



T-shirts and *Tinker*: Civil Rights Implications in Dress and Grooming Codes

Overview

- Local Authority for Dress Codes in Schools
- Rationale for Dress and Grooming Codes
- Potential Civil Rights “Land mines”
 - Sex-based discrimination: Title IX and Equal Protection Clause
 - Race-based discrimination: Title VI
 - Viewpoint discrimination: First Amendment
- Examples and Discussion

Objective

- To provide guidance on how to create and enforce dress and grooming codes on equitable and legal basis.

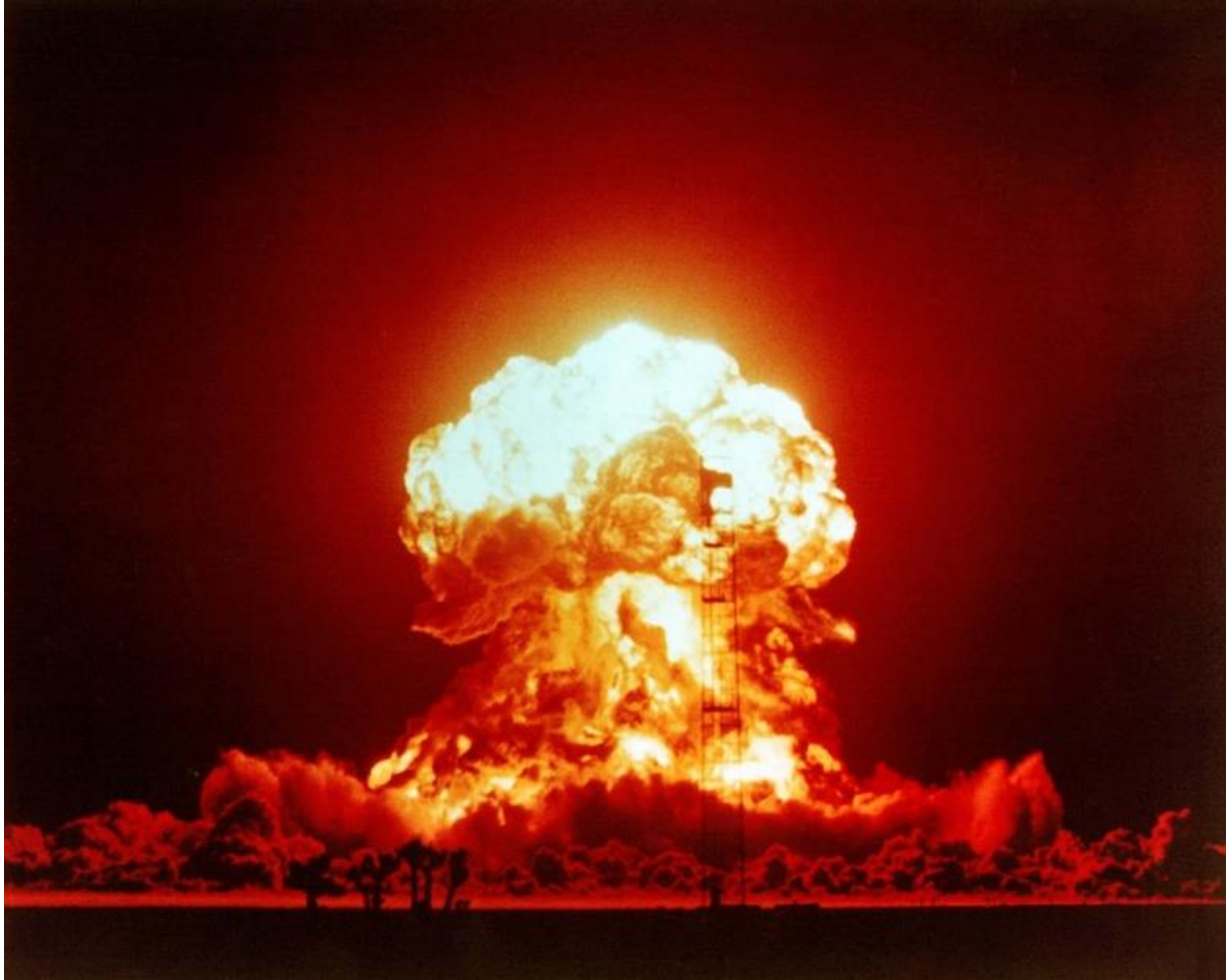
Local Authority

- Tenn. Code. Ann. 49-1-302(j):
- The State Board of Education “shall develop guidelines and criteria for local adoption and enforcement of uniform clothing for public school students. These guidelines and criteria shall require that uniform clothing be simple, appropriate, readily available and inexpensive. The Board shall disseminate these guidelines and criteria to LEAs. These guidelines and criteria can be used as a tool for LEAs that may adopt uniform clothing policies. Adoption of uniform clothing policies shall be at the discretion of the local board of education.”

Rationale for Dress and Grooming Codes

- Determining rationale behind rule and how it is enforced is more than just a thought experiment
- Good practice to have a statement of purpose
- Can you think of some reasons to have a dress code?
 - Distraction
 - More than just potential risk of distraction
 - Safe environment
 - Gang violence
 - Alcohol and Drug use
 - Atmosphere of respect and/or professionalism
 - “The Dress Code of Milford High School is designed to help students recognize choices regarding attire that would be appropriate in their future workplace as well as in an educational setting.”
 - Fairness

Land Mines!



Sex-Based Discrimination

- Title IX of the Education Amendments Act of 1972 is a comprehensive federal law that prohibits discrimination on the basis of sex in any federally funded education program or activity.
 - [Reminder that many Title IX cases rely on Title VII law, which applies to gender discrimination in the workplace.]
- Equal Protection Clause
 - Prohibits action that treats sexes differently under the law

Gender and Types of Codes

■ Gender-Specific Rules

- To play on the boys' basketball team, “each player’s hair must be cut about the ears, eyebrows, and collar.”
- Rationale: safety, team unity, “clean-cut image,” keeping hair out of face
- Allowed?
 - Hayden ex rel. A.H. v. Greensburg Community School Corp., 743 F.3d 569 (7th Cir. 2014)(not allowed under either Title IX or EP)
 - Only applied to boys
 - Not part of overall grooming code
 - No real reason only applied to boys

Gender Specific → Sex-Stereotyping

- *Price Waterhouse v. Hopkins* (1989)
 - Supreme Court found that Price Waterhouse's refusal to promote Ann Hopkins to partner and their instructions to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry,” constituted impermissible sex discrimination based on sex stereotypes.
 - Recognized somewhat new type of sex discrimination
- But, later case *Jespersion v. Harrah's Operating Co.* (2006)
 - Ninth Circuit Court upheld business' termination of female employee for refusing to wear make-up as policy was part of larger grooming code
 - Upheld because both male and female employees were subject to rules about appearance.



Gender Specific → Sex-Stereotyping (cont.)

- Office of Civil Rights Guidance
 - Recognizes a type of sexual harassment based on failure to conform to stereotypes of gender under Title IX
 - “Gender-based harassment, including that predicated on sex-stereotyping, is covered by Title IX if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program. **Thus, it can be discrimination on the basis of sex to harass a student on the basis of the victim's failure to conform to stereotyped notions of masculinity and femininity.**”
 - “Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,” U.S. Dep’t of Educ., January 19, 2001.
 - Reaffirmed by OCR on September 22, 2017
- Likely applies to gender nonconforming students
 - Prom dress in math class??
 - Yearbook

Gender Neutral

- “Distracting or tight clothing will not be allowed in the classroom.”
 - Only applied to girls in leggings?
 - In Evanston, IL school banned all leggings because they were too “distracting” for boys.
 - Students picketed in front of school; 500 signed petition
 - Eliana Dockterman, When Enforcing School Dress Codes Turns into Slut Shaming, TIME (Mar. 25, 2014), <http://time.com/36997/when-enforcing-school-dress-codes-turns-into-slut-shaming/>.
- Even “neutral” policy can be illegal if student can show “disparate impact”—has a disproportionate and adverse impact on protected group.
- Many of these types of cases are settled in court of “public opinion.”

Gender and Dress Code Conclusions

- Factors for Gender-Specific Policy:
 - Does policy create unequal burden on one sex over the other?
 - Part of comprehensive grooming code?
 - Does policy demand student's appearance and deportment match the stereotypes associated with their sex?
 - “Act feminine”; “Wear make-up”
 - These types of codes likely becoming less enforceable; courts less willing to enforce “social norms”
- Factors for Gender-Neutral Policy:
 - Who is being disciplined? Are you keeping track?
 - Switch the genders of the student—would you still apply?

Race-Based Discrimination/Title IV

- Title VI, 42 U.S.C. § 2000d et seq., was enacted as part of the landmark Civil Rights Act of 1964.
- It prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance.

Race-Based Discrimination/Title IV (cont.)



- 16 year-old wrestler, Andrew Johnson, was told he had to cut his dreadlocks or forfeit the wrestling match by referee. (Michael Frankel/Associated Press)
- Had competed in four previous matches without being told he needed to cut or cover hair.
- New Jersey Interscholastic Athletic Association now facing federal civil rights investigation.

Race-Based Discrimination/Title IV (cont.)

- As-applied, some grooming codes can unfairly single out Black students.
 - Mya and Deanna attend Mystic Valley School.
 - Mystic Valley School Code: “Hair more than 2 inches in height or thickness is not allowed.”
 - Black students and students of other ethnicities with tightly curled hair would have difficulty conforming to this rule even with “neat” or “conservative” hairstyles.
 - Only Black students had been punished under this policy at Mystic Valley.



- Source:
<https://www.npr.org/sections/ed/2017/07/17/534448313/when-black-hair-violates-the-dress-code>

Gang-Related Clothing

- Tenn. Code. Ann. 49-6-4215.
 - (a) The LEAs of this state are authorized to promulgate and adopt rules and regulations to prohibit the activities of criminal gangs on school property. The rules and regulations may prohibit students in grades six through twelve (6-12) from:
 - (1) Wearing, while on school property, any type of clothing, apparel or accessory that denotes the students' membership in or affiliation with any criminal gang;

Race-Based Discrimination/Vagueness

- Potential to be unconstitutionally vague.
 - AG Opinion, Opinion No. 09-114 (2009)
 - Fails to put person on notice what kind of clothing is prohibited
- Black student in majority-white school in North Carolina
 - Wears T-shirt that was blue with name and birthday on it in homemade letters.
 - Later wears pocket watch.
 - Punished for wearing “gang-related” clothing.
 - Source: <https://www.rollingstone.com/politics/politics-news/can-we-fix-the-race-problem-in-americas-school-discipline-101922/>

Race-Based Discrimination Conclusions

- Exercise extreme caution if applying gang-related clothing rule
- Check yourself:
 - Would you apply rule if student was a different race or nationality?
 - Who is the rule being applied to most?
 - Are you being consistent?
 - What's the local history?
 - Is this worth fighting in the court of public opinion (or in ACTUAL court?)

Free Speech and Viewpoint-Based Clothing

- First Amendment protects the right to free speech
 - Tinker v. Des Moines, 393 U.S. 503 (1969): public school students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”
 - Case involved students wearing black arm bands to protest the Vietnam War
 - In order to justify the suppression of speech, the school officials must be able to prove that the conduct in question would “materially and substantially disrupt the work and discipline of the school.”
 - More than just wanting to avoid discomfort, unpleasantness



Free Speech and Viewpoint-Based Clothing (cont.)



- Frederick v. Morse, 551 U.S. 393 (2007)
 - Constitution affords lesser protections to certain types of student speech at school or at school-supervised events.
 - Schools may "take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."

Confederate Flags in School?

- Melton v. Young, 465 F.2d 1332 (6th Cir. 1972)
 - White student wears Confederate flag patch on his jacket only a few years after all-white school is de-segregated in Chattanooga, TN
 - Applied *Tinker* standard and found that in this case there was substantial disruption that warranted the school from banning the Confederate flag clothing
- Barr v. Lafon, 538 F.3d 554 (6th Cir. 2008)
- Defoe v. Spiva, 674 F.3d 505 (6th Cir. 2011)
 - Both upheld school decisions to stop students from wearing clothing with Confederate flags
 - Both schools had demonstrated past of racial conflict; actual disruption or conflict not required—just reasonably anticipated.

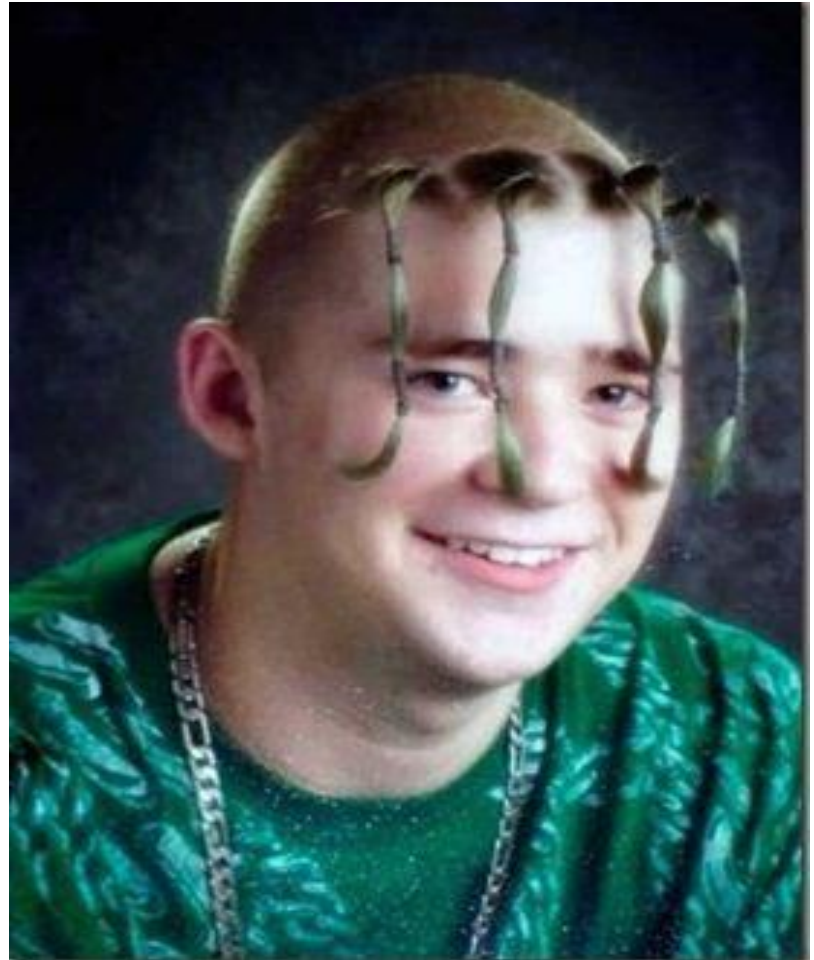
Free Speech (cont.)

- *Bethel School District No. 403 v. Fraser*: allowed school to limit “the use of obscene, profane language or gestures.”
- Student referred to another student using sexually-charged slur in school speech.



Scenarios

- Rule:
- To appear in Senior Yearbook, female students with long hair must wear in professional-looking ponytail or bun that does not block the face or eyes.



Scenarios (cont.)

- Rule:
- Clothing and accessories such as backpacks, patches, jewelry, and notebooks must not display
 - (1) racial or ethnic slurs/symbols;
 - (2) gang affiliations;
 - (3) vulgar, subversive, or sexually suggestive language or images;
- nor, should they promote products which students may not legally buy; such as alcohol, tobacco, and illegal drugs.
- [Actual dress code policy in *DeFoe v. Spiva*]



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Scenarios (cont.)



Take-Aways

- When drafting dress and grooming codes:
 - Try to stay away from gender-specific rules
 - Open to Equal Protection claims and sex-stereotyping issues
 - Better to have policies that apply to all sexes
 - Think about how rule will apply to ALL students
- When enforcing dress and grooming codes:
 - Would you do so if student was opposite sex or different ethnicity or race?
 - Does school have a history of selective enforcement?
 - Is there real and reasonable risk of disruption of school function?



These materials are not intended as legal advice, and should not be so construed. Law, local policy, and unique facts make dramatic differences in analyzing any situation. Consult your LEA attorney for legal advice regarding a specific situation.

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Districts and schools in Tennessee will exemplify excellence and equity such that all students are equipped with the knowledge and skills to successfully embark on their chosen path in life.