

THE RISE OF THE TRANSGENDER CHILD: OVERCOMING SOCIETAL STIGMA, INSTITUTIONAL DISCRIMINATION, AND INDIVIDUAL BIAS TO ENACT AND ENFORCE NONDISCRIMINATORY DRESS CODE POLICIES

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School districts are often called upon to adapt school policies in response to changing student populations, and transgender students appear to be an emerging student population. Schools should adopt nondiscriminatory and inclusive dress code policies to accommodate transgender students. Recently, awareness and advocacy on behalf of children who can be classified as transgender have increased. Unfortunately, despite this increase in awareness and advocacy, transgender students continue to face unique obstacles in the school environment, including bullying, as a result of being transgender. Because the primary means through which transgender students express their identified genders is through their dress, schools should take affirmative steps to accommodate transgender students through their dress code policies.

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INTRODUCTION

*I was born twice: first, as a baby girl, on a remarkably smogless Detroit day in January of 1960; and then again, as a teenage boy, in an emergency room near Petoskey, Michigan, in August of 1974.*¹

In the United States, awareness of the number of children who are identifying as transgender has increased, and a growing number of parents have accepted and even encouraged this gender self-identification.² This rise in awareness, coupled with a corresponding contingent of vocal parents, raises a host of legal questions related to the status of transgender children in the education system. For example, a parent attempting to enroll her biologically male child in school as a female when the child's birth certificate lists her sex as male may face opposition from the school district. A parent may also face difficulties in determining an appropriate response when a teacher or school administrator subjects his or her transgender

1. JEFFREY EUGENIDES, *MIDDLESEX 1* (2002).

2. Julia Reischal, *See Tom Be Jane*, THE VILLAGE VOICE (May 30, 2006), <http://www.villagevoice.com/2006-05-30/news/see-tom-be-jane/> (“[A] growing coalition of therapists, scientists, and activists disagree [that such children should be discouraged from identifying as the opposite genders] and refer to such children—even those as young as three years old—as transgendered, insisting that the child's new identification shouldn't be discouraged.”).

child to intimidation and discrimination.

To date, only a few lawsuits have been filed asserting a right for transgender children to express their genders through their dress.³ However, as the population of children identifying as transgender continues to gain exposure, parents may become more likely to consider legal action to enforce the rights of their transgender children. Because the primary method by which most transgender children express their identified genders⁴ is through their dress,⁵ school dress codes become ripe for legal challenges when they are applied to prohibit children from wearing clothing consistent with their identified genders. In order for school dress code policies to be nondiscriminatory, they cannot be enforced to limit a child from expressing his or her identified gender through clothing, accessories, makeup, or other visual expressions that the child and his or her parents determine are appropriate.⁶ Enforcement also presents a problem for school districts, because teachers and school administrators charged with enforcing nondiscriminatory dress code policies may be influenced by their own prejudices and beliefs.

This Comment argues that given the apparent rise in children identifying as transgender, schools should adopt gender nondiscriminatory dress code policies to protect the rights of transgender students and avoid potential litigation. Part I frames the Comment by defining the term “transgender” as it will be used throughout this article. Part II addresses the recent increase in awareness of transgender children, including an apparent increase in familial support for transgender children. Part II touches upon the advancements in medical and psychological treatment options for children identifying as transgender. Part III discusses the challenges transgender children face because of their transgender status. Part IV

3. See *Doe v. Bell*, 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003); Complaint for Damages and Demand for Jury Trial, *Youngblood v. Sch. Bd. of Hillsborough Cnty.*, No. 8:02-CV-1089-T-24MAP (M.D. Fla. June 19, 2002); *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000); see also *infra* Part IV.A.

4. “Identified gender” refers to a transgender child’s chosen gender. The transgender child’s identified gender is the opposite of his or her biological gender, which is the gender the child has been associated with since birth and is usually marked on the child’s birth certificate.

5. Zenobia V. Harris, *Breaking the Dress Code: Protecting Transgender Students, Their Identities, and Their Rights*, 13 SCHOLAR 149, 155–56 (2010).

6. See *infra* Part IV.A.

examines three lawsuits brought on behalf of transgender youth challenging institutional dress code policies. Finally, Part V offers and discusses possible affirmative steps schools can take to enact nondiscriminatory dress code policies and avoid litigation.

I. DEFINING CATEGORIES OF INDIVIDUALS UNDER THE “TRANSGENDER UMBRELLA”

Before the recent increase in awareness of transgender children can be discussed, the term “transgender” must be defined and understood. Defining what it means to be transgender and who falls under the transgender umbrella, is difficult.⁷ There is no accepted, concrete definition for the term “transgender.”⁸ Additionally, the transgender community itself has largely constructed the term “transgender,” and people who identify as transgender make up a diverse community, thereby further complicating any concrete definition that might be offered.⁹

Scholars have defined the term “transgender” to include a wide range of people who do not conform to traditional gender norms and stereotypes.¹⁰ Broadly speaking, the transgender umbrella includes “individuals of any age or sex whose appearance, personal characteristics, or behaviors differ from

7. Diana Elkind, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895, 897–98 (2007).

8. *See id.*

9. For a discussion of the creation of the term “transgender” by the transgender community, see Phyllis Randolph Frye, *The International Bill of Gender Rights vs. the Cider House Rules: Transgenders Struggle with the Courts Over What Clothing They are Allowed to Wear on the Job, Which Restroom They are Allowed to Use on the Job, Their Right to Marry, and the Very Definition of Their Sex*, 7 WM. & MARY J. WOMEN & L. 133, 153 (2000). Furthermore, the definition of what it means to be transgender is not static and has been evolving since its inception. *See* Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What is the “Plain Meaning” of “Sex” In Title VII of the Civil Rights Act of 1964?*, 18 TEMP. POL. & CIV. RTS. L. REV. 573, 581–90 (2009) (providing a comprehensive history of the definition and classifications under the transgender umbrella from the nineteenth century to present day); Ilana Gelfman, *Because of Intersex: Intersexuality, Title VII, and the Reality of Discrimination “Because of . . . [Perceived] Sex,”* 34 N.Y.U. REV. L. & SOC. CHANGE 55, 62 (2010) (“[T]he definition of intersex is shifting and changing alongside the corresponding shifts and changes in societal definitions of ‘male’ and ‘female.’”).

10. *See* Barbara Fedders, *Coming out for Kids: Recognizing, Respecting, and Representing LGBTQ Youth*, 6 NEV. L. J. 774, 778 (2006).

stereotypes about how men and women are ‘supposed’ to be.”¹¹ For example, Phyllis Randolph Frye conceptualizes two groups of people under the transgender umbrella: “part-time” transgender people and “full-time” transgender people.¹² Part-time transgender people include those whom society labels as a “cross-dresser, transvestite, effeminate male, masculine female, [or] drag queen.”¹³ Full-time transgender people include those in the process of transitioning to their identified genders and those who have completed the transition process.¹⁴ The transition process may involve people living their everyday lives as their identified genders, undergoing hormone therapy, or going through sex reassignment surgery.¹⁵

The term transgender is further complicated when it is applied to children.¹⁶ Unlike adults, children cannot consent to undergo full gender transition.¹⁷ Typically, transgender youths are able to express their identified genders primarily by wearing clothing and accessories society associates with their identified genders.¹⁸ Though this expression is significantly less dramatic than full biological gender transitions, many parents may still fear that their children will be ostracized, harassed, or otherwise negatively affected as a result of wearing clothing or engaging in play associated with their identified, rather than biological, genders.¹⁹ Additionally, parents, as well as the numerous specialists and professionals who are often involved in children’s lives, may prefer to avoid labeling a child as “transgender” or “gender variant,” knowing

11. Amanda Raflo, *Evolving Protection for Transgender Employees Under Title VII’s Sex Discrimination Prohibition: A New Era Where Gender is More Than Chromosomes*, 2 CHARLOTTE L. REV. 217, 221–22 (2010) (quoting Jameson Green, *Introduction* to PAISLEY CURRAH & SHANNON MINTER, *TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS* 1 (Pol’y Inst. of the Natl. Gay & Lesbian Task Force 2000), *available at* <http://www.thetaskforce.org/downloads/reports/reports/TransgenderEquality.pdf>).

12. *See* Frye, *supra* note 9, at 155–59.

13. *Id.* at 155–58. In her explanation of part-time transgender individuals, Frye adds that a defining characteristic of the individuals in this category is that they “do not wish to totally or permanently change their full-time gender presentation.” *Id.* at 157. Thus, she adds the term “gender variant” to classify these individuals. *Id.*

14. *Id.* at 158–59.

15. For a brief overview of the transition process, see Brittany Ems, *Preparing the Workplace for Transition: A Solution to Employment Discrimination Based on Gender Identity*, 54 ST. LOUIS U. L.J. 1329, 1333–34 (2010).

16. Harris, *supra* note 5, 162–63 (2010).

17. *Id.*

18. *Id.* at 163.

19. *See* Reischal, *supra* note 2.

that the child may later decide that he or she no longer identifies with that label.²⁰ This preference also indicates a concern that a transgender child will face negative consequences for living as his or her identified gender, even if the child later returns to living as his or her biological gender.²¹

The term transgender has been broadly interpreted and includes a diverse group of gender variant people, including children. Accordingly, as used in this Comment, the term transgender has a broad definition. As discussed herein, transgender children include those who tell their parents they want to undergo the transition process. Additionally, transgender children include those who insist on wearing clothing and accessories of their nonbiological genders, as well as those who exhibit other gender-nonconforming behavior.

II. THE RISE OF AWARENESS OF THE TRANSGENDER CHILD

The precise number of transgender children in the United States is unclear.²² Various international studies have estimated that the rate of people, including children and adults, who are transgender is somewhere between one in one thousand and one in thirty thousand.²³ Further muddling the estimate of the number of transgender children, “[s]ome gender specialists estimate that [one] in [five hundred] children is significantly gender nonconforming²⁴ or transgender.”²⁵ In contrast, a previous “study based on statistics of postoperative transsexual men put the number at [one] in [twenty thousand].”²⁶ The significant variations in studies indicate that

20. See Bedford Hope, *Disco-Ball Dresses and Spandex*, SLATE MAG., Aug. 2, 2010, http://www.slate.com/articles/double_x/doublex/2010/08/discoball_dresses_and_spandex.html. (parent-author noting “many of us have learned to accept ambiguity, ‘holding all options open,’ as some supportive therapists say. Many of us attempt to avoid labels for something that may or may not fade away in a year—or 10.”).

21. See *id.*

22. Madison Park, *Transgender Kids: Painful Quest to be Who They Are*, CNN (Sept. 27, 2011), <http://www.cnn.com/2011/09/27/health/transgender-kids/index.html> (“[R]obust data and studies about transgender children are rare.”).

23. *Id.*

24. The term “gender nonconforming” is encompassed in the term “transgender” as it is used in this Comment.

25. *Frequently Asked Questions*, GENDER SPECTRUM, <http://www.gender-spectrum.org/child-family/faq> (last visited Nov. 16, 2011).

26. *Id.*

“at present, it is impossible to determine the actual number of transgender or gender diverse children in the [United States].”²⁷

As discussed below, despite the uncertainty over the exact number of transgender children in the United States, it appears that the visibility of transgender children is rising.²⁸ Accompanying the increase in awareness of transgender children are services catering exclusively to their demographic, such as summer camps.²⁹ The rise in awareness of children publicly identifying as transgender is related to two main factors: (1) an increase in familial acceptance of transgender children; and (2) an increase in physical and psychological treatment options for transgender children.

A. *Families’ Embrace: Increase in Familial Acceptance*

A rise in the number of parents who support their children expressing their identified genders has accompanied the increase in public awareness of transgender children.³⁰ In a 2006 Village Voice article on a transgender child, “Nicole,” and her family, the article’s author noted that “[e]xperts consulted by this reporter say the Andersons are the only family in the United States supporting a five-year-old’s choice to live as the opposite sex.”³¹ However, only a single year later, one television special commented that there were “hundreds of families with transgender children” allowing their children to live as their identified genders.³²

27. *Id.*

28. See Norman P. Spack et al., *Children and Adolescents with Gender Identity Disorder Referred to a Pediatric Medical Center*, 129 PEDIATRICS 418 (Feb. 20, 2012), available at <http://pediatrics.aappublications.org/content/early/2012/02/15/peds.2011-0907> (explaining that after a gender clinic was established at Children’s Hospital Boston, the number of transgender youth coming to the hospital quadrupled); see also Hanna Rosin, *A Boy’s Life*, THE ATLANTIC MAG. (Nov. 2008), available at http://www.theatlantic.com/magazine/archive/2008/11/a-boys-life/307059?single_page=true (noting that a leading psychiatrist in treating transgender youth attributes an increase in referrals to “to media coverage and the proliferation of new sites on the Internet”).

29. See Hope, *supra* note 20 (describing the experience of the author, a parent of a transgender child, witnessing his child at a camp exclusively for transgender children).

30. See Alan B. Goldberg & Joneil Adriano, *I’m a Girl!—Understanding Transgender Children*, ABC 20/20 (Apr. 27, 2007), <http://abcnews.go.com/2020/story?id=3088298&page=1>.

31. Reischal, *supra* note 2.

32. Goldberg & Adriano, *supra* note 30; see also Johanna Olson, Catherine

Although this rise in media coverage does not imply that a transgender child is present in every elementary school classroom, it does reflect a growing awareness of transgender children generally.³³ This awareness may be partially attributed to the increase in parental acceptance of transgender children. After all, a parent must approve an interviewer's request to interview the parent's child, and concerned parents are often the strongest advocates for their minor children.³⁴ Additionally, at least one parent has taken her support for her transgender child public.³⁵ Jennifer Carr (pseudonym) recently authored a children's book entitled *Be Who You Are*, which chronicles her and her husband's response to their biologically male child informing them that she identifies as female.³⁶

Many parents appear to accept their transgender child regardless of the age at which the child first announces his or her desire to express his or her identified gender.³⁷ This acceptance suggests that litigation related to transgender students' rights may be seen at all school grade levels. For example, "Jazz," who was born biologically male but identifies as female, asserted at only one-and-a-half years old that she identifies as female.³⁸ When Jazz reached age five, her parents allowed her to present herself as a female full-time and allowed her to wear dresses and other feminine clothing outside of the home.³⁹ Now eleven years old, Jazz continues to live as a

Forbes & Marvin Belzer, *Management of the Transgender Adolescent*, 165 ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 171, 173 (2011), http://imatyfa.org/practioners/ManagementTGAdol_Olson.pdf (noting the increase in media attention paid to transgender children).

33. See Rosin, *supra* note 28.

34. See Reischal, *supra* note 2.

35. Alexia Elejalde-Ruiz, *Meeting the Challenge of a Transgender Child*, CHI. TRIB. (Jan. 25, 2011), http://articles.chicagotribune.com/2011-01-25/features/sc-fam-0125-transgender-child-20110125_1_hope-gender-family-therapy.

36. *Id.* To learn more about Carr's family, visit her blog at Jennifer Carr, TODAY YOU ARE YOU: UNDERSTANDING TRUTH & GENDER DIVERSITY, <http://todayyouareyou.com/> (last visited Dec. 28, 2012).

37. See Reischal, *supra* note 2 (discussing a 2006 Philadelphia Trans-Health Conference panel "How Young Is Too Young?" and a conference attendee parent's agreement "that it's never too early to support a child as a transsexual, even at age five").

38. See Goldberg & Adriano, *supra* note 30. Jazz's parents described Jazz's behavior to include unsnapping her onesie to make her outfit look like a dress and correcting them by saying that she was "a good girl" after they would tell her she was "a good boy." *Id.*

39. *Id.*

female.⁴⁰

Furthermore, this parental advocacy appears to have triggered community advocacy for transgender children. One recent example of community advocacy occurred in Colorado.⁴¹ Seven-year-old Bobby Montoya was born biologically male.⁴² Notwithstanding her biological gender, Bobby liked to dress as a female and play with toys typically associated with young girls.⁴³ Further expressing her identified gender and her enjoyment of activities typically associated with young girls, Bobby requested to join the Girl Scouts of Colorado.⁴⁴ Although Bobby's request was initially denied, the Girl Scouts of Colorado later "admitted a mistake was made" and allowed Bobby to join the Girl Scouts.⁴⁵ Additionally, the Girl Scouts of Colorado stated that it has received an increase in "requests for support of transgender kids[,] . . . and [it] is working to support the children, their families[,] and the volunteers who serve them."⁴⁶ Thus, Bobby's struggle to join the Girl Scouts illuminates not only the current rise in the awareness of transgender children, but also the corresponding rise in people advocating for these children.⁴⁷ This increase in advocacy suggests that parents may begin addressing their children's rights in the school system, including the right for transgender children to dress in clothing associated with their identified genders.⁴⁸

B. Increase in Psychological and Physical Treatment Options

The increase in awareness of transgender children is also

40. For a preview of a special that aired about Jazz on November 17, 2011, see Oprah Winfrey Network, *The Rosie Show: Meet Jazz*, YOUTUBE (Nov. 11, 2011), http://www.youtube.com/watch?v=L3L0uJY_Rg4.

41. Dean Praetorius, *Bobby Montoya, 7-Year-Old Transgender Child, Turned Away Form Girl Scouts, Later Accepted*, HUFFINGTON POST (Oct. 31, 2011 3:25 PM), http://www.huffingtonpost.com/2011/10/26/bobby-montoya-girl-scouts_n_1033308.html.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Colorado Girl Scouts Say Boy Welcome to Join*, FOX NEWS (Oct. 26, 2011), <http://www.foxnews.com/us/2011/10/26/colorado-girl-scouts-say-boy-welcome-to-join/>.

47. *See id.*

48. *See infra* Part IV.

related to an increase in psychological and physical treatment options for transgender youth.⁴⁹ It has also led to a vigorous dispute about how best to treat children who identify as transgender. In the psychiatric community, there are two factions of care providers who disagree on the most appropriate way to treat transgender children.⁵⁰ One group practices a line of therapy based on the belief that when a child expresses that his or her biological gender is not his or her identified gender, parents should encourage their child to embrace his or her identified gender.⁵¹ The second group practices a line of therapy designed to compel the child to conform to his or her biological gender and overcome the impulses that accompany the child's desire to dress and behave like his or her identified gender.⁵² The second group's practice is consistent with scientific studies finding that most people who identified as transgender when they were children will no longer identify as transgender by the time they reach adulthood.⁵³

Complicating the psychological treatment options for transgender youth is the invention of hormone blockers, or so-called "puberty blockers."⁵⁴ Hormone blockers became available in 2005 to assist transgender children in undergoing the transition process.⁵⁵ Hormone blockers effectively stop the puberty process, putting "teens in a state of suspended development."⁵⁶ For example, the blockers prevent a biological male from growing facial hair, developing a deep voice, and growing an Adam's apple.⁵⁷ Framed in the context of the transition process, the blockers prevent the development of "physical characteristics that a . . . [transgender individual] would later [have to] spend tens of thousands of dollars to reverse."⁵⁸ However, in order to be effective, the blockers must be taken before puberty begins.⁵⁹ Therefore, when crafting dress code policies, schools should consider the potential for

49. See Spack et al., *supra* note 28.

50. Alix Spiegel, *Two Families Grapple with Sons' Gender Identity*, NAT'L PUB. RADIO (May 7, 2008), <http://www.npr.org/2008/05/07/90247842/two-families-grapple-with-sons-gender-preferences>.

51. *Id.*

52. *Id.*

53. Spack et al., *supra* note 28, at 571.

54. Rosin, *supra* note 28.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

children to avoid ever outwardly presenting themselves as their biological genders. As children are increasingly able to disguise their biological genders, the capability of schools to define children as male or female is eroded. If a school does not have a gender-neutral dress code, this erosion may complicate the school's ability to enforce its dress policies, albeit possibly in a nondiscriminatory way, as it would be unable to differentiate between a student's biological gender and the gender expressed by the student. As discussed in Part III, transgender children often face difficulties in the school environment specifically because they are transgender.

III. UNIQUE OBSTACLES FACED BY THE TRANSGENDER CHILD

Transgender youth face unique obstacles due to their transgender status.⁶⁰ Transgender students are more likely to feel unsafe at school than non-transgender students, including other LGBT⁶¹ students.⁶² Additionally, transgender students are more likely to be verbally harassed,⁶³ physically harassed,⁶⁴ and physically assaulted⁶⁵ than their nontransgender peers. Almost half of all transgender children who have been assaulted or harassed do not report the incidents.⁶⁶

Additionally, transgender youth face unique institutional obstacles as a result of their student status.⁶⁷ For example,

60. Elkind, *supra* note 7, at 921.

61. LGBT is an acronym for Lesbian, Gay, Bisexual, and Transgender people.

62. Harsh Realities *Finds Transgender Youth Face Extreme Harassment in School*, GAY, LESBIAN, & STRAIGHT EDUC. NETWORK (Mar. 17, 2009), available at <http://www.glsen.org/cgi-bin/iowa/all/news/record/2388.html> [hereinafter GLESN study].

63. *Id.* (finding “[a]lmost all transgender students had been verbally harassed (e.g., called names or threatened) in the past year at school because of their sexual orientation (89 [percent]) and gender expression (87[percent])”).

64. The GLESN study defined physical harassment as action similar or equivalent to pushing and shoving and found that the majority of transgender students had been physically harassed in the last year “because of their sexual orientation (55 [percent]) and gender expression (53 [percent]).” *Id.*

65. Physical assault was defined as action similar or equivalent to punching, kicking, or injuring with a weapon. *Id.* The study found that 28 percent of transgender students had been physically assaulted because of their sexual orientation, and 26 percent had been physically assaulted because of their gender expression. *Id.*

66. *Id.* at 22. It is unclear why such a large percentage of transgender children do not report that they have been harassed or assaulted. *See id.*

67. *Safe and Supportive Schools*, NAT'L CTR. FOR TRANSGENDER EQUAL., <http://transequality.org/Issues/education.html> (last visited Nov. 15, 2011)

while most gender-conforming students likely have little difficulty enrolling in school, transgender students wishing to enroll as their identified genders, as opposed to their biological genders, often face difficulties. These difficulties arise because students are often required to show documentation, typically in the form of a birth certificate, proving their gender identity in order to enroll.⁶⁸ To enroll in school as their identified genders, students may need to legally petition a court to change the sex on their birth certificates from their biological genders to their identified genders.⁶⁹

Though these institutional hurdles often create difficulties for transgender students and their families, they also present an opportunity for parents to insert themselves into the education setting as advocates for their children. A parent's presence at school may impact more than just his or her child; it can also have a profound effect on school policy and school culture. Moreover, many teachers and administrators may be more willing to accommodate a transgender student's parents than to support a transgender child without parental support.⁷⁰

IV. CASE STUDY: THE TRANSGENDER STUDENT FORCED TO VIOLATE SCHOOL DRESS CODES

A. *Legal Claims Brought by Transgender Students over School Dress Codes*

To date, only a handful of legal actions brought on behalf of transgender children have challenged institutional dress codes. Below, this Comment examines three legal challenges at different stages in the proceedings. The first section examines a transgender student's complaint for damages and demand for jury trial. The student's complaint demonstrates the different contexts in which school dress policies may harm a transgender

(providing a comprehensive list of proposed measures to protect transgender children in the education system).

68. Stephanie Innes, *Meet Josie, 9: No Secret She's Transgender*, ARIZ. DAILY STAR (July 25, 2010), http://azstarnet.com/news/science/health-med-fit/article_62e8719b-5b8d-5f99-80f3-71f00a41c334.html (describing difficulty in enrolling child in school as identified gender without a legally changed birth certificate stating the child's identified gender).

69. *Id.*

70. See Reischal, *supra* note 2.

student.⁷¹ The second section summarizes a court order granting a transgender student's request for a preliminary injunction after she brought a suit challenging her school's dress code.⁷² This case is instructive in predicting how other courts may respond to similar requests. The third section summarizes a court's decision where a transgender youth had challenged the dress code in a residential foster care facility.⁷³ The court's decision provides additional insight into the approaches courts have taken to address legal challenges brought by transgender youth related to mandatory dress codes.

B. A Complaint: Youngblood v. School Board of Hillsborough County

The complaint in *Youngblood v. School Board of Hillsborough County* alleged that a public school district impermissibly discriminated against a high school senior when it refused to allow the student to wear a shirt, tie, and jacket in her⁷⁴ yearbook photograph rather than a "velvet-like, ruffly, scoop neck drape" that it required female students to wear.⁷⁵ In her complaint, the student stated that she "has not conformed to gender stereotypes about how girls are supposed to look and behave" from a "very young age."⁷⁶ This gender nonconformity included not wearing dresses or skirts after early elementary school.⁷⁷ Because she refused to wear the drape in her photograph, the district stated that the student would have to pay for her own photography and purchase a paid advertisement in the yearbook in order for her picture to appear in the yearbook.⁷⁸ The student refused to purchase a paid advertisement.⁷⁹ Therefore, the student did not appear in the yearbook, and the school did not list her name in the

71. Complaint for Damages and Demand for Jury Trial, *supra* note 3.

72. *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *1 (Mass. Super. Ct. Oct. 11, 2000).

73. *Doe v. Bell*, 754 N.Y.S.2d 846, 848 (N.Y. Sup. Ct. 2003).

74. Because it is unclear from her complaint whether the student explicitly identified as transgender, the female pronoun will be used when discussing her claim.

75. Complaint for Damages and Demand for Jury Trial, *supra* note 3, ¶ 7.

76. *Id.* ¶ 8.

77. *Id.* Therefore, as defined in this Comment, the student was transgender. See *supra* Part I.

78. *Id.* ¶ 28.

79. *Id.* ¶ 31.

yearbook's index.⁸⁰

The complaint asserted causes of action for discrimination based on sex in violation of Title IX of the Education Amendment Acts,⁸¹ a Florida state antidiscrimination act that prohibits discrimination on the basis of gender in K-20 education,⁸² the right to freedom of expression under the United States Constitution⁸³ and the Florida state constitution,⁸⁴ and equal protection under the Fourteenth Amendment.⁸⁵ The court never addressed the merits of the student's complaint because the case settled out of court.⁸⁶

The *Youngblood* complaint is instructive for two reasons. First, it demonstrates one scenario in which a school dress code impacts a transgender student. It appears from the complaint that the student had been gender nonconforming in her dress since the first or second grade.⁸⁷ However, it was not until her senior year portrait that the student brought a lawsuit challenging the school dress code.⁸⁸ The complaint demonstrates that, even where a school permits a student to wear gender nonconforming clothing, school dress codes are sometimes applied in a discriminatory way in specific situations, such as school yearbook photographs. Therefore, *Youngblood* indicates that when districts examine their dress code policies to determine whether they discriminate against gender nonconforming students, districts must also evaluate their policies with respect to school photographs or other situations in which the district has prescribed clothing and appearance guidelines. Second, as discussed in subsection 4 of this Part, the *Youngblood* complaint is instructive because it sets forth several distinct causes of action under which a

80. *Id.* ¶ 31.

81. *Id.* ¶ 35.

82. *Id.* ¶ 37; *see also* Florida Educational Equity Act, FLA. STAT. ANN. § 1000.05 (West 2011).

83. Complaint for Damages and Demand for Jury Trial, *supra* note 3, ¶ 3.

84. *Id.* ¶ 41.

85. *Id.* ¶ 43.

86. *See Florida Student Settles Lawsuit over Yearbook Dress Code*, FIRST AMEND. CTR. (May 15, 2004), <http://www.firstamendmentjournal.com/speech/studentexpression/%5Cnews.aspx?id=13346>. The settlement resulted in a new school district policy allowing high school seniors fourteen days to appeal the district's dress code policy if they believe it is discriminatorily applied to them. *See Adam Lynch, School Cuts Gay Student Photo from Yearbook*, JACKSON FREE PRESS (Apr. 26, 2010), http://www.jacksonfreepress.com/index.php/site/comments/school_cuts_gay_student_photo_from_yearbook/.

87. Complaint for Damages and Demand for Jury Trial, *supra* note 3, ¶ 8.

88. *See id.* ¶ 6.

gender nonconforming student may challenge a discriminatory school dress code policy.

C. A Preliminary Injunction: Doe ex rel. Doe v. Yunits

In *Doe ex rel. Doe v. Yunits*, an eighth grade student brought a lawsuit against a Massachusetts public school for its refusal to re-enroll her if she wore female clothing or accessories.⁸⁹ The student was biologically male and identified as male when enrolling in school.⁹⁰ However, in the seventh grade, the student began expressing her identified gender as female by wearing female clothing, accessories, and makeup to school.⁹¹ At this time, the student's therapist diagnosed her with Gender Identity Disorder.⁹² Notwithstanding knowledge of her diagnosis, the school principal required the student "to come to his office every day so that he could approve [her] appearance."⁹³ As a result of this daily screening process, "[s]ome days the [student] would be sent home to change, sometimes returning to school dressed differently and sometimes remaining home."⁹⁴

The school's dress code "prohibit[ed], among other things, 'clothing which could be disruptive or distracting to the educational process or which could affect the safety of students.'"⁹⁵ Because the student wore "padded bras, skirts or dresses, or wigs," the school determined the student violated the dress code because her "outfits [were] disruptive to the educational process."⁹⁶ Thus, the school gave the student two unfavorable options: enrolling in school but not wearing clothing consistent with her identified gender or not enrolling in school for the academic year.⁹⁷ These options led the student to file a lawsuit against the school in Massachusetts state court.⁹⁸ The student's suit included eight causes of action based

89. *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *1 (Mass. Super. Ct. Oct. 11, 2000).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at *2.

97. *Id.*

98. *Id.*

on the Massachusetts constitution and state statutes.⁹⁹ The student requested,¹⁰⁰ and the court subsequently granted,¹⁰¹ a preliminary injunction allowing her to wear female clothing and accessories to school. In its order granting the preliminary injunction, the court found that three of the eight causes of action likely would be successful on the merits.¹⁰²

First, when granting the student's request for a preliminary injunction, the court found that the student was likely to prevail on her claim that the school's actions unlawfully infringed on her right to freedom of expression.¹⁰³ The court found the student could likely establish that "by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with that gender."¹⁰⁴ As the court stated, "[the student's] expression is not merely a personal preference *but a necessary symbol of her very identity.*"¹⁰⁵ Additionally, the court found that by prohibiting the student "from wearing items of clothing that are traditionally labeled girls' clothing, such as dresses and skirts, padded bras, and wigs . . . [the school engaged in] direct suppression of speech because biological females who wear items such as tight skirts to school are unlikely to be disciplined by school officials."¹⁰⁶ Although this suppression of speech is permissible if the student's speech "materially and substantially interferes with the work of the school,"¹⁰⁷ the court found the school's argument that the student's dress was distracting to be unpersuasive.¹⁰⁸ In so finding, the court noted that the school did not consider the student's "clothing distracting *per se*, but, essentially, distracting simply because

99. *Id.*

100. *Id.* at *8.

101. *Id.*

102. *Id.* at *3-7. When determining whether to grant a preliminary injunction, the court first evaluates "the moving party's claim of injury and chance of success on the merits." *Id.* at *2 (quoting *Packing Indus. Grp. v. Cheney*, 405 N.E.2d 106, 112 (Mass. 1980)). Next, the court balances the risk that the moving party will suffer irreparable harm if the injunction is not granted against any risk of irreparable harm that the non-moving party may suffer if the injunction is granted. *Id.*

103. *Id.* at *5.

104. *Id.* at *3.

105. *Id.* (emphasis added).

106. *Id.* at *4.

107. *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969)).

108. *Id.*

plaintiff [was] a biological male.”¹⁰⁹

Second, the court found the student was likely to prevail on a liberty interest¹¹⁰ claim.¹¹¹ Although the court’s order only briefly addressed this claim, it stated that an individual has a liberty interest in her appearance.¹¹² It also cited favorably to a decision finding that this liberty interest was violated when a school prohibited a male student from having shoulder-length hair.¹¹³ Accordingly, because the school probably could not demonstrate that the student’s dress was distracting, the court found that the school probably could not overcome the student’s liberty interest claim in her appearance if the claim went to trial on its merits.¹¹⁴

Third, the court found that the student was likely to prevail on her claim of sex discrimination.¹¹⁵ In doing so, the court incorporated legal principles derived from Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment “because of” or “on the basis of” sex.¹¹⁶ The court relied on the landmark employment discrimination case *Price Waterhouse v. Hopkins*.¹¹⁷ In *Price Waterhouse*, the Court held that an employee alleging sex discrimination can prevail on a Title VII sex discrimination claim where the employee is discriminated against for not conforming to gender

109. *Id.*

110. In order to prevail on a due process claim, a plaintiff must establish that he or she was “deprived of a protected interest in ‘property’ or ‘liberty.’” *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) (citations omitted). Thus, a liberty interest claim encompasses allegations of a violation of due process such that the plaintiff was deprived of a protected interest in liberty. *See id.* There is no established definition for the types of deprivations encompassed by liberty interest claims. *See, e.g., Sandin v. Conner*, 515 U.S. 472, 493 (1995); *see also* Rebecca Brown, Note, *Grandparent Visitation and the Intact Family*, 16 S. ILL. U. L.J. 133, 143 (1991). However, some courts have found that “liberty” encompasses personal appearance. *See Rathert v. Village of Peotone*, 903 F.2d 510, 514 (7th Cir. 1990); *DeWeese v. Town of Palm Beach*, 812 F.2d 1365, 1367 (11th Cir. 1987); *Domico v. Rapides Parish Sch. Bd.*, 675 F.2d 100, 101 (5th Cir. 1982); *see also Kelley v. Johnson*, 425 U.S. 238, 244 (1976) (assuming liberty interest in one’s appearance exists for purpose of discussion where police officer challenged county’s hair-grooming standards for male police officers).

111. *Id.* at *6.

112. *Id.*

113. *Id.* (citing *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970)).

114. *Id.*

115. *Id.* at *7.

116. 42 U.S.C. § 2000e-2(b) (2006); *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *6 (Mass. Super. Ct. Oct. 11, 2000).

117. *Yunits*, 2000 WL 33162199 at *6 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989)).

stereotypes.¹¹⁸ Gender stereotypes include, but are not limited to, dress, speech, mannerisms, and other behavior.¹¹⁹ In *Yunits*, the court found that the student was discriminated against because the school believed that, by dressing as her identified gender, she did not conform to gender stereotypes of what a male student should wear.¹²⁰ In so finding, the court declared it could not “allow the stifling of plaintiff’s selfhood merely because it causes some members of the community discomfort.”¹²¹

Accordingly, the court granted the student’s motion for a preliminary injunction.¹²² In its preliminary injunction, the court ordered that:

1. Defendants are preliminarily enjoined from preventing plaintiff from wearing any clothing or accessories that any other male or female student could wear to school without being disciplined;
2. Defendants are further preliminarily enjoined from disciplining plaintiff for any reason for which other students would not be disciplined; and
3. If defendants do seek to discipline plaintiff in conformance with this order, they must do so according to the school’s standing policies and procedures.¹²³

Additionally, at the end of its opinion, the court expressed its own belief that transgender students can contribute positively to the school community: “[E]xposing children to diversity at an early age serves the important social goals of increasing their ability to tolerate such differences and teaching them respect for everyone’s unique personal experience in that ‘Brave New World’ out there.”¹²⁴

As discussed in Part IV, *infra*, the court’s order in *Yunits* can inform the discussion of school dress codes because it offers insight into which causes of action the court found persuasive. Although the court’s findings are not binding on other courts, and therefore school districts may not consider them

118. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

119. *Id.* at 235, 250.

120. *Yunits*, 2000 WL 33162199, at *6.

121. *Id.* at *7.

122. *Id.* at *8.

123. *Id.*

124. *Id.*

persuasive, there is very little precedent to guide schools as they craft nondiscriminatory dress code policies. Therefore, school districts can use the court's discussion in *Yunits* of the various causes of action to ensure their dress codes are not discriminatorily applied to transgender students. Likewise, the language of the court's injunction can be useful when examining how school districts should draft and enforce their dress codes to be inclusive of transgender students.¹²⁵

D. *A Final Order: Doe v. Bell*

In *Doe v. Bell*, a transgender youth resided in an all-male foster care center in New York State.¹²⁶ The youth identified as female and had been diagnosed with Gender Identity Disorder.¹²⁷ Despite a recommendation from her psychiatrist that she dress according to her identified gender,¹²⁸ the center prohibited her from wearing "female attire" while inside the center.¹²⁹ The youth filed a lawsuit against the center, alleging both violations of state law and the constitutional right to freedom of expression.¹³⁰ After the youth filed her lawsuit, the center enacted a new dress code.¹³¹ The dress code included the following provisions:

[R]esidents must wear pants, or in warm weather, loose-fitting shorts that extend at least to mid-thigh. Shirts (or blouses) must also be worn at all times and must not expose the chest or midriff [C]lothing that is sexually provocative, that is, excessively short or tight fitting, or which is see thru [sic] [is prohibited.] . . . [R]esidents who wish to wear female attire may do so as long as the above guidelines are respected. Female attire that does not conform to the policy may only be worn by a resident when

125. Particularly striking is how much of the policy outlined in the court's order aligns with that promulgated in the Model District Policy discussed in Section B, *infra*.

126. *Doe v. Bell*, 754 N.Y.S.2d 846, 847–48 (N.Y. Sup. Ct. 2003).

127. *Id.* at 847.

128. *Id.* at 848 (recounting psychiatrist's testimony regarding her recommendations to youth, which included "wearing girls' clothing, accessories, and makeup, and sometimes other items to make [herself] look . . . more feminine, such as breast enhancers") (alteration in original).

129. *Id.* at 849.

130. *Id.* at 848.

131. *Id.* at 849.

leaving facility premises. Residents whose attire does not conform to these guidelines must be immediately sent to their rooms to change.¹³²

The new dress code prohibited all residents from wearing skirts and dresses.¹³³ The transgender youth's lawsuit alleged that the center had violated the New York State Human Rights Law by discriminating against her on the basis of disability¹³⁴ when it refused to make a reasonable accommodation allowing her to wear women's clothing, including skirts and dresses, in her residence.¹³⁵ The court evaluated the youth's claim in the context of the center's new dress code.¹³⁶

First, the court found that, under the New York State definition of disability,¹³⁷ the youth was disabled because she had Gender Identity Disorder.¹³⁸ Second, the court found that, although the center's policy was facially neutral,¹³⁹ the center did not provide a requested reasonable accommodation for the youth, as required under the state's disability discrimination law.¹⁴⁰ The court also found that the youth's requested reasonable accommodation—exemption from the center's dress code policy—would not pose a health or safety risk to others living at the center, which otherwise would have provided a defense for the center's failure to accommodate the youth.¹⁴¹ Therefore, the court concluded that the center impermissibly discriminated against the youth by failing to provide a reasonable accommodation for the youth's Gender Identity

132. *Id.* at 849–50 (internal quotation marks omitted).

133. *Id.*

134. Here, categorizing Gender Identity Disorder as a disability proved helpful for the youth. However, there are problems with this approach, including the further stigmatization of transgender people. See L. Camille Hebert, *Transforming Transsexual and Transgender Rights*, 15 WM. & MARY J. WOMEN & L. 535, 543 (2009).

135. *Doe v. Bell*, 754 N.Y.S.2d 846, 848 (N.Y. Sup. Ct. 2003).

136. *Id.* at 852.

137. Under New York state law, “disability” includes “a physical, mental or medical impairment resulting from anatomical, physiological, genetic, or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques” *Id.* at 850 (quoting N.Y. HUMAN RIGHTS LAW § 292 (McKinney 2012)) (internal quotation marks omitted).

138. *Id.* at 851.

139. *Id.*

140. *Id.* at 853.

141. *Id.* at 855.

Disorder.¹⁴² Accordingly, the court ordered that the youth be exempt “from respondents’ dress policy, to the extent it bars her from wearing skirts and dresses” at the facility.¹⁴³

Under the two primary federal disability discrimination laws, the Americans with Disabilities Act (“ADA”) and the Rehabilitation Act, Gender Identity Disorder and transgenderism are excluded from coverage.¹⁴⁴ Because the majority of states with disability discrimination laws patterned their laws after the ADA, Gender Identity Disorder is also excluded from coverage under most state disability discrimination laws.¹⁴⁵ However, the court’s decision in *Doe v. Bell* illustrates that under some state laws it is possible for a transgender youth to succeed on a disability discrimination claim. In addition to the state of New York, state courts and administrative forums have construed disability discrimination laws in Connecticut,¹⁴⁶ Florida,¹⁴⁷ Massachusetts,¹⁴⁸ New Hampshire,¹⁴⁹ and New Jersey¹⁵⁰ to cover transgenderism as a disability if the plaintiff has a formal diagnosis of Gender Identity Disorder. Thus, *Doe v. Bell* illustrates the importance of school districts following not only federal laws, but also state laws, when crafting nondiscriminatory school dress code policies.

E. A Summary: Common Threads Through Legal Challenges

The foregoing claims exhibit five causes of action under which a transgender student may challenge a school district’s

142. *Id.* at 856.

143. *Id.*

144. 42 U.S.C. § 12211(b)(1) (2006) (excluding “transvestism, transsexualism[,] . . . [and] gender identity disorders” from the definition of disability under the ADA); 29 U.S.C. § 705(20)(F)(i) (2006) (codifying the ADA’s language excluding transgenderism in the Rehabilitation Act).

145. *See, e.g.*, IND. CODE § 22-9-5-6 (2012).

146. *Comm’n on Human Rights & Opportunities v. City of Hartford*, No. CV094019485S, 2010 WL 4612700, at *12 (Conn. Super. Ct. Oct. 27, 2010).

147. *Smith v. City of Jacksonville Corr. Inst.*, No. 88-5451, 1991 WL 833882, ¶ 52 (Fla. Div. Admin. Hrgs. Oct. 2, 1991).

148. *Lie v. Sky Publ’g Corp.*, No. 013117J, 2002 WL 31492397, at *7 (Mass. Super. Ct. Oct. 7, 2002).

149. *Doe v. Electro-Craft Corp.*, No. 87-E-132, 1988 WL 1091932 (N.H. Sup. Ct. Apr. 8, 1988).

150. *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 376–77 (N.J. Super. Ct. App. Div. 2001).

dress code policy.¹⁵¹ The Fourteenth Amendment is the strongest source for a legal challenge to a public school's dress code under federal law and contains two provisions¹⁵² under which such a claim can be brought. The broad language of the Fourteenth Amendment's equal protection clause offers one basis for such a challenge.¹⁵³ In the equal protection context, courts are more likely to find a violation where a school dress code includes gender classifications.¹⁵⁴ Such findings are consistent with the purpose of the equal protection clause, which "is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination."¹⁵⁵ The United States Supreme Court has consistently held that state classifications based on sex and gender are subject to intermediate scrutiny.¹⁵⁶ To pass intermediate scrutiny, the government must prove that a gender-based classification "is substantially related to a sufficiently important governmental interest."¹⁵⁷ Thus, a dress code containing dress or appearance standards that specifically apply to only one gender constitutes gender discrimination unless the school can demonstrate that the classification is sufficiently important to the school's interest. For transgender students, such discrimination may occur where a school dress code states that male students must wear pants but does not require female students to do the same, and the school requires a biologically male student who identifies as female to wear pants to school. To survive an equal protection challenge in such a situation, a school must demonstrate that requiring male students to wear pants is substantially related to an important school interest.

The due process clause of the Fourteenth Amendment

151. This list is almost certainly nonexhaustive in capturing the statutes and constitutional protections under which a transgender student may bring a claim related to a school dress code. Because of the small number of claims brought thus far, it is unclear where other legal bases for bringing such an action may be located, and whether such claims could be successful.

152. U.S. CONST. amend. XIV, § 1.

153. The Fourteenth Amendment mandates that "[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

154. Jennifer L. Greenblatt, *Using the Equal Protection Clause Post-VMI to Keep Gender Stereotypes Out of the Public School Dress Code Equation*, 13 U.C. DAVIS J. JUV. L. & POL'Y 281, 287 (2009).

155. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (internal citations omitted).

156. *United States v. Virginia*, 518 U.S. 515, 555 (1996); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985).

157. *City of Cleburne*, 473 U.S. at 441.

provides another avenue to challenge a school's discriminatory dress code policy.¹⁵⁸ Some circuits have interpreted the due process clause to include a distinct cause of action relevant to the discussion of school dress codes: the protection of a liberty interest in one's own appearance.¹⁵⁹ As applied to transgender people, numerous state courts have held that city or county ordinances banning cross-dressing are unconstitutional because they violate a transgender person's liberty interest in dressing as he or she chooses.¹⁶⁰ Thus, a school dress code could be unconstitutional if it prevents transgender students from dressing as they choose. Although courts allow schools some latitude in prescribing dress and appearance regulations because of schools' unique status as educational institutions,¹⁶¹ students' liberty interests are still implicated by school dress codes.¹⁶² The preliminary injunction issued in *Yunits* suggests

158. In relevant part, the Fourteenth Amendment states that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

159. *Rathert v. Village of Peotone*, 903 F.2d 510, 514 (7th Cir. 1990); *DeWeese v. Town of Palm Beach*, 812 F.2d 1365, 1367 (11th Cir. 1987); *Domico v. Rapides Parish Sch. Bd.*, 675 F.2d 100, 101 (5th Cir. 1982); see also *Kelley v. Johnson*, 425 U.S. 238, 244 (1976) (assuming the existence of a liberty interest in one's appearance for purpose of discussion where police officer challenged county's hair-grooming standards for male police officers); James M. Maloney, Note, *Suits for the Hirsute: Defending Against America's Undeclared War on Beards in the Workplace*, 63 *FORDHAM L. REV.* 1203, 1229 (1995) (discussing a county government's policy prohibiting a distinct class of public employees—police officers—from having facial hair in light of the "general contours of the substantive liberty interest protected by the Fourteenth Amendment"); *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *6 (Mass. Super. Ct. Oct. 11, 2000).

160. Kristine W. Holt, Comment, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 *TEMP. L. REV.* 283, 292 n.54 (1997) (describing three cases from different states in which such ordinances were found unconstitutional because they impermissibly infringed on the liberty interests of transgender individuals: *Doe v. McConn*, 489 F. Supp. 76 (S.D. Tex. 1980); *Chicago v. Wilson*, 389 N.E.2d 522 (Ill. 1978); and *Cincinnati v. Adams*, 330 N.E.2d 463 (Hamilton Co. Mun. Ct. 1974)).

161. See, e.g., *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1306 (8th Cir. 1997) (recommending that courts should "enter the realm of school discipline with caution, appreciating that our perspective of the public schools is necessarily a more distant one than that of the individuals working within these schools").

162. *Id.* at 1307. In *Stephenson*, a school district's policy prohibited the "display of 'colors', symbols, signals, signs, etc." related to gangs. *Id.* at 1305. A student who was disciplined for violating the policy challenged its constitutionality. *Id.* at 1304. The student had a cross tattoo that the school district interpreted as a gang symbol even though "there was no evidence that [the student] was involved in gang activity and no other student complained about the tattoo or considered it a gang symbol." *Id.* at 1305. The court held that the school district's policy was void

that courts will give credence to the liberty interest argument and may find it persuasive enough to hold that school dress codes are unconstitutional if they discriminate against transgender students.¹⁶³

Both the *Yunits* decision and the *Youngblood* complaint suggest an additional constitutional source by which a transgender student may challenge a school's dress code: the right to freedom of expression protected by the First Amendment's freedom of speech clause.¹⁶⁴ The Supreme Court has held that choice of dress can be a form of constitutionally protected speech.¹⁶⁵ Students have a constitutionally protected right to freedom of expression, including expression through choice of dress, "[i]n the absence of a specific showing of constitutionally valid reasons to regulate" this type of speech.¹⁶⁶ Thus, a school district's policy that, when applied to a transgender student, limits the student's ability to express his or her identified gender could be unconstitutional for violating the student's right to freedom of expression under the First Amendment.¹⁶⁷

The complaint in *Youngblood* posits that Title IX of the Educational Amendment Acts could give rise to a cause of action for discrimination related to school dress codes.¹⁶⁸ Indeed, Title IX, on its face, appears to be a logical source

for vagueness. *Id.* at 1311. In so finding, the court stated that the "[d]istrict regulation implicated [the student's] liberty interests in governing her personal appearance." *Id.* at 1307.

163. *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *5–6 (Mass. Super. Ct. Oct. 11, 2000).

164. *Id.*; Complaint for Damages and Demand for Jury Trial, *supra* note 3, ¶ 37.

165. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969). In order for dress to be protected speech, it must constitute "expressive conduct," meaning it has "an intent to convey a 'particularized message' along with a great likelihood that the message will be understood by those viewing it." *Zalweska v. Cnty. of Sullivan*, 316 F.3d 314, 319 (2d Cir. 2003) (citing *Texas v. Johnson*, 491 U.S. 397, 404 (1989); *Spence v. Washington*, 418 U.S. 405, 409 (1974)).

166. *Tinker*, 393 U.S. at 511.

167. To date, the Supreme Court has prescribed no set test—or level of scrutiny—to apply when determining if a school's dress code violates a student's right to freedom of expression. The circuit courts are in disagreement on how to interpret *Tinker* related to this issue and have applied conflicting standards. See *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 430–32 (9th Cir. 2008) (describing the split between circuits applying the *Tinker* test and the test articulated in both *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), and *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)).

168. Complaint for Damages and Demand for Jury Trial, *supra* note 3, ¶ 35.

under which to bring such a claim.¹⁶⁹ However, courts have held that gender discrimination claims for school dress codes brought under Title IX are not actionable.¹⁷⁰ Although a provision that was part of Title IX when it was enacted would have barred schools from including gender classifications in school appearance policies, the provision was quickly removed.¹⁷¹ As it stands now, courts have been unwilling to find violations of Title IX where school dress codes impose gender-based classifications.¹⁷² Nonetheless, Title IX may provide one legal means by which transgender students can be protected from discrimination in the school setting.

Finally, the examples above illustrate that most or all complaints challenging school dress codes brought on behalf of transgender students are likely to include state-based causes of action. Often, the protections afforded by state constitutions and statutes are broader than those prescribed by federal statutes and the Constitution.¹⁷³ For example, the youth in *Doe v. Bell* succeeded in challenging a dress code based on the court's interpretation of New York law that Gender Identity Disorder qualified as a disability that the state was required to accommodate.¹⁷⁴ Although a cause of action based on disability discrimination related to Gender Identity Disorder may be successful under other state disability discrimination statutes,¹⁷⁵ it cannot be successful under the federal disability discrimination statutes.¹⁷⁶ However, as some states have

169. See 20 U.S.C. § 1681 (2006) (ordering, subject to some narrow exceptions, that “[n]o person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or *be subject to discrimination under any education program or activity*”) (emphasis added).

170. See Greenblatt, *supra* note 154, at 285–86.

171. *Id.* Moreover, the only case decided under the provision narrowly construed the bar and upheld a school dress code that banned long hair only for male students. *Id.* at 286; see also *Trent v. Perritt*, 391 F. Supp. 171, 173–74 (S.D. Miss. 1975).

172. Carolyn Ellis Staton, *Sex Discrimination in Public Education*, 58 MISS. L.J. 323, 334 (1988).

173. See, e.g., *supra* notes 146–150 and accompanying text; *infra* note 177 and accompanying text.

174. *Doe v. Bell*, 754 N.Y.S.2d 846, 856 (N.Y. Sup. Ct. 2003).

175. See *supra* notes 146–150 and accompanying text.

176. See 42 U.S.C. § 12211(b)(1) (2006) (excluding “transvestism, transsexualism[,] . . . [and] gender identity disorders” from the definition of disability in the ADA); 29 U.S.C. § 705(20)(F)(i) (2006) (codifying the ADA’s language excluding transgenderism in the Rehabilitation Act); see also *Oiler v. Winn-Dixie Louisiana, Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541, at *3 n.47 (E.D. La. Sept. 16, 2002) (“Congress specifically excluded gender identity disorders from coverage under the ADA.”).

continued to increase the protections afforded to transgender people,¹⁷⁷ they have increased the number of methods by which transgender youth can seek relief under state constitutions and statutes. For example, Colorado amended its Anti-Discrimination Act in 2007 to include protections for discrimination based on sexual orientation, where sexual orientation “means a person’s orientation toward heterosexuality, homosexuality, bisexuality, or *transgender status* or another person’s perception thereof.”¹⁷⁸ The Act prohibits discrimination on the basis of sexual orientation in places of public accommodation, which includes educational institutions.¹⁷⁹ Therefore, a Colorado student who is transgender may successfully state a discrimination claim related to a school’s dress code policy under the Colorado Anti-Discrimination Act. Transgender students also may be able to challenge school dress code policies under other existing state statutes or constitutions but have not yet done so.

V. PRESCRIPTION: SCHOOLS SHOULD TAKE PROACTIVE MEASURES TO AVOID LITIGATION

Schools should adopt inclusive school dress code policies that allow students to express their identified genders through clothing and accessories. This adoption makes legal and financial sense given the various provisions of both federal and state constitutions and statutes that discriminatory school dress code policies may violate.¹⁸⁰ Regardless of whether the population of transgender students is actually increasing or

177. For example, as of 2009, employment discrimination based on an employee’s gender identity, including but not limited to being transgender, was prohibited in twelve states and the District of Columbia. William C. Sung, *Taking the Fight Back to Title VII: A Case for Redefining “Because of Sex” to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 490 n.16 (2011) (citations omitted). The twelve states are California, Colorado, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. *Id.*

178. COLO. REV. STAT. § 24-34-301(7) (2012) (emphasis added).

179. COLO. REV. STAT. § 24-34-601(1) (2012).

180. This article will not discuss in detail the arguably moral obligation a school district has to increase inclusiveness and decrease discrimination within the educational setting. However, it is worth reiterating that the only means through which most transgender students can express their identified genders is by way of their clothing, accessories, and other forms of dress. Harris, *supra* note 16, at 163. Thus, schools place transgender students in the inescapable position of violating school dress codes when students are forbidden from wearing clothing, accessories, etc., typically associated with their identified genders.

merely appears to be, only one transgender student need bring a discrimination claim for a school district to incur liability.¹⁸¹ Additionally, the uncertainty in this area of law makes it difficult for school districts to determine whether legal challenges to school dress code policies brought by transgender students will be successful. Therefore, school districts should take steps to enact school dress and appearance policies that are inclusive of all students, including transgender youth.

The Model District Policy on Transgender and Gender Nonconforming Students (“Model Policy”), recently released by the Gay, Lesbian and Straight Education Network (GLSEN) and the National Center for Transgender Equality, provides useful guidance to school districts re-evaluating and re-drafting school dress code policies.¹⁸² The Model Policy frames its discussion of school dress codes based on the assumption that the school already has a nongendered dress code in place.¹⁸³ Based on this assumption, it advises:

Schools may enforce dress codes pursuant to District policy. Students shall have the right to dress in accordance with their gender identity consistently asserted at school, within the constraints of the dress codes adopted by the school. School staff shall not enforce a school’s dress code more strictly against transgender and gender nonconforming students than other students.¹⁸⁴

In doing so, the Model Policy advocates nondiscriminatory enforcement of school dress code policies in two ways. First, it states that transgender students may dress in clothing and

181. Damages may include nonpecuniary, compensatory damages. *See, e.g.*, *Franklin v. Gwinnett Cty. Pub. Schools*, 503 U.S. 60, 73 (1992) (discussing remedies available for violations of federal rights when examining a student’s discrimination claim brought under Title IX). School districts should also consider attorneys’ fees and costs when determining potential litigation cost.

182. GAY, LESBIAN AND STRAIGHT EDUC. NETWORK & NAT’L CTR. FOR TRANSGENDER EQUAL., MODEL DISTRICT POLICY ON TRANSGENDER AND GENDER NONCONFORMING STUDENTS (2011), *available at* <http://transequality.org/Resources/Model%20District%20Trans%20and%20GNC%20Policy%20FINAL.pdf> (last visited Sept. 22, 2012) [hereinafter MODEL POLICY]. The Model Policy also addresses other areas of concern for transgender students, including a student’s official records, bathroom and locker room usage, bullying, and the transition process. *See generally id.*

183. *Id.* at 11 (“The model policy contemplates that a school district may have a dress code that is not gender-specific.”).

184. *Id.*

accessories typically associated with their identified genders, as long as such clothing and accessories are allowed under the school's gender-neutral dress code policy.¹⁸⁵ As an example, some school dress codes prohibit all students, with no mention of gender or gender nonconformity, from wearing sleeveless shirts. Thus, if a biologically male student who identifies as female wore a sleeveless shirt to school in order to express her gender identity, the student would be in violation of the school dress code because *no* student is allowed to wear a sleeveless shirt to school. This type of policy would prevent a transgender student from bringing a discrimination claim under the equal protection clause of the Fourteenth Amendment because the policy is gender-neutral on its face and applies nondiscriminatorily to all students.¹⁸⁶

Second, the Model Policy expresses that school dress codes must be both applied equally to all students and not enforced more harshly against transgender students.¹⁸⁷ Thus, if a school's dress code does not prohibit students from wearing skirts that fall above the knee, the dress code cannot then be enforced against a biologically male student who identifies as female and wears a skirt above the knee. Likewise, if it is permissible under the dress code for male students to wear jeans that sag, biologically female students identifying as male must be allowed to do so as well.

If a school dress code is gender-neutral and is applied identically to all students, the likelihood of a student succeeding on a federal constitutional claim is significantly decreased, as both the language and enforcement of the policy are gender-neutral.¹⁸⁸ Gender-neutral dress codes likely preclude equal protection claims because transgender students are not being treated differently than any other student in the district. For example, had the school district in *Youngblood* required that all students wear either the drape or the jacket, the transgender student could not have alleged she was being treated differently than other students in the district because all students would have been able to choose from the same clothing options. Similarly, gender-neutral dress codes may

185. *Id.*

186. *See supra* Part IV.B.

187. MODEL POLICY, *supra* note 182, at 11.

188. *See id.* (explaining that the "approach minimizes the risk of liability under state and federal constitutions and laws prohibiting discrimination based on sex or gender identity").

prevent claims brought under the First Amendment's protection for freedom of expression and the liberty interest component of the Fourteenth Amendment's due process clause because the parameters in which students can express themselves through their personal appearance, set by the school's dress code, would be identical for both transgender and gender-conforming students. Thus, if a court found that a dress code violated students' rights to freedom of expression or liberty interests, it likely would be because the dress code's restrictions unlawfully infringed on the rights of all students, not just the rights of transgender students.

For a gender-neutral policy to be successful in eliminating legal claims brought under the Constitution, the policy needs to be nondiscriminatory in practice.¹⁸⁹ If a school has recently adopted a gender-neutral dress code policy, or if a student has recently identified himself or herself to the school as transgender, there may be some sort of trial and error in the enforcement process of the dress code. Therefore, school districts should consider providing some type of initial training to school administrators and teachers on how a dress code policy should apply to transgender students.

For the aforementioned reasons, school dress code policies should be written and enforced in a gender neutral way. Should a school district choose to adopt a dress code policy containing gendered language, it should do so carefully. As the Model Policy correctly cautions, "[d]ress codes should be based on educationally relevant considerations, apply consistently to all students, include consistent discipline for violations, and make reasonable accommodations when the situation requires an exception."¹⁹⁰ This advice illustrates three specific difficulties schools may face if required to defend a gender-specific dress code in response to a transgender student's legal challenge.

First, regardless of the legal basis for a student's discrimination claim, schools are required to articulate why the dress code contains appearance restrictions based on the gender or gender-nonconformity of its students.¹⁹¹ As discussed in Part III, *supra*, the Supreme Court has held that intermediate scrutiny applies to all gender and sex-based classifications.¹⁹² An argument that biologically male students

189. See *supra* Part IV.B.

190. MODEL POLICY, *supra* note 182, at 11.

191. See *supra* Part IV.B.

192. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 454 (1985).

are not allowed to wear skirts because most male students do not wear skirts is likely insufficient.¹⁹³ Instead, the school needs to articulate a legitimate, nondiscriminatory reason based on the educational setting and the needs of the student body. Thus, the Model Policy appropriately cautions that the restrictions set forth by school dress codes must “be based on educationally relevant considerations.”¹⁹⁴

Second, the Model Policy captures the difficulty presented by all school dress codes as applied to transgender students: dress codes must be applied consistently to all students.¹⁹⁵ This consistency in enforcement applies not only in determining when a student violates the dress code, but also in ensuring that the levels of punishment for violating the dress code are consistent. Take, for example, the hypothetical school dress code policy that prohibits students from wearing sleeveless shirts. If a biologically female student wearing a tank top to school typically would be told to borrow a sweatshirt from a friend for the rest of the day to cover her shoulders, it is likely impermissible for the school district to effectuate different discipline upon a biologically male student who identifies as female and wears a tank top to school, such as sending the student home for the day. In this scenario, the school imposes different discipline because of the student’s transgender status, which likely violates the equal protection clause.

Third, the Model Policy argues that school districts should make reasonable accommodations to school dress code policies for gender-nonconforming students.¹⁹⁶ The obligation to provide a reasonable accommodation to transgender students requesting accommodations related to school dress codes is especially important for school districts given the final order in *Doe v. Bell*. In that case, the court found that the youth succeeded on her disability discrimination claim under state law because her Gender Identity Disorder was a condition included in the law’s definition of disability, and the residential foster care center failed to accommodate her disability by allowing her to wear dresses or skirts, which would have allowed her to express her gender identity.¹⁹⁷ The court found

193. See *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *4 (Mass. Super. Ct. Oct. 11, 2000).

194. MODEL POLICY, *supra* note 182, at 11.

195. *Id.*

196. *Id.*

197. *Doe v. Bell*, 754 N.Y.S.2d 846, 853 (N.Y. Sup. Ct. 2003).

that this was a violation of state law even though the center's dress code policy was gender-neutral and prohibited all youths from wearing dresses and skirts.¹⁹⁸ Accordingly, if a transgender student asks to wear clothing or accessories that are prohibited under a school's dress code, the court's order in *Doe v. Bell* suggests that the school district should examine the request on an individual basis to determine if denying the request would unlawfully discriminate against the student.

Although the Model Policy provides a solid foundation for a school district to build a nondiscriminatory policy, it falls short by failing to advocate for affirmative inclusiveness. Implicit in the Model Policy is the belief that if the language of a school district's dress code policy is gender-neutral, it will be properly applied and not discriminatorily enforced. However, as mentioned above, it is unlikely that all school employees will enforce dress code policies in a nondiscriminatory manner without some type of training. It is also possible, as demonstrated in *Doe v. Bell*, that even gender-neutral policies may result in unlawful discrimination against a transgender student. Thus, school dress code policies should include an affirmative statement of inclusiveness to signify to both students and staff that the policy not only allows gender nonconformity, but also encourages acceptance of gender nonconforming students. For example, the nation's sixth largest school district recently expanded its nondiscrimination policy to cover both the gender identity and gender expression of students and employees.¹⁹⁹ Such a statement communicates to students, parents, and staff that gender-nonconforming students are members of the school community just like gender-conforming students and should be treated as such.

CONCLUSION

The recent increase in awareness of the number of children whose behavior falls under the "transgender" umbrella suggests that protection of the rights of transgender children is an emerging issue. Whether this increase in awareness correlates to a rise in the number of openly transgender students in the American school system remains to be seen.

198. *Id.* at 852.

199. See Carli Teproff, *New Broward Policy Offers Protection to Transgender Students*, MIAMI HERALD (June 4, 2011), <http://www.miamiherald.com/2011/06/04/2251740/new-broward-policy-offers-protection.html>.

However, it is undeniable that, regardless of their numbers, transgender youth face unique obstacles—both inside and outside the classroom—because of their gender nonconformity. Wearing clothing and accessories typically associated with their identified genders is the primary means by which transgender youth are able to express their gender identities. Thus, school dress code policies have a profound impact upon the ability of transgender youth to express their identified genders.

Although only a handful of lawsuits have been brought on behalf of transgender students to challenge school dress codes, more legal challenges may lie ahead. Thus, school districts should adopt dress code policies that are not only gender-neutral, but actively aim to be inclusive of all students, including transgender students.