



## Dress Codes

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The First Amendment allows for mandatory uniform policies or dress codes in the public schools. However, it also generally permits exemptions from such policies or codes for students to wear religious clothes, head coverings, symbols or other attire. Under many circumstances policies or codes that prohibit students from wearing religious clothes or other attire are unconstitutional or unlawful.

### SPECIFIC ISSUES & QUESTIONS

#### **Under what circumstances are mandatory uniform policies or dress codes permissible under the First Amendment?**

A student's decision about the clothes he or she wears is a form of expression.<sup>1</sup> Therefore, a limitation on clothing choices through uniform policies or dress codes must comply with the First Amendment's free speech clause.<sup>2</sup> What is required by the First Amendment depends on whether a policy or code is neutral to expression, or it differentiates among viewpoints or opinions.

#### **Neutral Policies**

Such policies as written and in application are not intended to suppress student expression or viewpoints.<sup>3</sup> To be valid under the First Amendment, neutral policies must meet three criteria. First, they must further an important or substantial government interest, which can include, increasing student achievement and focusing on learning, promoting safety, providing a more orderly school environment, encouraging professional dress, promoting school spirit, improving

student self-esteem, or bridging socio-economic differences.<sup>4</sup> Second, the school interest in the code or policy must be unrelated to suppression of free expression. And third, any incidental restrictions on student expression must be no more necessary than to further or facilitate the government interest in the policy or code.<sup>5</sup> If other forms of student communications are available, including peer to peer communications, school newspapers, or school organizations, the third requirement is generally met.<sup>6</sup> Furthermore, policies or codes that allow students' clothes to bear small clothing logos, school logos or messages, or allow students to wear buttons bearing viewpoints do not generally transform them into policies or codes that differentiate among viewpoints or opinions.<sup>7</sup>

### **Policies Differentiating Among Viewpoints or Opinions**

Such policies or codes censor or bar certain viewpoints or opinions, including religious viewpoints or expression.<sup>8</sup> They are valid under the following circumstances. First, where a school demonstrates that a particular message or expression causes a material or substantial disruption to the school environment, or school officials can reasonably forecast that the message will cause a material or substantial disruption.<sup>9</sup> Such a forecast cannot be based on mere speculation, but on prior events or history.<sup>10</sup> Second, the message is lewd, vulgar or sexual in nature.<sup>11</sup> Or third, the message promotes illegal drug use.<sup>12</sup>

### **Under What Circumstances Must Exemptions from a Uniform Policy or Dress Code Be Granted for Students to Wear Religious Clothes or Other Attire?**

The public schools generally are permitted to accommodate the religious clothing and attire needs of students.<sup>13</sup> Provided that a uniform policy or dress code complies with the First Amendment's free speech clause and it is truly general in nature and neutral to religion, the policy or code may prohibit students from wearing religious clothes or attire so long as there is a nominal justification for the prohibition.<sup>14</sup> However, there are a number of significant exceptions to this rule. So under many circumstances schools will be required to exempt students from uniform policies or dress codes for the purpose of wearing religious attire:

State Laws Approximately twenty states have laws – either by statute or court decision - called Religious Freedom Restoration Acts which require the government, including public schools, to demonstrate a narrow and compelling interest where religious activity or practice is substantially burdened by a law, ordinance, government rule or practice.<sup>15</sup> Demonstrating such an interest is extremely difficult. For the purposes of these laws, it is irrelevant whether or not the law, rule or practice is general in nature or neutral towards religion.

A uniform policy or dress code prohibiting a student from wearing religious clothes or attire will generally constitute a substantial burden on religious practice and will be impermissible under such state laws.

### **Uniform Policies or Dress Codes Targeting Religion**

If a uniform policy or dress code is not neutral to religion and adversely treats religious activity or practice compared to secular activity, the First Amendment's free exercise clause requires that a school must demonstrate a narrow and compelling interest for the policy or code.<sup>16</sup> Under such circumstances, it is highly unlikely that the policy or code's prohibition on a student wearing religious clothes or attire will be constitutional.

There are several common circumstances where a policy or code is not neutral to religion. First, the language of the policy or code specifically targets religion or religious practice for adverse treatment.<sup>17</sup> Second, the policy or code may provide secular accommodations, for instance a medical exemption, but no similar exemption for religious practice.<sup>18</sup> Or third, the policy or code may be designed in way that effectively targets religious, but not secular conduct.<sup>19</sup>

### **Uniform Policies or Dress Codes Raising Constitutional Issues In Addition to Free Exercise of Religion**

Students, their parents or guardians sometimes bring other constitutional challenges to uniform policies or dress codes in addition to the free exercise of religion. Under such circumstances where there is another legitimate

constitutional claim such as free speech or the right to direct a child's upbringing some courts will apply more rigorous scrutiny to a policy or code's prohibition on the wearing religious clothes or attire.<sup>20</sup>

Some courts have required a demonstration of a narrow and compelling interest.<sup>21</sup> And other courts have required a lesser balancing test evaluating whether the policy or code places an undue burden on religious practice and whether the policy or code bears more than a reasonable relation its stated objective.<sup>22</sup> Under either test, the policy or code will likely be unconstitutional.

The law in this area diverges by jurisdiction.<sup>23</sup> It is therefore highly advisable for school personnel, parents or guardians to consult with an attorney to determine the local standards.

### **Can schools ban the wearing of religious symbols in an effort to stop gang activity or violence?**

Most courts evaluating prohibitions on gang activity in public schools that bar the wearing of religious symbols have found them unconstitutional on free speech or vagueness grounds.<sup>24</sup> Furthermore, the same exceptions to uniform policy and dress code bans on religious clothing would apply to prohibitions on gang activity that bar religious symbols. So if such a prohibition is issued in a state that has a Religious Freedom Restoration Act or if it is not neutral to religion, the ban would likely be unconstitutional. Additionally, if such a ban is challenged on free exercise of religion and other constitutional grounds, it also may be subject to more rigorous scrutiny and be found unconstitutional. So in the aggregate, most bans on gang activity that bar the wearing of religious symbols will be unconstitutional or unlawful.

## **SAMPLE SCENARIOS & SITUATIONS**

### **Neutral Uniform Policy in State with a Religious Freedom Restoration Act**

Zoe attends Farmdale Middle School. Zoe is Muslim and is required by her faith to wear a religious head covering called a Hijab. Over the summer the Farmdale School District adopts a viewpoint neutral mandatory dress code that prohibits the wearing of any hats or head coverings during the school day. Zoe's parents advise the Farmdale Middle School principal that their faith requires Zoe to wear a Hijab. They ask the principal for an accommodation to allow their daughter to wear the Hijab at school. Zoe lives in a state with a Religious Freedom Restoration Act.

### **Should the Principal Allow Zoe to Wear the Hijab to School?**

The Farmdale School District has adopted a neutral mandatory uniform policy which complies with the First Amendment's free speech clause. Under the First Amendment, the principal could allow Zoe to wear the Hijab, so the question is whether he is required to do. Because Zoe lives in a state with a Religious Freedom Restoration Act, the school would have to demonstrate a narrow and compelling reason for why Zoe cannot wear the Hijab at school. It is highly unlikely that the school will be able to demonstrate such a reason. Therefore, the prohibition will be unlawful under the state Religious Freedom Restoration Act.

### **Neutral Dress Code that Allows Medical Exemptions**

Jeff attends Western High School in Franklin County. Over Winter break, the Franklin County School District adopts a viewpoint neutral mandatory dress code that prohibits the wearing of hats or head coverings during the school day.

However, the code allows medical exceptions, including to the head-covering prohibition. The policy also allows students to wear hats or head coverings for school-related activities such as sports and drama. Jeff's faith requires him to wear a Jewish head covering called a Yarmulke. On the first day back from break, Jeff wears his Yarmulke to school. His teacher tells him that under the new code he cannot wear his Yarmulke during the school day, tells Jeff to remove it, and advises Jeff that he could be suspended if he again wears the Yarmulke to school.

## **Can the School Bar Jeff From Wearing a Yarmulke to School?**

Although the dress code is neutral for the purposes of free speech, it is not neutral towards religion for two reasons. First, it allows secular medical exceptions. And second, it allows students to wear hats or head coverings for school-sponsored student activities. Therefore, the school district will have to demonstrate a narrow and compelling interest for prohibiting Jeff from wearing a Yarmulke. It is highly unlikely that the district will be able to make this demonstration, and therefore the prohibition is unconstitutional under the First Amendment's free exercise clause.

## **T-Shirt Bearing a Religious Message**

The Walton School District has a mandatory dress code requiring all students to wear collared blue, green or white shirts with khaki blue or tan pants or skirts. However, messages are permitted on shirts provided they are not disruptive, offensive, or do not promote illegal drug use. Sally, a high school student, wears to school a white collared shirt which states "Moses was the greatest prophet." Her teacher, Mr. Jones, believes that her shirt may offend other students and sends Sally to the school principal to make determination as to whether she can wear the shirt and remain at school for the day. The shirt has caused no disruption and there is no past history at the school of religious-related harassment or other incidents?

## **Can the Principal Prohibit Sally from Wearing the Shirt?**

No. Although the shirt in question bears a religious message, the scenario raises a free speech issue. Under the dress code, Sally can wear a collared white shirt bearing a message. The shirt has caused no disruption, and furthermore there is no basis for school personnel to reasonably forecast a disruption. The shirt is not offensive as it is not lewd, vulgar or sexual in nature. And it does not promote illegal drug use. Therefore, Sally can wear the shirt to school.

## **Student Wearing Religious Symbol is Suspended for Violating Gang Activity Policy**

Robert, a middle school student, is Jewish. His grandfather recently gave him a silver Star of David necklace, which he wears to school. Very few Jewish children attend his school. David's school district has an anti-gang policy which prohibits students from wearing gang-affiliated colors, signs or symbols. The policy does not define the meaning of gang-affiliated. Additionally, the school principal has full discretion to determine what colors, signs and symbols are gang related. The school principal sees David wearing the necklace and tells him that he cannot wear the necklace to school because the Star of David is a symbol used by certain gangs.

### **Can the Principal Prohibit David from Wearing his Necklace at School?**

No. Although the anti-gang prohibition appears to be general and neutral towards religion, it is unconstitutionally vague for two reasons. First, it does not define the term "gang-related" and therefore provides no notice of what is and what is not a gang symbol. Second, the principal has full discretion to determine whether a symbol is gang-related and therefore any such determination is subjective.

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<sup>1</sup> See *Palmer v. Waxahachie Indep. School District*, 579 F.3d 502 (5th Cir. 2009), cert denied, 130 S. Ct. 1055 (U.S. 2010); *Jacobs v. Clark County School District*, 526 F.3d 419 (9th Cir. 2008); *Bar-Navon v. Brevard County School District*, 290 Fed. Appx. 273 (11th Cir. 2008); *Blau v. Fort Thomas Public School District*, 401 F.3d 381 (6th Cir. 2005); *Littlefield, et. al. v. Forney Indep. School District*, 268 F.3d 275 (5th Cir. 2001); *Canady v. Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> See *Palmer*, 579 F.3d 502; *Jacobs*, 526 F.3d 419; *Littlefield*, 268 F.3d 275; see also *Frudden v. Pilling*, 2015 U.S. Dist. LEXIS 16890 (D. Nev., Feb. 10, 2015) (elementary school had compelling interest in putting school motto on uniform).

<sup>8</sup> See *Nuxoll v. Indian Prairie School District*, 636 F.3d 874 (7th Cir. 2011); *B.W.A. v. Farmington R-& School District*, 554 F.3d 734 (8th Cir. 2009); *Barr v. Lafon*, 538 F.3d 554 (6th Cir. 2008), rehearing, en banc, denied by, 553 F.3d 463 (2009), cert denied, 130 S. Ct. 63 (U.S.); *Sapp v. School Board of Alachua County Florida*, 2011 U.S. LEXIS 124943 (N.D. Fla. 2011); *Nixon v. Northern Local School District Board of Education, et. al.*, 383 F. Supp. 2d 965 (S.D. Ohio 2005).

<sup>9</sup> See *Tinker v. Des Moines Indep. Community School District*, 393 U.S. 503 (1969); *Nuxoll*, 636 F.3d 874 (T-shirt bearing the message “My Day of Silence, Straight Alliance” and “Be Happy, Not Gay” did not cause a material or substantial disruption); *B.W.A.*, 554 F.3d 734 ; *Barr*, 538 F.3d 554 ; *Sapp*, 2011 U.S. LEXIS 124943 (T-shirt which stated in part “Islam is the Devil” caused a substantial disruption); *Nixon*, 383 F. Supp. 2d 965 (T-Shirt which said in part “Homosexuality is a sin, Islam is a lie, and Abortion is murder” did not cause a material or substantial disruption).

<sup>10</sup> Id.

<sup>11</sup> See *Bethel School District v. Fraser*, 478 U.S. 675 (1986); *Nixon*, 383 F. Supp. 2d 965 (T-shirt bearing the message “My Day of Silence, Straight Alliance” and “Be Happy, Not Gay” was not offensive within the meaning of *Fraser*).

<sup>12</sup> See *Morse v. Frederick*, 551 U.S. 393 (2007).

<sup>13</sup> See *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990); see generally, *Locke v. Davey*, 540 U.S. 712 (2004).

<sup>14</sup> See *Smith*, 494 U.S. 872.

<sup>15</sup> The twenty states are Alabama, Alaska, Arizona, Connecticut, Florida, Idaho, Illinois, Indiana, Massachusetts, Minnesota, Missouri, New Mexico, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Washington, and Wisconsin.

<sup>16</sup> See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See *Hicks v. Halifax County Board of Education*, 93 F.Supp. 2d 649 (E.D. N.C. 1999); *Chalifoux v. New Caney Indep. School District*, 976 F.Supp. 659 (S.D. Tex. 1997).

<sup>21</sup> See *Chalifoux*, 976 F. Supp. 659.

<sup>22</sup> See *Hicks*, 93 F.Supp. 2d 649.

<sup>23</sup> See *Jacobs*, 26 F.3d 419; *Combs v. Homer-Center School District*, 540 F.3d 231 (3rd Cir. 2008), cert denied, 555 U.S. 1138 (2009); *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), cert denied, 555 U.S. 815; *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003), cert denied, 541 U.S. 1096 (2004); *Leebaert v. Harrington*, 332 F.3d 134 (2nd Cir. 2003); *Henderson v. Kennedy*, 253 F.3d 12 (D.C. Cir. 2001), rehearing denied, 265 F.3d 1072, cert denied, 535 U.S. 986 (2002); *Kissinger v. Board of Trustees of the Ohio State University, College of Veterinary Medicine*, 5 F.3d 177 (6th Cir. 1993); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464

(8th Cir. 1991); *Society of Separationists v. Herman*, 939 F.2d 1207 (5th Cir. 1991),  
aff'd, rehearing en banc, 946 F.2d 1373, aff'd on rehearing, 959 F.2d 1283 (1992), cert  
denied, 506 U.S. 866.

<sup>24</sup> See *Stephenson v. Davenport Community School District*, 110 F.3d 1303 (8th Cir.  
1997), rehearing, en banc, denied by, 1997 U.S. App. LEXIS 13019; *Chalifoux*, 976  
F.Supp. 659 (S.D. Tex. 1997).

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