



## **Student Dress and Appearance**

*Published online in [TASB School Law eSource](#)*

The First Amendment of the U.S. Constitution protects free speech, which may include a student’s expression through dress and appearance. The First Amendment also protects a citizen’s right to exercise religious freedom, which could take the form of certain dress, accessories, and hairstyles. Students in public schools have First Amendment freedoms for both free speech and religious conduct, but these rights are not the same as adults’ rights and they are not without limits. Schools can prohibit unprotected expression and can generally regulate for hygiene, safety, and to prevent material and substantial disruptions to school operations.

### **1. What type of expression does the First Amendment protect?**

**Pure speech:** When student expression is political, religious, or states an opinion through spoken or written words, it is considered pure speech and is protected expression under the First Amendment. Sometimes students express pure speech when they wear t-shirts or buttons that bear slogans advocating a certain point of view, such as: “Vote Republican,” “Black Lives Matter,” or “Not My President.”

**Expressive conduct:** Expressive conduct and symbolic speech may also be protected expression under the First Amendment. Some examples include wearing a cross, a peace sign, or a confederate flag belt buckle. Expressive conduct and symbolic speech are protected by the First Amendment if the person who displays the symbol or engages in the conduct intends to convey a particularized message and there is a great likelihood that the message will be understood by those observing it. *Spence v. Washington*, 418 U.S. 405 (1974).

Non-expressive conduct is conduct that does not express a message to a reasonable viewer or listener. For example, students sometimes claim that they are expressing themselves through a certain haircut or manner of dress. If the clothing or grooming that the district seeks to prevent is neither pure speech nor expressive conduct, then it is not protected by the First Amendment. For example, a male student sought to wear an earring in violation of his school’s anti-gang rule, claiming the earring conveyed a message of individuality. Because the court found that no one seeing the earring would comprehend that message, the court upheld the prohibition. *Olesen v. Bd. of Educ. of Sch. Dist. No. 228*, 676 F. Supp. 820 (N.D. Ill. 1987) (mem.).

**2. When is speech not protected by the First Amendment?**

**Unprotected speech:** Schools can prohibit vulgar or offensive speech. They may also prohibit fighting words, inciting criminal activity, extortion or threats, speech that promotes illegal drug use, or lewd or indecent speech, as these terms are defined by law. Schools may consider the age, maturity, and impressionability of other students who will hear or see the expression. *See Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942) (holding a statute that prohibited addressing another person with offensive or derisive language did not infringe on First Amendment freedom of expression); *Morse v. Frederick*, 551 U.S. 393 (2007) (upholding discipline of a student who displayed a poster with a pro-drug message at a school event); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (holding a school acted within its authority in sanctioning a student for lewd speech during a school assembly).

**3. When can schools prohibit protected expression in student dress and appearance?**

A school may prohibit otherwise protected expression if the school has reason to believe that expression will materially and substantially interfere with the operation of the school. The U.S. Supreme Court developed the test for material and substantial interference in schools in a case involving an accessory. The Court determined that students protesting the Vietnam War by wearing black armbands during the school day did not cause a material and substantial disruption, and therefore, the high school violated the students' First Amendment rights by disciplining the students. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). Many cases have since helped define what may be considered material and substantial interference, but the *Tinker* analysis remains a strong and protective standard for student rights at school. *See B.H. v. Easton Area Sch. Dist.*, 725 F.3d 293 (3d Cir. 2013) (holding a school district failed to show that the "I 'heart' boobies" breast cancer bracelets could reasonably be expected to cause a material and substantial disruption to school operations). *But see McAllum v. Cash*, 585 F.3d 214 (5th Cir. 2009) (upholding a school ban on the display of the confederate flag based on a reasonable forecast of substantial disruption in a school with a history of racial tension).

Case law sets a high standard for proving material and substantial disruption when it applies to issues involving student dress. Districts should determine whether a particular message from student dress or appearance could cause a material and substantial disruption.

**4. Can a district have a dress code that prohibits any message on student clothing?**

Yes. A school district standardized dress code that prohibits any messages on student clothing is a permissible content-neutral restriction on student dress. However, a district that allows some messages and not others, regardless of the content of the message, is making a content-based regulation and that regulation may be subject to strict scrutiny

by a court. See *Reagan National Advertising of Austin, Inc. v. City of Austin*, 972 F.3d 696 (5th Cir. 2020) (abrogating *Palmer ex rel. Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502 (5th Cir. 2009) in a footnote and holding that content-based regulations must satisfy strict scrutiny). Although districts should enforce the dress code uniformly, districts must also accommodate a student's sincerely held religious belief. See *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010) (holding a district policy requiring a Native American student to put long hair in a bun or tuck it in his shirt violated the Texas Religious Freedom and Restoration Act).

## 5. Can schools require uniforms?

Yes. A school district board of trustees may adopt rules requiring students at a school in the district to wear uniforms if the board determines that a uniform requirement will improve the learning environment at the school. Tex. Educ. Code § 11.162(a). The rules must designate a source of funding to provide uniforms for educationally disadvantaged students. Tex. Educ. Code § 11.162(b).

A parent of a student assigned to attend a school at which students are required to wear school uniforms may choose for the student to be exempted from the requirement or to transfer to a school at which students are not required to wear uniforms and at which space is available by providing a written statement that, as determined by the board of trustees, states a bona fide religious or philosophical objection to the requirement. Tex. Educ. Code § 11.162(c).

## 6. What constitutes a uniform?

The Texas Education Code does not define a school uniform. Districts should take note that a dress code that is highly standardized could potentially be considered a uniform. For example, when Columbia-Brazoria ISD adopted a standardized dress code that permitted blue, gray, maroon, or white collared shirts and blue, denim, or khaki "bottoms," parents argued that the district failed to comply with the Texas Education Code's procedure for adopting a school uniform. The school district responded that the dress code was not a uniform because it permitted so many color combinations. The commissioner agreed with the district. However, the commissioner cautioned districts against using a standardized dress code to avoid the statutory requirements for adopting a uniform policy. *Myers v. Columbia-Brazoria Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 008-R8-999 (June 2, 2000).

In 2012, the commissioner reviewed another standardized dress code instituted by Greenville ISD. The commissioner again found that the dress code was not so standardized as to constitute a uniform and, therefore, was not subject to state laws regarding uniforms. According to the commissioner, someone challenging a dress code

as an unlawful school uniform policy would have to prove that a reasonable observer would identify students as members of a particular group, based on their distinctive dress. *Parent v. Greenville Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 026-R5-0107 (Apr. 13, 2012).

**7. Can students opt out of a dress code based on a philosophical objection?**

No. In 2002, the commissioner of education found that the state law allowing parents to opt out of a uniform policy did not apply to requests to opt out of a dress code based on a philosophical objection. *Davis v. Alvin Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 009-R8-1000 (Feb. 1, 2002).

Nonetheless, districts must be prepared to accommodate requests for exceptions to dress code rules based on a student’s or parent’s sincerely held religious belief. For example, when a school dress code provision restricted students’ ability to wear rosaries as necklaces, the court found that the students had both a free speech right and free exercise of religion right to wear the rosaries. *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659 (S.D. Tex. 1997). In another example, a court ordered a school district to allow students of the Khalsa Sikh faith to wear ceremonial knives to school after the students successfully argued that a regulation prohibiting the knives placed a substantial burden on their free exercise of religion. *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995). For more information about religious accommodations, see the [Religion in the Public Schools](#) section of TASB Legal Service’s School Law eSource.

**8. Can schools restrict hair styles and hats?**

Yes, but we recommend that district leadership collaborate thoughtfully with parents from diverse backgrounds in setting grooming standards.

Districts must accommodate requests for exceptions based on a student’s or parent’s sincerely held religious belief. *See Bd. of Trs. of Bastrop Indep. Sch. Dist. v. Toungate*, 958 S.W.2d 365 (Tex. 1997) (holding Texas courts should not become the arbiters of constitutional challenges to hair length regulations); *see also A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010) (holding the requirement that a Native American student with a sincerely held religious belief put his long hair in a bun or tuck it in his shirt violated the Texas Religious Freedom and Restoration Act).

Districts should also be aware that regulations of hair length and hair styles may have a disparate impact on students of a particular race. Several states around the country have adopted what is known as [the Crown Act](#). State versions of the Crown Act prohibit discrimination at schools and in the workplace based on hair textures and styles that are commonly associated with race. On February 6, 2020, members of the Texas Legislative

Black Caucus held a press conference to announce that they are working on a version of the Crown Act for the 2021 legislative session. A [federal version](#) of the Crown Act has also been proposed.

In August of 2020, in a case that brought national attention to a Texas school district, a district court temporarily enjoined a school district from enforcing its hair length policy against a Black student. The student wore his hair in the style commonly known as dreadlocks, although the court used the term ‘locs’ because the term “dreadlocks” was coined by slavers to refer to enslaved Africans. The student sued the district after being assigned to in-school suspension for refusal to cut his locs to adhere to the hair length policy, which prohibited male students from having hair that extended past the collar. The student argued that his locs were an expression of his Black culture and heritage. The court held that the student presented sufficient statistical and testimonial evidence to establish that the hair length policy, while facially race-neutral, may have been enacted with a racially discriminatory motive. The court also found the student was likely to win on the merits of his claims that the hair length dress code violated his First Amendment freedom of expression rights and his right to be free from sex discrimination under the Equal Protection Clause. *Arnold v. Barbers Hill Indep. Sch. Dist.*, No. 4:20-cv-01802 (S.D. Tex. Aug. 27, 2020).

**9. Can a district’s dress code or grooming standards have different standards for male and female students?**

Maybe. In the past, Texas courts have held that school districts have the authority to adopt dress codes that apply differently to male and female students. *See, e.g., Bd. of Trs. of Bastrop Indep. Sch. Dist. v. Tounge*, 958 S.W.2d 365 (Tex. 1997) (holding that a district did not illegally discriminate on the basis of sex by enforcing a regulation of the hair length of male students). However, more recently, courts outside of Texas have held that penalizing students for not conforming to a gender-based dress code restriction is gender discrimination in violation of federal law. *See Hayden v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569 (7th Cir. 2014) (holding that the district’s restriction on male basketball players’ hair lengths violated Title IX) *and Peltier v. Charter Day Sch., Inc.*, No. 20-1001 & No. 20-1023, 2021 WL 3483288 (4th Cir. Aug. 9, 2021) (applying Title IX to a charter school’s uniform policy that required females to wear “skirts, skorts, or jumpers”).

Recently, in *Barbers Hill*, discussed above, a district court in Texas temporarily enjoined a district from enforcing its gender-based hair length restrictions against a student. The court held that the student showed a substantial likelihood of success against the district, because the dress code was likely sex discrimination in violation of the Equal Protection Clause.

School districts with sex-based distinctions in their policies must also consider issues surrounding students' sexual orientation and gender identity. In 2010, a Mississippi court found that a school district violated a lesbian student's First Amendment rights by preventing her from attending high school prom with her girlfriend or wearing anything other than a dress to the prom. Although no court has ruled that students have a constitutional right to attend prom, the court in this case held that the district had violated the student's First Amendment right to freedom of expression. The court noted that the student, who had been openly gay since the eighth grade, intended to communicate a message by wearing a tuxedo and to express her identity by attending prom with a same-sex date. This type of speech, the court found, is exactly the type of speech that the First Amendment protects. *McMillen v. Itawamba Cnty. Sch. Dist.*, 702 F. Supp. 2d 699 (N.D. Miss. 2010).

In the context of employment, the Equal Employment Opportunity Commission (EEOC) advises that Title VII of the Civil Rights Act prohibits an employer from requiring a transgender employee to dress in accordance with the employee's assigned sex at birth. EEOC, [Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity](#) (June 15, 2021). Sex-based discrimination against students is analyzed under Title IX of the Education Amendments Act of 1972 rather than Title VII. However, courts have historically applied the same standards under both federal statutes. In 2020 the U.S. Supreme Court held that Title VII protects employees from discrimination on the basis of sexual orientation or transgender status. *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020). The Department of Education's Office for Civil Rights (OCR) and the U.S. Department of Justice have indicated that, based on the Supreme Court's decision in *Bostock*, discrimination against students based on their sexual orientation or gender identity is a form of sex discrimination prohibited by Title IX. U.S. Dep't of Educ., Office for Civil Rights, [Letter to Educators on Title IX's 49th Anniversary](#) (June 23, 2021). In order to avoid a complaint of Title IX discrimination, districts should allow students to comply with dress codes and grooming standards in accordance with the student's gender identity. For more information, see TASB Legal Services' FAQ, [Legal Issues Related to Transgender Students](#).

In light of the evolving law, we recommend districts refrain from including distinctions based on gender in the student dress code. As a practical matter, gender-neutral standards may be the best way to provide clear and consistent rules for campus administrators, avoid arbitrary enforcement, and promote equity for all students.

**10. May a school district enforce a dress code for extracurricular activities?**

Yes. Some districts may have an extracurricular code of conduct that addresses the issue of dress and grooming during extracurricular activities. The extracurricular code of conduct is created and adopted by the administration, after the board passes a policy to authorize its creation. If the district does not have an extracurricular code of conduct,

generally the principal, in cooperation with the sponsor, coach, or other person in charge of an extracurricular activity, may regulate the dress and grooming of students who are participating in an extracurricular activity.

**11. Can a student wear political buttons, t-shirts, etc. to school?**

Yes, if they are otherwise appropriate and conforming to the dress code. Some schools may have dress codes that restrict any messaging on t-shirts. Such a rule does not discriminate against a viewpoint and is content-neutral. However, if a school allows messaging on shirts or pins, they may not restrict the content of the expression unless it is unprotected expression (see questions 1 and 2 above).

**12. Where can I find more information about my district's dress code and rules?**

See TASB Policy FNCA for more information about dress codes. Districts may also contact their TASB Policy Service consultant to request a sample dress code policy. The sample policy states that dress and grooming guidelines shall not include distinctions based on gender, race, or inherent traits or characteristics. Many districts also include information in the student handbook and student code of conduct regarding expectations for students to meet district and campus standards of grooming and dress.

For more information about accommodating student's religious beliefs, see TASB Legal Service's [Religion in the Public Schools](#) resources available on eSource.

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*Updated August 2021*