Student Dress and Appearance
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The First Amendment of the United States Constitution protects free speech, not only in spoken and in written form, but in expressive conduct, which may include student 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 that extend into the school day, 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 speech is political, religious, or expresses 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, e.g., “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 style, such as 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, when a male student sought to wear an earring in violation of his school’s anti-gang rule, he claimed the earring conveyed a message of individuality. Because the court believed no one seeing the earring would comprehend that message, the court upheld the prohibition. *Oleson 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 impressability of other students who will hear or see the expression. See Chaplinsky v. State of New Hampshire, 315 U.S. 568 (1942) (holding statute prohibiting 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 student who displayed a poster with pro-drug message at school event); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (holding school acted within its authority in sanctioning student for lewd speech during 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 United States 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 arm bands during the school day did not cause a material and substantial disruption, and therefore, the high school violated the student’s 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 H. v. Easton Area Sch. Dist., 725 F.3d 293 (3rd Cir. 2013) (holding 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 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 reasonably be expected to cause a material and substantial disruption on a case-by-case basis.

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. Palmer ex rel. Palmer v. Waxahachie Indep. Sch. Dist., 579 F.3d 502 (5th Cir. 2009). School districts
may also impose content-neutral dress code requirements on the student population. Although districts should enforce the dress code uniformly, districts should allow for accommodations for sincerely held religious beliefs. See A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist., 611 F.3d 248 (5th Cir. 2010) (holding district policy requiring Native American student to put long hair in 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 too prescriptive 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 in adopting the dress code, the district failed to comply with the Texas Education Code’s procedure for adopting a school uniform. The school district responded that because the dress code permitted so many color combinations, it did not constitute a uniform. The commissioner agreed; 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 prescriptive dress code instituted by Greenville ISD. The commissioner again found that the dress code was not so prescriptive so as to constitute a uniform and, therefore, was not subject to state laws regarding uniforms. According to the commissioner, for the petitioner to prove a dress code actually constituted a uniform they would have to successfully demonstrate that

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 students were prohibited by a school dress code provision that restricted their 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 districts must accommodate requests for exceptions based on a student 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 bun or tuck it in his shirt violated the Texas Religious Freedom and Restoration Act).

9. **Is a district’s dress code requiring student dress to conform to gender norms illegal discrimination?**

Maybe. Texas courts have held that school districts have the authority to adopt dress codes which may apply differently on a gender basis, however, courts in other jurisdictions interpreting federal law have held that penalizing students for dressing in their preferred gender is a restriction on student expression or gender discrimination.
In 1997, the Texas Supreme Court found in favor of Bastrop ISD in a case involving hair length restrictions on male students. The mother of a third grade male student argued that the district’s prohibition on long hair for boys, but not girls, discriminated on the basis of sex. The Supreme Court disagreed, ruling that the regulation of males’ hair length did not deprive male students of an equal opportunity to receive an education or favor one sex over the other. Bd. of Trs. of Bastrop Indep. Sch. Dist. v. Toungate, 958 S.W.2d 365 (Tex. 1997).

More recently, school districts have addressed issues surrounding gender identity and student dress. 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 found a constitutional right to attend prom, the court in this case found that the district had violated the student’s First Amendment right to freedom of expression. The court noted that the student had been openly gay since the eighth grade and that she 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 is entitled to the protection of the First Amendment. McMillen v. Itawamba Cnty. Sch. Dist., 702 F. Supp. 2d 699 (N.D. Miss. 2010).

In light of the 2010 decision and evolving law regarding transgender students, some districts have allowed transgender students to wear attire in their preferred gender. A district that allows a transgender student to dress in conformance with their gender identity may use the dress code restrictions that apply to the gender with which the student is dressing (for example, dress and skirt length restrictions may still apply).

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?

Your district can find more information about the district’s dress code in TASB Policy FNCA. We recommend the district 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 at tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Community/Religion-in-the-Public-Schools.aspx.