

Spring 3-1-1998

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Recommended Citation

Amy Mitchell Wilson, *Public School Dress Codes: The Constitutional Debate*, 1998 BYU Educ. & L.J. 147 (1998).

Available at: <https://digitalcommons.law.byu.edu/elj/vol1998/iss1/6>

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Public School Dress Codes: The Constitutional Debate

By Amy Mitchell Wilson

The public school campuses of our nation are experiencing an unprecedented crisis of violence and a shocking decline in academic achievement. The National School Boards Association has estimated that approximately 135,000 guns are brought to the nation's 85,000 public schools every day.¹ Gang related violence and crime in the public schools continues to grow and challenge school administrators and students. The problems faced by school officials and students have grown considerably in the past twenty years. Reports of the crisis in our public schools are staggering. Student attendance and dropout rates are alarming, as are the presence of drugs, weapons, and violence in many schools.²

This proliferation of violence in our schools has created a sense of emergency for school districts. As a reaction to this threat of violence, many school boards are currently enforcing mandatory dress codes. These codes prohibit students from wearing clothing that is identifiable as gang clothing, such as bandanas, particular colored handkerchiefs, college jackets, earrings, and accessories. Some states have even passed laws that allow the public school districts to mandate school uniforms.³

Following the introduction of the dress code controversy, this article will examine the First Amendment protection of speech and expression as applied to school dress codes. An analysis of specific types of dress and grooming regulations will follow. The evolution of dress code cases dealing with hair length, obscenity, and gang clothing will demonstrate the different ways the courts

1. Williams Celis 3d, *Schools Getting Tough on Guns in the Classroom*, N.Y. TIMES, August 31, 1994, at A1, B8.

2. Ann L. Majestic, *Student Dress Codes in the 1990's* LEGAL GUIDELINES FOR CURBING SCHOOL VIOLENCE, p.62 1993.

3. Alyson Ray, *A Nation of Robots? The Unconstitutionality Of Public School Uniform Codes*, 28 J. MARSHALL L.REV. 645, 645 (1995)

have addressed these issues and how those decisions are likely to affect the legality of the current movement towards mandatory uniforms in the public schools. In conclusion, this article will specifically address the constitutionality of uniform dress codes and conclude that they are in fact constitutional.

I. THE CONTROVERSY

Throughout the nation, as dress codes gain popularity in the public schools, the debate ripens on the effectiveness of, constitutionality of, and need for such restrictive regulations:

Although dress codes are increasing in popularity throughout the United States, educators do not uniformly agree upon the benefits produced by these regulations. There is no certainty that dress codes reduce school violence or improve academic achievement. Furthermore, strict dress codes, which school officials justify because they are aimed at preventing gang violence, have been adopted in several areas that do not have gang problems, undermining some school official's justifications. Moreover, dress codes may contain an inherent racial bias because they tend to focus on clothing associated with African-American gangs while ignoring other groups such as white supremacist gangs. . . . In contrast, school officials who favor dress codes often contend that they reduce classroom violence and improve the educational environment. Dress code proponents frequently assert that dress codes prevent students who are not involved with gangs from mistakenly being targeted as a gang member because of their dress. In addition, some educators report that dress codes reduce the number of fights in schools. Many educators who promote the establishment of dress codes also assert that dress codes improve the educational environment of the classroom by encouraging discipline, enhancing self-esteem, and promoting unity in the educational process.⁴

The maintenance of an environment conducive to education is within the power of school authorities. The use of dress codes to this end has created significant controversy. While opponents

4. Wendy Mahling, *Secondhand Codes: An Analysis of the Constitutionality of Dress Codes in the Public Schools*, 80 MINN. L. REV. 715, 718-20 (1996).

of mandatory dress codes express concern over the constitutionality and effectiveness of such regulations, proponents of mandatory uniform dress codes laud their success. The following is an example of a proponent school district in California.

In 1993 the Will Rogers Middle School in Long Beach, California, instituted a uniform dress code. The school had been plagued with graffiti and students in gang style clothing. Test scores were down and suspensions were excessive. In an effort to improve the quality of education for Will Rogers students, parents and faculty voted to implement the uniform policy. As the policy was implemented the teachers noticed a different attitude in the school; the students were calmer and more polite. Students admitted their lives were easier as they were not occupied with what they would wear to school.

In Long Beach's first year with uniforms, suspension dropped 32 percent and crime fell 36 percent. At the city's high school, where uniforms were not worn, crime showed no decline. Before uniforms were introduced, Rogers ranked 14th out of 19 district schools on a statewide algebra test. Rogers jumped to fourth the year following the implementation of uniforms. Will Roger's PTA president commented that "uniforms are not a magic pill, but any school will see payoffs. We have a whole generation of children who have grown up with no boundaries, look what happens when you provide a few."⁵

While opinions will always differ regarding the effectiveness and need for uniform dress codes, ultimately, the legal argument rests on whether or not such dress codes are constitutional.

II. OVERVIEW OF CONSTITUTIONAL ISSUES

The constitutional controversy involves the First Amendment protection of speech and expression. Non-verbal conduct that has a communicative impact is sometimes found to fall within the protection of free expression.⁶ Some argue that the choice of dress is this type of protected expression. Dress codes

5. Jo Beth McDaniel, *Can Uniforms Save Our Schools?* READER'S DIGEST, September 1996, at 79.

6. Paul D. Murphy, *Restricting Gang Clothing in Public School: Does A Dress Code Violate A Student's Right of Free Expression?*, 64 S. CAL. L. REV. 1321, 1333 (1991).

have also been challenged as an infringement upon the students' liberty interest to control their own appearance.⁷

A. *The First Amendment*

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."⁸ This restriction on law making power is extended to state governments through the Fourteenth Amendment.⁹ There are several interpretations of the meaning of the First Amendment. Supreme Court Justices Black and Douglas supported the idea that the First Amendment right speaks in absolute terms.¹⁰ However, the majority of the Supreme Court has never endorsed the absolutist view that would prohibit any government restriction of speech. Rather, the Court has applied varying tests to determine whether an individual's right to freely express his or her views is subordinate to other interests of society.¹¹ The Court has created many categories of speech, regulations, form, and speakers. Depending on which category is being addressed, different tests are applied to determine the scope of permissible restraints on that type of speech.

The Court has determined that some categories of speech receive limited First Amendment protection. These types of speech are distinguished by the nature of the regulation: content based or content neutral.

A regulation that is content based prohibits speech on the basis of the ideas or information contained in the speech. There must be a compelling government interest to implement such a regulation. Further, there must be no less restrictive means available to achieve the governmental interest at stake.¹²

Content neutral regulations, on the other hand, are those that prohibit speech to avoid an evil unconnected to the content of the speech. Content neutral regulations often interfere with

7. Mahling, *supra* note 4, at 725.

8. U.S. CONST. amend. I.

9. U.S. CONST. amend. XIV.

10. Alison M. Barbarosh, *Undressing The First Amendment In Public Schools: Do Uniform Dress Codes Violate A Students' First Amendment Rights?* 28 LOY. L.A. L. REV. 1415, 1424 (1995).

11. Mahling, *supra* note 4, at 721.

12. Barbarosh, *supra* note 10, at 1425.

speech by regulating the time, place, and manner of speech. This type of regulation must meet a substantial government purpose and be narrowly tailored to meet that purpose. Further, content neutral regulations must leave open an alternative channel of communication.¹³

In addition to the regulation classifications, the Court has recognized two different types of speech: pure speech and symbolic speech. All speech that is classified as pure receives some type of First Amendment protection. For example, defamation is protected as pure speech, although it receives less protection. Symbolic Speech involves *conduct* in which one engages intending to convey a message.¹⁴

In *United States v. O'Brien*,¹⁵ the defendant was convicted for burning his draft card in violation of a law that prohibited knowing destruction or mutilation of a draft card. O'Brien argued the law was unconstitutional because his conduct was symbolic speech protected by the First Amendment. The Supreme Court rejected the view that the First Amendment would protect anyone engaged in any conduct intended to convey a message.

The Court set out the following standards, now known as the O'Brien Test for analyzing statutes regulating symbolic speech. A regulation will be justified if: (1) it is within the government's interest, (2) it furthers an important or substantial government interest, (3) the government interest is unrelated to the suppression of free expression, and (4) the incidental restriction on First Amendment rights is no greater than necessary to further that interest.¹⁶

In today's simplified approach, the courts generally apply a two-pronged test: (1) was there an intent to convey a particular message, and (2) was there a great likelihood that the message would be understood by those who viewed it.¹⁷

The context in which the symbolic speech occurs will also be taken into consideration. In *Texas v. Johnson*,¹⁸ the defendant was arrested for burning an American flag outside the Republi-

13. Barbarosh, *supra* note 10, at 1426.

14. Mahling, *supra* note 4, at 723.

15. *United States v. O'Brien*, 391 U.S. 367 (1968).

16. *Id.*

17. *Id.*

18. *Texas v. Johnson*, 491 U.S. 397 (1989).

can National Convention. As part of the Court's assessment of the conduct claimed to be symbolic, the Court took into account the context in which this conduct took place.

The Court found that the political climate and current national events did in fact set the stage for the defendant to convey a particular message. While the message may have been interpreted differently by various groups of people, this did not place the conduct outside the scope of protected speech.

First Amendment rights apply to all United States citizens. However, the government may curtail or limit these rights depending on the class of citizens involved. For example, the government has broader discretion in limiting the rights of schoolchildren than adults.¹⁹ In *Ginsberg v. New York*,²⁰ the Supreme Court recognized that the state has power to control the conduct of children that reaches beyond its scope of authority over adults. School districts are given considerable latitude to ensure an environment that is safe and conducive to learning.²¹

B. First Amendment Issues in Dress Regulation

In *Tinker v. Des Moines Independent Community School District*,²² several students were suspended for wearing black arm bands in protest of the Vietnam War. These students claimed that their First Amendment right of expression had been violated. The Supreme Court agreed with the students and held that they had been suspended in violation of their rights. The Court found that First Amendment rights apply in all situations in which students seek to freely express themselves on the school campus, whether in the cafeteria, in hallways, or during extra-curricular activities.

The Court reasoned that personal intercommunication is an integral part of the educational process. The Court held there must be actual or likely classroom disruption or violence on the school campus to justify restriction on student's speech.²³

In *Tinker*, the Supreme Court broadly interpreted students' First Amendment rights. Other cases seem to offer much less

19. Barbarosh, *supra* note 10, at 1427.

20. *Ginsberg v. New York*, 390 U.S. 629, 638 (1968).

21. Barbarosh, *supra* note 10, at 1428.

22. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

23. *Id.*

protection of student rights to freedom of expression. In several instances, the Court has found that First Amendment protection does not apply to restrictions that do not affect political speech or a student's access to information.²⁴ Therefore, in relation to uniform dress code regulations, the first argument to be addressed is whether the student's clothing - not the button, ribbon, or armband worn in protest or demonstration - is political speech.

In *Bethel School District No. 403 v. Fraser*,²⁵ a student was suspended for three days and his name was withdrawn from the list of possible graduation speakers for using sexually explicit language in a campaign speech at a school assembly. The speech was delivered over the objection of the teachers who reviewed the content beforehand. The Court upheld the decision of the school board and found that the school officials did have a right to discipline the student for using lewd and vulgar speech. This case demonstrates the authority school officials have in regulating verbal speech that is not conducive to the educational environment.

From this decision, one may reasonably interpret that clothing worn by a student, if found to qualify as speech, may also be regulated. In addition, many lower court decisions have held that dress codes aimed at maintaining a good educational environment do not violate the First Amendment.²⁶

The Supreme Court in *Tinker* held that a school cannot regulate speech simply because it disagrees with the content of the speech. This implies that the motivations of a school official in regulating speech are relevant in determining the constitutionality of those regulations. However, the Court has also found that many school administrators' decisions concerning which speech is consistent with the educational goals of the school are beyond the scope of judicial review.²⁷ Public school administrators may only regulate expression when there is evidence that the regulations are "necessary to avoid material and substantial interference with schoolwork or discipline."²⁸

24. Mahling *supra* note 4, at 728.

25. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986).

26. Mahling *supra* note 4, at 728.

27. *Id.* at 729.

28. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

The actual wording of a dress code can be significant to the court in determining its legality. If the court interprets the wording of the rule to forbid conduct that would materially disrupt or interfere with the educational process or threaten the safety of other students, the school administrators' decision will be given great deference. However, if the regulation seems to express a school official's personal prejudice that is not based on a rational purpose related to the educational mission of the school, the court is unlikely to uphold such a regulation²⁹

C. Fourteenth Amendment Issues

While the majority of constitutional challenges to dress codes involve First Amendment issues, some challenges have been based on, or addressed by the court in light of, the Due Process Clause of the Fourteenth Amendment. The Amendment, in relevant part, states that:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.³⁰

While there may be a liberty interest in one's appearance, it is important to remember that, "[S]tudents are subject to numerous restrictions on their personal freedoms as an inherent part of the educational process. They must adhere to a general code of conduct, take required classes, attend school regularly, and only leave campus when they are allowed."³¹

While in *Wallace v. Ford*,³² the court recognized the freedom to govern one's appearance under the protection of the Due Process Clause, the court has consistently acknowledged the right of the school administrators to establish regulations that were necessary to fulfill the educational functions of the school, including safety, health decency, and classroom decorum. These interests were subjected to a balancing test. The court determined that if the state interest outweighed the personal liberty

29. Mary Julia Kuhn, *Student Dress Codes in the Public Schools: Multiple Perspectives in the Courts and Schools on the Same Issues*, 25 J. LAW EDUC. 91 (1996).

30. U.S. CONST. amend. XIV.

31. *Majestic*, *supra* note 2, at 57.

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

interest, the intrusion on the personal liberty would be justified; if it did not, the dress code regulation would fail. The court approved of an analysis which took into account the nature of the liberty asserted, the context in which it is asserted, and the extent to which the intrusion is confined to the legitimate public interest to be served."³³

Wallace involved dress code regulations covering both hair and clothing. The court noted that "the very nature of public school education required limitations on one's personal liberty in order for the learning process to proceed."³⁴ Further, the court observed that clothing regulations may not require as much justification as hair regulations because clothing can be changed after school hours. Regulations governing dress do not require the student to alter his or her physical being, while a hair style regulation affects a student at all times, both during and after school.

The court in this case upheld parts of the dress code which it determined to be actually related to a legitimate goal necessary to carry out the mission of the school. For example, the court found that the prohibition of immodest or suggestive clothing to be a legitimate objective, while it held invalid those prohibiting modest forms of dress such as "knicker suits" and "jumpsuits." Finally, the court noted the importance of providing adequate procedural safeguards to the students before imposing disciplinary measures.

The fundamental rights approach to the dress code regulations disregards the authority that the school administrators have and need in order to maintain an environment conducive to education. Three circuit courts that found a fundamental right to govern one's appearance required a "substantial burden of justification" by the school district.³⁵ Such a high standard, however, would contradict Supreme Court precedent, which acknowledged that school officials have an interest in maintaining an educational environment conducive to learning and in teaching students community norms.³⁶ There is little case law in

33. *Wallace*, citing *Richards v. Thurston*, 424 F.2d 128, 1281-85 (1st Cir. 1970).

34. *Id.*

35. *Holsapple v. Woods*, 500 F.2d 49, 49 (7th Cir. 1974); see also *Massie v. Henry*, 455 F.2d 779, 783 (4th Cir. 1972); *Bishop v. Colaw*, 450 F.2d 1069, 1075 (8th Cir. 1971).

36. *Mahling*, *supra* note 4, at 736-37.

this area to guide school officials in determining constitutionally permissible dress codes.

Thus, the scope of a student's First Amendment rights on a public school campus and the extent to which the courts will enforce those rights are uncertain. Even though school officials will usually be given great deference in establishing a school environment conducive to learning and safety, there is not an exact test or formula for determining the constitutionality of such decisions. The different opinions of the various courts demonstrate the uncertainty of this issue and seem to indicate that the issue will be dealt with on a case-by-case basis that will be further affected by the jurisdiction in which the issue arises.

III. ANALYSIS OF SPECIFIC TYPES OF DRESS AND GROOMING REGULATIONS

A. Regulation of Hair Length

Hair length restrictions account for most of the reported cases dealing with student appearance. In the early 1970s several circuit courts considered the constitutionality of dress codes that regulated hair length in the public schools. Most of these restrictions did not deal with students' dress per se. However, a review of the case law that developed from these cases is helpful to understand what factors the courts will consider when addressing dress code disputes.

Following the *Tinker* decision, the courts were flooded with matters of student discipline, particularly cases dealing with student appearance. "By one author's count there were 150 reported cases involving student hair restrictions by mid 1974."³⁷ Nine of the federal circuit courts heard these cases and the results were almost evenly split. The courts used different reasoning when deciding the constitutional questions. Therefore, varying results were reached. A detailed study of dress codes among the various circuits shows that the outcome of a student dress code case depends almost exclusively on the geographic location of the events.³⁸

The Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits have generally held that school officials have the authority to impose

37. Majestic, *supra* note 2, at 55.

38. Kuhn, *supra* note 29, at 732.

reasonable grooming requirements, and that review of hair length regulations is not properly within the scope of review of the federal judiciary. However, the First, Fourth, Seventh, and Eighth Circuits have held that hair length regulations are unconstitutional. Yet, these circuits did not agree on which constitutional grounds should be used in examining public school dress codes.³⁹

The Supreme Court had the opportunity to resolve this issue nine times, yet each time the Court declined. Therefore, an overview of how the different circuits have dealt with the issue will be helpful in determining how the courts may evaluate the constitutionality of dress codes today.

1. *The Pro-School Approach*

The Third, Fifth, Sixth, Ninth, and Tenth Circuit Courts of Appeals have recognized and upheld the authority of the school officials to regulate reasonable grooming requirements. These circuits have found that this issue is not properly within the scope of federal judicial review. While these circuits have all found that hair length restrictions do not sufficiently implicate any constitutional rights, different approaches have been adopted to reach that conclusion.⁴⁰

In *Zeller v. Donegal School District Board of Education*,⁴¹ the Third Circuit Court stated:

[T]here are areas of state school regulation in which the federal courts should not intrude. Without attempting to survey a bright line between permissible and impermissible intervention, we conclude that student hair cases fall on the side where the wisdom and experience of school authorities must be deemed superior and preferable to the federal judiciary's.⁴²

The court found here that privacy rights and liberty interests were not sufficiently affected by hair length regulations to merit the court's review. Further, the court was concerned that by recognizing a liberty interest, it would interfere significantly with the mission of the schools.

39. Mahling, *supra* note 4, at 732.

40. *Id.* at 730.

41. *Zeller v. Donegal School District Board of Education*, 517 F.2d 600 (3d Cir. 1975).

42. *Id.* at 607.

The Fifth, Sixth, Ninth, and Tenth Circuits not only agreed with the Third Circuit that hair length regulations do not violate a personal liberty, but went a step further to hold that these regulations do not violate First Amendment rights of free expression. The courts reached this determination by reasoning that a student's hair style does not contain a sufficient communicative message to warrant protection by the First Amendment.⁴³

In *Karr v. Schmidt*, the Fifth Circuit court bluntly stated that a right to wear one's hair in a public high school in the length and style that suits the wearer, simply cannot be found within the plain meaning of the Constitution.⁴⁴

2. *The Pro-Student Approach*

The First, Fourth, Seventh, and Eight Circuits have found protection for the students in several constitutional provisions. These circuits agreed with the pro-school circuits in that they did not implicate First Amendment issues in the cases they decided. Although the pro-student circuits agreed that the students in violation of the hair regulations were not intending to convey a message, each found that students do have a fundamental constitutional right to govern their appearance.

The First Circuit, in *Richards v. Thurston*,⁴⁵ found that this liberty right was not as fundamental as other rights protected by the Constitutions Due Process Clause. The court stated, "[w]e do not say that the governance of the length and style of one's hair is necessarily so fundamental as those substantive rights already found implicitly in the 'liberty' assurance of the Due Process Clause."⁴⁶

The other three circuits found that school administrators must justify such regulations by demonstrating their necessity. This showing was required before the courts would allow the infringement of this liberty right. In *Bishop v. Colaw*,⁴⁷ the Eighth Circuit held that adherence to the hair regulations on

43. Mahling, *supra* note 4, at 731.

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

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

46. *Id.* at 1284.

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

the basis that they reduce classroom disruption and improve academic performance does not meet the school's burden.

The conflicting decisions by the federal courts in hair regulation cases demonstrates the uncertainty of the standard of review in dress code cases. Even the circuits which held that judicial review is appropriate do not agree on the level of scrutiny the regulation should receive.⁴⁸

The differing views of the federal circuit courts in the hair length opinions seem to be more philosophical than legal. The pro-school circuits view the controversy as one that belongs in school board offices and not in the courts. Therefore, the courts grant substantial deference to the judgment of school administrators. The pro-student circuits seem to view the regulations as imposing unnecessary burdens on the students. They are concerned that hair length regulations are very restrictive because they cannot be changed at the end of the school day as clothing may be.⁴⁹

As previously mentioned, the Supreme Court never granted certiorari to hear any of the hair length cases. The Court did, however, hear a case involving grooming regulations of a New York county police department. In *Kelley v. Johnson*,⁵⁰ Suffolk County police officers challenged a grooming regulation involving the wearing of long or bushy hair, long sideburns, mustaches, or beards of any kind except for medical reasons. The Court distinguished the claimed liberty interest in personal appearance from the fundamental liberties of marriage, procreation, and family life. These fundamental interests have been recognized as deserving significant constitutional protection. The Court put the burden on the plaintiff to show that the regulation was so irrational that it could be branded as arbitrary. Finally, the Court noted that broad discretion and a presumption of validity must be accorded by the courts in cases relating to the state's internal affairs.⁵¹

The Supreme Court decision in *Kelley* established a method for interpreting personal appearance cases that could be applied to the judicial review of a dress code. That method calls for a showing of a rational basis related to a legitimate government

48. Mahling, *supra* note 4, at 733.

49. Majestic, *supra* note 2, at 58.

50. *Kelley v. Johnson*, 425 U.S. 238 (1976).

51. Majestic, *supra* note 2, at 56.

interest. The context of the regulation will be considered in determining the level of deference to be granted the government. In matters regarding traditional state prerogatives, the Court will give the government deference in setting restrictions. If a dress code regulation is rationally related to the functions of the school, the administration will generally prevail unless the rule is found to be arbitrary and capricious. If the regulation fails the rationality test, the student will prevail and the regulation will be struck down.⁵²

In light of the current movement towards mandatory uniforms in the public schools, either of the previously mentioned philosophies would support a dress code calling for uniforms. The pro-school circuits have already given the school districts the discretion they need to implement such a regulation. The pro-student circuits have stated that a restriction on clothing would not be held to the same scrutiny as one involving hair length as, in their opinion, students can change their clothing at the end of the school day.

B. Regulation of Obscenity on Clothing

Following the era of hair length cases, the courts began to see cases involving dress codes that contained obscenity restrictions. Many of these cases involved T-shirts worn by students with slogans deemed by school officials to be obscene.

As background, the Supreme Court decision in *Bethel* focused on the expressive rights of public school students. In that case, a student was disciplined for delivering a campaign election speech that was sexually explicit. The Court emphasized the difference between *Bethel* and *Tinker*. *Tinker* involved the wearing of an arm band to express a political message, where, in *Bethel*, the regulated speech involved sexual metaphors. The Court held, in *Bethel*, that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse," and that the determination of what "manner of speech" is inappropriate in school "properly rests with the school board."⁵³

In *Tinker*, the right of the students to express their political views was upheld by the Court. In light of these decisions, it

52. Kuhn, *supra* note 29, at 84.

53. *Bethel*, at 683.

appears that student speech and expressive conduct on matters of public interest or political issues will receive more protection when the student is conveying a particularized message that is understandable to those who view it. Where a student's appearance conveys only a generalized message, such as group membership or individuality, or, if the speech is considered vulgar or offensive, such speech should not be considered as deserving First Amendment protection.⁵⁴

The court followed *Tinker* in *Chandler v. McMinnville School District*.⁵⁵ In this case high school students were suspended for refusing to remove buttons worn in support of an ongoing teachers strike. The buttons read: "Do Scabs bleed" and "I'm Not Listening Scab." The court found that the buttons did not fall into the category of vulgar, lewd, obscene, and plainly offensive speech. Therefore, in order to compel removal the school had to show that the buttons would substantially interfere with the educational process or the rights of others.

In two federal district court cases involving student dress code regulations, this reasoning has also been followed. In *Broussard v. School Board of City of Norfolk*,⁵⁶ a middle school student was sent home for wearing a T-shirt with a picture of a rock star with the words "Drugs Suck." The school's dress code prohibited clothing that contained messages with strong language especially when the language is sexually overt. The court rejected the student's claim that the message on the T-shirt was an anti-drug message. Rather, they held that the word "suck" was offensive and vulgar and fell within the scope of the school's regulation.

Pyle v. South Hadley School Committee,⁵⁷ is a similar case involving T-shirts that read "Coed Naked Band: Do It to the Rhythm" and "See Dick Drink/ See Dick Drive/See Dick Die/Don't Be a Dick." Here, the court found that while the message may be protected speech, the form of the message was vulgar, and thus the dress code was a proper restriction.

54. Majestic, *supra* note 2, at 59.

55. *Chandler v. McMinnville School District*, 978 F.2d 524 (9th Cir. 1992).

56. *Broussard v. School Board of City of Norfolk*, 801 F. Supp. 1526 (E.D. Va. 1992).

57. *Pyle v. South Hadley School Committee*, 824 F. Supp. 7 (D. Mass. 1993).

Another interesting case following the *Bethel* reasoning was *Harper v. Edgewood Board of Education*.⁵⁸ In this case, students who were brother and sister were denied admittance to the prom because they were dressed in clothing of the opposite sex. The district court found that the school regulations were reasonable because they were related to the valid educational purposes of teaching community values and maintaining school discipline.

These cases demonstrate the discretion the courts have given to school officials in determining what is and what is not appropriate speech in school environment. For speech to be protected, the message must be a clear political message that is likely to be understood. It appears from these cases that an article of clothing that simply identifies a student with a particular group or expresses a student's individuality is not the type of expression that will receive constitutional protection. The courts have recognized the necessity to give school officials authority to regulate speech that is obscene or lewd.

C. Regulation of Gang Related Clothing

Gang violence has caused great concern in the public schools. Gangs have been present in America since before the turn of the nineteenth century.⁵⁹ In the past, male youth gangs were regarded as adventurous, fun-loving and spirited, despite occasional manifestations of delinquent behaviors. In the 1950's and 1960's gang violence consisted of hand to hand combat, if there was violence at all.⁶⁰ A 1950 study showed that the most serious delinquency incidents included, "shooting staples, driving noisily by schools and churches, prowling, using abusive language, and loafing in the pool halls."⁶¹

Unfortunately, since the early 1980's gang life has taken on a much more violent and dangerous dimension. Gangs have become a new form of organized crime. The ease with which children can obtain guns and weapons has created a much more serious and dangerous group of gangs than before. Today's gangs are involved in drug trafficking, extortion, and territorial wars:

58. *Harper v. Edgewood Board of Education*, 655 F.Supp. 1353 (S.D. Ohio 1987).

59. Ray, *supra* note 3, at 647.

60. *Id.*

61. *Id.*

Gangs today plague all areas of the country. Presumably this is because of the decline in the nuclear family structure, the increase in poverty, and the lack of education and constructive alternatives for youths. . . . Gang members today achieve status and recognition through clothing, jewelry, hand signals, tattoos, and graffiti. . . . Recently American society has seen an increase in gang crimes committed over clothing. For gang members desiring various types of clothing, or merely desiring to humiliate other gangs, armed robbery and homicide become ways to achieve their goals. An unfortunate consequence of gang crimes committed over clothing is that innocent bystanders are often caught in the crossfire.⁶²

Gang violence has spread from the streets to the schools, threatening school environment. Stabbings, carrying weapons under clothing, threatening teachers and students, and selling drugs on school property have all become regular occurrences in many of our nation's public schools.⁶³ Many school administrators have turned to dress codes as a way to curb violence in the schools. Many dress codes now restrict the wearing of gang clothing or gang symbols in public schools.

Olesen v. Board of Education of School District No. 228,⁶⁴ involved a violation of a dress code that prohibited male students from wearing earrings. School officials had determined that many of the male students were wearing earrings to show their gang affiliation. The school board had adopted a general policy that banned wearing or displaying any gang symbols. The court upheld the dress code and rejected the plaintiff's arguments based on First Amendment rights of expression, and an equal protection violation because the restriction applied only to male students. The court did not find any particularized message worthy of protection, and further found there was no gender based discrimination because the policy was based on discouraging gang membership and girls did not wear earrings to indicate gang membership.

62. Ray, *supra* note 3, at 649-51.

63. *Id.* at 652.

64. *Olesen v. Board of Education of School District No. 228*, 676 F. Supp. 821 (N.D. Ill. 1987).

In *Jeglin v. San Jacinto Unified School District*,⁶⁵ a district court held that a ban on wearing all clothing with a collegiate or professional sports insignia was valid because the school could demonstrate gang activity in the school and document a connection between the clothing and the gangs. However, the court held that the ban was unconstitutional in the middle and elementary schools because the district could not prove there was gang activity there. Following this case and *Olesen*, it appears that courts will strike down dress codes that prohibit students from wearing gang-related clothing when there is no actual presence of gang activity.⁶⁶ The school must show an actual need for the restriction, not simply a preventative measure.

In a more recent case, *Bivens by Green v. Albuquerque Public Schools*,⁶⁷ a dress code regulation prohibiting saggy pants was upheld by the court. The student who was in violation of the dress code had been given several verbal warnings as well as short term suspensions, and still did not comply with the dress code. He was therefore suspended long-term. The court upheld the suspension, finding that the defiant behavior by the student was not constitutionally protected speech. The court further held that the school did have a legitimate interest in banning gang-related clothing.

School districts have been able to meet the *Tinker* standard by arguing that gang symbols lead to material or substantial interference with the educational process and the rights of other students. The courts appear to be willing to defer to the school authorities' legitimate interests in preventing gang activity in the schools. It is unclear how the court would balance a restriction involving the kind of speech protected by *Tinker* against a school's interest in banning gangs.⁶⁸

D. Regulation requiring Uniforms

In an effort to curtail gang activity in the public schools, legislatures and school districts are encouraging and implementing uniform policies. Uniforms eliminate the need to monitor the

65. *Jeglin v. San Jacinto Unified School District*, 827 F. Supp. 1459 (C.D. Cal. 1993).

66. Barbarosh, *supra* note 10, at 1420.

67. *Bivens by Green v. Albuquerque Public Schools*, 899 F. Supp. 556 (D. NM 1995).

68. Majestic, *supra* note 2, at 60.

constantly changing gang fashions. Further, uniform policies eliminate the need to determine whether schools can ban a particular article of clothing.⁶⁹ Public schools across the nation are experimenting with this restrictive form of dress code. Uniforms are traditional in American private schools and foreign public schools, however uniforms in American public schools are novel, and as of yet, legally untested.⁷⁰ The requirement of uniforms creates a new debate for the constitutional issues that have been previously addressed.

1. *The Long Beach Experiment*

Long Beach Unified School District was the first district to experiment with a uniform policy.⁷¹ In 1989, the district began a pilot program in several schools to determine the effect of a uniform policy. After adopting the program, the district found a decrease in ethnic and racial tensions, an improvement in scholastic achievement, and a decrease in absenteeism. Parents were pleased with the program and felt that the children were safer in uniforms because they would not be mistaken for gang members.⁷² The district administrators were so pleased with the pilot program that they implemented a district wide uniform policy that began in the fall of 1994, before California amended its law to permit uniform dress codes.⁷³

The Long Beach policy affects nearly 60,000 students from fifty-six elementary and fourteen middle schools. This policy became the first in the nation to require students to wear uniforms in kindergarten through the eighth grade. The district did not include high schools in the policy because they doubted that the older students would accept the uniforms.⁷⁴

According to a report on the Internet,⁷⁵ the California law adopted in 1994 allows parents to request exemption from the school uniforms. However, in Long Beach, less than one percent of parents have requested such an exemption. In an unofficial

69. Barbarosh, *supra* note 10, at 1422.

70. Majestic, *supra* note 2, at 61.

71. Ray, *supra* note 3, at 655.

72. Barbarosh, *supra* note 10, at 1421.

73. *Id.* at 1422.

74. Ray, *supra* note 3, at 655.

75. School Uniforms Fact Sheet <<http://www.Ibusd.k12.ca.us/uniform/uniform.htm>>.

1994 survey, more than 80% of the Long Beach community supported the uniform policy.

Financial assistance is available to disadvantaged children who cannot afford uniforms. Privately funded at no taxpayer expense, local organizations have provided more than \$160,000 in uniforms to Long Beach children. The uniform in Long Beach consists of navy blue pants, shorts, skirts, or jumpers and a white shirt or blouse. Each school selects its own uniform and it is available from more than forty local retailers and discount stores. Parents report that three uniforms cost about the same as one pair of designer label jeans. There are many other major school districts that have implemented uniform policies, including: Dade County, Florida; Baltimore, Maryland; Oakland, California; and Charleston, South Carolina.⁷⁶

2. California Law

The California Education Code was amended by the California legislature in 1994 to permit public schools to implement uniform dress codes.⁷⁷ The amendment replaced a provision allowing school districts to prohibit students from wearing gang related apparel, and authorized the schools to implement a uniform dress policy as part of its school's safety plan. A safety plan is "a plan to develop strategies aimed at the prevention of, and education about, potential incidents involving crime and violence on the school campus."⁷⁸

Two principal reasons have been cited for the Code's amendment. First, the difficulty and the time it takes to educate teachers and faculty about gang apparel distracts from the educational time the teachers should be spending with their students. With students in uniforms, teachers will not waste valuable teaching time trying to determine what is or is not gang clothing. Second, uniforms protect the students from being targeted as gang members, thus increasing their safety on the school campus.⁷⁹ Many states have followed California's lead and have likewise adopted laws that allow school districts to mandate uniform policies.

76. School Uniforms Fact Sheet <<http://www.Ibusd.k12.ca.us/uniform/uniform.htm>>.

77. Cal. Educ. Code § 35183 (West Supp. 1995).

78. Barbarosh, *supra* note 10, at 1422.

79. *Id.*

3. *The Opposition*

The arguments of uniform opponents are well summarized in a “Point of View” comment found on the Internet, written by Loren Siegel:

Are uniforms a good idea? The most concise response to this question is, nobody knows. The superintendent of the Long Beach School District claims that the district’s self-generated data showing decreases in certain forms of student misconduct is proof that uniforms work. But other steps to improve student behavior, like increasing the number of teachers patrolling the hallways during class changes, were also taken by the district around the same time the uniform policy was introduced. Without further study, it is impossible to say with any certainty that uniforms were responsible for the changes. The fact is that there are no empirical studies that show that uniforms consistently produce positive changes in student behavior over the long run. At best, school uniform policies are purely experimental. . . . The call for school uniforms is not constructive because it is a Band Aid solution to a set of serious problems that defy easy answers . . . the fact is that there are no empirical studies that show that uniforms consistently produce positive changes in student behavior over the long run.⁸⁰

This comment cites a series of focus groups and discussions conducted by the ACLU with high school students. The students were asked what they thought would help curb school violence. Their suggestions are:

1. Schools confronting and discussing seriously the issues of racism and cultural conflict.
2. “Safe corridor” programs should be supported to protect the safety of students as they go to and from school.
3. Secured school entrances.
4. More extracurricular activities and clubs should be established.
5. Open-mike assemblies should be held on a regular basis to give students the opportunity to express themselves.
6. Programs to help students find part-time jobs.

80. Loren Siegel, Director, Public Education Dept., ACLU, *Point of View: School Uniforms*, <<http://www.aclu.org/congress/uniform.html>>.

7. Teaching of conflict resolution techniques.⁸¹

The author of this comment notes that uniforms did not even make the list. However, it is important to note that none of these suggestions, or even uniforms, are the magic pill to end school violence and restore respect. The solution will involve many band-aid solutions working together until the problems are solved.

The uniform controversy involves many issues that are seen differently by people. While there are many emotional and intellectual opinions on the subject, the answer ultimately resides in the legality of implementing such dress codes. As long as the courts remain silent on the issue, the majority of lawmakers, parents, and school officials will be able to make the decision for their district or school. However, should this issue find itself in court, it is difficult to predict what the outcome may be based on the inconsistent line of dress code cases.

81. Loren Siegel, Director, Public Education Dept., ACLU, *Point of View: School Uniforms*, <<http://www.aclu.org/congress/uniform.html>>.

IV. CONSTITUTIONALITY OF UNIFORM DRESS CODES

The current tests in place for examining dress code regulations do not offer a sound guideline to resolve the constitutionality of clothing regulations in the public schools. It has been argued that current positions "defer too much to public school administrators' authority to regulate student appearance, impose too great a burden of substantiation on school administrators to demonstrate the necessity of the regulation, or provide too little guidance in differentiating between constitutional and unconstitutional regulations."⁸²

The threshold question for the constitutional analysis of uniform dress codes is: Does clothing receive constitutional protection as speech? If so, what type of speech is it and what type of protection does it receive? "Determining whether uniform dress codes are constitutional depends on whether the codes regulate expressive conduct or pure speech. This distinction determines the applicable level of scrutiny."⁸³

If clothing were found to be "speech," it is possible that it would qualify as expressive conduct or symbolic speech. The students in *Tinker* who wore armbands in protest of the Vietnam War were found to be protected by the First Amendment because the court found that their conduct did convey a particular message with great likelihood that the message would be understood by those who viewed it.

Dress code opponents argue that a student's clothing does convey a message expressing their ideas and individuality, and thus qualifies as expressive speech. As such, a regulation requiring uniforms violates the O'Brien standard which requires that regulation restricting students' rights be no more than necessary to further the government's interest in providing a safe, educationally conducive environment. Uniform opponents argue that requiring students to wear uniforms is more than merely incidental. Implementation of a uniform dress code is excessive, therefore such regulations are unconstitutional.

Advocates believe that uniforms are necessary to provide safe public schools and that in a balancing test, the governmental interest outweighs the incidental burden placed on stu-

82. Mahling, *supra* note 4, at 735.

83. Barbarosh, *supra* note 10, at 1432.

dents.⁸⁴ Based on how the courts have ruled previously on related issues, it is unlikely that the court would find students' clothing to be a protected form of speech. However, even if the court did find clothing to be expressive speech, the governmental interest is so great in having safe schools with an environment conducive to learning, that the courts would most likely continue to grant this discretion to school authorities.

If students' clothing were found to be pure speech, courts would then need to determine whether the regulation is content based or content neutral to determine the appropriate level of scrutiny.⁸⁵ A dress code that calls for all students to wear a uniform does not appear to be based on the content of what any individual student is wearing. Uniforms ban all clothing that does not comply with the policy regardless of what message particular clothing may convey. Therefore, a uniform dress code would be content neutral, as it applies equally to all students regardless of their particular type of clothing.

Proponents of uniforms favor the argument that a "uniform dress code is content neutral since its goal is to provide a safe and effective learning environment through a means unrelated to the speech's content."⁸⁶ A regulation found to be content neutral receives lesser scrutiny than one found to be content based. A content neutral regulation simply must meet a substantial government interest and be narrowly tailored to meet that interest.⁸⁷

Opponents of uniform dress codes argue that the emphasis of the uniform policy is to ban gang related clothing and is therefore content based because the regulation is aimed at eliminating particular clothing. Content based regulations face strict scrutiny and laws rarely survive this high level of scrutiny. Strict scrutiny requires that there must be a compelling state interest with no less restrictive means available to further that interest. A safe school environment could be considered a compelling state interest, and uniform policies implemented only if the state could prove that there was no less restrictive means available to meet that compelling interest.

84. Barbarosh, *supra* note 10, at 1432.

85. *Id.* at 1431.

86. *Id.* at 1439.

87. *Id.* at 1443.

To avoid these issues and resulting litigation, schools that have implemented uniform dress codes have an opt out policy. Students who do not wish to wear uniforms may be excused from doing so with the consent of their parents.⁸⁸ As long as school requiring uniforms have this opt out option, it is unlikely that the issue will make it to the courts.

V. CONCLUSION

While there is not a single answer to the problems that plague public schools, a combination of many small solutions may work together to restore safety, respect, and learning to public education. Allowing schools to adopt dress codes that call for uniforms is one of the small solutions that has produced positive results. While the judiciary is divided on the standard of review for dress code issues, it appears that a dress code calling for uniforms will be upheld by the courts as constitutional and that school officials will be given great discretion in determining what their individual school needs.

88. Siegel, *supra* note 80.