that educators can exercise editorial control over student speech when reasonably related to pedagogical concerns); *Fraser*, 478 U.S. at 682 (distinguishing *Tinker* from the facts of the case, which involved vulgar and offensive language); *West*, 206 F.3d at 1366 (noting abridging speech is permissible in situations where expression interferes with the rights of other students); *La Vine*, 257 F.3d at 988 (failing to base holdings on *Tinker*’s “rights of others” prong).

235. 445 F.3d 1166 (9th Cir. 2006), *judgment vacated on other grounds*, 549 U.S. 1262 (2007).

236. *Id.* at 1171.

237. *Id.*

groups on campus.²³⁸ Harper refused and was disciplined.²³⁹ He then filed suit alleging violation of his free speech rights.²⁴⁰

The Ninth Circuit focused exclusively on the “rights of others” under *Tinker* and did not even reach the issue of substantial disruption. In its analysis, the court rejected Harper’s argument that in order for the rights of another to be infringed upon, some physical altercation must occur.²⁴¹ The court noted that by definition offensive speech may impinge upon the rights of other students and cited the *West* court’s interpretation of *Tinker*’s second prong.²⁴² The *Harper* court held that the tee shirt “collide[d] with the rights of other students in the most fundamental way”²⁴³ and wrote, “[p]ublic school students who may be injured by verbal assaults on the basis of a core identifying characteristic . . . have a right to be free from such attacks while on school campuses.”²⁴⁴

The court looked to *Tinker*’s language, which protects the right of school students “to be secure and let alone. . . from psychological attacks that cause young people to question their self-worth and rightful place in society.”²⁴⁵ The court also noted that this right is fundamental in American jurisprudence.²⁴⁶ The court held that this right must be especially protected in the context of public schools because mandatory attendance renders students unable to protect themselves from the effects of harassing speech.²⁴⁷ The school had a compelling interest in “providing a proper educational environment for its students” and banning Harper’s tee shirt was narrowly tailored to that end.²⁴⁸ The court’s conclusion also rested on a variety of studies which found that students, particularly gay students, are more likely to be depressed, struggle academically, and drop out of school because of unchecked peer harassment.²⁴⁹ The court emphasized that it wished to preserve the “bedrock principle” of student speech, but found that Harper’s tee shirt did not fall within the scope of those rights.²⁵⁰ Finally, the Ninth Circuit explained that there need not be a link to disruption in order to prevent student speech.²⁵¹

While the *Harper* court embraced the second prong of *Tinker*, the Supreme Court declined to do so. The Court granted certiorari in *Harper*,

238. *Id.* at 1172.

239. *Id.*

240. *Id.*

241. *Harper*, 445 F.3d at 1177.

242. *Id.* at 1178.

243. *Id.* (internal quotation marks omitted).

244. *Id.*

245. *Id.* (quoting *Tinker*, 393 U.S. at 598).

246. *Id.*

247. *Harper*, 445 F.3d at 1178.

248. *Id.* at 1189.

249. *Id.* at 1178-79.

250. *Id.* at 1180, 1182.

251. *Id.* at 1180.

but remanded the case to the Ninth Circuit directing it to dismiss the case as moot because the district court had issued a final judgment denying Harper's initial claim for an injunction against the school.²⁵² Post-*Harper* decisions have failed to further pursue the use of *Tinker's* second prong.²⁵³

This approach, if used more widely, would enable school administrators to prevent substantial disturbances from occurring because of transgender student dress. Indeed such a doctrine would allow schools to constitutionally prohibit bullying and harassing speech without even reaching the substantial disturbance issue. Free speech in public schools is not absolute, as the Supreme Court has repeatedly made clear.²⁵⁴ The free speech rights of adults are not unlimited; the Supreme Court has developed several doctrinal exceptions, including speech that provokes violence or intimidates.²⁵⁵ In much the same way, courts should interpret the second prong of *Tinker* to limit speech that interferes with the rights of others while still recognizing the validity of the right to expressive speech. A substantial moral and realistic difference exists between expressive speech used to convey identity and harassing speech.

CONCLUSION

The right of transgender public school students to dress in way that does not conform to gender norms is protected by the First Amendment's free speech clause. Through clothing choices, transgender students send a message to their peers about their identity. Gender is a fundamental part of who they are and they seek to communicate identity through this medium. Such a message is expressive and is protected under the First Amendment. The Supreme Court determined that school officials may only restrict the free speech rights of public school students where the absence of restriction would cause a substantial disturbance or where the speech interfered with the rights of others.²⁵⁶

Generally, the expression of a transgender student through dress will not

252. *Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007).

253. *See, e.g., Gillman v. Sch. Bd. for Holmes Cnty. Fla.*, 567 F. Supp. 2d 1359 (N.D. Fla. 2008) (failing to use *Tinker's* second prong in a student speech case involving pro-gay rights accessories); *see also Nuxoll*, 523 F.3d at 668 (failing to use *Tinker's* second prong in a case where a student wore a shirt reading "Be Happy, Not Gay").

254. *See, e.g., Frederick*, 551 U.S. at 396-97 (articulating the standards for student free speech in public schools); *Kuhlmeier*, 484 U.S. at 266-67 (finding that students have a right to free speech in schools and that students may express their thoughts so long as it does not materially or substantially interfere with the work of the school); *Fraser*, 478 U.S. at 680 (same); *Tinker*, 393 U.S. at 512-13 (noting that a student may express his feelings so long as he does not "materially and substantially disrupt the work and discipline of the school").

255. *See Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (establishing the "fighting words" exception to First Amendment Free Speech protections); *see also Virginia v. Black*, 538 U.S. 343 (2003) (prohibiting speech that intimidates).

256. *Tinker*, 393 U.S. at 509.

rise to the level of a substantial disturbance. However, given the realities of bullying and potential injury or death, schools must adopt policies which strike a balance between the speech rights and safety of transgender students. Schools have an obligation to prevent disturbances and remedy hostile environment harassment of transgender students under Title IX.²⁵⁷ However, because it is unclear that transgender individuals are protected by sex discrimination statutes,²⁵⁸ schools should also seek other solutions to protect the free speech rights of transgender students.

Schools, along with state and local governments, should embrace anti-discrimination policies which specifically protect against harassment based on gender identity. Such laws and policies discourage and effectively handle instances of bullying that arise in schools. Additionally, courts should utilize the second prong of the standard articulated by the Supreme Court in *Tinker* and allow schools to prohibit speech that interferes with the rights of others.²⁵⁹ Through these efforts transgender students will both be able to express their identities at school and be part of a safe learning environment.

*Laurel Grbach**

257. 20 U.S.C. § 1681 (West 2011).

258. Compare *Smith*, 378 F.3d at 566 (holding that a transgender person is protected under Title VII), and *Schroer*, 577 F. Supp. 2d at 306 (holding that an employer discriminated on the basis of sex, in violation of Title VII, when rescinding a job offer to a woman because of her transgender status), with *Etsitty*, 502 F.3d at 1215 (holding that Title VII sex discrimination prohibitions were inapplicable to a transgender bus driver).

259. *Tinker*, 393 U.S. at 509.

* J.D. Candidate, May 2013, Temple University Beasley School of Law.