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GENDER STEREOTYPES AND GENDER IDENTITY IN PUBLIC SCHOOLS

Dara E. Purvis *

INTRODUCTION

In recent years, claims brought by transgender students requesting accommodations from a public school have been framed under Title IX of the Education Amendments Act of 1972, which prohibits discrimination on the basis of sex in any educational program or activity that receives federal funding.¹ Although the statutory language does not specifically include discrimination on the basis of gender identity, a number of advocates argued that gender identity was encompassed by the term sex, and a number of federal courts agreed. More notably, in May 2016, the Department of Education (“DOE”) issued a “Dear Colleague” letter interpreting the statutory language to include discrimination on the basis of gender identity, specifically noting that Title IX thus prohibits discrimination against transgender students.² Given the seemingly changing tide in agency interpretation, as well as an increasing number of courts agreeing, the statutory argument dominated new claims.

With the change in presidential administrations, however, came a sharp about-face in agency reading of the statute. In February 2017, the DOE withdrew the prior letter, and subsequently announced that the Department would no longer represent transgender students and their claims.³ At around the same time,

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1. 20 U.S.C. § 1681 (2012).

2. Catherine E. Lhamon & Vanita Gupta, U.S. DEP’T JUST. & U.S. DEP’T EDUC., Dear Colleague Letter on Transgender Students 1 (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/5ADT-FTZ2>].

3. See U.S. DEP’T JUST. & U.S. DEP’T EDUC., Dear Colleague Letter 1 (Feb. 22, 2017), <https://www.justice.gov/crt/page/file/942021/download> [<https://perma.cc/5XRQ-PAZ9>]; Press Release, U.S. Dep’t Educ., U.S. Secretary of Education Betsy DeVos Issues Statement on New Title IX Guidance (Feb. 22, 2017), <https://www.ed.gov/news/press-releases/us-secre>

then-Attorney General Jeff Sessions issued a memo stating that the similar statutory language forbidding employment discrimination because of sex in Title VII of the Civil Rights Act of 1964 did not apply to discrimination against transgender employees.⁴ The Trump administration agencies presented a united front that the term “sex” meant solely biological sex, and not gender identity.

Given the changing interpretation of Title IX, both statutory and constitutional arguments supporting the right of public school students to express their gender in any manner contrary to traditional gendered norms have renewed vitality. In the decades since *Stonewall*, students facing school discipline for nonconforming gender presentation that violated school dress codes have attempted to challenge the dress codes as violating their First Amendment free expression rights. Tracing these arguments is not only helpful as a historical exercise, but also to present alternative arguments under an unsympathetic presidential administration and Supreme Court. In today’s world in which the Trump administration targets transgender students, employees, and service members, one strategy is to embrace gender nonconformity for cisgender, transgender, and nonbinary students all at once, in the hopes that thinking about the expression rights of students will be a more fruitful approach than just relying on Title IX.

I. STATUTORY BACKGROUND

The main federal law protecting students from discrimination and harassment in their schools is Title IX of the Education Amendments Act of 1972, which prohibits discrimination “on the basis of sex” in any educational program or activity that receives federal funding.⁵ The term “sex” can be read in very different ways: narrowly to apply only to categorical discrimination against a biological sex, or broadly to encompass things like gender stereotypes and gender identity.

tary-education-betsy-devos-issues-statement-new-title-ix-guidance [https://perma.cc/P9HS-STTU].

4. Memorandum from the Attorney Gen. on Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Oct. 4, 2017), <https://www.justice.gov/ag/page/file/1006981/download> [https://perma.cc/V658-QEM2].

5. 20 U.S.C. § 1681.

The DOE's reading of the word "sex," specifically whether it includes gender identity, has rapidly swung back and forth in recent years. In 2016, the DOE took an affirmative position that Title IX specifically protects transgender students from discrimination in the form of a "Dear Colleague" letter explaining the Department's reading that the term "sex" covered gender identity.⁶ In February 2017, however, the switch in political leadership from President Obama and Secretary of Education John King to President Trump and Secretary Betsy DeVos also meant a switch in policy. The DOE withdrew the prior guidance letter, and later announced that the Department would not represent transgender students with claims of discrimination against their public schools.⁷ This shift has been consistent across other departments and statutes, most notably the Department of Justice and its reading of Title VII of the Civil Rights Act of 1964.⁸ Although Title IX and Title VII are portions of different statutes and have slightly different language, the root question of how to define "sex" is very similar, and courts called upon to interpret Title IX have often cited readings of Title VII as persuasive authority.⁹ It is thus unsurprising and significant that the Department of Justice has similarly changed its position under President Trump to argue that Title VII does not protect employees from discrimination on the basis of gender identity.¹⁰

Changes in the DOE's reading of Title IX are not determinative of course, and the current administration's position may also be reversed by subsequent leadership. The statutory language has already been read by some courts to protect transgender students from discrimination, and such interpretation has continued past the February 2017 withdrawal of guidance. For example, a student named Gavin Grimm had famously been asking his high school to recognize his male gender identity since 2014, including a lawsuit that had been granted a writ of certiorari to the Supreme Court and even had oral argument scheduled.¹¹ A main question in the

6. Lhamon & Gupta, *supra* note 2, at 1.

7. See Battle & Wheeler, *supra* note 3, at 1; Press Release, U.S. Dep't Educ., *supra* note 3.

8. See Memorandum from Attorney Gen., *supra* note 4, at 2.

9. See, e.g., Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1158, 1160–61 (C.D. Cal. 2015).

10. Brief for Respondent at 12, R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp't Opportunity Comm'n, No. 18-1070, 2019 WL 3958416 (Aug. 16, 2019).

11. See G.G. v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 716–17 (4th Cir. 2016), *cert. granted*, 137 S. Ct. 369 (2016).

case, however, turned on issuance of the 2016 “Dear Colleague” letter, so in the wake of the withdrawal of the letter the oral argument was canceled and the case remanded back down for re-evaluation.¹² Nonetheless, Grimm won a second victory in August 2019 when the district court held that his high school had violated his rights under Title IX, even without the explicit 2016 guidance regarding gender identity.¹³ As Grimm’s case indicates, federal courts’ readings of the text of Title IX are not conclusively determined by the DOE, so litigation about the meaning of Title IX will undoubtedly continue.

The shifting ground underlying the statutory argument, however, indicates that Title IX may not be as strong of a legal argument as before. It certainly does not help transgender student plaintiffs to have the DOE taking the opposite side of an argument interpreting Title IX, and if the Supreme Court holds that Title VII does not apply to transgender employees, that will be a strong persuasive argument that Title IX similarly does not apply to transgender students.

To the extent that statutory arguments are weakened, it is the contention of this Essay that a reinvigorated First Amendment constitutional argument will provide an additional and distinct line of reasoning as to why transgender students should be allowed to wear clothing consistent with their gender identity. The next Part turns to a history of such arguments demonstrating the promise of the First Amendment as a supplement to an imperiled Title IX argument.

II. CLOTHING, GENDER IDENTITY, AND SPEECH

Clothing and other aesthetic choices such as hairstyle, makeup, jewelry, and other accessories are arguably superficial aspects of appearance, but are central to how people present their gender identity to the world.¹⁴ Deborah Ahrens and Andrew Siegel describe aesthetic choices as “central, not superficial or trivial, aspects of autonomy because of their critical role in facilitating the

12. See *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (2017).

13. *Grimm v. Gloucester Cty. Sch. Bd.*, No. 4:15CV54, 2019 U.S. Dist. LEXIS 138246, at *6–7, *27–28 (E.D. Va. Aug. 9, 2019).

14. See Deanna J. Glickman, *Fashioning Children: Gender Restrictive Dress Codes As an Entry Point for the Trans* School to Prison Pipeline*, 24 AM. U. J. GENDER SOC. POL’Y & L. 263, 265 (2015).

communication of complicated and sometimes inchoate ideas, emotions, and affinities.”¹⁵ This communication is particularly important for transgender children seeking to express their gender identity.¹⁶ Choices around appearance are one of the first choices that children have any control over, and dressing in clothes reflecting their gender identity is often the first, and may be the only, decision over which a transgender child can assert their control.¹⁷

The sartorial choices of students, however, are routinely limited by dress codes. Ahrens and Siegel describe the adoption of dress codes as progressing from rarities in the 1970s to “wildly popular” today, uniting both sides of the political spectrum in favor of consistent student clothing.¹⁸ There is not a rich history of transgender students challenging dress codes, but there are a significant number of challenges brought by cisgender students who wanted to have something in their appearance that is at least arguably gender nonconforming. An examination of such earlier cases, beginning in the 1960s and 1970s, demonstrates the potential in First Amendment challenges to restrictions on student appearance.

As the adoption of dress codes grew, so too did legal challenges to them.¹⁹ In response, schools offered a number of reasons for dress codes: promoting student safety by prohibiting clothing that signals gang affiliation, for example.²⁰ Adoption of student uniforms has also been justified as promoting safety because it lets school staff immediately identify intruders who are not wearing the appropriate uniform and eliminates the risk of theft if a student wears expensive items to school.²¹

Dress codes have also been explained as a way to reduce distraction so that students are able to concentrate fully on their educational endeavors.²² This often has a sharply gendered aspect, in

15. Deborah M. Ahrens & Andrew M. Siegel, *Of Dress and Redress: Student Dress Restrictions in Constitutional Law and Culture*, 54 HARV. C.R.-C.L. L. REV. 49, 96 (2019).

16. See Christine L. Olson, *Transgender Foster Youth: A Forced Identity*, 19 TEX. J. WOMEN & L. 25, 29–30 (2009).

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

18. Ahrens & Siegel, *supra* note 15, at 52.

19. See *id.* at 56.

20. Glickman, *supra* note 14, at 269–70.

21. See Andrew D.M. Miller, *Balancing School Authority and Student Expression*, 54 BAYLOR L. REV. 623, 670–71 (2002).

22. Glickman, *supra* note 14, at 270–71.

that the distraction school officials have in mind is a heteronormative worry that sexually attractive female students will distract their male classmates.²³ An Arkansas superintendent, for example, described a concern that male students would wear “bizarre” clothing, whereas female students might wear something “revealing or seductive.”²⁴ Of course, what was considered revealing and seductive in the early 1970s strikes modern ears as unremarkable, such as one school’s assertion that “the wearing of culottes, slacks or pantsuits by female students . . . results in an increased amount of physical contact and familiarity between boys and girls in school surroundings.”²⁵

Another type of distraction, however, was students who broke the expected mold, including gendered norms of appearance, in a way that other students reacted to. A common example of this was male students who wanted to grow their hair long—again highlighting changing social mores, “long” in the 1970s meant hair that reached over their ears or long enough to touch their collar. School descriptions of such students often claimed that the students spent too much time styling and adjusting their hair, sometimes using feminized language to do so. One teacher explained the distracting influence of two students who were “constantly combing, flipping, looking in mirrors and rearranging their hair.”²⁶ Another teacher at the same school said that “hardly a day would go by that she would not have to interrupt her teaching and say: ‘Put your combs away. This is not a beauty parlor. This is a school classroom.’”²⁷ Another school explained the “disruptive influence” of boys with long hair as “combing, styling and arranging their hair in classes; being late for classes because they linger in the restrooms combing their hair; congregating at mirrors provided for girls while combing their hair; creating unsanitary conditions . . . through dandruff accumulating on desks from boys’ handling their hair in the school room.”²⁸ Although most of the testimony and other evidence regarding such disturbances came from teachers, there were also

23. See Meredith J. Harbach, *Sexualization, Sex Discrimination, and Public School Dress Codes*, 50 U. RICH. L. REV. 1039, 1039–40 (2016); Wendy Mahling, *Secondhand Codes: An Analysis of the Constitutionality of Dress Codes in the Public Schools*, 80 MINN. L. REV. 715, 718 (1996).

24. *Wallace v. Ford*, 346 F. Supp. 156, 161 (E.D. Ark. 1972).

25. *Johnson v. Joint Sch. Dist. No. 60*, 508 P.2d 547, 548 (Idaho 1973).

26. *Jackson v. Dorrier*, 424 F.2d 213, 216 (6th Cir. 1970) (per curiam).

27. *Id.* at 217.

28. *Griffin v. Tatum*, 425 F.2d 201, 203–04 (5th Cir. 1970).

multiple examples of other students reacting to boys with long hair with physical harassment, including “vigilantes,” as one lawyer described them,²⁹ who attacked classmates with scissors and cut off the offending long hair themselves.³⁰ Following a strict dress code, in the school’s eyes, prevents such disruption and even violence within the school.

One challenge to such dress codes attempted by many student plaintiffs was to argue that the dress code violated their First Amendment speech and expression rights. In 1969, the Supreme Court vindicated the speech rights of students, even inside of a school, in *Tinker v. Des Moines Independent School District*, famously holding that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”³¹ Absent material and substantial interference with the educational activities of the school, the Court established, school officials could not constitutionally prohibit or punish student expression.³² The expression in *Tinker* was very clear: the student plaintiffs wore black armbands that everyone understood to be protesting the Vietnam War.³³ The Court described this expression as “direct, primary First Amendment rights akin to ‘pure speech.’”³⁴

Not all clothing and aesthetic choices convey such a clear message, however. At one extreme are cases involving clothing or accessories that are literally emblazoned with text. Those messages are impossible to understand as anything but speech, such as buttons that said “I’m not listening scab” worn by students during a teacher’s strike,³⁵ or a t-shirt protesting the school dress code that read “Coed Naked Civil Liberties: Do It To The Amendments.”³⁶ Other unusual uses of clothing and jewelry were similarly easily understood as speech by courts, such as wearing a military uniform

29. *Myers v. Arcata Union High Sch. Dist.*, 75 Cal. Rptr. 68, 71 (Cal. Ct. App. 1969).

30. *See Gfell v. Rickelman*, 441 F.2d 444, 447 (6th Cir. 1971); *Ferrell v. Dall. Indep. Sch. Dist.*, 392 F.2d 697, 700 (5th Cir. 1968).

31. 393 U.S. 503, 506 (1969).

32. *Id.* at 509.

33. *Id.* at 504.

34. *Id.* at 508.

35. *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 526 (9th Cir. 1992).

36. *Pyle By & Through Pyle v. S. Hadley Sch. Comm.*, 861 F. Supp. 157, 162 (D. Mass. 1994).

during a theatrical performance with an explicit anti-war message,³⁷ or wearing rosary beads as a necklace.³⁸

It was not universally clear, however, whether less explicit messages conveyed through clothing, hair, and other stylistic choices were expression under the ambit of the First Amendment. The *Tinker* Court did not answer the question, saying merely that “[t]he problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment.”³⁹ The Court’s mention of hairstyle was prescient, as male students with long hair were the most common challenge to school dress codes throughout the 1970s,⁴⁰ resulting in over 150 reported cases between 1968 and 1977.⁴¹ Such cases were common enough that the Fifth Circuit began one per curiam opinion wearily, “This is another haircut case.”⁴²

Hair length cases are particularly interesting for a modern reader, because they sometimes contain shades of prejudice, as observers assumed that long hair on a male student signaled both femininity and homosexuality. One student with long hair got into a physical fight with another student who called him “pretty boy.”⁴³ An Iowa judge explained the controversy around boys with long hair by writing that “most hair rules are promulgated largely, if not entirely, because there are people who are repelled by the sight of a male with hair length and style which in times past has been almost exclusively reserved for the fairer sex.”⁴⁴ A school administrator argued that “if boys were allowed to wear long hair so as to look like girls, it would create problems with the continuing operation of the school because of confusion over appropriate dressing room and restroom facilities.”⁴⁵ Another staffer described male students with long hair jokingly being told to use the girl’s restroom, including one student who “refused to go to the boy’s restroom until

37. *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (citing *Schacht v. United States*, 398 U.S. 58, 59–60 (1970)).

38. *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 665 (S.D. Tex. 1997).

39. *Tinker*, 393 U.S. at 507–08.

40. See Amy Mitchell Wilson, *Public School Dress Codes: The Constitutional Debate*, 1998 B.Y.U. EDUC. & L.J. 147, 156–60.

41. See Natalie Smith, *Eliminating Gender Stereotypes in Public School Dress Codes: The Necessity of Respecting Personal Preference*, 41 J.L. & EDUC. 251, 253 (2012).

42. *Wood v. Alamo Heights Indep. Sch. Dist.*, 433 F.2d 355, 355 (5th Cir. 1970) (per curiam).

43. *Breese v. Smith*, 501 P.2d 159, 173 (Alaska 1972).

44. *Turley v. Adel Cmty. Sch. Dist.*, 322 F. Supp. 402, 410 (S.D. Iowa 1971).

45. *Bishop v. Colaw*, 450 F.2d 1069, 1076 (8th Cir. 1971).

the other boys had left” and others who “would eat in the lunch-room only with the girls and never eat with the boys.”⁴⁶

Such students, however, did not frame their hairstyle as expressing anything feminine. To the contrary, many of the plaintiffs in the early cases admitted they did not intend to convey any specific message. Statements explicitly disclaiming any cognizable message abound.⁴⁷ One student “flatly stated that his hair style[sic] was not a badge or a symbol of any group.”⁴⁸ Another student explained that he wanted long hair because he “just like[s] it.”⁴⁹ Decisions quoting students explaining their hairstyles remind the reader that the plaintiffs were, after all, children: “I think it looks better for one reason, and for another reason, I don’t associate with a group, but I try to disassociate with general society, you know, people that look normal, because I am not entirely satisfied with things that are happening like this.”⁵⁰

Another student said that his hair was not meant as an expression of any idea, but instead as “[a] symbol of my choice. More of a symbol of my desire to appear the way I wish to. . . . My individual rights.”⁵¹ More than one case involved students in a band, prompting courts to find that the students “pursued their course of personal grooming for the purpose of enhancing the popularity of the musical group in which they performed.”⁵² (Entertainingly, one such band recorded a protest song about the principal who wanted them to cut their hair, called “Keep Your Hands Off It.”⁵³)

In the absence of any cognizable message that the students claimed to be conveying with their hair, it was very easy for courts to dismiss the First Amendment as inapplicable.⁵⁴ The Fourth Circuit’s explanation is typical, reasoning that although long hair might in circumstances be considered symbolic speech, “the record before us does not establish that the minor plaintiffs selected the

46. *Ferrell v. Dall. Indep. Sch. Dist.*, 392 F.2d 697, 701 (5th Cir. 1968).

47. *See Bishop*, 450 F.2d at 1074; *Giangreco v. Ctr. Sch. Dist.*, 313 F. Supp. 776, 779 (W.D. Mo. 1969).

48. *King v. Saddleback Junior Coll. Dist.*, 445 F.2d 932, 937 (9th Cir. 1971).

49. *Gere v. Stanley*, 453 F.2d 205, 207 (3d Cir. 1971) (alteration in original).

50. *Crews v. Cloncs*, 432 F.2d 1259, 1261 (7th Cir. 1970).

51. *Pendley v. Mingus Union High Sch. Dist.*, 504 P.2d 919, 921 (Ariz. 1972).

52. *Jackson v. Dorrier*, 424 F.2d 213, 217 (6th Cir. 1970) (per curiam).

53. *Ferrell v. Dall. Indep. Sch. Dist.*, 392 F.2d 697, 700 (5th Cir. 1968).

54. *See King v. Saddleback Junior Coll. Dist.*, 445 F.2d 932, 937 (9th Cir. 1971).

length of their hair for any reasons other than personal preference.”⁵⁵ Similarly, the Fifth Circuit noted that although “[f]or some . . . the wearing of long hair is intended to convey a discrete message to the world,” it was often taste or “peer group influence,” citing a plaintiff who explicitly disclaimed any message and simply said “I like my hair long.”⁵⁶ Courts had little trouble concluding that mere “expressions of individuality rather than a contribution to the storehouse of ideas” was not properly considered expression protected by the First Amendment.⁵⁷ Many courts thus found no cognizable constitutional issue raised by application of dress codes to hair length.⁵⁸

Some courts, however, did see a constitutional problem with dress codes that mandated short hair for male students. Such decisions were not full-throated vindications of the expressive value of hair, in large part because few plaintiffs could articulate any message they wanted their hair to express. The Fourth Circuit’s description is typical:

Perhaps the length of one’s hair may be symbolic speech which under some circumstances is entitled to the protection of the First Amendment. But the record before us does not establish that the minor plaintiffs selected the length of their hair for any reasons other than personal preference. For that reason, we prefer in this case to treat their right to wear their hair as they wish as an aspect of the right to be secure in one’s person guaranteed by the due process clause⁵⁹

55. *Massie v. Henry*, 455 F.2d 779, 783 (4th Cir. 1972).

56. *Karr v. Schmidt*, 460 F.2d 609, 613–14 (5th Cir. 1972).

57. *Freeman v. Flake*, 448 F.2d 258, 260 (10th Cir. 1971).

58. *Zeller v. Donegal Sch. Dist. Bd. of Educ.*, 517 F.2d 600, 608 (3d Cir. 1975) (“Complaints which are based on nothing more than school regulations of the length of a male student’s hair do not ‘directly and sharply implicate basic constitutional values’ and are not cognizable in federal courts”); *Karr*, 460 F.2d at 613 (“Is there a constitutionally protected right to wear one’s hair in a public high school in the length and style that suits the wearer? We hold that no such right is to be found within the plain meaning of the Constitution.”); *King*, 445 F.2d at 940 (“We do not believe that the plaintiffs have established the existence of any substantial constitutional right which is in these two instances being infringed.”); *Freeman*, 448 F.2d at 262; *Jackson v. Dorrier*, 424 F.2d 213, 218–19 (6th Cir. 1970) (per curiam).

59. *Massie*, 455 F.2d at 783.

Other justifications as to why school dress codes were unconstitutional included state constitutional liberty rights,⁶⁰ the Due Process clause,⁶¹ the Equal Protection clause,⁶² and the Ninth Amendment.⁶³ Even in decisions rooted in other rights, several courts acknowledged the significance of expression, such as the Alaska Supreme Court, which noted that “[h]airstyles have been the subject of great variety and individual taste and have traditionally been left to personal decision; they are the manifestations of our diverse and numerous individual personalities.”⁶⁴ Although the First Circuit rejected a First Amendment framing, it “recognize[d] that there may be an element of expression and speech involved in one’s choice of hair length and style, if only the expression of disdain for conventionality.”⁶⁵ Perhaps the most striking dicta was delivered by the Fourth Circuit, which mused that “[a]lthough there exists no depiction of Jesus Christ, either reputedly or historically accurate, He has always been shown with hair at least the length of that of plaintiffs.”⁶⁶

Two lessons may thus be drawn from the dress code hairstyle cases. First, no court will read into sartorial choices a message that the student in question can’t articulate. Teenagers who make aesthetic choices to be an individual, because they like it, or because they want to look cool onstage with their band will not be viewed as expressing any cognizable message that should receive First Amendment protection. Second, however, courts recognize the *possibility* of such expression, and explicitly note that if an aesthetic choice delivered a recognizable message, that would change the analysis by implicating the First Amendment.

60. *Breese v. Smith*, 501 P.2d 159, 168 (Alaska 1972) (“We hold that under article I, section 1 of the Alaska constitution’s affirmative grant to all persons of the natural right to ‘liberty,’ students attending public educational institutions in Alaska possess a constitutional right to wear their hair in accordance with their personal tastes.”).

61. *Stull v. Sch. Bd. of W. Beaver Junior-Senior High Sch.*, 459 F.2d 339, 347 (3d Cir. 1972), *overruled by*, *Zeller*, 517 F.2d 600; *Arnold v. Carpenter*, 459 F.2d 939, 942–44 (7th Cir. 1972); *Massie*, 455 F.2d at 783; *Bishop v. Colaw*, 450 F.2d 1069, 1075 (8th Cir. 1971); *Richards v. Thurston*, 424 F.2d 1281, 1284–86 (1st Cir. 1970); *Breen v. Kahl*, 419 F.2d 1034, 1036 (7th Cir. 1969).

62. *Crews v. Cloncs*, 432 F.2d 1259, 1266 (7th Cir. 1970).

63. *Murphy v. Pocatello Sch. Dist. No. 25*, 480 P.2d 878, 884 (Idaho 1971).

64. *Breese*, 501 P.2d at 169.

65. *Richards*, 424 F.2d at 1283.

66. *Massie*, 455 F.2d at 780.

Although no other aesthetic choice generated the same amount of litigation as male hair length, other dress code challenges generally fit the same pattern. Occasionally courts found that a school had created too vague of a dress code,⁶⁷ or overstepped its authority with a blanket prohibition of female students wearing slacks,⁶⁸ but a key question in other cases is whether the student was delivering a specific message. In New Hampshire, students challenging a ban of dungarees gave “no suggestion that the wearing of blue jeans, clean or otherwise, in any way constitutes a right of expression. The First Amendment, therefore, does not apply and is not an issue.”⁶⁹

Slightly more modern cases similarly refuse to find First Amendment significance where a message is not easily identifiable. Several examples in the 1990s involved male students who wanted to wear earrings, but could not identify the message their earring expressed,⁷⁰ or students simultaneously challenging both hair and earring regulations without an explanation of what their long hair and earrings conveyed.⁷¹ One such student’s “only message is one of his ‘individuality.’”⁷² A court in Ohio rejected the challenge of two siblings who were kicked out of their prom after both arrived in gender nonconforming clothes; the brother in a dress, heels, and fur cape, and the sister in a tuxedo and men’s dress shoes.⁷³ The case does not recount any specific message the two wished to convey, nor whether they identified as gender nonconforming, transgender, or any other motivation behind their dress.⁷⁴ After they sued, the court found that the school acted appropriately to further the “valid educational purposes of teaching community values and maintaining school discipline.”⁷⁵ One judge gave a particularly blunt explanation when rejecting the argument that wearing sagging pants far below the waistline was expression, grouching

67. *Crossen v. Fatsi*, 309 F. Supp. 114, 115 (D. Conn. 1970).

68. *Scott v. Bd. of Educ., Union Free Sch. Dist. No. 17*, 305 N.Y.S.2d 601, 606 (N.Y. Sup. Ct. 1969).

69. *Bannister v. Paradis*, 316 F. Supp. 185, 187 (D.N.H. 1970).

70. *Hines v. Caston Sch. Corp.*, 651 N.E.2d 330, 333 (Ind. Ct. App. 1995).

71. *Barber v. Colo. Indep. Sch. Dist.*, 901 S.W.2d 447 (Tex. 1995); *see also* *Bd. of Trs. of Bastrop Indep. Sch. Dist. v. Toungate*, 958 S.W.2d 365, 373 (Tex. 1997) (declining to revisit the issue).

72. *Olesen ex rel. Olesen v. Bd. of Educ. of Sch. Dist. No. 228*, 676 F. Supp. 820, 822 (N.D. Ill. 1987) (citation omitted).

73. *Harper v. Edgewood Bd. of Educ.*, 655 F. Supp. 1353, 1354 (S.D. Ohio 1987).

74. *Id.*

75. *Id.* at 1355.

that “not every defiant act by a high school student is constitutionally protected speech.”⁷⁶

Another negative treatment involved a female student named Nikki Youngblood, who wanted to wear a shirt and tie for her senior photograph (like male students) instead of the velvet drape of cloth that female students were expected to wear.⁷⁷ Although she claimed to be expressing a message that “women do not have to conform to gender stereotypes,” the court rejected this and found there was “no constitutionally protected right for a female to wear a shirt and tie for senior portraits.”⁷⁸

There are at least two recent examples, however, of courts recognizing the expressive value of gender nonconforming students. One involved a student named Constance McMillen who wanted to bring another girl as her date to high school prom and to wear a tuxedo instead of a dress.⁷⁹ Her school refused to allow her to do either, and she sued.⁸⁰ Analyzing her claim, the court described Constance as intending to communicate the message of “her social and political views that women should not be constrained to wear clothing that has traditionally been deemed ‘female’ attire.”⁸¹ The court stated explicitly that it “f[ound] this expression and communication of her viewpoint is the type of speech that falls squarely within the purview of the First Amendment.”⁸²

An even stronger example took place in Massachusetts in 2000. A student known as Pat Doe in litigation was assigned male at

76. Green *ex rel.* Bivens v. Albuquerque Pub. Sch., 899 F. Supp. 556, 560 (D.N.M. 1995); see also William C. Vandivort, *I See London, I See France: The Constitutional Challenge to “Saggy” Pants Laws*, 75 BROOK. L. REV. 667, 680–82 (2009).

77. See Clifford J. Rosky, *No Promo Hetero: Children’s Right To Be Queer*, 35 CARDOZO L. REV. 425, 492 (2013) (citing Paisley Currah, *Gender Pluralisms Under the Gender Umbrella*, in TRANSGENER RIGHTS 3, 10 (Paisley Currah et al. eds., 2006)).

78. *Id.*

79. McMillen v. Itawamba Cty. Sch. Dist., 702 F. Supp. 2d 699, 701 (N.D. Miss. 2010).

80. *Id.*

81. *Id.* at 704.

82. *Id.* at 705. The court ultimately declined to issue an injunction because after the school canceled the prom, parents planned a “private” prom that every student including Constance was invited to. *Id.* at 706. Unfortunately, it appears that the parent-sponsored prom was a Potemkin village, as Constance and a handful of other students attended one prom while all of the rest of her classmates attended a secret and separate prom. See *Constance McMillen, Fake Prom? Itawamba Dance Was Kept Secret from Lesbian Teen*, HUFFPOST (June 5, 2010, 5:12 AM), https://www.huffpost.com/entry/constance-mcmillen-fake-p_n_525856 [<https://perma.cc/HNN9-PANJ>].

birth, but partway through seventh grade began to express her female gender identity through clothing and makeup.⁸³ After a series of disciplinary incidents with the school principal, she was told that she could not attend school while wearing female clothing.⁸⁴ In response she sued, alleging a number of legal and constitutional violations, including that the school was violating her First Amendment free expression rights.⁸⁵ A Massachusetts court granted a preliminary injunction ordering the school to allow her to wear clothing consistent with her gender identity, finding that she was “likely to establish that, by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with that gender.”⁸⁶ Moreover, the court specified that her fellow students, teachers, and other school staff would understand that message, making it symbolic speech protected by the First Amendment.⁸⁷

This opens the door to a promising legal argument framing the clothing and other aesthetic choices of transgender students today as protected First Amendment expression. The claims of gender nonconforming students today fall under *Tinker* so long as the student is dressing to express their gender identity and articulates their message as such. This seems easily done by transgender students, who are increasingly identifying as transgender at younger ages than in the past.⁸⁸ Where teenage boys in the 1970s could not express any message they wanted to communicate through their hair, it seems very simple for a transgender student to say “I want to wear these clothes to communicate that I am a girl.”

Merely expressing speech is not the end of *Tinker* analysis, of course: speech might nonetheless create a material interference with educational activities if students respond with outrage, such as the other boys in the 1970s who were so horrified by long hair that they took scissors and cut their classmate’s hair themselves.

83. See *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 Mass. Super. LEXIS 491, at *1–3 (Oct. 11, 2000), *aff’d sub nom.*, *Doe v. Brockton Sch. Comm.*, No. 2000-J-638 2000 Mass. App. LEXIS 1128 (Nov. 30, 2000).

84. *Id.* at *2–4.

85. *Id.* at *5–6.

86. *Id.* at *10.

87. *Id.* at *9–11.

88. See Dara E. Purvis, *Transgender Children, Teaching Early Acceptance, and the Heckler’s Veto*, in 72 *STUDIES IN LAW, POLITICS, AND SOCIETY* 219, 221 (Austin Sarat ed., 2017).

Acceptance of gender nonconformity and transgender children varies considerably, but at least in areas where the tolerance of the student body outpaces the tolerance of the local school board, it may actually be to a student's advantage to ask whether their classmates reacted to their gender expression as part of the inquiry into their First Amendment rights.⁸⁹

CONCLUSION

Although framing clothing choices as expression is a viable additional argument to set alongside other claims such as under Title IX, it has significant limitations. Clifford Rosky contrasts the varying success of Nikki Youngblood and Pat Doe by describing the courts' analyses as "quintessentialism," recognizing Doe's gender only because "her gender identity was fixed early in life and could not be changed."⁹⁰ Rosky argues that "courts have been more willing to protect gender as an identity or status—as an unchosen or immutable trait—rather than as the expression of a particular viewpoint."⁹¹

Even more significantly, casting expressions of gender as free speech very literally does not get students everywhere they need to go. The free speech frame may ensure that students can dress the way they want, but it would not, for example, give them access to bathrooms and locker rooms consistent with their gender identity. Additionally, application of *Tinker* allows schools to prohibit and punish speech if classmates react in a way that disrupts educational activities, so the speech of students in more conservative areas is effectively less protected.⁹²

That said, a reinvigorated free speech argument has both strategic and conceptual advantages that make it worthy of considera-

89. Although the issue was framed under Title IX rather than the First Amendment, a case involving bathroom access for a transgender boy demonstrated this point when his school argued that allowing him to use the boy's bathroom would violate the privacy rights of other male students. The Seventh Circuit easily found the school's concern to be without support, given that the student had used the boys' bathrooms for six months without a single student complaint. *See Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1052 (7th Cir. 2017), *cert. denied sub nom.*, *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker*, 138 S. Ct. 1260 (2018).

90. *See Rosky, supra* note 77, at 493.

91. *Id.*

92. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507–09 (1969).

tion. If the Supreme Court reads Title VII to not prohibit discrimination in employment against transgender employees,⁹³ it is very likely that readings of Title IX will soon go the same way. There are multiple paths forward if that happens, including legislative action to either amend Title IX or separately and explicitly protect transgender students in public schools, but any legislative response would take time, and the First Amendment argument can be made today.

Second, notwithstanding Rosky's criticism of the *Youngblood* and *Doe* courts, the framing of speech further opens up the field to less clearly defined gender variance, such as nonbinary, gender-queer, or agender students, or students who identify as cisgender but prefer wearing clothing coded as the other gender. Courts would likely find it difficult to fit a student explaining clothing choices as "I felt more masculine today, and more feminine yesterday" into the framing of Title IX, but might more easily grasp "today I wanted to express that I felt masculine, and yesterday I wanted to express that I felt very feminine" as speech. In a counterintuitive way, therefore, the relatively conservative analysis of the 1970s points towards a more progressive path today, supplementing statutory arguments under Title IX with constitutional protections for expression of all genders.

93. See *supra* Part I.