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, et al.; Plaintiffs, v. CHARTER DAY SCHOOL, INC., et al.; Defendants.	**PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF SUMMARY JUDGMENT**

INTRODUCTION

In this challenge to the Skirts Requirement of Charter Day School's ("CDS") Uniform Policy, three girls have sought the option to wear pants. The need for litigation would have been obviated had Defendants granted them that choice when they first requested it in 2015. Defendants have refused to allow them that option for one reason: Defendants' desire to enforce "traditional values," and specifically, "societal norms . . . about the difference between the sexes." *See* Defs.' Mem. in Opp. to Pls.' Mot. for Summ. J., DE 170 at 39 (internal quotations omitted).

As fully briefed in Plaintiffs' Memorandum in Support of Summary Judgment,[1] the Skirts Requirement violates Title IX and the Constitution. Defendants' principal justifications for the Skirts Requirement are facially illegitimate under the Equal Protection Clause. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692-93 (2017). They have otherwise failed to establish that

[1] Plaintiffs' Motion for Summary Judgment, accompanying Memorandum in Support of Summary Judgment, DE 149 & DE 150, and Memorandum in Opposition to Defendants' Motion for Summary Judgment, DE 177, are fully incorporated herein.

the Skirts Requirement is substantially related to furthering the interests underlying the Uniform Policy as a whole, as there is no evidence that permitting girls the option to wear pants would have any effect on the school's ability to achieve those goals. Moreover, Plaintiffs' unrebutted testimony demonstrates the harms the Skirts Requirement has imposed, causing them discomfort and distraction in class and inhibiting them from engaging in physical play, such as climbing monkey bars or playing soccer, during recess—harms that make the burden of justifying the Skirts Requirement even heavier. For these same reasons, the Skirts Requirement violates Title IX's prohibition on discrimination that denies girls full benefits of educational activities. None of the arguments or evidence Defendants raise permits a different result. Because there is no disputed issue of material fact, and Plaintiffs are entitled to judgment as a matter of law, Plaintiffs ask that this Court grant Plaintiffs' motion for summary judgment on all claims.

ARGUMENT

I. THE SKIRTS REQUIREMENT VIOLATES THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION.

A. Defendants are State Actors.

As administrators and operators of a public charter school, Defendants have acted under color of state law in imposing the Skirts Requirement. *See* DE 177 at 7.[2] That Defendants are state actors is not altered by the fact that CDS is a charter school because, as this Court has recognized, North Carolina law specifically designates charter schools as public schools. *See* DE 91 at 12; *accord Yarbrough v. E. Wake First Charter Sch.*, 108 F. Supp.3d 331, 337 (E.D.N.C. 2015); *Sugar Creek Charter Sch., Inc. v. State*, 214 N.C. App. 1, 6, 712 S.E.2d 730, 734 (2011). Defendants Charter Day School, Inc. ("CDS, Inc.") and its Board of Trustees ("Board

[2] Contrary to Defendants' assertion, state action is squarely addressed on page 25 of Plaintiffs' Memorandum in Support of Summary Judgment, and briefed even more fully in their opposition to Defendants' motion. *See* DE 151 at 25; DE 177 at 6-11.

Members") thus serve as state actors in their role of providing a free, general public education to students at CDS—which is "an historical, exclusive, and traditional state function." *Riester v. Riverside Cmty. Sch.*, 257 F. Supp. 2d 968, 972 (S.D. Ohio 2002); *see also McNaughton v. Charleston Charter Sch. For Math and Science, Inc.*, 411 S.C. 249, 266, 768 S.E.2d 389, 399 (2015); *ACLU of Minn. v. Tarek Ibn Ziyad Acad.*, Civil No. 09–138, 2009 WL 2215072 at *9-10 (D. Minn. July 21, 2009); *Scaggs v. N.Y. Dep't of Educ.*, No 06-CV-0799, 2007 WL 1456221 at *13 (E.D.N.Y. May 16, 2007). Defendants have pointed to no authority holding a charter school was not a state actor where, as here, a student challenged the policies or practices of the school. *See* DE 170 at 17-18 (citing *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (employment discrimination claims brought by teachers); *Caviness v. Horizon Cmty. Learning Center, Inc*., 590 F.3d 806 (9th Cir. 2010) (same); *Mentavlos v. Anderson*, 249 F.3d 301 (4th Cir. 2001) (peer-on-peer harassment by student cadets at military college)).

Defendant Roger Bacon Academy ("RBA") is a state actor for the same reasons. The State's delegation of authority through the Charter to educate public school students runs not only to CDS, Inc., but also to RBA, as the School's manager, operator, and joint applicant for the Charter. DE 151 & 171 ¶¶ 309, 311. RBA employs and supervises CDS officials, including the headmasters and chief administrators of CDS, DE 151 & 171 ¶ 293, who serve as state actors in enforcing school policy as a matter of law. *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985). Whatever the relative degree of authority vested in RBA versus the Board of CDS, Inc. to officially adopt CDS policy, the record makes clear that RBA officials in practice have played, and continue to play, a significant role in promulgating and enforcing the Uniform Policy, along with other policies at CDS pursuant to the Management Agreement. DE 151 & 171 ¶ 292; *see also* Deposition of Mark Dudeck 127-128 (attached as Exhibit A). Mr. Mitchell, the RBA

president, served as Chair of the CDS, Inc. Board at the time the Uniform Policy was established, DE 151 & 171 ¶¶ 26, 36; it was Mr. Mitchell to whom A.P.'s mother, Bonnie Peltier, was directed for an explanation when she questioned the Skirts Requirement, DE 151 & 171 ¶¶ 84-87; and it was Mr. Mitchell who personally authorized the recent change to the Uniform Policy's contours to allow "polo dresses"—a change that was put into practice at CDS several months before it was formally approved by the Board, DE 151 ¶¶ 294-301.[3] Thus, the record establishes that both RBA and CDS, Inc. are deeply involved in establishing and enforcing the Skirts Requirement, and Defendants have failed to point to any evidence creating a material factual dispute as to whether either is a state actor for these purposes.

B. The Uniform Policy, Through the Skirts Requirement, Triggers Heightened Scrutiny Because it Incorporates a Facially Sex-Based Classification.

In imposing different requirements for girls' and boys' attire, the Skirts Requirement draws a facial, sex-based distinction. Consequently, Defendants must come forward with an "exceedingly persuasive" justification for the Skirts Requirement, and demonstrate that the sex-based classification it embodies is substantially related to the furtherance of that justification. *United States v. Virginia*, 518 U.S. 515, 533 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). Despite this well-settled standard, Defendants assert that there is "no authority" for applying the Equal Protection Clause to dress codes, and that the Uniform Policy is "insulate[d from] Equal Protection challenge." DE 170 at 29.

This assertion is contrary to law in the Fourth Circuit, which has long recognized the equal protection dimensions of sex-based distinctions in student codes of appearance. *See Massie*

[3] Defendants do not dispute that this change was put in place at CDS prior to Board approval, but rather, assert that "the Uniform Policy had not yet been updated" at the time. DE 171 ¶ 297. The timing of formal approval aside, this nonetheless demonstrates Mr. Mitchell's central role in establishing policy as well as practice at CDS, which Defendants concede is "consistent with RBA's authority 'to recommend reasonable rules, regulations and procedures applicable to' the school." *Id.*

v. Henry, 455 F.2d 779, 783 (4th Cir. 1972).[4] It is also without authority in modern Equal Protection jurisprudence. The Supreme Court has made clear that all gender-based classifications, without exception, are subject to heightened scrutiny. *Virginia*, 518 U.S. at 555; *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994). Courts routinely apply the test to classifications that, like the Skirts Requirement, impose facially different but parallel standards for men and women. *See, e.g., Morales-Santana*, 137 S. Ct. at 1690-93 (applying heightened scrutiny to invalidate statutory scheme containing parallel standards that facially distinguished between men and women for purposes of determining qualifications for gaining citizenship); *Craig v. Boren*, 429 U.S. 190 (1976) (applying heightened scrutiny to invalidate statute prohibiting sale of small beer to males under 21 and females under 18); *Doe v. Vermilion Parish Sch. Bd.*, 421 Fed. App'x 366, 372 (5th Cir. Apr. 6, 2011) (unpublished) (faulting district court for failure to apply heightened scrutiny to separation of students into parallel single-sex classrooms). This is, of course, "in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of archaic and overbroad generalizations about gender." *J.E.B.*, 511 U.S. at 135 (internal quotation marks omitted); *see also Morales-Santana*, 137 S. Ct. at 1684 (the government's justification may not be premised on "habitual, but now untenable, assumptions" about gender roles); *Knussman v. Maryland*, 272 F.3d 625, 636 (4th Cir. 2001) (noting that Supreme Court has repeatedly struck down sex-based classifications based on "conventional notions about the proper station in society

[4] Defendants' suggestion that *Washington v. Glucksburg*, 521 U.S. 702 (1997), overruled *Massie*, *see* DE 170 at 28, is meritless. *Massie* remains the law in this Circuit, *see Isaacs ex rel. Isaacs v. Bd. of Educ. of Howard Cty., Md.*, 40 F. Supp. 2d 335, 339 (D. Md. 1999) (citing *Massie*), and its holding that sex-based distinctions in student grooming codes merit constitutional review was based on both "overlapping equal protection clause considerations" and due process grounds. *See Massie*, 455 F.2d at 783.

for males and females"). These are precisely the type of archaic generalizations Defendants advance in this case.

Defendants assert that before applying heightened scrutiny, this Court must *first* answer the "antecedent question whether the Uniform Policy amounts to sex discrimination" by assessing whether the Uniform Policy "as a whole" poses an "unequal burden" on girls. *See* DE 170 at 37. Such an approach reverses the correct order of analysis as well as the evidentiary burdens on the parties. Whether a sex-based classification constitutes "discrimination" is not an "antecedent question" to the application of heightened scrutiny, but rather, the *answer* that results from its application. *Hayden* is not to the contrary: in that case, the court began its analysis by noting that heightened scrutiny applied to the hair-length rule at issue before going on to strike down the hair-length rule as lacking adequate justification—in part because it posed a burden on members of one sex alone. *See Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 577-582 (7th Cir. 2014). The other case on which Defendants rely, *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006), was a Title VII case and is thus inapplicable to the Equal Protection analysis altogether. *See* DE 170 at 34.[5] Moreover, it is not Plaintiffs' burden to *disprove* that the entire policy has any harmful impacts on boys. *See Carter*

[5] As discussed more fully in Plaintiffs' Opposition Brief, DE 177 at 39-45, the cases on which Defendants rely were either decided prior to the enunciation of the framework for evaluating sex-based distinctions or did not raise equal protection claims at all—or both. *See King v. Saddleback Jr. Coll. Dist.*, 445 F.2d 932, 939 (9th Cir. 1971); *Karr v. Schmidt*, 401 U.S. 1201, 1202 (1971) (Black, J., denying motion to vacate a stay). Moreover, the line of cases addressing dress codes in the employment context are not applicable to either the Constitution or Title IX, and in any event, most have since been overruled by superseding developments acknowledging the reach of Title VII and the discriminatory nature of sex stereotypes. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78-80 (1998); *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Jespersen*, the only contemporary case Defendants cite, suffers from the same flaws because although it distinguished *Price Waterhouse*, it relied on those earlier Title VII cases without addressing *their* continued viability. *See* 444 F.3d at 1110; *see also id.* at 1115-16 (Pregerson, J., dissenting). Nonetheless, *Jespersen* acknowledged that grooming policies that rest on overt sex stereotypes or impose more significant burdens might violate the statute. *Id.* at 1113.

v. Sch. Bd. of Arlington Cty., Va., 182 F.2d 531, 535 (4th Cir. 1950) (the right to equal protection "is a personal one and equivalency cannot be determined by weighing the respective advantages furnished to the two groups of which the individuals are members"). This would subvert the purpose of the heightened scrutiny analysis, which places the "demanding" burden of justifying sex-based classifications "entirely on the state." *Virginia*, 518 U.S. at 533.[6]

In any event, even if the Uniform Policy is evaluated as a whole,[7] Defendants have offered no evidence of any parallel burden on boys. Although Defendants emphasize that the Uniform Policy is most frequently enforced against boys for failure to wear a belt, DE 170 at 11, 14, 35-36, the harms Plaintiffs complain of do not relate to frequency of enforcement for *non*-compliance, but rather, the harms related to *compliance* with the Skirts Requirement. There is simply no evidence that being required to wear a belt (or socks) in any way inhibits boys' ability to fully participate in the educational programs or activities at CDS, or exposes boys to sex stereotypes. Defendants have thus failed to demonstrate any material factual dispute on the relative burdens posed to boys and girls.

Defendants' other attempts to evade heightened scrutiny are equally unsuccessful. This Court has already rejected Defendants' appeal to the courts' deference to the discretion of public schools in establishing policy, DE 170 at 40, finding it lacking in support. DE 91 at 7-8. Defendants have offered no new authority for this position. This Court has similarly rejected the

[6] *Doe v. Vermilion Parish* did not suggest that evidence of sex stereotypes was a prerequisite to applying heightened scrutiny, but instead emphasized that heightened scrutiny applies to sex-based classifications regardless of any showing of discriminatory intent. 421 F. App'x at 372.

[7] Defendants urge this Court to include CDS's grooming requirements in its analysis. Plaintiffs take no position on whether these requirements are permissible, as they have no desire to challenge them. Defendants should not be permitted to redefine the scope of Plaintiffs' constitutional claims in this manner. Nothing in *Hayden* suggests otherwise; in assessing the hair-length restriction for athletes at issue in that case, the court did not consider the contours of the team's uniform requirements essential to its decision, which was based on a stipulated record that omitted those facts. *See Hayden*, 743 F.3d at 583.

argument that Plaintiffs, as children, enjoy fewer constitutional protections than adults. DE 91 at 7 ("[I]t is well-established that children do not 'shed their constitutional rights . . . at the schoolhouse gate.'" (quoting *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503 (1969)). Indeed, in the Equal Protection context, courts routinely apply a heightened level of scrutiny to assess violations asserted by elementary and secondary students. *See, e.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701 (2007); *Whitaker By Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1051-52 (7th Cir. 2017); *Vermilion Par. Sch. Bd.*, 421 F. App'x at 372; *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 459 F.3d 676, 693-94 (6th Cir. 2006). Finally, the Supreme Court has squarely rejected Defendants' contention that the Constitution reaches only conduct prohibited under Title IX, as "neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment." *Hogan*, 458 U.S. at 732-33; *see also Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 256 (2009) ("Congress did not intend Title IX to preclude § 1983 constitutional suits"). Because Plaintiffs challenge the provision of the Uniform Policy that contains a facial, sex-based classification, this Court is bound to apply heightened scrutiny—which Defendants fail to satisfy.

C. The Skirts Requirement Fails Heightened Scrutiny Because it Rests on Impermissible Sex Stereotypes that Perpetuate the Inferiority of Women.

The "primary objective" Defendants offer for the Skirts Requirement is to "create a school environment that embodies traditional values" that include "societal norms" about the "difference between the sexes." DE 170 at 39; *see also id.* at 41 (the school "teaches that boys and girls are distinct and that all should respect the difference between the sexes"); *id* at 44 (in enacting the Uniform Policy, the Board acted "to enshrine the norms of the parental community"). Despite Defendants' protestation that the Board Members were not acting "out of a desire to enshrine sex stereotypes," these various articulations of the justification for the Skirts

Requirement all amount to the same thing: imposition of traditional gender norms. As Mr. Mitchell explained, the principal traditional value that the Skirts Requirement is intended to foster is "chivalry"—i.e. the notion that girls are "fragile vessels that men should take care of and honor." DE 151 & 171 ¶ 94. The Skirts Requirement was intentionally designed to convey the message to students, as early as Kindergarten, that boys and girls are different, and specifically, that "females are to be treated courteously and more gently than boys." DE 151 & 171 ¶ 96. The "traditional" respect and values that the Uniform Policy is intended to foster are,—again in Mr. Mitchell's words—"values that traditionally prevailed for ladies and gentlemen before the statistics on rape, unwed motherhood, spousal abuse, STDs, and abortions began to skyrocket." DE 151 & 171 ¶ 91.

Although Defendants now attempt to distance the Board Members from Mr. Mitchell's explanation for the Uniform Policy, the Skirts Requirement's true purpose is not disputed. The Board Members endorsed Mr. Mitchell's explanation, contained in his email to Ms. Peltier, of the reason for the Skirts Requirement, and Defendants concede that its purpose is to promote chivalry and traditional gender roles. *See* DE 151 & 171 ¶¶ 101-02, 104-05, 165-66. Mr. Mitchell's explanation, although more vivid, is also consistent with those given by other RBA staff over the years, as well as with the practices employed at the School. *See id.* ¶¶ 97-98, (email from CDS Assistant Headmaster Lisa Edwards explaining: "[W]e teach and expect that boys open the doors for the girls and that the gentlemen let ladies go before them. In wearing skirts, it models the difference and that we expect the proper treatment of young ladies.").

Defendants' attempt to differentiate between the goals of fostering "respect between sexes" and intentionally promoting sex stereotypes, DE 170 at 45, is similarly unavailing. The Supreme Court has recognized their equivalence, rejecting appeals to "decency and propriety" as

a smoke screen for impermissible presumptions about women's more delicate nature. *See Virginia*, 518 U.S. at 555 n.20 (rejecting argument that allowing girls to participate in adversative military training at VMI would destroy the "sense of decency that still permeates the relationship between the sexes" as an "ancient and familiar fear"); *Hogan*, 458 U.S. at 725 ("[I]f the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."); *J.E.B.*, 511 U.S. at 132 (striking down a statute excluding women from jury service premised on the notion that women were "too fragile and virginal to withstand the polluted courtroom atmosphere"). None of the cases Defendants cite recognizing schools' authority to transmit community values, *see* DE 170 at 40, concerned the "value" to promote traditional gender norms in the context of an equal protection challenge, as is the case here. Defendants do not dispute that boys are capable of behaving respectfully to girls regardless of whether they wear pants or skirts, and agree that "violent or disrespectful behavior should not be blamed on girls' and women's appearance or attire." DE 151 & 171 ¶¶ 115-16, 119. Yet the assumption that requiring girls to wear a particular type of clothing will promote respect from boys does just that, and is therefore itself tainted with sex stereotypes. *See* DE 152-20 at 8.

Even assuming that the Skirts Requirement reflects the standards of a majority of the "community,"[8] that is not material to the outcome here because neither the Constitution nor Title

[8] Defendants point to no evidence, aside from the self-serving testimony from CDS Board Members, that the Skirts Requirement actually reflects the standards of the "community." *See* DE 170 at 45. In fact, it is undisputed that a percentage of parents have objected to the Uniform Policy in CDS's annual parent survey, DE 151 & 171 ¶¶ 108-110; that CDS Board Members and/or their female relatives frequently wear pants both at work and at school, DE 152-69; and that pants are considered an acceptable form of attire in today's society, DE 151 & 171 ¶¶ 121-22. It is also undisputed that no other school in Leland, including the Catholic schools, requires girls to wear skirts. DE 151 & 171 ¶ 68. Furthermore, based on her investigation of local and national uniform standards, Plaintiffs' expert concluded that CDS's policy was "an outlier" by local and national standards, and that "[t]he 'tradition' that the [Skirts Requirement]

IX permits rights to be violated by majority rule. *See Morales-Santana*, 137 S. Ct. at 1693 n.13; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 491 (1972); *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 736-37 (1964). It is the students who object to the sex-based classification, rather than those who may approve of it, on whose behalf a remedy must be crafted. *See Virginia*, 518 U.S. at 550; *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992); *Arnold v. Carpenter*, 459 F.2d 939, 943 (7th Cir. 1972).

D. Defendants Have Failed to Demonstrate a Factual Dispute Regarding the Uniform Policy's Harmful Effects.

The evidence Defendants offer is insufficient to create a triable issue of fact on whether the Uniform Policy imposes burdens on Plaintiffs. Defendants do not dispute that wearing skirts requires women to pay attention to their sitting position in order to avoid exposing their undergarments, that it can result in exposure of one's undergarments during physical activity, and that skirts and tights are less protective of the body than pants. DE 151 & 171 ¶¶ 123, 127, 129, 134, 137, 141, 142. They further do not dispute the relative warmth of pants versus skirts during cold months—which is especially significant in the environment of CDS, where classrooms are frequently chilly and students spend a substantial amount of time outdoors, including eating lunch outside every day. DE 151 & 171 ¶¶ 154-163, 207 (testimony of I.B. that impact of cold was so harsh that she used to cry in the morning about having to wear a skirt). Nor do they generally dispute Plaintiffs' own experiences of distraction, humiliation, and discomfort as a result of the Skirts Requirement—including that Plaintiffs "have restricted their movements during physical and athletic activities to avoid exposing their undergarments." DE

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evokes has not been the norm for nearly half a century in either the educational context or in society as a whole." DE 152-20 at 11; DE 151 & 171 ¶¶ 68, 69. The record thus establishes that the "community standards" to which Defendants point are, at a minimum, far from universally held.

151 & 171 ¶¶ 135, 139, 179-216, 222-29, 234-38, 249-58. These facts alone are sufficient to demonstrate an unequal burden not only on Plaintiffs, but on girls at CDS generally.

Unable to dispute this evidence, Defendants offer an affidavit from Rosina Walton, a CDS headmaster, who now testifies that boys and girls are not expected to sit differently during class, and that she has not observed girls refraining from physical activity during recess. DE 172-2. This contradicts her own deposition testimony that if a female student were sitting such that her undergarments were showing "she might be . . . asked to sit a different way so she is not embarrassed," and that if she found a student sitting with her legs "wide open" she "would probably just, like, tap her and say you don't want to sit, you know, kind of thing." DE 152-23, 43:19-23; *see also id.* at 43:24-45:19. It is well-established that "a party cannot create a triable issue in opposition to summary judgment simply by contradicting his deposition testimony with a subsequent affidavit." *See Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432, 438 (4th Cir. 1999). Ms. Walton's testimony is further contradicted by I.B.'s and K.B.'s own accounts of having been instructed to "sit like a princess" or "sit like a girl" in the classroom, DE 151 ¶¶ 217, 242-43, reprimanded for activities such as doing cartwheels on the playground, *id.* at ¶ 231, and inhibited from engaging in physical activity as a result, DE 151 & 171 ¶¶ 135, 211-214, 236, DE 151 ¶¶ 233, 240, 243. Ms. Walton's self-serving affidavit regarding her observations of other students, whatever limited value it holds, does not undercut Plaintiffs' own first-hand experiences or otherwise create a triable issue of fact on the expectations applied to female students at CDS relating to the Skirts Requirement.

Nor do these observations by one administrator at CDS create a material factual dispute to counter Plaintiffs' expert testimony regarding the well-established dignitary harms of being exposed to gender stereotypes. *See* DE 171 ¶¶ 143-46, 152. In any event, Defendants do not

dispute personal testimony such as K.B.'s that the Uniform Policy and "constant monitoring" led her to believe that CDS teachers and administrators "thought girls should not play roughly or be as active and able to move around as freely and comfortably as boys—that we simply weren't worth as much as boys," which left her feeling "inferior and angry at the same time." DE 151 & 171 ¶ 256-58; DE 152-8 ¶ 19. Or the testimony of I.B., who understood the message that "girls should be less active than boys and they are more delicate than boys," which she felt made boys feel "empowered" and puts them "in a position of power over girls." DE 152-7 ¶ 16. The harms of being exposed to such stereotypes are well-recognized. *See Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 733-34 (2003); *Virginia*, 518 U.S. at 550; *Brown v. Board of Educ.*, 347 U.S. 483, 494-95 (1954); *Hopkins*, 490 U.S. at 265. This Court should reject Defendants' attempt to trivialize Plaintiffs' experiences by characterizing them as "subjective." DE 170 at 36.

Defendants' emphasis on CDS's undisputedly superior test results relative to other schools locally and statewide is misguided, as these results are not relevant to whether the Skirts Requirement is discriminatory. The effects of discriminatory treatment do not necessarily manifest in lower test scores for girls compared to boys. DE 163-19 at 5-6, 14. Plaintiffs' own academic success and general satisfaction with their education at CDS is irrelevant for the same reasons. *See Jennings v. Univ. of N. Carolina*, 482 F.3d 686, 699-700 (4th Cir. 2007). These results indicate nothing about whether Plaintiffs themselves or girls at CDS in general might achieve even better results in the absence of discriminatory treatment.[9] DE 163-19 at 5-6, 13-14.

[9] Defendants have apparently abandoned their attack on the well-established concept in the field of developmental psychology that exposure to stereotype conditions can harm girls' math performance, and now even concede that requiring girls to wear skirts can create stereotype-threat conditions. *See* DE 171 ¶ 175-76. They argue instead that this theory "is of limited use" because it does not "measure the effects of increasing the salience of gender distinctions in the particular classrooms relevant to their lawsuit." DE 170 at 37. As discussed above, it is not necessary for Plaintiffs to prove that the Skirts Requirement specifically impacts student test results at CDS, especially in light of the ample other evidence of the

And, as this Court has already recognized, Plaintiffs' decision to attend or remain at CDS does not deprive them of their right to contest discriminatory treatment. *See* DE 91 at 5. The test results Defendants point to are thus insufficient to create a material factual dispute as to the harms Plaintiffs have suffered as a result of the Skirts Requirement.

E. Defendants Have Failed to Demonstrate that the Skirts Requirement is Substantially Related to Any Permissible or Important Interest.

Because Defendants have also failed to demonstrate that the Skirts Requirement is related—much less substantially—to the achievement of any of the *permissible* interests they have advanced, it cannot withstand heightened scrutiny. At the outset, there is no merit to their contention that "[t]he proof of the Uniform Policy's substantial relationship to the transmission of the community's traditional values lies in the overwhelming parental support for the current policy." DE 170 at 43. As discussed above, because the "community's traditional values" rest on impermissible sex stereotypes, parental support for the Skirts Requirement cannot serve as its justification. *See Virginia*, 518 U.S. at 545 (rejecting such reasoning as "notably circular").

Defendants assert that the Skirts Requirement "work[s] seamlessly" with the "other educational distinctives" employed at CDS, such as direct instruction and a classical curriculum, and that changing the Uniform Policy thus "risks fundamentally altering the School." DE 170 at 39 and 47. But Plaintiffs do not challenge the use of those pedagogical methods, which do not depend on students' attire, or seek to eliminate the requirement that students wear uniforms or even the option to wear skirts. Defendants have made no evidentiary showing, other than the

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harms it poses and the illegitimacy of Defendants' justifications overall. Moreover, as argued in Plaintiffs' Reply in Support of Plaintiffs Motion to Exclude the Testimony of Dr. Chen, filed simultaneously with this brief, Defendants' concessions regarding the validity of this research provide further support for granting Plaintiffs' *Daubert* motion.

speculation of certain Board Members, that any of these distinctive characteristics—aside from the perpetuation of traditional gender norms—would be altered by the presence of girls in pants.

Defendants similarly assert—citing no quantitative or qualitative research—that school uniforms generally are associated with "maintaining classroom order [and] increasing student achievement." DE 170 at 43. Even accepting the accuracy of this statement, which is disputed, *see* DE 152-20 at 10, there is simply no evidence linking these outcomes to the *Skirts Requirement*, as opposed to the use of school uniforms generally. Indeed, the Board Members' undisputed testimony was either that the stated goals of the Uniform Policy could be achieved if girls were permitted to wear pants, or that they did not know whether there would be any impact. DE 151 & 171 ¶ 120. Defendants' sole evidence related to "order" in the classroom consists of testimony from CDS's two assistant headmasters sharing their observation that students are more "rowdy" and "excited" on days the Uniform Policy is suspended for special events such as field trips or spirit days. DE 151 & 171 ¶ 118. But there is no evidence that these observed changes result from the presence of female students in pants, as opposed the excitement of the special occasion itself. Indeed, both of these administrators, as well as Mr. Mitchell and several Board Members, testified that they had not observed any similar changes in behavior on the regular days when female students are wearing pants or shorts in class because they are scheduled for physical education. DE 151 & 171 ¶ 117.

Defendants' emphasis on the positive academic outcomes at CDS is similarly misguided because they have failed to point to any evidence, other than unsupported speculation from Mr. Mitchell and various Board Members, that CDS's superior test scores are related to the Skirts Requirement—or even to the Uniform Policy more broadly—as opposed to a host of other factors widely accepted as influencing academic outcomes. *See* DE 163-19 at 3-4. The failure to

account for such confounding variables "renders the analyses meaningless as a measure of the impact of the gender-differentiated uniforms." *Id.* at 5; *see also* DE 179-7 at 43:1-45:8 (testimony of Defendants' expert disavowing drawing any conclusions as to the causes of the test results he analyzed). Defendants have therefore failed to carry their burden of justifying the Skirts Requirement by showing it has a "substantial" relationship to the achievement of any of its permissible objectives. *See Hogan*, 458 U.S. at 724 n. 9; *Craig v. Boren*, 429 U.S. at 190.

II. THE SKIRTS REQUIREMENT VIOLATES TITLE IX.

A. RBA is Subject to Title IX.

Defendants do not contest that CDS is subject to Title IX, but argue that RBA is not because it does not directly receive any federal funds. But Title IX applies to both direct and indirect recipients of federal funds. *See* 34 C.F.R. § 106.2(i) (defining "recipient" as an entity that receives federal funding either "*directly or through another recipient* . . . including any subunit, successor, assignee, or transferee thereof") (emphasis added); 7 C.F.R. § 15a.105(same); *Grove City College v. Bell*, 465 U.S. 555, 564 (1984), *superseded on other grounds by* Civil Rights Restoration Act, Pub. L. 100-259, 102 Stat. 28 (1988). RBA's status as a recipient of federal funding is therefore not affected by the intermediary presence of either CDS, Inc. or Acadia NorthStar, the third-party financial services company that handles the bank accounts for CDS and other CDS, Inc. schools. It is undisputed that CDS, Inc. receives federal financial assistance earmarked for the purposes of educating students, and that RBA is responsible for operating CDS and providing education to CDS students pursuant to the Management Agreement. DE 151 & 171 ¶¶ 314-321. It is also undisputed that CDS, Inc. pays RBA for rendering those services and for its expenses, including RBA-employee salaries, DE 151 & 171 ¶ 323; indeed, RBA receives approximately 90% of its funding from CDS, Inc. schools. DE 178 ¶¶

4-8. That RBA receives a small percentage of its funding from other sources, *see* DE 171 ¶ 323, is immaterial to whether it receives federal funds via CDS, Inc. Furthermore, because RBA directly engaged in operating all aspects of CDS, its role is unlike that played by entities courts have found merely "benefit" from federal dollars. *See* DE 170 at 23-24 (citing *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 468 (1999) (receipt of dues from member colleges to set policy governing intercollegiate athletic competition); *Campbell v. Dundee Cmty. Schs.*, 661 Fed. App'x 884, 886, 888 (6th Cir. 2016) (contract to perform criminal background checks)). Because RBA plainly meets the definition of "recipient," it is subject to Title IX.

B. Neither Title IX's Terms Nor the Regulation Prohibiting Differential Treatment Based on Sex Were Altered by the Education Department's Revocation of the Rule Governing Codes of Appearance.

Defendants' argument that the Skirts Requirement is exempt from Title IX hinges on the revocation by the U.S. Department of Education ("USED") in 1982 of a provision that had previously prohibited "discrimination in the application of codes of personal appearance." *See Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance*, 47 F.R. 32526-02 (July 28, 1982). As discussed in Plaintiffs' Opposition Brief, this revocation did not amount to an interpretation of Title IX's reach for purposes of private enforcement, but rather, represented the agency's wish to focus its own enforcement efforts on other forms of sex discrimination it deemed more pressing and more generally minimize agency oversight of local schools. DE 177 at 46. Nor did the agency's action alter the application of the more general regulation prohibiting recipients from "[s]ubject[ing] any person to separate or different rules of behavior, sanctions, or other treatment." 34 C.F.R. § 106.31(b)(4) (2017); 7 C.F.R. § 15A.400(b)(4) (2017). The revocation therefore does not, as Defendants contend, DE 170 at 17, 19, 20, constitute an "authoritative interpretation" of the

statute as categorically exempting dress codes, but rather, is better understood as a rejection of the broad ban on all differential rules related to clothing, grooming, or appearance in favor of a case-by-case approach. Moreover, Defendants' appeal to the canon of statutory construction that *the specific controls the general*, *see* DE 170 at 19-20, is not applicable in this context. That canon applies in cases when there is a question as to which of two potentially conflicting statutory provisions or regulations, both of which are in effect, should control the outcome. *See Rodgers v. United States*, 185 U.S. 83, 88-89 (1902); *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 302 (4th Cir. 2000). No such conflict exists here because there are not two competing regulations in play. The revocation of the provision governing codes of appearance is not equivalent to an affirmative enactment of a replacement regulation specifically exempting dress codes—which neither USED nor any other agency has done.

In addition, any interpretation that Title IX was *per se* inapplicable to dress codes would not be entitled to deference for two reasons. First, before according deference to a regulation, courts must consider whether "Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). In 1975, Congress approved of regulations by USED's predecessor agency, HEW, including a provision identical to USED's prohibiting discrimination in codes of personal appearance. As required by law, *see* H.R. 69, 93rd Cong. (1974) (amending § 431 of the General Education Provisions Act), HEW submitted that regulation to Congress; after six days of hearings to determine whether the regulations were "consistent with the law and with the intent of the Congress in enacting the law," they went into effect. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 532 (1982) (citations omitted). This implies Congress's view that HEW "correctly discerned" Title IX's legislative intent in promulgating the regulation. *Id*. at 535. By contrast, Congress never held hearings after

USED revoked the rules of appearance provision, and, moreover, has cautioned that failure to do so should not "be construed as evidence of an approval or finding of consistency." S.6, 94th Cong. (1975) (amending § 431(d)(1) of the General Education Provisions Act). Thus, deference would not be warranted because Congress has actually spoken directly on this question: by approving the HEW regulations containing a provision identical to that which its successor agency later revoked.

Second, even if that were not the case, the interpretation of Title IX as categorically excepting dress codes would not constitute a reasonable interpretation of the statute, and thus would not be entitled to deference under *Chevron* or any other standard. Such interpretation would undermine the statute's remedial goals and defy the Supreme Court's repeated directive to interpret its terms as broadly as possible. *See N. Haven*, 456 U.S. at 521; *Jackson v. Birmingham Bd. of Educ*., 544 U.S. 167, 174-75 (2005) (Congress intentionally crafted Title IX as "a broadly written general prohibition on discrimination, followed by specific, narrow exceptions"). Moreover, application of an implied exception, on these facts, would lead to a result manifestly contrary to Title IX' purpose—to "root out, as thoroughly as possible . . . the social evil of sex discrimination in education." *See* 118 Cong. Rec. 5804 (1972) (statement of Sen. Bayh).

III. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR STATE LAW CLAIMS.

Because Defendants raise no new legal or factual arguments regarding Plaintiffs' state law claims, Plaintiffs largely rest on their previous briefing, except to raise two issues. First, Defendants misconstrue Plaintiffs' state constitutional claims. Plaintiffs do not bring a separate claim for denial of the right to education, but rather rely on a fundamental rights equal protection theory, which holds that "[w]hen a classification operates to the disadvantage of a suspect class or if a classification impermissibly interferes with the exercise of a fundamental right a strict

scrutiny must be given the classification." *Northampton Cty. Drainage Dist. v. Bailey*, 326 N.C. 742, 746, 392 S.E.2d 352, 355 (1990). Because the Skirts Requirement interferes with Plaintiffs' right to education on equal terms, the even more demanding test of strict scrutiny applies. Defendants are unable to satisfy either test.

Second, the third party beneficiary theory Plaintiffs advance is well-established under North Carolina law. *See Mosely v. Balboa Ins. Co.*, No. 5:10-CV-0132-RLV-DSC, 2013 WL 5938096, at *3–5 (W.D.N.C. Nov. 5, 2013); *Hospira Inc. v. Alphagary Corp.*, 194 N.C. App. 695, 703, 671 S.E.2d 7, 13 (2009); *James River Equip., Inc. v. Tharpe's Excavating, Inc.*, 179 N.C. App. 336, 343–44, 634 S.E.2d 548, 554–55 (2006); *Snyder v. Freeman*, 300 N.C. 204, 219–23, 266 S.E.2d 593, 603–05 (1980). Therefore, should the Court find that one or more of Defendants is not subject to Title IX directly or is not a state actor, it may still find that Defendant liable on a third party beneficiary theory.

CONCLUSION

For the foregoing reasons and those contained in Plaintiffs' Memorandum in Support of Their Motion for Summary Judgment and their Memorandum in Opposition to Defendants' Motion for Summary Judgment, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Summary Judgment and deny Defendants' Motion for Summary Judgment.

This the 17th day of January, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2018, I electronically filed the foregoing Memorandum in Support with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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