



Legal Notes Five: Dress Code, Attire, and Freedom of Expression

The First Amendment has protected students' freedom of expression since the landmark U.S. Supreme Court case in 1969 regarding students' rights to wear black armbands to protest the Vietnam War. This fundamental right protects our LGBTQ+ students in expressing their gender identities through appearance and attire. It is critical that we understand the importance of gender expression for these youth, and that we remove unnecessary policies and practices in schools that mandate compliance with gender norms and sex stereotypes that harm LGBTQ+ youth.

In tandem with Simone Chriss from Southern Legal Counsel (simone.chriss@southernlegal.org), as well as members of our EQFL Florida School Board Attorney Advisory Group, we have created a series of "Legal Notes" to keep handy as you continue to move forward with ensuring the safety and well-being of LGBTQ+ students.

Every Florida School Board is responsible for providing "proper attention to [the] health, safety, and other matters relating to the welfare of students." Fla. Stat. § 1001.42(8)(a). To fulfill this responsibility, schools must treat LGBTQ+ students in an affirming and respectful manner that allows for freedom of speech and freedom of expression, including gender expression.

The Reality for LGBTQ+ Youth

- Schools are often inherently gendered spaces, but there is no reason for schools to mandate compliance with "traditional" gender norms and sex stereotypes.
- Gender expression refers to the way in which a person expresses their gender, typically through their appearance, dress, and behavior. Freedom of expression, including expression of one's gender, is critical to the social and emotional development and well-being of LGBTQ+ youth.
- Many LGBTQ+ students have experienced school-based discipline as a result of their clothing, and many have been forced to dress in accordance with their sex assigned at birth. This happens through gender-specific uniform policies, as well as dress code policies, that leave no room for affirming self-expression. These policies can cause emotional and psychological harm, subject students to bullying and harassment by peers, and lead to school avoidance/aversion.
- Studies have demonstrated that a majority of LGBTQ+ students (56.9%) were verbally harassed at school in the past year based on their gender expression; a fifth (20%) experienced this harassment often or frequently. When a student is not allowed or does not feel safe to authentically express themselves at school, the student is deprived of a safe and affirming learning environment. -GLSEN, 2019
- The American Academy of Pediatrics, the American Psychological Association, and a myriad of other leading medical and mental health organizations support "social transition" among transgender and gender non-binary youth. Social transition may include dressing in accordance with the students' gender identity (including hair style, accessories, make up), using the name and pronouns aligned with their gender identity, and access to facilities and activities in accordance with their gender identity. This medically necessary recommendation is hindered when schools enforce strict dress codes mandating compliance with students' sex assigned at birth.

The Legal Landscape

In 1969, the United States Supreme Court issued a historic opinion in *Tinker v. Des Moines Indep. Cnty Sch. Dist.*, 393 U.S. 503 (1969), upholding the free speech rights of students to wear black armbands to protest the Vietnam War, explaining that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Id.* at 506.

In 2000, this reasoning was applied to the case of a transgender student who experienced discrimination at the hands of her school for expressing her female gender identity by wearing girl's clothing and accessories. *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *3 (Mass. Super. Oct. 11, 2000), *aff'd sub nom., Doe v. Brockton Sch. Comm.*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000). Symbolic acts constitute expression if the actor's intent to convey a particularized message is likely to be understood by those perceiving the message. *Id.* at *3-4 (by dressing in clothing and accessories traditionally associated with the female gender, the student was expressing her identification with that gender, and her therapist attested to the fact that her ability to express herself through attire was important to her health and well-being). The school regularly sent the student home, required her to have her outfit “approved” by the principal daily, and prohibited her from enrolling the next year if she continued wearing girls clothing. *Id.* at *1. The school defended these actions by citing their dress code policy that prohibited “clothing which would be disruptive or distracting to the educational process or which could affect the safety of students.” *Id.* Because the school permitted students who were assigned female at birth to wear the same clothing that the Plaintiff was prohibited from wearing, and because she was disciplined for things that cisgender students would not be disciplined for, the Court held that the school violated her First Amendment right to freedom of expression.

Id. The Court further discussed that mandating compliance with gender stereotypes constitutes sex discrimination, as the school's policy discriminated against students for failure to conform with the norms and expectations associated with their sex assigned at birth. *Id.* at *6.

The rights to freedom of speech and expression also prohibit schools from banning students from wearing clothing and accessories expressing pro-LGBTQ+ messages, as long as the messages are not “significantly disruptive” (i.e. vulgar, obscene, encouraging violence, etc.). For instance, a Florida high school student sued her school board for violations of her First Amendment right to freedom of speech stemming from a ban on wearing or displaying symbols or slogans advocating the fair treatment of LGBTQ+ individuals. *See Gillman ex rel. Gillman v. Sch. Bd. for Holmes Cnty., Fla.*, 567 F. Supp. 2d 1359 (N.D. Fla. 2008). The court's rationale was based on the First Amendment principle that discrimination against speech because of its message is presumed to be unconstitutional. *Id.* at 1375.

Schools are permitted to maintain and enforce dress codes, but they must be enforced equally among all students, regardless of their gender identity, gender expression, or sexual orientation. For instance, a transgender female student cannot be disciplined for wearing an appropriate-length skirt if a cisgender female student would not be similarly disciplined for wearing the same skirt. Schools are permitted to require uniforms, but students must be permitted to dress in the uniform that matches their gender identity.

Questions? Reach out to us at:

Simone Chriss, Southern Legal Counsel, simone.chriss@southernlegal.org

De Palazzo, Statewide Safe and Healthy Schools Director, de@equalityflorida.org

Ian Siljestrom, Safe and Healthy Schools Associate Director, ian@equalityflorida.org

Members of the EQFL School Board Attorney Advisory Group, reached via Ian or De

