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

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

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I. INTRODUCTION

Plaintiffs studiously ignore the threshold legal barriers that not only prevent summary judgment for them, but require summary judgment for Defendants. They obliquely acknowledge in a footnote that binding Title IX regulations permit sex-specific dress codes. But they then proceed to ignore that fatal point and inexplicably argue that more general Title IX regulations about codes of behavior somehow nevertheless prohibit the School's Uniform Policy. Unsurprisingly in light of Title IX's dispositive regulations, Plaintiffs dedicate most of their effort to their Equal Protection Clause claims. But they ignore that the Constitution only reaches *state* action, and the School's Uniform Policy is not state action, as Defendants explained in their Motion for Summary Judgment. The state-action doctrine thus protects the freedom of the School to enact and maintain its Uniform Policy. Defendants will not belabor these dispositive points in this brief, as they are fully explained in Defendants' Motion for Summary Judgment and Plaintiffs' motion almost completely ignores them.

Eliding these insuperable barriers, Plaintiffs posit a radical constitutional vision, in which schools are forbidden to adopt policies reflecting the reality that "boys and girls are different." (*E.g.*, Plfs.' Mem. in Support of Summ. J., Dkt. No. 150 ("Plaintiffs' MSJ") at 2, 10, 12, 28.) But the leading educational sex-discrimination statute does not require eliminating all gender distinctions. Indeed, as noted, Title IX's implementing regulations expressly permit dress codes with different requirements for boys and girls. Title IX also acknowledges gender differences in numerous other ways, allowing sex-segregated bathrooms and sports teams, and allowing girls to be prohibited from contact sports altogether. Title IX even allows elementary and secondary schools to be designated exclusively for males or females. Plaintiffs' sweeping interpretation of the Constitution would therefore require invalidating broad swaths of the federal statute that governs sex discrimination in education. Plaintiffs err because the Constitution—like Title IX—

prohibits denying girls educational opportunities; it does not mandate eradicating all sex-based distinctions. Because Plaintiffs cannot plausibly claim to be denied the former, they misconstrue the law to require the latter.

Plaintiffs also apparently believe that the Constitution is irreconcilable with Title VII case law, which has long permitted comprehensive, sex-specific dress codes in the workplace, as long as men and women are not unequally burdened by the code's requirements. Plaintiffs barely acknowledge this law's existence and instead contend that the Constitution somehow prohibits what Title VII and Title IX permit. Plaintiffs create this anomaly only by weaponizing an unrecognizable version of the constitutional rule that applies heightened scrutiny to state action that facially excludes one sex from a particular opportunity. But *no court* has applied that Equal Protection doctrine to evaluate—much less invalidate—a comprehensive school dress code that contains sex-specific appearance standards.

Even if Plaintiffs were correct that heightened constitutional scrutiny applies to a school dress code allegedly rooted in sex stereotypes, they still would not be entitled to summary judgment. That is because Plaintiffs seek summary judgment against a uniform policy and school that do not exist. In Plaintiffs' telling, Charter Day School's distinctive approach to education begins and ends with the requirement that girls wear jumpers, skirts, or skorts. And according to Plaintiffs, the School adopted that requirement for the purpose of reinforcing Mr. Mitchell's allegedly improper sex stereotypes about the role of males and females.

But that distorts the reality of the Uniform Policy and the School's broader vision. The record contains undisputed evidence that the School initially adopted the Uniform Policy at its founding because parents preferred such a policy. The Board then emphatically reaffirmed the policy in 2016, again based upon a parent survey expressing overwhelming satisfaction with the

Uniform Policy. Numerous witnesses explained motivations for the Uniform Policy that have nothing to do with alleged sex stereotypes. All of this evidence at the very least creates a fact issue because it shows that the Board-enacted Uniform Policy reflects community standards and is part and parcel of the School's uniquely successful approach to education—as opposed to being driven by an intent to discriminate against girls.

The Uniform Policy is comprehensive and generally seeks a respectful appearance that will facilitate learning. It requires all children to wear similar tops, bottoms, and shoes. For girls, along with requiring skirts, skorts, or jumpers, the Uniform Policy regulates the appearance of their jewelry and makeup. The Uniform Policy prohibits boys from wearing any of these. And it requires boys to wear socks, a belt, and a prescribed hairstyle, none of which it requires of girls. Plaintiffs are notably silent about this context for what they deem the "Skirts Requirement." They similarly do not consider the Uniform Policy in the context of the School's broader educational vision. The School's holistic, traditional-values approach governs all aspects of student life: the classical curriculum; the teacher-centered instructional method called "direct instruction"; the conventional manners, including addressing adults as "Ma'am" and "Sir"; and the Uniform Policy, which requires all children to wear simple, traditional clothing. The School that actually exists, which seeks to instill its community's traditional values in its students through rules like the Uniform Policy, generally outperforms the other schools in the area. Plaintiffs' failure to account for the context of the Uniform Policy discredits and defeats their Motion for Summary Judgment.

Plaintiffs argue that the policy harms girls by making them cold or uncomfortable, distracting them from learning, and causing them to be less likely to engage in physical activity during recess. They even argue, based on their expert's report, that sex-specific uniform policies

reinforce stereotypes that discourage girls from succeeding in sports or historically male-dominated fields such as mathematics. Suffice it to say there are at least factual issues on whether the Uniform Policy has any of these ill effects. Girls at the School participate and succeed in sports at a high level. They are not inhibited in physical activity at recess. They often outperform boys at the School in math and consistently outperform their peers at legacy public schools in all fields. Girls outnumber boys at the School and continue joining in record numbers. At a minimum, a factfinder could reasonably conclude that the Uniform Policy is not impeding the physical or academic success of girls, but is instead part of an educational approach that allows both boys and girls to partake in a school environment that positions them for future flourishing in both life and profession.

Plaintiffs are not entitled to summary judgment on their state-law claims primarily for these same reasons, although these claims also fail for other reasons outlined in more detail below and in Defendants' prior briefing.

II. BACKGROUND

A. Charter Day School and the Uniform Policy

Defendants have, in the Memorandum in Support of their Motion for Summary Judgment, provided the Court with a comprehensive background of the School and its educational model. (*See* Dkt. No. 159 ("Defendants' MSJ") at 2–9.) The summary below is focused on placing Plaintiffs' one-sided view of this case in the proper context.

Charter Day School, Inc. and The Roger Bacon Academy, Inc. (which we will continue to refer to as CDS, Inc. and RBA, respectively) are, and always have been, entirely separate entities. (*See, e.g.*, Statement of Material Facts that Defendants Contend are Not Genuinely in Dispute, Dkt. No. 160 ("Facts") ¶¶ 2, 20, 24, 31.) Charter Day School, the K–8 school that Plaintiffs attend (which we will call "the School" to distinguish it from CDS, Inc.), exists as a

result of a contract called a Charter Agreement between CDS, Inc. and North Carolina. (*Id.* ¶ 6.) Under state law, the Board of CDS, Inc. "decide[s] matters related to the operation of the school, including budgeting, curriculum, and operating procedures." N.C. Gen. Stat. § 115C-218.15(d). (*See* Facts ¶ 11 ("The Board is the final decisionmaker regarding the School.").) Neither the state nor RBA has the power to place someone on the Board of CDS, Inc. or to participate in a vote held by the Board. (*Id.* ¶¶ 12, 22–24.) As part of RBA's responsibility to operate the four CDS, Inc. charter schools, RBA or its officers occasionally act in an advisory role, recommending certain policies to the Board of CDS, Inc. (*See id.* ¶¶ 25–26.) But in all policy matters, the final decision remains in "the sole and absolute discretion" of the CDS, Inc. Board. (*Id.* ¶ 11.) These governance principles maintain the distinction between CDS, Inc. and RBA.

These two entities are also financially distinct. CDS, Inc. maintains a separate bank account for each of its four charter schools. (*Id.* ¶ 32.) Acadia NorthStar, a third-party financial-services firm that specializes in serving North Carolina charter schools, manages the bank accounts of all four schools. (*Id.* ¶ 35.) These four schools obtain funding from a variety of sources, including the federal government. (*Id.* ¶ 33.) Money from any funding source flows into the particular school's account. (*Id.*) At no point does RBA control or have access to the funds in these accounts. (*Id.* ¶¶ 33–37.) To obtain payment from a CDS, Inc. school, RBA must first incur an expense and then submit a request to Acadia NorthStar for reimbursement from the relevant school's account. (*Id.* ¶ 41.) In this way, CDS, Inc. schools pay RBA for its services just as any other charter school that contracts with RBA. (*Id.*) And, to be clear, RBA provides services to non-CDS, Inc. charter schools as well. (*Id.* ¶ 43.)

As this wall of separation between CDS, Inc. and RBA would suggest, the Board of CDS, Inc. establishes the specifics of the Uniform Policy, not RBA or any of its officers. (*Id.* ¶ 52.)

So in March 2016, when the Board of CDS, Inc. voted not to change the Uniform Policy in response to this lawsuit, Mr. Baker Mitchell, RBA's president, could not participate. (*Id.* ¶¶ 20–24, 53.) The Board voted as it did based on its understanding that the School's community is satisfied with the Uniform Policy's current requirements. (*Id.* ¶¶ 53, 89.) By ensuring that the School's community of parents approves of these requirements, the Board is able to maintain an appearance code that comports with the relevant community's norms. (*See id.* ¶¶ 90–92.)

Keeping the Uniform Policy consistent with the norms of parents who send their children to the School supports the entire endeavor of traditional-values education at the School. (*Id.* ¶ 118.) It is but "one facet" of the School's overall approach to help students "focus on education." (*Id.* ¶ 128.) Alongside the other unique characteristics of the School, like direct instruction and a classical curriculum that includes cursive handwriting and Latin instruction, the Uniform Policy's sex-differentiated requirements in particular "work seamlessly together in a coordinated fashion in a disciplined environment that has mutual respect between boys and girls and between each other as students." (*Id.* ¶ 125.) These important objectives—promoting a traditional educational approach, focusing on learning, and engendering a respectful environment—motivate the Board to keep the Uniform Policy as it has always been.

The School's teachers have the first-line duty to further those objectives by enforcing the Uniform Policy. (*Id.* ¶ 75.) They enforce it equally against both sexes. (*Id.* ¶ 86.) The School has no policy that girls sit differently in the classroom than boys, or that girls refrain from activities at recess that are open to boys. (*See* Defs.' MSJ Ex. 55, Decl. of Rosina Walton ("Walton Decl.") ¶¶ 6–10, 19 (filed simultaneously with this Memorandum).) In fact, the requirement that boys wear belts (a requirement that does not apply to girls) is the most enforced provision of the Uniform Policy—enforced more often than any of the Policy's female-specific

requirements. (*Id.* ¶¶ 16–17.) When a teacher enforces the Uniform Policy against a student, there is no rule that the student must be sent to the office until her parents arrive with compliant clothing. (*Id.* ¶¶ 11–15.) The School often simply supplies the child with an article of clothing that complies with the Uniform Policy. (Facts ¶ 81; Walton Decl. ¶ 14.) Beyond this, the Uniform Policy is primarily enforced by sending a standard notification letter home to parents. (Facts ¶¶ 76–78.) And Plaintiffs produce no evidence that noncompliance has ever led to "suspension" or "expulsion"—and it has not. (*Contrast id.* ¶ 79, *and* Walton Decl. ¶¶ 15, 18, *with* Plaintiffs' MSJ at 8.)

The Uniform Policy has not caused girls to forego participation in any aspect of School life. (*See* Walton Decl. ¶¶ 3–10.) Female enrollment has trended slightly upwards for the last few years and recently eclipsed male enrollment. (Facts ¶ 117.) Girls at the School are as physically active during recess as girls at schools that do not have the Uniform Policy. (Walton Decl. ¶¶ 3–6.) The girls at the School who would like to participate in sports at recess do participate; for example, girls and boys join in a game of schoolyard soccer most days. (*Id.* ¶¶ 7–8.) And girls' participation levels do not change on days when they are wearing their P.E. uniform. (*Id.* ¶ 9.) The Uniform Policy thus does not inhibit girls' participation in physical activities. (*Id.* ¶ 10.) Indeed, the cheerleading squad associated with the School has won nine national titles. (Facts ¶ 116.) And the School's coed archery team has won the state championship for the last eight years. (*Id.*)

Nor have girls fallen behind academically because of the Uniform Policy. In math, "on the whole the girls' achievement has been somewhat greater than that of the boys." (Defs.' MSJ Ex. 45, Expert Rep. of Dr. Duncan-Hively and Dr. Hively, Dkt. No. 164 ("Hively Rep.") at 22.) So too with science—girls "do not appear to be educationally impaired, in comparison to the

boys, by having to wear dresses." (*Id.* at 24.) The same is true when comparing the math performance of the School's female students to female students at local noncharter public schools. On standardized math tests, the School's "female students' academic performance is mostly better than those from [Brunswick County Public Schools]." (Defs.' MSJ Ex. 46, Expert Rep. of Dr. Yishi Wang, Dkt. No. 163-17 ("Wang Rep.") at 4.) And on these same tests, the School's female students' performance relative to its male students' performance is "on-par with" the that at Brunswick County schools. (*Id.*) In sum, the evidence shows that girls—far from being hindered by the Uniform Policy or the School's other unique characteristics—thrive at the School, academically and otherwise.

B. Summary-Judgment Standard

As the "party seeking summary judgment," Plaintiffs "bear[] the initial burden of demonstrating the absence of a genuine issue of material fact" on all of their claims. *Ballard v. Mullins*, No. 5:15-CT-3045-H, 2016 WL 9448107, at *3 (E.D.N.C. Sept. 26, 2016). Because they have failed as a matter of law to meet that initial burden, it does not fall on Defendants to demonstrate the existence of such a fact issue. *Faircloth v. United States*, 837 F. Supp. 123, 126 (E.D.N.C. 1993). Indeed, as Defendants have previously shown, Defendants, not Plaintiffs, are entitled to judgment as a matter of law on all claims in the Complaint. At the very minimum, there can be no doubt in this case that "the evidence is such that a reasonable jury could return a verdict for" Defendants. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Either way, summary judgment for Plaintiffs is inappropriate. *Id.*

III. ARGUMENT

Plaintiffs seek summary judgment on their claims that the Uniform Policy violates Title IX, the U.S. Constitution's 14th Amendment (via 42 U.S.C. § 1983), the North Carolina Constitution, and North Carolina common law. Plaintiffs do not, however, address the

preliminary legal impediments to each of their claims. Defendants' Motion for Summary Judgment has shown that these matter-of-law barriers entitle Defendants, not Plaintiffs, to summary judgment. In addition, Plaintiffs have not carried their burden of showing the absence of a genuine issue of material fact on their claims. Even accepting Plaintiffs' wildly distorted view of the law, numerous fact issues would need to be resolved regarding whether the Uniform Policy is in purpose and effect rooted in impermissible sex stereotypes. The Court should, therefore, deny Plaintiffs' Motion for Summary Judgment in its entirety.

A. Plaintiffs are not entitled to summary judgment on their Title IX claims.

We begin with Title IX, for if a claim against sex-based school dress codes exists, Title IX—not the Constitution—would be the first place to look. But Plaintiffs demote Title IX to second billing for an understandable reason. The Department of Education ("ED"), which is chief among the agencies charged with enforcing Title IX, decades ago interpreted the statute through notice-and-comment rulemaking *not to apply at all* to dress or grooming codes. *Withdrawal of Appearance-Code Regulation*, 47 Fed. Reg. 32,526 (July 28, 1982). This authoritative interpretation forecloses Plaintiffs' Title IX claims as a matter of law and requires summary judgment for Defendants. (*See* Defendants' MSJ at 12–17 (explaining in detail how ED's interpretation poses an insurmountable barrier to Plaintiffs' Title IX claims).) Plaintiffs make no effort to explain why the Court should disregard the interpretation of Title IX formally promulgated by the agencies to which Congress entrusted the statute's enforcement. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (mandating deference to agency interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute"). Instead of confronting the relevant regulatory interpretation, Plaintiffs seek to have the Court apply a novel, sex-stereotyping approach to Title IX, one that no court has applied to a comprehensive school dress code that burdens both boys and girls.

1. Plaintiffs offer no reason to reject the authoritative agency interpretation that Title IX does not apply to dress or grooming codes.

As this Court has previously noted, in 1982 ED unmistakably foreclosed Plaintiffs' Title IX claims "by revoking [its former regulations] which prohibit[ed] discrimination in the application of codes of personal appearance." *Withdrawal of Appearance-Code Regulation*, 47 Fed. Reg. at 32,536. (*See* Order, Dkt. No. 91 at 10.) The backdrop against which this regulation was revoked further confirms that the arguments proffered in Plaintiffs' Motion for Summary Judgment must fail as a matter of law.

The very first regulations issued under Title IX included eight "Specific prohibitions." *Nondiscrimination on the Basis of Sex*, 40 Fed. Reg. 24,128, 24,141 (June 4, 1975).[1] Two of the eight prohibitions are particularly relevant: one prohibiting "separate or different rules of behavior, sanctions, or other treatment"; the other prohibiting "[d]iscriminat[ion] against any person in the application of any rules of appearance." *Id.* Since promulgation of those initial regulations, ED has rescinded only one of those eight prohibitions—the prohibition on "discrimination in the application of codes of personal appearance." *Withdrawal of Appearance-Code Regulation*, 47 Fed. Reg. at 32,526.

By withdrawing its appearance-code regulation, ED intended to "permit[] issues involving codes of personal appearance to be resolved at the local level," not through enforcement of Title IX. *Id.* at 32,527. The current Title IX regulations maintain seven of the eight original prohibitions, but omit the appearance-code regulation, reflecting ED's ongoing view that Title IX does not govern school appearance codes. *See* 34 C.F.R. § 106.31(b); *see also*

[1] The now-defunct Department of Health, Education, and Welfare promulgated these initial Title IX regulations. Upon the creation of ED, it adopted HEW's Title IX regulations with no changes. *See Establishment of Title & Chapters*, 45 Fed. Reg. 30,802, 30,955, 30,960 (May 9, 1980); *see also Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993) (recounting history of ED's adoption of HEW regulations).

Common Rule, 65 Fed. Reg. 52,858, 52,859 (Aug. 30, 2000) ("As set forth in this common rule, the substantive nondiscrimination obligations of recipients, for the most part, are identical to those established by [ED] under Title IX."); *Education Programs or Activities Receiving or Benefitting from Federal Financial Assistance*, 82 Fed. Reg. 46,655, 46,655 (Oct. 6, 2017) (USDA's adoption of Common Rule).

Thus for 35 years, ED has consistently interpreted Title IX to permit personal-appearance codes like the Uniform Policy; every agency with Title IX enforcement authority now agrees. *See Sturgis v. Copiah Cty. Sch. Dist.*, No. 3:10-CV-455-DPJ-FKB, 2011 WL 4351355, at *5 n.3 (S.D. Miss. Sept. 15, 2011) ("For what it is worth, every other federal department or agency to offer Title IX regulations [including USDA as of October 2017] follows the Department of Education's interpretation."). Yet Plaintiffs fail even to acknowledge the existence of ED's express interpretation of Title IX, which specifically forecloses their claims. (*See* Plaintiffs' MSJ at 41–46 (failing even to cite ED's withdrawal of the appearance-code regulation).)[2]

Plaintiffs instead direct the Court to the regulations' generalized prohibition of "separate or different rules of behavior, sanctions, or other treatment." 34 C.F.R. § 106.31(b)(4); *see* 7 C.F.R. § 15a.400(b)(4) (identical USDA regulation). But ignoring the specifically applicable interpretation—which permits appearance codes—in favor of the generalized prohibition that does not directly apply would violate the venerable principle that a more specific provision must control the application of a more general one. *Rodgers v. United States*, 185 U.S. 83, 88–89

[2] Plaintiffs admit that USDA adopted the Common Rule on October 6, 2017, and thus "rescinded" its previous regulation prohibiting sex-based appearance codes. (Plaintiffs' MSJ at 43 n.13.) But Plaintiffs inexplicably maintain that this action "should not be interpreted to mean that USDA has *sub silentio* adopted the position that dress codes that differentiate on the basis of sex are now permissible." (*Id.*) There was nothing *sub silentio* about USDA's resoundingly clear action. In 2017, USDA belatedly came into line with ED's 1982 interpretation permitting sex-based appearance codes, which ED has maintained for decades and which had previously been adopted by more than twenty other federal agencies.

(1902); *see Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 302 (4th Cir. 2000) ("[A] specific statute closely applicable to the substance of the controversy at hand controls over a more generalized provision." (quotation marks omitted)). That is especially true here, where ED expressly repealed the appearance-code regulation and allowed sex-based appearance codes, while choosing to leave the more general regulatory prohibition on "behavior[al]" discrimination in place. This deliberate action in the form of an intentional choice to repeal only one of the original eight prohibitions on discrimination reflects the agency's considered view that allowing sex-based appearance codes is wholly consistent with the statute's other prohibitions on discrimination.[3]

In sum, the agencies charged with enforcing Title IX have specifically interpreted it not to apply to school rules like the Uniform Policy. *See Withdrawal of Appearance-Code Regulation*, 47 Fed. Reg. at 32,526. And Plaintiffs have not attempted to show why, under *Chevron*, the Court must reject that interpretation. Barring the requisite *Chevron* showing, the Court must apply the agencies' interpretation and grant Defendants' judgment as a matter of law on Plaintiffs' Title IX claims.

[3] In an apparent attempt to show that a general prohibition of discrimination can somehow trump a specific regulatory exemption, Plaintiffs cite a Fourth Circuit decision for the proposition that the "exclusion of [a] female athlete from participation on [the] men's football team" violated a general prohibition on discrimination. (Plaintiffs' MSJ at 43 (citing *Mercer v. Duke Univ.*, 190 F.3d 643, 648 (4th Cir. 2001)).) That description is quite misleading. In reality, the Fourth Circuit held that Title IX's specific exemption allowing schools to exclude girls from contact sports would have "respect[ed] the choice" of "a university [to] choose[] not to permit members of the opposite sex to tryout for a single-sex contact-sports team." *Mercer*, 190 F.3d at 647. The court applied the general prohibition on discrimination only because the school allowed the female athlete to join the football team, but later dismissed her on the basis of sex. *Id.* at 648. Nothing analogous occurred here, so the specific regulatory interpretation allowing appearance codes governs the Uniform Policy.

2. Plaintiffs ask the Court to ignore the authoritative agency interpretation of Title IX in favor of a novel sex-stereotyping theory.

Without discussion of ED's binding interpretation that Title IX does not apply to dress or grooming codes, Plaintiffs attempt to read into the statute a sweeping sex-stereotyping theory that has never been applied in the context of educational dress codes. (*See* Plaintiffs' MSJ at 44–45.) In support of their novel approach, Plaintiffs first cite a passage from this Court's order on Defendants' Motion to Dismiss, but this passage discusses the Title IX regulatory framework, not the viability as a general matter of Plaintiffs' sex-stereotyping theory. (*Id.* at 44 (citing Order, Dkt. No. 91 at 10–11).) They then turn to *M.D. v. School Board of City of Richmond*, an unpublished Fourth Circuit decision. 560 F. App'x 199 (4th Cir. 2014). There, the court elaborated on the rule that "non-attorney parents are not authorized to represent their children pro se in federal court," *id.* at 200, and expressly refused to issue "a decision on the law" applicable to sex-stereotyping Title IX claims, *id.* at 203. The out-of-circuit decisions they cite are equally beside the point. *See Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 867 (8th Cir. 2011) (developing standard applicable to "Title IX deliberate indifference claim"—not viability of standalone sex-stereotyping claim); *Sturgis*, 2011 WL 4351355, at *3–4 (denying motion to dismiss because "record is not complete with respect to the wording or contours of the disputed policy"—expressly not because of "any final rulings" on sex-stereotyping theory). None of these decisions had the occasion to decide whether ED's Title IX regulation foreclosed dress-code claims as a matter of law, much less to adopt a sex-stereotyping cause of action in that context.

Even if the regulation permitting appearance codes were somehow not dispositive, a sex-stereotyping approach still would not apply. Courts have routinely upheld sex-differentiated dress codes under both Title VII and Title IX (before ED's regulation). *See Earwood v. Cont'l S.E. Lines, Inc.*, 539 F.2d 1349, 1350 (4th Cir. 1976) (holding that "sex differentiated grooming

standards do not, without more, constitute discrimination under Title VII"); *Trent v. Perritt*, 391 F. Supp. 171, 173 (S.D. Miss. 1975) (holding that male-only hair-length policy was not "discrimination within the purview of" Title IX because the statute did not require "eras[ing] all outside physical distinctions between the sexes"). Even *Sturgis*, which Plaintiffs repeatedly cite, recognizes that sex-differentiated dress codes have been consistently upheld in the Title VII context. *See* 2011 WL 4351355, at *3 ("[S]everal circuits have held—after *Price Waterhouse* [*v. Hopkins*, 490 U.S. 228 (1989)]—that certain sex-differentiated appearance standards did not constitute sex-based discrimination."). As Defendants explain in more detail, *infra* Section III.B.2.iii, the Uniform Policy would satisfy the equal-burdens test that has been applied under Title VII. But there is no need for the Court to conduct an equal-burdens analysis here because the binding Title IX regulation expressly forecloses dress-code challenges in the context of schools.

3. Plaintiffs have not proved that RBA receives federal funds.

RBA is entitled to summary judgment under Title IX for an additional reason that does not apply to CDS, Inc. (Plaintiffs bring no Title IX claim against the Board.) Plaintiffs have offered no evidence that RBA "receiv[es] Federal financial assistance." 20 U.S.C. § 1681(a). They devote only a fraction of a footnote to the topic. (Plaintiffs' MSJ at 41 n.12.) RBA is entitled to summary judgment on Plaintiffs' Title IX claims, then, independent of Plaintiffs' failure to prove that the Uniform Policy violates Title IX. *See Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) (defendant's receipt of federal funds is an element of a Title IX claim). (*See also* Defendants' MSJ at 11–12 (explaining that RBA "does not become subject to Title IX solely because it does business with schools that receive federal funding").)

Arguing otherwise based on ED's definition of a "recipient" of federal funding, Plaintiffs ignore the Supreme Court's interpretation of that definition. (Plaintiffs' MSJ at 41 n.12.) ED's

definition has two parts: (1) A recipient is one "to whom Federal financial assistance is extended directly or through another recipient"; and (2) a recipient "operates an education program or activity which receives such assistance." 34 C.F.R. § 106.2(*i*). "The first part of this definition," the Supreme Court has said, "makes clear that Title IX coverage is not triggered when an entity merely benefits from federal funding." *NCAA v. Smith*, 525 U.S. 459, 468 (1999). Under this reading of ED's definition, the court held that Title IX did not apply to the NCAA solely because it "received dues from its federally funded members." *Id.* Importantly, none of the NCAA's members received federal money earmarked for the purpose of paying NCAA dues. *Id.* "At most," the "receipt of dues demonstrate[d] that [the NCAA] indirectly benefit[ted] from the federal assistance afforded its members." *Id.*

As in the *NCAA* decision, RBA "only benefit[s] economically from federal assistance" received by CDS, Inc. and the School, which is not enough to subject RBA to Title IX's requirements. *Id.* (*See* Facts ¶¶ 31–42.) CDS, Inc. maintains a bank account for the School that a third-party financial services firm, Acadia NorthStar, L.L.C., manages. (*Id.* ¶¶ 32, 35.) The School's funding from all sources, including federal financial assistance, flows into this Acadia-managed bank account. (*Id.* ¶¶ 33, 38–39.) RBA does not own the funds in this account. (*See id.* ¶ 36 (explaining that RBA and CDS, Inc. do not share a joint bank account).) Acadia—and not RBA—has the authority to disburse funds from the School's account. (*Id.* ¶¶ 34–37.) As in *NCAA*, none of the funding that the School receives is earmarked for payment to RBA; RBA must first incur an expense in performance of its Management Agreement with CDS, Inc. and then request that Acadia disburse funds on behalf of the School. (*Id.* ¶ 41.) In sum, CDS, Inc. receives federal funding, which it then uses in part to compensate RBA for services rendered under the Management Agreement. Like the NCAA's receipt of dues from federally funded

members, RBA's receipt of compensation from federally funded CDS, Inc. does not trigger Title IX's coverage. *NCAA*, 525 U.S. at 468; *see Campbell v. Dundee Cmty. Schs.*, 661 F. App'x 884, 886, 888 (6th Cir. 2016) (holding that contractor "did not receive federal funds" despite "'benefit[ting] economically from federal assistance'" (quoting *NCAA*, 525 U.S. at 468)).

B. Plaintiffs are not entitled to summary judgment on their constitutional claims.

Plaintiffs also cannot succeed on their constitutional claims because they have not established—and, as a matter of law, cannot establish—either of the two elements required by 42 U.S.C. § 1983. First, Plaintiffs offer no evidence, or even any argument, that the Uniform Policy was enacted "under color of State statute, ordinance, regulation, custom, or usage." *Mentavlos v. Anderson*, 249 F.3d 301, 310 (4th Cir. 2001) (brackets omitted) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970)). Therefore, the Uniform Policy was not state action, and, accordingly, cannot as a matter of law form the basis of Plaintiffs' constitutional claims. In addition, Plaintiffs have not proved that the Uniform Policy deprives them of the particular "right secured by the Constitution" on which they base their claims. *Id.* (quoting *Adickes*, 398 U.S. at 150). In other words, Plaintiffs' constitutional claims fail on their merits. For the reasons explained below and in Defendants' prior briefing (*see* Defendants' MSJ at 25–42), it is Defendants, not Plaintiffs, who are entitled to summary judgment.

1. Plaintiffs make no attempt to prove that the Uniform Policy is state action.

None of Defendants are public officials (Facts ¶ 1), so Plaintiffs must prove that "the allegedly unconstitutional conduct is fairly attributable to the State." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). Meeting this burden begins with examination of "the specific conduct of which the plaintiff complains," here the Uniform Policy. *Id.* at 51 (quotation marks omitted). That is because "an entity may be a State actor for some purposes but not for others." *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 812–13 (9th Cir. 2010) (quotation

marks omitted)). Defendants have already explained at length why the Uniform Policy, as a matter of law, is not state action. (Defendants' MSJ at 26–33.) Plaintiffs almost completely ignore this threshold barrier to their § 1983 claim.

In the lone footnote that Plaintiffs devote to this required element of their § 1983 claims, they make zero effort to prove that the Uniform Policy "is fairly attributable to the State." *Sullivan*, 526 U.S. at 50. (*See* Plaintiffs' MSJ at 25 n.4.) They instead point to a single page from the Court's order on Defendants' Motion to Dismiss, which addresses whether the members of the Board are unnecessary parties or immune from damages, not whether the Uniform Policy is state action. (Order, Dkt. No. 91 at 12.) Far from holding "that CDS is a state actor"—as Plaintiffs incredibly contend (Plaintiffs' MSJ at 25 n.4)—the order does not discuss the state-action requirement at all. The Court simply noted that "charter schools are public schools under state law" and ruled that this fact did not entitle the Board to immunity from damages. (Dkt. No. 91 at 12.) *See* N.C. Gen. Stat. § 115C-218.15(a) (establishing charter schools as public schools). In *Caviness*, the Ninth Circuit held that Arizona's similarly worded charter-school statute did not convert a corporation that operated a charter school (like CDS, Inc. here) into a state actor. 590 F.3d at 813–14. (*See* Defendants' MSJ at 27–28 (discussing principle that state-law characterization of private entity does not determine whether it is a state actor).) Plaintiffs ignore that principle and choose instead to distort this Court's order.

The remaining argument in Plaintiffs' brief state-action footnote has been soundly rejected by courts around the country. Plaintiffs suggest that, because Defendants operate a school, they are state actors for all purposes under the "public function" test. (Plaintiffs' MSJ at 25 n.4.) But this test requires not just that Defendants perform a public function, but that "the function performed has been 'traditionally the *exclusive* prerogative of the State.'" *Rendell-*

Baker v. Kohn, 457 U.S. 830, 842 (1982) (emphasis in original). The public-function doctrine is "carefully confined" and "has been found [to apply] in only narrow circumstances." *Mentavlos*, 249 F.3d at 317 (quotation marks omitted). In *Rendell-Baker*, for example, the Supreme Court held that "the education of maladjusted high school students," although it certainly "serves the public," did not satisfy the public-function test. 457 U.S. at 842. The Fourth Circuit and other courts have expanded on *Rendell-Baker* and held that education in general is not a traditionally exclusive public function. *See Mentavlos*, 249 F.3d at 314–15; *Caviness*, 590 F.3d at 808, 814–16 (holding that "a private non-profit corporation that runs a charter school" is not executing an exclusively public function). These represent but a sampling of the authorities that defeat Plaintiffs' cursory state-action arguments; the remainder are fully discussed elsewhere.[4] (*See* Defendants' MSJ at 26–33.)

Because Plaintiffs, as a matter of law, have failed to prove that the Uniform Policy is state action, Defendants are entitled to summary judgment on their constitutional claims. Because this is a threshold question, the Court need not evaluate the merits of Plaintiffs' constitutional claim.

2. Plaintiffs do not establish that the Uniform Policy even implicates—much less violates—the Equal Protection Clause.

In any event, Plaintiffs' constitutional claims fail on the merits as well. Plaintiffs are in the untenable position of arguing that the Equal Protection Clause prohibits sex-specific dress codes in local schools even though ED has interpreted Title IX to permit them. Indeed, even

[4] Without any discussion, Plaintiffs cite a North Carolina statute and an unpublished Illinois federal district court decision related to open-records laws and charter schools. (Plaintiffs' MSJ at 25 n.4 (citing N.C. Gen. Stat. § 115C-218.25, and *Jordan v. N. Kane Educ. Corp.*, No. 08 C 4477, 2009 WL 509744 (N.D. Ill. Mar. 2, 2009)).) To the extent Plaintiffs mean by these citations to argue that the open-records law converts Defendants into state actors for all purposes, the Ninth Circuit considered and correctly rejected this very argument based on Arizona's similar "Open Meetings Act." *Caviness*, 590 F.3d at 814.

outside the educational context, courts "have long recognized" that the law permits "differentiat[ing] between men and women in appearance and grooming policies." *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1110 (9th Cir. 2006) (en banc) (Title VII). Plaintiffs seek to escape this reality by contending that heightened *constitutional* scrutiny applies to policies that have been upheld time and again under the relevant *statutes*. Plaintiffs can make this argument only by mechanically applying the Equal Protection Clause's heightened scrutiny to a comprehensive school dress code—an arena where that test has *never* been applied before. To the extent the Equal Protection Clause regulates comprehensive school dress codes at all, the Title VII unequal-burden test—not heightened scrutiny—would apply. But even if the Court were to apply intermediate scrutiny to the Uniform Policy, Plaintiffs still would not be entitled to summary judgment, for the Uniform Policy is substantially related to important interests. For these reasons (and those laid out in Defendants' MSJ at 33–42), Defendants—not Plaintiffs—are entitled to judgment as a matter of law on these constitutional claims.

i. As with Title IX, comprehensive dress and grooming codes like the Uniform Policy are exempt from Equal Protection scrutiny.

Plaintiffs present no authority for subjecting the Uniform Policy to constitutional scrutiny under the Equal Protection Clause. (*See* Defendants' MSJ at 33–36 (explaining that the Uniform Policy does not implicate the Equal Protection Clause).) Contrary to Plaintiffs' characterization of the male-haircut cases from the early 1970s, no court has held that sex-based appearance codes like the Uniform Policy amount to constitutionally suspect sex discrimination as long as schools enforce them equally as to both sexes. *See King v. Saddleback Jr. College Dist.*, 445 F.2d 932, 939 (9th Cir. 1971) (upholding haircut policy against Equal Protection Clause challenge although "boys were treated differently than girls"). The Plaintiffs' haircut cases largely rested on outmoded substantive-due-process reasoning. *See, e.g.*, *Massie v. Henry*, 455

F.2d 779, 783 (4th Cir. 1972) ("[W]e prefer in this case to treat their right to wear their hair as they wish as an aspect of the right to be secure in one's person guaranteed by the due process clause . . . .").[5] Plaintiffs do not claim a substantive-due-process right to wear pants in school, and such a claim would be frivolous under prevailing doctrine. *See Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 575 (7th Cir. 2014) ("The notion that one's hair length is an aspect of personal liberty so important that it constitutes a fundamental right is hard to square with the Supreme Court's later opinion in *Glucksberg* . . . ." (citing, *inter alia*, *Arnold v. Carpenter*, 459 F.2d 939 (7th Cir. 1972), on which Plaintiffs rely, and *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), on which the *Massie* court relied)). Not one of Plaintiffs' cases explains why "the more or less vague terms" of the Equal Protection Clause would govern the Uniform Policy when Title IX does not. *Karr v. Schmidt*, 401 U.S. 1201, 1202 (1971) (Black, J., in chambers).[6]

The few haircut cases that addressed sex discrimination under the Equal Protection Clause confirm the conclusion that the Uniform Policy does not implicate the Constitution. *Compare King*, 445 F.2d at 934, 939, *with Crews v. Cloncs*, 432 F.2d 1259, 1261–62, 1266 & n.2 (7th Cir. 1970). In *King*, the Ninth Circuit considered a high school's "'Personal Appearance' standards" that contained "seven items to be observed by boys and five items to be

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[5] Along with *Massie*, Plaintiffs rely on two other Fourth Circuit decisions, both of which are single-page per curiam opinions that do little more than cite *Massie*. *See Mick v. Sullivan*, 476 F.2d 973 (4th Cir. 1973); *Long v. Zopp*, 476 F.2d 180 (4th Cir. 1973).

[6] As Plaintiffs admit, the other three decisions they cite all "follow[ed] reasoning similar to that of the Fourth Circuit in *Massie*." (Plaintiffs' MSJ at 24.) None of these decisions ruled that an appearance code like the Uniform Policy amounted to constitutionally suspect sex discrimination under the Equal Protection Clause. *See Johnson v. Joint Sch. Dist. No. 60*, 508 P.2d 547, 549 (Idaho 1973) (relying on "constitutionally protected right of personal taste" to uphold trial court's factual findings regarding appearance code); *Wallace v. Ford*, 346 F. Supp. 156, 161 (E.D. Ark. 1972) (reasoning from students' "constitutional right to govern their personal appearance"); *Scott v. Bd. of Educ.*, 305 N.Y.S.2d 601, 604–05 (N.Y. Sup. Ct. 1972) (expressly refusing "to pass upon the issues of . . . equal protection," which related to plaintiff's lack of "the means to buy new attire," not sex discrimination).

observed by girls," including a requirement that boys wear short hairstyles. *King*, 445 F.2d at 934. Among other arguments, the plaintiffs challenged the appearance standards on equal-protection grounds: "[B]oys were treated differently than girls; *i.e.*, girls could have long hair and boys could not." *Id.* at 939. The Ninth Circuit held that the standards did not implicate the Equal Protection Clause. *Id.* Contrast this with *Crews*, where the Seventh Circuit was faced with a school that, despite having "published no written rules governing the length of high school student[s'] hair," refused to readmit a male student with long hair. 432 F.2d at 1261–62. The absence of an evenly applied policy that burdened both male and female students led the *Crews* court to hold that the school had violated the Equal Protection Clause. *Id.* at 1266. Like the Personal Appearance standards in *King*, the Uniform Policy imposes a variety of requirements on both girls and boys. (*See* Defendants' MSJ at 6–8; Facts ¶¶ 68–74.) Unlike the school in *Crews*, the School here evenly enforces the Uniform Policy against all students. (*See* Defendants' MSJ at 6–8; Facts ¶¶ 75–82; Walton Decl. ¶¶ 11–18.) These facts insulate the Uniform Policy from Equal Protection challenge.

While the battle over 1970s appearance-code case law inures to Defendants' benefit, it is perhaps more telling that there have been vanishingly few cases after the 1970s in which courts have even entertained Equal Protection challenges to schools' sex-specific appearance codes. Plaintiffs acknowledge as much, noting the "limited applicable case law in the education context" since the 1970s. (Plaintiffs' MSJ at 25 n.3.) Plaintiffs admit that this is likely due, among other things, to "the enactment of Title IX" (*id.*), thus recognizing that Title IX would be the natural vehicle to bring a challenge to school dress codes. But Plaintiffs omit to mention the effect of the 1982 ED regulation under Title IX that expressly permitted sex-specific dress codes. That binding interpretation is the real reason that there are so few post-1970s cases challenging

school appearance codes under either Title IX or the more general language of the Constitution. And that is why Plaintiffs are forced to turn to constitutional sex-discrimination cases that apply heightened scrutiny to scenarios far afield from sex-differentiated school dress codes.

ii. Comprehensive dress and grooming codes like the Uniform Policy are plainly not subject to the heightened scrutiny that applies to sex-based exclusions from governmental programs.

Defendants have already explained why the intermediate-scrutiny standard announced in *United States v. Virginia*, 518 U.S. 515 (1996) ("*VMI*"), does not apply to the Uniform Policy. (Defendants' MSJ at 36–38.) The *VMI* Court leveled its intermediate scrutiny against "the categorical exclusion of women from an extraordinary educational opportunity" at the university level—a circumstance far different from the requirement here that elementary- and middle-school students dress according to community norms. 518 U.S. at 547. Plaintiffs make no attempt to prove that Defendants have categorically excluded them from the indisputably "fantastic" educational and extracurricular activities offered by the School. (Facts ¶ 111; *see id.* ¶¶ 109–17.) Barring that, Plaintiffs have failed to invoke *VMI*'s intermediate-scrutiny standard, let alone prove that the Uniform Policy, as a matter of law, fails to satisfy that standard. They are thus plainly not entitled to summary judgment.

Plaintiffs cite exactly two dress-code cases that they imply support heightened scrutiny here. (*See* Plaintiffs' MSJ at 27.) But that implication is misleading. The Seventh Circuit in *Hayden* noted that it had no occasion to address the question presented in this case: whether "a set of grooming standards that impose comparable, although not identical, responsibilities on male and female athletes [in this case, students more generally], does not constitute sex discrimination." 743 F.3d at 580. *Hayden* expressly left open whether a rule like the Uniform Policy implicates intermediate scrutiny and strongly suggested it would not. *See id.* ("[W]e are neither speaking to that argument here nor foretelling the result in a case in which it is properly

asserted and developed."). Reviewing *Hayden*'s Equal Protection *dicta* in its motion-to-dismiss order, this Court accurately "noted that 'sex-differentiated standards consistent with community norms may be permissible to the extent they are part of a comprehensive, evenly-enforced grooming code that imposes comparable burdens on both males and females alike.'" (Order, Dkt. No. 91 at 7 n.2 (quoting *Hayden*, 743 F.3d at 581).) Similarly, *Sturgis* did not decide that intermediate scrutiny applied to the challenged dress code, but instead expressly left the question open, to "be made on a more complete record." 2011 WL 4351355, at *2. Plaintiffs' only two Equal Protection dress-code decisions thus did not apply intermediate scrutiny to a dress and grooming code like the Uniform Policy. Rather, as this Court understood, these cases teach that a prerequisite to intermediate scrutiny is at least a showing that a dress code singles out girls, rather than imposes "comparable burdens on both males and females alike." That approach would be consistent with the unequal-burden test applied to dress-code cases under Title VII. *See infra* Section III.B.2.iii (discussing application of unequal-burden test).

Undeterred, Plaintiffs try another novel sex-stereotyping theory of discrimination, this one under the Equal Protection Clause. *See supra* Section III.A.2 (explaining why their similar Title IX arguments fail). Plaintiffs cite no authority, however, to support the proposition that intermediate scrutiny will apply to a government action solely because it "rel[ied] upon or reinforce[d] traditional gender roles." (Plaintiffs' MSJ at 26.) In the decisions they cite, the courts subjected state action to heightened scrutiny, not because of a sex stereotype, but because the government had facially excluded one sex from a concrete benefit extended to the other. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017) (immigration law denied citizenship to certain children whose U.S.-citizen fathers were unwed at their birth while granting it to similarly situated children of unwed, U.S.-citizen mothers); *Orr v. Orr*, 440 U.S. 268, 270 (1979)

(state statute "provide[d] that husbands, but not wives, may be required to pay alimony upon divorce"); *Frontiero v. Richardson*, 411 U.S. 677, 678 (1973) (plurality opinion) (federal law granted certain spousal benefits to male members of the uniformed services while denying those same benefits to similarly situated females); *Knussman v. Maryland*, 272 F.3d 625, 634–35 (4th Cir. 2001) (state law categorically excluded male employees from "additional paid [family] leave" that was available to females); *see also Doe ex rel. Doe v. Vermilion Par. Sch. Bd.*, 421 F. App'x 366, 376 (5th Cir. 2011) (affirming denial of plaintiff's motion to preliminarily enjoin single-sex education program). Courts have noted the state's reliance on sex stereotypes only in explaining why the exclusionary practices did not satisfy intermediate scrutiny (*i.e.*, because the state's actions were based on stereotypes rather than on an important governmental interest)—not to trigger intermediate scrutiny in the first place.

Plaintiffs do not claim that girls are facially excluded from any School activities on the basis of sex. Quite the contrary, girls thrive in all aspects of life at the School. (*See* Defendants' MSJ at 37 (summarizing evidence of girls' participation at the School).) Moreover, the School's administrators have not observed any exclusion or discouragement of girls from participating in any of the School's activities.[7] (*See* Walton Decl. ¶¶ 6–10.) Plaintiffs' guardians admit that Defendants have not excluded them from any of the School's "extraordinary educational opportunit[ies]." *VMI*, 518 U.S. at 547. Ms. Peltier noted, for example, that the School, recognizing that A.P. is academically gifted, allowed her to enroll early in kindergarten. (*See* Peltier Decl., Dkt. No. 152-4 ¶¶ 3–4, 10.) In her deposition, Ms. Brown testified that the "structure" provided by the School, along with its education more generally, were both "great"

[7] The School's unisex P.E. uniforms additionally defeat any inference that a desire to exclude girls from physical activity undergirds the Uniform Policy. (*See* Plaintiffs' MSJ at 34.) Contrary to Plaintiffs' understanding, the unisex P.E. uniforms demonstrate that, when it comes to physical activity, boys and girls are treated identically by the School.

for K.B. (Facts ¶ 109.) The School "was something that she needed." (*Id.*) And Ms. Booth testified that sending I.B. to the School allowed her to experience "innovative ideas in education." (*Id.* ¶ 110.) Ms. Booth has "been satisfied with the way that [her son and I.B.] have been educated" by Defendants. (*Id.*) Because Plaintiffs present no evidence that Defendants have, on the basis of sex, excluded them from any of the School's opportunities, the Uniform Policy does not receive intermediate scrutiny, regardless of their sex-stereotyping theory of discrimination.

iii. To the extent Title VII's "unequal burdens" approach applies in Equal Protection dress-code cases, Plaintiffs are not entitled to summary judgment because the Uniform Policy is a comprehensive appearance code that imposes comparable burdens on males and females.

As noted above, Plaintiffs' cited cases at most support the proposition that a school dress code may be subjected to intermediate scrutiny only if it imposes unequal burdens on males and females. *See Hayden*, 743 F.3d at 579–80. Plaintiffs unpersuasively dismiss the relevant language from *Hayden* (*see* Plaintiffs' MSJ at 27 n.5), and question whether Title VII's unequal-burden framework should inform the Equal Protection Clause analysis (*id.* at 32 n.8).[8] But Plaintiffs' alternative approach—applying intermediate scrutiny to all sex-differentiated dress codes—lacks any judicial support and creates the absurd result that the Constitution would prohibit what Title VII and Title IX permit.

In the Title VII context, the en banc Ninth Circuit has held that "[g]rooming standards that appropriately differentiate between the genders are not facially discriminatory." *Jespersen*, 444 F.3d at 1109–10, *approved of by Bauer v. Lynch*, 812 F.3d 340, 349 (4th Cir. 2016). Put

[8] In seeking to paint the unequal-burden test as a relic of the benighted 1970s, Plaintiffs overlook the leading *Jespersen* precedent, decided by the en banc Ninth Circuit in 2006. (*See* Plaintiffs' MSJ at 32 n.8.) They instead cite inapplicable cases where courts rightly invalidated policies that placed manifestly unequal burdens on women. (*See id.*)

differently, when a "grooming and appearance policy does not unreasonably burden one gender more than the other," it does not amount to illegal sex discrimination. *Id.* at 1110. The Seventh Circuit has implied that *Jespersen*'s unequal-burdens test also applies to Equal Protection challenges to dress and grooming standards at schools. *See Hayden*, 743 F.3d at 577–78. The *Hayden* court summarized *Jespersen* and other cases as holding that "sex-differentiated standards consistent with community norms" do not amount to sex discrimination, as long as they "are part of a comprehensive, evenly-enforced grooming code that imposes comparable burdens on both males and females alike." *Id.* at 581. According to *Hayden*'s unequal-burdens analysis, sex-differentiated requirements may "give[] rise to an inference of discrimination." *Id.* at 580. But Defendants could "defeat that inference" by showing that the challenged portion of the Uniform Policy "is just one component of a comprehensive grooming code that imposes comparable although not identical demands on both male and female [students]." *Id.*

Defendants have already explained in support of their own Motion for Summary Judgment that the Uniform Policy places comparable burdens on both sexes. (*See* Defendants' MSJ at 19–22; Facts ¶¶ 69–74.) To summarize: Much of the Uniform Policy applies to both sexes. (Defendants' MSJ at 21.) Girls must wear jumpers, skirts, or skorts, and may wear makeup or jewelry. (*Id.*) Boys cannot wear any of those items. (*Id.*) Boys must wear socks, a belt, and a prescribed hairstyle, none of which are required of girls. (*Id.*) As was true in *Jespersen*, "here we deal with requirements that, on their face, are not more onerous for one gender than the other." 444 F.3d at 1109.

Plaintiffs offer no explanation for avoiding this straightforward application of the en banc Ninth Circuit's reasoning in *Jespersen*. Although it is the seminal Title VII case on the legality of sex-differentiated dress and grooming policies, Plaintiffs do not even cite it. Plaintiffs' only

response is to ask the Court to treat the so-called "Skirts Requirement" in isolation, as if the Uniform Policy contained no requirements other than the requirement that girls wear jumpers, skirts, or skorts. (*See* Plaintiffs' MSJ at 31–34.) This is factually inaccurate. (*See, e.g.*, Facts ¶¶ 72, 74 (Uniform Policy requirements that apply only to boys).) Not only that, it begs the question. When viewed in isolation, any requirement in the Uniform Policy that applies only to girls—by definition—"imposes burdens on female students alone." (Plaintiffs' MSJ at 32.) The same is equally true of any requirement that applies only to boys. A sex-specific requirement, simply by virtue of applying only to one sex, will not burden the other sex to which it does not apply. The only way out of this circularity problem is to analyze the challenged provision in the context of the Uniform Policy as a whole, which is what the courts of appeals have required. *See Hayden*, 743 F.3d at 580 (faulting school for its lack of evidence that challenged "hair-length policy is just one component of a comprehensive grooming code"); *see also Jespersen*, 444 F.3d at 1112 ("The requirements must be viewed in the context of the overall policy.").

The proper question is whether the Uniform Policy imposes *unequal* burdens on girls, and that can only be assessed by considering the burdens the policy imposes on boys. But Plaintiffs offer no evidence of the burden that the Uniform Policy's other requirements place on boys. (*Id.*; *see* Facts ¶¶ 83–85 (discussing lack of testimony by Plaintiffs' guardians about Uniform Policy's burden on boys).) Plaintiffs do not identify the proper analysis, much less explain why the Uniform Policy does not satisfy it. Their criticism of the Uniform Policy thus must fail.

Nor is it disputed that the School's officials enforce the Uniform Policy equally against both sexes. (Facts ¶¶ 86–87.) The Uniform Policy is often enforced against boys. (Walton Decl. ¶¶ 16–17.) The requirement that boys wear belts is the most commonly enforced of all the

Uniform Policy's requirements (enforced more than any requirement applicable only to girls), but others are also enforced against boys. (*Id.*) In September 2017, for example, Ms. Peltier authored a post on Facebook discussing a situation at another CDS, Inc. school, where the parents of a male student were told that the uniform policy at that school required them to cut his hair. (Defendants' MSJ Ex. 54, Peltier_000746 (filed simultaneously with this Memorandum).) Whether or not individual teachers have told Plaintiffs to sit a certain way or to refrain from certain activities, these actions are not part of any policy promulgated by Defendants—much less the Uniform Policy. (*See* Plaintiffs' MSJ at 33.) The School has no policy requiring that girls sit differently than boys. To the contrary, "girls and boys must sit the same way." (Walton Decl. ¶ 19.) Nor does the School have any policy that girls refrain from activities that are open to boys. (*See id.* ¶¶ 6–10.) The only evidence in the record is that the Uniform Policy is "evenly-enforced" and "imposes comparable burdens on both males and females alike." *Hayden*, 743 F.3d at 581.

Faced with a Uniform Policy that plainly satisfies the tests drawn from the relevant case law, Plaintiffs proceed to ask the Court to reach an unprecedented result: to declare the comprehensive Uniform Policy invalid based on their subjective experience of "[t]he message" that it conveys (Plaintiffs' MSJ at 45), or based on an expert's opinion about "the effects of gender stereotypes in general" (*id.* at 35). But *Jespersen* rejected a similar sex-stereotyping argument based on that plaintiff's "subjective reaction" to the challenged policy. 444 F.3d at 1112. Here, as elsewhere, Plaintiffs fail to explain why *Jespersen* does not defeat their claims.

Unable to prove that the Uniform Policy unequally burdens them as girls, or that it is unevenly enforced against them, Plaintiffs are left with no explanation for how the Uniform Policy violates the Constitution. So they turn to their expert witnesses for help. First, they try to

construct a constitutional sex-discrimination claim from their psychologist's sweeping hypothesis that any practice that "[i]ncreas[es] the salience of gender distinctions in the classroom" harms girls. (Plaintiffs' MSJ at 35.) But that broad theory, which has not been established "in ordinary classroom circumstances" (Facts ¶ 108), would condemn mundane practices like referring to children as "he" or "she" (*id.* ¶ 102). Besides mandating pure androgyny in the classroom, the psychologist's theory is of limited use in this case. Plaintiffs' expert offered no means to measure the effects of increasing the salience of gender distinctions in the particular classrooms relevant to their lawsuit. (*See* Defendants' MSJ at 23–24.)

Plaintiffs also turn to a fashion historian to distract from the undisputed fact that the School's community of parents overwhelmingly support the Uniform Policy's current requirements. (*See* Plaintiffs' MSJ at 30–31.) For the 2015–2016 school year, a supermajority of the parents who make up the School's community were either "satisfied" or "very satisfied" with the Uniform Policy. (Facts ¶ 89.) And members of the Board testified that the Uniform Policy's requirements are consistent with that community's standards. (*Id.* ¶¶ 90–92.) Plaintiffs' fashion historian does not dispute that the School's community approves of the Uniform Policy but instead offers evidence of other communities that would not. (*See* Defendants' MSJ at 25 & n.6.) It is therefore undisputed that the Uniform Policy is consistent with the relevant community's norms. Plaintiffs misunderstand the significance of this last point. (*See* Plaintiffs' MSJ at 36–38.) Consistency with community norms is relevant, not only to whether Defendants have sufficiently justified the Uniform Policy under intermediate scrutiny, but rather to the antecedent question whether the Uniform Policy amounts to sex discrimination in the first place. *See Hayden*, 743 F.3d at 581 (noting "that sex-differentiated standards consistent with community norms may be permissible"); *Harper v. Edgewood Bd. of Educ.*, 655 F. Supp. 1353,

1356 (S.D. Ohio 1987) (concluding that "school dress code [did] not differentiate based on sex" because it "require[d] all students to dress in conformity with the accepted standards of the community").

Besides the theoretical shakiness of Plaintiffs' expert testimony, it is simply wrong as a factual matter to suggest that the Uniform Policy harms female students in general by discouraging physical activity or hindering academic achievement. (*See, e.g.*, Plaintiffs' MSJ at 33–36.) Girls at the School are not less physically active than girls who attend schools with different dress-code policies. (Walton Decl. ¶¶ 3–6.) The Uniform Policy has not inhibited girls' participation in sports and other physical activities during recess. (*Id.* ¶ 10.) And the School's girls have achieved great success in organized sports. (Facts ¶ 116.) The academic data in the record show that girls at the School are performing well, far from being "distracted" from their studies by the Uniform Policy. In math and science, the School's girls often outperform its boys. (Hively Rep. at 22, 24.) Comparing the math performance of the School's girls to that of girls at other local noncharter schools, girls at the School perform mostly better than the girls at the other schools. (Wang Rep. at 4.) Their performance relative to the boys in their respective schools is about the same. (*Id.*) The evidence thus refutes the assertion that the School's traditional-values model, which includes the Uniform Policy, is harming its female students.

Plaintiffs' efforts to show that the Uniform Policy imposes unequal burdens on girls or is otherwise subject to intermediate scrutiny fail at every turn. Because Plaintiffs have not proved under the relevant case law that the Uniform Policy implicates the intermediate-scrutiny standard, they cannot, as a matter of law, prove that it fails that standard.

iv. Even if intermediate scrutiny applies, the Board adopted the Uniform Policy to serve important government interests, and it is substantially related to those interests.

Defendants have now twice explained why intermediate scrutiny does not apply to the Uniform Policy. *See supra* Section III.B.2.ii. (*See also* Defendants' MSJ at 36–38.) But even under intermediate scrutiny, Plaintiffs still could not obtain summary judgment. Intermediate scrutiny requires state action: (1) to "serve[] important governmental objectives"; and (2) to be "substantially related to achievement of those objectives." *Knussman*, 272 F.3d at 635 (quotation marks omitted). If this Court were to apply intermediate scrutiny in this case—something unsupported by precedent in this or any other circuit—the Uniform Policy would nonetheless pass constitutional muster.

First, the Board's objective in maintaining the Uniform Policy with its sex-differentiated requirements is to further the School's holistic vision for traditional-values education. (*See* Defendants' MSJ at 39–43; Facts ¶¶ 118–30.) The Uniform Policy is but "one facet" of the School's distinctive educational approach. (Facts ¶ 128.) But it serves the Board's core objective: to "create a school environment that embodies traditional values." (*Id.* ¶ 118.) The sex-differentiated portions of the Uniform Policy, in particular, arise out of a perception about "societal norms." (*Id.* ¶ 125.) Those include the local community's norms about the "difference between the sexes." (*Id.* ¶ 126.) The Uniform Policy's sex-differentiated requirements "work seamlessly together" with the School's other educational distinctives—*e.g.*, direct instruction, a classical curriculum, and traditional manners—to foster "a disciplined environment" where "mutual respect between boys and girls" is paramount. (*Id.* ¶ 125.) Although the novelty of Plaintiffs' sex-discrimination theory means there is little authority discussing permissible objectives for the Uniform Policy, principles drawn from other areas of the law leave little doubt that the Board has acted to further "important governmental objectives." *Knussman*, 272 F.3d at

635 (quotation marks omitted); *cf. Hayden*, 743 F.3d at 579–80 (leaving this question open because parties had not presented it).

The Supreme Court recognizes the "importance of public schools . . . in the preservation of the values on which our society rests." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). Or, in the words of the en banc Second Circuit, "a principal function of all elementary and secondary education is indoctrinative whether it be to teach the ABC's or multiplication tables or *to transmit the basic values of the community*." *E. Hartford Educ. Ass'n v. Bd. of Educ. of E. Hartford*, 562 F.2d 838, 859 (2d Cir. 1977) (en banc) (emphasis added) (citation omitted).[9] A plurality of the Supreme Court has also said "that local school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values.'" *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 864 (1982) (opinion of Brennan, J.). Courts have relied on that statement to reject a variety of constitutional challenges to actions taken by public schools. *See, e.g.*, *Henerey ex rel. Henerey v. St. Charles Sch. Dist.*, 200 F.3d 1128, 1135 (8th Cir. 1999) (rejecting First Amendment challenge to prior restraint on speech on school property); *Herndon ex rel. Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 899 F. Supp. 1443, 1447–48 (M.D.N.C. 1995) (rejecting Ninth, Thirteenth, and Fourteenth Amendment challenges to school district's mandatory community-service program). A community's decision to provide for children's education encompasses a "'legitimate and substantial community interest in promoting . . . traditional values be they social, moral, or political.'" *Pico*, 457 U.S. at 864 (opinion of Brennan, J.).

[9] Note that the en banc majority's opinion is reported immediately after the panel decision, at the same citation. *See E. Hartford Educ. Ass'n*, 562 F.2d at 856.

Along with acknowledging this interest in promoting a community's traditional values through its public schools, "the Supreme Court has made abundantly clear that children's rights are not coextensive with those of adults." *Schleifer ex rel. Schleifer v. City of Charlottesville*, 159 F.3d 843, 847 (4th Cir. 1998). As a result, state action that infringes children's constitutional rights "should be subject to less than the strictest level of scrutiny." *Id.* Because the Uniform Policy applies exclusively to children, then, it should not receive the same level of scrutiny that it might otherwise receive if it applied to adults, for example, at a university. *See Lansdale v. Tyler Junior College*, 470 F.2d 659, 664–65 (5th Cir. 1972) (en banc) (Bell, Godbold, and Thornberry, JJ., specially concurring) (noting that Fifth Circuit lays out different principles "applicable to hair style regulations at the college level" and to those "applying below the college level"). Especially in light of the lesser scrutiny for alleged infringements of children's constitutional rights, the Board's primary objective—to further its traditional-values educational vision—is sufficiently important to justify the Uniform Policy.

Plaintiffs caricature the Uniform Policy and the School as reinforcing retrograde stereotypes about women. (*See, e.g.*, Plaintiffs' MSJ at 2, 28.) But neither the School nor the Uniform Policy teaches that women are to be devoted to childbearing or homemaking, for example, or to be restricted from academic or athletic fields of endeavor because they are girls. Quite the opposite. While empowering both boys and girls to thrive academically and athletically, the School simply teaches that boys and girls are distinct and that all should respect the differences between the sexes. Plaintiffs cite no cases condemning this belief as invidious. In fact federal law itself enshrines the understanding that the "[p]hysical differences between men and women . . . are enduring." *VMI*, 515 U.S. at 533. And Title IX allows schools to respect these differences in myriad ways, including instituting sex-differentiated dress codes,

Withdrawal of Appearance-Code Regulation, 47 Fed. Reg. at 32,526; excluding girls from contact sports, 34 C.F.R. § 106.41(b); and establishing separate restroom and housing facilities, 20 U.S.C. § 1686. Schools may even choose to admit only boys or only girls. 34 C.F.R. § 106.34(b)–(c). The School's educational policies are wholly consistent with federal law and are not motivated by impermissible sex stereotypes.

But transmitting community values is not the only objective served by the Uniform Policy. In support of Defendants' own Motion for Summary Judgment, they have already detailed those other objectives. (*See* Defendants' MSJ at 39–40.) They include: "instill[ing] discipline and keep[ing] order in the classroom"; "promot[ing] a sense of pride and of team spirit" among students; reducing economic pressure on parents; and preventing students from "call[ing] attention to them[selves] and away from the educational endeavor." (Facts ¶¶ 119–23.) In decisions upholding other schools' uniform policies against free-speech challenges, courts have often held that objectives like these satisfy intermediate scrutiny. *See, e.g.*, *Blau v. Ft. Thomas Pub. Sch. Dist.*, 401 F.3d 381, 391 (6th Cir. 2005); *Canady v. Bossier Par. Sch. Bd.*, 240 F.3d 437, 443 (5th Cir. 2001). Plaintiffs' only response to the judicial consensus that school uniforms serve these important interests is that their fashion historian holds a different opinion. (*See* Plaintiffs' MSJ at 40 n.11 (suggesting that no school uniform policy ever "fulfils the goal of promoting discipline or student learning").) No less an authority than the Department of Education, however, disagrees with the historian's opinion. ED has "acknowledged the efficacy of school uniforms in advancing such state interests" as "increasing student achievement, enhancing safety, and creating a positive school environment." *Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419, 436 (9th Cir. 2008); *see id.* at 436 n.38 (discussing benefits of school uniforms as listed by ED in its *Manual on School Uniforms*).

Transmitting traditional values, maintaining classroom order, increasing student achievement—the Uniform Policy serves many objectives, all of which are important. *See id.* at 435–36 ("Indeed, it is hard to think of a government interest more important than the interest in fostering conducive learning environments for our nation's children.").

Second, to survive intermediate scrutiny, the Uniform Policy must be "substantially related to achievement of those objectives." *Knussman*, 272 F.3d at 635 (quotation marks omitted). These objectives fall into two general categories: the more abstract, traditional-values related objectives, and the more concrete objectives related to classroom management and student achievement. The record shows that the Uniform Policy, with its sex-differentiated requirements, is substantially related to those objectives. The rest of this section discusses each category of objectives in turn.

The proof of the Uniform Policy's substantial relationship to the transmission of the community's traditional values lies in the overwhelming parental support for the current policy. The Uniform Policy's requirements arose from the desires of the local Charter Day School community. (Facts ¶ 50–51.) That community support continues through the present. Over three-quarters of the School's parents who responded to a recent iteration of an annual survey indicated that they were at least "satisfied" with the Uniform Policy. (*Id.* ¶ 89.) And the understanding that the Uniform Policy is substantially related to the desires of the parental community is what motivates the Board to maintain the policy's current requirements. (*Id.* ¶ 130.) Multiple Board members testified that a key reason they have decided not to change the Uniform Policy in response to this lawsuit is because of that community support. (*See id.* ¶¶ 52–53, 90–91.) In fact, because North Carolina links charter schools' funding to attendance

numbers, enacting a new uniform policy that did not reflect community values would endanger the financial viability of the School. (*See id.* ¶¶ 90, 129–30.)

Plaintiffs cannot prove that the Uniform Policy, as a matter of law, is not substantially related to the transmission of the community's traditional values. The only evidence in the record that even touches on the question is an email that Mr. Mitchell sent to Ms. Peltier in 2015. (*See* Plaintiffs' MSJ at 27–29.) Plaintiffs do not present any evidence, however, that Mr. Mitchell consulted with the Board before sending that email. Defendants do not dispute that, in his role as the president of RBA and the secretary of CDS, Inc., Mr. Mitchell acts in an advisory capacity for the Board. (Facts ¶¶ 21–22; *see* Plaintiffs' MSJ at 28 n.6, 50 n.14.) But his statements, in one email sent in response to a single parent's question, do not amount to official pronouncements of the School's policy. It is undisputed that the Board of CDS, Inc. sets policies at the School, not Mr. Mitchell nor anyone else at RBA. (Facts ¶¶ 11, 13, 22–24.) The Board of CDS, Inc. has "the sole and absolute discretion" to set policy at the charter schools that it runs. (*Id.* ¶ 11.) And Mr. Mitchell is not a member of the CDS, Inc. Board. (*Id.* ¶ 22.) In fact, the agreement between North Carolina and CDS, Inc. forbids Mr. Mitchell from being a voting member of the Board. (*Id.* ¶¶ 22, 24.) When the Board voted not to alter the Uniform Policy in March 2016, Mr. Mitchell did not participate in that vote. (*See id.* ¶ 53.)

Equally relevant is the undisputed fact that the School initially implemented the Uniform Policy based on the desires of parents who wished to send their children to the School. (*Id.* ¶¶ 49–50.) And the Board reaffirmed the Policy in 2016 to respect the overwhelming support expressed by parents for the existing Uniform Policy. (*Id.* ¶¶ 53, 89.) These undisputed facts show that the relevant decisionmaker—the Board—acted to enshrine the norms of the parental community in enacting the Uniform Policy. Plaintiffs assert that the views of a majority cannot

justify a policy rooted in sex stereotypes, citing cases almost exclusively outside of the dress-code context. (Plaintiffs' MSJ at 36–38.) But Plaintiffs have not cited any evidence that the School's parents acted out of a desire to enshrine sex stereotypes through the dress code. Thus, the undisputed fact that the School acted at the behest of parents in instituting the dress code shows that there is at least a fact issue as to whether the Uniform Policy was motivated by impermissible sex stereotypes.

Beyond Mr. Mitchell's inability to set Board policy or control parental desires, the reasons given in his email do not violate intermediate scrutiny. In his email, Mr. Mitchell discussed his aspiration "to preserve chivalry and respect among young women and men" and to "restore, and then preserve, traditional regard for peers." (Plaintiffs' MSJ at 27.) According to Plaintiffs, the hope of fostering "respect among young women and men" and preserving "traditional regard for peers" must be grounded in an impermissible stereotype. (*Id.*) But these are exactly the sorts of objectives that the Supreme Court and other courts have recognized as the province of public education. *See Ambach*, 441 U.S. at 76–77 (discussing schools' role "in the preservation of the values on which our society rests"); *E. Hartford Educ. Ass'n*, 562 F.2d at 859 (noting schools' legitimate role in "transmit[ting] the basic values of the community"). And Plaintiffs cite nothing for the proposition that it is an illegitimate governmental objective to promote respect between the sexes. The evidence establishes that the Uniform Policy is substantially related to the Board's objective of creating an educational environment that transmits to students the traditional values of the local community.

Moreover, Defendants have established in support of their Motion for Summary Judgment that the Uniform Policy is substantially related to the Uniform Policy's more concrete objectives, including those regarding student discipline and achievement. (*See* Defendants' MSJ

at 40–42.) Plaintiffs attempt to dispute this fact by singling out the "Skirts Requirement" and relying on *Hayden*. (Plaintiffs' MSJ at 39–41.) But the parties in that case "litigated the hair-length policy in isolation"; according to their set of stipulated facts, that policy was not "an aspect of any broader grooming standards applied to boys and girls." *Hayden*, 743 F.3d at 578. Contrast this case, where no one disputes that the Uniform Policy applies comprehensive requirements to both boys and girls. Plaintiffs' tactic of singling out one particular aspect of the Uniform Policy would doom all uniform policies, for an educator would be hard-pressed to show that a belt, for instance, or a tucked-in shirt, or any other particular requirement for that matter, when considered in isolation, substantially advances educational goals.

Plaintiffs finally mischaracterize the record to undermine the Uniform Policy's substantial relationship to these important objectives. They assert that there is no evidence of increased disciplinary issues or decreased student focus "on days when the uniform [policy] is suspended." (Plaintiffs' MSJ at 41.) To the contrary: The School's two Assistant Headmasters testified that they had "observed changes with student learning" on days when the Uniform Policy is suspended for a special occasion. (Facts ¶ 131.) On such days, "the classroom level usually is not as orderly[;] the kids are excited." (*Id.* ¶ 132.) Students are "more rowdy," "more excited," and "distracted." (*Id.*) They "tend to be less focused," and are "sillier and excited." (*Id.* ¶ 133.) Plaintiffs fault members of the Board for testifying that they were unsure what would happen at the School if the Uniform Policy were changed to allow girls to wear pants or shorts. (Plaintiffs' MSJ at 40.) But in light of the Assistant Headmasters' experience, along with the Board's testimony that the Uniform Policy's sex-differentiated requirements "work seamlessly in a coordinated fashion" with the policy as a whole and the School's other

distinctive practices (Facts ¶ 125), the Board's trepidation about changing any particular requirement is unsurprising.

The various components of Defendants' holistic, traditional-values educational model are interconnected, and changing any one of them risks fundamentally altering the School. (*Id.* ¶¶ 128–30.) That is not a risk that the Constitution requires Defendants to take.

C. Plaintiffs are not entitled to summary judgment on their state-law claims.

Plaintiffs' state-law claims are largely derivative of their federal claims. (*See* Plaintiffs' MSJ at 46 (conceding that state and federal constitutions apply same level of scrutiny); *id.* at 47 (claiming that Defendants breached contracts by violating federal law).) Because of this interconnectedness, the Court should deny summary judgment to Plaintiffs on their state-law claims for the same reasons that apply to their federal claims. (*See* Defendants' MSJ at 43–50.)

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

Plaintiffs' claims under the state constitution fail for three independent reasons, two of which are preliminary to their merits. (*See* Defendants' MSJ at 43–45.) First, Plaintiffs fail to acknowledge that North Carolina law requires them to prove that the challenged conduct was state action. *See Corum v. Univ. of N.C. ex rel. Bd. of Governors*, 330 N.C. 761, 782–83, 413 S.E.2d 276, 289–90 (1992); *Gibbs v. Waffle House Store No. 1919*, No. 5:15-CV-8-BO, 2015 WL 1951744, at *2–3 (E.D.N.C Apr. 29, 2015). (*See* Plaintiffs' MSJ at 46–47.) For the reasons Defendants have already given in support of their Motion for Summary Judgment, this failure to establish state action under North Carolina law is fatal to Plaintiffs' state constitutional claims. (*See* Defendants' MSJ at 43–44.)

Second, Plaintiffs make no effort to show that they lack "an adequate state remedy," that is, a remedy under some provision of law other than the North Carolina Constitution. *Corum*,

330 N.C. at 289, 413 S.E.2d at 782; *see Wilcox v. City of Asheville*, 222 N.C. App. 285, 298, 730 S.E.2d 226, 236 (2012) ("Direct claims against the State arising under the North Carolina Constitution are permitted only in the absence of an adequate state remedy, and where an adequate state remedy exists, those direct constitutional claims must be dismissed." (quotation marks and alterations omitted)). Plaintiffs bear the burden of proving the absence of an adequate state-law remedy. *Cannon v. Village of Bald Head Island, N.C.*, No. 7:15-CV-187-H, 2017 WL 2712958, at *9 (E.D.N.C. June 22, 2017).

Because Plaintiffs have not met that burden, they are not entitled to summary judgment on their state constitutional claims, while Defendants are. Plaintiffs are apparently unaware of their burden on this front. They do not reference it in their summary-judgment memorandum, nor even in their Amended Complaint. (*See* Plaintiffs' MSJ at 46–47; Am. Compl., Dkt. No. 13 ¶¶ 167–73.) Regardless, as Defendants have already laid out elsewhere, Plaintiffs' breach-of-contract claims, which are based on the same conduct as their state constitutional claims, prove that they in fact have an adequate state remedy outside of the North Carolina Constitution. (Defendants' MSJ at 44–45.) Their contract claims are ultimately unsuccessful, but it is "the chance as opposed to the guarantee of success [that] is the measure" of whether a nonconstitutional remedy is "adequate." *Cannon*, 2017 WL 2712958, at *9. That alternative remedy means their direct claims under the state constitution must fail.

Third, and finally, these claims are meritless. Plaintiffs and Defendants agree on one thing in this case, that the same legal standard governs Plaintiffs' federal and state constitutional claims. (*See* Defendants' MSJ at 44; Plaintiffs' MSJ at 46.) As a result, Plaintiffs' sex-discrimination claims under the North Carolina Constitution have no merit for the same reasons as their claims under the U.S. Constitution. *See supra* Section III.B.2.

Despite Plaintiffs' assertions, the North Carolina Constitution's separate provision entitling the state's citizens "to the privilege of education" does not change the analysis. N.C. Const. art. I, § 15. (*See* Plaintiffs' MSJ at 46–47.) First and foremost, Plaintiffs have brought no claim for a violation of this provision. (*See* Am. Compl. ¶¶ 167–73.) The only state constitutional violation alleged in the Amended Complaint concerns the North Carolina equivalent of the Equal Protection Clause. (*Id.* ¶ 171.) The Court should not allow Plaintiffs through their Motion for Summary Judgment to convert their state-law equal-protection claims into ones based on the state constitutional right to an education. *See Carawan v. McLarty*, No. 5:14-CT-3079-FL, 2017 WL 829193, at *13 (E.D.N.C. Mar. 2, 2017) (refusing to consider plaintiff's new claims raised during summary-judgment briefing).

In any event, the right to a "sound basic education" is primarily concerned with the content of the education offered, not the rules that govern students' day-to-day behavior. *See Leandro v. State*, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997) (expounding the two provisions of the N.C. Constitution cited by Plaintiffs). It guarantees each student a baseline education in subjects like English, math, and science, along with "sufficient academic and vocational skills to enable the student" to pursue post-secondary education or employment. *Id.* Plaintiffs have identified no violation of that right. In fact, North Carolina courts have held that "[r]easonable regulations" of student behavior do not implicate the right to an education at all. *State v. Davis*, 126 N.C. App. 415, 421, 485 S.E.2d 329, 333 (1997). Even when such regulations are "punishable by suspension," they "deny the right to engage in the prohibited behavior"—not the right to an education. *Id.* According to this principle, the Uniform Policy does not receive strict scrutiny under North Carolina law.

2. Plaintiffs cannot prevail on their breach-of-contract claims.

Plaintiffs finally claim that CDS, Inc. and RBA have breached the Charter Agreement and the Management Agreement by violating federal and state antidiscrimination law. As a matter of law, however, they have not proved any such violation, so they have not proved any breach. Here and elsewhere, Defendants have shown that the Uniform Policy does not violate Title IX, its implementing regulations, the U.S. Constitution, or the North Carolina Constitution. *See supra* Sections III.A–III.C.1. (*See also* Defendants' MSJ at 49.)

Plaintiffs have apparently abandoned their allegation that the Uniform Policy violates the antidiscrimination provision of the North Carolina Charter School Statute, N.C. Gen. Stat. § 115C-218.55. They make no argument on this point. (*See* Plaintiffs' MSJ at 47–50 (referring to provision only to support claim that Plaintiffs are third-party beneficiaries).) In any event, as Defendants have already explained, the Uniform Policy does not violate § 218.55, which no court has ever cited, let alone applied to a claim like Plaintiffs'. (Defendants' MSJ at 49–50.)

In addition to their failure to prove a breach of either Agreement, Plaintiffs have not proved that the parties to those Agreements "intended to confer a legally enforceable benefit on" Plaintiffs. *Babb v. Bynum & Murphrey, PLLC*, 182 N.C. App. 750, 754, 643 S.E.2d 55, 57 (2007) (citation omitted). They must prove not just that the Charter Agreement or the Management Agreement in fact benefits them but also that it was "*intended* for [their] *direct* benefit." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 329 N.C. 646, 651, 407 S.E.2d 178, 181 (1991) (citations omitted) (emphasis added). North Carolina law strictly construes these Agreements against finding Plaintiffs to be third-party beneficiaries. *Venturtech II v. Deloitte Haskins & Sells*, 790 F. Supp. 576, 581 (E.D.N.C. 1992). Especially in light of the strict-construction requirement, neither of these Agreements demonstrates an intent to confer a

direct and legally enforceable benefit upon Plaintiffs. (*See* Defendants' MSJ at 46–49 (walking through the relevant provisions of both Agreements).)

Courts around the country have rejected a variety of third-party contract claims similar to Plaintiffs' breach-of-contract claims. (*See id.* at 48–49 (collecting cases).) Plaintiffs, by contrast, point to no decision allowing charter-school students to sue as third-party beneficiaries to contracts like the Charter Agreement or the Management Agreement. (Plaintiffs' MSJ at 47–48.) Worse, every single North Carolina decision that Plaintiffs discuss in this section of their brief held that the person in question was not a third-party beneficiary. *See Raritan River Steel Co.*, 329 N.C. at 654, 407 S.E.2d at 183 ("trade creditor" not third-party beneficiary of debtor's contract with auditor); *Matternes v. City of Winston-Salem*, 286 N.C. 1, 15, 209 S.E.2d 481, 489 (1974) (travelers not third-party beneficiaries to contract between city and Board of Transportation to maintain highway); *Revels v. Miss Am. Org.*, 182 N.C. App. 334, 336–37, 641 S.E.2d 721, 724 (2007) (beauty-pageant contestant not third-party beneficiary of franchise agreement between state and national pageant organizers); *Holshouser v. Shaner Hotel Grp. Props. One Ltd. P'ship*, 134 N.C. App. 391, 400, 518 S.E.2d 17, 25 (1999) (hotel employee not third-party beneficiary of "Contract For Guard Service" between hotel and security-guard firm); *State v. Interstate Cas. Ins. Co.*, 120 N.C. App. 743, 747–48, 464 S.E.2d 73, 75–76 (1995) (creditor-attorneys not third-party beneficiaries to agreement between Department of Insurance and debtor-insurance company). These decisions demonstrate just how difficult it is for Plaintiffs to prove that they are third-party beneficiaries to either of the Agreements in this case. They have fallen far short of the required showing.

IV. CONCLUSION

For the reasons explained in this Memorandum and those in the Memorandum in Support of Defendants' Motion for Summary Judgment (Dkt. No. 159), Defendants, not Plaintiffs, are

entitled to judgment as a matter of law on all claims in this lawsuit. The Court should deny Plaintiffs' Motion for Summary Judgment and grant Defendants' Motion for Summary Judgment.

Respectfully submitted, this 20th day of December, 2017.

BAKER BOTTS L.L.P.

By: /s/ *Aaron M. Streett*

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CERTIFICATE OF SERVICE

On December 20, 2017, I electronically filed this document using the Court's CM/ECF system, which will serve all counsel of record.

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