

# School uniforms, dress codes, and free expression: What's the balance?

By **JULIE UNDERWOOD**

*Requiring school uniforms may be less legally fraught than implementing a school dress code.*

More and more public schools are adopting school uniform policies. In 2013, 23% of public elementary schools and 15% of public high schools required students to wear uniforms — up from 3% of all schools in 1996 (NCES, 2016). Most of the schools adopting these policies have a high percentage of low-income students. These schools include, for example, 80% of Chicago public schools. How is this possible in a climate where there is so much litigation and publicity regarding lawsuits about students' rights to express themselves through dress — particularly T-shirts?

The push for school uniforms started in 1996, when the U.S. Department of Education urged the adoption of school uniforms as a strategy for reducing school violence. The focus then was on potential discipline and safety benefits, including:

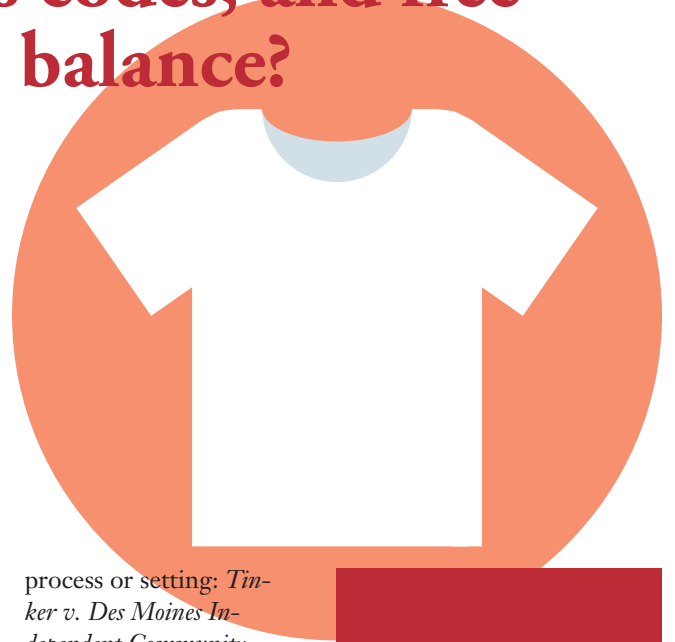
- Decreasing violence and theft;
- Preventing gang members from wearing gang colors and insignia at school;
- Instilling students with discipline;
- Helping parents and students resist peer pressure; and
- Helping school officials recognize nonstudents who may be in the school.

More recently, proponents of school uniforms have argued that they improve student achievement and student test scores, although the research is mixed on both these claims and the claims of improved student discipline.

## **What about free expression?**

Of course, a student's dress can be a form of expression — a bold statement of one's own persona or political views. This can be especially true for high school students. Because dress may convey a message, the First Amendment comes into play in determining how far a school district can go in regulating what students wear. Schools may restrict a student's speech if:

- The school expects the speech to substantially disrupt the educational



process or setting: *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

- It is plainly lewd or vulgar: *Bethel School District v. Fraser*, 478 U.S. 675 (1986).
- It promotes illegal activity, including drug use: *Morse v. Frederick*, 551 U.S. 393 (2007).

If a school precludes a particular message from being conveyed, courts have consistently held that the students' rights have been violated unless one of these exceptions is found. But the implementation of a uniform policy is different.

## **Dress codes versus uniforms**

Generally less restrictive than uniform policies, dress codes tend to prohibit things like lewd or disruptive apparel or anything that promotes violence, harassment, or illegal activity (including alcohol and drug use). Some policies are

**In meeting the requirement of being content and viewpoint neutral, it is best to prohibit all messages, including your own.**

much more specific, banning categories of clothing and specific items.

When schools implement dress codes on a student-by-student basis, they sometimes run into legal trouble. For example, courts have sided with students, upholding the right to wear "I love Boobies" bracelets (to promote breast cancer awareness), as in *B.H. v. Easton Area School Dist.*, 827 F. Supp. 2d 392 (E.D. Pa. 2011), and to wear a T-shirt with a Confederate flag on it (when there was no

**JULIE UNDERWOOD** (Julie.Underwood@wisc.edu) is the Susan Engeleiter Professor of Education Law, Policy, and Practice at the University of Wisconsin-Madison.

evidence of racial tensions in the school), as in *Castorina ex rel. Rewt v. Madison Cnty School Board*, 246 F. 3d 536 (6th Cir. 2001). (See Under the Law, March 2016, for details.)

Considering the legal difficulty in administering dress codes, you would think it would be extremely difficult to uphold a school policy that bans certain forms of student expression by requiring school uniforms. But, in fact, it seems easier (legally) for schools to control student dress with a wholesale approach, like uniforms, rather than dealing with individual situations or a list of apparel to be excluded in a dress code policy.

Perhaps in part because of this difference, many schools have moved to adopt the stricter uniform policy. Some of these policies require students to wear a certain color of shirt and bottoms, such as black bottoms and white shirts for all. Others allow a range of colors but mandate that they must be solid colors with no visible labels, logos, designs, symbols, or writing.

### Analyzing uniform policies

What sets these broad uniform policies apart from dress codes is that they are content and viewpoint neutral — that is, they don't differentiate between and among forms of political speech, gang-related speech, or religious speech. Instead, uniform policies ban everything across the board. Theoretically, the courts consider this a type of "time, place, and manner restriction" on speech.

Time, place, and manner restrictions limit all speech within a location or during a

particular time — for example, disallowing demonstrations at a board meeting or requiring a parade permit in a city. To be constitutional, such restrictions must be content and viewpoint neutral, serve a significant government interest, and leave open alternative channels of communication. That is, they don't differentiate among messages, they are intended to protect the original purpose of the forum, and they don't ban speech forever. With these policies in place, the public board meeting continues without interruption, traffic is not impeded by an unplanned-for parade, and the school day is not disrupted by attention-seeking dress.

Uniform policies must pass muster under this time, place, and manner restriction rather than having to show that the speech the school is trying to ban is disruptive, lewd, or promoting of illegal activity. For example, in *Canady v. Bossier Parish Sch. Bd*, 240 F. 3d 437 (5th Cir. 2001), the school uniform policy allowed for two colors of polo or button-down shirts and navy or khaki bottoms. When parents challenged the policy as a violation of their children's right to expression, the court found that although dress could be a form of expression protected by the First Amendment, the policy could be upheld if it 1) furthered an important or substantial government interest, 2) the interest was unrelated to the suppression of student expressions, and 3) the restrictions on the speech were no more than necessary to further the state interest. The court found that the policy was consistent with the state's interest of improving education and that it was not implemented as an attempt

to curtail any particular viewpoint or message. The restrictions were content neutral and were reasonable restrictions on the students' speech; therefore, the policy was upheld.

**When schools implement dress codes on a student-by-student basis, they sometimes run into legal trouble.**

In meeting the requirement of being content and viewpoint neutral, it is best to prohibit all messages, including your own. The First Amendment prohibits government-compelled speech, which means that a school cannot force a student to express support for a particular view. For example, in *West Va. v. Barnette*, 319 U.S. 624 (1943), the U.S. Supreme Court held that the school could not force students to stand and say the Pledge of Allegiance and could not penalize them for not doing so. Because the First Amendment protects both the right to speak one's mind and to refrain from speaking, and because the mandatory recitation was seen as a compelled speech, it was contrary to the First Amendment.

For example, a Nevada elementary school adopted

a mandatory uniform policy, requiring students to wear only red or navy polo shirts and tan or khaki bottoms. So far no problem — the policy is content and viewpoint neutral. But when the school required that all shirts bear the school logo and the motto "Tomorrow's Leaders," one family objected to the motto's implicit messages, which seemed to argue that leadership should be celebrated and that the school is likely to produce leaders. The Ninth Circuit Court of Appeals has had difficulty with this case, hearing it two times. In the most recent case, the court found the school did not have a sufficient state interest in requiring the motto to be worn and thus ruled in favor of the family: *Frudden v. Pilling*, 877 F. 3d 821 (9th Cir. 2017).

### All zipped up

Other difficult aspects of implementing a uniform policy include making sure you have an exemption for religious dress and providing access to uniforms for homeless and economically disadvantaged students. And of course, there is the question of whether uniforms foster or discourage student growth. But the legal hurdles are not as high as you might think, and, in fact, dress codes are often more difficult to implement legally than content- and viewpoint-neutral uniform policies. **◀**

### Reference

National Center for Education Statistics. (2016). *Indicator 20: Safety and security measures taken by public schools*. Washington, DC: U.S. Department of Education. [https://nces.ed.gov/programs/crimeindicators/ind\\_20.asp](https://nces.ed.gov/programs/crimeindicators/ind_20.asp)