

NSBA Study Hall: The 411 of School Uniforms & Standardized Dress

April 6th, 2014

11:45 AM - 12:15 PM

Ernest N. Morial Convention Center, Hall E

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Syllabus

- ★ Dress codes vs. school uniforms
- ★ Leading indicators for school uniforms
- ★ Benefits school communities are experiencing
- ★ What are the perceived cons
- ★ What should the board know when discussing uniforms
- ★ What is the process
- ★ Uniforms in Action
- ★ Questions



Dress codes vs. school uniforms

- ★ Dress code policies suggest what students can wear to school and specify what they can't wear to school.
- ★ School uniforms and standardized dress code policies inform students what they must wear to schools.
- ★ Both types of policies:
 - ★ Vary in detail
 - ★ Have consequences
 - ★ May affect a positive learning environment



Dress codes vs. school uniforms



STUDENT DRESS CODE

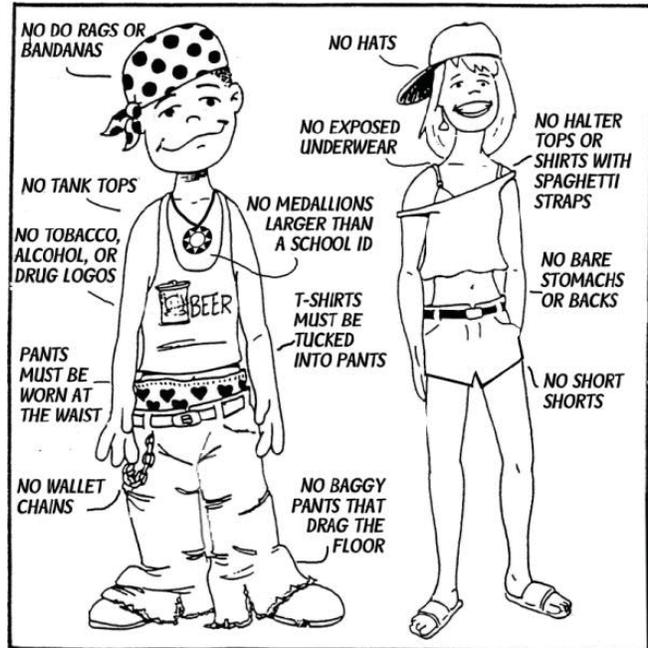
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THE DRESS CODE



Leading indicators for school uniforms

- ★ **Improved School Safety:** Schools with school uniform programs are seeing a decrease in bullying (85%) and other disciplinary issues (75%).
- ★ **Improved Academic Performance:** Schools in both urban and suburban areas are seeing quantitative improvements in their attendance, parent participation and AYP Target Achievement scores.
- ★ **Promote Creativity & Individuality:** Students find more productive and creative outlets to express their individuality, when what to wear is no longer a part of the discussion.
- ★ **Reduce Peer Pressure:** Dress codes affect learning. Seventy-eight percent (78%) of NSBA members believe what a student wears to school affects their educational experience.
- ★ **School Uniforms Are Cost Effective:** Over 50% of families quickly realize the immediate economic benefit of school uniforms over general apparel. The average cost for a year's worth of Classroom School Uniforms (10 items) ranges from \$100-150.



Benefits School are experiencing

- ★ What a student wears to school affects their educational experience.
- ★ NAESP/Lands End Survey 2013 & Classroom/NSBA 2010-2012 Survey reports the following results at their schools:
 - ✦ 85% experienced a decline in discipline referrals
 - ✦ 83% believe image in community is enhanced
 - ✦ 79% perceive heightened student safety and reduction of bullying
 - ✦ 64% saw increased student achievement through AYP improvements
 - ✦ 44% experienced improved attendance
 - ✦ 90% believe families find BTS shopping easier and less expensive
 - ✦ 92% agree getting kids ready in the morning is easier



What are the typical objections?

- ★ Violates a student's right to freedom of expression
- ★ Are simply a Band-Aid issue of school violence
- ★ Make students a target for bullies from other schools
- ★ Are a financial burden for economically challenged families
- ★ Are an unfair additional expense for parents who pay taxes for a free public education
- ★ Are difficult to enforce



What should the board know when discussing uniform options

- ★ What is your district's motivation. Can you articulate this succinctly?
- ★ Know your goals, potential benefits, and potential objections:
- ★ Uniforms should be part of a district-wide strategy not a silver bullet.
- ★ Understand the different types of policies available to schools:
 - ✦ Dress code vs. Uniform
 - ✦ Mandatory vs. Voluntary
 - ✦ District wide vs. school choice
 - ✦ Blank vs. logo
- ★ Anticipate the purchase process
 - ✦ Know the costs
 - ✦ Know the supply chain
 - ✦ Anticipate assistance for qualifying families
- ★ Understand precedents and legalities when setting policy



What is the process?

- ★ Educate the board and community as to goals and objectives.
- ★ Communicate (in all languages) often and clearly
- ★ Define the program
 - ★ What is a uniform (looks, feel, fabrication)
 - ★ How much it costs
 - ★ What it really does
- ★ Why you are looking at such a program
- ★ Determine Where uniforms can be purchased
- ★ Conduct surveys, host forums, fashion shows
 - ★ Survey all stakeholders
 - ★ Allow a yes or no vote on policy
 - ★ Move forward with 65% buy in
- ★ Enforce policy once approved



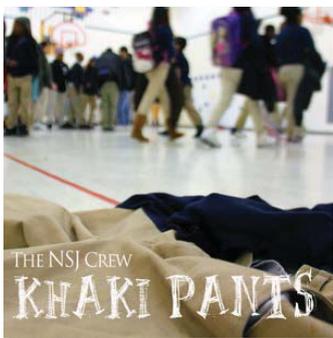
Uniforms in Action

1



1. Classroom: Find your style
2. NSJ Crew: Khaki Pants
3. Wall Street Journal: School Uniforms for Pre-Schoolers
4. The Today Show: School Uniforms

2



3



4



Thank you

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Inquiry & ANALYSIS

June 2012

A Right or a Rite? Students' Limited Right To Attend Graduation Ceremonies 1

A Constitutional Right to Make a Fashion Statement? 4

Call for Proposals 2013 School Law Seminar 8

KASB/NSBA Patricia E. Baker Scholarship now accepting applications 8

2012 School Law Seminar Presentation Papers..... 8

2012 School Law Practice Seminar Registration opens soon! 8

Recognizing Council Members 8

A RIGHT OR A RITE? 'STUDENTS' LIMITED RIGHT TO ATTEND GRADUATION CEREMONIES

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Since the 1970s, courts have almost unanimously agreed that students do not have a due process interest in attending their high school graduation ceremony.¹ Although at least one court has granted a preliminary injunction to a number of students because of a substantive due process violation,² the vast majority of decisions have gone the other way, making it unlikely that a student would prevail in such a case.

Yet, each year as the calendar reaches late spring, school districts around the country are saddled with lawsuits involving this very issue, likely because even the U.S. Supreme Court has acknowledged that graduation ceremonies are "one of life's most significant occasions."³ This article discusses why courts have concluded that students do not have a due process right to attend their graduation ceremonies, how courts have applied substantive due process differently, and the special case of a suspension that happens to include attending graduation. A

checklist to follow before barring a student from graduation appears on page 3.

Due Process Overview

Students who have been barred from graduation (usually due to misconduct) most frequently assert a Fourteenth Amendment due process right to attend the ceremony. Courts considering these cases sometimes speak of due process rights in general terms, while others distinguish between procedural and substantive due process rights. A Washington state appellate court eloquently described the two concepts as follows:

The Due Process Clause provides two kinds of protection, procedural due process and substantive due process. Procedural due process refers to the procedures that the government must follow before it deprives a person of life, liberty, or property. Substantive due process generally asks whether the government abused its power by arbi-

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trarily depriving a person of a protected interest, or by basing the decision on an improper motive.⁴

Regardless of the specific legal right considered, courts routinely reject student due process claims in these cases, concluding that students have no property or liberty interest in attending their graduation ceremony.⁵ In theory, if students have no recognized property or liberty interest in attending graduation, no procedural or substantive due process is required. Nevertheless, a number of courts have gone on to consider students' substantive due process claims even after concluding that they have no liberty or property right to attend graduation.⁶

And, at least one court has recently commended a school district for offering procedural due process to a student who was denied participation in graduation.⁷

No Property Interest

As explained by the Supreme Court in *Goss v. Lopez*, property interests are created and their dimensions defined by sources independent of the federal Constitution; they are creatures of state law.⁸ Courts reviewing student challenges to graduation bans overwhelmingly find that although state law may recognize a student's right to a public education, it does not provide a corresponding right to participate in the graduation ceremony.

A North Carolina federal district court was one of the first to decide a case in which a student was barred from the graduation ceremony solely due to one failure to follow school rules. In *Fowler v. Williamson*,⁹ a student was denied permission to attend graduation because he wore jeans in violation of a written notice telling male students to wear "dress pants, as opposed to jeans."¹⁰ He asserted a due process property right to attend. The district court concluded that, North Carolina, through its state constitution and statutes, had undertaken to provide a public education to students age six to eighteen, so a property right existed to attend public school and graduate if requirements are met. After reviewing "kindred matters" decided by the North Carolina Court, however, the federal district court concluded that a North Carolina court "would hold that the expectation of a graduate to participate in the graduation ceremony would *not* rise to the level of a property right."¹¹

No Liberty Interest

Courts have routinely rejected plaintiffs' due

process liberty interest claims, finding that a plaintiff's "good name, reputation, honor or integrity"¹² are not at stake simply because the plaintiff may not attend graduation. In *Swany v. San Ramon Valley Unified School District*,¹³ a student was prohibited from attending his graduation ceremony after failing to turn in by the deadline his participation log for a required independent study physical education course. The court found that by barring the student from attending graduation, the school district had not deprived him of "his good name, reputation, or honor in any future opportunities."¹⁴ The student, who ultimately graduated 11 days after the ceremony, finished his freshman year at U.C. Davis. There was "nothing on his permanent record" stating that he was prevented from attending commencement exercises.¹⁵

Substantive Due Process

Even after concluding that student-plaintiffs have no property or liberty interest in attending graduation, some courts have considered their substantive due process claims. Three such cases are examined below. In one, the court concluded the plaintiffs' substantive due process rights were violated. In another, the court concluded they were not. In the third, the appellate court refused to consider whether the plaintiff had a substantive due process rights claim after a jury had found the district's decision to ban the student from graduation arbitrary and capricious.

In *DeCaro v. Pocono Mountain School District*,¹⁶ the court concluded that plaintiffs had no property right in attending graduation, but nevertheless ruled that the district acted arbitrarily (presumably violating substantive due process) and granted plaintiffs' preliminary injunction allowing them to attend their graduation ceremony.¹⁷ In this case, the students had been barred from attending graduation because they had attended a party where underage drinking and vandalism occurred, in violation of school policy. Plaintiffs, however, cited evidence of other students who committed acts of vandalism on school property but were allowed to attend graduation as long as they repaired the damage. While the court cited a Pennsylvania case for the proposition that "a graduation ceremony is not within the scope of any property right,"¹⁸ it ruled in favor of the plaintiffs using substantive due process language. "Here defendant has applied its policies stringently to plaintiffs, but failed to use the same rigidity with the

school vandals. As a result, it is apparent that defendant's actions are arbitrary and capricious."¹⁹

In *Swany v. San Ramon Valley Unified School Dist.*,²⁰ described above, the court found that the plaintiff had no property or liberty interest in attending graduation, but still considered—and ultimately rejected—plaintiff's substitutive due process claims.²¹ The student was prevented from participating in graduation ceremonies after he failed to turn in a required participation log by the stated deadline, causing him not to receive credit for the class. Plaintiff argued that: (1) the requirement was both unauthorized by board policy and rationally unrelated to any school district goal; (2) he was treated in an arbitrary and capricious manner; and (3) precluding him from the graduation ceremonies was a disproportionate punishment considering the nature of the "offense." The court found none of these arguments to be persuasive, reasoning that specific evidence showed the required deadline was both authorized by the board and related to furthering a school district goal; the plaintiff was treated the same as other students who missed the deadline and were also not given credit for the class; and missing the graduation was not so much a punishment as the result of the plaintiff's failure to complete his graduation requirements.

In *Nieshe v. Concrete School Dist.*,²² the court refused to consider plaintiff's substantive due process claim after rejecting her arguments that she had a protected property interest in attending graduation.²³ This came after a jury found that the school district violated her due process right by arbitrarily and capriciously violating its own policies when it informed her she was prohibited from graduating mere hours before the ceremony because she had not achieved a passing grade for a required class. The Court of Appeals overturned this decision, first citing a litany of court decisions concluding that students do not have a property right in attending graduation, then pointing out that state law does not expressly reference a student's right to attend a high school graduation. Nor does state law "require significant procedures and guidelines for decision makers to follow before forbidding a student to participate in a graduation ceremony," found the court. Finally, the court determined that the state had not created a property interest that would warrant substantive due process protections.²⁴

Suspension Includes Graduation

Often a student is not specifically and only banned from graduation, but is suspended for a period of time that happens to coincide with graduation, and therefore cannot attend the ceremony. To avoid a successful challenge to such a suspension, school boards should be careful to follow procedural due process requirements applicable to suspensions contained in state statutes and district policy. In *Mifflin County School District v. Stewart*,²⁵ a student caught fighting on school grounds was given two consecutive suspensions, the second of which lasted four days. The student and his parents were only given oral notice of each suspension, despite district policy requiring written notice for any suspension longer than three days. After stating that "a graduation ceremony is not within the scope of any property right,"²⁶ the court concluded that the four-day additional suspension that coincided with the date of plaintiff's graduation was not valid because the district did not adhere to state policies when it failed to give the student written notice of the suspension. The plaintiff, the court determined, should have been allowed to participate in the ceremony.

Conclusion

The simple answer to the question of whether students have a constitutional *right* to attend graduation ceremonies is likely no. Even so, the graduation ceremony is undoubtedly a *rite* of passage the removal of which will engender resentment and possibly draw a legal challenge. Because numerous jurisdictions have not considered this question, students have occasionally prevailed in these cases, and litigation—meritorious or not—is more likely in the context of this "significant occasion"²⁷ than it is in others, school attorneys would be wise to advise their clients to offer students some procedural and substantive due process protections when this *rite* is taken away. See the box below. **I&A**

End Notes

1. See, e.g., *Fowler v. Williamson*, 448 F.Supp. 497 (W.D. N.C. 1978); *Swany v. San Ramon Valley Unified School Dist.*, 720 F.Supp. 764 (N.D. Cal. 1989); *Mifflin County School Dist. v. Stewart*, 503 A.2d 1012 (Pa. Commw. Ct. 1986); *Nieshe v. Concrete School Dist.*, No. 54451-9-1, 2005 WL 1580043 (Wash. Ct. App. July 5, 2005).
2. *DeCaro v. Pocono Mountain School Dist.*, No. 5561, 2010 WL 5573798, 15 Pa. D. & C. 388 (June 18, 2010) (holding school district acted arbitrarily and capriciously when applying its policies).

Before banning a student from attending his or her graduation consider the following:

1. Does a state statute, rule, policy, or regulation, or a court decision within your jurisdiction make attending the graduation ceremony a legal right? Has any court in your jurisdiction held that students have a property interest in participating in extracurricular activities?

If yes, do the following. If no, consider doing the following:

- Make sure relevant procedures contained in state law and school district policy applicable to student discipline are followed. Provide the student an opportunity for a hearing and give the student notice of the hearing.
- Examine the specific facts surrounding the incident to determine if the graduation ban was applied arbitrarily, capriciously, or disproportionately to the act. Have other students in similar circumstances been treated the same?

2. Is there a ruling in your jurisdiction applying substantive due process to a decision to ban a student from graduation (or another extracurricular activity) even where the court has held a student has no property or liberty interest in attending the ceremony?

If yes, do the following. If no, consider doing the following:

- Examine the specific facts surrounding the incident to determine if the graduation ban was applied arbitrarily, capriciously, or disproportionately to the act. Have other students in similar circumstances been treated the same?

3. Is the district suspending the student from school during a time period that happens to coincide with the graduation ceremony (versus only banning the student from graduation)?

If yes, do the following.

- Make sure applicable suspension procedures contained in state law and school district policy have been followed.

3. *Lee v. Weisman*, 505 U.S. 577 (1992).
4. *Nieshe v. Concrete School Dist.*, No. 54451-9-I, 2005 WL 1580043 (Wash. Ct. App. July 5, 2005).
5. See, e.g., *Fowler*, 448 F.Supp. 497; *Swany*, 720 F.Supp. 764; *Mifflin County School Dist.*, 503 A.2d 1012; *Nieshe*, 2005 WL 1580043.
6. See *Swany*, 720 F.Supp. 764; *DeCaro*, 2010 WL 5573798 (Pa. D. & C. June 18, 2010); *Nieshe*, 2005 WL 1580043.
7. *Walters v. Dobbins*, ___ S.W. 3d ___, No. 09-1004, 2010 WL 2131869 (Ark. 2010). The Supreme Court of Arkansas stated, "The fundamental prerequisite of due process in this situation is the opportunity to be heard and the right to be informed of the matter pending so a person can choose for himself whether to contest the claim. *Goss v. Lopez*, 419 U.S. 565, 581 (1975). The student received this required due process. Additionally the student was not denied education as the suspension occurred after his education was completed. The only activity he was denied was participation in the graduation ceremony. There is no right to participate in a graduation ceremony under the Arkansas State Constitution. Graduation is the ceremony symbolizing achievement of an education, not the education itself." *Id.*
8. *Goss v. Lopez*, 419 U.S. 565, 572-573 (1975).
9. 448 F.Supp. 497 (W.D. N.C. 1978). Courts before that had decided cases involving graduation bans brought under theories such as equal protection and First Amendment religious freedom.
10. *Id.* at 499.
11. 448 F.Supp. at 502 (emphasis added).
12. *Goss*, 419 U.S. at 574 (finding where a persons' good name, reputation, honor, or integrity is at stake due to government action, due process is required).
13. 720 F.Supp. 764 (N.D. Cal. 1989).
14. *Id.* at 775.
15. *Id.* at 771, 775 (student was able to make use of a Board Policy which enabled him to demonstrate proficiency in a subject – weightlifting – equivalent to what would have been attained by completing the respective course).
16. No. 5561, 2010 WL 5573798, 15 Pa. D.&C. 388 (June 18, 2010).
17. *Id.*
18. *Id.* at 391.
19. *Id.* at 391, 392.
20. 720 F.Supp. 764 (N.D. Cal. 1989).
21. *Id.*
22. No. 54451-9-I, 2005 WL 1580043 (Wash. Ct. App. July 5, 2005).
23. *Id.*
24. *Id.*
25. 503 A.2d 1012 (Pa. Commw. Ct. 1986).
26. *Id.* at 1013.
27. *Lee v. Weisman*, 505 U.S. 577 (1992).



A CONSTITUTIONAL RIGHT TO MAKE A FASHION STATEMENT? COURT DECISIONS ON PUBLIC SCHOOL UNIFORM POLICIES

By: *Amanda Bartusek, NSBA Legal Intern, Alexandria, Virginia*

A growing percentage of public schools have implemented school uniform policies. According to the National Center for Education Statistics, in 2009-10, about 19 percent of public school principals reported that their schools required school uniforms, an increase from 12 percent in 1999-2000.¹ Schools and school districts turn to uniform policies to advance building-level goals such as lessening distractions, reducing gang violence, decreasing socio-economic tensions and creating social decorum. These goals serve larger educational interests such as increasing student achievement, promoting safety, enhancing a positive school environment, increasing attendance, and decreasing drop-out rates.

Public schools implementing uniform policies and other restrictive dress codes draw constitutional challenges from students and their families, who allege infringement of students' First Amendment free expression rights. Frequently, the plaintiffs also allege that the policy violates the parent's Fourteenth Amendment right to direct the upbringing and education of his or her child. Courts have overwhelmingly upheld content-neutral school uniform policies against such constitutional challenges.

This article discusses court decisions involving constitutional challenges to school uniforms and restrictive dress codes, the claims

asserted, the standards applied, and practical considerations for advising school districts.

Guiding Principles: *United States v. O'Brien (1968)* and *Canady v. Bossier Parish School Board (5th Cir. 2001)*

With the exception of one federal district court, all courts considering First Amendment free expression challenges to school uniform policies have applied the test articulated in *United States v. O'Brien*.² In that case, David O'Brien had burned his draft card outside of a Boston courthouse and had been convicted under a federal statute making such conduct criminal. O'Brien challenged the constitutionality of the criminal statute on its face and as applied³ to him, claiming that his conduct was intended to express his opposition to the war and therefore should be protected under the First Amendment.

While the Court agreed that O'Brien's conduct did have a communicative element, it found that the conduct did not necessarily deserve protection under the First Amendment's free speech clause. Instead, the Court concluded, "...when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment Freedoms."

The Court laid out a four-prong test to determine whether such a regulation is constitutional. Government regulation of conduct containing speech and nonspeech elements will be found to be justified if: it is within the constitutional power of the Government; it furthers an important or substantial governmental interest; the governmental interest is unrelated to the suppression of free expression; and the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest.⁴

Traditionally courts have allowed schools to impose content-based regulations on four categories of student speech; 1) speech that is disruptive to the school environment (*Tinker*); 2) lewd, vulgar, or obscene speech (*Fraser*); 3) speech related to school sponsored activities (*Hazelwood*); and 4) speech promoting illegal drug use (*Morse*). Courts analyzing school uniform policies – which are found to regulate conduct with speech and non-speech elements that incidentally limits First Amendment freedoms – have looked instead to *O'Brien*. Generally, courts uphold content neutral school uniform policies that meet *O'Brien's* latter three prongs.

The Fifth Circuit acknowledged this “expressive conduct” category of speech in *Canady v. Bossier Parish School Board*.⁵ In that case, the plaintiff filed suit against a school district alleging that a school uniform policy was unconstitutional because it banned him from wearing clothing that was not disruptive, lewd, vulgar, obscene, drug related, or related to school sponsored activities. The court held that while a school’s imposition of school uniforms does not readily correspond to one of the categories of speech that schools may regulate (under *Tinker* and its progeny), schools may also constitutionally regulate student speech so long as the regulation is

content and viewpoint neutral, i.e., “unrelated to any political viewpoint.”⁶ The *Canady* court determined that content neutral regulations would be subject to the *O'Brien* test to determine their constitutionality.⁷

In each of the school uniform/dress code cases discussed below, the court only addresses the latter three prongs of *O'Brien* and not the requirement that the government has the power to enact the regulation because in all dress code cases this prong is automatically met.⁸ See sidebar below left.

School Uniform Policy Deemed Constitutional

Courts finding school uniform policies content neutral have overwhelmingly upheld them.

*Palmer v. Waxahachie Independent School District (5th Cir. 2009)*¹⁰

In *Palmer*, the Fifth Circuit upheld the constitutionality of a school district’s dress code which prohibited students from wearing shirts with any wording, except school sponsored t-shirts and t-shirts that supported school spirit. The dress code did not prohibit political pins, buttons, bumper stickers or wrist bands. High School student Paul Palmer sued the Waxahachie School District alleging that the dress code violated his First Amendment right to freedom of speech after he was denied approval to wear a San Diego shirt, a “John Edwards for President” shirt, and a t-shirt with “Freedom of Speech” on its front and “First Amendment” on its back.

The Fifth Circuit upheld the dress code as constitutional on the grounds that it was content neutral and passed the intermediate scrutiny standard articulated in *O'Brien*. The policy’s exceptions for shirts with small logos and school related shirts did not violate content neutrality, the court found, because the exceptions did not suppress unpopular viewpoints but rather gave students more choices than they would have had there been a complete ban on student speech. *O'Brien*, therefore, applied.¹¹

The court held that the three relevant prongs of *O'Brien* were satisfied, as follows:

- (1) The district provided enough evidence, through teacher affidavits, to show that the school uniform policy had furthered the school’s goals of encouraging a safe learning environment and professional dress, and cutting down the time teachers spent on dress code violations.

- (2) Palmer did not argue that the uniform failed to meet the second prong so the Court did not discuss it.

- (3) Under *Canady*, the school uniform passed the third prong because students were allowed to wear what they wished after school hours and could still express their views through other media during the school day (buttons, wristbands, bumper stickers, and the like).¹²

*Jacobs v. Clark County Sch. Dist. (9th Cir. 2008)*¹³

In *Jacobs*, The Ninth Circuit upheld a Nevada school district’s school uniform policy against a challenge based on the First Amendment’s Free Speech and Free Exercise Clauses. The Clark County School District had implemented a standard dress code for all students and allowed individual schools to implement more stringent dress codes. Liberty High School implemented a policy that required all students to wear, “solid khaki colored bottoms and solid colored polo, tee or button down shirts (blue, red, or white) with or without the High school’s logos.”

The Ninth Circuit held that neither the school district’s regulation nor the individual school dress code violated the student’s free speech rights. By allowing students to wear the school logo, the school had not converted the policy into a content-based regulation because there was no evidence that the school district enacted the uniform policy in order to suppress particular viewpoints or regulate student speech based on disagreements with its content.¹⁴ “Plaintiffs put forth no evidence that the Regulation’s logo allowance was an attempt by the District to inundate the marketplace of ideas with pro-school messages or to starve that marketplace of contrary opinions; rather, all evidence suggests that the District considered the logo to be an identifying mark, not a communicative device.”¹⁵

Because the policy was content and viewpoint neutral, it was subject to intermediate scrutiny under *O'Brien*. Using the three relevant prongs of that standard, the court held:

- (1) The goals of increasing student performance, promoting school safety, and encouraging a positive learning experience were clearly important governmental interests.
- (2) There was no evidence of underlying interests by the school to suppress free expression of its students’ speech.

Courts consider three prongs of the *O'Brien* test when analyzing school uniform policies. A content neutral uniform policy is generally upheld if:

- (1) it furthers an important or substantial governmental interest;
- (2) the governmental interest is unrelated to the suppression of free expression; and
- (3) the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest.⁹

(3) The school did not suppress more speech than necessary, as it permitted students to express themselves through other avenues such as school clubs and conversing with one another in the halls.¹⁶

The Ninth Circuit repeatedly cited with approval the Fifth Circuit's decision in *Littlefield v. Forney Ind. Sch. Dist.*, summarized below.

Littlefield v. Forney Independent School District (5th Cir. 2001)¹⁷

Here, the Fifth Circuit upheld Forney Independent School District's dress code policy, which required students to wear polo shirts, oxford shirts, or blouses in any of four specified solid colors, with blue or khaki pants, skirts, shorts or jumpers. Denim, leather, suede, vinyl, and spandex were prohibited, as well as baggy clothes and specific types of shoes. A number of parents who had been denied exemptions for their children sued the district. They contended the district's policy violated the student's right to freedom of expression.

The court rejected the free expression claim and applied the three relevant prongs of *O'Brien*, finding:

(1) The school district passed the mandatory uniform policy "to improve student performance, instill self-confidence, foster self-esteem, increase attendance, decrease disciplinary referrals, and lower drop-out rates," which the court agreed were undoubtedly important government interests.¹⁸

(2) The school's interests in decreasing socioeconomic disparities, increasing attendance and reducing gun related activity could not be seen as intending to suppress student speech.

(3) The policy only restricted speech during the school day; other forms of expression were not limited.

The *Littlefield* court addressed not only the free speech challenge, but also the parents' claim that the policy violated their Fourteenth Amendment right to direct the care and education of their children. The parents asserted that the policy interfered with their right to teach their children about making choices in their dress as a matter of conscience and good grooming, and not judging others for similar choices. The court found that this parental right can be limited by a school dress code and applied the rational basis test:

"While parents may have a fundamental right in the upbringing and education of their children, this right does not cover the parents' objection to a public school Uniform Policy. It has long been recognized that parental rights are not absolute in the public school context and can be subject to reasonable regulation. . . . [P]arents simply do not have a constitutional right to control each and every aspect of their children's education and oust the state's authority over that subject. . . . Applying the rational basis test, we conclude that the Uniform Policy is rationally related to the state's interest in fostering the education of its children and furthering the legitimate goals of improving student safety, decreasing socioeconomic tensions, increasing attendance and reducing drop-out rates. [T]he Uniform Policy does not violate the Parents' Fourteenth Amendment rights."¹⁹

Dempsey v. Alston (NJ App. 2009)²⁰

In *Dempsey*, the New Jersey Superior Court, Appellate Division, decided a case in which parents challenged the school's dress code, as well as the state law authorizing it. The parents of a Pleasantville High School student sued the school district after their son was repeatedly reprimanded at school for failing to abide by the dress code. The parents had submitted several formal opt out requests based on "Constitutional Rights, fundamental freedom, individual personal choice, and philosophical beliefs," all denied by the district.

The Court found that the state statute and the school dress code were content and viewpoint neutral, rejecting the family's assertion that choosing to dress as one pleased was, in and of itself, an attempt to convey a particularized message or viewpoint. The court applied *O'Brien* and held:

(1) The state had a legitimate interest in protecting and preserving the quality of the State's educational system and protected that interest by enacting the dress code.

(2) The Legislature's stated purpose of improving classroom behavior "to facilitate and maintain an effective learning environment," was unrelated to the suppression of free expression.

(3) The adoption of the dress code policy was no greater than was essential because it limited only one form of

conduct and there was no evidence that students were prohibited from other ways of expressing themselves through buttons or other jewelry.²¹

The parents also asserted that their son had a due process right to dress how he chose, necessitating an opt-out provision in the school dress code legislation for it to withstand constitutional scrutiny. The New Jersey court disagreed. While the *parents* had a constitutional right to determine where their child went to school, *children* do not have a constitutional right to dress how they choose during the school day.²²

Because no constitutional right is implicated, the court explained, the Legislature is only required to establish a rational basis for the law. The court found that the law's purposes "to assist in controlling the environment in public schools, to facilitate and maintain an effective learning environment, and to keep the focus on learning" were rationally related to advancing legitimate interests in "protecting and preserving the quality of its educational system." Therefore, according to the court, the absence of a mandatory opt out provision was not unconstitutional.²³

The New Jersey court relied upon the Sixth Circuit's analysis in *Blau v. Fort Thomas public Sch. Dist.*, summarized below.

Blau v. Fort Thomas Public School District (6th Cir. 2005)²⁴

In *Blau*, the Sixth Circuit upheld another school uniform policy against a parent's free speech claim on behalf of his daughter, and his own Fourteenth Amendment parental rights claim. The policy required that students not wear any clothing that was baggy, tight, revealing, condoning inappropriate messages, ripped, or representing any logos. It also prohibited students from wearing blue jeans and sweat pants.

The Court determined that the dress code was content neutral because it did not suppress any particular viewpoint. "Merely because a dress code conveys what a school district believes is 'appropriate' does not mean that the regulation exists in order to suppress speech or turns on the expressive quality of the clothing at issue but rather only regulates the type of clothes a student may wear."²⁵ *O'Brien* applied, the court determined:

(1) The adoption of a dress code furthered an important governmental interest by promoting school unity,

reducing socio-economic gaps, focusing the attention on learning, and improving discipline.²⁶ The school district had provided three teacher affidavits stating that the school dress code had furthered the school's interest and there were fewer disciplinary problems since the adoption of the code.

(2) The policy was unrelated to the suppression of freedom of expression because the aims of the dress code were to improve learning, not to promote or regulate viewpoints with which the school did not agree.

(3) The policy was narrowly tailored because it only regulated what students wore during the school day; the students were able to express themselves through school assignments, extra-curricular activities, and by wearing pins.²⁷

The court also dismissed the claim that the dress code interfered with the father's fundamental right to direct the education of his daughter. Citing *Littlefield* and other decisions, the court held that while parents have a fundamental right to decide to send their children to public school, they do not have a fundamental right to exempt their children from the school dress code.²⁸

clothing be free of pictures, patterns, logos, and stripes. Clothing had to be in solid color only; no jeans or sweat pants were allowed. Several of the students were found to have violated the dress code by wearing clothing items such as jeans, socks with a Winnie the Pooh character, an American Cancer Society pink ribbon for breast cancer awareness, a Vintage High School t-shirt, a heart sticker on Valentine's Day, a T-shirt with the words "D.A.R.E. to resist drugs and violence" and a t-shirt reading "Jesus Freak."

The plaintiffs claimed that the dress code constituted an absolute ban on expressive content and violated their First Amendment free speech rights. The court agreed, in part, finding, "certain clothing and accessories prohibited by the attire policy— the D.A.R.E. t-shirt, the Jesus freak t-shirt, and the breast cancer awareness pin—did convey a particularized message subject to First Amendment protection." Because the student's clothing conveyed a particularized message, it was subject to the *Tinker v. Des Moines Independent School District* standard.³⁰ The school district claimed that its legitimate interest in adopting the policy was to combat gang activity and make intruders easy to identify but was only able to provide one example, which the court deemed insufficient. Without more evidence of how the policy served the interest of reducing gang related disruptions, and because the policy suppressed student expression, the court found the policy unconstitutional. **I&A**

Special thanks to former COSA Chair Dean Pickett for insight on Arizona's parents' rights statute in the context of school uniform policies.

End Notes

1. National Center for Education Statistics, <http://nces.ed.gov/fastfacts/display.asp?id=50> (last visited May 14, 2012). That same year, approximately 57 percent of principals reported that their school enforced a strict dress code, an increase from 47 percent in 1999–2000.
2. *United States v. O'Brien*, 391 U.S. 367 (1968).
3. *Id.* at 376, 382–383.
4. 391 U.S. at 377 (1968).
5. 240 F.3d 437, 443 (5th Cir. 2001).
6. *Id.* at 443, citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).
7. Since *Canady*, courts have also described content-neutrality in terms of whether a rule regulates speech based on disagreement with the message conveyed. See, e.g., *Brazos Valley Coal. for Life, Inc. v. City of Bryan, Tex.*, 421 F.3d 314, 326–27 (5th Cir. 2005).
8. *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 434 (9th Cir. 2008).

Practical Suggestions For School Districts Considering School Uniform Policies:

Research and Identify Goals

Clearly identify the goals the school district hopes to achieve in implementing a uniform policy, keeping in mind the goals should serve a legitimate purpose. It may be helpful to research policies other districts in the area have implemented and determine if they have faced legal challenges.

Communication

Openly communicate with students and parents about the process of formulating and adopting a school uniform policy. A school district should invite input from families and, after creating the policy, provide a concise, written public statement on the process.

Create a policy which is content and viewpoint neutral

The policy must be content and viewpoint neutral to be safe from strong legal challenge. The school district's goals must be educational, and must not include the desire to suppress any particular form of expression. Strive to ensure that the policy is not overbroad, but rather narrowly tailored to meet the educational goals of the school district.

9. *United States v. O'Brien*, 391 U.S. 367 (1968).
10. *Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502 (5th Cir. 2009).
11. *Id.* at 509.
12. *Id.* at 511.
13. *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419 (9th Cir. 2008).
14. *Id.* at 433.
15. *Id.*
16. *Id.* at 434.
17. *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275 (5th Cir. 2001).
18. *Id.* at 287.
19. *Id.* at 291.
20. *Dempsey v. Alston*, 966 A.2d 1 (N.J. Super. Ct., App. Div. 2009).
21. *Id.* at 12–14.
22. *Id.* at 9.
23. *Id.* at 8–9.
24. *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381 (6th Cir. 2005).
25. *Id.* at 391.
26. *Id.*
27. *Id.* at 392.
28. *Id.* at 395–396.
29. *Scott v. Napa Valley Unified Sch. Dist.*, No. 26–37082 (Cal. Super. Ct. July 2, 2007).
30. In order to justify suppression of protected speech school must show "facts which might reasonably have led school authorities to forecast a substantial disruption of or material interference with school activities." *Tinker v. Des Moines Ind. Sch. Dist.*, 393 U.S. 503, 514 (1968).

It remains to be seen if parents' rights statutes, such as Arizona's below, will change courts' analysis of claims brought under the parent rights concept extrapolated from the Fourteenth Amendment. The Arizona law reads:

All parental rights are reserved to parent of a minor child without obstruction or interference from this state, any political subdivision of this state, any other governmental entity or any other institution, including but not limited to, the following rights:

1. The right to direct the education of the minor child. . . .

A.R.S. § 1–602

School Uniform Deemed Unconstitutional

Scott v. Napa Valley Unified School District (Cal. Super. Ct. 2001)²⁹

The California Superior Court granted a preliminary injunction to several student plaintiffs who claimed that a restrictive dress code put in place by the Court Napa Valley Unified School District violated their free speech rights. The policy required that all students'

ANNOUNCEMENTS & EVENTS

Call for Proposals 2013 School Law Seminar

Proposals are now being accepted from COSA members to present at the 2013 School Law Seminar, April 11-13, San Diego, California. Presentations should be geared toward an experienced attorney audience. Proposal deadline is Wednesday, June 27, 2012.

More information, including evaluation criteria, and a program proposal form can be found on the Council's website at www.nsba.org/cosa

KASB/NSBA Patricia E. Baker Scholarship now accepting applications

Administered by COSA, the Pat Baker Scholarship for 2012-2013 will assist a COSA member with the resources to attend the School Law Practice Seminar, October 11-13, 2012 in Santa Fe New Mexico, or the annual School Law Seminar, April 11-13, 2013 in San Diego.

Eligibility, award criteria, and an application form, can be found on the Council's website at www.nsba.org/cosa

2012 School Law Seminar Presentation Papers

As a benefit of your COSA membership, the presentation papers from the 2012 School Law Seminar held April 19-21 in Boston, Massachusetts are now available for review or download at

<http://www.nsba.org/SchoolLaw/COSA/School-Law-Seminar>

Topics include cloud computing, response to intervention, use of school facilities by religious groups, rights of transgender youth, and much more.

2012 School Law Practice Seminar – Registration opens soon!

October 11-13, 2012, Eldorado Hotel & Spa Santa Fe, New Mexico – save the date.

We look forward to seeing you in October at the Council's fall seminar. Topics include helping boards navigate the issue of board recusal, defining the limits of board member access, examining children's internet protection act, ethics, and much more.

Recognizing Council Members

The Council thanks members Lenore Silverman and Diane Marshall Freeman, Fagen Friedman & Fulfrost, for presenting on the School Law Boot Camp, Special Education webinar on Tuesday, May 8.