


## DRESSED TO IMPRESS: Dress Code Issues in Schools

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## Agenda for Today

- Student Issues
  - Blame it all on my roots...
  - Dress code cases
  - LOL wut?
  - Recommendations
- Staff Issues
  - Endorsement v. Establishment
  - First Amendment

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## Common Student Issues

- First Amendment
  - Viewpoint discrimination
  - Overly broad restrictions
  - Religious expression and dress
- Title IX
- Title VI
- Administrators enforcing dress codes like they are "stuck in the 90's"

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You call it!

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### Dress Code Responses



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## Dress Code Responses




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## Remember where it all started...

- Tinker v. Des Moines Comm. Schs.
  - United States Supreme Court, 1969
  - Students wore black armbands to protest the Vietnam War
  - Principals adopted policy banning armbands at school
  - Students suspended
  - ACLU Sued

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## Tinker v. Des Moines

- Supreme Court:
  - Students don't "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."
  - School would have to prove "facts which reasonably may have led school authorities to forecast substantial disruption of or material interference with school activities"

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## Tinker Standard

"In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained."

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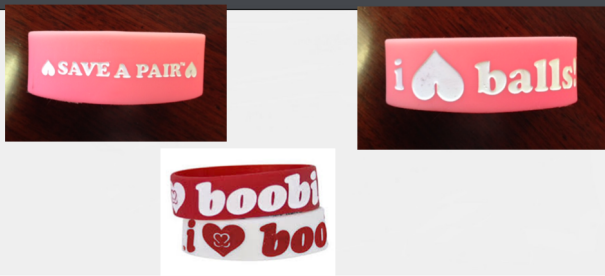
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## "I Boobies" Bands




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## "I Boobies" Bands

### ■ B.H. v. Easton Area

- Dress code: impermissible "double entendre"
- School: was both "lewd" and "vulgar"
- Court: free expression, not obscene or vulgar
- "There is no evidence before the Court of any incidents that caused the type of disruption required by Tinker."
- No material and substantial disruption
- Students win

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## "I Boobies" Bands

### ■ J.A. v. Fort Wayne County

- J.A.'s mom was breast cancer survivor
- *Frayser*: "lewd, vulgar, obscene or plainly offensive"
- Court: this falls into a "gray area"
- "School officials, who know the age, maturity, and other characteristics of their students better than federal judges, are in a better position to decide whether to allow these products into their schools."
- School wins

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## First Amendment Summary

"In summary, a school may categorically prohibit speech that is (1) lewd, vulgar, or profane; (2) school-sponsored speech on the basis of a legitimate pedagogical concern; and (3) speech that advocates illegal drug use.

If school speech does not fit within one of these exceptions, it may be prohibited only if it would substantially disrupt school operations."

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## "I Boobies" Bands

- Supreme Court denied to hear appeal
- Courts generally defer to administrators who know when speech is used to be lewd, vulgar, or obscene
  - Seniors vs. 7<sup>th</sup> graders
- Still prefer material/substantial disruption
- Confederate flag cases have started noting that "subjective intent" may not matter

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## Can Dress Codes "Reasonably Forecast" Disruption?

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## Kuhr v. Millard P.S. (NE)

- Julius Robinson murder
- History of gang violence in MPS
- Training for staff
- Students wore t-shirts and bands
- In Sept. teacher noticed shirts
- Rally formed across the street with "Pit Bull" there
- School suspended students for violating policy against wearing gang-related clothes and bands

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**Kuhr v. Millard P.S. (NE)**

- Students sued under 1st Amend.
- Court: "Schools may preemptively discipline students . . . if they have information which would reasonably lead them to forecast that the speech will cause disruption."

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**Kuhr v. Millard P.S. (NE)**

- Court: Tinker "reasonably forecast"
  - Specific and significant fear
  - Of disruption at school
  - More than remote apprehension or disturbance
  - School must point to "well-founded" expectation of disruption

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**Kuhr v. Millard P.S. (NE)**

- Court will look at:
  - What officials knew—facts, training, and application
  - Basis of the knowledge
  - Severity of threat
  - Likelihood of actual disruption

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## Other Dress Code Cases

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## Barnes v. Hillsboro School Dist.

- Barnes wore "Donald Trump Border Wall Construction Company" t-shirt
- Shirt says, "The wall just got 10 feet taller."
- Removed from "People and Politics" class and given suspension for refusing to reverse the shirt
- AP: one other student was offended by it
- No good evidence of disruption
- Court: injunction for student, \$25,000 settlement

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## Barnes v. Hillsboro School Dist.

*"The school clearly crossed the line when it required a student to remove a T-shirt that voiced support for Donald Trump's border wall or face a suspension. This shirt is mean-spirited, but it isn't a 'disturbance' under First Amendment case law.*

*"It is disappointing that Liberty High School decided to censor the student instead of inviting the student body to discuss immigration, the freedom of speech, and the impacts of xenophobic rhetoric. Schools have a responsibility to teach our youth how to engage in thoughtful conversations about difficult and potentially offensive subject matters. Censorship doesn't work and often just elevates the subject the government is trying to silence."*

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## (Pat) Doe v. Yunits

- 7<sup>th</sup> grade male presenting as female
- Wore women's clothes, makeup
- Dress code: "disruptive to educational process or threaten student safety"
- Principal sent student home to change
- 8<sup>th</sup> grade: had to get daily approval
  - Sometimes stayed home

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## Doe v. Yunits (MA 2000)

- Doe was required to repeat 8<sup>th</sup> grade
- Began wearing padded bras, skirts, "tight shirts," wigs, and high heels
- Fight with fellow student re oral sex rumors
- Doe "blew kisses" at male students
- Doe grabbed buttocks of male student
- Doe provocatively danced in the halls

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### Doe v. Yunits (MA 2000)

- Suspended 3 times for using ladies' restroom
- Admins: no more padded bras, skirts, dresses, or wigs
- Was not allowed to enroll if Doe wore "girls' clothing or accessories"
- Sued school

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### Doe v. Yunits (MA 2000)

"A school should not be allowed to bar or discipline a student because of gender-identified dress but should be permitted to ban clothing that would be inappropriate if worn by any student, such as a theatrical costume, and to punish conduct that would be deemed offensive if committed by any student, such as harassing, threatening, or obscene behavior."

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### Doe v. Yunits (MA 2000)

- Court
  - Protected expression
  - Important to health and well-being
  - Fighting means it had an effect on other students and caused a disruption
  - *Tinker*: the behavior is the issue, not the clothes

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## Other T-Shirt Cases

- **Zamecnik:** “Be Happy, Not Gay” shirt—student won
- **Defoe:** Confederate flag shirts considered “racially hostile speech”—school won
- **Dariano:** May 5, HS students wear American flag shirts with history of racial tension—school won

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## Dress Codes Come in Many Fashions

### 5031 Student Appearance

Any manner of dress, hair style, make up, cleanliness, or personal appearance that constitutes a threat to the safety, health, welfare, or morals of the student or others; violates any statute; interferes with the education process, or school officials can reasonably predict will interfere with the education process; or causes or may cause excessive maintenance problems in the school, may be grounds for corrective or disciplinary action. The superintendent or designee may institute specific dress code regulations in any school consistent with board policy.

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## Use the “Challenge Flag”...

The following “fashions” are prohibited:

- Tube tops
- Halter tops
- Spaghetti strap tops
- Crop tops
- Swimwear
- Pajamas/sleepwear
- Shorts with less than 3 inches of inseam
- Tank tops with less than 2-inch-wide straps
- Athletic shorts with the waistband rolled up
- Excessively short skirts
- Shirts or tops that show bra straps
- Shirts that advertise alcohol, drugs, tobacco or have a sexual connotation or double meanings

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- Shirts that have a message of racism, prejudice or bigotry
- Shirts or apparel that have a gang or crime/violence/weapons related message or images
- Students are not allowed to wear clothing that shows undergarments
- Shirts or tops that show bare midriff
- Shirts or tops that show bare backs
- Shirts or tops that show excessive cleavage
- Shirts that depict nudity
- Shirts with profanity or depictions of profane gestures

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- Shirts that are abusive to staff or other adults in the building
- Hats of any kind
- Slippers
- Volleyball shorts
- Sagging pants
- Chains
- Spiked apparel
- Hoods (down at all times during the school day)

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### Student Dress Code Rec's

- First determine your "style" of dress code
  - General principles
  - Specific: inclusive or exclusive
- Make sure it matches your practices
- If you're regularly making exceptions to a rule, change it!
- Identify areas where you could get the "challenge flag" and decide if it's worth it

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### Student Dress Code Rec's

- Avoid words not supported by case law, such as "rude" or "immoral"
- One suggestion: have student council review it
- Think through instances where dress is supposed to be uniform (graduation) in advance
  - Requests for religious adornments at graduation
  - Student fee issues
- Train staff on proper responses...because...

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**"I am quite disturbed by the entire situation."**



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### Staff Dress Codes

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## Staff Issues

- First Amendment
  - Endorsement vs. Free Exercise
  - LB 62 (2017)
- Title VII
  - Prohibits discrimination on the basis of "religion"
- Title IX

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## LB 62

- 79-898: crime if a teacher "wears...any dress or garb indicating the fact that such teacher is a member or an adherent of any religious order, sect, or denomination"
- 79-899: misdemeanor if a board member failed to suspend a teacher for one year for wearing religious garb
- Both repealed by LB 62

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## Religious Accommodation

- Title VII prohibits:
  - Denials of requests for "reasonable accommodations" based on religion unless it would pose an "undue hardship"
  - Harassment based on religion
  - Retaliation for filing a complaint of harassment or for making an accommodation request

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## Religious Accommodation

"Title VII protects all aspects of religious observance, practice, and belief, and defines religion very broadly to include not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, Buddhism, and Sikhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or may seem illogical or unreasonable to others."

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## Religious Accommodation

"Religious observances or practices include, for example, attending worship services, praying, wearing religious garb or symbols, displaying religious objects, adhering to certain dietary rules, proselytizing or other forms of religious expression, or refraining from certain activities.."

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## EEOC Example 1

- Elizabeth, a librarian, wears a cross as part of her Catholic religious beliefs.
- After church services she attends on Ash Wednesday each year, Elizabeth arrives at work with a black ash mark on her forehead in the shape of a cross, which she leaves on until it wears off.
- Her new supervisor directs her not to wear the cross in the future while on duty, and to wash off the ash mark before reporting to work.

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## EEOC Example 1

- The supervisor fears that her cross and ash mark could be mistaken as government endorsement of religion in violation of the Establishment Clause of the First Amendment to the U.S. Constitution.
- He cites the need to avoid any appearance of religious favoritism by government employees interacting with the public
- Emphasizes that employees must be viewed as impartial to patrons.

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### EEOC Example 1

▪ EEOC Answer

- Because the librarian's cross and ash mark are clearly personal in this situation, they would not cause a perception of government endorsement of religion. Accordingly, accommodating Elizabeth's religious practice is not an undue hardship under Title VII.

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### EEOC Example 2

- Gloria, a newly hired bus driver, was terminated when she advised her supervisor that due to the tenets of her faith (Apostolic Pentecostal), she needs to wear a skirt rather than the pants required by the dress code.
- EEOC Response:
  - Absent evidence that the type of skirt Gloria must wear would pose an actual safety hazard, no undue hardship would have been posed by allowing this dress code exception, and Gloria's termination would violate Title VII.

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### Staff Dress Code Rec's

- Watch for sex-based disparities ("It's easier and cheaper for males to comply.")
- EEOC recognizes Title VII protections for transgender employee dress, even if the 8<sup>th</sup> Circuit law wouldn't require you to hire them
- Consider if you need position-specific dress codes
- Title VII applies to applications (see *Abercrombie*)
- Tread lightly on religious establishment issues

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