



West Virginia

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May 3, 2021

Superintendent John G. Hudson
Putnam County Schools
sent via email to: jghudson@k12.wv.us

Re: Gendered Dress Code at Poca High School Graduation

Superintendent Hudson,

Our organization recently became aware that administrators at Poca High School intend to enforce a gendered dress code at the school's June 1, 2021, high school graduation. It is our understanding that not only does the school plan to enforce this dress code, but that it will be applied discriminately against trans students, who will be prohibited from wearing clothes that conform to their gender identity. This practice would be unlawful at any time, but it is particularly discouraging given the current climate in West Virginia (the state with the highest percentage of trans teenagers)¹, where trans kids face discrimination daily from everyone from school administrators to elected officials.

The school's policy imposes disparate requirements for students on the basis of sex and therefore violates students' federal constitutional and statutory rights and must be rescinded immediately. It is well established that under both Title IX and the Equal Protection Clause, school officials cannot force students to conform to sex stereotypes. See *Glenn v. Brumby*, 663 F.3d 1312, 1913-20 (11th Cir. 2011); *Sturgis v. Copiah Cnty. Sch. Dist.*, No. 3:10-CV-455-DPJ-FKB, 2011 WL 4351355, at *4-5 (S.D. Miss. Sept. 15, 2011); *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 150-52 (N.D.N.Y. 2011).

This is further bolstered by recent law in both the U.S. Supreme Court and the Fourth Circuit. The Fourth Circuit includes West Virginia, and opinions issued by the Fourth Circuit are binding on the state. The U.S. Supreme Court in 2020 made clear that all gender-based classifications trigger heightened scrutiny and ... "[I]t is impossible to discriminate against a person for being ... transgender without discriminating against that individual based on sex." *Bostock v. Clayton Cty., Ga.*, — U.S. —, 140 S. Ct. 1731, 1741, — L.Ed.2d — (2020). In *Grimm v. Gloucester County School Board*, the Fourth Circuit applied *Bostock* and held that school policy of excluding a boy from a restroom solely because he was transgender violates Title IX and the Constitution. *Grimm*, 972 F.3d 586, 616 (4th Cir. 2020), as amended (Aug. 28, 2020). This same reasoning is directly on point when applied to gendered dress codes.²

¹Ryan Quinn, Study: WV has nation's highest percent of teens who identify as transgender, CHARLESTON GAZETTE-MAIL, https://www.wvgazette.com/news/education/study-wv-has-nation-s-highest-percent-of-teens-who-identify-as-transgender/article_d5080981-91d8-5490-b8ed-e80c57348bd1.

² The Department of Justice also recently clarified that "[a]fter considering the text of Title IX, Supreme Court caselaw, and developing jurisprudence in this area, the [DOJ] has determined that the best reading of Title IX's prohibition on discrimination 'on the basis of sex' is that it includes discrimination on the basis of gender identity and sexual orientation." See Memorandum, <https://www.justice.gov/crt/page/file/1383026/download>.

Schools may impose a gender-neutral requirement of proper, even formal, attire for the regular school day or for school events, provided it doesn't create an undue financial burden for students. But schools can't rely on gender stereotypes when creating dress codes, such as requiring only girls to wear skirts or only boys to have short hair. See *Hayden ex rel. A.H. v. Greensburg Community School Corporation*, 743 F.3d 569, 583 (7th Cir. 2014) (requiring male athletes to have short hair discriminated on the basis of sex in violation of the Equal Protection Clause and Title IX); *Bonnie Peltier, et al. v. Charter Day School, Inc., et al.*, No. 7:16-CV-30-H, Dkt. 216 at *31 (E.D.N.C. Mar. 28, 2019) (requiring girls to wear skirts was an impermissible sex classification based on outdated stereotypes).

Policies that impose dress standards based on gender stereotypes are also especially harmful to lesbian, gay, bisexual, transgender, queer, and questioning ("LGBTQ") students. Legal protections against gender stereotyping also protect transgender and gender nonconforming students who seek to act and dress in accordance with their gender identity. See *Glenn*, 663 F.3d at 1913-20; *Sturgis*, 2011 WL 4351355, at *4-5 (declining to dismiss sex stereotyping claim where gender nonconforming female student was required to wear a drape for yearbook photograph instead of a tuxedo).

In addition, under the First Amendment students have a right to express their gender nonconformity or gender identity through their dress and appearance. See *Zalewska v. Cnty. of Sullivan*, 316 F.3d 314, 320 (2d Cir. 2003); *Doe v. Yunits*, No. 001060A, 2000 WL 33162199 (Mass. Super. 2000) (preliminarily enjoining school officials from disciplining transgender student for wearing girls' clothes or accessories), *aff'd Doe v. Brockton Sch. Comm.*, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000); *McMillen v. Itawamba Cnty. Sch. Dist.*, 702 F. Supp. 2d 699 (N.D. Miss. 2010) (holding that school's prohibition of a female student from wearing a tuxedo and bringing a date of the same gender to prom violated her First Amendment rights). In *McMillen*, judgment was entered against the school and the student was awarded over \$116,000 in damages and attorneys' fees.

To comply with the law, the school must change any rule that prohibits students from wearing particular types of clothing based on their gender. Please respond in writing by May 7, 2021 to confirm that the school has done so.

Thanks,



Loree Stark
Legal Director, ACLU-WV

cc: Principal David Harper, Poca High School
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