

September 11, 2018

Dr. Jeff Stephens
Superintendent
Weber School District
5320 Adams Ave. Pkwy
Ogden, UT 84405

Sent via email: jstephens@wsd.net

Heide Alder
Part-time General Counsel
Weber School District
5320 Adams Ave. Pkwy
Ogden, UT 84405

Sent via email: healder@wsd.net

RE: Discriminatory Dress Code Policy and Enforcement

Dear Dr. Stephens and Ms. Alder,

The American Humanist Association writes to express serious concerns regarding the Weber School District dress code policy and its recent enforcement against a young female student at Valley Elementary School. We were deeply disturbed to learn that the school reprimanded eight-year-old Jada Kelson for a dress code violation simply because the balls of her shoulders were exposed while moving (wearing the shirt depicted below).



Kelson was told to wear a jacket for the remainder of the school day or be sent to the principal's office with a call home to her parents. Kelson understandably felt embarrassed and confused but complied with her school's demands. Her parents were not aware of the incident until after school and promptly contacted our office for legal assistance.

It is our understanding that Valley Elementary was enforcing the Weber High dress code provision that "sleeves must cover the ball of the shoulder." It is our further understanding that the general district dress code (Policy 5220) simply forbids "[i]nappropriately short, tight, revealing or otherwise disruptive appearance or attire." After the parent, Mr. Kelson, addressed his concerns to Valley Elementary, he was informed the school would no longer follow the Weber High provision but instead use the district's general "disruptive appearance" provision as the guiding principle. While Valley Elementary has at least temporarily changed its policy, the concerns we have remain, especially because the policy is still in place at Weber High where one of his children will be attending next year, as well as other schools in the district that his children attend, including North Ogden Junior High, Snowcrest Junior High, and Weber Innovation Center.

The American Humanist Association (AHA) is a national nonprofit organization with over 600,000 supporters and members across the country, including many in Utah. The mission of AHA's legal center is to protect one of the most fundamental principles of our democracy: the constitutional mandate requiring a separation of church and state. Our legal center includes a network of cooperating attorneys from around the country, and we have litigated constitutional cases in state and federal courts from coast to coast, including in the Tenth Circuit.¹

Under Title IX and the Constitution's equal protection guarantee, school districts cannot base either a dress code policy or its enforcement on sex stereotypes.² The Equal Protection Clause forbids public schools from treating male and female students differently because of "overbroad generalizations about the different talents, capacities, or preferences of males and females." *U.S. v. Virginia*, 518 U.S. 515, 533 (1996). *See, e.g., Miss. Univ. Women v. Hogan*, 458 U.S. 718, 724-25 (1982) (stating that the "test for determining the validity of a gender-based classification . . . must be applied free of fixed notions concerning the roles and abilities of males and females" and that "[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions"). The Supreme Court has long struck down policies based on "'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in

¹ *See Am. Humanist Ass'n v. Douglas Cnty. Sch. Dist. Re-1*, 2018 U.S. Dist. LEXIS 118963 (D. Colo. July 17, 2018); *Am. Humanist Ass'n v. Douglas Cty. Sch. Dist. Re-1*, 859 F.3d 1243 (10th Cir. 2017).

² *See, e.g., Hayden v. Greensburg Cmty. School Corp.*, 743 F.3d 569 (7th Cir. 2014) (school district violated Title IX and Equal Protection Clause in requiring male basketball players to have a short haircut while there is not a similar requirement restricting female players); *Peltier v. Charter Day Sch., Inc.*, No. 7:16-CV-30-H, 2017 WL 1194460 (E.D.N.C. Mar. 30, 2017) (denying motion to dismiss where plaintiff raised a Title IX and Equal Protection Clause sex-discrimination claim regarding the requirement that girls wear skirts and are prohibited from wearing pants or shorts); *Sturgis v. Copiah Cnty. Sch. Dist.*, No. 3:10-CV-455-DPJ-FKB, 2011 WL 4351355, at *3 (S.D. Miss. Sept. 15, 2011) (denying motion to dismiss where plaintiff raised a Title IX sex-discrimination claim regarding the requirement that girls, but not boys, wear robes for senior portraits).

a cage.”³ The dress code provision enforced against Ms. Kelson does just that. It is based on generalizations about boys’ inability to control their sexual impulses, reinforcing the harmful message to female students that they are at fault for experiencing sexual harassment based on certain clothing choices.

The provision also jeopardizes female students’ equal access to education by forcing them to miss important class time. In fact, Mr. Kelson’s eldest daughter, Bailey Kelson, now in her second year at the University of Utah, shared the following incident she experienced at Weber High in 2017: “This happened to me my senior year of high school. I was working with my group in AP Chemistry, and I was told to leave and find a jacket to wear over my knee-length, long-sleeved dress because the sleeves had slits in it. I ended up coming back and not knowing what was going on in my group because of what I had missed. For what it’s worth, my group members were as confused as I was about my outfit meriting a dress code.” Like her younger sister, Bailey felt humiliated, stigmatized and unfairly sexualized: “somehow this dress was enough of a distraction for it to be deemed necessary for me to leave in the middle of class.”

We would also be naïve to overlook the strong influence of The Church of Jesus Christ of Latter-day Saints on the district’s dress code policies. We are aware of The Church of Jesus Christ of Latter-day Saints’ dress code for youth in a pamphlet called “For the Strength of Youth,”⁴ the obvious source for the Weber High dress code provision, as it provides: “Immodest clothing is any clothing that is tight, sheer, or revealing in any other manner. Young women should avoid short shorts and short skirts, shirts that do not cover the stomach, *and clothing that does not cover the shoulders* or is low-cut in the front or the back. Young men should also maintain modesty in their appearance.” (emphasis added).

The Establishment Clause of the “First Amendment has erected a wall between church and state” and this “wall must be kept high and impregnable.” *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 18 (1947). To do so, “the Constitution mandates that the government remain secular.” *County of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989). This means, *inter alia*, that the government must “not promote or *affiliate itself with any religious doctrine or organization.*” *Id.* at 590-93 (citation omitted, emphasis added). The Supreme Court “has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.” *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987).

³ *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (invalidating statutory scheme presuming that spouses of male armed services members were dependents for purposes of obtaining benefits, with parallel provision requiring proof that spouses of female armed services were actually dependent on their wives); *see also Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692 (2017) (“if a ‘statutory objective is to exclude or ‘protect’ members of one gender’ in reliance on ‘fixed notions concerning [that gender’s] roles and abilities,’ the ‘objective itself is illegitimate.’”) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (striking down a statutory scheme that provided that husbands, but not wives, may be required to pay alimony because of the “inherent risk of reinforcing the stereotypes about the proper place of women and their need for special protection”) (internal quotation marks omitted).

⁴ <https://www.lds.org/bc/content/shared/content/english/pdf/ForTheStrengthOfYouth-eng.pdf?lang=eng> (page 7).

As Justice Stevens recognized in his dissent in *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986), “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.” This statement was expressly adopted by the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003). In overruling *Bowers*, the Court observed *Bowers*’ misguided reliance on “the history of Western civilization and Judeo-Christian moral and ethical standards.” *Id.* at 572.

The Supreme Court has held that “[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.” *U.S. v. Lee*, 455 U.S. 252, 261 (1982). *See, e.g., Bob Jones University v. U.S.*, 461 U.S. 574, 604 (1983) (holding that the government’s compelling interest in eradicating discrimination “substantially outweighs whatever burden denial of tax benefits places on [a racist religious university’s] exercise of their religious beliefs”) (emphasis added). A law or school policy is not unconstitutional merely because it “happens to coincide or harmonize with the tenets of some or all religions.” *McGowan v. Maryland*, 366 U.S. 420, 442 (1961). However, in enacting such laws, “legislatures [must] conclude that the general welfare of society, *wholly apart from any religious considerations*, demands such regulation.” *Id.* The dress code provision in question does not merely “harmonize” with religious views; it embodies and establishes them as binding even on those who do not follow that religion’s rules, thereby violating the Establishment Clause.

In light of the above, we seek the following written assurances from the School District: (1) all dress code policies will be considered and adopted based on gender neutral criteria and free from any religious influence; (2) the School District will repeal any school dress code provision stating that “sleeves must cover the ball of the shoulder” (or language to that effect); (3) tank tops and similar garments will be permitted; (4) parents of elementary or junior high school students will be notified of any alleged dress code violation before any action is taken by school officials.

We are most hopeful that you will recognize the concerns raised by this letter and address them properly. Kindly respond within seven (7) days. We thank you in advance for your attention to this matter.

Very truly yours,
Monica Miller, Esq.