IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
Case No. 7:16-cv-30

BONNIE PELTIER, as Guardian of A.P., a minor child; ERIKA BOOTH, as Guardian of I.B., a minor child; and PATRICIA BROWN, as Guardian of K.B., a minor child; Plaintiffs, v. CHARTER DAY SCHOOL, INC.; ROBERT P. SPENCER; CHAD ADAMS; SUZANNE WEST; COLLEEN COMBS; TED BODENSCHATZ; and MELISSA GOTT in their capacities as members of the Board of Trustees of Charter Day School, Inc.; and THE ROGER BACON ACADEMY, INC.; Defendants.	**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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I. INTRODUCTION

Charter Day School offers a unique, traditional-values approach to elementary- and middle-school education. The School applies this approach holistically. It governs all aspects of academic life, from the classical curriculum (which includes traditional English grammar, Latin, and classical history), to a regimented and interactive method of "direct instruction," to students' manners ("Yes, Ma'am" and "No, Sir" are expected). In line with this traditional-values framework, the School has a Uniform Policy that governs students' appearance. All students must wear white or navy blue tops, tucked into khaki or blue bottoms. Boys must wear pants or shorts with a belt, must keep their hair short (off the collar and above the ears), and must not wear any jewelry. Girls must wear jumpers, skirts, or skorts, but have no required hairstyle and may wear small pieces of jewelry. The Uniform Policy fosters the School's goal of classroom discipline and mutual respect between boys and girls. The School's traditional-values approach reflects the community values of parents who freely choose to send their children to the School, and it promotes educational diversity, one of North Carolina's stated goals in the creation of charter schools. The School has met with great success, producing outstanding academic and extracurricular achievements—for boys and girls alike—despite demographic challenges equal to those of noncharter public schools.

Plaintiffs seek to make the proverbial federal case out of this local charter-school policy. Indeed, they argue that Defendants have violated federal and state antidiscrimination law, even the U.S. Constitution, because the School requires girls to wear jumpers, skirts, or skorts instead of pants or shorts. Each of Plaintiffs' claims is barred as a matter of law by longstanding, black-letter legal doctrines. Even if they could overcome these legal bars, Plaintiffs have not raised a genuine factual dispute that the School's policy constitutes unlawful sex discrimination.

Plaintiffs cannot challenge the Uniform Policy under either Title IX or the Equal Protection Clause. The U.S. Department of Education, which has primary responsibility for Title IX, has authoritatively pronounced that the statute simply does not apply to "codes of personal appearance," like the Uniform Policy. That reasonable interpretation is entitled to *Chevron* deference and bars Plaintiffs' claims as a matter of law. Nor can Plaintiffs prevail on their constitutional claim under 42 U.S.C. § 1983 because, as a matter of law, none of Defendants are state actors bound by the Constitution or § 1983. In any event, the Uniform Policy does not violate Title IX or the Constitution—even if they somehow applied to local charter-school dress codes—because the Uniform Policy comprehensively regulates the appearance of all students, placing equal compliance burdens on both sexes. Courts applying federal civil-rights statutes and the Constitution have repeatedly upheld such evenhanded dress codes as nondiscriminatory, related to reasonable objectives, and reflective of community standards. Plaintiffs' state-law claims fail for many of these same reasons and others discussed below. Defendants are thus entitled to summary judgment.

II. BACKGROUND

A. North Carolina's Charter School Statute

In the mid-1990s, the North Carolina General Assembly passed the Charter School Statute, which "authorize[d] a system of charter schools to provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently of existing schools." N.C. Gen. Stat. § 115C-218(a). These independent charter schools were designed to "[i]mprove student learning," with a "special emphasis" on "at risk" and "academically gifted" students, and to "[e]ncourage the use of different and innovative teaching methods." *Id.* § 218(a)(1)–(3). The ultimate goal was to "[p]rovide parents and

students with expanded choices in the types of educational opportunities that are available within the public school system." *Id.* § 218(a)(5).

Although the statute deems charter schools to be "public school[s] within the local school administrative unit in which [they are] located," *id.* § 218.15(a), they differ substantially from "traditional" public schools. "Any child who is qualified . . . for admission to a public school" may attend any charter school, but no child may be required to attend one. *Id.* § 115C-218.45(a)–(b). And charter schools are operated not by a local public-school board, but "by a private nonprofit corporation" that has been state-approved to establish a charter school. *Id.* § 218.15(b); *see id.* §§ 218.1(a), 218.15(a). The nonprofit's board of directors, which the state does not appoint (Statement of Material Facts that Defendants Contend are not Genuinely in Dispute (hereinafter, "Facts") ¶ 12), has authority to "decide matters related to the operation of the school, including budgeting, curriculum, and operating procedures." *Id.* § 218.15(d).

To foster its stated aims of innovation and expanded choice, North Carolina gives charter schools great freedom to experiment. As a baseline, "a charter school is exempt from statutes and rules applicable to a local board of education." *Id.* § 218.10. Instead of those generally applicable laws, charter schools operate under a contract with the state, called a charter. *Id.* § 218.15(c). Among other things, the charter incorporates "any terms and conditions imposed on the charter school by the State Board of Education." *Id.* In other words, charter schools are creatures of contracts between the state and private nonprofit corporations.

B. Charter Day School's History and Organizational Structure

The nonprofit corporation holding the charter in this case is Defendant Charter Day School, Inc. (Facts ¶¶ 44–45.) We will refer to Charter Day School, Inc. as "CDS, Inc." to distinguish it from the charter school attended by the Plaintiffs, Charter Day School, which will

be referred to by name or simply as "the School." The School exists solely as a result of the charter between the state and CDS, Inc.; it is not a juridical entity and thus not a Defendant.

Mr. Baker Mitchell incorporated CDS, Inc. in 1999. (*Id.* ¶ 2.) CDS, Inc. then filed its initial application for the state's approval to open the School. (*Id.* ¶ 3.) Mr. Mitchell sought to open a charter school instead of a private school because he saw a "need . . . in public schools and among the low income and minority [and] . . . the special needs students" in the local area. (*Id.* ¶ 4; *see id.* ¶ 5.) The state approved the application for an initial five-year term, and the School began operations for the 2000–2001 school year. (*Id.* ¶ 6.) The state renewed the charter of CDS, Inc. to operate the School for ten years in 2005, with another ten-year renewal in 2015. (*Id.* ¶ 7.) When the School first opened, it had 53 students. (*Id.* ¶ 8.) Since then, it has grown to over 900 and has both elementary- and middle-school campuses. (*Id.* ¶¶ 8–9.) CDS, Inc. has applied for and opened three additional charter schools in southeastern North Carolina. (*Id.* ¶ 10.)

The Board of Trustees of CDS, Inc. (the Board), all six members of which are named defendants, establishes policy at the School. (*Id.* ¶¶ 1, 11, 13.) The Chairman of the Board, Robert Spencer, described its primary focus as the big picture of managing the School, seeking "to provide the best education possible to the greatest number of students that [it] can provide that education to." (*Id.* ¶ 14.) Secondarily, the Board ensures that the School operates in a "fiscally responsible" way. (*Id.*) The Board's members are uncompensated volunteers interested in the education offered by the School. (*Id.* ¶¶ 15–16; *see id.* ¶ 18.) Mr. Spencer, for example, initially developed an interest in participating in the School because the entrance of charter schools into the educational arena reminded him of the breakup of the telephone monopolies,

which he had experienced firsthand as an AT&T employee. (*Id.* ¶ 17.) When asked to join the Board, he agreed in order "to give back to society" and "to help with educating kids." (*Id.*)

The original charter application filed by CDS, Inc. notified the state that it intended to enter into an "educational management contract" with Defendant The Roger Bacon Academy, Inc. (RBA). (*Id.* ¶ 19.) RBA is a for-profit corporation separate from CDS, Inc. (*Id.* ¶¶ 20, 24, 31.) Mr. Mitchell is the founder, president, and sole shareholder of RBA. (*Id.* ¶ 21.) Although he initially served on the Board of CDS, Inc., Mr. Mitchell is currently the secretary of CDS, Inc., not a voting Board member. (*Id.* ¶ 22.) Similarly, RBA's CFO, Mark Dudeck, serves as the treasurer of CDS, Inc. but is not part of the Board. (*Id.* ¶ 23.) The Charter Agreement between CDS, Inc. and the State bars RBA employees from serving on the Board. (*Id.* ¶ 24.)

RBA manages the day-to-day operations of the four CDS, Inc. charter schools. (*Id.* ¶ 25.) Under its contract with CDS, Inc., RBA undertakes various functions at the Board's direction, including leasing land and buildings to the School, acquiring "instructional materials, equipment and supplies," and managing the School's "business administration." (*Id.* ¶ 26; *see id.* ¶¶ 27–28.) Although RBA assists in managing the School's teachers, the ultimate responsibility for this function falls to the Board. Moreover, "[s]tate law requires that the teachers be paid directly by the charter school" itself. (*Id.* ¶ 29; *see id.* ¶ 30 (describing management of other staff).)

CDS, Inc. and RBA are separate entities. (*Id.* ¶ 31.) RBA does not exist only to serve CDS, Inc. and the School. RBA has provided consulting services to charter schools that are not operated by CDS, Inc. (*Id.* ¶ 43.) RBA's officers have no control over the policy decisions made by the Board of CDS, Inc. (*Id.* ¶¶ 11, 20, 24,31.) The Board is "responsible for the fiscal and academic policy" at the School. (*Id.* ¶ 11.) The independent, nonoverlapping financial structures of CDS, Inc. and RBA further demonstrate their separateness. (*See id.* ¶¶ 32–41.)

C. Charter Day School's Educational Model

The Board has chosen to operate a "traditional values" charter school. (*Id.* ¶ 54.) The School's pledge sums up these values: "to keep myself healthy in body, mind, and spirit"; "to be truthful in all my works"; "to be virtuous in all my deeds"; and "to be obedient and loyal to those in authority." (*Id.* ¶¶ 55–56.) Students must use polite forms of address, including "Ma'am" and "Sir." (*Id.* ¶ 57.) It is "a traditional school with a traditional curriculum, traditional manners and traditional respect." (*Id.* ¶ 58.)

The cornerstone of the School's traditional model is the "direct instruction" teaching method. (*Id.* ¶ 59.) In line with the Charter School Statute's goals, direct instruction "has been proven in numerous schools to dramatically improve learning over other teaching methodologies . . . particularly for at-risk children." (*Id.* ¶ 60.) Direct instruction involves "constant vocal responses" during the lesson, with the teacher making a statement ("Trees breathe in carbon dioxide."), then asking a question ("What do trees breathe in?"), and the entire class responding ("CARBON DIOXIDE!"). (*Id.* ¶ 61.) To ensure that direct instruction is properly applied, the School trains its teachers and gives them "[v]ery little" autonomy to design curricula. (*Id.* ¶ 62.)

The other key to the School's traditional model is its "classical curriculum," which teaches material that has "withstood the test of time." (*Id.* ¶ 63.) The School's goal is that "the children gain a solid base of knowledge well grounded in the intellectual, aesthetic and moral traditions of western civilization." (*Id.* ¶ 64.) This includes classical literature and history, Latin, and sentence diagramming—topics whose "instruction [has] been abandoned in the last half century or so." (*Id.* ¶ 63.) These subjects serve the goals of liberal education, to learn "to communicate one's ideas clearly and understand the communications of others." (*Id.* ¶ 65.)

CHARTER DAY SCHOOL UNIFORM POLICY (*Id.* ¶¶ 69–74.)

Regardless of Sex	Males Only	Females Only
• White or navy blue tops • Khaki or blue bottoms • Shirts tucked in • Closed-toed, closed-heel shoes • Bottoms must be knee-length or longer • May wear watches • No "[e]xcessive or radical haircuts and colors" • PE uniform required on PE days	• Unisex polo or oxford collar shirt • May wear pants or shorts • Must wear belt at all times • Must wear white, black, or navy blue socks • No jewelry • Must keep hair "neatly trimmed and off the collar, above the eyebrows, and not below the top of the ears or eyebrows" • Must not have any facial hair	• Unisex polo, oxford, or "Peter Pan" collar shirt • May wear jumpers, skirts, or skorts • May wear socks, stockings, or leggings, but not required; if worn, must be plain and white, black, or navy blue • May wear small earrings, and "non-eccentric necklaces and bracelets" • Middle school girls may wear makeup

The School's traditional-values educational model requires "a disciplined, caring classroom environment" for success. (*Id.* ¶ 54.) At the time of the School's formation, it was "just common knowledge" that "the data show[ed] uniforms promote discipline and better behavior." (*Id.* ¶¶ 48, 66.) As a result, from the time of the School's initial charter application, it has "require[d] all students to wear a simple uniform" to "help to instill discipline and keep order" in the classroom. (*Id.* ¶¶ 67–68; *see id.* ¶ 47.) Before opening the School, Mr. Mitchell and its other founders hosted meetings with parents of prospective students to obtain their opinion about how the School should operate. (*Id.* ¶¶ 48–49.) Around 60–80 parents attended and participated in an "open ended" discussion about the specific dress and grooming requirements. (*Id.* ¶¶ 48, 51.) From that time on, the School has regulated the appearance of its students according to a "Uniform Policy." (*Id.* ¶¶ 47, 68.) The Uniform Policy requires all students "to dress in the appropriate school uniform," according to "[h]igh standards of decency, cleanliness and grooming." (*Id.* ¶ 70.) The above chart summarizes the specific requirements. During the 1999–2000 meetings that the School's founders held with parents of prospective

students, those parents expressed a desire for specific dress and grooming requirements that closely resemble the specific requirements of the current Uniform Policy. (*Id.* ¶ 50.)

The Board of CDS, Inc. has the authority to alter the Uniform Policy's specific requirements. (*Id.* ¶¶ 52–53.) In the Board's estimation, the Uniform Policy's current requirements inextricably support the School's broader, traditional-values educational model. (*Id.* ¶¶ 118, 124.) In the words of one Board member, the Uniform Policy's specific requirements, including particularly its sex-differentiated requirements, "work seamlessly together in a coordinated fashion in a disciplined environment that has mutual respect between boys and girls and between each other as students." (*Id.* ¶ 125.)

The School's teachers enforce the Uniform Policy. (*Id.* ¶ 75.) If a student fails to comply, then a standardized, written notification is sent home to that student's parents. (*Id.* ¶ 76.) Earlier this year, one Plaintiff received just such a "uniform compliance letter." (*Id.* ¶ 77.) When her mother inquired about "getting this removed from her record," the assistant headmaster responded: "[T]he letter is not on [Plaintiff's] record. These letters are a communication tool for parents, not disciplinary actions." (*Id.* ¶ 78.) Repeated noncompliance with the Uniform Policy results in a phone call to the parents. (*Id.* ¶ 79.) The precise method for handling noncompliance will "depend[] on the history of that particular individual student." (*Id.* ¶ 80.) For example, if a male student who "can't afford a belt" were to arrive beltless, then the School would "get [him] a belt," or if a female student had no skirt, the School would loan her one. (*Id.* ¶ 81.) Neither the assistant headmaster over the elementary school, nor the assistant headmaster over the middle school could recall a time when a female student failed to comply with the Uniform Policy's requirement that they wear skirts, skorts, or jumpers. (*Id.* ¶ 82.)

In the words of one Plaintiff's guardian, the School's education model has resulted in "fantastic test scores." (*Id.* ¶ 111; *see id.* ¶ 112.) The School's students are demographically similar to students in the surrounding area (*id.* ¶ 113), but it is "usually the highest scoring [public] school in Brunswick County" (*id.* ¶ 112). Students from all demographics who attend the School pass standardized tests at a higher rate than students in Brunswick County and Leland Schools. (*Id.* ¶ 114.) The same is true for the School's female students. With standardized math tests taken at the School, "on the whole the girls' achievement has been somewhat greater than that of the boys." (Defs.' MSJ Ex. 45, Duncan-Hively, Hively Expert Rep. at 22; *see* Facts ¶ 96.) Compared to female students at noncharter public schools across the state, the School's female students pass standardized tests at a higher rate. (Facts ¶ 115.) Compared to female students in Brunswick County Public Schools, the School's female students perform on par or better. (Defs.' MSJ Ex. 46, Wang Expert Rep. at 4; *see* Facts ¶ 100.) Regarding extracurricular success, girls at the School have excelled at both cheerleading (nine national titles) and coed archery (eight consecutive state championships). (Facts ¶ 116.) Over the last five years, female enrollment has trended slightly upwards, eclipsing male enrollment. (*Id.* ¶ 117.) As one Board member remarked, the School's success is obvious from the waiting list to enroll. (*Id.* ¶ 129.)

D. Summary-Judgment Standard

Federal Rule of Civil Procedure 56 entitles a party to summary judgment "when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Ballard v. Mullins*, No. 5:15-CT-3045-H, 2016 WL 9448107, at *3 (E.D.N.C. Sept. 26, 2016). This procedure offers the court and the parties "'a means of avoiding the delay and expense of a full trial when,'" as is true of this case, "'the action involves only a legal question and there are no triable issues of fact.'" *Soto v. McLean*, 20 F. Supp. 2d 901, 906 (E.D.N.C. 1998) (quoting 10B Charles Alan Wright et al., *Federal Practice and Procedure*, § 2734). Once

Defendants have shown the absence of any genuine issue of material fact, the burden falls on Plaintiffs to show "both the *materiality* and the *genuineness* of the alleged fact issues." *Faircloth v. United States*, 837 F. Supp. 123, 126 (E.D.N.C. 1993). Plaintiffs cannot meet their burden by relying on "irrelevant or unnecessary" factual disputes; only outcome-determinative disputes "under the governing law will properly preclude the entry of summary judgment" for Defendants. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

III. ARGUMENT

Plaintiffs, who are students at the School, challenge the Uniform Policy as unlawful under Title IX, the U.S. Constitution's Fourteenth Amendment (via 42 U.S.C. § 1983), and North Carolina's constitution, statutes, and common law. They name as defendants CDS, Inc., its board members, and RBA. Each of Plaintiffs' claims founder on threshold legal bars. In addition to these matter-of-law barriers, there is simply no genuine factual dispute that the School's evenhanded dress code constitutes unlawful discrimination on the basis of sex.

A. Defendants are entitled to judgment as a matter of law on Plaintiffs' Title IX claims.

Title IX provides that "[n]o 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." 20 U.S.C. § 1681(a). Plaintiffs' Title IX claims (*see* Am. Compl., Dkt. No. 13 ("Compl.") ¶¶ 157–66) require them to prove: (1) that RBA and CDS, Inc. receive federal financial assistance;[1] (2) that Plaintiffs were excluded from participation in, denied the benefits of, or subject to discrimination under an education program operated by RBA and CDS, Inc.; and (3) that the alleged violation harmed Plaintiffs. *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) (en banc).

[1] Plaintiffs bring no Title IX claim against the Board members because they cannot: individuals are not proper Title IX defendants. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009).

As an initial matter, RBA is entitled to summary judgment on Plaintiffs' Title IX claim because it receives no federal financial assistance, and because it has no authority to alter the Uniform Policy, which is set by the Board of CDS, Inc. Moreover, Plaintiffs' claims against both Defendants fail because the federal agencies tasked with enforcing Title IX interpret it *not* to apply to school personal-appearance codes at all. Because that interpretation warrants deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), RBA and CDS, Inc. are entitled to summary judgment. Even if Title IX somehow applied to personal-appearance codes, analogous Title VII precedent holds that comprehensive dress and grooming policies that differentiate between, but equally burden, both boys and girls do not amount to sex discrimination. The undisputed evidence proves that the Uniform Policy equally burdens both sexes, thus providing an alternative path to summary judgment.

1. Title IX does not apply to RBA, which receives no federal funds.

RBA does not "receiv[e] Federal financial assistance." 20 U.S.C. § 1681(a). While the School receives federal funding for a variety of programs (*see* Facts ¶ 38), none of that funding passes through RBA (*id.* ¶ 34–37). Similarly, although two of the other CDS, Inc. charter schools operate federally funded school-lunch programs, RBA is not a party to the funding agreements between those schools and the North Carolina Department of Public Instruction. Mr. Spencer, the Board Chairman, signs those agreements on behalf of CDS, Inc. (*Id.* ¶ 42.) Because RBA is not a party to any "contract, agreement, or arrangement" with the federal government to provide "assistance to any education program or activity," RBA does not receive "Federal financial assistance." 34 C.F.R. § 106.2(g) (Dep't of Educ.); 7 C.F.R. § 15a.105 (USDA). RBA may benefit from the federal funding that CDS, Inc. receives (*see* Facts ¶ 41), but "Title IX coverage is not triggered when an entity merely benefits from federal funding." *NCAA v. Smith*, 525 U.S. 459, 468 (1999); *see Campbell v. Dundee Cmty. Schs.*, 661 F. App'x

884, 886, 888 (6th Cir. 2016) (affirming dismissal of Title IX claim against corporation that received no federal funds, even though it "took over employment responsibilities" for public school district's athletic department). RBA, whose officers have no control over CDS, Inc. (Facts ¶¶ 24, 31), does not become subject to Title IX solely because it does business with charter schools that do receive federal funding. *See NCAA*, 525 U.S. at 468 (refusing to apply Title IX to "entities that only benefit economically from federal assistance"); 4 James Rapp, *Education Law* § 10B.02[1][a][i] (available on Lexis Advance) ("Indirectly benefiting from the federal assistance afforded a recipient is not sufficient to extend Title IX coverage."). This undisputed fact entitles RBA to judgment as a matter of law on Plaintiffs' Title IX claim.

2. The relevant federal agencies interpret Title IX not to apply to dress or grooming codes—a reasonable interpretation entitled to *Chevron* deference.

The authoritative administrative interpretation of Title IX forecloses Plaintiffs' claims as a matter of law. Thirty-five years ago, the U.S. Department of Education (which refers to itself as "ED") promulgated a rulemaking to delete from its Title IX regulations a provision that had "prohibit[ed] discrimination in the application of codes of personal appearance." *Nondiscrimination on the Basis of Sex*, 47 Fed. Reg. 32,526, 32,527 (July 28, 1982) [hereinafter, *Withdrawal of Appearance-Code Regulation*]. ED found "no indication in the legislative history of Title IX that Congress intended to authorize Federal regulations in the area of appearance codes." *Id.* The agency therefore squarely interpreted the statute to "permit[] issues involving codes of personal appearance to be resolved at the local level." *Id.* ED has never retreated from this interpretation, throughout decades under both Republican and Democratic management. As

a result, commentators have long observed that Title IX simply does not provide a valid ground for challenging dress or grooming codes that contain sex-specific requirements.[2]

If ED's interpretation is binding, the Uniform Policy cannot violate Title IX. The question is whether *Chevron*'s two-step analysis requires the Court to defer to that interpretation. The Court must decide, first, "whether Congress has directly spoken to the precise question at issue"; and second, if not, whether ED's "answer is based on a permissible construction of the statute." 467 U.S. at 842–43. At the very least, "the intent of Congress" is not clear regarding whether Title IX has any bearing on local school-uniform policies. *Id.* The Court must therefore "give[] controlling weight" to ED's interpretation of Title IX, unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. It is not; it is reasonable and therefore binding.

i. Congress has not directly said whether Title IX applies to the Uniform Policy.

Title IX has not "directly spoken" to the "precise question" of school uniform policies, strongly suggesting that Congress left this matter to the agency's discretion. *Chevron*, 467 U.S. at 842. Moreover, as ED has authoritatively explained, the legislative history suggests no congressional concern on this score. In 35 years, Congress has never overridden ED's interpretation of Title IX as not covering school appearance policies.

What the statute does say strongly supports ED's interpretation. Title IX and many of its implementing regulations reflect that *distinctions* on the basis of sex often do not amount to impermissible sex *discrimination*. *See, e.g.*, 20 U.S.C. § 1686 (permitting "separate living facilities for the different sexes"); *cf. United States v. Virginia*, 518 U.S. 515, 532–33 (1996)

[2] *See* 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, 286 (2009) (concluding, based on ED's interpretation of Title IX, that the statute likely does not "protect[] against gender discrimination lingering in school dress codes"); Carolyn Ellis Staton, *Sex Discrimination in Public Education*, 58 Miss. L.J. 323, 334 (1989) ("Title IX has been rendered largely ineffective as a method of challenging dress codes.").

(refusing to "equat[e] gender classifications, for all purposes, to classifications based on race or national origin," because "the two sexes are not fungible" (alterations and quotation marks omitted)). Just as Title VII "requires neither asexuality nor androgyny" in the workplace, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998),[3] Title IX "does not require that the recipient erase all differences between the sexes," a result that would be unrelated "to the purpose of the federal funding," *Trent v. Perritt*, 391 F. Supp. 171, 173 (S.D. Miss. 1975); *cf. Virginia*, 518 U.S. at 533 (noting "enduring" "[p]hysical differences between men and women").

Exemplifying this approach, Title IX's prohibition on sex-specific admissions requirements applies "only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education." 20 U.S.C. § 1681(a)(1). In less technical language, "Title IX exempts elementary and secondary schools from its prohibition against discrimination in admissions." *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009). Thus, Title IX indisputably would allow CDS, Inc. to *entirely exclude* children from the School on the basis of sex. The additional litany of statutory exceptions to Title IX confirms that the statute does not seek to eliminate all sex-based distinctions. Title IX generally does not apply to military or religious schools. 20 U.S.C. § 1681(a)(3)–(4). It does not prohibit single-sex social clubs, nor traditional single-sex events like "father–son or mother–daughter activities," or even "'beauty' pageants." *Id.* § 1681(a)(6)–(9). Regulations contain still further exceptions, allowing schools to completely exclude girls from contact sports without running afoul of Title IX. *E.g.*, 34 C.F.R. § 106.41(b). Taken as a whole, it would be utterly implausible to conclude that this statute unambiguously forecloses schools from adopting uniform policies that distinguish between boys and girls.

[3] The Fourth Circuit looks to Title VII caselaw to interpret Title IX. *Jennings*, 482 F.3d at 695.

Congressional silence on uniform policies and the remainder of the statute reflect that "Congress has explicitly left a gap for [an] agency to fill." *Chevron*, 467 U.S. at 843.

ii. The administrative interpretation of Title IX is entitled to deference.

While Congress has not spoken to "the precise question at issue" here, *id.* at 842, ED has provided a clear answer. It interprets Title IX to "permit[] issues involving codes of personal appearance to be resolved at the local level"—not via federal law. *Withdrawal of Appearance-Code Regulation*, 47 Fed. Reg. at 32,527. Indeed, ED repealed a previous regulation that had governed personal-appearance codes. As long as ED's interpretation of Title IX "is based on a permissible construction of the statute," it controls this case. *Chevron*, 467 U.S. at 843. The Court "need not conclude that the agency construction was . . . the reading [the Court] would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11.

In addition to the overall context of the statute discussed above, perhaps the strongest indication that ED's interpretation is permissible is the overwhelming support it has found among the other federal agencies with authority to implement Title IX. *See* 20 U.S.C. § 1682 (granting Title IX rulemaking power). Acknowledging the need for standardized enforcement, 21 federal agencies adopted a "Common Rule" interpreting Title IX in 2000. *Nondiscrimination on the Basis of Sex*, 65 Fed. Reg. 52,858, 52,858 (Aug. 30, 2000) [hereinafter, *Common Rule*]. The Common Rule's "substantive nondiscrimination obligations" were designed, "for the most part, [to be] identical to those established by [ED]." *Id.* at 52,859. In particular, all 21 agencies followed ED's interpretation and did not include a provision prohibiting discriminatory appearance codes. *Id.* at 52,870. Although the Department of Agriculture did not initially adopt the Common Rule, it has since adopted it. *Education Programs or Activities Receiving or Benefitting From Federal Financial Assistance*, 82 Fed. Reg. 46,655, 46,655 (Oct. 6, 2017) (codified at 7 C.F.R. §§ 15a.100–.605).

ED's interpretation of Title IX, shared by nearly two dozen other agencies, deserves the utmost *Chevron* deference. For starters, Title IX includes "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron*, 467 U.S. at 843–44; *see* 20 U.S.C. § 1682 (authorizing agencies to "issu[e] rules, regulations, or orders of general applicability" that will "effectuate" Title IX). Title IX regulations, as a result, deserve "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. Equally important, ED takes the administrative lead on Title IX. Under the Common Rule, the other agencies treat "ED [as] the lead agency for enforcement of Title IX through its guidance, interpretations, technical assistance, investigative expertise, and resources committed." *Common Rule*, 65 Fed. Reg. at 52,859. Courts and commentators concur. *See, e.g.*, *Equity In Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 96 (4th Cir. 2011); *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993); *see also* 4 James Rapp, *Education Law* § 10B.02[3][a] (available on Lexis Advance) (describing ED's "[p]rimary responsibility for enforcing Title IX"). As the agency "entrusted to administer" Title IX, ED's "construction of [the] statutory scheme" must be given "considerable weight." *Chevron*, 467 U.S. at 844. Finally, ED's use of notice-and-comment rulemaking to promulgate its interpretation of Title IX further heightens *Chevron*'s deference. *See Knox Creek Coal Corp. v Sec'y of Labor*, 811 F.3d 148, 159 (4th Cir. 2016). When "derive[d] from notice-and-comment rulemaking," a statutory interpretation "will almost inevitably receive *Chevron* deference." *Id.*

As detailed above, ED's long-settled and never-challenged interpretation of Title IX is not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844; *cf., e.g.*, *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 771 (9th Cir. 1999) (deferring under *Chevron* to ED's athletics regulation, 34 C.F.R. § 106.41); *Kelley v. Bd. of Trs.*, 35 F.3d 265,

270–71 (7th Cir. 1994) (same). Indeed, one early judicial interpretation concluded that a school's sex-differentiated hairstyle regulations were not "within the purview of" Title IX. *Trent*, 391 F. Supp. at 173. As ED explained, the legislative history is consistent with that interpretation. 47 Fed. Reg. at 32,527.

All told, this is a classic *Chevron* case. Title IX prohibits sex discrimination in broad terms and then expressly delegates authority to effectuate that principle through specific regulations. *See* 20 U.S.C. §§ 1681–82. Exercising a gap-filling function, *see Chevron*, 467 U.S. at 843, ED has authoritatively interpreted Title IX to "permit[] issues involving codes of personal appearance to be resolved at the local level" and not by Title IX. *Withdrawal of Appearance-Code Regulation*, 47 Fed. Reg. at 32,527. That interpretation is not "manifestly contrary to the statute," so "a court may not substitute its own construction" for it. *Chevron*, 467 U.S. at 844. According to ED's binding interpretation, the Uniform Policy does not implicate, let alone violate, Title IX, and that mandates summary judgment here.

3. Even if Title IX applies to school appearance codes, the Uniform Policy is a lawful dress and grooming code that equally burdens both sexes.

Even if Title IX's prohibition on sex discrimination were somehow relevant here, the Uniform Policy would not be unlawful. In the Title VII employment context, there is "a discrete subset of judicial and scholarly analysis" about "[w]hether and when the adoption of differential grooming standards for males and females amounts to sex discrimination." *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 577 (7th Cir. 2014). In that arena, courts have consistently held that comprehensive dress and grooming codes with sex-differentiated requirements *that equally burden both sexes*—like the Uniform Policy—do not violate Title VII. *See Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1109–10 (9th Cir. 2006) (en banc)

(summarizing equal-burden analysis); *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1388 (11th Cir. 1998) (collecting cases rejecting challenges to male-only hair-length restrictions).

The Title VII hairstyle decisions cast doubt on whether sex-differentiated dress and grooming standards like the Uniform Policy can ever violate Title VII. For example, the Fourth Circuit held that a "sex-differentiated hair length regulation that is not utilized as a pretext to exclude either sex from employment does not constitute an unlawful employment practice as defined by Title VII." *Earwood v. Cont'l S.E. Lines, Inc.*, 539 F.2d 1349, 1351 (4th Cir. 1976). This reasoning is not limited to hairstyles. The Ninth Circuit affirmed summary judgment against a Title VII claim based on a grocery store's "regulations requiring men [and only men] to wear a tie as a condition of employment." *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755 (9th Cir. 1977). "It is clear that regulations promulgated by employers which require male employees to conform to different grooming and dress standards than female employees [are] not sex discrimination within the meaning of Title VII." *Id.* And a Missouri district court relied on the hairstyle decisions to enter judgment against a Title VII claim challenging a policy "prohibit[ing] women from wearing pants in the executive office[s]." *Lanigan v. Bartlett & Co. Grain*, 466 F. Supp. 1388, 1389–90 (W.D. Mo. 1979). The EEOC has ratified these decisions. *See* EEOC Compliance Manual, 2006 WL 4672751, § 619.4(d) (June 2006) ("For example, the dress code may require male employees to wear neckties at all times and female employees to wear skirts or dresses at all times.").[4] According to this line of authority, Plaintiffs' Title IX claims fail as a matter of law, regardless of the equal-burdens analysis.

[4] This Manual is "a body of experience and informed judgment to which [courts] may resort for guidance." *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 449 n.9 (2003) (quotation marks omitted); *accord Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 750 (4th Cir. 1996).

Some courts apply the equal-burdens analysis to determine whether a sex-differentiated, comprehensive dress and grooming policy amounts to sex discrimination under Title VII. *See Jespersen*, 444 F.3d at 1110. The Uniform Policy passes muster under that test as well. The equal-burdens analysis first appeared in some of the hairstyle cases, which upheld policies with "slight differences in the appearance requirements for males and females," as long as they were "reasonable" and "imposed in an evenhanded manner on all employees." *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973) (no Title VII violation because employer "enforce[d] strict grooming regulations against both male and female employees"). The EEOC also endorses this analysis: Sex-differentiated dress and grooming policies do not violate Title VII if they are "suitable" and "equally enforced," as long as "the requirements are equivalent for men and women with respect to the standard or burden that they impose." EEOC Compliance Manual § 619.4(d). The Fourth Circuit has applied this analysis to other types of sex-differentiated policies, such as physical-fitness requirements. *Bauer v. Lynch*, 812 F.3d 340, 346 (4th Cir. 2016).

The Uniform Policy survives the equal-burdens analysis. In the seminal *Jespersen* case, the en banc Ninth Circuit rejected "a challenge to one small part of what is an overall apparel, appearance, and grooming policy that applies largely the same requirements to both men and women." 444 F.3d at 1113, *approved of by Fourth Circuit in Bauer*, 812 F.3d at 349. The plaintiff there lost "her position as a bartender" at a casino for refusing to comply with the casino's "comprehensive uniform, appearance and grooming standards for all bartenders." *Id.* at 1105–06. Regardless of sex, those standards required bartenders to "maintain [their] Personal Best image." *Id.* at 1107. Some requirements applied to both sexes, but many were sex-differentiated. *Id.* (See the table below.) The plaintiff's only objection was to the "makeup

requirement," which made her "so uncomfortable" that "it interfered with her ability to perform." *Id.* at 1108. When she lost her job, she sued the casino under Title VII. *Id.*

APPEARANCE CODE UPHELD ON SUMMARY JUDGMENT IN *JESPERSEN*

Regardless of Sex	Males Only	Females Only
• Only "tasteful and simple jewelry" • "No faddish hairstyles or unnatural colors" • Black shoes	• "Hair must not extend below top of shirt collar" • "No colored polish" on fingernails • "Eye and facial makeup is not permitted"	• "Hair must be teased, curled, or styled," and "must be worn down at all times" • Stockings and nail polish limited to certain colors • "Makeup (face powder, blush and mascara) must be worn and applied neatly in complimentary colors" • "Lip color must be worn"

The Ninth Circuit affirmed summary judgment for the casino because the casino's "grooming and appearance policy d[id] not unreasonably burden one gender more than the other." *Id.* at 1110. The plaintiff had not carried her burden of presenting "any evidence of the relative cost and time required to comply with the grooming requirements by men and women." *Id.* Instead, she argued that the makeup requirement impermissibly forced "women bartenders [to] conform to a commonly-accepted stereotypical image of what women should wear." *Id.* at 1112. The court rejected this argument, holding that it "conflict[ed] with established grooming standards analysis." *Id.* "The requirements must be viewed in the context of the overall policy." *Id.* Appropriately viewed in context, the makeup requirement was "one small part" of the casino's "overall apparel, appearance, and grooming policy." *Id.* at 1113.

Plaintiffs similarly offer no evidence that the Uniform Policy, considered holistically, unequally burdens the School's female students. The Uniform Policy is "a comprehensive [dress and] grooming code that imposes comparable although not identical demands on both male and female" students. *Hayden*, 743 F.3d at 580. (For a full summary of the Uniform Policy's

requirements, *see supra* Section II.C, Chart.) Just as the *Jespersen* casino required bartenders to present their "Personal Best image," the School requires all students, regardless of sex, "to dress in the appropriate school uniform," and to adhere to "[h]igh standards of decency, cleanliness and grooming." (Facts ¶ 70.) Many of the Uniform Policy's requirements apply to both sexes. In particular, all children must wear similar shoes, white or navy tops tucked into khaki or blue bottoms that come at least to the knees, and must not have "[e]xcessive or radical haircuts." (*Id.* ¶¶ 70–74.) All children may wear watches, but only girls may wear other jewelry or makeup. (*Id.*) Girls must wear a skirt, skort, or jumper, but need not wear belts or socks, which are required of boys at all times. (*Id.*) And only boys must wear a prescribed hairstyle. They must keep their hair "neatly trimmed and off the collar, above the eyebrows, and not below the top of the ears or eyebrows." (*Id.*) These requirements serve to create a "very similar look for all" students, *Jespersen*, 444 F.3d at 1109, which serves the Board's goal of nixing clothing-related peer pressure and boosting "team spirit" among Charter Day School's students, (*see* Facts ¶ 120).

While the Uniform Policy "contains sex-differentiated requirements," none of them "on its face places a greater burden on one gender than the other." *Jespersen*, 444 F.3d at 1109. Girls must wear jumpers, skirts, or skorts; boys must wear pants or shorts. Boys additionally must wear socks and a belt, must keep their hair short, and cannot wear makeup or jewelry. (Facts ¶¶ 70–74.) Plaintiffs have presented no evidence of the burden of those additional requirements on boys, much less explained why they are less onerous than those on girls. (*Id.* ¶¶ 83–85.) Nor have Plaintiffs offered any evidence that the Uniform Policy is enforced disproportionately against girls. (*Id.* ¶¶ 86–88.) Consequently, they have failed to create a material fact issue regarding whether the Uniform Policy unequally burdens them as girls.

Plaintiffs instead pull "one small part" of the Uniform Policy out of context and attempt to label it sex discrimination. *Jespersen*, 444 F.3d at 1113. Plaintiffs would have the Court consider, not the permissibility of the Uniform Policy as a whole under Title IX, but only the permissibility of the requirement that girls wear skirts, skorts, or jumpers. (*See* Compl. ¶¶ 163–64.) *Jespersen* rejected such an attempt to "improperly divide[] the grooming policy into separate categories of hair, hands, and face, and then focus[] exclusively on the makeup requirement." 444 F.3d at 1112. Because the Uniform Policy is a "comprehensive" dress and grooming code, the Court must consider all of its requirements. *Hayden*, 743 F.3d at 580; *Knott*, 527 F.2d at 1252. A so-called "skirt requirement," like a makeup or short-hair requirement, "must be seen in the context of the overall standards imposed." *Jespersen*, 444 F.3d at 1113.

Lacking any evidence relevant to the governing equal-burden test, Plaintiffs instead offer a sweeping, untestable psychological theory. According to their psychological expert, Dr. Brown, "[a]ny policies that strengthen [sex] stereotypes will increase the negative developmental consequences." (Defs.' MSJ Ex. 47, Brown Rep. at 6; *see* Facts ¶ 94.) Covered by this statement are any policies that "hav[e] teachers increase the salience of gender in the classroom," which allegedly cause children to form stereotypes about the sexes. (Brown Rep. at 4–5.) In other words, Dr. Brown theorizes that making any distinctions between the sexes in a classroom will lead to negative developmental consequences. This theory of sex-stereotyping would condemn not only the requirement that girls wear skirts, skorts, and jumpers, but the very idea of *any* sex-differentiated Uniform Policy. More than that, Dr. Brown admits that her theory encompasses the most minor sex distinctions imaginable—everything from "pink and blue bulletin boards" to "gender labels in [classroom] language." (*Id.* at 4; *see* Facts ¶¶ 102–03.)

Adopting this unprecedentedly broad theory of Title IX would expose a school to liability every time a teacher begins class "by saying 'Good morning, boys and girls.'" (Brown Rep. at 4.)

Plaintiffs' speculative theory is foreclosed by both Title IX itself and Title VII caselaw. As discussed, Title IX facially allows numerous instances of differential treatment of boys and girls, including sex-specific admissions, sex-specific sports teams, and numerous other examples. *Jespersen*, moreover, squarely holds that a plaintiff cannot prevail by claiming that one aspect of a dress code reinforces sex stereotypes. 444 F.3d at 1112. Rather, the law requires a plaintiff to show that the dress code as a whole unequally burdens men or women. Plaintiffs' attempt to sidestep that test through an ambitious psychological hypothesis is legally invalid.

Despite the sweep of their theory, Plaintiffs cannot connect it to the specifics of this lawsuit. Dr. Brown broadly asserts that sex-differentiated uniform policies, as a general matter, cause "negative academic, social, and psychological consequences for children." (Brown Rep. at 6.) But she does not link this broad assertion to Plaintiffs' claims; Plaintiffs did not ask her to. (Facts ¶ 104.) Her report is "about the gender difference" in general, "not about the uniforms per se" at the School, nor about Plaintiffs themselves, whom she has never met. (*Id.* ¶ 105.) Although Plaintiffs' key premise is that the Uniform Policy harms them by increasing the prevalence of sex stereotypes at the School, Dr. Brown has no opinion on this topic. (*Id.* ¶ 106.) Worse, she testified that it would not be possible to measure the prevalence of damaging stereotypes at the School. (*Id.* ¶ 107.) Even stated at its most general level, Dr. Brown admits that her theory relies on "no direct evidence that stereotype threat [*i.e.*, the sort of harm she posits] occurs among school girls in ordinary classroom circumstances." (*Id.* ¶ 108.) Most telling, this Court has already held that Plaintiffs' mental state is *not* at issue in this case because Dr. Brown does not "opine that any of the minor children involved have suffered particularized

psychological consequences as a result of the uniform policy." (*See* Order, Dkt. No. 68 at 3–4 (refusing to allow Rule 35 exam for this reason).) Plaintiffs cannot rely on generic assertions of psychological harm to prove discrimination here. *See Smith v. Scottsdale Ins. Co.*, No. 5:12-CV-86, 2014 WL 7183865, at *13 (N.D. W. Va. Dec. 16, 2014) (finding no genuine issue of material fact because expert "fail[ed] to 'sufficiently link'" allegedly discriminatory action to plaintiffs' membership in protected class), *aff'd*, 621 F. App'x 743 (4th Cir. 2015).

A recent Seventh Circuit decision has applied Title IX to invalidate a school's male-only grooming requirement, but that court did not consider ED's Title IX regulations that interpret Title IX *not* to govern appearance codes. Moreover, the defendant school presented no evidence that the challenged requirement was "an aspect of any broader grooming standards applied to boys and girls." *Hayden*, 743 F.3d at 578. It did not argue that the challenged grooming requirement was "just one component of a set of grooming standards that impose comparable, although not identical, responsibilities on male[s] and female[s]." *Id.* at 580. In fact, the equal-burdens "line of precedent ha[d] been ignored entirely in [that] appeal." *Id.* at 578. Perhaps because of the school's failure to present these arguments, the *Hayden* court simply tacked on its Title IX conclusion to the end of the equal-protection analysis that dominated most of the opinion. *See id.* at 582–83. The *Hayden* court thus did not consider the key arguments for why the Uniform Policy in this case does not violate Title IX. *See id.* at 577–78, 582–83.

Additionally, the school in *Hayden* offered no evidence that its grooming requirement was "consistent with community norms." *Id.* at 581. In this case, by contrast, the Uniform Policy is manifestly consistent with community norms. *See Harper v. Edgewood Bd. of Educ.*, 655 F. Supp. 1353, 1356 (S.D. Ohio 1987) (granting summary judgment to school that refused to allow brother and sister to attend prom wearing clothing of opposite sex because "dress code

require[d] all students to dress in conformity with the accepted standards of the community"). For the 2015–2016 school year, parents of the School's students responded overwhelmingly that they were "satisfied" or "very satisfied" with the Uniform Policy. (Facts ¶ 89.) The Uniform Policy conforms to the norms of parents who choose to send their children to the School—that is, the Charter Day School community.[5] Plaintiffs cannot dispute this by isolating one part of the Uniform Policy and comparing it to the norms of *other* communities.[6] *See Jespersen*, 444 F.3d at 1112–13 (requiring analysis of Uniform Policy as a whole).

The only evidence is that the School's environment—including its comprehensive Uniform Policy—has greatly benefitted the female Plaintiffs as well as countless students of both sexes. (*See* Facts ¶¶ 97, 109–11.) Plaintiffs must offer some evidence that the Uniform Policy unequally burdens females, and they have not done so here. They cannot avoid summary judgment with generalized musings from an expert about unmeasurable, potential effects of all sorts of sex-based distinctions in the classroom.

B. Defendants are entitled to judgment as a matter of law on Plaintiffs' constitutional claims.

Plaintiffs' claims under the Equal Protection Clause and 42 U.S.C. § 1983 (*see* Compl. ¶¶ 147–56) face an insuperable threshold problem. Plaintiffs cannot raise a genuine issue of material fact about one of the two elements for a successful § 1983 claim because none of the Defendants acted "'under color of [State] statute, ordinance, regulation, custom, or usage.'" *Mentavlos v. Anderson*, 249 F.3d 301, 310 (4th Cir. 2001) (quoting *Adickes v. S.H. Kress & Co.*,

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[5] *See* Facts ¶ 90 (Board testimony about how CDS, Inc. must "pay attention to the needs of the parents in terms of what they want to see happen with their kids"); *id.* ¶ 91 (Board testimony that "parents, who was our constituency, who we serve, support the policy"); *id.* ¶ 92 (Board testimony, "[i]n this location" complying with "professional attire requires ladies to wear knee length dresses or skirts with a blouse").

[6] *See* MSJ Ex. 44, Paoletti Expert Rep. at 6–8 (comparing the requirement that girls wear skirts, skorts, or jumpers to uniform policies in effect around the state and national fashion more generally); Facts ¶ 93.

398 U.S. 144, 150 (1970)) (brackets in *Mentavlos*). In addition to this fatal flaw in Plaintiffs' constitutional claims, they have failed as a matter of law to prove that the Uniform Policy even implicates the Equal Protection Clause—much less violates it. The Court should grant Defendants' Motion for Summary Judgment on these claims.

1. Because Defendants did not act "under color of" state law, Plaintiffs' constitutional claims fail as a matter of law.

Defendants are two private corporations and six individuals, none of whom are public officials. (Facts ¶ 1.) To show that these private parties are "subject to suit under § 1983," Plaintiffs must prove that "the[ir] alleged infringement of federal rights" is "'fairly attributable to the State.'" *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982)). This important limitation on § 1983 liability ensures that the Constitution remains, as designed, "a shield that protects private citizens from the excesses of government, rather than a sword that they may use to impose liability upon one another." *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 181 (4th Cir. 2009).

Plaintiffs cannot satisfy this "state action"[7] requirement in the abstract. Rather, the analysis "begins by identifying the specific conduct of which the plaintiff complains." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (quotation marks omitted); *see Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982) (prescribing "careful attention to the gravamen of the plaintiff's complaint" to analyze state action). Plaintiffs must prove "there is such a close nexus between the State and the challenged action" that the "seemingly private behavior may be fairly treated as that of the State itself." *Mentavlos*, 249 F.3d at 310 (quoting *Brentwood*, 531 U.S. at

[7] The Fourteenth Amendment's state-action requirement and § 1983's under-color-of-state-law requirement are interchangeable, and courts often refer to "state action" in § 1983 cases. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 n.2 (2001); *Mentavlos*, 249 F.3d at 310.

295) (quotation marks omitted). They must show, in other words, that the Uniform Policy is state action, not that Defendants act on the state's behalf in other situations.

Given this focus on the specifics of the claim at hand, "examples may be the best teachers" when it comes to state action. *Brentwood Acad.*, 531 U.S. at 296. In this regard, the Ninth Circuit's decision in *Caviness v. Horizon Community Learning Center, Inc.*, 590 F.3d 806 (9th Cir. 2010), exemplifies how to apply § 1983 to actions by a charter school. That decision held that a charter school and its executive director did not act under color of state law when it allegedly violated a teacher's due-process rights. *Id.* at 808. A female student filed a grievance against the teacher alleging improper communications, and the charter school put him on paid leave, eventually letting his contract lapse. *Id.* at 810. Based on the ensuing actions of the school and its executive director, the teacher sued them under § 1983 for deprivation "of his liberty interest in finding and obtaining work without due process." *Id.* at 811. After ordering *sua sponte* briefing on whether the school had acted under color of state law, the district court ruled the school "was not functioning as a state actor in executing its employment decisions" and dismissed the complaint. *Id.* The Ninth Circuit affirmed. *Id.* at 818.

The *Caviness* court analyzed three factors on the way to its conclusion that the charter school did not act under color of state law, and all three lead to the same conclusion in this case. *Id.* at 813–18; *see Mentavlos*, 249 F.3d at 311–12 (outlining "circumstances bearing upon th[is] issue," *i.e.*, the under-color-of-state-law requirement, including factors considered by *Caviness*).

First, the court rejected the argument that, because the relevant state "statutes designate charter schools as 'public schools,'" they are "state actor[s] for all purposes, including employment purposes, as a matter of law." *Caviness*, 249 F.3d at 813–14. The "statutory characterization of a private entity as a public actor for some purposes is not necessarily

dispositive with respect to all of that entity's conduct." *Id.* at 814; *see Brentwood Acad.*, 531 U.S. at 296 (reviewing "cases [that] are unequivocal in showing that" an "expressly private characterization in statutory law" does not determine "the character of a legal entity"); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 n.7 (1974) (finding no state action, despite statutory definition of defendant as "public utility").

North Carolina law also designates a charter school as "a public school," N.C. Gen. Stat. § 115C-218.15(a), but that statutory designation does "not resolve the question whether the state was sufficiently involved in causing the harm to plaintiff[s] such that [the Court] should treat [Defendants] as acting under color of state law," *Caviness*, 590 F.3d at 814 (quotation marks omitted). Similarly, whether or not charter schools, like traditional public schools, receive state-law "governmental immunity" from tort claims has no bearing on the state's involvement with the Uniform Policy. *See Yarbrough v. E. Wake First Charter Sch.*, 108 F. Supp. 3d 331, 336–40 (E.D.N.C. 2015) (discussing "governmental immunity" question). The "core issue presented in this case" is "whether the school's action"—the Uniform Policy—"can fairly be seen as state action." *Rendell-Baker*, 457 U.S. at 838. The state-law characterization of charter schools as "public schools" is unrelated to that issue. *See Sufi v. Leadership High Sch.*, No. C-13-01598 (EDL), 2013 WL 3339441, at *4–9 (N.D. Cal. July 1, 2013) (applying *Caviness*, which considered Arizona charter schools, to California charter schools).

Second, *Caviness* decided that "public education" is not "a function that is 'traditionally and exclusively the prerogative of the state,'" another state-action factor. 590 F.3d at 814 (citing *Jackson*, 419 U.S. at 352). Relying on the Supreme Court's *Rendell-Baker* decision, the Ninth Circuit concluded that the charter school's "provision of educational services is not a function that is traditionally and exclusively the prerogative of the state." *Caviness*, 590 F.3d at 816. The

Fourth Circuit agrees. *See, e.g.*, *Mentavlos*, 249 F.3d at 314 ("[T]o educate civilian students and produce community leaders . . . has never been held to be the exclusive prerogative of a State"); *Logiodice v. Trs. of Me. Cent. Inst.*, 296 F.3d 22, 26–27 (1st Cir. 2002) ("[E]ducation is not and never has been a function reserved to the state.").[8] In fact, North Carolina law confirms that education is not exclusively the state's province. *See* N.C. Gen. Stat. § 115C-548, -556 (allowing private-school attendance to satisfy compulsory-attendance law).

Much like a charter school, the school in *Rendell-Baker* was publicly funded and received nearly all of its students pursuant to a contract with the state. 457 U.S. at 832 & n.1. Every year public funding "accounted for at least 90%, and in one year 99%, of [that school's] operating budget." *Id.* at 832. The state had indeed decided "to provide services for [certain] students at public expense." *Id.* at 842. But this "legislative policy choice in no way ma[de] these services the exclusive province of the State." *Id.* The school's "perform[ing] a function which serves the public [did] not make its acts state action." *Id.*; *see Mentavlos*, 249 F.3d at 317 (finding no state action where defendants "indirectly serve[d] a governmental function").

As in *Rendell-Baker* and *Caviness*, CDS, Inc. "is a private entity that contracted with the state to provide students with educational services that are funded by the state." *Caviness*, 590 F.3d at 815; *see* N.C. Gen. Stat. § 115C-218.15(c). (Facts ¶ 44.) In this case no less than those cases, North Carolina "chose to provide alternative learning environments at public expense," but this "'legislative policy choice in no way makes these services the exclusive province of the State.'" *Caviness*, 590 F.3d at 815 (quoting *Rendell-Baker*, 457 U.S. at 842).

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[8] "[E]ven though 'it is difficult to imagine a regulated activity more essential or more clothed with the public interest than the maintenance of schools,'" it is clear "that the provision of education" is not "traditionally within the exclusive prerogative of the state." *United Auto. Workers v. Gaston Festivals, Inc.*, 43 F.3d 902, 907 (4th Cir. 1995) (quoting *Jackson*, 419 U.S. at 354 n.9) (alterations and quotation marks omitted); *see Santiago v. Puerto Rico*, 655 F.3d 61, 69 (1st Cir. 2011) ("[E]ducation in general is not an exclusive public function because it has long been undertaken by private institutions.").

Third, and finally, *Caviness* considered whether the state's control of—its "entwinement" with or regulation of—the charter school's challenged action satisfied the under-color-of-state-law requirement. 590 F.3d at 816–18; *see Brentwood Acad.*, 531 U.S. at 297.

There is no evidence of direct public entwinement with the Uniform Policy. *See Moore v. Williamsburg Reg'l Hosp.*, 560 F.3d 166, 179–80 (4th Cir. 2009) (finding no entwinement with hospital's decision although state and local government officials were members of governing board). The Uniform Policy was enacted by the Board of Directors of CDS, Inc., a private, nonprofit corporation. No government officials sit on the Board, nor do they control Board elections. (*See* Facts ¶ 1 ("No officer, employee, agent, or subcontractor of the Nonprofit is an officer, employee, or agent of the SBE or DPI.").) When the School first opened, the Board adopted the Uniform Policy based on the desires of the local community, as expressed by parents of prospective students. (*Id.* ¶¶ 47–51.) Soon after Plaintiffs filed this lawsuit, the Board voted not to alter the Uniform Policy, again based on its understanding of parents' desires. (*Id.* ¶ 53.) Plaintiffs offer no evidence that the federal, state, or local government had any entwinement with enacting the Uniform Policy.[9] *See Caviness*, 590 F.3d at 816 n.6 ("[T]he complaint is devoid of allegations that any state actors were involved in [the] governing board, or . . . played any role in the employment decisions of the school.")

Neither do Plaintiffs have any evidence that the state regulates matters directly related to the Uniform Policy. *See id.* at 816 (rejecting argument that employment decision was state

[9] CDS, Inc. and the School certainly receive public funding, but "a private party's dependence upon the state for assistance, even if substantial, does not transform its actions into actions of the state." *Mentavlos*, 249 F.3d at 319; *see Rendell-Baker*, 457 U.S. at 840. CDS, Inc. and the School are "not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government." *Rendell-Baker*, 457 U.S. at 840–41. "[S]ignificant or even total engagement in performing public contracts" will not transform "[a]cts of such private contractors" into "acts of the government." *Id.* at 841.

action based on regulations of "personnel matters of charter schools"). Regulation of a private entity only demonstrates state action if the regulation is directly tied to the alleged deprivation of constitutional rights. In *Caviness*, Arizona regulated charter schools' personnel matters, but none of the regulations showed "that the state was involved in the contested employment actions." *Id.* at 818. As the Fourth Circuit has said, "state regulation unrelated to the alleged constitutional violation, even if extensive, is not sufficient, in itself, to transform private action into state action." *Mentavlos*, 249 F.3d at 320 (quotation marks omitted). The regulation must show the state's "'encouragement, endorsement, and participation' in the challenged actions." *Id.* at 318 (quoting *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 615–16 (1989)).

Plaintiffs cite no North Carolina law related to the Uniform Policy. (*See* Compl. ¶¶ 94–110.) The baseline for charter schools in North Carolina is independence, not regulation. *See* N.C. Gen. Stat. § 115C-218.10 (exempting them "from statutes and rules applicable to" noncharter public schools). The very reason that charter schools exist is to be free to use "different and innovative teaching methods" and to offer "expanded choices in the types of educational opportunities." *Id.* § 218(a)(3), (5); *see Sugar Creek Charter Sch., Inc. v. State*, 214 N.C. App. 1, 20, 712 S.E.2d 730, 742 (2011) (remarking on charter schools' "greater freedom to devise their own educational programs" than traditional public schools). And the charter school's board, not the state, "decide[s] matters related to the operation of the school, including budgeting, curriculum, and operating procedures." N.C. Gen. Stat. § 115C-218.15(d). In fact, the state expressly disclaimed any endorsement of "any method of instruction, philosophy, practices, curriculum, or pedagogy used by the School or its agents." (Facts ¶ 46.) The freedom to enact rules like the Uniform Policy—thus expanding the educational choices available in North Carolina—lies at the heart of the state's generally hands-off approach to charter schools.

Contrast this expansive freedom to innovate in a charter school's daily operations with certain specific requirements of the charter-school statute. *See id.* §§ 115C-218.1 to .2, 218.5 to .8 (charter application and renewal), .35 (facilities leasing), .40 (student transportation), .45 (admissions), .80 (display of U.S. and North Carolina flags), .105 (funding allocation). Not one of these provisions mentions dress or grooming codes like the Uniform Policy. *Cf. id.* § 218.105(b) (prohibiting charter schools from using state funds to purchase real estate); *id.*§§ 218.81.5 to .85 (providing detailed regulations of "courses of study" for noncharter public schools). "[I]n contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest" in the Uniform Policy. *Rendell-Baker*, 457 U.S. at 841. The Uniform Policy was "not compelled or even influenced by any state regulation." *Id.*

The lack of state action is even clearer with respect to RBA. Like CDS, Inc., RBA is a private corporation. (Facts ¶ 1.) Unlike CDS, Inc., however, RBA holds no contract with the state and receives no public funding. *See supra* Section II.B. RBA simply has contracted to provide CDS, Inc. with "necessary educational facilities and management services." (Facts ¶ 27.) As part of this contract, for example, RBA leases facilities to and writes curricula for the School. (*Id.* ¶ 26.) Government contractors like CDS, Inc. are not state actors solely "by reason of their significant or even total engagement in performing public contracts." *Rendell-Baker*, 457 U.S. at 841. *A fortiori*, a private corporation like RBA is certainly not a state actor because it does business with a government contractor. *See Santiago v. Puerto Rico*, 655 F.3d 61, 68 (1st Cir. 2011) (affirming summary judgment for private school bus operator on state-action grounds and noting that "[t]he mere fact that they entered into a contract with the Department to transport public school students does not alter their status"). Most importantly, RBA cannot change the Uniform Policy. (Facts ¶ 52.) The Uniform Policy flows from the Board, and RBA's officers

are not members. (*Id.*) Because the Board is vested with authority over the Uniform Policy, Plaintiffs cannot prove RBA acted under color of state law with regard to the Uniform Policy.

As a matter of law, Defendants did not act under the color of state law in enacting or enforcing the Uniform Policy; that mandates summary judgment on the constitutional claims.

2. Even if the Constitution governed Defendants, the Uniform Policy would not violate the Equal Protection Clause.

By enacting and enforcing a comprehensive Uniform Policy with requirements that distinguish between male and female students, Defendants have engaged in no conduct that implicates Plaintiffs' rights under the Equal Protection Clause. *See, e.g.*, *King v. Saddleback Jr. College Dist.*, 445 F.2d 932, 939 (9th Cir. 1971) (holding that school policy did not "creat[e] any substantial constitutional question" under Equal Protection Clause even though "boys were treated differently than girls" in regard to hair length). In any event, the Uniform Policy satisfies the intermediate-scrutiny test established in a much different context by *United States v. Virginia* ("*VMI*"), 518 U.S. 515 (1996) (striking down university policy that wholly excluded women).

i. The Uniform Policy does not implicate the Equal Protection Clause.

Considering Title IX's indifference to dress and grooming policies, *see supra* Sections III.A.1–III.A.2, it should come as no surprise that they do not implicate the far less specific language of the Fourteenth Amendment. Congress enacted Title IX precisely to address sex discrimination in education programs. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998). While the Fourteenth Amendment prohibits unjustified sex discrimination as well, it would be anomalous to interpret the "more or less vague terms" of the Equal Protection Clause to prohibit conduct that is permitted by Title IX's more specific provisions. *Karr v. Schmidt*, 401 U.S. 1201, 1202 (1971) (Black, J., in chambers). As Justice Black opined, the Equal Protection Clause did not "rob[] the States of their traditionally recognized power to run their school

systems in accordance with their own best judgment." *Karr*, 401 U.S. at 1202; *cf. Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 507–08 (1969) (contrasting the "direct, primary First Amendment rights" implicated by expressive-armband prohibition with the "regulation of the length of skirts or the type of clothing").

Generally, "children do not possess the same rights as adults." *Schleifer ex rel. Schleifer v. City of Charlottesville*, 159 F.3d 843, 847 (4th Cir. 1998). Particularly in public schools, children's constitutional rights must be viewed in context. *See Morse v. Frederick*, 551 U.S. 393, 396–97 (2007) (recounting that students' rights "must be applied in light of the special characteristics of the school environment" (quotation marks omitted)); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655–56 (1995) ("[W]hile children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,' the nature of those rights is what is appropriate for children in school." (ellipsis in original) (quoting *Tinker*, 393 U.S. at 506)). Children attending public elementary and secondary schools have narrower freedoms than adults. *See Blau v. Ft. Thomas Pub. Sch. Dist.*, 401 F.3d 381, 393 (6th Cir. 2005) ("It long has been the case that constitutional claims generally receive less rigorous review in the secondary and middle school setting than they do in other settings."). Otherwise unconstitutional conduct is often permissible when performed by a school. *See, e.g.*, *Acton*, 515 U.S. at 656–57 (Fourth Amendment); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (First Amendment).

Public schools have more expansive power to regulate the conduct of schoolchildren than the government has over adults. Schools hold a "custodial and tutelary" power, which "permit[s] a degree of supervision and control that could not be exercised over free adults." *Acton*, 515 U.S. at 655. This leaves schools, acting *in loco parentis*, "with the power and indeed the duty to 'inculcate the habits and manners of civility'" in schoolchildren. *Id.* (quoting *Fraser*, 478 U.S. at

681). Especially viewed under this lessened constitutional scrutiny, a school's duty to inculcate "the habits and manners of civility," *id.*, surely comprehends the power to require parent-approved standards of dress and grooming that are "consistent with community norms" and "are part of a comprehensive, evenly-enforced grooming code that imposes comparable burdens on both males and females alike," *Hayden*, 743 F.3d at 581. *See Harper*, 655 F. Supp. at 1356 (rejecting equal-protection challenge to sex-differentiated dress code that "require[d] all students to dress in conformity with the accepted standards of the community"); 3 James Rapp, *Education Law* § 9.04[8][b][ii] ("Recognizing that the state has somewhat more control over the conduct of minors than it does over adults, courts have upheld [grooming] regulations notwithstanding difference in application based on the sex of the student.").

No court of appeals has held that a comprehensive dress and grooming code like the Uniform Policy violates the Equal Protection Clause, as long as it is evenly applied. *See Hayden*, 743 F.3d at 579–80 (noting that the court was "neither speaking to that argument," nor was it "foretelling the result in a case in which [that argument] is properly asserted and developed"); *Fagan v. Nat'l Cash Register Co.*, 481 F.2d 1115, 1117–19 (D.C. Cir. 1973) (surveying landscape of potential constitutional challenges to sex-differentiated appearance codes, including under Equal Protection Clause, and rejecting them all).[10] As already detailed, the Uniform Policy comprehensively regulates the dress and appearance of students at the School, with a variety of items that both boys and girls must observe. *See supra* Section III.A.3.

[10] *Compare King*, 445 F.2d at 934, 939 (rejecting equal-protection challenge to "'Personal Appearance' standards" that contained "seven items to be observed by boys and five items to be observed by girls"), *with Crews v. Cloncs*, 432 F.2d 1259, 1261–62, 1266 & n.2 (7th Cir. 1970) (finding equal-protection violation where school, which had no comprehensive policy, refused to readmit male student with long hair). The Fourth Circuit has not considered the Equal Protection Clause's application to comprehensive, sex-differentiated dress and grooming codes, but it has held that they do not violate Title VII. *See Earwood*, 539 F.2d at 1350–51; *cf. Massie v. Henry*, 455 F.2d 779, 781–82 (4th Cir. 1972) (relying on substantive-due-process reasoning abrogated by *Washington v. Glucksberg*, 521 U.S. 702 (1997)).

Plaintiffs have not created a genuine issue of material fact about whether the Uniform Policy "was applied in other than in an even-handed manner." *King*, 445 F.2d at 939. Barring that, the comprehensive requirements of the Uniform Policy, including some sex-differentiated particulars, do not implicate the Equal Protection Clause. *Id.*

ii. The Uniform Policy does not implicate intermediate scrutiny.

The Supreme Court's *VMI* decision holds that courts must "carefully inspect[] official action that closes a door or denies opportunity to women (or to men)." 518 U.S. at 532. The Court's reasoning demonstrates that the Uniform Policy does not trigger *VMI*'s intermediate-scrutiny standard. *See id.* at 531. The Uniform Policy regulates schoolchildren—not university students—and it does not exclude girls from educational opportunities.

VMI did not cast constitutional doubt upon every imaginable regulation of student life with sex-differentiated particulars; it certainly did not direct its "skeptical scrutiny" at a rule like the Uniform Policy. *Id.* The Virginia Military Institute offered a one-of-a-kind college education—and offered it only to men. *See id.* at 547 ("The constitutional violation in this suit is *the categorical exclusion of women from an extraordinary educational opportunity* afforded men." (emphasis added)). To ameliorate that exclusion, Virginia opened an inferior women's school. *Id.* at 553. That women's school was "a pale shadow" of VMI "in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence." *Id.* (quotation marks omitted). Virginia created a two-caste educational system that "perpetuate[d] the legal, social, and economic inferiority of women," *id.* at 534, "clos[ing] a door" and "den[ying] an opportunity to women," *id.* at 532. "Women seeking and fit for a VMI-quality education [could] not be offered anything less" under the Equal Protection Clause. *Id.* at 557.

The Supreme Court left no doubt about the limits of its reasoning: "We address *specifically and only an educational opportunity recognized . . . as 'unique,'* an opportunity

available only at Virginia's premier military institute, the Commonwealth's sole single-sex public university or college." *Id.* at 533 n.7 (emphasis added). Notably, the Court simultaneously highlighted its desire to protect states' "prerogative evenhandedly to support diverse educational opportunities." *Id.*

VMI does not apply to the Uniform Policy. Plaintiffs do not dispute that the School offers "an extraordinary educational opportunity" to boys and girls alike. *Id.* at 553. That is why they chose to attend the School instead of the noncharter public schools in the area. (*See* Compl. ¶¶ 27, 29, 31.) There is no evidence that girls are anything less than full participants in the School's vibrant educational programs. Girls now outnumber boys at the School. (Facts ¶ 117.) Academically, girls at the School outperform their peers nationally and around the state. (Duncan-Hively, Hively Expert Rep. at 20–24.) A higher percentage of the School's female students than female students statewide are both "Grade Level Proficient" and "College and Career Ready." (Facts ¶ 115.) And female students perform on par with or better than their peers in Brunswick County Public Schools. (Wang Expert Rep. at 4.) Beyond academics, girls excel in extracurricular activities like athletics. The cheerleading squad associated with the School has won nine national titles, and the coed archery team has won the state championship eight consecutive years. (Facts ¶ 116.) These facts lead to a straightforward conclusion: The Uniform Policy neither "closes a door [n]or denies opportunity to" the School's female students. *VMI*, 518 U.S. at 532.

VMI's limited application of intermediate scrutiny sought to preserve "diverse educational opportunities." 518 U.S. at 533 n.7. But if Plaintiffs succeed on their constitutional claims, large swaths of public educational policies would become questionable. For example, the comprehensive dress and grooming code applicable to cadets at the United States Military

Academy contains a variety of sex-specific particulars. *See* Army Reg. 670-1, *Applicability*, at i (May 25, 2017).[11] Those include the requirement that female cadets (and only female cadets) wear skirts as part of their formal "blue mess" uniform, which is "worn for black-tie functions and corresponds to a civilian tuxedo." Army Reg. 670-1 ¶ 15-3; *compare id.* ¶ 15-2 (female blue mess uniform), *with id.* ¶ 14-2 (male blue mess uniform). If the Constitution does not permit the Uniform Policy in an elementary school, then it at least casts doubt upon the Army's ability to require female cadets at West Point to wear skirts to formal dinners.

Moreover, since *VMI*, the Department of Education has promulgated regulations that allow Title IX funding recipients to operate entirely single-sex "nonvocational elementary or secondary school[s]." 34 C.F.R. § 106.34(c)(1). Under these regulations, CDS, Inc. could choose to entirely exclude either sex from the School, without regard to the existence of a substantially equal charter school for the excluded sex. *Id.* § 106.34(c)(2). Yet none of the handful of courts to consider lawsuits under ED's single-sex regulations have held that they violate the Equal Protection Clause. *See, e.g.*, *A.N.A. ex rel. S.F.A. v. Breckinridge Cty. Bd. of Educ.*, 833 F. Supp. 2d 673, 678 (W.D. Ky. 2011). If *VMI*'s holding subjects the Uniform Policy to heightened scrutiny, then the same would certainly be true for the wholesale exclusion of a student from the School on the basis of sex. Plaintiffs' success on their equal-protection claims would put these and all other programs that distinguish between students on the basis of sex in constitutional danger. Absent clear and binding precedent, there is no good reason for holding that the Equal Protection Clause mandates searching, federal-court scrutiny of local school dress codes at a level far beyond that of Title IX, the education-specific federal statute.

[11] http://www.apd.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN6173_AR670-1_Web_FINAL.pdf.

iii. The Uniform Policy would satisfy intermediate scrutiny.

In any event, the Uniform Policy would satisfy *VMI*'s standard, which requires a showing that the Uniform Policy "'serves important governmental objectives and is substantially related to achievement of those objectives,'" even if it applied. *Knussman v. Maryland*, 272 F.3d 625, 635 (4th Cir. 2001) (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)) (alterations omitted).

Most discussions of justifications for school dress or grooming codes arise under the First Amendment's free-speech clause. The courts in these decisions apply an intermediate level of scrutiny that closely resembles *VMI*'s standard. They require the school to show that its "uniform policies advance important government interests unrelated to the suppression of free speech." *Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419, 435 (9th Cir. 2008); *accord Blau*, 401 F.3d at 391; *Canady v. Bossier Par. Sch. Bd.*, 240 F.3d 437, 443 (5th Cir. 2001). If anything, the free-speech standard is more difficult for a school to satisfy than *VMI*'s standard. *See Jacobs*, 526 F.3d at 435 (requiring uniform policy to "effect as minimal a restriction on students' free expression as possible"); *accord Blau*, 401 F.3d at 391; *Canady*, 240 F.3d at 443.

The Uniform Policy serves the same important interests that have satisfied First Amendment scrutiny. These interests include: "bridging socio-economic gaps between families within the school district, focusing attention on learning, increasing school unity and pride, enhancing school safety, promoting good behavior, reducing discipline problems, improving test scores, improving children's self-respect and self-esteem, helping to eliminate stereotypes and producing a cost savings for families." *Blau*, 401 F.3d at 391; *see Canady*, 240 F.3d at 443–44 (affirming summary judgment for school board that enacted its uniform policy "to increase test scores and reduce disciplinary problems"); *see also Jones ex rel. Cooper v. W.T. Henning Elem. Sch. Principal*, 721 So. 2d 530, 531–32 (La. App. 1998) (relying on similar reasoning to reject federal equal-protection challenge to school policy forbidding male students from wearing

earrings).[12] One First Amendment decision allowed a school to discriminate against nonobscene messages on student clothing because of the school's interest in regulating viewpoints that are "inconsistent with and counter-productive to education." *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 467, 470–71 (6th Cir. 2000).

The undisputed facts show that the Board enacted the Uniform Policy to further interests similar to those that have withstood heightened First Amendment scrutiny. Members of the Board testified that the Uniform Policy "instills discipline and keeps order in the classroom." (Facts ¶ 119.) It prevents students from "call[ing] attention to them[selves] and away from the educational endeavor." (*Id.* ¶ 123.) The Uniform Policy "helps promote a sense of pride and of team spirit as every student is a member of the academic team" (*id.* ¶ 120); it supports "student learning" (*id.* ¶ 121); and it reduces economic pressures on parents to keep up with fashion trends (*id.* ¶ 122). The sex-differentiated requirements in the Uniform Policy cannot be viewed in isolation, but instead "work seamlessly together in a coordinated fashion in a disciplined environment that has mutual respect between boys and girls and between each other as students." (*Id.* ¶ 125; *see id.* ¶ 124.) Reflecting the "difference between the sexes," the Uniform Policy helps children to "act more appropriately" towards the opposite sex. (*Id.* ¶ 126.) Taking away those visual cues that signify sex distinction would hinder "respect between the two sexes at that age," when children are learning proper behavior. (*Id.* ¶ 127.)

These important objectives—instilling academic discipline, keeping classroom order, reducing distractions, encouraging team spirit, reducing economic pressure, promoting respectful relationships with the opposite sex—will satisfy intermediate scrutiny as long as the Uniform

[12] ED itself has recognized that uniform policies serve important interests such as "instilling students with discipline," and helping them "resist peer pressure," and "concentrate on their school work." *Jacobs*, 526 F.3d at 436 n.38 (quoting U.S. Dep't of Educ., *Manual on School Uniforms* (1996)).

Policy is "'substantially related to [their] achievement.'" *Knussman*, 272 F.3d at 635 (quoting *Craig*, 429 U.S. at 197). The free-speech cases regarding school dress codes again provide a useful analogy. In *Canady*, the Fifth Circuit affirmed summary judgment for the school board because of affidavits "present[ing] statistics showing that, after one year of implementing school uniforms in several parish schools, discipline problems drastically decreased and overall test scores improved." 240 F.3d at 443; *see Jacobs*, 526 F.3d at 435–36 (affirming summary judgment for school district based on "affidavits from school personnel confirming . . . that the [uniform] policies have, in fact, been effective"). Similarly, the Sixth Circuit in *Blau* affirmed summary judgment for a school district that "presented affidavits from three teachers who agreed that the dress code has had a positive impact on the . . . learning environment." 401 F.3d at 392. Those teachers "stated that the dress code ha[d] made it easier for teachers to 'keep the focus of the students on instruction,'" for example, and that it had "'increased school spirit and pride' and has 'increased the students' respect for themselves and their respect for others.'" *Id.*

Those courts accorded deference to the observations of teachers and administrators about the uniform policy's day-to-day effectiveness in achieving its stated goals and also looked to statistics about student performance. Taking student performance first, Plaintiffs themselves admit that the School has "fantastic test scores." (Facts ¶ 111.) The data back this assessment. The School's "girls tend to outperform their peers statewide and the boys in their own school." (Duncan-Hively, Hively Expert Rep. at 19.) In seven of the nine grades from kindergarten to eighth grade, girls at the School equaled or exceeded the median score for boys. (*Id.*) Related to this point, in both reading and math, "[t]here is no statisical[ly] significant evidence indicating that female students at CDS are not as competitive to their male peers as the female students at [Brunswick County Public Schools] to their male peers." (Wang Expert Rep. at 5.) The School

is "usually the highest scoring [public] school in Brunswick County." (Facts ¶ 112.) One Board member noted the School's success at "deliver[ing] high quality education," as attested by the waiting list to enroll. (*Id.* ¶ 129.)

The everyday experience of the School's faculty and staff with the Uniform Policy confirms that the Uniform Policy is substantially related to the School's academic success. The School's assistant headmasters testified that they had "observed changes with student learning" on days when the Uniform Policy is suspended for a special occasion. (*Id.* ¶ 131.) Elementary assistant headmaster, Ms. Stroup described students on these days as "rowdy," "excited," and "distracted." (*Id.* ¶ 132.) Her middle-school counterpart, Ms. Walton agreed that, on such days, "[s]tudents tend to be less focused in the sense of being a little bit . . . sillier and excited, ... and they are very much more distracted on those days." (*Id.* ¶ 133.) According to these first-hand accounts of the day-to-day educational benefits of the Uniform Policy, changing the Uniform Policy risks "driving away clients" (*id.* ¶ 129)—the parents who keep "telling [the Board] that they like [the Uniform Policy] the way it is" (*id.* ¶ 130)—by unintentionally lowering educational quality. The chairman of the Board, Mr. Spencer, described the Uniform Policy's specific requirements as part of the School's holistic educational vision, "one facet of where [it is] trying to instill discipline in these kids." (*Id.* ¶ 128.) Because it is tied up with the School's distinctive and highly successful traditional-values educational program, changing the Uniform Policy risks undermining the School's unique program. (*See id.*)

These facts demonstrate that there is no dispute about whether the Uniform Policy is substantially related to important government interests. Defendants are therefore entitled to judgment as a matter of law on Plaintiffs' constitutional claims.

C. Defendants are entitled to judgment as a matter of law on Plaintiffs' state-law claims.

Plaintiffs' claims under North Carolina law fail for similar reasons. (*See* Compl. ¶¶ 167–89.) The Court should grant Defendants summary judgment against Plaintiffs' claims based on the North Carolina Constitution, the Charter Agreement, and the Management Agreement.

1. The Uniform Policy does not violate the guarantee of equal protection in the North Carolina Constitution.

Defendants are entitled to judgment as a matter of law on Plaintiffs' claims under the North Carolina Constitution, which run parallel to their federal constitutional claims. (*See* Compl. ¶¶ 167–73.) As with the U.S. Constitution, the "fundamental purpose" for the adoption of the North Carolina Constitution "was to provide citizens with *protection from the State's encroachment* upon [their] rights." *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 290 (1992) (emphasis added). So just like the rights guaranteed by its federal counterpart, "[t]he civil rights guaranteed by the Declaration of Rights in Article I of [the North Carolina] Constitution are individual and personal rights entitled to protection against state action." *Id.* at 782, 413 S.E.2d at 289; *see Gibbs v. Waffle House*, No. 5:15-CV-8-BO, 2015 WL 1951744, at *2 (E.D.N.C. Apr. 29, 2015) ("In order to establish a violation of North Carolina's Declaration of Rights, there also must be state action."). To prevail on their state constitutional claims, then, Plaintiffs must prove that the Uniform Policy is state action. *See Lea v. Grier*, 156 N.C. App. 503, 509, 577 S.E.2d 411, 416 (2003) (state equal-protection claim requires action by "the government"); *Freeman v. Duke Power Co.*, 114 F. App'x 526, 534 (4th Cir. 2004) ("[Plaintiff] has no cognizable action based on the state constitution against his wholly private employer.").

State and federal law are the same on this issue. *See Weston v. Carolina Medicorp, Inc.*, 102 N.C. App. 370, 376, 402 S.E.2d 653, 657 (1991) (applying federal law to state-action question under North Carolina Constitution); *Gibbs*, 2015 WL 1951744, at *2–3 (same). For the

reasons already discussed in relation to Plaintiffs' claims under the U.S. Constitution, they have failed to create a genuine issue of material fact about whether the Uniform Policy is state action. *See supra* Section III.B.1. This failure entitles Defendants to judgment as a matter of law.

The claims also lack substantive merit. "North Carolina courts have consistently interpreted the due process and equal protection clauses of the North Carolina Constitution as synonymous with their Fourteenth Amendment counterparts." *Tri Cty. Paving, Inc. v. Ashe Cty.*, 281 F.3d 430, 435 n.6 (4th Cir. 2002); *see, e.g.*, *Dep't of Transp. v. Rowe*, 353 N.C. 671, 675, 549 S.E.2d 203, 207 (2001) ("To determine if a regulation violates either of these [equal protection] clauses, North Carolina courts apply the same test."). Regarding sex-discrimination claims, in particular, the North Carolina Supreme Court has articulated the same test, and relied on the same U.S. Supreme Court precedent, as the Fourth Circuit. *See, e.g.*, *Rowe*, 353 N.C. at 675, 549 S.E.2d at 207 (asking whether allegedly discriminatory "regulation is substantially related to an important government interest"); *J.W. v. Johnston Cty. Bd. of Educ.*, No. 5:11-CV-707-D, 2012 WL 4425439, at *8 (E.D.N.C. Sept. 24, 2012) (concluding that "plaintiffs must make the same factual allegations" to state equal-protection claim under either federal or North Carolina law). Plaintiffs' state-law constitutional claims fail on the merits for the same reasons as their federal constitutional claims. *See supra* Section III.B.2.

These claims fail for an additional reason peculiar to North Carolina law. The North Carolina Constitution provides a direct cause of action only "in the absence of an adequate state remedy." *Corum*, 330 N.C. at 782, 413 S.E.2d at 289. As an element of their state-law constitutional claims, "plaintiff[s] bear[] the burden of establishing there is no 'adequate' alternative state law remedy." *Cannon v. Village of Bald Head Island*, No. 7:15-CV-187-H, 2017 WL 2712958, at *9 (E.D.N.C. June 22, 2017). Because Plaintiffs have made no attempt to

demonstrate the absence of an adequate, alternative state-law remedy, their direct claim under the North Carolina Constitution cannot proceed. *See Patterson v. City of Gastonia*, 220 N.C. App. 233, 242–47, 725 S.E.2d 82, 90–92 (2012) (affirming summary judgment against plaintiffs who had not "establish[ed] that they lacked an adequate alternative state remedy").

The very structure of the Complaint demonstrates the existence of an adequate alternative remedy. Plaintiffs have brought breach-of-contract claims for the same conduct as their direct constitutional claims. (*See* Compl. ¶¶ 180, 189.) Whether or not those contract claims will ultimately succeed, they "provide the possibility of relief under the circumstances." *Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 340, 678 S.E.2d 351, 356 (2009). That possibility of relief prohibits Plaintiffs from bringing their direct state-constitutional claims. *See Wilcox v. City of Asheville*, 222 N.C. App. 285, 299–300, 730 S.E.2d 226, 237 (2012) ("[A]dequacy is found not in success, but in chance."); *Hughes v. Bedsole*, 48 F.3d 1376, 1383 n.6 (4th Cir. 1995) (holding that plaintiff had no state-law equal-protection claim because she had adequate state remedy in her related statutory claim); *Cannon*, 2017 WL 2712958, at *9 (granting summary judgment against state-law free-speech claim because related breach-of-contract claim was "an available adequate state remedy"). Defendants are thus entitled to judgment as a matter of law on Plaintiffs' claims under the North Carolina Constitution.

2. Defendants are entitled to judgment as a matter of law on Plaintiffs' breach-of-contract claims.

Because Plaintiffs are not intended third-party beneficiaries of the CDS, Inc.'s "Charter Agreement" with the state or its "Management Agreement" with RBA, they cannot prevail on their claims for breach of either contract. (*See* Compl. ¶¶ 167–89.) Beyond this fundamental problem, Plaintiffs have predicated these claims on proof that the Uniform Policy violates some provision of state or federal law. (*See* Compl. ¶¶ 180, 189.) For the reasons already laid out,

they have failed to show any such violation. Defendants are entitled to judgment as a matter of law on Plaintiffs' breach-of-contract claims.

i. Because Plaintiffs are not intended third-party beneficiaries, they cannot recover for breach of either contract.

As third parties to these contracts, Plaintiffs have "no cause of action upon the contract[s] to enforce [them], or sue for [their] breach," unless they were "made for [Plaintiffs'] benefit." *Am. Trust Co. v. Catawba Sales & Processing Co.*, 242 N.C. 370, 379, 88 S.E.2d 233, 239 (1955). Plaintiffs cannot bring these claims simply by showing that the contracts in fact benefit them; they must prove that the contracts were "intended for [their] direct benefit," *Raritan River Steel Co. v. Cherry, Bekaert & Hollan*, 329 N.C. 646, 651, 407 S.E.2d 178, 181 (1991) (citations omitted)—that "the contracting parties intended to confer a legally enforceable benefit on" them, *Babb v. Bynum & Murphrey, PLLC*, 182 N.C. App. 750, 753–54, 643 S.E.2d 55, 57 (2007) (citations omitted). The intent of CDS, Inc., RBA, and the state as to whether they intended to allow Plaintiffs to bring a lawsuit for breach is determinative. *See Venturtech II v. Deloitte Haskins & Sells*, 790 F. Supp. 576, 581 (E.D.N.C. 1992) ("[T]he parties' 'intent to benefit' is the determining factor in whether a third-party beneficiary is entitled to recover on the contract."). The contracts are "'construed strictly against the party seeking enforcement,'" namely, Plaintiffs. *Id.* (quoting *Raritan River Steel*, 329 N.C. at 652, 407 S.E.2d at 182).

Both contracts indicate that the parties entered into them to establish the terms of CDS, Inc.'s relationship with the state and with RBA, not to directly benefit Plaintiffs. The Charter Agreement (*see* Facts ¶ 1) details the oversight relationship that the state would have with CDS, Inc. It lays out general administrative topics like: the structure of the Board (Charter Agr. ¶¶ 4.1–.4); the notifications CDS, Inc. must give the state (*id.* ¶¶ 11.1–.7); and insurance, health-code compliance, facilities, licensing, and indemnity requirements (*id.* ¶¶ 13.1–16.5, 19.1–.3).

Only a handful of provisions even mention students, related to specific topics like special-needs education, transportation, and student due process. (*Id.* ¶¶ 9.1–.4, 18, 20.1–.4.) The provision upon which Plaintiffs base their claim is a generalized guarantee of compliance with all applicable laws, hardly an indication that the state and CDS, Inc. intended to allow third-party lawsuits for breach of the Charter Agreement: "The Nonprofit shall ensure that the Public Charter School complies with the Federal and State Constitutions and all applicable federal laws and regulations . . . ." (*Id.* ¶ 5.1.) Throughout the Charter Agreement, specific language indicates that the state and CDS, Inc. intended "revocation of the charter" as the remedy for breach, not a lawsuit by Plaintiffs. (*Id.* ¶ 6; *see id.* ¶¶ 7.1, 10, 11.7, 26.1–.4.) In particular, any "[v]iolation of law" is grounds to "terminate this Charter." (*Id.* ¶ 26.1.)

The Management Agreement (*see* Facts ¶ 1) similarly defines RBA's relationship with CDS, Inc., not with Plaintiffs. Article IV of this agreement details the "role of RBA," making it "responsible and accountable to the Board"—not to individual students like Plaintiffs. (Mgmt. Agr. ¶ 4.01.) The Management Agreement could not possibly intend to subject RBA to a claim based on the Uniform Policy because it expressly provides that such "rules, regulations, and procedures" are "to be adopted by CDS [Inc.] in the sole discretion of the Board." (*Id.* ¶ 4.09.) And much like the Charter Agreement, the Management Agreement specifically provides that "CDS [Inc.] may terminate this Agreement" if "RBA shall fail to remedy a material breach." (*Id.* ¶ 8.02.) Far from intending to confer a direct, legally enforceable benefit upon Plaintiffs, this provision suggests that only CDS, Inc. holds a remedy for a breach of the Management Agreement by RBA. Particularly given the strict construction required by North Carolina law, *see Venturtech II*, 790 F. Supp. at 581, none of these provisions indicate that Plaintiffs are intended third-party beneficiaries of either contract.

Plaintiffs' breach-of-contract claims ask this Court to reach a novel result: to allow charter-school students to sue for breach of the charter or of a management agreement. *See Montoya ex rel. S.M. v. Española Pub. Sch. Dist. Bd. of Educ.*, 861 F. Supp. 2d 1307, 1311 (D.N.M. 2012) (remarking that "there is little case law on the area" of students suing as third-party beneficiaries to school contracts more generally). North Carolina courts have not yet considered whether this is possible. Decisions from other jurisdictions with similar third-party-beneficiary law suggest that it is not. *See, e.g.*, *Schilling ex rel. Foy v. Emp'rs' Mut. Cas. Co.*, 569 N.W.2d 776, 783–84 (Wis. App. 1997) (collecting cases). The *Schilling* court, for example, reversed the denial of summary judgment and held that a student was not an intended third-party beneficiary of a teacher's employment contract. *Id.* at 778, 781. The *Montoya* court dismissed claims by students for breach of a school district's contracts with a private security firm, because those students were not intended third-party beneficiaries. 861 F. Supp. 2d at 1311–12.

Courts have likewise refused to allow students to sue as third-party beneficiaries based on alleged failures to provide educational services or civil-rights violations. For example, a court granted summary judgment against a claim by a student based on a contract between a private school and a county for the education of autistic children. *Smith v. James C. Hormel Sch. of Va. Inst. of Autism*, No. 3:08-CV-00030, 2010 WL 1257656, at *2 (W.D. Va. Mar. 26, 2010). That contract "did not provide for the education of any particular student, but instead set up the structure by which [the county] could purchase services from [the private school]." *Id.* at *18.

In an analogous sex-discrimination context, a federal district court considered a breach-of-contract claim by a nursing student against a nursing school, the program run by the school, and the hospital where the school conducted the program. *Consolmagno v. Hosp. of St. Raphael*, No. 3:11-CV-109 (PCD), 2011 WL 4804774, at *1 (D. Conn. Oct. 11, 2011). The agreement

that governed the relationship between the school, the program, and the hospital provided that the hospital would "not discriminate or permit discrimination against any person . . . on the grounds of . . . sex . . . in any manner prohibited by [state or federal] laws." *Id.* (ellipses in original). The court denied the nursing student's request to add a breach-of contract claim to her complaint because she was not a third-party beneficiary to the agreement. *Id.* at *9.

As in these decisions, Plaintiffs' novel attempt to invoke third-party beneficiary status fails as a matter of law.

ii. Because the Uniform Policy does not violate state or federal law, Defendants have not breached any contract.

Summary judgment is also warranted for another, independent reason. Plaintiffs allege that Defendants breached these contracts because the Uniform Policy violates "the U.S. Constitution, Title IX, the Title IX implementing regulations of [ED] and USDA, the North Carolina Constitution, and the North Carolina Charter School Statute."[13] (Compl. ¶¶ 180, 189.) This Memorandum has already explained that the Uniform Policy complies with the federal and state constitutions, and with Title IX and its implementing regulations.

This leaves only the North Carolina Charter School Statute's nondiscrimination provision. *See* N.C. Gen. Stat. § 115C-218.55. No court has ever cited this provision—let alone applied it to a rule like the Uniform Policy. Because North Carolina follows federal antidiscrimination law in other statutory contexts, it is unlikely that § 218.55's meaning would diverge from Title IX, which as discussed above does not govern school appearance policies.

[13] Regarding the Management Agreement, Plaintiffs recursively allege that RBA breached it by violating "the Charter Agreement." (Compl. ¶ 189.) But the only alleged violation of the Charter Agreement is that the Uniform Policy violated the named provisions of state and federal law. (*See id.* ¶¶ 181–88.) Because the Uniform Policy does not violate them, Plaintiffs have raised no genuine issue of material fact that RBA breached the Management Agreement by violating the Charter Agreement.

The closest analogue to this provision is North Carolina's declaration that "[i]t is the public policy of this State to protect and safeguard the opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of" various protected characteristics. N.C. Gen. Stat. § 143-422.2. The North Carolina Supreme Court has held that Title VII's standards govern wrongful-termination lawsuits based on this provision. *N.C. Dep't of Corr. v. Gibson*, 308 N.C. 131, 141, 301 S.E.2d 78, 85 (1983); *see Hughes*, 48 F.3d at 1383 (North Carolina "has explicitly adopted the Title VII evidentiary standards in evaluating a state claim under § 143-422.2"). This adoption of federal law extends beyond Title VII to other federal antidiscrimination statutes. *See Sweet v. Bank of Am., N.A.*, No. 1:09-CV-148, 2010 WL 11541904, at *2 (M.D.N.C. Mar. 18, 2010) (applying standard from Age Discrimination in Employment Act to state-law claim).

In light of this pattern of applying federal antidiscrimination law to claims based on North Carolina's statutes, Title IX principles will control the Charter School Statute's nondiscrimination provision, N.C. Gen. Stat. § 115C-218.55. For a host of reasons, the Uniform Policy does not violate Title IX principles (or those of Title VII), *see supra* Section III.A, and therefore does not violate this provision. Plaintiffs have raised no genuine issue of material fact about breaches of either the Charter Agreement or the Management Agreement.

IV. CONCLUSION

As explained above, the Court should grant Defendants' Motion for Summary Judgment because they are entitled to judgment as a matter of law on all claims by Plaintiffs.

Respectfully submitted, this 29th day of November, 2017.

BAKER BOTTS L.L.P.

By: /s/ *Aaron M. Streett*

Aaron M. Streett
(*LR 83.1(a) special appearance*)
Texas State Bar #24037561
J. Mark Little
(*LR 83.1(a) special appearance*)
Texas State Bar #24078869
910 Louisiana Street
Houston, Texas 77002
713.229.1234
713.229.1522 (facsimile)
aaron.streett@bakerbotts.com
mark.little@bakerbotts.com

Vincent M. Wagner
(*LR 83.1(a) special appearance*)
Texas State Bar #24093314
2001 Ross Avenue, Suite 700
Dallas, Texas 75201
214.953.6000
214.953.6503 (facsimile)
vincent.wagner@bakerbotts.com

Counsel for Defendants

KNOTT & BOYLE, PLLC

/s/ *W. Ellis Boyle*

W. Ellis Boyle
NC Bar #: 33826

/s/ *Ben Van Steinburgh*

Ben Van Steinburgh
NC Bar #: 44869
4800 Six Forks Road, Suite 100
Raleigh, North Carolina 27609
Telephone: 919-783-5900
Fax: 919-783-9650
Email: ellis@knottboyle.com
ben@knottboyle.com

Local Civil Rule 83.1 Counsel for Defendants

CERTIFICATE OF SERVICE

On November 29, 2017, I electronically filed this document using the Court's CM/ECF system, which will serve all counsel of record.

/s/ *Aaron M. Streett*
Aaron M. Streett