CASE NO. 20-1001 (L)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BONNIE PELTIER, as Guardian of A.P., a minor child; ERIKA BOOTH, as Guardian of I.B., a minor child; and KEELY BURKS,

Plaintiffs - Appellees, Cross-Appellants

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 – Appellants

and

THE ROGER BACON ACADEMY, INC,

Defendant - Cross-Appellee

On Appeal from the United States District Court for the Eastern District of North Carolina, Southern Division Case No. 7:16-cv-00030-H-KS

OPENING AND RESPONSE BRIEF OF PLAINTIFFS-APPELLEES

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-1001 Caption: Bonnie Peltier, as Guardian of A.P., a minor child; Erika Booth, as Guardian of I.B., a minor child; and Keely Burks v. Charter Day School, Inc. et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Bonnie Peltier, as Guardian of A.P., a minor child
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: _____ Date: January 15, 2020

Counsel for: Bonnie Peltier, as Guardian of A.P.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 20-1001 Caption: Bonnie Peltier, as Guardian of A.P., a minor child; Erika Booth, as Guardian of I.B., a minor child; and Keely Burks v. Charter Day School, Inc. et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Erika Booth, as Guardian of I.B., a minor child
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Signature: _____ Date: January 15, 2020

Counsel for: Erika Booth, as Guardian of I.B.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Keely Burks
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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Signature: _____ Date: January 15, 2020

Counsel for: Keely Burks

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JURISDICTIONAL STATEMENT

This action arises under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, et seq.; the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; and 42 U.S.C. § 1983. JA 0036. The district court had jurisdiction pursuant to Article III and 28 U.S.C. §§ 1331 and 1343. *Id.*

This is an appeal from a partial final judgment over which this Court has jurisdiction under 28 U.S.C. § 1291. On November 26, 2019 the District Court entered partial final judgment for Plaintiffs against Defendants CDS, Inc. and the individual Board Members, but for Defendant RBA, on Plaintiffs' Equal Protection claim. JA 2747. The court entered partial final judgment for all Defendants on Plaintiffs' Title IX claims. *Id.* Both Parties filed timely notices of appeal. JA 2757, 2759.

STATEMENT OF ISSUES

Issues on appeal in Case No. 20-1001:

(1) Whether Charter Day School, a public charter school, violates Plaintiffs' right to equal protection by imposing a requirement that they wear skirts as a condition of attending school because they are girls (the "Skirts Requirement"), to promote "chivalry" and traditional gender roles;

(2) Whether Charter Day School, Incorporated, the nonprofit corporation granted a Charter pursuant to North Carolina Law to offer free, public education to its students, operates as a state actor for purposes of Section 1983 in creating, implementing, and enforcing the Skirts Requirement.

Issues on cross-appeal in Case No. 20-1023:

(1) Whether Title IX of the Education Amendments of 1972 prohibits Charter Day School from imposing the Skirts Requirement, which is based on and reinforces gender stereotypes and has impeded Plaintiffs' educational opportunities;

(2) Whether Roger Bacon Academy, Inc., the entity that manages Charter Day School, may be liable under Title IX due to the role of its President and employees in creating, implementing, and enforcing the Skirts Requirement, or at a minimum, whether material issues of fact preclude entry of summary judgment on this question;

(3) Whether Roger Bacon Academy acted as a state actor for purposes of Section 1983 due to the role of its President and employees in creating, implementing, and enforcing the Skirts Requirement, or at a minimum, whether material issues of fact preclude entry of summary judgment on this question.

INTRODUCTION

Plaintiffs A.P., I.B., and Keely Burks ("Keely")[1] challenge a policy at their public charter school, Charter Day School ("CDS"), in Leland, North Carolina, requiring girls to wear skirts, skorts, or dresses as a condition of attending school (Skirts Requirement). By Defendants' admission, the Skirts Requirement was adopted to promote "traditional" gender norms—specifically, the notion that girls and boys are different, a message most effectively communicated by treating them differently at school, beginning in Kindergarten. JA 0345, 1549-50, 2518.[2] The Requirement is designed to emphasize "chivalry"—which CDS's founder defines as the notion that girls are "fragile vessel[s]" needing boys' protection and care. School officials, members of the CDS, Inc. Board of Trustees ("Board"), and faculty articulate similar justifications for the Skirts Requirement. Plaintiffs, girls who attended the elementary and

[1] Keely Burks initially proceeded under her initials and via her grandmother and appointed guardian ad litem, Patricia Brown, in accordance with F.R.C.P. 5.2 and 17.1(a). She has since attained the age of majority and now proceeds in her own name. *See* JA 0031; Peltier v. Charter Day School, No. 7:16-cv-30, DE 241, 242. All further citations to docket entries in the below case, No. 7:16-cv-30, Eastern District of North Carolina, will be listed hereinafter as DE and the relevant docket entry number.

[2] All citations to JA 0319-68 and JA 2506-32 are to undisputed facts, per Defendants' response to Plaintiffs' Rule 56.1 Statement (JA 2506-32), unless otherwise noted.

middle school, object to being treated as different and more fragile than boys and want to be able to learn, move, and play with the same freedom boys enjoy.

This case presents the opportunity to affirm that such stereotypes about traditional gender roles have no place in our nation's education system, whether in public charter schools or traditional public schools. Subjecting boys and girls to facially different treatment based on historical norms about girls' presumed "fragility" violates longstanding equal protection principles. Defendants have asserted no justification for the Skirts Requirement that satisfies the heightened scrutiny that attends gender-based classifications. And far from being exempt from Title IX, dress codes that limit girls' ability to fully participate in educational opportunities—especially those intentionally designed to foster different treatment of boys and girls—represent precisely the sort of discriminatory treatment Title IX was intended to eradicate. Public charter schools may not evade these guarantees of equal treatment because of their corporate structure.

Accordingly, Plaintiffs are entitled to summary judgment on their equal protection and Title IX claims against all Defendants. This Court

should affirm the district court's grant of summary judgment to Plaintiffs on their constitutional claim on the merits; affirm Plaintiffs' equal protection claims against Defendant Charter Day School, Inc. ("CDS, Inc."), the non-profit corporation that holds the charter for CDS, and its Board members; reinstate Plaintiffs' equal protection claim against Defendant Roger Bacon Academy ("RBA"), the corporation that manages and operates CDS, and direct entry of summary judgment against RBA; and reverse the grant of summary judgment to Defendants on Plaintiffs' Title IX claim and direct entry of summary judgment in Plaintiffs' favor against all Defendants.

STATEMENT OF THE CASE

The CDS/RBA Skirts Requirement and Defendants' Justifications

Since its founding, CDS has had in place a uniform policy (the "Uniform Policy") that included the Skirts Requirement, which conditions girls' access to school on their wearing "skirts, "skorts" (skirts with shorts attached underneath), or "jumpers" (collectively referred to herein as "skirts"). Under the Uniform Policy, boys wear

pants or shorts. JA 0068.[3] The Uniform Policy is in effect except on days when students have physical education class or when there are special events, such as field trips. JA 0040, 2508-09. If a girl wears pants or shorts to school a range of disciplinary consequences may result, including a teacher calling or sending a notification of noncompliance to a parent or the student missing class to obtain a skirt, which a parent may be required to bring to the school if the student does not have one on hand. JA 0327-28, 1541-42, 2510-11. Students may face expulsion for violating the disciplinary code, which includes the Skirts Requirement. JA 1963-64.

In 2015, Bonnie Peltier, A.P.'s mother, inquired about the reasons for the Skirts Requirement at a new parent orientation for A.P.'s entry into Kindergarten; CDS staff directed her to contact Baker Mitchell Jr., the school's founder and RBA's president and owner. JA 0041. When she emailed Mitchell her question, he responded:

> The Trustees, parents, and other community supporters were determined to preserve chivalry and respect among young women and men in this school of choice. For example, young men were to

[3] CDS also requires that boys wear their hair short, wear belts, and not wear jewelry, and provides that girls may wear tights or leggings, "conservative" makeup, and certain jewelry. JA 0100-01. Plaintiffs have not challenged these provisions.

> hold the door open for the young ladies and to carry an umbrella, should it be needed. Ma'am and sir were to be the preferred forms of address. There was felt to be a need to restore, and then preserve, traditional regard for peers.

JA 0070-71, 0331-32.

Objecting to the Skirts Requirement and Mitchell's explanation as discriminatory, Peltier wrote CDS through her counsel asking that it be changed. JA 0328-29. In its response, CDS's counsel stated that the Uniform Policy was adopted "to establish an environment in which our young men and women treat one another with mutual respect." JA 0427. The letter implicitly conceded that skirts impede equal participation by pointing out that CDS allowed girls to wear pants or shorts when they needed to be able to move freely, such as "during physical education and activities" and "some field trips." *Id.* But it refused Peltier's request to allow girls to wear pants or shorts during class, recess, and all other school activities.

During his deposition, Mitchell elaborated on the justification for the Skirts Requirement, explaining it was designed to convey the message, starting in Kindergarten, that boys and girls are different, and to instill "chivalry," which he defined as "a code of conduct where women are . . . regarded as a fragile vessel that men are supposed to

take care of and honor." JA 0332.[4] His reference to restoring and preserving "traditional regard for peers," he explained, meant distinguishing between how boys should treat girls versus boys at school, and that "females are to be treated courteously and more gently than boys." JA 0333. In depositions, members of the Board of CDS, Incorporated ("CDS, Inc."), the nonprofit that holds the charter for CDS, as well as the principals of CDS middle and elementary schools,

[4] An earlier draft of Mitchell's email articulated this justification for the Skirts Requirement even more overtly. *Id.* ¶¶ 91-92. It read:

> Both the Trustees, the parents, and the other community supporters were determined to respect the traditional gender roles in this school of choice. . . .
>
> Thus, the uniform policy seeks to make clear the mutual respect and values that traditionally prevailed for ladies and gentlemen before the statistics on rape, unwed motherhood, spousal abuse, STDs, and abortions began to skyrocket.
>
> That gentlemen wear pants and ladies wear dresses is not just a policy of the school that has prevailed for 15 years, it has been a norm of civilization for many thousands of years. The school is chartered to preserve this norm along with many others. . . . The uniform policy is an important aspect of the school acknowledging the importance of traditional values.

JA 0332, 1086.

embraced Mitchell's rationale for the Skirts Requirement. JA 0335, 1549-50.[5]

Lisa Edwards, the Assistant Headmaster of CDS Elementary, explained the purpose of the policy similarly: "[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." JA 0333. Jesse Smith, another RBA employee, responded: "I couldn't have said it better . . . . It is a touchy subject but I love how you used the reference of distinguishing between boys/girls when opening doors, etc." *Id.*

After this lawsuit was filed, the Board met, and RBA staff presented the results of a survey purportedly showing that a majority of parents approved of the Skirts Requirement. JA 0336, 1535. The survey contained a single question regarding overall satisfaction with the

[5] For example, Board Member Colleen Combs explained: "[W]e are attempting to teach people respect for each other using . . . the tool of a uniform policy. One that makes a distinction between boys and girls. . . . [It] is nice that boys who are often bigger . . . learn to respect girls and to treat them as a matter of respect more gently than they might treat other boys." JA 0801-02. Board Member Melissa Gott similarly stated: "I also believe that . . . the purpose of [the uniform policy] is to preserve chivalry and respect among the students. I believe also that traditional roles such as opening the doors for young ladies, carrying umbrellas [sic] is important and is fostered by the uniform policy . . . ." JA 1722.

Uniform Policy; it had no question about the Skirts Requirement specifically. JA 0335, 1535.

During the course of the litigation, Defendants have offered a number of other justifications for the Skirts Requirement: They argue that members of the community involved in founding CDS had expressed a preference for uniforms limiting girls to skirts or dresses and that the policy continues to enjoy the support of parents. JA 1756-57, 2011. But each year, when polled about their satisfaction with the Uniform Policy, several parents objected to girls not being permitted to wear pants, especially in winter time. JA 0335-36.

Defendants argue it teaches students to follow rules and instills order and discipline. JA 1538. But this is a justification for adopting a school uniform in the first place, not a sex-specific one. JA 0329, 0335. There is no evidence that the Board considered any data linking policies like the Skirts Requirement to better discipline. JA 0329, 1538. Indeed, Board members and administrators either admitted that a uniform requirement permitting girls the option of wearing pants could also accomplish order and discipline, or stated that they did not know what would happen if girls were permitted to wear pants. JA 0337-38.

And Defendants argue the Skirt Requirement contributed to CDS's superior grades, test scores and overall student achievement. Defs' Br. 12. But they point to no data considered by the Board or founders at the time the Skirts Requirement was adopted linking such a policy to improved achievement or outcomes. Rather, they rely on CDS's raw data on student grades and test scores once CDS had begun operating, generated to evaluate student performance in the regular course of operating the school, JA 2495-96, as well as expert testimony purporting to analyze those data.

CDS's experts, Dr. Wells Hively and Anne Dell Duncan-Hively, opined that data comparing the grades and test scores of CDS boys and girls to each other and to nationwide averages showed that CDS girls "do not appear to be educationally impaired, in comparison to the boys, by having to wear dresses." JA 2788 (SEALED). Dr. Duncan Hively, who authored that portion of the report, admitted that he was not a statistician, that he had relied on data and calculations performed by CDS staff using a "computer program" with which he was unfamiliar—which turned out to be Microsoft Excel—without checking the accuracy of the results, and that he had not performed any tests for statistical

significance of the data or taken any confounding variables whatsoever into account in conducting his analysis. JA 1730, 1733; DE 154-3 Ex. C at 19-21.

Defendants' other expert, Dr. Yishi Wang, whose analysis compared CDS's test scores and grades by gender to those of other area schools, admitted that he was not aware of the Skirts Requirement or even the Uniform Policy, and declined to offer any opinion on the causes of CDS's superior outcomes or to claim they were associated in any way with the Skirts Requirement. JA 2623-29.

Harms to Plaintiffs from the Skirts Requirement

The harms Plaintiffs suffered as a result of the Skirts Requirement were far more serious and lasting than merely being penalized for noncompliance. Plaintiffs understood the lesson the Skirts Requirement was intended to convey: in the words of I.B., it was "that girls should be less active than boys and that they are more delicate than boys. This translates into boys being put in a position of power over girls." JA 0499, 0351. Keely similarly testified:

> It seemed particularly unfair to me that school administrators and teachers claimed to treat boys and girls equally, but then on most days they would make us girls dress in a way that restricted our movement and they would tell us how to sit so boys couldn't see up

> our skirts. It seemed silly and sexist, and it made me angry to be treated like a person whose comfort and convenience was less important to them than the boys'.

JA 0504. Ultimately, Keely thought that by restricting girls from moving "as freely and comfortably as boys," administrators and teachers were saying "that we simply weren't worth as much as boys. They seemed to be telling me every day that girls are not in fact equal to boys, and that would make me feel inferior and angry at the same time." JA 0356, 0507. Keely's dissatisfaction with the Skirts Requirement and its effects on girls led her to circulate a petition asking CDS to permit girls to wear pants and shorts. JA 0355, 0507. A teacher confiscated the petition, but not before Keely gathered approximately 100 signatures. JA 0356, 0507.

Plaintiffs' very mobility was limited. Although students may wear their P.E. uniforms on days they have gym class, they play outside nearly every school day during recess. JA 0350. Plaintiffs testified that on the majority of days, when they had to comply with the Skirts Requirement, they avoided activities including climbing, playing on swings, doing cartwheels or flips, and playing soccer during recess. JA 0350, 0353, 0498-99, 0503. Keely described P.E. days as the days when

she "was free to do flips and cartwheels and I could sit in class unselfconsciously and focus on my classwork rather than worrying about whether my legs were in the proper position for a girl." JA 0504, 0354. In other words, she could move like a boy. *See also* JA 0473-74 (Peltier explaining she wanted A.P. to be able to participate freely in play time). On days when she had P.E. but still had to wear a skirt because she had a "show choir" performance, Keely would not participate in gym class and would have "to sit and watch while the other kids in the class played sports . . . even though I loved sports." JA 0506, 0354. She was "angry that the boys could play however they wanted in their regular school clothes while I had to avoid the activities I enjoyed because I had to worry about being 'ladylike.'" JA 0506; *see also* JA 0499 (testimony of I.B. that "it's unfair that . . . girls can only be really active on days when we have PE and can wear shorts or sweatpants").

Plaintiffs were constrained even in how they sat. They testified that girls were expected to "sit in a feminine, modest manner" during

class;[6] to cross their legs at the ankles "and keep our knees together." JA 503-04; 0338-40, 0351, 0353-55. Keely testified that as a result, "I always had to be conscious of how I was sitting, and that took focus that distracted me from my academic work." JA 0504, 0353, 0499. Or as I.B. testified, by the time they were in older grades, "girls at school just know how they are supposed to sit in skirts." JA 0497, 0351. They had to restrict movement so as to keep boys from looking up their skirts or teasing them when their underwear showed, JA 0348-49, 0353, 0499, even during tornado and fire drills, when they had to curl up on the floor or crawl on their hands and knees. JA 0353, 0506.

And they were cold during the winter. Defendants admit that skirts with tights or leggings are not as warm as pants with long underwear underneath. JA 0344, 0349-52. But CDS students spend

[6] Defendants attempt to dispute that girls at CDS are expected to sit in a different manner than boys, pointing to a declaration by Assistant Headmaster Rosina Walton. *See* JA 2539. Walton's declaration, submitted by counsel in support of their motion for summary judgment, is contradicted not only by Plaintiffs' first-hand accounts, but by Walton's own prior deposition testimony. *See* JA 0338, 0964-66 (testifying that if a girl were sitting with her legs apart "she might be . . . asked to sit a different way so she is not embarrassed," and that if a student were 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"). "[I]t is well established that a genuine issue of fact is not created where the only issue of fact is to determine which of the two conflicting versions of a party's testimony is correct." *CTB, Inc. v. Hog Slat, Inc.*, 954 F.3d 647, 666 (4th Cir. 2020) (quoting *In re Family Dollar FLSA Litig.*, 637 F.3d 508, 512 (4th Cir. 2011)).

time outdoors almost every day and eat lunch outside when the temperature is above 50 degrees. JA 0343-44, 0347, 0350-51, 0504. I.B. testified that she would sometimes cry in the mornings before school when she was in Kindergarten and first grade because she was so cold. JA 0350, 0497.

And Plaintiffs sometimes missed out on time in class because of the Skirts Requirement. For example, Keely was dismissed from class and sent to the school office for the entire school day for wearing shorts to school because she thought the Uniform Policy was suspended that day. JA 0503.

Harms of Gender Stereotypes

Plaintiffs' expert, Dr. Christia Spears Brown, a developmental psychologist specializing in adolescence, summarized literature on child development showing the harms of gendered clothing requirements like the Skirts Requirement and the stereotypes they reflect. She pointed to research showing that requiring girls to wear skirts restricts girls' physical mobility, leads to girls being less active during playtime than boys, and reinforces "gender roles in which girls are viewed as weak and passive and focused on their appearance instead of agency." JA 0341-42,

0346, 2450-53. Requiring skirts can thus contribute to stereotyped views about athletics as a domain for boys and deprive girls of the positive effects associated with physical activity, including improved psychological, musculoskeletal and cardiovascular health, better academic performance, and lower obesity. JA 0342, 2453.

Dr. Brown further testified that practices that foster sex stereotypes, in turn, lead to negative academic, social, and psychological consequences for both boys and girls, and specifically, affect girls' confidence, interest, and motivation about their science and math abilities. JA 0346, 2445-47. The harms are particularly great for students who do not conform to gender stereotypes. JA 0346, 2450-53. And she pointed to a robust body of literature showing that practices that draw attention to gender in the classroom place girls in a state of "stereotype threat, which negatively affects performance in tasks such as mathematics testing that are negatively associated with the stereotype." JA 0346, 2447-49. Defendants do not dispute Dr. Brown's findings generally, including those regarding "stereotype threat." JA 2519. Rather, they dispute that these effects have been observed "in

ordinary classroom circumstances" or at CDS—a topic on which Dr. Brown did not opine. JA 2519, 2609.

Dr. Jo Paoletti, a fashion and dress historian at the University of Maryland, testified to the practical impacts of requiring girls to wear skirts, the evolution of community standards and attitudes about women's clothing, and historical and current norms regarding dress codes and uniforms in schools. JA 2406-18. Her review of local dress codes in Leland, which included a private Catholic school in the area, found that no school other than those operated by RBA prohibits girls from wearing pants or shorts to school. JA 0328, 2411-12. Noting that "the 'tradition' that the requirement evokes has not been the norm for nearly half a century in either the educational context or in society as a whole," she concluded that "the research on gender stereotypes, gendered clothing, and physical activity supports the plaintiffs' claims that they are disadvantaged by the gender distinctions made by their uniforms and the physical limitations that result." JA 2415. For example, she testified that the distraction girls face over worries about the position of their legs "mov[es] their attention from the task at hand—whether learning or recreation." JA 2414. She concluded that

"there is no evidence that the CDS skirts requirement is doing any good, and there is evidence that it causes harm." JA 2415.

The Structure of CDS and RBA

CDS is a public school. It derives ninety-five percent of its funding from government sources. JA 2595-97. In turn, ninety percent of RBA's funding comes from management fees paid by the four schools operated by CDS, Inc. JA 1676, 2605.

CDS was established, pursuant to the North Carolina Constitution and North Carolina's Charter Schools Statute, N.C. Gen. Stat. § 115C-218 *et seq.*, under a charter granted by the North Carolina State Board of Education to CDS, Inc. ("Charter"). JA 0212, 0363. CDS was founded by Mitchell, who served as Chair of its original Board and currently serves as Board Secretary. JA 0319, 0322.

RBA, which was also founded by and is wholly owned by Mitchell, manages and operates CDS. JA 0323, 0360, 1530. The charter application for CDS was filed "in conjunction" with RBA, and lists Mitchell as the primary contact and signatory, in his capacity as Chair of the CDS, Inc. Board. JA 0359-60.

The Charter application detailed RBA's operation and management of CDS, and incorporated a draft Management Agreement between CDS and RBA, which Mitchell signed as RBA's President. JA 0360. The Charter, granted by the State Board of Education, incorporated the Management Agreement. JA 0363, 0365. The Management Agreement delegates to RBA the management and day-to-day operation of CDS and its academic programs, including "implementation and administration of the [CDS] education program, including the selection and acquisition of instructional materials, equipment and supplies; and the administration of any and all extra-curricular and co-curricular activities and programs." JA 0230, 1770. And it confers on RBA the authority to "recommend reasonable rules, regulations and procedures applicable to CDS" and directs RBA "to enforce the rules, regulations and procedures adopted by CDS, Inc." JA 0229-31, 0360.

In his current role as RBA's President, Mitchell is responsible for promulgating RBA policies and running day-to-day operations at CDS, as well as at three other charter schools operated by CDS, Inc. JA 0323, 0360. Individual Board members Robert Spencer, Chad Adams,

Suzanne West, Colleen Combs, Ted Bodenschatz, and Melissa Gott comprise the CDS, Inc. Board of Trustees, which approves CDS's school policies. JA 0322-23. Mark Dudeck serves as the CFO of RBA as well as the treasurer and registered agent of CDS, Inc. JA 0361-62. CDS's football and cheerleading teams compete under the name "Roger Bacon Academy Vikings" or "RBA Vikings." *E.g.* JA 2277, 2284.

RBA's organizational chart lists RBA above the headmasters, administrators and staff at CDS, as well as at the other three CDS, Inc. schools. JA 0360, 1088. RBA employs the top administrators at CDS, including the Headmaster and Assistant Headmaster, JA 2582, and it selects and hires CDS personnel, including teachers, though teachers are paid by CDS. JA 0363, 2657. RBA officials routinely promulgate and implement changes to CDS's policies, including changes to the Uniform Policy, even prior to receiving approval from the CDS Board. JA 0361-62, 0659, 1318-19.

Procedural History

Plaintiffs A.P., I.B., and Keely Burks, then in Kindergarten, fourth grade, and eighth grade respectively, filed suit in March 2016 alleging, pursuant to 42 U.S.C. § 1983, that the Skirts Requirement

violates the Equal Protection Clause and Title IX. JA 0034-35. The district court denied Defendants' motion to dismiss. JA 0244-56.

Following discovery and cross-motions for summary judgment, the district court held that the Skirts Requirement was unconstitutional because (a) Plaintiffs had shown that the requirement placed an unequal burden on girls, and (b) Defendants failed to show that the Skirts Requirement furthered the goals of promoting respect between students or improving student outcomes. JA 2738-44. The court granted summary judgment for Plaintiffs on the equal protection claim against CDS, Inc. and the Board, finding they acted under color of state law in adopting the Skirts Requirement. JA 2736. The court, however, held that Defendant RBA was not a state actor because it is a separate legal entity from CDS, Inc. JA 2736-38.

The court granted summary judgment to all Defendants on Plaintiffs' Title IX claim based on its novel holding that discrimination in student dress codes is categorically exempt from that statute. The court reached that conclusion based on the rescission of a prior regulation, which had been issued by the U.S. Department of Education ("USED") as part of Title IX's original implementing regulations in

1977, and which had expressly prohibited sex discrimination in dress and appearance codes. In 1982, the agency rescinded the regulation to better reflect the agency's then-current administrative enforcement priorities. Though the 1982 rescission was non-substantive, the district court found that it was entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and that it barred even private parties from bringing claims based on discriminatory dress codes. The court denied without prejudice the parties' cross-motions for summary judgment on the state-law claims for sex discrimination and breach of contract. JA 2744-45.

On November 26, 2019, the District Court entered partial final judgment for Plaintiffs on their Equal Protection claim against Defendants CDS, Inc. and the individual Board members, and dismissed Defendant RBA; entered partial final judgment for Defendants on Plaintiffs' Title IX claims; and stayed Plaintiffs' state law claims. JA 0033, 2755-56, DE 256. This appeal followed.

SUMMARY OF ARGUMENT

This case presents the question of whether Title IX and the Constitution permit a public charter school to require girls to wear skirts in order to attend school, with the express purpose of conveying the message that girls are more "fragile" and in need of protection than boys. The answer is plainly no. Rather, the Skirts Requirement at CDS reflects—and reinforces—the "the very stereotype the law condemns," *J.E.B. v. Alabama*, 511 U.S. 127, 138 (1994) (internal quotation omitted).

The Skirts Requirement violates the guarantee of equal protection. By requiring girls to wear skirts to school and prohibiting them from wearing pants, the Skirts Requirement makes a facial, sex-based classification subject to heightened scrutiny. *See United States v. Virginia*, 518 U.S. 515, 531 (1996). In the words of the school's founder, the purpose of the Skirts Requirement is to foster "respect" between boys and girls by instilling the value of "chivalry"—*i.e.*, the notion that girls are more "fragile" and should be treated more gently than boys at school. JA 0334-35, 1549-50, 2518. This Court need look no further: The Skirts Requirement rests on "'fixed notions'" about girls' purported need

for protection, and is thus plainly illegitimate. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692 (2017) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)); *Knussman v. Maryland*, 272 F.3d 625, 636 (4th Cir. 2001).

Even if the Skirts Requirement were not animated by stereotypes, Defendants have failed to articulate any other sufficiently important justification, much less demonstrate that the Skirts Requirement furthers any such interest. Notwithstanding the purported wishes of a majority of CDS parents, the preferences of a majority cannot justify discrimination. *See Virginia*, 518 U.S. at 542. And Defendants have pointed to no evidence showing that the Skirts Requirement has any effect whatsoever on classroom discipline or student outcomes, much less that it is substantially related to achieving those results. *See Hogan*, 458 U.S. at 731; *Massie v. Henry*, 455 F.2d 779, 783 (4th Cir. 1972).

Defendants' attempts to generate a factual dispute on issues related to CDS's overall student performance miss the mark, as those issues have never been disputed in this case and are irrelevant to the analysis under both equal protection and Title IX. *See Virginia*, 518

U.S. at 542; *Jennings v. Univ. of N. Carolina*, 482 F.3d 686, 699-700 (4th Cir. 2007). Plaintiffs' undisputed testimony shows that the Skirts Requirement has harmed them individually, including by conveying harmful messages about girls' worth and ability, and impeding their ability to learn, play, and participate equally in activities at school. JA 2525, 2520-24. No more is required.

Defendants' attempts to evade heightened scrutiny altogether are equally unavailing. All gender-based distinctions are subject to this "demanding" test. *Morales-Santana*, 137 S. Ct. at 1690-91; *J.E.B.*, 511 U.S. at 135. Plaintiffs need not make any "threshold showing" that the Skirts Requirement is "discriminatory" in order to trigger heightened scrutiny, as it is precisely the question of whether a classification is discriminatory that the application of heightened scrutiny review is intended to answer. *See J.E.B.* at 135; *Hogan*, 458 U.S. at 724 n.9.

Nor need Plaintiffs prove that the Uniform Policy, viewed as a whole, posed an "unequal burden" on girls relative to boys. That framework, which stems from a discredited line of cases decided principally in the context of Title VII—*see Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006) (en banc)—is not

controlling in an equal protection analysis. And in any event, its reasoning has been effectively abrogated by the Supreme Court's decision in *Bostock v. Clayton County*, which flatly rejected the theory that an employer can impose parallel gender stereotypes on men and women without running afoul of Title VII. No. 17-1618, 2020 WL 3146686, at *8 (U.S. June 15, 2020). Plaintiffs are not required to show that the Skirts Requirement harms all girls as a group, or to disprove harm to boys, as the burden to justify the Skirts Requirement rests squarely on Defendants. *Virginia*, 518 U.S. at 533. And it is one that—particularly on this Record—Defendants cannot carry.

This Court should affirm the finding that in promulgating the Skirts Requirement, CDS, Inc., the entity that holds the charter for CDS, engaged in state action; it should reverse the finding that RBA, the entity that operates and manages CDS, did not. In granting the Charter to CDS, Inc., the State of North Carolina delegated to *both* CDS, Inc. and RBA its constitutional obligation to provide free, public education, and to promulgate codes of student conduct. *See* N.C. Gen. Stat. § 115C-218 *et seq.*; N.C. Gen. Stat. §§ 115C-390.2, 115C-218.60; *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1929 n.1

(2019); *West v. Atkins*, 487 U.S. 42, 55-56 (1988). Both CDS, Inc., and RBA act as creatures of state law in operating CDS, and act wholly pursuant to government authority in establishing and enforcing the Skirts Requirement. *See Mentavlos v. Anderson*, 249 F.3d 301 (4th Cir. 2001).

The delegation of state authority runs equally to RBA. In practice, RBA controls all aspects of the school's day-to-day operations, hires and employs the school administrators who enforce the Uniform Policy on a daily basis, and plays a principal role in establishing school policy, including the Skirts Requirement. And the two entities are functionally intertwined. Both CDS, Inc. and RBA therefore engaged in state action when they promulgated and enforced the Skirts Requirement. *See, e.g.*, *Jordan v. N. Kane Educ. Corp.*, No. 08 C 4477, 2009 WL 509744, at *2-3 (N.D. Ill. Mar. 2, 2009). To hold otherwise would be to hand charter schools and their operators a free pass to use their corporate structure as a shield for those most directly responsible for unconstitutional conduct.

The Skirts Requirement also offends Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), which expressly prohibits

differential treatment of students based on sex and was designed to root out the very gender stereotypes the Skirts Requirement reflects. *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982); 118 Cong. Rec. 5804 (1972) (statement of Sen. Bayh). The Skirts Requirements applies to Plaintiffs solely because they are girls, has subjected them to differential treatment based on blatant stereotypes, and has resulted in excluding them from and denying them participation in activities at school. This violates Title IX by its plain terms and flies in the face of its purpose.

This Court should reverse the district court's grant of summary judgment to Defendants based on its finding of an implied exemption for dress codes in the statute. Title IX's text encompasses the conduct at issue here; while it contains several express exceptions, there is no such exemption for dress or appearance codes. *See Jackson v. Birmingham*, 544 U.S. 167, 175 (2005). Nor does the decision by the U.S. Education Department in 1982 to rescind a regulation on dress and appearance remove dress codes from Title IX's scope. The rescission reflected the agency's enforcement priorities, not its interpretation of the statute's substantive terms. It did not, nor could it, eliminate an entire category

of discrimination from the statute. And because the Skirts Requirement violates Title IX, and because both CDS, Inc. and RBA are recipients of federal funds used to run CDS, both are equally liable for violating the statute. *See* 34 C.F.R. § 106.2(i); *Grove City Coll. 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).

This Court should affirm that rank stereotypes like those reflected in the Skirts Requirement have no place in our public schools, *see Virginia*, 518 U.S. at 542, including charter schools.

ARGUMENT

I. LEGAL STANDARD

A district court's grant or denial of summary judgment is reviewed de novo. *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014). Summary judgment is appropriate when "'the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Ret. Comm. of DAK Americas LLC v. Brewer*, 867 F.3d 471, 479 (4th Cir. 2017) (quoting Fed. R. Civ. P. 56(a)).

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

A. The Skirts Requirement Discriminates on the Basis of Sex and Fails Heightened Scrutiny Because It Reflects, and Perpetuates, Impermissible Gender Stereotypes.

CDS's Skirts Requirement makes a facial, gender-based distinction, imposing a rule on girls—the Skirts Requirement—not imposed on boys. To justify such differential treatment based on sex, Defendants must demonstrate an "exceedingly persuasive" justification for the sex-based classification, and show that the Skirts Requirement is substantially related to achieving the articulated objective. *See*

United States v. Virginia, 518 U.S. 515, 533 (1996). "The burden of justification [for sex-based classifications] is demanding and it rests entirely on the State." *Id.*

While it is the facially different treatment of girls and boys under the CDS Uniform Policy that triggers heightened scrutiny, Plaintiffs here challenge only the requirement that girls wear skirts. They do not challenge the parallel requirement that boys wear pants or shorts, or other sex-based rules contained in the Uniform Policy. It is the Skirts Requirement, and the differential treatment of girls it demands, that Defendants must justify in this lawsuit.

They cannot do so, as the policy was predicated on blatant sex stereotypes. As Mitchell explained in his email to Peltier, the Skirts Requirement was adopted to instill the value of "chivalry," JA 0070-71, 0331-32, and to distinguish between how boys should treat girls versus other boys at school. JA 0333; *see also* JA 0331-32 (earlier draft of the email explaining that CDS founders were "determined to *respect the traditional gender roles* in this school of choice," and to preserve at the school what had been "a norm of civilization for many thousands of years" (emphasis added)). And he defined "chivalry" as "a code of

conduct where women are . . . regarded as a fragile vessel that men are supposed to take care of and honor." JA 0332. Board members and other school officials unanimously echoed Mitchell's rationale. JA 0344, 1549-50.

Before the district court, Defendants argued that "'[r]eflecting the 'difference between the sexes,' the Uniform Policy helps children to 'act more appropriately' towards the opposite sex. 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." DE 159 at 40, JA 1549-50. Defendants now attempt to style the rationale as a more general appeal to "traditional manners and traditional respect." Defs' Br. 10. But they cannot conceal what the Record makes plain: the invocation of "tradition" is an appeal to traditional *gender roles*.

Such reasoning does not amount to an "exceedingly persuasive justification" for the Skirts Requirement—and on the contrary, it is premised on the very fixed "notions about the proper station in society for males and females [that] have been declared invalid time and again by the Supreme Court." *Knussman v. Maryland*, 272 F.3d 625, 636 (4th Cir. 2001); *see also Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690-

91 (rejecting "habitual, but now untenable, assumptions" about gender roles). And the Supreme Court has taken special aim at governmental interests that view women as more "fragile" or in need of "special protection" than men. *See Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); *J.E.B. v. Alabama*, 511 U.S. 127, 133, 141 (1994). Defendants' position that permitting girls to wear pants would hinder "traditional respect between the two sexes," JA 1549-50; DE 159 at 40-42; Defs' Br. 10, fares no better. The Court has perceived such appeals to "respect" and "decency" as reflecting "the very stereotype the law condemns." *J.E.B.*, 511 U.S. at 138; *see also Virginia*, 458 U.S. at 555 n.20. Because, at its core, Defendants' justification for the Skirts Requirement is expressly premised on the notion that girls require "special protection," *Orr v. Orr*, 440 U.S. 268, 283 (1979), it cannot stand. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) .

Finally, Plaintiffs have shown that *in practice*, the Skirts Requirement not only reflects, but also perpetuates pernicious sex stereotypes causing Plaintiffs dignitary harms, including feelings of inferiority. *See Virginia*, 518 U.S. at 534. Plaintiffs understood and internalized the message that girls and boys should be treated

differently at school, that girls are considered fragile and in need of boys' protection, and that girls are less entitled to learn or play in comfort. As Keely testified,

> The dress code and the constant monitoring by teachers and school administrators made me feel like they 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. They seemed to be telling me every day that girls are not in fact equal to boys, and that would make me feel inferior and angry at the same time.

JA 0356, 0503-07; *see also* JA 0351, 0499 (I.B. testimony of her understanding from the Skirts Requirement "that girls should be less active than boys and that they are more delicate than boys"). These are precisely the types of harms that heightened scrutiny of sex-based classifications is intended to guard against. *Virginia*, 518 U.S. at 534.

B. The Skirts Requirement Is Not Substantially Related to Any Other Important Justification.

Because Defendants take the position that heightened scrutiny is not warranted, *see infra* Section II.C, they have declined to clearly articulate—or support with evidence—other interests that the Skirts Requirement was intended to promote. Instead, they argue that if any justification is required, there would be factual disputes as to whether

the Uniform Policy *as a whole* advances various vague objectives, including honoring the preferences of the majority of CDS parents, Defs' Br. 10, 55-56; fostering "respect" or "discipline and good behavior," *id.* at 11, 57; or furthering the success of girls or of students at the school as a whole, *id.* at 58. But even assuming the Court finds these justifications genuine rather than invented *post hoc*, *see Virginia,* 518 U.S. at 533, none satisfies heightened scrutiny as a matter of law.

Among these justifications, the only one that applies to the Skirts Requirement—as opposed to the existence of a uniform policy at all—is "majority preference" or "community norms." But the approval of a majority cannot justify an otherwise unconstitutional policy. *See Virginia*, 518 U.S. at 542. To the contrary, heightened scrutiny jurisprudence developed precisely to counter majoritarian goals that disadvantage historically vulnerable groups. *See United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938). Indeed, even the majority preference of the *disadvantaged* group cannot justify discrimination against those individual members of the group who fall "outside the average description." *Virginia*, 518 U.S. at 550; *see also Hayden v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 579 (7th Cir.

2014). Nor does the school setting, Defs' Br. 41, change the result: far from being "diluted," much equal protection law arose in the context of schools, in large part in recognition that the preferences of parents cannot justify discrimination against other people's children (or even their own). *See United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 488, 491 (1972); *Massie*, 455 F.2d at 780; *accord Arnold v. Carpenter*, 459 F.2d 939, 943 (7th Cir. 1972). It is the girls who wish to be permitted to wear pants or shorts, not the girls (or parents) who approve of the command to wear skirts, on whom this Court must focus. *Virginia*, 518 U.S. at 550.

The second possible justification—that girls wearing pants would hinder "respect between the two sexes"—is illegitimate, as set forth above. *See* Section II.A. Moreover, Defendants do not—nor could they in any seriousness—dispute that boys and men are capable of respecting women and girls at school regardless of whether they wear skirts or pants, or that violent or disrespectful behavior should not be blamed on girls' and women's attire. JA 0337. Board members conceded that whether a girl or woman is wearing pants or a skirt does not change the level of respect she should be given, and allowed that they themselves

(if they were women) or their wives, siblings, or other relatives (if they were men) routinely wore pants in professional settings. JA 0338. And they admitted at depositions that they did not know whether permitting girls to wear pants would have any effect on whether boys at CDS treat girls with respect. *Id.* In fact, Plaintiffs testified that wearing skirts resulted in boys teasing them when their undergarments showed, and "looking up" their skirts. JA 0341, 0353, 0498, 0505-06. The Record therefore fails to support that the Skirts Requirement is related, substantially or otherwise, to fostering respect between boys and girls—and there is evidence that, for Plaintiffs, it has had the opposite effect.

The third possible justification—that the presence of girls in pants or shorts would undermine discipline or order in the classroom generally—is wholly unavailing for one key reason: Several Board members and school officials conceded that there would be no change in student discipline if girls were permitted to wear pants, or that they did not know if it would make any difference. JA 0337. Indeed, CDS administrators admitted that there have been no demonstrable differences in student behavior in the classroom on the days when students wore their unisex P.E. uniforms. *Id.* And although some

RBA/CDS administrators testified that children acted more "rowdy," "excited," or "distracted" on days when the Uniform Policy is waived for special occasions—such as field trips, celebrations, or other special events, JA 1551—they do not assert that this resulted from the presence of some girls in shorts or pants, rather than from the excitement of being allowed to wear whatever clothing they chose generally, or simply of the special occasion itself. Indeed, this Court has rejected this type of justification for sex-specific appearance codes on similarly thin records. *See Massie*, 455 F.2d at 783; *Long v. Zopp*, 476 F.2d 180, 181 (4th Cir. 1973); *Mick v. Sullivan*, 476 F.2d 973, 973 (4th Cir. 1973).

Defendant's reliance on CDS's much-touted grades and test scores fares no better, because there is no evidence that the Skirts Requirement was adopted to improve these outcomes or to further "student success." Even if the Court were to consider whether this is a reason for *keeping* the Skirts Requirement, Defendants can point to no evidence showing a correlation between the Skirts Requirement and better outcomes. For example, Defendants' own expert, Dr. Yishi Wang, whose report compared results for boys and girls at CDS to those of

other area schools, explicitly disavowed drawing any conclusions regarding the *causes* of CDS's superior results, or attributing them to the Uniform Policy at all, let alone to the Skirts Requirement. JA 2623-29. Indeed, Dr. Wang was not even aware of what the Uniform Policy required. *Id.* Moreover, he admitted that his analysis of the results for girls at CDS relative to girls at other schools failed to account for confounding variables such as socioeconomic status, race, or selection effects, *id.*, rendering his analysis essentially meaningless.[7] *See Lamarr-Arruz v. CVS Pharmacy, Inc.*, No. 15-CV-04261 (JGK), 2017 WL 4277188, at *10 (S.D.N.Y. Sept. 26, 2017) ("To be reliable, a data analysis must account for major variables, including confounding variables."). And he certainly did not dispute the possibility that girls at CDS could have performed even better in the absence of a requirement that they wear skirts. JA 2466-67; DE 132-4 at 5-6, 14-15. The connection with the Skirts Requirement is thus far too tenuous, and the

[7] The report of Drs. Hively and Duncan-Hively similarly purported to analyze CDS grades and test scores in support of the conclusion that girls are not impaired "by having to wear dresses." JA 2419, 2788 (SEALED). Their analysis was similarly fatally flawed by their failure to perform any tests for statistical significance or to account for confounding variables. JA 1733.

goal far too vague, to serve as an "exceedingly persuasive" justification for a gender-based distinction. *See Hogan*, 458 U.S. at 731.

Finally, the factual disputes Defendants attempt to generate as to the adequacy of their justifications are not supported by the Record. Their arguments aim to call into question whether the Skirts Requirement has caused harm to girls in general at CDS—for example, pointing to girls' overall academic success and participation in school activities or interscholastic sports. Defs' Br. 47, 52. But this is not sufficient to create a triable issue of fact as to whether the *Skirts Requirement* is linked to any of these positive outcomes in the absence of any evidence of such a link. Nor, for that matter, can these factors create a dispute as to whether the Skirts Requirement has harmed the individual Plaintiffs. And although Plaintiffs' experts spoke to the harms that practices like the Skirts Requirement have been shown to cause for girls generally, including negatively impacting their test scores relative to how they might have performed absent gender stereotypes, JA 0346, 2447-49, their testimony did not purport to show such effects *at CDS*. They were not required to. Rather, it is Defendants'

burden to demonstrate that the Skirts Requirement is substantially related to furthering its asserted goals, which they have failed to do.

There are therefore no material factual disputes that would cure the inadequacy of Defendants' justifications, as they either fail as a matter of law, are wholly unsupported by the Record, or are simply irrelevant to the analysis.

C. The Skirts Requirement Is Not Exempt from Heightened Scrutiny.

Perhaps not surprisingly given the stereotypes that animate the Skirts Requirement, Defendants go to great lengths to avoid heightened scrutiny altogether. These efforts fly in the face of foundational principles of modern equal protection jurisprudence and should be rejected.

First, Defendants suggest that dress codes that impose different rules on men and women are categorically exempt from heightened scrutiny simply because they contain requirements for both. Not true: The Supreme Court has been unwavering in its application of heightened scrutiny to gender-based classifications. *See Morales-Santana*, 137 S. Ct. at 1689-90; *J.E.B.*, 511 U.S. at 135; *Hogan*, 458 U.S. at 724 n.9. That is so even where the classification challenged involves

parallel rules affecting men *and* women. *See, e.g., Morales-Santana*, 137 S. Ct. at 1690-93 (applying heightened scrutiny to invalidate statutory scheme containing parallel qualifications applicable to men and women for gaining citizenship); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying heightened scrutiny to invalidate statute prohibiting sale of 3.2% beer to men under 21 and women under 18). As the Court has recognized, such regimes are often a double-edged sword that harm men and women in different, though equally pernicious, ways. *See Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) (different ages of majority reflected archaic stereotypes that "the female [is] destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas").[8]

Second, Defendants compound this error by proposing that Plaintiffs must make this showing of "unequal burden" as a "threshold element of discriminatory treatment" *before* Defendants are required to

[8] Even before the Supreme Court acknowledged that the equal protection guarantee extended to gender, this Court recognized the equal protection concerns implicated by gendered appearance codes. *See Massie*, 455 F.2d at 783 (striking down a school restriction on boys' hair length on due process and equal protection grounds); *Long,* 476 F.2d at 181 (4th Cir. 1973) (high school football coach could not deny male player his "letter" because his hair length exceeded the coach's "hair code"); *Mick*, 476 F.2d at 973 (4th Cir. 1973) (fear of disruptive effects on discipline could not justify hair length restriction).

justify their policy. Defs' Br. 48, 50. That gets the analysis backwards. The very purpose of the heightened scrutiny test is to determine whether a sex-based classification *is discriminatory*. *See Hogan*, 458 U.S. at 724 n.9, 725-26; *accord J.E.B.*, 511 U.S. at 135.

Defendants' "unequal burden" theory also seeks to reverse the burden of proof in asserting that Plaintiffs bear the "heavy load of showing that the Uniform Policy, viewed as a whole, imposes disproportionate burdens on one sex." Defs' Br. 37, 42-44, 48. And they complain that they are wrongly being "forc[ed] . . . to justify their policy," Defs' Br. 37, when in fact, that is exactly what heightened scrutiny requires. It has never been the *plaintiffs'* burden to disprove harm to others, whether inside or outside of their own group. *Virginia*, 518 U.S. at 533. The burden "rests entirely" on Defendants. *Id.*

Finally, Defendants' proposed test also uses the wrong focus of the equal protection analysis. Plaintiffs do not need to prove that *all* girls are harmed relative to boys, or that boys are *not* harmed relative to girls. *See Hayden*, 743 F.3d at 579. The guarantee of equal treatment protects *individuals*—not groups. *See Batson v. Kentucky,* 476 U.S. 79, 95-96 (1986); *Shelley v. Kraemer,* 334 U.S. 1, 22 (1948). Plaintiffs need

only show that the policy treats them differently because of sex, in ways that harm *them*. *See Virginia*, 518 U.S. at 533, 550 (rejecting defense that exclusion from military college was justifiable because a majority of women would not wish to apply).

Defendants' chief authority for their "unequal burden" standard is dicta from the Seventh Circuit's decision in *Hayden*, 743 F.3d at 577, which invalidated a policy requiring boys on the basketball team to wear their hair short. *Hayden* discussed the "unequal burden" standard that had emerged from the employment context as an alternative theory on which the case could have been tried. But the court cast doubt on whether that theory remained viable, and never even applied it. 743 F.3d at 578-80.[9] And if the viability of this theory was doubtful then, the Supreme Court has now put that question to rest by firmly rejecting

[9] The court in *Hayden* neither applied the unequal burden standard—because the defendants had not advanced it—nor opined on whether it would have been successful had they done so. *Id.* at 579-82. Rather, *Hayden* recognized that the traditional heightened scrutiny standard applied to the athletes' claims and found that Defendant had failed to satisfy any level of review because it could not show that having separate grooming standards for girls and boys furthered the goals offered by the school—promoting team unity and a "clean-cut" image. *See Hayden*, 743 F.3d at 582. Moreover, had the *Hayden* Court actually applied the "unequal burden" standard in reliance on cases decided under Title VII, it would have been in conflict with a prior panel decision expressly rejecting the application of that standard under Title VII in a dress code case. *See Carroll v. Talman Fed. Sav. & Loan Ass'n of Chicago*, 604 F.2d 1028, 1030 (7th Cir. 1979).

the "double discriminator" defense in the Title VII context. An employer's application of a discriminatory rule to both men and women, in reliance on traditional sex stereotypes, "*doubles* rather than eliminates Title VII liability." *Bostock*, 2020 WL 3146686, at *8. That principle is all the stronger here, where the issue is not a challenge to a sex-specific dress code of a private employer, but rather an equal protection challenge to a sex-based dress code imposed by the state on schoolchildren. *See Massie*, 455 F.2d at 783; *Hogan*, 458 U.S. at 742.

Defendants are equally misguided in suggesting that Plaintiffs were required, in challenging the Skirts Requirement, to address the effects of the other sex-specific provisions of the Uniform Policy "as a whole"—such as the provision permitting girls, but not boys, to wear their hair long or to wear makeup or certain jewelry. Defs' Br. 43-44. Plaintiffs welcome Defendants' newfound awareness that the gendered provisions of the Uniform Policy may well harm some boys. And indeed, Plaintiffs' experts pointed out that they could be expected to pose particular hardships for transgender and non-binary students. JA 0346, 2450-53, 2829-32 (SEALED). But because Plaintiffs are not personally harmed by those terms—the hair and jewelry provisions are permissive,

not mandatory, for girls—they would have to be challenged by different plaintiffs and judged on a different record.[10] Plaintiffs have appropriately focused their challenge on the specific provision—the Skirts Requirement—that has harmed them personally, and have made a detailed showing as to how. This is all they were required to do. The Uniform Policy's overall effects on other students, no matter how harmful, do not cancel out the harms to Plaintiffs from the Skirts Requirement.

D. A Ruling that the Skirts Requirement Violates Equal Protection Would Not Render Unlawful All Sex-Based Rules in Schools.

Defendants and their *Amici* suggest that heightened scrutiny cannot apply to the Skirts Requirement because, if it did, *all* gender-based dress and grooming codes, along with single-sex schooling, would

[10] Moreover, like the defendant school board in *Hayden*, Defendants here have failed to point to any specific Record evidence related to the burden on boys, apart from the fact that the Uniform Policy applies to and is enforced against both boys and girls. *See* Defs' Br. 46 (pointing to requirement that boys "maintain short hair, avoid wearing jewelry, and wear belts and socks"); 48 (raising, without reference to the Record, the "added cost of belts and more frequent haircuts" for boys). Plaintiffs, on the other hand, have provided ample evidence of the many concrete and dignitary harms it posed to them, beyond the mere fact of its enforcement, because they are girls. *See supra* at 12-16. Therefore, as the district court's analysis showed, Plaintiffs would prevail even under the "unequal burden" test—even though that analysis is incorrect as a legal matter.

fall. *See* Defs' Br. 41 Br. Amicus Curiae North Carolina Inst. For Constitutional Law, Doc. 27-1, at 3. Not true.

Although many facially discriminatory regimes have been invalidated as a result of applying heightened scrutiny, not all of them have. *See, e.g., Michael M. v. Superior Court of Sonoma Cty.*, 450 U.S. 464, 472-73 (1981) (upholding statutory rape law penalizing men for engaging in sexual intercourse with a woman under the age of 18); *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981) (upholding exclusion of women from selective service). And application of heightened scrutiny to single-sex schools and classrooms is already the law; a ruling in Plaintiffs' favor would not alter this. *See Virginia*, 518 U.S. at 555; *Hogan*, 458 U.S. at 723-24; *Doe v. Vermilion Par. Sch. Bd.*, 421 F. App'x 366, 372 (5th Cir. 2011); *Garrett v. Bd. of Educ. of Sch. Dist. of City of Detroit*, 775 F. Supp. 1004, 1006-09 (E.D. Mich. 1991). Nor has this led to the end of all single-sex schooling. *See Virginia*, 518 U.S. at 515, 533 n.7 ("We do not question [Virginia's] prerogative evenhandedly to support diverse educational opportunities."); *A.N.A. ex rel. S.F.A. v. Breckinridge Cty. Bd. of Educ.*, 833 F. Supp. 2d 673, 678 (W.D. Ky.

2011) (allowing single-sex classrooms in middle school where such classes were optional and there was no evidence of gender stereotypes).

As shown above, *see* Section II.A, on this particular Record, a ruling in Plaintiffs' favor would be entirely consistent with the Supreme Court's recognition that sex-based distinctions premised on gender stereotypes violate the right to equal protection. Ultimately, any future challenge to a different sex-based policy—whether to a single-sex program, a sex-specific facility, or a gendered dress or appearance code—would pose different questions, on a different record. *See Bostock*, 2020 WL 3146686, at *17. Those questions would have to be evaluated, as all sex-based classifications are, based on the scope of the policy, the harms to the specific plaintiffs, and the justification offered. Here, the question is whether a sex-specific rule shown to harm girls and based expressly on stereotypes can be justified. It cannot.

III. IN PROMULGATING THE SKIRTS REQUIREMENT, BOTH CDS AND RBA ACTED AS STATE ACTORS.

As operators of a public charter school created by virtue of state law to carry out the state's constitutional mandate to provide free public education, both CDS, Inc. (including its Board) and RBA acted as state actors in setting and enforcing policy governing student conduct. This

Court should affirm the district court's holding the CDS, Inc. was a state actor and reverse its holding that RBA was not because of its status as a separate entity.

A. Private Entities Engage in State Action when They Act Pursuant to Constitutional Authority Delegated by the State.

A private entity engages in state action if it has "exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West,* 487 U.S at 49 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). State action exists when the state "has exercised coercive power or has provided such significant encouragement that the action must in law be deemed to be that of the state"; or "when the private entity has exercised powers that are traditionally the exclusive prerogative of the state." *Mentavlos v. Anderson*, 249 F.3d 301, 313 (4th Cir. 2001) (quoting *Haavistola v. Cmty. Fire Co. of Rising Sun*, 6 F.3d 211, 215 (4th Cir. 1993)); *see also Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct.1921, 1929 n.1 (2019) (recognizing state action may be present when the state has "outsourced one of its constitutional obligations to a private entity"). Determining whether a private entity has engaged in

state action is a functional and fact-bound inquiry, requiring the court to focus on the specific conduct at issue. *See Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296, 298 (2001); *Mentavlos*, 249 F.3d. at 313.

Here, the state expressly delegated—to both CDS, Inc. and RBA—its historical and exclusive constitutional obligations to provide free public education and to promulgate policy governing student conduct. Article IX, Section 2, of the North Carolina Constitution establishes the right to free public education, and provides for the establishment of "a general and uniform system of free public schools." N.C. Const. art. IX § 2. Pursuant to this mandate, the North Carolina legislature created the traditional public schools to be provided "free of charge to all children of the State, and to every person of the State less than 21 years old, who has not completed a standard high school course of study." N.C. Gen. Stat. § 115C-1. Through this school network, the state is responsible for ensuring that all school-aged children within the state have access to free public education, which the state's highest court has recognized as "a fundamental right," *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997) and the North Carolina Court of Appeals called "a core

constitutional function of the highest order." *State v. Kinston Charter Acad.*, 836 S.E.2d 330, 336 (N.C. Ct. App. 2019).

It was pursuant to the same constitutional authority that the state later authorized the creation of charter schools via the Charter School Statute. *See* N.C. Gen. Stat. § 115C-218 *et seq.*; *Sugar Creek Charter Sch., Inc. v. State*, 712 S.E.2d 730, 742 (N.C. 2011). The Charter School Statute unambiguously designates charter schools as public schools. *See* N.C. Gen. Stat. § 115C-218.15 ("A charter school that is approved by the State shall be a public school."); *Kinston Charter Acad.,* 836 S.E.2d at 336. And North Carolina courts have recognized that charter school operators are on the same footing as state officials. *See Yarbrough v. East Wake First Charter Sch.*, 108 F. Supp. 3d 331, 337 (E.D.N.C. 2015) (dismissing suit by charter school employees against school and its board president because charters, "as statutorily defined public schools, enjoy the same governmental immunity as traditional public schools")[11]; *Kinston Charter Acad.,* 836 S.E.2d at 336 ("[A]s public schools in the State of North Carolina,

[11] CDS, Inc., carries an insurance policy that indemnifies the school and its Board, and that contains no exception for conduct subject to governmental immunity. JA 1945. Defendants have not appealed the District Court's ruling that the Board members did not enjoy Eleventh Amendment immunity. JA 0255-56.

[charter schools] exercise the power of the State and are an extension of the State itself.").

Because both charter schools and their operators are definitionally public entities, CDS, Inc., exists and operates CDS "by virtue of state law . . . and clothed with the authority of state law." *West*, 487 U.S. at 49 (quoting *Classic*, 313 U.S. at 326). There is no dispute in this case that CDS is a public school, or that it operates CDS by virtue the Charter granted by the North Carolina State Board of Education, pursuant to Charter School Statute. JA 0212-13, 0322, 0357, 2178. Consequently, there is no need to conduct an inquiry into whether there is a close enough *nexus* between the state and the corporate entity that operates the charter school, CDS, Inc., to confer state action. *See Tann v. Ludwikoski*, 393 F. App'x 51, 53 (4th Cir. 2010) (unpublished) (finding employees of public community college were "state actors," and rejecting as inapplicable the so-called "*Jackson* test," which considers "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity" (*citing Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)); *Chalfant v. Wilmington Inst.,* 574 F.2d 739, 745 (3d Cir.1978) (same, reaffirming holding that state action

automatically is met in the context of officials at public schools and universities). The charter school itself operates as an arm of the state.

Indeed, based on comparable statutory schemes, courts around the country have recognized that charter schools and their operators act as state actors with respect to policies and practices affecting students. *See ACLU of Minnesota v. Tarek Ibn Ziyad Acad.*, Civil No. 09-138, 2009 WL 2215072, at *9-10 (D. Minn. July 21, 2009) (charter school and its operator were state actors pursuant to statute designating them as public schools, operator's oversight of the school's operations and policies, and its role in obtaining the charter); *Matwijko v. Bd. of Trustees of Glob. Concepts Charter Sch.*, No. 04-CV-663A, 2006 WL 2466868, at *5 (W.D.N.Y. Aug. 24, 2006) (same); *Riester v. Riverside Cmty. Sch.*, 257 F. Supp.2d 968, 972 (S.D. Ohio 2002) (same); *cf. McNaughton v. Charleston Charter Sch. for Math & Sci., Inc.*, 768 S.E.2d 389, 399 (S.C. 2015) (South Carolina charter school is a state actor for purposes of fee shifting provision "because it is classified as a public school; is funded by state money; and created by virtue of state law in furtherance of the state's duty to provide public education pursuant to . . . the South Carolina Constitution"). Courts generally

draw no distinction between the school itself and the corporation or officials charged with operating it, but treat them as one and the same. *See, e.g., Jordan*, 2009 WL 509744, at *2-3.

If this were not enough, the North Carolina legislature has vested charter schools with the specific authority exercised in this case—the establishment of student conduct policies. The statute *requires* charter schools, like all other public schools, to enact student codes of conduct—and places limits on that authority. *See* N.C. Gen. Stat. § 115C-390.2(a) (local school boards "shall adopt policies to govern the conduct of students and establish procedures to be followed by school officials in disciplining students [that] must be consistent with the provisions of this Article and the constitutions, statutes, and regulations of the United States and the State of North Carolina"); N.C. Gen. Stat. § 115C-218.60 (charter schools are "subject to and shall comply with § 115C-390.2(a)). To be sure, the statute does not *require* charter schools to adopt *dress codes* specifically. But neither does it prohibit them. Defendants derived the authority to establish codes of student conduct from the state, and thus they acted under color of state law in promulgating the Skirts Requirement as part of the school's disciplinary

code. *See Milonas v. Williams*, 691 F.2d 931, 940 (10th Cir. 1982); *cf. Rendell-Baker v. Kohn*, 641 F.2d 14, 26 (1st Cir. 1981) (students "would have a stronger argument" than the plaintiff teachers that the school engaged in state action "since the school derives its authority over [students] from the state"), *aff'd* 457 U.S. 830 (1982); JA 2732-36.

Defendants and their *Amici* argue that the existence of private schools and home schooling mean that education is not the exclusive province of the state. But state action may exist when the state has delegated its authority to a private entity to fulfill a constitutionally mandated state function—even if other private entities also engage in the same conduct. *See Halleck*, 139 S. Ct. at 1929 n.1; *West*, 487 U.S. at 55-56 (private doctor acted as a state actor in providing medical care to an inmate in state custody in light of the state's "affirmative obligation" to provide medical care to prisoners, even where both public and private entities provided care in other contexts). Here, the state has delegated to CDS, Inc. its constitutional obligation to provide free public education and it is the state that is ultimately and exclusively responsible for ensuring that *all* students in North Carolina have access to it regardless of their ability to pay or their parents' ability to provide it

themselves. *See Leandro*, 488 S.E.2d at 255. CDS, Inc.'s conduct taken pursuant to that obligation is thus "fairly attributable to the state." *West*, 487 U.S. at 54-56.

Rendell-Baker v. Kohn, on which Defendants rely, does not control the outcome here. 457 U.S. 830 (1982). First, the defendant school in that case was private: no state law designated it as "public," and the government referred to the school's operator as a "contractor." *Id.* at 833. Second, the school was not charged with providing free public education to students in general, but rather, served only a sub-population of students who "*could not be served by traditional public schools*." *Id.* at 842. Finally, *Rendall-Baker*, like the other cases on which Defendants rely, did not concern the school's provision of education to students, but its status as an employer, which is not exclusively a state function. *Id.*; *Caviness v. Horizon Learning Center, Inc.*, 590 F.3d 806, 813 (9th Cir. 2010);[12] *Johnson v. Pinkerton Acad.*, 861 F.2d 335, 338 (1st Cir. 1988); *see also Milonas*, 691 F.2d at 940;

[12] *Caviness* is further distinguishable because in Arizona, unlike in North Carolina, the charter schools statute *excludes* charter schools from the provision of the constitution establishing public schools. *See* Az. Stat. 15-181; *cf. Nampa Classical Acad. v. Goesling*, 714 F. Supp. 2d 1079, 1088 (D. Idaho 2010) (distinguishing *Caviness* given that under Idaho law "charter schools . . . are not private entities but are instead created by statute as part of the public education system"), *aff'd*, 447 F. App'x 776 (9th Cir. 2011).

Rendell-Baker, 641 F.2d at 26 (1st Cir. 1981). Similarly, this Court's conclusion in *Mentavlos v. Anderson* that a state military academy was not a state actor by virtue of its *students* harassing other students has no bearing on the question whether student conduct policies promulgated *by the school* may be state action. 249 F.3d at 319.

By contrast, where, as here, the claims asserted directly implicate the policies or quality of education offered *by* charter schools *to* the general student population, courts have found the schools and their operators to be state actors. *See, e.g., Scaggs v. New York Dep't of Educ.*, No. 06 CV 0799, 2007 WL 1456221, at *13 (E.D.N.Y. May 16, 2007) ("[C]laims addressing the nature and quality of education received at charter schools may be properly brought against such schools *and their management companies* under Section 1983." (emphasis added)). As in those cases, the school's promulgation of student policy challenged in this case is state action.

B. CDS, Inc., and the Board Acted as State Actors in Promulgating the Skirts Requirement.

Even if the statutory definition of charter schools as public and the state's delegation of its obligation to provide free public education were not sufficient to find state action, the additional factors this Court

has applied in assessing state action all point in the same direction. These factors include: "(1) 'whether the injury caused is aggravated in a unique way by the incidents of governmental authority'; (2) 'the extent and nature of public assistance and public benefits accorded the private entity'; (3) 'the extent and nature of governmental regulation over the institution'; and (4) 'how the state itself views the entity, *i.e.*, whether the state itself regards the actor as a state actor.'" *Mentavlos*, 249 F.3d. at 313 (quoting *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 343 (2000)).

As shown above, *see* Section III.A, CDS exists by virtue of state law, and both CDS, Inc. and RBA derive their authority to operate the school and set student conduct policy from state law. The degree of public funding similarly supports the finding that CDS, Inc. is a state actor in setting CDS school policies: CDS derives 95% of its funds from government sources, JA 1676, 2595-97, 2605, and could not operate without the state's express approval.

As to governmental regulation, as a charter school, CDS is subject to an extensive network of laws and regulations concerning nearly all aspects of its operation, including funding, operations, and academic

and extracurricular activities. To name just a few, the state (a) establishes criteria for student admission, N.C. Gen. Stat. § 115C-218.45; (b) requires charter schools to submit financial reports and data to the state relating to student outcomes under the Uniform Education Reporting System, *id.* § 115C-218.30; and (c) requires charter schools to comply with instructional standards adopted by the State Board of Education and to cover specific topics related to student health and safety, *id.* §§ 115C-218.75; 115C-218.85. This is hardly, as Defendants would have it, a "hands-off approach," Defs' Br. 8.

Finally, there can be no doubt that the state itself regards not only CDS itself, but also CDS, Inc. and its Board as public entities.[13] The North Carolina charter school statute specifies that charter schools as well as the "board of directors of the private nonprofit corporation that operates the charter school" are subject to state open meetings and

[13] Far from being distinct questions of state and federal law, as Defendants suggest, Defs' Br. 36-37 n.5, the test for state action makes the designation of the entity in question under state law central to the analysis, even if it is not alone dispositive. *Compare Kinston Charter Acad.*, 836 S.E.2d at 338, 340 (applying multi-factor test "to determine whether a corporation or other entity is a 'person' under the [Federal False Claims Act]," including "examin[ing] the relationship between Kinston Charter and the State as established by state law") *with Mentavlos*, 249 F.3d at 313 (explaining that "considerations which are pertinent to the [state action] inquiry" include "how the state itself views the entity, i.e., whether the state itself regards the actor as a state actor.")

public records requirements in exactly the same manner as are "local school and administrative units." N.C. Gen. Stat. §115C-218.25. Charter schools share equally the obligation comply with the law, including civil rights laws that prohibit discrimination based on protected status. *Id.* § 115C-218.15(a); *see also* JA 0214 (term of the Charter requiring CDS, Inc. to "ensure that the Public Charter School complies with the Federal and State Constitutions and all applicable federal laws and regulations," including civil rights laws). Indeed, in its audited financial statements, CDS, Inc. categorizes its assets and expenses as relating to "Governmental" rather than "Business" activities. JA 2181, 2195-2202. And the statutory abrogation of state sovereign immunity of charter schools, their operators, and their officials to the extent of their liability insurance further indicates that the legislature views charter schools as arms of the state. *Id.* at § 115C-218.20(a). The state thus expressly treats private nonprofits operating charter schools, and their boards, as public entities to the same degree as it treats the schools themselves, and makes clear that they do not have license to discriminate simply because charter schools are "schools

of choice." Application of the *Mentavlos* factors thus all point to state action.

C. RBA Engaged in State Action Because of its Intertwinement with CDS, Inc. and its Role in Operating and Enforcing CDS Policy, Including the Skirts Requirement.

That CDS and RBA are structured as legally distinct entities does not absolve RBA of responsibility as a state actor. The State delegated its constitutional authority equally to CDS, Inc. and to RBA, and RBA played the principal role in all aspects of the creation, governance, and operation of the School, including the Skirts Requirement.

The State Board of Education has been fully aware from the outset of RBA's central role in founding and operating CDS. RBA filed the Charter Application "in conjunction with" CDS, Inc. JA 0358-59, 0106-0211. The Charter application lists Mitchell as the primary contact and signatory, in his capacity as Chair of the CDS, Inc. Board. JA 0107, 0323, 0359-60. The Application, submitted by Mitchell, JA 0359-60, detailed RBA's role in operating and managing the school, and incorporated a draft of the Management Agreement, also signed by Mitchell as RBA's President. JA 0204, 0360. The Charter granted by the State Board of Education incorporated the Management Agreement,

authorizing RBA to manage, operate, and enforce "rules, regulations and procedures" at CDS. JA 0224, 0229-31, 0294, 0360-65. The State's delegation of its constitutional obligation to educate public school students, through the Charter, thus runs not only to CDS, Inc., but also equally to RBA.

CDS, Inc. and RBA are also inextricably intertwined, with RBA deriving the lion's share—over 90%—of its budget from CDS, Inc., schools, JA 1676, 2605; sharing officers—including Mitchell and Dudeck—with CDS, JA 0322; and handling staffing, hiring, marketing, curriculum, school policies, and afterschool activities at CDS, JA 0323, 0359-63, 1770. CDS, Inc., in turn, leases all CDS property, facilities, and equipment from yet another entity, Coastal Habitat Conservancy, also wholly owned by Mitchell. JA 0362-63. The two entities are thus functionally inseparable.

Finally, RBA, through Mitchell, played a direct role in promulgating and enforcing the very policy challenged in this case. RBA is listed as an author, along with the Board, of CDS's Parent and Student Handbook, into which the Skirts Requirement is incorporated. JA 0363. The Skirts Requirement was a result of Mitchell's "vision,"

and he continues to play a major ongoing role in shaping the contours of the Uniform Policy. JA 0322-24, 0329-33, 0361-62, 1317. And CDS, Inc.'s formal decision-making authority frequently amounts to retroactively rubber-stamping RBA's decisions, including decisions regarding school policy. JA 0362-63. RBA employs the school administrators responsible for carrying out CDS policies, who report to Mitchell, and RBA selects and hires CDS's teachers, who enforce the Skirts Requirement. JA 0363, 2582, 2657. Because these public-school officials, like administrators of other public schools, are state actors when they enforce school policy, *see New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985), RBA, as their employer, is itself a state actor.

As the school's operator, RBA should not be able to shield itself by creating a corporate buffer—in the form of CDS, Inc.—between itself and the state. But at a minimum, should the Court discern any evidence creating a material factual dispute on this point, it should reverse the grant of summary judgment for RBA and remand to the District Court for further proceedings.

IV. THE SKIRTS REQUIREMENT VIOLATES TITLE IX.

A. The Skirts Requirement Violates Both the Language and Purpose of Title IX.

1. The Skirts Requirement Treats Girls Differently "On the Basis of Sex."

Title IX is a broad remedial statute enacted to eradicate gender inequality and stereotypes in education. It provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance," with certain enumerated exceptions. 20 U.S.C. § 1681(a). Title IX was designed to "protect[] individuals from discriminatory practices carried out by recipients of federal funds." *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998). As a result, courts "must accord [Title IX] a sweep as broad as its language." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

The Skirts Requirement obligates Plaintiffs—solely because they are girls—to wear skirts as a condition of attending school. Defendants, by adopting this policy, thus treat students differently "on the basis of

sex." 20 U.S.C. § 1681(a). By its express language, the student's sex determines whether the Skirts Requirement applies.

2. The Skirts Requirement Has "Discriminated Against" Plaintiffs by Imposing Harmful Sex Stereotypes.

A school-mandated policy that facially requires girls and boys to comply with a separate set of rules based on longstanding stereotypes about the appropriate comportment and role of girls discriminates on the basis of sex in violation of Title IX.

The record shows that the Skirts Requirement was adopted to further sex stereotypes—that girls are more "fragile" and deserving of "protection" than boys. Its express purpose was to teach students that boys and girls should be treated differently. JA 0345, 1549-50, 2518. And it has had its intended effect, sending Plaintiffs clear messages that the school valued their ability to fully participate in learning and play in comfort less than that of boys. JA 0356, 0503-07. Plaintiffs' experts buttressed the harms Plaintiffs testified to, including limitations on mobility, increased stereotyped views about girls' athletic abilities, deprivation of psychological, physical, and academic benefits associated with physical activity, and harmful impacts on girls'

confidence and motivation, particularly in STEM fields. JA 0346, 2406-17, 2442-53.

Such intentional enforcement of traditional sex stereotypes is exactly the type of discrimination Title IX was enacted to "root out, as thoroughly as possible." 118 Cong. Rec. at 5804 (statement of Sen. Bayh on the day Title IX was enacted). As the Supreme Court observed in *Price Waterhouse v. Hopkins*, "we are beyond the day" of evaluating people "by assuming or insisting that they matched the stereotype associated with their group." 490 U.S. 228, 251 (1989); *cf. M.D. v. Sch. Bd. of Richmond*, 560 F. App'x 199, 203 (4th Cir. 2014) (recognizing viability of sex stereotyping theory under Title IX and remanding to develop record on whether student's harassment case was based on "a failure to conform to gender stereotypes"); *see generally Jennings*, 482 F.3d at 695 ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.").

In the face of these decisions, cases decided decades ago that trivialized the harm imposed by sex-stereotypes are no longer persuasive. *See, e.g.*, *Lanigan v. Bartlett & Co. Grain*, 466 F. Supp.

1388, 1392 (W.D. Mo. 1979) (characterizing the contention that policy prohibiting women from wearing pants in executive offices perpetuate a stereotype as "simply a matter of opinion"). The Court's understanding of the range of discriminatory treatment that can impede equal opportunity has since evolved considerably. *See Bostock*, 2020 WL 3146686, at *13 (rejecting out of hand the notion that employer could impose requirements that employees conform to "1950s gender roles" without offending Title VII); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78-80 (1998).

The Ninth Circuit's "unequal burden" analysis articulated in *Jespersen*, 444 F.3d at 1104, and considered in dicta in *Hayden*, on which Defendants rely, Defs' Br. 42, 44-49, is not binding in this circuit, was wrong when it was decided, and—as discussed above—has been eviscerated by the Supreme Court's recent decision in *Bostock*, 2020 WL 3146686, at *8. It makes no difference under Title IX that the Skirts Requirement is part of a comprehensive Uniform Policy that contains a parallel requirement for boys—even if boys, too, are harmed. Like the Equal Protection Clause and Title VII, Title IX requires that every "person" be treated fairly regardless of sex, 20 U.S.C. § 1681(a);

accordingly, "a rule that appears evenhanded at the group level can prove discriminatory at the level of individuals." *Bostock*, 2020 WL 3146686, at *8. As under Equal Protection, Defendants cannot escape Title IX liability by arguing that both boys and girls are burdened. *Id.* The only relevant question is whether these plaintiffs were discriminated against "on the basis of [their] sex." 20 U.S.C. § 1681(a).

But in any event, Plaintiffs would prevail even under the "unequal burden" standard announced in *Jespersen* because here, unlike in that case, there is ample evidence in the Record that the Skirts Requirement harmed Plaintiffs' educational opportunities in unique ways because of their sex. This case is thus far more akin to Title VII cases that have *struck down* sex-based codes of appearance on similar grounds. *See Frank v. United Airlines, Inc.*, 216 F.3d 845, 855 (9th Cir. 2000) (discriminatory weight requirements between male and female flight attendants violated Title VII); *Gerdom v. Cont'l Airlines, Inc.*, 692 F.2d 602, 610 (9th Cir. 1982) (same).

3. The Skirts Requirement Has Denied and Excluded Plaintiffs from Educational Opportunities.

The Record shows that the Skirts Requirement has the effect of depriving Plaintiffs of benefits of, and excluding them from equal

participation in, the activities at CDS. Plaintiffs provided detailed testimony that the Skirts Requirement results in distraction during class and barriers to engaging in common forms of physical play during recess. JA 0341, 0350-55, 0498-99, 0503-06. They report being admonished by teachers regarding the position of their legs while seated or during play, and being teased and harassed by boys in their class who looked up their skirts, causing them to limit their activities for fear of exposure. JA 0503-04, 0338-40, 0351-55, 0497-99. And they contrast these experiences with how they feel on days when they are permitted to wear their P.E. uniforms, or when the Skirts Requirement is waived. JA 0354, 0499, 0504.

Neither the overall positive academic performance of girls at CDS in general, nor their supposed participation in school activities and interscholastic sports at CDS, creates a factual dispute as to whether the Skirts Requirement limited the educational opportunities of the *individual* Plaintiffs. Defs' Br. 47, 52. Testimony by school administrators that *other* girls participate in activities at recess does not refute Plaintiffs' testimony that the Skirts Requirement has limited

their own participation.[14] And Plaintiffs have never claimed—nor need they have—that the Skirts Requirement has harmed their grades or test results or impeded their participation in interscholastic sports teams. As this Court has rightly recognized, the harms from discrimination can manifest in ways other than grades or sports. *See Jennings*, 482 F.3d at 699-700 (evidence of plaintiff's good grades and participation on the soccer team did not entitle university to summary judgment on sex discrimination claim); JA 2445-53, 2462-67. Defendants do not dispute Plaintiffs' testimony describing the harms they experienced as a result of the Skirts Requirement. JA 2515, 2520-24. And indeed, they acknowledge the restrictions in mobility that result from wearing skirts by pointing to the P.E. uniforms and waiver of the Skirts Requirement during field trips as mitigating these effects. JA 0427. That should end the inquiry.

[14] Similarly, Defendants point to no Record evidence in support of their assertions that the availability of "skorts" or "leggings" mitigate the harms to girls in general, Defs' Br. 53, nor have they disputed Plaintiffs' testimony regarding the teasing, cold temperatures, and restrictions in movement they experienced even when wearing skorts or leggings. JA 0344, 0349-52, 2414.

B. There Is No Exception from Title IX's Broad Antidiscrimination Mandate for Separate Dress Codes.

The district court erred in finding an implied, categorical exception to Title IX for dress codes. Title IX is a broad mandate to schools not to discriminate based on sex. While the statute contains certain defined exceptions—for example, for religious organizations, social fraternities or sororities, "voluntary youth service organizations," or separate living facilities, 20 U.S.C. §§ 1681(a)(2)-(9), 1686, it contains no exception for dress codes. "[W]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Hillman v. Maretta*, 569 U.S. 483, 496 (2013) (internal citation omitted).

As the Supreme Court has long recognized, Congress's "failure to mention one such practice does not tell us anything about whether it intended that practice to be covered." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005); *accord Bostock*, 2020 WL 3146686, at * 11. Indeed, the Supreme Court has long read Title IX as reaching conduct, such as sexual harassment and retaliation, not explicitly mentioned in the statutory text, legislative history, or implementing

regulations, but nonetheless constituting discrimination "based on sex." *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. at 175 (recognizing retaliation as prohibited); *Gebser*, 524 U.S. at 284-91 (recognizing sexual harassment as prohibited).

USED's 1982 rescission of a regulation governing dress codes, 47 Fed. Reg. 32,526, 32,526-27 (July 28, 1982) ("Rescission"), does not—nor could it— withdraw dress codes from the statute's ambit. At the outset, any such claim runs contrary to Title IX's text, structure, and purpose as outlined above.[15] In this case, it would lead to the absurd result that a school would be free to adopt any dress code based on sex without running afoul of Title IX, no matter how outrageous—such as requiring girls to wear revealing tops and mini-skirts to class while allowing boys to wear regular pants and shirts. That cannot be right.

[15] Even if the Rescission were construed as a substantive interpretation of Title IX's scope, it would not merit deference because USED failed to provide the reasoned analysis necessary when an agency changes its policy. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, No. 18-587, 2020 WL 3271746, at *7 (U.S. June 18, 2020) (holding agency's rescission violated the APA's requirement that agencies "engage in 'reasoned decisionmaking'" (quoting *Michigan v. EPA*, 576 U.S. 743, 750 (2015)). The decision to exclude an entire category of conduct from a generally applicable civil rights law would have represented a substantial departure from prior agency policy and a significant narrowing of the statute's scope. The Rescission and notice of proposed rulemaking, collectively *total* less than two pages in the Federal Register. 46 Fed. Reg. at 23,081; 47 Fed. Reg. at 32,527. The absence of any reasoned analysis from the Rescission's administrative record further militates that it not be afforded controlling weight. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016).

Discrimination grounded in personal appearance or dress codes was, at the time of the Rescission and still today, prohibited by another provision of the same Title IX regulation. *See* 34 C.F.R. § 106.31(b)(4) (prohibiting "subject[ing] any person to separate or different rules of behavior, sanctions, or other treatment" based on sex); 45 Fed. Reg. 30,955 (May 9, 1980) (same). The Skirts Requirement itself embodies "different rules of behavior . . . or other treatment" based on sex, and thus violates § 106.31(b)(4).

Moreover, the notice of proposed rulemaking and subsequent final Rescission make clear that the agency *did not* actually purport to construe Title IX's terms at all. 46 Fed. Reg. 23,081, 23,081 (Apr. 23, 1981); 47 Fed. Reg. at 32,527. Rather, the Rescission reflects only USED's judgment in 1982 about the priority to be given to administrative enforcement of claims of discrimination grounded in codes of personal appearance. *See* 46 Fed. Reg. at 23,081 (explaining that the rescission would "free[]" the "Office of Civil Rights from devoting its resources to resolving complaints involving personal appearance codes"); 47 Fed. Reg. at 32,527 (same). Nor did the agency express any views regarding the availability of enforcement through

litigation by private parties against schools, without USED's involvement. *Id.* The Rescission thus does not contain the agency's "construction of a statutory scheme" or its interpretations of "the meaning or reach of a statute," which is required to trigger deference under *Chevron*, 467 U.S. at 844 (1984).[16]

C. RBA Is Subject to Title IX Because It Receives Federal Funds Earmarked for Education to Operate CDS.

There is no dispute that CDS accepts federal funds, JA 0363, 1527, and is thus a "recipient" subject to Title IX. RBA is equally subject to the statute, because it receives federal funds via CDS to operate the school. The source or scope of the passthrough federal funding to RBA is not contested, nor is RBA's role as the operator of CDS. This Court should therefore find that both RBA and CDS are recipients of federal funds for purposes of Title IX.

---

[16] The district court pointed to the statement from the final Rescission that there is "no indication in the legislative history of Title IX that Congress intended to authorize Federal regulations in the area of appearance codes." JA 2724 (quoting 47 Fed. Reg. 32,527). But this statement also does not provide the agency's interpretation of the scope of the statute, as the absence of evidence of such intent in legislative history cannot be used to narrow the statute's expansive text. *Cf. Milner v. Dep't of the Navy*, 562 U.S. 562, 572 (2011) ("Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text. We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language."); *Trailmobile Co. v. Whirls*, 331 U.S. 40, 61 (1947) ("The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers.").

Title IX applies to all recipients of federal financial assistance, whether that funding is received directly or indirectly. *See Grove City 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); *accord Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 272 (6th Cir. 1994). Accordingly, Title IX regulations define "recipient" as "any public or private agency, institution, or organization, or other entity . . . to whom Federal financial assistance is extended *directly or through another recipient* and which *operates* an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof." 34 C.F.R. § 106.2(i) (emphasis added).

Because RBA is an indirect recipient of Title IX funding and operates an education program, it is subject to Title IX. Ninety percent of RBA's funding derives from the four schools operated by CDS, Inc., which in turn derive 95% of their income from government funding, including federal funds. JA 1676, 2595-97, 2605. Per the Management Agreement, RBA is responsible for "the management, operation, administration, accounting and education at CDS," JA 0230, 0653—in other words, nearly every aspect of CDS's operations. The money RBA

receives as its "management fees" is thus earmarked for the direct benefit of students, and goes to providing "educational programs that meet federal, state, and local requirements, and the requirements imposed under the Law and the Charter." JA 0231, 0720. Moreover, as discussed above, *see* Section III.C, RBA was directly involved in implementing and enforcing the very policies challenged in this case. Because CDS has ceded authority to RBA to operate the school, RBA must abide by Title IX. *See Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1294 (11th Cir. 2007); *Horner*, 43 F.3d at 271-72; *A.B. by C.B. v. Haw. State Dep't of Educ.*, 386 F. Supp. 3d 1352, 1357-58 (D. Haw. 2019).

RBA's liability under Title IX for promulgating and implementing the Skirts Requirement should be decided as a matter of law in favor of Plaintiffs. This Court should vacate the District Court's dismissal of RBA, as well as CDS, Inc., for purposes of Plaintiffs' Title IX claims. However, should the Court identify any disputed questions of fact that bear on the scope of RBA's Title IX liability, it should reverse the grant of summary judgment and remand for trial.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's award of summary judgment on Plaintiffs' equal protection claim, reverse the award of summary judgment to Defendants and grant summary judgment to Plaintiffs on Plaintiffs' Title IX claim, and reverse the grant of summary judgment to RBA and award summary judgment to Plaintiffs on both claims against RBA.

Respectfully submitted this 6th Day of July, 2020.

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

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REQUEST FOR ORAL ARGUMENT

Plaintiffs respectfully request oral argument pursuant to Local Rule 34(a).

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

This brief complies with the type-volume limits established by this Court's Order, No. 20-1001 (L), DKT 34, because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments), this brief contains 16,150 words, and has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century font.

Dated: July 6, 2020

/s/ *Galen L. Sherwin*

Counsel for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on July 6 2020, I electronically filed the foregoing Opening and Response Brief of Plaintiffs-Appellees with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ *Galen L. Sherwin*

ADDENDUM TO
OPENING AND RESPONSE BRIEF OF PLAINTIFFS-APPELLEES

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 20. Education
Chapter 38. Discrimination Based on Sex or Blindness (Refs & Annos)

20 U.S.C.A. § 1681

§ 1681. Sex

Currentness

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

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(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices--

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to--

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for--

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

CREDIT(S)

(Pub.L. 92-318, Title IX, § 901, June 23, 1972, 86 Stat. 373; Pub.L. 93-568, § 3(a), Dec. 31, 1974, 88 Stat. 1862; Pub.L. 94-482, Title IV, § 412(a), Oct. 12, 1976, 90 Stat. 2234; Pub.L. 96-88, Title III, § 301(a)(1), Title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095.)

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Notes of Decisions (1281)

20 U.S.C.A. § 1681, 20 USCA § 1681
Current through P.L. 116-145.

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Code of Federal Regulations
Title 34. Education
Subtitle B. Regulations of the Offices of the Department of Education
Chapter I. Office for Civil Rights, Department of Education
Part 106. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (Refs & Annos)
Subpart D. Discrimination on the Basis of Sex in Education Programs or Activities Prohibited (Refs & Annos)

34 C.F.R. § 106.31

§ 106.31 Education programs or activities.

Currentness

(a) General. Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which subpart C does not apply, or (2) an entity, not a recipient, to which subpart C would not apply if the entity were a recipient.

(b) Specific prohibitions. Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

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(6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) Assistance administered by a recipient educational institution to study at a foreign institution. A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided*, a recipient educational institution which administers or assists in the administration of such scholarships, fellowships, or other awards which are restricted to members of one sex provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) Aid, benefits or services not provided by recipient.

(1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

Credits

[45 FR 30955, May 9, 1980, as amended at 47 FR 32527, July 28, 1982; 65 FR 68056, Nov. 13, 2000; 85 FR 30579, May 19, 2020]

SOURCE: 45 FR 30955, May 9, 1980; 65 FR 68056, Nov. 13, 2000, unless otherwise noted.

AUTHORITY: 20 U.S.C. 1681 et seq., unless otherwise noted.

Notes of Decisions (26)

Current through June 25, 2020, 85 FR 38105.

End of Document

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USCA4 Appeal: 20-1001 Doc: 35 Filed: 07/06

DEPARTMENT OF EDUCATION

Office for Civil Rights

34 CFR Part 106

Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance

AGENCY: Department of Education.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Secretary of Education proposes to amend the Title IX regulations (nondiscrimination on the basis of sex) by revoking a provision which prohibits discrimination in the application of codes of personal appearance.

DATES: Comments must be received on or before May 26, 1981.

ADDRESSES: Comments should be addressed to Mr. Frederick T. Cioffi, Acting Assistant Secretary for Civil Rights, 400 Maryland Avenue, SW. (Room 5000, Switzer Building), Washington, D.C. 20202.

FOR FURTHER INFORMATION CONTACT: Mr. Antonio J. Califa, Telephone No. (202) 245-0843.

SUPPLEMENTARY INFORMATION: On December 11, 1978, the Department of Health, Education, and Welfare (HEW) issued a notice proposing the revocation of a subparagraph of the regulations implementing Title IX of the Education Amendments of 1972. The subparagraph proposed for revocation prohibits discrimination on the basis of sex in rules relating to personal appearance (43 FR 58076). The reasons given for that proposal were to permit issues involving codes of personal appearance to be resolved at the local level and to permit the Federal government to concentrate its resources on the enforcement of other parts of the Title IX regulations. That proposed rule was withdrawn on November 13, 1979 (44 FR 66626).

The Department of Education believes that there are substantial arguments that support the revocation of the provision on appearance codes. The issue of sex discrimination in codes of personal appearance, such as rules governing hair length, is more properly resolved at the local level. Federal regulations in this area are likely to be overly intrusive. In addition, by freeing the Office of Civil Rights from devoting its resources to resolving complaints involving personal appearance codes, issues that are more clearly related to the prohibition against sex discrimination under Title IX can be given the additional attention they require.

Section 106.31(b)(5) presently reads as follows:

"(b) *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

* * * * *

(5) Discriminate against any person in the application of any rules of appearance;"

§ 106.31 [Amended]

Accordingly, in § 106.31 the Department proposes to revoke and remove paragraph (b)(5) and redesignate paragraphs (b)(6)–(8) as (b)(5)–(7).

Regulatory Flexibility Analysis

The regulation being amended affects all small entities that are recipients of Federal financial assistance provided by the Department of Education. Since the proposal involves elimination of a requirement, there are no recordkeeping or reporting burdens. If anything, the revocation of the rule would lessen these burdens since the Department would no longer investigate complaints related to rules of appearance. Revocation of the rule is the alternative providing the maximum reduction in burden on small entities.

Invitation to Comment

Interested persons are invited to submit comments and recommendations regarding this proposed rulemaking. Written comments and recommendations may be sent to the address given at the beginning of this notice. All comments received on or before May 26, 1981, will be considered. All comments submitted in response to this notice will be available for public inspection, during and after the comment period, in Room 5000, Switzer Building, 4th and C Streets, SW., Washington, D.C. between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday of each week, except Federal holidays.

Dated: April 16, 1981.

T. H. Bell,

Secretary of Education.

[FR Doc. 81-12133 Filed 4-22-81; 8:45 am]

BILLING CODE 4000-01-M

VETERANS ADMINISTRATION

38 CFR Ch. I

Executive Order 12291, Federal Regulation; Semi-Annual Agenda of Regulations

AGENCY: Veterans Administration.

ACTION: Publication of semi-annual agenda.

SUMMARY: This agenda announces the regulations that the Veterans Administration will have under development, revision and review during the 6-month period from April 23, 1981 through October 22, 1981. The purpose in publishing this agenda is to give notice of these upcoming regulations to allow the public the opportunity to participate in the rulemaking process.

FOR FURTHER INFORMATION CONTACT: Celia Fasone, Office of Management Services (61), Veterans Administration, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 389-2308.

SUPPLEMENTARY INFORMATION: Executive Order 12291, Federal Regulation, and the Regulatory Flexibility Act (Public Law 96-354) require that executive agencies publish in the Federal Register, in April and October of each year, a semi-annual agenda of major regulations under development or review.

At this time, none of the regulations listed have been determined to be major and requiring a Regulatory Impact Analysis under E.O. 12291. None of the regulations listed have been determined to pose compliance costs or reporting burdens upon the public nor have they been found to affect small business or state and local governments thereby requiring a Regulatory Flexibility Analysis to be performed under 5 U.S.C. 603. However, during the process of development and review of a regulation, should it be determined that a regulation is considered major, a Regulatory Impact Analysis or a Regulatory Flexibility Analysis will be prepared and published with the regulation as required.

Under the requirements of the rescinded Executive Order 12044, the VA published its agenda in June and December of each year. The agenda set forth below will replace our June agenda, and our second agenda for the year will be published on October 23, 1981 and not in December.

Dated: April 16, 1981.

Rufus H. Wilson,

Acting Administrator.

USCA4 Appeal: 20-1001 Doc: 35 Filed: 07/06/2

Dated: July 16, 1982.
Edwin L. Johnson,
Director, Office of Pesticide Programs.

PART 193—TOLERANCES FOR PESTICIDES IN FOOD ADMINISTERED BY THE ENVIRONMENTAL PROTECTION AGENCY

Therefore, 21 CFR 193.186(b) is amended by extending the expiration date for sugarcane molasses to read as follows:

§ 193.186 Ethephon.

* * * * *

(b) * * *

Foods	Parts per million	Company	Expiration date
*	*	*	*
Sugarcane, molasses.	7.0	Union Carbide	July 16, 1984.
*	*	*	*

[FR Doc. 82-20408 Filed 7-27-82; 8:45 am]
BILLING CODE 6560-50-M

21 CFR Part 561

[FAP 9H5206/R116; PH-FRL 2176-6]

Tolerances for Pesticides in Animal Feeds Administered by the Environmental Protection Agency; Diflubenzuron

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This rule establishes a feed additive regulation for residues of the insecticide diflubenzuron in or on soybean hulls and soybean soap stock. This regulation to establish the maximum permissible levels for the insecticide in or on the commodities was requested by TH Agriculture and Nutrition Co., Inc.

EFFECTIVE DATE: July 28, 1982

ADDRESS: Written objections may be submitted to the: Hearing Clerk (A-110), Environmental Protection Agency, Rm. 3708, 401 M St., SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Franklin D.R. Gee, Product Manager (PM) 17, Registration Division (TS-767C), Office of Pesticide Programs, Environmental Protection Agency, Rm. 207, CM#2, 1921 Jefferson Davis Highway, Arlington, VA 22202; (703-557-2690).

SUPPLEMENTARY INFORMATION: EPA issued a notice published in the Federal Register of April 12, 1979 (44 FR 21882) which announced that Thompson Hayward Chemical Co., P.O. Box 2383, Kansas City, KS 66110, had filed a feed additive petition (FAP 9H5206) with EPA proposing that 21 CFR Part 561 be amended by permitting residues of the insecticide diflubenzuron (*N*-[[(4-chlorophenyl)amino]carbonyl]-2,6-difluorobenzamide) in or on the commodities soybean hulls at 0.5 part per million (ppm) and soybean soap stock at 0.1 ppm. No comments were received in response to this notice of filing.

The data submitted in the petition and other relevant material have been evaluated. The toxicity and other relevant data pertaining to this insecticide are included in a related document (PP 6F1832/R467) which appears elsewhere in this issue of the Federal Register.

The established tolerances for residues in eggs, milk, meat, and poultry are adequate to cover secondary residues resulting from the proposed uses as delineated in 40 CFR 180.6(a)(2).

The pesticide is considered useful for the purpose for which the feed additive regulation is sought, and it is concluded that the insecticide may be safely used in accordance with the prescribed manner when such uses are in accordance with the label and labeling registered pursuant to FIFRA as amended (86 Stat. 973, 89 Stat. 751, U.S.C. 135(a) *et seq.*). Therefore, the feed additive regulation is established as set forth below.

Any person adversely affected by this regulation may, by August 27, 1982, file written objections with the Hearing Clerk, at the address given above. Such objections should specify the provisions of the regulation deemed objectionable and the grounds for the objections. If a hearing is requested, the objections must state the issues for the hearing and the grounds for the objections. A hearing will be granted if the objections are supported by grounds legally sufficient to justify the relief sought.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-534, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new food and feed additive levels, or conditions for safe use of additives, or raising such food and feed additive levels do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the Federal Register of May 4, 1981 (46 FR 24945).

(Sec. 409(c)(1), 72 Stat. 1786 (21 U.S.C. 346(c)(1)))

List of Subjects in 21 CFR Part 561

Animal feeds, Pesticides and pests.

Dated: July 12, 1982.
Edwin L. Johnson,
Director, Office of Pesticide Programs.

PART 561—TOLERANCES FOR PESTICIDES IN ANIMAL FEEDS ADMINISTERED BY THE ENVIRONMENTAL PROTECTION AGENCY

Therefore, 21 CFR Part 561 is amended by establishing a new § 561.420 to read as follows:

§ 561.420 Diflubenzuron.

A regulation is established permitting residues of the insecticide diflubenzuron (*N*-[[(4-chlorophenyl)amino]carbonyl]-2,6-difluorobenzamide] in or on the following feed commodities:

Feeds	Parts per million
Soybean hulls	0.5
Soybean soap stock	0.1

[FR Doc. 82-20160 Filed 7-27-82; 8:45 am]
BILLING CODE 6560-50-M

DEPARTMENT OF EDUCATION

34 CFR Part 106

Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting From Federal Financial Assistance

AGENCY: Education Department.

ACTION: Final regulations.

SUMMARY: The Secretary of Education amends the Title IX regulation (nondiscrimination on the basis of sex) by revoking § 106.31(b)(5) which prohibits discrimination in the application of codes of personal appearance. This amendment permits the Department to concentrate its resources on cases involving more serious allegations of sex discrimination. Development and enforcement of appearance codes is an issue for local determination.

EFFECTIVE DATE: Unless Congress takes certain adjournments, these regulations will take effect 45 days after publication

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in the Federal Register. If you want to know if there has been a change in the effective date of these regulations, call or write the Department of Education contact person. At a future date, the Secretary will publish a notice in the Federal Register stating the effective date of these regulations.

ADDRESSES: Any questions concerning these regulations should be addressed to Harry M. Singleton, Acting Assistant Secretary for Civil Rights, 400 Maryland Avenue, SW. (Room 5000 Switzer Building), Washington, D.C. 20202.

FOR FURTHER INFORMATION CONTACT: Mr. Antonio J. Califa, Telephone No. (202) 245–2184.

SUPPLEMENTARY INFORMATION: Revocation of this subparagraph of the Title IX regulations permits issues involving codes of personal appearance to be resolved at the local level. The Department will concentrate on enforcing Title IX in cases involving more serious allegations of sex discrimination. There is no indication in the legislative history of Title IX that Congress intended to authorize Federal regulations in the area of appearance codes.

A Notice of Proposed Rulemaking was published in the Federal Register on April 23, 1981 (46 FR 23081). Interested persons were given until May 26 to submit written comments. A summary comment analysis and the Department's response follows.

Section 106.31(b)(5)

Fifty-three comments were received regarding revocation of § 106.31(b)(5). Of those, thirty-one favored the recission, seventeen opposed it, and five expressed no clear opinion. Twenty-two of the comments favoring the amendment specifically mentioned the need to allow appearance code matters to be resolved by the local community.

Comment: Many commenters supported the Department's proposal to leave appearance codes to local determination. Some commenters stated that the proposed rule would remove an area of overregulation by the Federal government. Others stated that the Department was unnecessarily burdened by the enforcement of requirements such as the regulation on appearance codes.

Response: The Department agrees with the commenters and has revoked the appearance code regulation.

Comment: Some commenters opposed the elimination of appearance codes as an area for Federal regulation under Title IX. These commenters stated that appearance codes encourage restrictive stereotyped roles for male and female students and foster an atmosphere which is not conducive to equal educational opportunity. Some commenters expressed concern that individual liberties would be restricted as a result of the proposed regulatory amendment. Others cited the symbolic value of the appearance code regulation and stated that its elimination would indicate to school administrators that restrictions on educational opportunities based solely on a student's gender are appropriate.

Response: The Department does not take any position regarding the adoption of appearance codes by local school districts since this is a matter that should be left to local discretion. The Department does not believe that the regulatory change will lead to restrictions on individual liberty. The amendment does not indicate any lack of resolve on the part of the Department to vigorously enforce the Title IX regulation. On the contrary, one result of the regulatory amendment will be to permit the concentration of resources on areas of the Title IX regulation which are more central to the statute's prohibition of discrimination on the basis of sex in education programs which receive Federal financial assistance.

Regulatory Flexibility Act Certification

The Secretary certifies that this regulation will not have a significant economic impact on a substantial number of small entities. These regulations are administrative and do not affect any small entities.

List of Subjects in 34 CFR Part 106

Civil rights, Grant programs—Education, Sex discrimination, Vocational education, Women.

Dated: June 7, 1982.

T. H. Bell,
Secretary of Education.

Approved: July 2, 1982.

William French Smith,
Attorney General.

Part 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

The Secretary amends Title 34 of the Code of Federal Regulations as follows:

§ 106.31 [Amended]

In § 106.31, paragraph (b)(5) is revoked and removed, and paragraphs (b)(6)–(8) are redesignated as (b)(5)–(7).

[FR Doc. 82-20474 Filed 7-27-82; 8:45 am]
BILLING CODE 4000-01-M

VETERANS ADMINISTRATION

DEPARTMENT OF DEFENSE

38 CFR Part 21

Veterans' Educational Assistance Program; Advance Payments

AGENCIES: Veterans Administration and Department of Defense.

ACTION: Final regulation.

SUMMARY: This regulation, adopted jointly by the Veterans Administration and the Department of Defense, permits the advance payment of educational assistance allowance to participants in the Post-Vietnam Era Veterans' Educational Assistance Program following breaks in enrollment of more than 30 days. Previously, a break had to be more than a calendar month before the Veterans Administration could make an advance payment. This resulted in some instances where an individual could not be paid for the interval between terms, and could not receive an advance payment for the next term. This regulation eliminates this inequity.

EFFECTIVE DATE: July 9, 1982.

FOR FURTHER INFORMATION CONTACT: June C. Schaeffer (225), Assistant Director for Policy and Program Administration, Education Service, Department of Veterans Benefits, Veterans Administration, 810 Vermont Avenue, NW, Washington, D.C. 20420 (202–389–2092).

SUPPLEMENTARY INFORMATION: On page 12363 of the Federal Register of March 23, 1982 there was published a notice of intent to amend part 21 to permit advance payments of educational assistance allowance following breaks in enrollment of more than 30 days.

Interested persons were given 30 days in which to submit comments, suggestions, or objections regarding the proposal. The Veterans Administration and Department of Defense received no comments. Accordingly, the agencies are adopting the proposal.

The agencies have determined that this regulation is not a major rule as that term is defined by Executive Order 12291, Federal Regulation. The annual effect on the economy will be less than $100 million. It will not result in any major increases in the costs or prices for

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H.R. 13419. A bill to authorize the Secretary of State to furnish assistance for the resettlement of Soviet Jewish refugees in Israel; to the Committee on Foreign Affairs.

By Mr. HALPERN (for himself, Mr. COTTER, and Mr. GRAY):

H.R. 13420. A bill to promote the peacefull resolution of international conflict, and for other purposes; to the Committee on Government Operations.

By Mr. MATSUNAGA:

H.R. 13421. A bill to provide for the payment of losses incurred by domestic growers, manufacturers, packers, and distributors as a result of the barring of the use of cyclamates in food after extensive inventories of foods containing such susbtances had been prepared or packed or packaging, labeling, and other materials had been prepared in good-faith reliance on the confirmed official listing of cyclamates as generally recognized as safe for use in food under the Federal Food, Drug, and Cosmetic Act, and for other purposes; to the Committee on the Judiciary.

By Mr. PRICE of Illinois:

H.R. 13422. A bill to amend the Federal Trade Commission Act (15 U.S.C. 41) to provide that under certain circumstances exclusive territorial arrangements shall not be deemed unlawful; to the Committee on Interstate and Foreign Commerce.

By Mr. PRYOR of Arkansas:

H.R. 13423. A bill to provide that certain expenses incurred in the construction of the U.S. Highway 65 Expressway through Pine Bluff, Ark., shall be eligible as local grants-in-aid for purpose of title I of the Housing Act of 1949; to the Committee on Banking and Currency.

By Mr. RONCALIO:

H.R. 13424. A bill to authorize the Secretary of the Interior to establish the John D. Rockefeller, Jr., Memorial Parkway, and for other purposes; to the Committee on Interior and Insular Affairs.

H.R. 13425. A bill to amend the Land and Water Conservation Fund Act of 1965 to allow for the recreation planning, acquisition, or development for indoor facilities; to the Committee on Interior and Insular Affairs.

By Mr. ROSTENKOWSKI (for himself, Mr. ANNUNZIO, Mr. COLLINS of Illinois, Mr. KLUCZYNSKI, and Mr. PUCINSKI):

H.R. 13426. A bill to provide for greater and more efficient Federal financial assistance to certain large cities with a high incidence of crime, and for other purposes; to the Committee on the Judiciary.

By Mr. THOMPSON of New Jersey:

H. Res. 849. Resolution authorizing the expenditure of certain funds for the expenses of the Committee on Internal Security; to the Committee on House Administration.

MEMORIALS

Under clause 4 of rule XXII, memorials were presented and referred as follows:

317. By the SPEAKER: Memorial of the House of Representatives of the State of Washington, relative to amending the Soil Conservation and Domestic Allotment Act, as amended, to include a Columbia-Snake-Palouse conservation program; to the Committee on Agriculture.

318. Also, memorial of the Legislature of the State of Oklahoma, relative to exempting businesses which furnish ambulance services from the Federal wage and hour law provisions requiring the payment of overtime; to the Committee on Education and Labor.

319. Also, memorial of the Legislature of the State of Colorado, relative to maintaining the free market price system and quota import system on red meat products; to the Committee on Ways and Means.

320. Also, memorial of the Senate of the Commonwealth of Puerto Rico, relative to the offset procedure provided for in section 224 of the Social Security Act; to the Committee on Ways and Means.

SENATE—*Monday, February 28, 1972*

The Senate met at 10 a.m. and was called to order by Hon. LAWTON CHILES, a Senator from the State of Florida.

PRAYER

Dr. Frederick M. Lange, president, Dallas Community Chest Trust Fund, Dallas, Tex., offered the following prayer:

Almighty God, eternal in the heavens, who holds in Your hands the destiny of nations and of men, we thank You for the privilege and power of prayer by which we may ascend as on wings to the very steps of Your throne and receive Your blessings.

Accept our humble thanks for the free world in which we live. Make us truly appreciative of the heritage of our fathers, the open Bible, our free institutions, our civil and religious liberties.

Counsel those in authority. Make them worthy of this great trust. May they, as true statesmen, have the wisdom to discern what is right and the courage to defend it. Help us so to believe and live that we may pass on the torch of liberty and light, as contained in Your Holy Word, to succeeding generations.

In the name of Christ, our Saviour. Amen.

DESIGNATION OF THE ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication to the Senate from the President pro tempore (Mr. ELLENDER).

The assistant legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, D.C., February 28, 1972.

To the Senate:

Being temporarily absent from the Senate on official duties, I appoint Hon. LAWTON CHILES, a Senator from the State of Florida, to perform the duties of the Chair during my absence.

ALLEN J. ELLENDER,
President pro tempore.

Mr. CHILES thereupon took the chair as Acting President pro tempore.

THE JOURNAL

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the reading of the Journal of the proceedings of Friday, February 25, 1972, be dispensed with.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

WAIVER OF THE CALL OF THE CALENDAR

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the call of the Legislative Calendar, under rule VIII, be dispensed with.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

COMMITTEE MEETINGS DURING SENATE SESSION

Mr. MANSFIELD. Mr. President, I ask unanimous consent that all committees may be authorized to meet during the session of the Senate today.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

DISPOSITION OF JUDGMENT FUNDS FOR CONFEDERATED TRIBES OF THE COLVILLE RESERVATION

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar No. 609, H.R. 6291.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

The bill (H.R. 6291) to provide for the disposition of funds arising from judgments in Indian Claims Commission dockets numbered 178 and 179, in favor of the Confederated Tribes of the Colville Reservation, and for other purposes, was considered, ordered to a third reading, read the third time, and passed.

Mr. MANSFIELD. Mr President, I ask unanimous consent to have printed in the RECORD an excerpt from the report (No. 92-642), explaining the purposes of the measure.

There being no objection, the excerpt was ordered to be printed in the RECORD, as follows:

PURPOSE

The purpose of H.R. 6291 is to authorize the disposition of judgment funds awarded in favor of the Confederated Tribes of the Colville Reservation in dockets 178 and 179 of the Indian Claims Commission. The gross amount available is approximately $5,540,-598.00. The money has been appropriated, but it may not be used until authorizing legislation has been enacted.

The bill provides for a per capita distribution of the entire sum. There are about 5,309 tribal members, about half of whom live away from the reservation.

The Committee on Interior and Insular Affairs held open hearings on October 7, 1971, on S. 1104, the Senate companion measure which was sponsored by Senator Jackson.

In addition to some technical amendments, the House of Representatives amended H.R. 6291 to permit a $950 per capita payment to be made immediately to each enrolled member, without waiting for the completion of the roll and the resolution of contested applications. This will leave about $100,000 to take care of enrollment appeals and additions to the roll, and if the entire amount is not needed for that purpose, the

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

This amendment has received careful preparation based on a thorough discussion with national education groups and other interested parties. I believe it represents a completely responsible and reasonable solution to the problem of sex discrimination. Nearly all groups which have contacted me agree on the necessity for the various provisions in this amendment; in fact, most of the provisions were recommended in April 1970 by President Nixon's Task Force on Women's Rights and Responsibilities. In addition, the administration included sex discrimination provisions in its proposed Higher Education Act.

As my colleagues know, a similar amendment on the House side was the center of some controversy because many felt that the admissions policies of too many schools were covered without sufficient study and debate. Because of time pressures on the House side, long preparation was not possible. One result of the House approach is that all single-sex elementary and secondary institutions of education—both public and private—would be required to become coeducational. While this may be a desirable goal, no one even knows how many single-sex schools exist on the elementary and secondary levels or what special qualities of the schools might argue for a continued single sex status. Therefore, my amendment narrows the coverage of admissions policies somewhat—pending a thorough study by the Commissioner of Education—and makes explicit that admissions to public undergraduate institutions and to vocational and professional and graduate institutions, where the most insupportable discrimination lies, would be covered.

I urge the Senate to adopt this amendment which provides a less disruptive but equally effective remedy designed to root out, as thoroughly as possible at the present time, the social evil of sex discrimination in education.

I. SCOPE ON THE PROBLEM

It is difficult to indicate the full extent of discrimination against women today. The field of education is just one of many areas where differential treatment has been documented; but because education provides access to jobs and financial security, discrimination here is doubly destructive for women. Therefore, a strong and comprehensive measure is needed to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women.

The rationale for denying women an equal education is vague, but its destructive presence is all too clear. As a study by an independent task force, formed by the Ford Foundation, reported in March of 1971:

> Discrimination against women, in contrast to that against minorities, is still overt and socially acceptable within the academic community.

We are all familiar with the stereotype of women as pretty things who go to college to find a husband, go on to graduate school because they want a more interesting husband, and finally marry, have children, and never work again. The desire of many schools not to waste a "man's place" on a woman stems from such stereotyped notions.

But the facts absolutely contradict these myths about the "weaker sex" and it is time to change our operating assumptions. First of all, the percentage of entering undergraduate students who graduate in 4 years is about 15 percent higher for women than for men—and their grade averages are also higher than those of men. Second, 70 percent of female college graduates do secure jobs, thus giving the lie to assumptions that they are not serious students. More than half the mothers of school age children work. At age 35, women with husbands can expect to work fully 24 years.

For those women who go on to receive graduate degrees, their work records demonstrate a clear dedication to their careers. Female Ph. D.'s rarely give up their careers; 91 percent of the women with doctorates are working today, 81 percent of them full time. Moreover, in a study of 2,000 women 10 years after they received their doctorate, 79 percent had not interrupted their careers at any time. The diligence of these women is worthy of note: By way of contrast, 10 percent more men than women had interrupted their careers within 10 years of completing the doctoral program. Furthermore, research shows that married women publish more than men.

And yet a vicious and reinforcing pattern of discrimination persists.

I ask unanimous consent that a table which appeared in the New York Times on January 10, 1972, be printed in the RECORD to indicate the continued second-class status of women in education despite a decade devoted to civil rights.

There being no objection, the table was ordered to be printed in the RECORD, as follows:

WOMEN AND HIGHER EDUCATION—STUDENT ENROLLMENT
(1969 STATISTICS)

Year	All institutions Total	All institutions Percent [1]	Junior colleges Total	Junior colleges Percent [1]	Graduate Total	Graduate Percent [1]
1950	727,270	32	77,599	36	65,262	[2] 27
1955	931,194	35	112,021	36	73,608	[4] 29
1960	1,339,367	37	170,325	38	97,373	[5] 28
1965	2,173,697	39	321,712	38	196,000	[3] 32
1970	3,135,000	[3] 41	593,000	40	347,000	[6] 37

[1] As a percent of total enrollment.
Estimated.
[2] 1949 to 1950.
[4] November 1955.
[5] 1959 to 1960

Source: American Council on Education.

EARNED DEGREES
[In percent]

Year	All degrees Male	All degrees Female	Bachelor's Male	Bachelor's Female	Master's Male	Master's Female	Doctor's Male	Doctor's Female
1949-50	76	24	76	24	71	29	90	10
1955-56	65	35	64	36	66	34	90	10
1959-60	66	34	65	35	68	32	90	10
1965-66	62	38	60	40	66	34	88	12
1968-69	60	40	58	42	63	37	87	13

Source: American Council on Education.

[In percent]

	All institutions Male	All institutions Female	2-year college Male	2-year college Female	4-year college Male	4-year college Female	Universities Male	Universities Female
Faculty rank:								
Professor	24.5	9.4	7.1	3.6	22.0	11.2	30.1	9.9
Associate	21.9	15.7	10.1	13.4	23.3	17.1	23.8	15.1
Assistant	28.2	28.7	15.2	17.0	30.8	31.6	29.4	30.7
Instructor	16.3	34.8	38.7	45.6	15.8	29.6	11.5	35.7
Lecturer	3.3	4.6	.8	1.3	5.2	6.5	2.7	4.0
No ranks	3.4	3.3	23.1	14.6	1.4	1.4	.3	.3
Other	2.3	3.5	5.0	4.6	1.4	2.5	2.2	4.2
Basic salary:								
Below $7,000	6.2	17.0	10.9	16.6	6.0	17.8	5.3	16.2
$7,000 to $9,999	21.7	45.6	35.7	52.7	30.0	48.8	13.1	38.8
$10,000 to $11,999	20.6	17.6	22.2	15.4	24.1	15.7	17.9	20.7
$12,000 to $13,999	17.4	9.9	18.8	9.8	15.9	8.8	18.1	11.3
$14,000 to $16,999	15.5	6.1	10.5	4.6	12.5	5.5	18.6	7.4
$17,000 to $19,999	9.1	2.0	1.2	.1	6.3	1.8	12.7	3.2
$20,000 to $24,999	6.3	1.2	.4	.1	3.7	1.0	9.3	2.0
$25,000 plus	3.1	0.5	.2	.7	1.5	.6	4.9	.3

Source: American Council on Education.

Mr. BAYH. In the summer of 1970, Representative EDITH GREEN, chairman of the House Special Subcommittee on Education, held extensive hearings on discrimination in education and related areas—hereafter referred to as the 1970 hearings. Over 1,200 pages of testimony document the massive, persistent patterns of discrimination against women in the academic world. Yet despite a situation which approaches national scandal, the problem has gone unnoticed for years. Today, many would deny that it exists.

But discrimination against women in education does exist. Moreover it prospers. Alan Pifer, president of Carnegie Corporation of New York, has pointed out that women actually have lost ground in education over the years.

> If we compare the participation of women in higher education today with the situation of 40 years ago we find, rather surprisingly, that it has considerably worsened. In 1930 47 percent of undergraduates, as opposed to today's 38 percent, were women; 28 percent of the doctorates were won by women as against today's 13 percent, and at many institutions, the proportion of women faculty members was higher than today.

I believe it is important to survey in some detail the scope of the problem in certain fundamental areas—hiring, scholarships, and admissions.

A. DISCRIMINATION IN HIRING AND PROMOTION OF FACULTY AND ADMINISTRATORS

Discrimination against females on faculties and in administration is well documented and widespread abuse is clear. I have been dismayed to learn of the double standard the academic community has applied to those women who

West's North Carolina General Statutes Annotated
Constitution of North Carolina
Article IX. Education (Refs & Annos)

N.C.G.S.A. Art. IX, § 2

§ 2. Uniform system of schools

Currentness

(1) General and uniform system: term. The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.

(2) Local responsibility. The General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate. The governing boards of units of local government with financial responsibility for public education may use local revenues to add to or supplement any public school or post-secondary school program.

<Article I, §§ 1 to 22, appears in this volume>

<Adoption of the Constitution of 1970>

<A complete revision to the North Carolina Constitution of 1868 was proposed in Laws 1969, c. 1258 for submission to the voters at the general election of 1970. The revision was adopted by the electorate at the election of November 3, 1970 to take effect on July 1, 1971. In addition to this revision, amendments separately submitted at the November, 1970, were also adopted and are incorporated in the 1970 Constitution.>

N.C.G.S.A. Art. IX, § 2, NC CONST Art. IX, § 2
The statutes and Constitution are current through 2020-15 of the 2020 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes.

End of Document

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West's North Carolina General Statutes Annotated
Chapter 115C. Elementary and Secondary Education
Subchapter IV. Education Program
Article 14a. Charter Schools (Refs & Annos)

N.C.G.S.A. § 115C-218.15

§ 115C-218.15. Charter school operation

Effective: March 1, 2016

Currentness

(a) A charter school that is approved by the State shall be a public school within the local school administrative unit in which it is located. All charter schools shall be accountable to the State Board for ensuring compliance with applicable laws and the provisions of their charters.

(b) A charter school shall be operated by a private nonprofit corporation that shall have received federal tax-exempt status no later than 24 months following final approval of the application. The board of directors of the charter schools shall adopt a conflict of interest and anti-nepotism policy that includes, at a minimum, the following:

(1) The requirements of Chapter 55A of the General Statutes related to conflicts of interest.

(2) A requirement that before any immediate family, as defined in G.S. 115C-12.2, of any member of the board of directors or a charter school employee with supervisory authority shall be employed or engaged as an employee, independent contractor, or otherwise by the board of directors in any capacity, such proposed employment or engagement shall be (i) disclosed to the board of directors and (ii) approved by the board of directors in a duly called open-session meeting. The burden of disclosure of such a conflict of interest shall be on the applicable board member or employee with supervisory authority. If the requirements of this subsection are complied with, the charter school may employ immediate family of any member of the board of directors or a charter school employee with supervisory authority.

(3) A requirement that a person shall not be disqualified from serving as a member of a charter school's board of directors because of the existence of a conflict of interest, so long as the person's actions comply with the school's conflict of interest policy established as provided in this subsection and applicable law.

(c) A charter school shall operate under the written charter signed by the State Board and the applicant. A charter school is not required to enter into any other contract. The charter shall incorporate the information provided in the application, as modified during the charter approval process, and any terms and conditions imposed on the charter school by the State Board

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of Education. No other terms may be imposed on the charter school as a condition for receipt of local funds.

(d) The board of directors of the charter school shall decide matters related to the operation of the school, including budgeting, curriculum, and operating procedures.

(e) The board of directors of the private nonprofit corporation operating the charter school may have members who reside outside of the State. However, the State Board of Education may require by policy that a majority of the board of directors and all officers of the board of directors reside within the State.

Credits

Added by Laws 1995 (Reg. Sess., 1996), c. 731, § 2, eff. June 21, 1996. Amended by S.L. 1997-430, § 4, eff. Aug. 22, 1997; S.L. 2013-355, § 1(e), eff. July 25, 2013. Recodified from § 115C-238.29E(a) to (d) pursuant to S.L. 2014-101, § 7, eff. Aug. 6, 2014. Amended by S.L. 2015-248, § 6(a), eff. March 1, 2016.

Notes of Decisions (2)

N.C.G.S.A. § 115C-218.15, NC ST § 115C-218.15
The statutes and Constitution are current through 2020-15 of the 2020 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes.

End of Document

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West's North Carolina General Statutes Annotated
Chapter 115C. Elementary and Secondary Education
Subchapter IV. Education Program
Article 14a. Charter Schools (Refs & Annos)

N.C.G.S.A. § 115C-218.25

§ 115C-218.25. Open meetings and public records

Effective: July 1, 2015

Currentness

The charter school and board of directors of the private nonprofit corporation that operates the charter school are subject to the Public Records Act, Chapter 132 of the General Statutes, and the Open Meetings Law, Article 33C of Chapter 143 of the General Statutes. Notwithstanding the requirements of Chapter 132 of the General Statutes, inspection of charter school personnel records for those employees directly employed by the board of directors of the charter school shall be subject to the requirements of Article 21A of this Chapter. The charter school and board of directors of the private nonprofit corporation that operates the charter school shall use the same schedule established by the Department of Natural and Cultural Resources for retention and disposition of records of local school administrative units.

Credits

Added by S.L. 2014-101, § 5, eff. Aug. 6, 2014. Recodified from § 115C-238.29F(m) pursuant to S.L. 2014-101, § 7, eff. Aug. 2014. Amended by S.L. 2015-241, § 14.30(s), eff. July 1, 2015.

N.C.G.S.A. § 115C-218.25, NC ST § 115C-218.25
The statutes and Constitution are current through 2020-15 of the 2020 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes.

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West's North Carolina General Statutes Annotated
Chapter 115C. Elementary and Secondary Education
Subchapter IV. Education Program
Article 14a. Charter Schools (Refs & Annos)

N.C.G.S.A. § 115C-218.60

§ 115C-218.60. Student discipline

Effective: August 6, 2014

Currentness

The school is subject to and shall comply with Article 27 of Chapter 115C of the General Statutes, except that a charter school may also exclude a student from the charter school and return that student to another school in the local school administrative unit in accordance with the terms of its charter after due process.

Credits

Recodified from § 115C-238.29F(d)(5) pursuant to S.L. 2014-101, § 7, eff. Aug. 6, 2014.

N.C.G.S.A. § 115C-218.60, NC ST § 115C-218.60
The statutes and Constitution are current through 2020-15 of the 2020 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes.

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