

ACLU of Virginia

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Via Facsimile (757-925-6751)

Suffolk County School Board
100 N. Main St.
Suffolk, Virginia 23434

Dear School Board members:

I understand that the School Board is considering a dress code policy at tonight's meeting that would prohibit "[a]ny clothing worn by a student that is not in keeping with a student's gender and causes a disruption and/or distracts others from the educational process or poses a health or safety concern." I urge you not to pass this policy, which is unlawful and unfair to students.

To begin with, the policy is unconstitutionally vague. To be constitutional, a policy must give clear notice of what conduct is prohibited, and must provide clear standards to the officials charged with enforcing the policy. This policy does neither. For example, some girls have been wearing neckties since the film *Annie Hall*, but some teachers may view it as a "male" garment. The vagueness of the policy makes it unclear to students what clothing is forbidden, and opens the door for arbitrary or discriminatory enforcement by school officials.

Additionally, the policy violates Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, which prohibits discrimination on the basis of sex in educational institutions that receive federal funding. Federal courts have consistently recognized in other contexts that discriminating against a person for failure to conform with the norms of her gender constitutes illegal sex stereotyping. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (denying promotion for female associate of accounting firm because she failed to walk, talk, and dress femininely was illegal sex stereotyping); *Rosa v. Park West Bank*, 214F.3d213 (1st Cir. 2000) (claim of sex discrimination may be sustained when cross-dressing man was denied a loan application until he went home to change clothes).

The Fourteenth Amendment to the United States Constitution also prohibits a public school from engaging in this type of arbitrary gender discrimination. Schools may impose a requirement of proper attire, but to mandate dress based on notions that girls must wear one type of clothing and boys another is impermissible. See *Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001) (classifications that reinforce stereotyped ideas about the roles and capabilities of women are invalid).

The legality of the policy is not saved by limiting the prohibition to clothing that "causes a disruption and/or distracts others from the educational process or poses a health or safety concern." To the extent that a student's gender-nonconforming dress causes other students to be "disruptive," the school's response must be to address the disruptive behavior, not to punish the

student who refuses to conform to gender stereotypes. “Deference to the real or presumed biases of others is discrimination, no less than if [a school] acts on behalf of [its] own prejudices.” *Schroer v. Billington*, 577 F.Supp.2d 293, 302 (D.D.C. 2008).

Moreover, if students are harassed or bullied for wearing clothing that is “not in keeping with [their] gender,” the school has an affirmative obligation under Title IX to protect those students rather than banning the nonconforming behavior. *See Doe v. Brimfield Grade School*, 552, F.Supp.2d 816 (C.D. Ill. 2008) (School is liable for allowing student to be harassed because he was “acting like a girl” and was “not man enough”); *Pratt v. Indian River Cent. School Dist.*, 803 F.Supp.2d 135 (N.D.N.Y. 2011) (School district liable for allowing male student to be bullied based on “effeminate” gestures and manner of speaking).

For these reasons, this policy is a virtual invitation to litigation. For example, the ACLU recently sued a school district in Mississippi for refusing to allow a senior photograph of a girl wearing a tuxedo to be published in a school yearbook. After a federal judge refused to dismiss the case, the school district agreed to change its policies.

Please do not pass this unfair and discriminatory policy.

Sincerely,

Rebecca K. Glenberg
Legal Director