

## *Student Note*

### **How to Not Be A Distraction: Universal Dress Codes Could Hold the Answer to South Carolina’s Education System’s Deficiencies**

Elizabeth L. Tucker\*

#### **I. INTRODUCTION**

“What are you wearing?” a teacher asked me as I walked into class on a warm day in the Spring of my Senior year of high school in South Carolina. The weather finally warmed up again after winter. The outfit in question was a black top that was three fingers in width on the straps. I instinctively and immediately held up three fingers and placed them on the strap to show that the shirt fell within the “three-finger width” required by the dress code. The bell signaling the start of class rang as I still stood in the doorway waiting for my teacher to “approve” my outfit, holding my breath. I felt my classmates’ eyes on me. “That shirt is pushing it. Don’t wear it again,” my teacher instructed me in a chastising tone. “Why was “pushing it” the language used to describe a piece of clothing that was within the dress code? What even was the point of the dress code rules if even something I am allowed to wear will be commented on?” I wondered to myself. I felt very lucky this was the extent of my “punishment” for an almost dress code infraction as I took my seat feeling the heat of embarrassment rush over me. My feelings were not unique to me as a student which is a thought that provided temporary relief.

The “Shirt of Shame.”<sup>1</sup> Measuring hem lengths. Removal from class. Calling out students in class. Humiliation. All of these are punishments as a result of students’ violations of school dress code

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1. Jenna Schiferl, *Charleston School Board Rejects Controversial Dress Code, but Parents Say it Isn’t Enough*, POST & COURIER (Mar. 27, 2020), [https://www.postandcourier.com/news/charleston-school-board-rejects-controversial-dress-code-but-parents-say-it-isnt-enough/article\\_9b9c9ce0-63d7-11ea-a075-03ba757a0750.html](https://www.postandcourier.com/news/charleston-school-board-rejects-controversial-dress-code-but-parents-say-it-isnt-enough/article_9b9c9ce0-63d7-11ea-a075-03ba757a0750.html).

policies in South Carolina across various districts. Discriminatory dress codes are not a new issue that students face daily. Missing a few minutes of class to a full day is not an uncommon punishment as a form of “exclusionary discipline.”<sup>2</sup> According to a report by the U.S. Government Accountability Office (hereinafter *GAO*), 60 percent of dress codes involve measuring students’ clothing and bodies, leading to female students feeling less safe at school.<sup>3</sup> Measuring clothes and also closely inspecting students’ bodies sends a clear message to young female students: “they are to blame for male students’ and teachers’ inability to keep their eyes to themselves.”<sup>4</sup>

In South Carolina, dress codes vary across public school districts. Within the last year, Richland County School District Two, the fifth largest school district in the state, in response to student feedback, adopted a new dress code which includes allowing more “tank tops, piercings and tight-fitting clothing, and lightening the consequences for breaking the remaining restrictions.”<sup>5</sup> Richland Two’s reasoning behind the more inclusive universal dress code is “students should be able to dress in a manner that expresses their individuality without fear of unnecessary discipline or body shaming.”<sup>6</sup> Furthermore, the universal dress code removes “unnecessary barriers to school attendance.”<sup>7</sup> This

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2. U.S. GOV’T ACCOUNTABILITY OFF., GAO-23-105348, K-12 EDUCATION: DEPARTMENT OF EDUCATION SHOULD PROVIDE INFORMATION ON EQUITY AND SAFETY IN SCHOOL DRESS CODES 1 (2022).

3. *Id.* at 12; *see also id.* at 17 (“Dress codes that focus on girls’ clothing and bodies contribute to shifting the burden of being harassed from the perpetrator to the victim, thus potentially creating an environment that is less safe for girls.”).

4. Gretchen Marie Whitman, *A Curricular Critique of School Dress Codes*, 93 CLEARING HOUSE: J. EDUC. STRATEGIES, ISSUES & IDEAS 72, 72 (2020).

5. *Student Dress Code*, RIDGE VIEW HIGH (Aug. 9, 2022), [https://www.richland2.org/RVH/STUDENTS/Student-Dress-Code-\(updated-2022\)](https://www.richland2.org/RVH/STUDENTS/Student-Dress-Code-(updated-2022)).

6. *Id.*

7. *Id.* (“It is the mission of Richland School District Two to develop global citizens of tomorrow who are prepared to lead and excel in their chosen pathways. In support of this mission, it is the policy of the district that students and their parents/guardians hold the primary responsibility in determining the student’s personal attire, hairstyle, jewelry and personal items (collectively referred to as attire). Schools are responsible for ensuring that student attire does not interfere with the health or safety of any student, does not contribute to a hostile or intimidating environment for any student and preparing students for college and/or careers. In relation to student attire, the district believes: in our core values of Learning, Character, Community and Joy; students should be able to dress in a manner that expresses their individuality without fear of

“Universal Dress Code” creates an educational environment in Richland Two Schools where students “prepare . . . for success by providing meaningful, challenging, and engaging learning experiences” where school staff can focus on actual instruction time, not reprimanding students for their clothes.<sup>8</sup>

Other school districts across the state debated similar issues in recent history, including Charleston County School District where the school board considered a stricter dress code in 2020, moving in the opposite direction from Richland Two’s inclusive and universal policy.<sup>9</sup> The dress code revisions the Charleston County School Board would ban excessively form-fitting clothes along with pants with rips or tears above the knee.<sup>10</sup> Parents expressed differing opinions about the stricter proposed policy changes ranging from complete approval to total outrage.<sup>11</sup> Parents against the new restrictions cited their feelings of their daughters being humiliated at school as the source of their outrage. One of the parents, Kat Martin, expressed that parents want a dress code that is “more protective and less punitive.”<sup>12</sup> Further, Martin, along with other parents, believes “that the current dress code is still biased and discriminatory and has some room for improvement.”<sup>13</sup>

Sarah Simpson, the parent of a student in the school district, feels that the district is “body shaming our daughters[,] . . . [they are] sexualizing shoulders, and a couple inches above the knee.” Parents even go into detail about how the schools attempt to remedy the infractions, citing the “‘Shirt of Shame,’ a red or yellow oversize T-shirt ‘they make the kids wear it if they wear leggings with shorter shirts or

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unnecessary discipline or body shaming; students have the right to be treated equitably. Enforcement of this policy will not create disparities, reinforce or increase marginalization of any group nor will it be more strictly enforced against students because of racial identity, ethnicity, gender identity, gender expression, gender nonconformity, sexual orientation, culture or religious identity, household income, body size/type or body maturity; students are responsible for managing their personal distractions; and students should not face unnecessary barriers to school attendance. The board will review the policy for any changes needed on a periodic basis. The administration will make the final judgment on the appropriateness of a student's attire.”).

8. *Id.*

9. Schieferl, *supra* note 1.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

[administrators or teachers] don't like what they are wearing.”<sup>14</sup> Parents expressed further concerns that the "strict dress codes can be unfair to girls and people of color" and emphasized the need for a dress code that is "more positive and less punitive."<sup>15</sup>

In response to parents' outrage over the dress code, Reverend Chris Collins, a member of the district's board who is spearheading the new stricter dress code, highlights the need for teachers to teach in a classroom "without any distractions."<sup>16</sup> Reverend Collins also believes that "[t]hese are just basic standard Christian values and moral values that any parent should want for their child. The child is covered up, the child is safe."<sup>17</sup> This begs the question: what (or who) is the school district trying to keep the child "safe" from?

To develop a dress code that creates a safer environment for students, especially young girls, the South Carolina State Legislature would need to enact a bill mirroring the "universal dress code" accepted by Richland Two and apply the dress code unanimously to all school districts to comply with both the Equal Protection Clause and Title IX. This note will focus on South Carolina Public Schools because based on national and state statistics, the education system needs a change. Starting with dress code reform can create an environment where students not only have the fear of embarrassment and sexualization removed but also a learning environment where they feel comfortable in their own skin and can wear what they want.

This note will first cover the background and factual explanation of school dress codes in general through governmental agencies' and other organizations' studies and in South Carolina by looking at what certain public school districts implement as a dress code. Next, this note will also address the legal framework for the creation of and implementation of dress codes across the state under both Title IX and the Equal Protection Clause. Finally, this note will address recommendations for a fair and realistic dress code that complies with Title IX and the Equal Protection Clause along with counterarguments.

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14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

## II. BACKGROUND

In short, the background section of this note will cover the issues behind what is “dress coded” means to students, specifically female students, as seen through government and other agency reporting and then focus specifically on dress code issues within South Carolina, including a comparison of various counties’ dress codes, and the impact the variety of dress codes has on students.

### A. Agencies and Organizations Dress Code Analysis

Government agencies and other organizations conduct studies to determine and report on the impact of school dress codes at a national level on a young girl’s education. First, this section will discuss a report by the National Women’s Law Center that focuses on students in the D.C. area and their experiences with dress code discrimination. Next, this section will review a report from the U.S. Government Accountability Office that provides a broad overview of the current state of dress codes in the United States along with recommendations for improving dress codes. Finally, this section will also address how both of these reports are large pictures of what has already happened on a smaller scale in South Carolina public schools.

The National Women’s Law Center conducted a study of D.C. dress codes and found that “D.C. dress codes promote race and sex discrimination and pull students out of the classroom for no good reason—often through illegal suspensions.”<sup>18</sup> As a result of the discrimination and exclusionary discipline, “Black girls fall behind in school, which threatens their long-term earning potential while also exacerbating longstanding and widespread racial and gender inequalities.”<sup>19</sup> To make these findings, the National Women’s Law Center conducted both one-on-one interviews and small group interviews with Black girls ages twelve to eighteen who either are currently enrolled or have been enrolled in a public middle or high school in D.C.<sup>20</sup> The National Women’s Law Center also “conducted a qualitative and quantitative analysis of D.C.’s public high schools’

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18. NAT’L WOMEN’S L. CTR., *DRESS CODED: BLACK GIRLS, BODIES, AND BIAS IN D.C. SCHOOLS* 1 (2018).

19. *Id.*

20. *Id.* at 2.

written dress code policies.”<sup>21</sup> By doing so, common problems with both the rules and enforcement of the dress codes were concisely categorized.<sup>22</sup> Problems with the rules of dress codes include “Rules that are overly strict<sup>23</sup>, Rules that require expensive purchases, rules that punish kids for dressing for the weather, Rules based in racial stereotypes, Rules based in sex stereotypes, [and] Unclear rules.”<sup>24</sup> Problems with enforcement include “Discriminatory enforcement, Enforcement that promotes rape culture, Enforcement through physical touching by adults, including school police, Shame-based punishments, [and] Overly harsh and illegal punishments.”<sup>25</sup> The most concerning finding of the National Women’s Law Center is the enforcement of dress codes promoting rape culture by telling girls they “‘distract’ or ‘tempt’” boys.<sup>26</sup>

By referring to girls as distractions or temptations, the schools, through the enforcement of dress codes, “sends the clear message that boys are not responsible for their bad behavior” by shifting the blame for boys’ bad behavior and misconduct onto the choices of girls.<sup>27</sup> Furthermore, the National Women’s Law Center emphasizes that students “may think it is appropriate to commend on girls’ bodies because they see teachers do it.”<sup>28</sup> Essence Kendall,<sup>29</sup> a student interviewed for the National Women’s Law Center report, recounted a time when a teacher commented on her ripped jeans:

“One teacher at [school] did not like the girls for some reason. One day she told me that I had on ripped jeans, but I had gym shorts to cover it. She was like, ‘You

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21. *Id.*

22. *Id.* at 3.

23. Overly strict refers to the amount of detail the dress codes go into. *Id.* at 4 (summarizing the “strictness” with percentiles: “81 percent require a uniform, 65 percent regulate the length of skirts, 58 percent prohibit tank tops, 42 percent ban tights and/or leggings, 45 percent require students to wear belts (and many specify the belts must be black”).

24. *Id.* at 3.

25. *Id.*

26. *Id.* at 20.

27. *Id.*

28. *Id.*

29. *Id.* Essence Kendall is an 18-year-old at Charles Herbert Flowers High School who previously attended Banneker High School.

know why I don't like holes above the knee? Because a boy can put [his] finger up there.' And I'm just like, 'Wait, what?' Why would you even say something like that to a student? And she said, 'So, your mom let you walk from the station to your to school like that?' I'm like, 'Yeah, sure.' [The teacher] wanted you to be covered."<sup>30</sup>

Students, based on this report, can recognize when a teacher's comment about their attire passes far beyond what is appropriate to say to a child, especially in a teacher-student relationship. Along with the comment the teacher made to Kendall about not being appropriate, the comment along with forcing her to wear gym shorts over her jeans was also shame-based. A shame-based punishment is a way to "punish students who break the dress code, or even other rules, by shaming them with attention-grabbing clothing 'fixes.'"<sup>31</sup>

Seeing a student with gym shorts over her jeans is an attention-grabbing "fix" because it is not a normal fashion statement to wear shorts over jeans like that. Similarly, in South Carolina, the Shirt of Shame in Charleston County Schools is another clear shame-based punishment used to grab the attention as a fix for a dress code infraction.<sup>32</sup> The shirt of shame, either red or yellow, is similar to another shame-based punishment at Kendall's school. In the past, Kendall's school has given students "a big t-shirt that says 'help the homeless' if you have on a crop top or something and they'll call your parent as well."<sup>33</sup> These shameful and embarrassing dress code punishments are not unique to any part of the country and in turn "schools distract and upset students and undermine young people's trust in educators."<sup>34</sup>

In line with the promotion of rape culture, enforcing the dress code through unconsented touch is a major concern for students.<sup>35</sup> By unnecessarily touching girls, another subliminal message is sent to all

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30. *Id.*

31. *Id.* at 22.

32. Schieferl, *supra* note 1.

33. NAT'L WOMEN'S L. CTR., *supra* note 18, at 22.

34. *Id.*

35. *Id.* at 21.

students: “their bodies are not their own.”<sup>36</sup> Phina Walker,<sup>37</sup> one of the students interviewed, spoke of a specific incident of physical touch as a method of enforcement.<sup>38</sup> Walker said:

“[T]his girl she had on some brown Uggs. And she didn’t have no other shoes at home because some people cannot afford all black shoes... [The teacher] grabbed her shirt. She told her to come, come on. And so the girl had to get up and the girl had to change her shoes to these orthopedic shoes.”<sup>39</sup>

The National Women’s Law Center’s findings, although based in the D.C. area public schools, clearly reflect common issues faced by students across the county, especially in South Carolina. For example, in Rock Hill, a female student “was sent to the office two days in a row for clothing the school deemed inappropriate.”<sup>40</sup> As a result, parents created an online petition with more than 5,000 signatures.<sup>41</sup> Parents even have expressed difficulty in finding clothes that meet what the school dress code rules specify as acceptable.<sup>42</sup> In response, the district did say it will review the dress code, but holds that the dress code is “designed to be gender-neutral and is applied equally to males and females” despite parents’ expressions of the dress code being “inconsistent” from school to school.<sup>43</sup>

The previously mentioned U.S. Government Accountability Office report titled “Department of Education Should Provide Information on Equity and Safety in School Dress Codes” addresses dress codes on a nationwide level and the enforcement of those dress codes, along with

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36. *Id.*

37. *Id.* Phina Walker is a seventeen-year-old student at Thurgood Marshall Academy.

38. *Id.*

39. *Id.* Phina Walker is a seventeen-year-old student at Thurgood Marshall Academy.

40. *Mother Says School District Dress Code Unfair to Girls*, AP NEWS (Sept. 7, 2019, 4:21 PM), <https://apnews.com/article/0239b2c7d25247f0a940b701343657da>.

41. *Id.*

42. *Id.* (noting that Rock Hill parent Mindy Neal specifically called out Rock Hill’s rule that shorts and skirts must be “four inches above the knee” especially for tall girls).

43. *Id.*



recommendations on how to remedy dress code enforcement.<sup>44</sup> Overall, the U.S. Government Accountability Office found “many dress codes include elements that may make the school environment less equitable and safe for students.”<sup>45</sup> Statistically, the GAO report estimates that “90 percent of dress codes prohibit clothing items typically associated with girls compared to 69 percent that prohibit items typically associated with boys.”<sup>46</sup>

The GAO Report also featured extreme examples of dress code enforcement from media reports from April 2018 through June 2022.<sup>47</sup> One of the most disturbing reports was a “high school girl was told to ‘move around’ for the school dean to determine if her nipples were visible through her shirt . . . [and] student was then instructed to put band aids on her chest.”<sup>48</sup> Further, GAO asked families to respond to a survey about the dress codes or uniform policies at their child’s school which produced a broad range of opinions.<sup>49</sup> Some families express that the dress codes reinforce their own family values such as “that our 12-year-old doesn’t need to go to school with her stomach showing.”<sup>50</sup> Other families feel similar outrage consistent with the girls in the National Women’s Law Center report in that “girls definitely feel anger towards the school for not educating the boys and making [the girls] aware every day what they wear can be a distraction to the boys” which further enforces the rape culture ideology<sup>51</sup> that girls, not boys, are responsible for the bad behavior of the boys when the girls are deemed a “distraction.”<sup>52</sup>

## B. Being “Dress Coded” in South Carolina

To be dress-coded means to be punished by the school administration for an infraction or violation of the dress code.<sup>53</sup> Although schools may point to student “safety” as the main reason for

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44. See generally U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 2.

45. *Id.*

46. *Id.* at 9.

47. *Id.* at 6.

48. *Id.*

49. *Id.* at 10.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 1.

maintaining a dress code, the United States Government Accountability Office found that “many dress codes include elements that may make the school environment less equitable and safe for students.”<sup>54</sup> Furthermore, “more than four in five predominantly Black schools (schools where Black students comprise at least 75 percent of the student body) and nearly two-thirds of predominantly Hispanic schools enforce a strict dress code” while keeping other school characteristics constant.<sup>55</sup> One of the largest safety concerns is that an estimated 60 percent of dress codes studied contain rules that would require adults to touch students to measure the lengths of their clothing.<sup>56</sup> For example, GAO mentioned a dress code enforcement method involving inappropriate touching widely reported on by the media: “Middle school girls were gathered at an assembly on dress code and told they should not report inappropriate touching if they were not following the dress code.”<sup>57</sup> This communication about dressing in the “wrong” way makes inappropriate touching acceptable and is extremely dangerous in the promotion of rape culture.

Between the four “primary” regions of the United States (Northeast, West, Midwest, and South), schools in the South are twice as likely to enforce strict dress codes compared to Northeast schools.<sup>58</sup> “Strict” enforcement of dress codes also leads to higher rates of removing students from the classroom, or “exclusionary discipline.”<sup>59</sup> Exclusionary discipline proves to have negative outcomes for students outside of missing precious instructional class time in both the present and future such as “increased risk for failing standardized tests and increased rates of drop outs and incarceration.”<sup>60</sup> Even if the school opts for non-exclusionary discipline, which more than three-quarters of dress

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54. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 2.

55. *Id.* at 20.

56. *Id.* at 12.

57. *Id.* at 6; see generally Madeleine List, *Principal Told Girls to Follow Dress Code or Boys Might Touch Them, Students in WV say*, NEWS & OBSERVER (Apr. 6, 2022, 2:39 PM), <https://www.newsobserver.com/news/nation-world/national/article260171360.html>.

58. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 2, at 22.

59. *Id.* at 24; *id.* at 21 (“In this report, schools that ‘enforce a strict dress code’ are identified and reported using Education’s School Survey on Crime and Safety, which asks school administrators, ‘During the 2017-18 school year, was it a practice of your school to enforce a strict dress code?’ The survey does not define ‘a strict dress code’ so school administrators could interpret this question differently.”).

60. *Id.* at 25.

codes do, students can face “verbal reprimands, requiring students to wear clothing that is not their own, calling parents, after-school detention, and taking away privileges and extracurricular activities.”<sup>61</sup> Exclusionary discipline<sup>62</sup> like this “is associated with short and long-term negative outcomes for students, including increased risk for failing standardized tests and increased rates of dropouts and incarceration.”<sup>63</sup> Despite the reports of forms of exclusionary discipline used, it is unfortunately impossible to determine the full range that children are disciplined due to “informal removals and non-exclusionary discipline” that are not documented.<sup>64</sup>

Along with the concern of rules requiring adults to measure students and their clothing, other organizations express concerns with both the rules of dress codes and the enforcement. First, according to a report by the National Women’s Law Center, the rules themselves are overly strict, require expensive purchases, punish students for dressing for the weather, are based on racial stereotypes, are based on sex stereotypes, and are unclear.<sup>65</sup> In enforcing the rules, schools often have discriminatory enforcement, enforcement that can promote rape culture, shame-based punishment, and overly harsh punishments.<sup>66</sup> Unlike the GAO report, the National Women’s Law Center specifically focused on D.C. area schools and the stories of individual students.<sup>67</sup>

### C. South Carolina Schools

In South Carolina, the Department of Education, to comply with state and federal data reporting needs, takes student headcount “snapshots” on the 45th day, 135th day, and 180th day of the school year.<sup>68</sup>

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61. *Id.* at 30; *id.* at 6 (“A high school girl was suspended for 10 days and prohibited from attending her graduation ceremony for wearing a top that showed her shoulders and back.”).

62. *Id.* at 24 (“Exclusionary discipline,’ or any action that removes students from the learning environment, includes more severe disciplinary measures such as suspensions and expulsions, but it can also include sending students to the principal’s office or any other action that takes a student out of the learning environment.”).

63. *Id.* at 25.

64. *See id.* at 1 (noting that a lack of formal reporting creates a “critical gap” in GAO’s ability to provide complete resources on exactly what kinds of disciplines are taking place).

65. NAT’L WOMEN’S L. CTR., *supra* note 18, at 3.

66. *Id.*

67. *See generally id.*

68. *Active Student Headcounts*, S.C. DEP’T EDUC., <https://ed.sc.gov/data/other/student-counts/active-student-headcounts/> (last visited Apr. 4, 2023).

The most recent headcount for the forty-five-day active headcount for 2022-2023 is 789,231 students for public schools.<sup>69</sup> The private schools and homeschools have a headcount of 49,016<sup>70</sup> students and 30,474<sup>71</sup> students, respectively. This note will focus on public schools because of how many students the dress code guidelines impact when compared with the headcounts of both private and homeschool students combined. The South Carolina Public School System has the widest impact and reaches students within the state, and any recommendations in this note will be tailored based on what is constitutional to those students.

In South Carolina, there is no uniform standard of dress codes that districts are required to model their dress code after. This section will provide an overview of various counties' dress codes to show the wide and confusing differences between each one. For example, in Greenville County, the dress code guidelines emphasize that "students are expected to dress and be groomed in such a way as not to distract or cause disruption in the educational program or orderly operation of the school."<sup>72</sup> The dress code includes guidelines that "[s]horts, skirts and dresses must be in good taste and not be shorter than fingertip length, when standing with arms extended straight down at the sides,"<sup>73</sup> which would and does require adult administrators and teachers to look at students, measure their clothing and bodies, and possibly touch the students as well. Any clothing that is "deemed" to be "inappropriate" by the school is considered "disruptive."<sup>74</sup>

In Horry County, the prescribed measurement for bottoms (i.e., shorts, skirts, and dresses) is the clothing "must NOT be shorter than the length of a dollar bill from the very top of the knee upward at all

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69. *Id.*

70. *Private School Headcounts*, S.C. DEP'T EDUC., <https://ed.sc.gov/data/other/student-counts/private-school-headcounts/> (last visited Oct. 13, 2023).

71. *Home Schooling Headcounts*, S.C. DEP'T EDUC., <https://ed.sc.gov/data/other/student-counts/home-schooling-headcounts/> (last visited Oct. 13, 2023).

72. *Dress Code*, MAULDIN MIDDLE SCH., <https://www.greenville.k12.sc.us/mauldinm/main.asp?titleid=dresscode#:~:text=Students%20shall%20not%20expose%20undergarments,%2C%20tobacco%2C%20drugs%20or%20sex> (last visited Apr. 4, 2023).

73. *Id.*

74. *Id.*

times.”<sup>75</sup> Additionally holes or “slits” also must “be no shorter than the dollar bill length from the top of the knee upward.”<sup>76</sup> Straps on shirts must have a “two-finger” width.<sup>77</sup> To determine compliance with the dress code, students are “checked at each door in the morning.”<sup>78</sup> Students who violate the dress code “will be sent to [in-school suspension] until the violation is corrected.”<sup>79</sup> Further, if the student’s parent or guardian takes the student out of school to go home to change, the student receives an “unexcused” absence for the period they are absent from school.<sup>80</sup> Thus, in addition to missing instructional class time, the student receives an absence penalty as well.

In Colleton County, “[s]tudents are expected to dress and be groomed in such a way as to not distract or cause disruption in the educational program or orderly operation of the school.”<sup>81</sup> The guidelines in the dress code include that all tops and bottoms must be “[g]arments [that] will assure modesty when the student is seated or engaged in school activities.”<sup>82</sup> Also, shirts, pants, and outerwear “will not exceed one size larger than necessary as determined by the school administrator.”<sup>83</sup> Punishments or “enforcement” in Colleton County is categorized by what number of offense the alleged infraction of dress code is.<sup>84</sup> For the first offense, students are informed of the violation and are given the “opportunity” to either wear clothes available at the school or have a parent bring acceptable clothes.<sup>85</sup> If the student does neither of these, “students may be placed in an alternative setting, if available, for the remainder of the day.”<sup>86</sup> For a second offense, there will be a parent/guardian conference in addition to the first offense disciplinary

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75. *St. James High School Dress Code*, Horry Cnty. Schs., <https://www.horrycountyschools.net/Page/8407> (last visited Apr. 4, 2023).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. Sch. Dist. Colleton Cnty., S.C., JICA: Student Dress, Articles and Displays (July 2018) [https://cdnsm5ss19.sharpschool.com/UserFiles/Servers/Server\\_21783578/File/DressCode/studentdresscode2018.pdf](https://cdnsm5ss19.sharpschool.com/UserFiles/Servers/Server_21783578/File/DressCode/studentdresscode2018.pdf).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

actions.<sup>87</sup> For a third offense, the violation is considered “Disruptive Conduct,” and the student “will be subject to the consequences outlined therein, including but not limited to out-of-school suspension.”<sup>88</sup> As in other districts, the “principal has the authority to make the final determination as to whether a particular style or garment violates this policy.”<sup>89</sup>

In Aiken County, the district specifically calls out “young ladies” attire, and any straps must be the “width of her ‘four fingers’” differentiated from the standard for young men that is just “shirts with sleeves.”<sup>90</sup> Along with other school districts, Aiken County allows for pants with a patch sewn on the inside or outside of pants to cover holes that are no higher than “three inches” above the knee.<sup>91</sup> Aiken County even goes far enough to mandate confiscation of non-religious head clothing such as “hats, hoods on sweatshirts or jackets, athletic headbands, and sunglasses.”<sup>92</sup> Again, as seen in other school districts, Aiken County leaves the discretion and “final judgment on the appropriateness of clothing and/or appearance” up to the administration of the school.<sup>93</sup>

In contrast to other counties in South Carolina, Richland Two’s newly adopted “universal dress code” only provides that the clothes students must wear are “tops (shirt, blouse, sweater, sweatshirt, tank, etc.); with fabric in the front, back and on the sides under the arms; and [b]ottoms (pants, shorts, skirt, dress, etc.) and [f]ootwear.”<sup>94</sup> The only attire not allowed at school is clothing that displays inappropriate “pornographic” images or promotes “illegal or violent conduct” along with clothes that show “private parts.”<sup>95</sup> Moreover, the enforcement of the new universal dress code looks much different than in any other

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87. *Id.*

88. *Id.*

89. *Id.*

90. *Dress Code*, AIKEN CNTY. PUB. SCHS., <https://www.acpsd.net/Page/1661> (last visited Apr. 4, 2023).

91. *Id.*

92. *Id.* (noting it is unclear how a hood may be removed from a sweatshirt or jacket when the hood is sewn into the clothing) (not providing a removal procedure).

93. *Id.*

94. *Student Dress Code*, *supra* note 5.

95. *Id.*

district.<sup>96</sup> The code states that “[s]tudents shall not be disciplined or removed from class as a consequence for wearing attire in violation of this policy unless the attire creates a substantial disruption to the educational environment or poses a hazard to the health and safety of the wearer or others.”<sup>97</sup> Students also may not be referenced as a “distraction” due to their appearance and staff may not discuss any “violations” of the dress code in a way that would embarrass the student.<sup>98</sup>

Richland Two moved from a disciplinary dress code to an inclusive dress code by embracing the mission to “develop global citizens of tomorrow who are prepared to lead and excel in their chosen pathways.”<sup>99</sup> Richland Two shifted the responsibility of determining personal attire from the school to parents. Schools then in turn are only responsible for ensuring the attire does not “interfere with the health or safety of any student, does not contribute to a hostile or intimidating environment for any students[,] and preparing students for college and/or careers.”<sup>100</sup>

Overall, all of these dress codes have such subjective enforcement that is left up to individual school administrators and teachers to determine if the student is dressed “inappropriate[ly].”<sup>101</sup> The “measurements” administrators must use are different across districts and regardless of the measurement, require school administrators to either closely examine or touch students and pass judgment on the “appropriateness” of their clothing. Interestingly, the punishments for when a student is determined to not be following school dress codes are overwhelmingly the same: the student will miss instructional class time for a few minutes, hours, or even days.<sup>102</sup> Some of the punishments

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96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *See Dress Code, supra* note 72.

102. *See* NAT’L CTR. ON SAFE SUPPORTIVE LEARNING ENV’TS, SOUTH CAROLINA COMPILATION OF SCHOOL DISCIPLINE LAWS AND REGULATIONS, 11-13 (Mar. 31, 2022) <https://safesupportivelearning.ed.gov/sites/default/files/discipline-compendium/South%20Carolina%20School%20Discipline%20Laws%20and%20Regulations.pdf> (noting that the State of South Carolina provides a “Compilation of School Discipline Laws and Regulations.” Within the Laws and Regulations, guidelines based on South Carolina Statutes outline when in-school suspension is the exclusionary discipline used compared to

require parents to come and pick the student up from school to either go home and change or bring clothes to school, meaning the parent would need to leave work or otherwise interrupt their day as well as the student's day.<sup>103</sup>

As seen in the U.S. Government Accountability study, published in October 2022, the South is the most likely region to enforce a “strict” dress code which increases the likelihood that exclusionary discipline is used.<sup>104</sup> South Carolina is ranked forty-second in Education per the U.S. News with a high school graduation rate of 81.0%.<sup>105</sup> Furthermore, according to the South Carolina State Report Card, prime instructional time is down from last year's 87.4% to 85.9%.<sup>106</sup> In the year 2021-2022, there were 89,409 incidents of in-school suspension and 87,856 incidents of out-of-school suspensions.<sup>107</sup> This study will be further explained in the analysis section of this note. This note will focus on South Carolina public schools because based on national rankings<sup>108</sup> and graduation rates<sup>109</sup>, South Carolina is desperately in need of some revision to its education system. Altering the system in which dress codes are created is the perfect place to start because once students are comfortable, they can perform at their best. Correlation is not causation, but South Carolina's public education needs a change for the sake of the future of students and their careers.

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when out-of-school suspension is used. There are three levels of standards for classifying what behaviors constitute which punishments: Behavioral Misconduct (Level I), Disruptive Conduct (Level II), and Criminal Conduct (Level II). Both in-school suspension and out of-school suspensions are considered punishments at the “Disruptive Conduct” level).

103. *St. James High School Dress Code*, *supra* note 75.

104. *See generally* GAO-23-105348, *supra* note 2.

105. *Overview of South Carolina*, U.S. NEWS & WORLD REP. (2023), <https://www.usnews.com/news/best-states/south-carolina> (noting that the national average for high school graduation is 85.3%).

106. *State of SC | 2021-2022*, SC SCH. REP. CARDS, <https://screportcards.com/overview/?q=eT0yMDIyJnQ9UyZzaWQ9MDAwMA> (last visited Apr. 5, 2023) (defining prime instructional time, as the percentage of instructional time available when both students and teachers are present).

107. *Id.*

108. *See Overview of South Carolina*, *supra* note 105.

109. *See State of SC | 2021-2022*, *supra* note 106.



### III. ANALYSIS: SCHOOL DRESS CODES CAN HINDER YOUNG GIRL'S EDUCATION AND ENCOURAGES STEREOTYPICAL GENDER ROLES

Legally speaking, dress code issues in public schools or schools that are state actors have directly and indirectly been addressed at the Circuit level and Supreme Court level. The analysis of this note will center around how public school dress codes are directly related to the obligations schools have as state actors under the Equal Protection Clause and Title IX. Courts have analyzed Equal Protection and Title IX as two separate analyses<sup>110</sup>, so this section will follow suit. Overall, this section will address how the Supreme Court addressed sex-based classification using the Equal Protection Clause on a broad level compared to how the Fourth Circuit narrowed the interpretation to include dress code analysis. First, this section will address how the Equal Protection Clause and Title IX have been analyzed regarding gender and education in the past. Next, this section will first address what the Fourth Circuit has explicitly found concerning dress codes under the Equal Protection Clause and Title IX. Then, this section will more clearly define an analysis of dress code under Title IX despite dress codes not being explicitly included in Title IX. Finally, this section will analyze what government agencies and other organizations have found about the impact of dress code on students. In short, this section will synthesize how various standards of jurisprudence that review both the Equal Protection Clause and Title IX can be applied to the creation of a new South Carolina Universal Public School Dress Code.

#### A. Equal Protection Clause Application to Dress Codes

Within the jurisprudence of the Supreme Court and the Fourth Circuit, the justices created a patchwork framework for determining whether or not a public school or state actor dress code succeeds “heightened scrutiny”<sup>111</sup> under the Equal Protection Clause and under Title IX. *Peltier* is the only federal case that has considered the legal

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110. *See generally* *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104 (4th Cir. 2022).

111. *United States v. Virginia*, 518 U.S. 515, 555 (1996).

implications of dress codes under the Equal Protection Clause and Title IX and is the representative example of how to analyze dress codes as discriminatory within the Fourth Circuit.<sup>112</sup> As seen below, the Fourth Circuit considers the question of Equal Protection violation and Title IX violation to be two separate questions in the analysis of dress codes. First, this note will review how *United States v. Virginia* provides analysis for sex-based discrimination in an educational context. Next, this note will delve deeper into the analysis in *Peltier* of the Equal Protection Clause and Title IX specifically with discriminatory dress code practices by a state actor.

As a starting point, *United States v. Virginia* (hereinafter *VMI*) provides the burden of proof for educational claims based on sex under the Equal Protection Clause.<sup>113</sup> The Equal Protection Clause lies within the Fourteenth Amendment. The Equal Protection Clause reads:

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 to any person within its jurisdiction the equal protection of the laws.<sup>114</sup>

The Equal Protection Clause provides that a state actor has “a legitimate, accurate proxy for the regulation” when discrimination on the basis of gender occurs, as defined in *Craig v. Boren*.<sup>115</sup> Although the subject matter of the *VMI* case is not directly related to dress codes in public schools, the court does address Equal Protection analysis about the public education system and gender discrimination. Any allegation of a school violating Equal Protection on the basis of sex must pass “intermediate scrutiny” where it must be “establish[ed] that

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112. See e.g., *N.J. v. Sonnabend*, 37 F.4th 412 (7th Cir. 2022) (addressing dress code and First Amendment free speech issues); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381 (6th Cir. 2005) (alleging that school dress code violates First Amendment free speech).

113. *Virginia*, 518 U.S. at 533.

114. U.S. CONST. amend. XIV.

115. See *Craig v. Boren*, 429 U.S. 190 (1976).

classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.”<sup>116</sup>

Furthermore, *VMI* is a great example of a case that looks to the discriminatory harms caused by exclusionary practices on the basis of gender.<sup>117</sup> The court found that the burden a defender of a challenged action under the Equal Protection Clause “must show ‘at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.’”<sup>118</sup> Here, the court held that “inherent differences” between sexes or classification on the basis of sex “may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women.”<sup>119</sup>

Sex-based classifications under the Equal Protection Clause are often brought against schools in federal courts because the Constitution requires American children to be “given **equal educational opportunity no matter what their race, ethnic background, religion, or sex, or whether they are rich or poor, citizen or non-citizen.**”<sup>120</sup> **The equal education opportunity comes from the Supreme Court’s decision in *Brown v. Board of Education*. Within the opinion, the court acknowledged education is an opportunity afforded to all children and** “where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”<sup>121</sup> Thus, Equal Protection claims are often brought against schools and other state educational actors because the Equal Protection Clause is the remedy provided for discriminatory educational practices.

Looking more narrowly, the Fourth Circuit’s holding in *Peltier* provides a starting point for the framework used in determining how the Equal Protection Clause applies to dress codes in a narrower holding compared to *VMI* by looking specifically to dress codes. First, according to the court:

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116. *Id.*

117. *See generally Virginia*, 518 U.S. at 515.

118. *Id.* at 524.

119. *Id.* at 534. *See also* *Goesaert v. Cleary*, 335 U.S. 464 (1948).

120. *Your Right to Equality in Education*, ACLU: DEP’T PUB. EDUC. (July 17, 2023), <https://www.aclu.org/other/your-right-equality-education>.

121. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

[t]o prevail on [the Equal Protection Clause] claim under Section 1983, the plaintiffs were required to show that: (1) the defendants deprived them of a constitutional right; and (2) the defendants did so ‘under color of [State] statute, ordinance, regulation, custom, or usage’ (the state action requirement).<sup>122</sup>

After the Equal Protection analysis, Title IX applies when public and private educational institutions that receive federal funds discriminate on the basis of sex.<sup>123</sup> Dress codes, therefore, will violate the Equal Protection Clause when “blatant gender stereotypes”<sup>124</sup> are used in making the dress code. This analysis of what state actions would allow for a plaintiff to prevail on an Equal Protection claim to remedy public school dress code discrimination.

To apply these broad frameworks to the real world, a great example of the *VMI* Equal Protection implementation is to “allow female students the option of choosing to wear pants rather than forcing them to wear skirts or dresses . . . [because] [t]here is likely no rationale that does not rely on the constitutionally-illegitimate ‘fixed notions concerning the roles . . . of males and females.’”<sup>125</sup> Thus, if a dress code explicitly classifies students on the basis of sex, the school or state would then have a heavy burden under the “intermediate scrutiny” Equal Protection standard where “classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.”<sup>126</sup> Consequently, if a school creates a dress code under which students are explicitly classified based on sex, “the school will be forced to show that its dress code not only

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122. *Peltier*, 37 F.4th at 115 (citing to *Mentavlos v. Anderson*, 249 F.3d 301, 310 (4th Cir. 2001)).

123. Jennifer L. Greenblatt, *Using the Equal Protection Clause Post-VMI to Keep Gender Stereotypes Out of the Public School Dress Code Equation*, 13 U.C. DAVIS J. JUV. L. & POL'Y 281, 285 (2009).

124. *Peltier*, 37 F.4th at 130-31.

125. Greenblatt, *supra* note 123, at 290.

126. *Id.* at 288 (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

aims to serve an important goal, but that it actually accomplishes that goal.”<sup>127</sup>

### **B. Title IX Application to Dress Codes**

Similarly, the court provides a two-fold test for plaintiffs to prevail under Title IX. Title IX reads that “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>128</sup> To prevail on Title IX, the plaintiffs must show that:

- (1) they were excluded from participation in an education program or activity, denied the benefits of this education, or otherwise subjected to discrimination because of their sex; and (2) the challenged action caused them harm, which may include "emotional and dignitary harm."<sup>129</sup>

The Supreme Court originally set forth Title IX framework in *Franklin v. Gwinnett County Public Schools*.<sup>130</sup> There, the Court gave schools a “duty not to discriminate on the basis of sex.”<sup>131</sup> There is no circuit split on the question of Title IX analysis. The Supreme Court has not specifically ruled on dress code, but the principles of the framework of Title IX may be applied to dress code.

The Court also defined discrimination to mean ““treating [an] individual worse than others who are similarly situated.””<sup>132</sup> Under Title IX, Congress provided for specific entities and activities that are exceptions to Title IX such as religious organizations, sororities, fraternities, and mother-daughter or father-son activities when offered

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127. *Id.*

128. Title IX, Education Amendments of 1972, 20 U.S.C.S. § 1681(a).

129. *Peltier*, 37 F.4th at 129.

130. *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992).

131. *Id.*

132. *Peltier*, 37 F.4th at 130 (citing *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 618 (4<sup>th</sup> Cir. 2020)).

to both sexes.<sup>133</sup> The exceptions to Title IX do not act as an exclusive list, rather, in the Court’s view, “a deliberate choice to ‘limit[] the statute to the [exceptions] set forth.’”<sup>134</sup> Thus, although dress code is not explicitly listed as a Title IX exception, a plaintiff may still bring a claim of dress code discrimination under Title IX.<sup>135</sup> Due to that a dress code can be challenged under Title IX, the court must look to if the dress code “operates to exclude the plaintiffs from participation in their education, to deny them its benefits, or otherwise to discriminate against them based on their sex.”<sup>136</sup>

Under Title IX, the proper standard of how to analyze a dress code has been unclear until the *Peltier* opinion. Scholars have suggested that the focus should lie with “disparate impact”<sup>137</sup> as opposed to the intermediate scrutiny required by the Equal Protection clause. The evidentiary requirement in a Title IX claim would not be discriminatory intent, but instead one sex is “being [more] unfairly burdened than those of the opposite sex.”<sup>138</sup> In turn, the creation of a “neutral” dress code policy is needed when compared to the disproportionate impact that the current “non-neutral” dress codes have on female students.<sup>139</sup> This analysis provides similar guidance to that of the Fourth Circuit because the disparate impact seen due to dress codes is the exclusion of students from their own education.

### C. Fourth Circuit addresses dress codes directly in *Peltier*

The Fourth Circuit specifically addresses the Equal Protection Clause and Title IX in regard to dress codes in *Peltier v. Charter Day School, Inc.*, 37 F.4th 104 (4th Cir. 2022). *Peltier* is one of the few cases in the Fourth Circuit that addresses dress code in the context of both a

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133. *Id.* at 128.

134. *Id.* at 128-29.

135. *Id.* at 129.

136. *Id.* at 130.

137. Stephan Wah, *Boys will be Boys and Girls will get Raped: How Public School Dress Codes Foster Modern Day Rape Culture*, 23 CARDOZO J. EQUAL RTS. & SOC. JUST.. 245, 250 (2016).

138. *Id.*

139. *Id.*

potential Equal Protection Clause violation and a Title IX violation.<sup>140</sup> Furthermore, *Peltier* analyzes dress codes and gender within the South that can be used to scrutinize dress codes within South Carolina. Charter Day School (CDS), a public charter school in North Carolina, emphasized ““traditional values”” in everything from curriculum to dress code.<sup>141</sup> The dress code stated that students, to comply with the dress code, must wear a “unisex polo shirt and closed-toe shoes; ‘[e]xcessive or radical haircuts and colors’ are prohibited; . . . boys are forbidden from wearing jewelry[;] [f]emale students are required to wear a ‘skirt,’ ‘jumper,’ or ‘skort’[;] . . . [and] boys must wear shorts or pants.”<sup>142</sup> This “traditionally” based dress code is what led Bonnie Peltier, the mother of a female kindergarten student at CDS, along with two other parents and guardians, to file suit on behalf of their female children against CDS alleging violations of the Equal Protection Clause and Title IX.<sup>143</sup> In their complaint, the plaintiffs alleged “the skirts requirement is a sex-based classification rooted in gender stereotypes that discriminates against them based on their gender.”<sup>144</sup>

In support of their allegations of sex-based discrimination, the plaintiffs cited specific instances when the dress code interfered with students’ participation in class, physical activities, and even emergency drills.<sup>145</sup> For example, a first-grade female student, in a misunderstanding concerning the dress code, wore shorts and “was removed from class and was required to spend the day in the school’s office.”<sup>146</sup> In another instance, the plaintiffs explained how they avoid “numerous physical activities, including climbing, using the swings, and playing soccer, except for days on which they are permitted to wear their unisex physical education uniforms.”<sup>147</sup> Furthermore, during emergency drills that required students to crawl on the floor, the plaintiffs feared that when wearing the required skirts, boys would

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140. See e.g., *Hardwick v. Heyward*, 711 F.3d 426 (4th Cir. 2013) (student alleging her right to free speech was violated when she was not allowed to wear a Confederate flag shirt to school); *Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249 (4th Cir. 2003) (student alleging dress code excluded broad range of symbols, political messages, and images that infringed on First Amendment freedoms).

141. *Peltier*, 37 F.4th at 112-13.

142. *Id.* at 113.

143. *Id.* at 113-14.

144. *Id.* at 114.

145. *Id.*

146. *Id.*

147. *Id.*

“tease them or look up their skirt.”<sup>148</sup> The defendants, CDS and its management company, maintained that as a charter school, CDS is not a state actor and thus not accountable under the Equal Protection Clause.<sup>149</sup> The defendants additionally maintained that Title IX does not apply to dress codes.<sup>150</sup>

In their holding, the Fourth Circuit Court of Appeals first looked to “the totality of the circumstances of the relationship between the private actor and the state to determine whether the action in question fairly is attributable to the state.”<sup>151</sup> Here, the court found that CDS is a state actor due to the North Carolina statute that defines the nature of charter schools<sup>152</sup> and based on the fact that CDS is 95% funded by public sources in a per-pupil calculation.<sup>153</sup> Thus, although CDS technically is a charter school, the court’s characterization of it as a state actor allows for easy application within the South Carolina public school dress code analysis.

Based on the determination that CDS is a state actor, the court then applied the Equal Protection Clause and Title IX to determine that “[b]y implementing the skirts requirement based on blatant gender stereotypes about the ‘proper place’ for girls and women in society, CDS has acted in clear violation of the Equal Protection Clause. . . . [and] that sex-based dress codes like the skirts requirement, when imposed by covered entities, are subject to review under the anti-discrimination provisions of Title IX.”<sup>154</sup>

#### D. Applying *Peltier* to South Carolina Dress Codes

*Peltier* is the only case within the jurisprudence of the Fourth Circuit and South Carolina that directly addresses dress code in the context of discrimination against female students under both the Equal

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148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 116 (citing *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 343 (4th Cir. 2000)).

152. *Id.* at 117 (citing N.C. GEN. STAT. § 115C-218.15 (1985)).

153. *Id.* at 118.

154. *Id.* at 130-31.



Protection Clause and Title IX.<sup>155</sup> A school may not implement a blatant stereotype within dress codes about the “proper place”<sup>156</sup> for girls without running afoul of violating the Equal Protection Clause. Furthermore, under Title IX, a school, as a state actor in an educational context, may not have a sex-based dress code without being subject to review under the “anti-discrimination provisions of Title IX.”<sup>157</sup>

I argue that almost all South Carolina public dress codes, at minimum, violate the sex-based dress code provision of Title IX and are subject to review. For example, Aiken County specifically has parameters within its dress code for “young ladies.”<sup>158</sup> Again, by creating different and specific standards for male and female students, a school district may very likely find itself subject to review under the anti-discrimination provisions within Title IX. Additionally, those dress codes that use blatant stereotypes are subject to review under the Equal Protection Clause. Therefore, the State of South Carolina needs to take a deeper look at the formation of dress codes and the various harms that may result from said discriminatory dress codes.

#### IV. RECOMMENDATIONS: ADOPTING RICHLAND TWO’S UNIVERSAL DRESS CODE STATEWIDE

Currently, school districts are left to create dress codes themselves. Unfortunately, the discretion for individual districts creates a varied patchwork of dress codes throughout the state. If a student transferred from one school district to another, likely, the clothes the student already has and wears to the first district would not be acceptable in the second adding financial and emotional strain on the student already undergoing change. Therefore, by using Richland Two’s “Universal Dress Code”<sup>159</sup> as a template, the South Carolina Legislature will eliminate discretion that school districts have to set a dress code and allow the districts to focus more on student development.<sup>160</sup>

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155. South Carolina cases involving dress code include work dress code cases, which is not the subject of this note. *See e.g.*, *Shatto v. McLeod Reg'l Med. Ctr.*, 406 S.C. 470 (2013) (discussing workers' compensation, dress code, and termination).

156. *Peltier*, 37 F.4th at 130-31.

157. *Id.* at 131.

158. *Dress Code*, *supra* note 90.

159. *Student Dress Code*, *supra* note 5.

160. *Id.*

## A. Uniformity without Uniforms

To develop a dress code that complies with the Equal Protection Clause and Title IX while additionally creating a safe and non-exclusionary environment for all students, especially young girls, the South Carolina State Legislature would need to enact a bill mirroring the “universal dress code” accepted by Richland Two Public School District. Implementing the Universal Dress Code along with teacher workday training into South Carolina Public School teacher requirements would allow students to feel comfortable in their learning environment while also preparing educators for how to handle dress code issues.

The Universal Dress code fits squarely within the Equal Protection analysis under both *Peltier* and *VMI* and the Title IX analysis under *Peltier*. The goal of a dress code should be to encourage safety without taking a student away from education through exclusionary discipline, and the Universal dress code does that exactly. First, under the Equal Protection Clause in *VMI*, the Universal Dress Code does not set forth explicit “inherent differences” between the sexes.<sup>161</sup> Nowhere within this dress code are students referred to by their sex. Under the Equal Protection analysis provided in *Peltier*, the dress code does not “deprive[]”<sup>162</sup> any student of a constitutional right and the analysis need not go further.

Next, looking to the Title IX analysis under *Peltier*, no students are “excluded from participation in an education program or activity, denied the benefits of this education, or otherwise subjected to discrimination because of their sex.”<sup>163</sup> In fact, the Universal Dress code policy is to explicitly remove any “barriers”<sup>164</sup> students may face in school attendance. Thus, due to the fact that the Universal Dress Code passes both the Equal Protection analysis under both *VMI* and *Peltier* along with Title IX analysis under *Peltier*, applying the Universal Dress Code along with teacher and administrative training statewide via the Legislature would create a learning environment for students where

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161. *United States v. Virginia*, 518 U.S. 515, 534 (1996); *see also* *Goesaert v. Cleary*, 335 U.S. 464 (1948).

162. *Peltier*, 37 F.4th at 115.

163. *Id.* at 129.

164. *Student Dress Code*, *supra* note 5.

The South Carolina Legislature already attempted to create a uniform dress code requirement in January 2017 with the introduction of H. 3050 in the 122nd Session of the South Carolina General Assembly.<sup>165</sup> The Bill emphasized the desirability “to provide local school boards with clear legal authority to adopt dress code and school uniform policies.”<sup>166</sup> This bill was introduced and read for the first time to the House in January 2017 and was subsequently referred to the Committee on Education and Public Works.<sup>167</sup> No action has been taken since.<sup>168</sup> By already acknowledging that the local school districts need a “clear legal authority” regarding the dress code and uniform standards, the South Carolina Legislature is the perfect place to introduce a Universal Dress Code similar to Richland Two’s dress code.

As a refresher, the Universal Dress Code is as follows: “Students must wear: [t]ops (shirt, blouse, sweater, sweatshirt, tank, etc.); with fabric in the front, back and on the sides under the arms; and [b]ottoms (pants, shorts, skirt, dress, etc.) and [f]ootwear.”<sup>169</sup> The Universal Dress Code does not allow students to wear anything they want and contains a list of attire students must not wear.<sup>170</sup> The Universal Dress Code eliminates exclusionary discipline, potential embarrassment, and the language of referring to a student as a “distraction” from the enforcement of the dress code.<sup>171</sup> The schools are then only focused on and responsible for “ensuring that student attire does not interfere with

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165. H. 3050, 122d Gen. Assemb. (S.C. 2017).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Student Dress Code*, *supra* note 5.

170. *Id.* (“Students must not wear attire that: is pornographic, contains threats or that promotes illegal or violent conduct; demonstrates hate group association/affiliation and/or uses hate speech targeting groups based on race, ethnicity, gender, sexual orientation, gender identity, religious affiliation or other protected groups; shows private parts (nipples, genitals, buttocks). Private parts must be covered by clothing that is opaque (not able to be seen through); shows skin on the student’s abdomen; covers the student’s face to the extent that the student is not identifiable (except that worn for religious purposes) or covers the student to the point that they cannot be identified from the front or the back (ski masks, etc.); demonstrates gang association or affiliation; may be used as a weapon; reveals visible undergarments, except waistbands and visible straps are allowed; or swimsuits, except as required for class or athletic practice or meet.”).

171. *Id.*

the health or safety of any student, does not contribute to a hostile or intimidating environment for any student[,] and preparing students for college and/or careers.”<sup>172</sup> Furthermore, creating a learning environment where students can comfortably dress especially for the South Carolina heat without fear of reprimand, missed class time, or embarrassment.

Further, training on how to properly enforce dress codes without humiliating students or implementing exclusionary discipline for teachers and administrators that interact with students on a daily basis can be built into already existing “teacher workdays.”<sup>173</sup> Throughout the year, there are at least forty-seven teacher in-service workdays based on the South Carolina Composite of School Calendars.<sup>174</sup> Although all teachers do not have the same workdays<sup>175</sup>, dress code training along with yearly “re-trainings” can easily find room within the teacher workdays. This training can be built from the already existing GAO report<sup>176</sup> into the State of South Carolina’s Department of Education. Looking at the four recommendations the GAO has to the Department of Education, training would revolve around three major points: safeguarding students’ privacy and autonomy, enforcement of dress code discipline, and the prevalence and effects of “informal removals and non-exclusionary discipline.”<sup>177</sup>

A major part of the enforcement of the Universal Dress Code is the removal of the word “distraction” from what a student may be referred to as based on their attire. Instead of making a student feel embarrassed or sexualized based on their appearance, school staff can approach the possible infraction in a non-accusatory technique. According to the National Women’s Law Center report, referring to girls as a “distraction” or even worse a “temptation,” the school is sending a clear message to boys: they are not responsible for their misconduct towards girls which is a dangerous precedent to set forth.<sup>178</sup> By educating educators and staff that interact with students on a daily basis on how to

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172. *Id.*

173. 2021-22 School Year South Carolina Composite of School Calendars, S.C. DEP’T EDUC., <https://ed.sc.gov/data/other/school-calendars/2021-2022-composite-district-calendar/> (last visited Oct. 13, 2023).

174. *Id.*

175. *Id.*

176. GAO-23-105348, *supra* note 2.

177. *Id.*

178. NAT’L WOMEN’S L. CTR., *supra* note 18 .

approach a potential dress code infraction, those school employees will have the tools to properly address any issue without embarrassing the student or forcing the student to miss valuable instructional class time. With proper tools on how to appropriately address potential dress code infractions, the teacher will no longer send a message that it is okay or acceptable to comment on a girl's body or refer to her as a distraction.<sup>179</sup>

## B. Counterarguments to Universal Dress Code

Two counterarguments may be made against the Universal Dress Code. The first is to keep the dress code discretion with each district. Another valid argument to be made is to switch to a uniform system where students are required to wear uniforms.

First, keeping the dress code system as is would still leave the state with a checkerboard across districts without consistency in any dress codes. Although this dress code method allows each district to evaluate its own needs, students who transfer districts may face additional costs to find clothes that are within their new district's dress code. The current dress code system is not a reflection of the real world, especially when compared to the Universal Dress Code's goal to "prepare all students for success by providing meaningful, challenging, and engaging learning experiences including preparing them for college and/or career success."<sup>180</sup>

Next, uniforms for all students has already been proposed by House Bill 3050 to "contribute to an orderly, disciplined school environment and conceal income disparities among students."<sup>181</sup> Although a noble mission, income disparities will remain as some families will not be able to afford multiple uniforms or the extra accessories that are allowed with uniforms. House Bill 3050 attempted to address this issue by providing that the South Carolina Department of Education will assist "students eligible for free or reduced school lunches in obtaining at least five sets of school uniforms for each season," but "the provision[] depend[s] on the availability of funding."<sup>182</sup> There are no guarantees that students would even be able to access the required uniforms.

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179. *Id.*

180. *Student Dress Code*, *supra* note 5.

181. H. 3050, 122d Gen. Assemb. (S.C. 2017).

182. *Id.*

Considering the negatives already associated with the way South Carolina handles dress codes and the negatives associated with students wearing uniforms, to create a safer environment where female students in particular do not feel sexualized by classmates or school administrators. Therefore, the best course of action is a Universal Dress Code<sup>183</sup> in order to create a learning environment where students are learning in an environment where students do not feel like a distraction or face “unnecessary barriers to school attendance,”<sup>184</sup> especially in a state like South Carolina where prime instructional time is already not at 100%.<sup>185</sup>

## V. CONCLUSION

The State of South Carolina is long overdue for statutory guidance concerning dress codes in schools. Leaving discretion to individual districts is outdated and has already created issues as seen in Charleston County. The idea of uniforms for students seems facially like a remedy to discriminatory enforcement of dress codes but removing the choice of students to pick their attire along with placing an unnecessary financial burden on the families and guardians of students creates more problems than it would solve. The Universal Dress Code<sup>186</sup> created by Richland Two fits perfectly within the Equal Protection and Title IX jurisprudence created by both the Supreme Court and Fourth Circuit because it does not discriminate against sexes and does not prevent participation in education or other education-based activities like recreational time such as gym class or sporting events. The goal of any dress code should be to provide students with a guide in which they feel comfortable making choices about their appearance for themselves without fear of being called a “distraction,” sexualized, inappropriately touched without consent, or removed from class to miss priceless instructional time. Therefore, to develop a dress code that creates an appropriate and safe environment for students, especially young girls, the South Carolina State Legislature must enact a bill mirroring the

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183. *Student Dress Code*, *supra* note 5.

184. *Id.*

185. *State of SC | 2021-2022*, *supra* note 106 (demonstrating that prime instructional time has gone down from 87.4% to 85.9%).

186. *Student Dress Code*, *supra* note 5.

“Universal Dress Code” accepted by Richland County and apply the dress code unanimously along with administrative training.