Dress Codes: An Update

In the January 2000 column, when we last reviewed student dress codes,1 the judicial trend was to uphold their constitutionality, with three limited exceptions:

■ Where the code significantly burdened a fundamental religious tenet, and school officials did not have a compelling justification that it was the least restrictive alternative;
■ Where the code did not violate religious freedom; or
■ Where the code was so ambiguous as to be unconstitutionally vague or overly broad.

Dress codes have continued to be an active area of litigation. The following illustrative case and the accompanying question-and-answer discussion track the latest developments.

The Case

In May 2001, at a meeting of the site-based council of Highlands Middle School in Kentucky, several parents proposed a student dress code. Their stated purposes were to “create unity, strengthen school spirit and pride, and focus attention upon learning, away from distractions.” The principal promptly followed up with a letter to all Highlands students and parents, inviting their attendance at a meeting to discuss the proposal. At the meeting, the council formed a committee of two teachers, four parents, and four students—including Amanda B.—to gather feedback and make recommendations.

On Aug. 21, based on the committee’s recommendation, the council adopted a dress code that included the following prohibitions:

■ Clothing that is too tight, revealing, or baggy, including tops and bottoms that do not meet;
■ Hats, caps, scarves, or sweatbands, except on special event days;
■ Visible body piercings (other than ears);
■ Shorts, skirts, or “skorts” that do not reach mid-thigh;
■ Pants, shorts, or skirts that are not of a solid navy blue, black, any shade of khaki, or white; and
■ Tops that are not of a solid color and are not crew-neck style, polo style with buttons, oxford-style, or turtleneck.

On Nov. 20, Robert B., a lawyer and parent of Amanda B., filed suit in federal court, claiming various violations, including Amanda’s First Amendment right of free expression and his Fourteenth Amendment “liberty” to control his child’s education. Later during the 2001–02 school year, while the suit was pending, the school council modified the dress code to loosen a few requirements and tighten a few others. Mr. B. then amended his suit to challenge both the revised as well as the original dress code. Approximately a year later, the federal trial court granted the district’s pretrial motion for summary judgment. Mr. B. then sought review by the Sixth Circuit Court of Appeals.

Questions and Answers

What was the Sixth Circuit’s decision?

On Feb. 8, 2005, the Sixth Circuit affirmed the trial court’s decision in favor of the defendant district. First, Amanda’s First Amendment free expression claim failed. The court concluded that she and her father “have not met their burden of showing that the First Amendment protects Amanda’s conduct—which in this instance amounts to nothing more than a generalized and vague desire to express her middle-school individuality.”2

Second, the appeals court similarly rejected the overbreadth claim that the dress code infringed upon the First Amendment freedom of other students, concluding that the code met the test of being unrelated to suppression of expression; furthering important governmental interests, such as bridging socioeconomic gaps and improving the educational environment; and not substantially burdening more expressive conduct.

Third, the Sixth Circuit made short shrift of Amanda’s Fourteenth Amendment substantive due process claim, rejecting her asserted fundamental right to wear blue jeans.

Fourth, the court similarly jettisoned her father’s Fourteenth Amendment “liberty” argument, concluding that the parent’s constitutional right to decide whether to send a child to a public school does not extend to deciding whether the school will have a dress code or whether the child will be exempt from it.

Fifth, his daughter’s active participation in the process of adopting the dress code defeated the Fourteenth Amendment procedural due process claim.

Finally, the court rejected Mr. B.’s claims based on the Kentucky constitution (concerning unreasonable governmental action) and Kentucky legislation (concerning the authority and procedures of site-based councils).

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IT’S THE LAW

PENDER A. ZIRKEL

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An Update

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If the dress code had been aimed at gang-related activity, would the outcome have been different?

No. As long as a dress code is not unconstitutionally vague or the claims are not religion-based, the courts have continued to uphold school authorities’ discretion. For example, in another case arising in Kentucky, a federal court sided with school officials who adopted a dress code after a safety subcommittee of the school’s site-based council identified signs of gang activity and conducted a careful and deliberative process. The court concluded that the school officials had struck a reasonable balance between safety and student expression, regardless of disagreement among parents, teachers, and students.

The court also rejected the plaintiff-students’ claims of Fourteenth Amendment substantive due process (finding that choice of clothing is not a fundamental right), procedural due process (finding that school officials had provided the requisite notice and hearing for suspensions), and equal protection (finding a rational justification in the absence of evidence of gender discrimination intent).3

If the dress code prohibited “messages on clothing, jewelry, and personal belongings that relate to…weapons,” would a lawsuit claiming unconstitutional overbreadth and vagueness succeed?

Probably. It would depend on various factors, including the specific facts and the particular court. For example, in a recent Virginia case, the Fourth Circuit, citing as examples the Virginia state seal (which shows a vanishing woman holding a spear), insignia supporting our troops overseas, and anti-weapon messages such as “Guns and Schools Don’t Mix,” found that the challenged provision “excludes a broad range and scope of symbols, images, and political messages that are entirely legitimate and even laudatory.” The court concluded that the plaintiff student had demonstrated “a strong likelihood” of success on his First Amendment overbreadth claim, thus making a determination of his Fourteenth Amendment vagueness claim unnecessary.4

If, instead, the dress code was so comprehensive as to amount to a mandatory school uniform, would the decision have been different?

No. For example, after officials in a Texas school district adopted a mandatory school uniform policy, some students and their parents challenged its constitutionality in federal court. The Fifth Circuit ruled in favor of the school officials in two claims that were not based on religious issues. First, assuming that First Amendment freedom of expression applies to a school uniform policy, the appeals court concluded that the school uniform policy met the same multi-step test used for Amanda’s overbreadth claim. Second, the court rejected the parents’ Fourteenth Amendment “liberty” claim, concluding that the uniform policy was rationally related to the public school’s “legitimate goals of improving student safety, decreasing socioeconomic tension, increasing attendance, and reducing dropout rates.”5

What if the school uniform policy also included an opt-out provision for bona fide religious or philosophical exemptions?

The judicial odds still would strongly favor the school’s side. For example, in the Texas case previously cited, the district had such an opt-out provision, as required by Texas law, and the Fifth Circuit concluded that this provision and its procedure to determine bona fides were neutral, rational, and did not promote or inhibit religion.6 In a more recent New Jersey case, the Third Circuit Court of Appeals rejected an atheist parent’s equal protection claim, ruling that the religious exemption was a rational means of achieving the legitimate governmental goal of accommodating students’ free exercise of religion.7

What if the school uniform policy did not have an opt-out provision?

Here, the judicial odds would shift somewhat in the direction of the plaintiff-parents. For example, in a North Carolina case, the federal district court granted summary judgment to the district defendants with regard to the plaintiffs’ equal protection and due process claims, but denied summary disposition of the plaintiffs’ claim that combined First Amendment free exercise of religion and Fourteenth Amendment parental liberty, thus leaving the outcome inconclusive.8

Conclusion

The various published court decisions during the years since the last article on this topic reinforce the lessons derived from the earlier cases:

“If your district or school decides to adopt a [student dress] code, after arranging for ample warning to and input from the community…provide legitimate and provable justification; bona fide religious exceptions; reasonable clarity; and compliance with state law.” ■

Notes
6. Id.

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