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.	**REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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I. INTRODUCTION

Plaintiffs continue to run from the threshold legal barriers that mandate summary judgment. Their Opposition barely acknowledges the Department of Education's binding construction of Title IX that defeats their claim—burying it on pages 46 and 47 of their 50-page brief. ED has squarely interpreted Title IX not to prohibit sex-differentiated appearance codes, and Plaintiffs offer no reason to deny this construction *Chevron* deference. Plaintiffs use a similar avoidance strategy when it comes to state-action precedent that defeats their constitutional claims. They all but ignore the only federal appellate decision to consider whether a charter-school operator is a state actor—presumably because it compels the conclusion that the Uniform Policy is not state action. *See Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806 (9th Cir. 2010). Plaintiffs' failure to seriously join issue on these matter-of-law impediments dooms their claims, and the Court need not go further to grant Defendants summary judgment.

On the merits, Plaintiffs strain to disguise the novelty of their Title IX and constitutional sex-discrimination theories. Because closely analogous Title VII decisions permit sex-differentiated dress codes that equally burden the sexes, Plaintiffs insist, contrary to governing law and common sense, that Title VII law is irrelevant. Plaintiffs instead press a sweeping understanding of intermediate scrutiny that would make any sex-based distinction constitutionally suspect—including many that Title VII and Title IX permit. The correct approach would be to analyze whether the Uniform Policy, viewed as a whole, unequally burdens girls at the School. But Plaintiffs do not even attempt to assess the burdens—let alone the *comparative* burdens—that the Uniform Policy places on boys. Consequently, they cannot possibly raise a fact issue about whether the Uniform Policy *unequally* burdens girls.

The Court should grant summary judgment to Defendants on all claims.

II. ARGUMENT

A. Plaintiffs' Title IX claims fail as a matter of law.

Plaintiffs proceed as if this Court were required to determine, as a matter of first impression, the standard under Title IX for the permissibility of sex-differentiated appearance codes like the Uniform Policy. Not so. After engaging in notice-and-comment rulemaking, ED determined that Title IX does not apply at all to appearance codes. That interpretation has remained consistent for 35 years and has been endorsed by all 21 federal agencies that enforce Title IX. This Court has expressed its "desire[] to give proper deference to the proper regulations." (Order, Dkt. No. 91 at 10.)[1] Because ED's interpretation deserves *Chevron* deference, it requires summary judgment in Defendants' favor.

1. The Department of Education has authoritatively declared that Title IX does not prohibit sex-differentiated appearance codes.

a. Plaintiffs make almost no effort to show that ED's construction is unambiguously foreclosed by the statute. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (holding that regulation must be "given controlling weight" unless it is "arbitrary, capricious, or manifestly contrary to the statute"). (*See also* Dkt. No. 159 ("Defendants' MSJ") at 12–17 (explaining this point fully).) They argue instead that ED's withdrawal of the appearance-code prohibition was not an interpretation of Title IX's scope, but was instead a mere statement of the agency's enforcement priorities. (Dkt. No. 177 ("Plaintiffs' Opp'n") at 46.) That remarkable assertion is belied by ED's determination to engage in a formal rulemaking process and to officially remove a previously binding regulation from the Code of Federal

[1] In its ruling on Defendants' motion to dismiss, the Court explained that USDA had maintained the regulatory prohibition on appearance codes that ED and other agencies had long ago repealed by adopting the Common Rule. (Dkt. No. 91 at 10.) Joining 20 other agencies, USDA has now adopted the Common Rule and eliminated its prohibition on appearance codes. *See Education Programs or Activities Receiving or Benefitting From Federal Financial Assistance*, 82 Fed. Reg. 46,655, 46,655 (Oct. 6, 2017). All of the relevant regulations now speak with one voice in permitting sex-differentiated appearance codes.

Regulations. That cumbersome process would have been unnecessary if ED simply wanted to allocate its own resources away from bringing lawsuits against appearance codes.

ED plainly based its withdrawal of the appearance-code prohibition on its construction of Title IX. Indeed, the pre-existing prohibition on appearance codes had been one of only eight prohibitions included in HEW's original regulations that were designed to comprehensively implement Title IX's ban on sex discrimination. (Dkt. No. 170 ("Defendants' Opp'n") at 10–11.) By formally repealing one—and only one—of those eight prohibitions, ED left no doubt as to its view that appearance codes did not constitute sex discrimination outlawed by Title IX.

The rulemaking documents make this explicit. The notice of proposed rulemaking stated ED's preliminary view that appearance codes are less "closely related to the prohibition against sex discrimination under Title IX" than other issues. *Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance*, 46 Fed. Reg. 23,081, 23,081 (Apr. 23, 1981). After receiving comments, ED repealed the appearance-code prohibition because "[t]here is no indication in the legislative history of Title IX that Congress intended to authorize Federal regulations in the area of appearance codes." *Withdrawal of Appearance-Code Regulation*, 47 Fed. Reg. 32,526, 32,527 (July 28, 1982). ED thus applied the statute to "permit issues involving codes of personal appearance to be resolved at the local level." *Id.* That determination necessarily means that Title IX does not prohibit sex-based uniform policies, leaving matters relating to appearance codes wholly for local resolution.

The fact that this action rested to some degree on ED's policy views about the overall goals of Title IX makes it no less worthy of *Chevron* deference. In *Chevron* itself, the Court explained that the "principle of deference" applies "whenever [the agency's] decision as to the meaning or reach of a statute has involved reconciling conflicting policies . . . [i]f [the agency's]

choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." 467 U.S. at 844–45 (quotation marks omitted). ED's formal decision to repeal the prohibition on appearance codes represents a considered administrative effort to interpret and implement Title IX's ban on sex discrimination.

b. Plaintiffs next argue—in one paragraph and without citation—that ED's construction of Title IX should receive no deference because it revoked the prior appearance-code regulation without also promulgating a new regulation expressly permitting appearance codes. (Plaintiffs' Opp'n at 46–47.) But CFR codification of a regulation is not the test for *Chevron* deference. *See Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 466–67 (D.C. Cir. 2007) (deferring under *Chevron* to agency's "publication in the federal register" of a "declaration of policy" that was not codified). To the contrary, an agency's construction of a statute after notice-and-comment rulemaking is the gold standard of administrative law and "will almost inevitably receive *Chevron* deference," *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 159 (4th Cir. 2016), regardless of whether the agency action is codified in a new CFR section. *See, e.g.*, *Cohen v. Brown Univ.*, 991 F.2d 888, 896–97 (2d Cir. 1993) (deferring to ED's "Policy Interpretation" of its Title IX regulations, although there was "no record that [ED] formally adopted the Policy Interpretation").

Here, Congress has expressly "authorized and directed" ED "to effectuate" Title IX "by issuing rules, regulations, and orders of general applicability," 20 U.S.C. § 1682, meaning that "[t]he degree of deference is particularly high in Title IX cases," *Cohen*, 991 F.2d at 895. ED's action repealing the appearance-code regulation was a "final regulation[]" that was published in the Federal Register after notice and comment. 47 Fed. Reg. at 32,526. That is more than enough for *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

c. Relatedly, Plaintiffs incorrectly assert that ED's repeal of the appearance-code prohibition does not mean that appearance codes are permitted under Title IX. The plain text of the rulemaking defeats this argument, leaving appearance codes to be addressed at the local level, not through Title IX lawsuits. Moreover, by repealing only one of the original eight prohibitions that comprehensively implemented Title IX's ban on sex discrimination, ED necessarily determined that appearance codes are not covered by that statutory ban. Even commentators sympathetic to Plaintiffs' sex-discrimination theory recognize that ED's repeal of the appearance-code prohibition means that sex-based appearance codes are permitted.[2]

Plaintiffs look in vain to other Title IX regulations for help. They note that ED sometimes promulgates regulations expressly permitting sex-specific rules, as when it authorized schools to maintain sex-specific bathrooms and housing. (*See* Plaintiffs' Opp'n at 46 (citing these and other regulatory exemptions).) But unlike appearance codes, Title IX regulations have never expressly prohibited sex-specific bathrooms and housing, so enacting a specific exemption was the natural course. Because the original regulations prohibited sex-specific appearance codes, a repeal of that prohibition accomplished the same result.

Plaintiffs also imply that sex-differentiated appearance codes remain outlawed by the more general regulatory prohibition of sex-based "rules of behavior, sanctions, or other treatment." (Plaintiffs' Opp'n at 46 (citing 34 C.F.R. § 106.31(b)(4) (ED), and 7 C.F.R. § 15A.400(b)(4) (USDA)).) But that prohibition was one of the eight original prohibitions promulgated alongside the now-repealed appearance-code prohibition. Plaintiffs' argument that the "rules of behavior" prohibition *also* prohibits appearance codes would mean that the original

[2] Jennifer L. Greenblatt, *Using the Equal Protection Clause Post-*VMI *to Keep Gender Stereotypes Out of the Public School Dress Code Equation*, 13 U.C. Davis J. Juv. L. & Pol'y 281, 286 (2009) (concluding that Title IX likely does not "protect[] against gender discrimination lingering in school dress codes"); Carolyn Ellis Staton, *Sex Discrimination in Public Education*, 58 Miss. L.J. 323, 334 (1989) (explaining that ED's interpretation "rendered [Title IX] largely ineffective as a method of challenging dress codes").

appearance-code prohibition was unnecessary and superfluous. It would also mean that the repeal of the appearance-code prohibition was a meaningless act. Courts routinely reject such interpretative gymnastics. *See, e.g.*, *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("[N]o clause, sentence, or word shall be superfluous, void, or insignificant." (quotation marks omitted)).[3]

d. Plaintiffs spend one footnote arguing that ED's allowance of sex-based appearance codes is foreclosed by the statute and therefore ineligible for *Chevron* deference. (Plaintiffs' Opp'n at 47 n.20.) Plaintiffs correctly acknowledge that to defeat *Chevron* deference they must show that "Congress has directly spoken to the precise question at issue"—*i.e.*, the permissibility of sex-based uniform policies. 467 U.S. at 842. But contrary to Plaintiffs' argument, courts make that *Chevron* determination not by drawing inferences from post-enactment legislative hearings, but by "examin[ing] the statute's plain language." *Barahona v. Holder*, 691 F.3d 349, 354 (4th Cir. 2012) (quotation marks omitted). If "the statute is silent or ambiguous, [the court] defer[s] to the agency's interpretation if it is reasonable." *Id.* (quotation marks omitted). Plaintiffs cannot dispute that the statute is silent on the precise question of school uniform policies. *Cf. Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 770–72 (9th Cir. 1999) (deferring to ED's regulations under *Chevron* because Title IX did not directly address whether school could "decreas[e] athletic opportunities for [an] overrepresented gender"). Nor do they make any other effort to demonstrate that ED's interpretation is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.

[3] The rules-of-behavior regulation simply requires a school to evenly enforce its behavioral rules against both sexes. *See Thomas v. Univ. of Pittsburgh*, Civ. Action No. 13-514, 2014 WL 3055361, at *8 (W.D. Pa. July 3, 2014) (upholding claim where female plaintiff was suspended after a fight but university had "declined to suspend a male athlete after being charged with assault"); *Hall v. Lee College, Inc.*, 932 F. Supp. 1027, 1029–30, 1033 (E.D. Tenn. 1996) (entering judgment for college after bench trial because plaintiff failed to "prov[e] males would not have been suspended under the same or [a] similar set of circumstances" for violating college's extramarital-sex rules). It has nothing to do with evenly enforced dress codes. It is undisputed that the Uniform Policy is evenly enforced against both sexes. (*See* Defs.' Facts, Dkt. No. 160 ¶¶ 86–87; Walton Decl., Defs.' MSJ Ex. 55, Dkt. No. 172-2 ¶¶ 11–19.)

Accordingly, the Court should defer to ED's interpretation of Title IX and grant summary judgment to Defendants. (*See* Defendants' MSJ at 12–17.)[4]

2. Even if there were no binding administrative interpretation that foreclosed Plaintiffs' Title IX claims, they would still fail under the unequal-burdens test applied in Title VII cases.

Plaintiffs' Title IX claims would fail even if ED's interpretation did not exist. The case law on sex-differentiated dress codes under Title IX is sparse, which is no surprise given ED's regulation. Title VII case law, however, provides a helpful analogue.[5] Older, but still binding, cases reject the notion that comprehensive grooming policies constitute sex discrimination. *See Earwood v. Cont'l Se. Lines, Inc.*, 539 F.2d 1349, 1350 (4th Cir. 1976) ("[S]ex-differentiated grooming standards do not, without more, constitute discrimination under Title VII."). More recent cases hold that an "appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment." *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1109 (9th Cir. 2006) (en banc). Under either approach, the Uniform Policy is valid as a matter of law.

The Fourth Circuit's *Earwood* decision exemplifies the traditional Title VII approach. Much like Plaintiffs here, the *Earwood* plaintiff argued that his employer's requirement that men wear short hair "deprives some men of employment because it enforces a sex stereotype." 539

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[4] Plaintiffs misrepresent the role of legislative history in *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982). There, the court agreed with HEW's view that it had the authority to regulate employment practices. The court's use of post-enactment legislative history to *uphold* an agency interpretation is a far cry from Plaintiffs' attempt to use such evidence to *defeat* an agency interpretation when the statute itself is silent. Nor did the *North Haven* court state that the original HEW regulations perfectly captured Congress's intent, as Plaintiffs imply. The court actually said, "Congress' failure to disapprove the HEW regulations does *not* necessarily demonstrate that it considered those regulations valid and consistent with the legislative intent." *Id.* at 533–34 (emphasis added).

[5] The en banc Fourth Circuit, like many other courts, has left no doubt that it will "look to case law interpreting [Title VII] for guidance in evaluating a claim brought under Title IX." *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) (en banc); *see Nelson v. Christian Bros. Univ.*, 226 F. App'x 448, 454 (6th Cir. 2007) (collecting Title IX decisions from around the nation that rely on Title VII case law).

F.2d at 1351. The Fourth Circuit distinguished the hair-length requirement from other requirements based on impermissible sex stereotypes, such as "regulations limiting employment of women with small children." *Id.* Unlike those other requirements, the hair-length requirement did not "present obstacles to employment of one sex that cannot be overcome." *Id.* Barring evidence that the requirement was "utilized as a pretext to exclude either sex from employment," it did "not constitute an unlawful employment practice as defined by Title VII." *Id.* Neither does the School's Uniform Policy amount to sex discrimination under Title IX.[6]

Plaintiffs cannot distinguish *Earwood*. Contrary to Plaintiffs' argument (*see* Plaintiffs' Opp'n at 40), children generally possess *fewer* rights than adults, not *more*, particularly in schools. *Cf., e.g., Morse v. Frederick*, 551 U.S. 393, 396–97 (2007); *Schleifer ex rel. Schleifer v. City of Charlottesville*, 159 F.3d 843, 847 (4th Cir. 1998). And Plaintiffs ignore the precedent contradicting their assertion (*see* Plaintiffs' Opp'n at 43) that a student's choice of attire receives more protection than her hairstyle. *See, e.g., Richards v. Thurston*, 424 F.2d 1281, 1285 (1st Cir. 1970) ("[A] school rule which forbids skirts shorter than a certain length while on school grounds would require less justification than one requiring hair to be cut, which affects the student twenty-four hours a day, seven days a week, nine months a year."). Under *Earwood*, Defendants deserve summary judgment.

A second line of Title VII cases also demonstrates that the Uniform Policy does not violate Title IX—the unequal-burdens cases that culminated in the en banc Ninth Circuit's

[6] The Fourth Circuit is no outlier on this point; "[e]very circuit to have considered the issue has reached the same conclusion." *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1388 (11th Cir. 1998) (citing decisions from six other circuits that agree with *Earwood*). Despite Plaintiffs' contentions (Plaintiffs' Opp'n at 41), these decisions remain good law. *See, e.g., EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1030 (11th Cir. 2016) (reaffirming the validity of a decision on which the *Earwood* court relied); *Sturgis v. Copiah Cty. Sch. Dist.*, No. 3:10-CV-455-DPJ-FKB, 2011 WL 4351355, at *3 (S.D. Miss. Sept. 15, 2011) ("[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.").

Jespersen decision. The *Jespersen* court considered a comprehensive dress and grooming code with "individual requirements" that "differ[ed] according to gender." 444 F.3d at 1109. It affirmed summary judgment on that plaintiff's Title VII claim because the "grooming and appearance policy d[id] not unreasonably burden one gender more than the other." *Id.* at 1110. Defendants have detailed the parallels between the comprehensive appearance code in *Jespersen* and the Uniform Policy. (*See* Defendants' MSJ at 17–25, 35–36; Defendants' Opp'n at 25–30.) Suffice it to say that the handful of *Jespersen* references in Plaintiffs' Opposition—a couple of citations and a footnote (*see* Plaintiffs' Opp'n at 44 & n.18)—leave Defendants' unequal-burdens arguments almost entirely unaddressed.[7]

To the extent Plaintiffs address the unequal-burdens analysis at all, they distort it beyond recognition. They assert that because their only objection is to the requirement that girls wear skirts, skorts, or jumpers, the Court must focus solely on the so-called "Skirts Requirement," as if the Uniform Policy required nothing else. (Plaintiffs' Opp'n at 45 n.19.) But *Jespersen* rejected a similar argument, insisting instead that the "makeup requirement" challenged in that case "must be seen in the context of the overall standards imposed." 444 F.3d at 1113. Any other rule would allow a plaintiff to defeat *all* sex-specific appearance codes simply by challenging each sex-specific aspect, one at a time.

[7] Plaintiffs attempt to use *Jespersen* to bolster their novel sex-stereotyping theory. (Plaintiffs' Opp'n at 44 n.18.) But *Jespersen*'s reasons for rejecting that plaintiff's stereotyping claim apply with equal force here. As in *Jespersen*, the Uniform Policy neither "tend[s] to stereotype women as sex objects;" nor does it force them "to conform to a stereotypical image that would objectively impede" their participation in activities at the School; nor were Plaintiffs "treated . . . differently" than males "who did not comply" with the Uniform Policy; "[n]or is this a case of sexual harassment." 444 F.3d at 1112–13. (*See, e.g.*, Defendants' MSJ at 9, 37.) Like the *Jespersen* plaintiff, Plaintiffs have brought "essentially a challenge to one small part of what is an overall apparel, appearance, and grooming policy." 444 F.3d at 1113. Plaintiffs' theory is akin to that of the *Jespersen* dissent, which criticized the majority for assessing the defendant's appearance policy holistically and would have upheld the plaintiff's sex-stereotyping claim by focusing on the makeup requirement in isolation. *Id.* at 1115–16 (Pregerson, J., dissenting).

Plaintiffs make no effort to develop the evidence the law actually requires: evidence that the Uniform Policy's overall burden falls unequally on girls. That would necessitate proof as to the burden of the male-specific requirements on boys, something Plaintiffs do not even attempt to undertake. That failure was dispositive in *Jespersen*, and it should be here as well. *See Jespersen*, 444 F.3d at 1110 (affirming summary judgment because "Jespersen did not submit any documentation or any evidence of the relative cost and time required to comply with the grooming requirements by men and women").[8]

None of the decisions Plaintiffs cite invalidated a comprehensive appearance code because it was "premised upon sex stereotypes." (Plaintiffs' Opp'n at 44.) In each case, the court invalidated a policy only after finding an unequal burden. *See Frank v. United Airlines, Inc.*, 216 F.3d 845, 854 (9th Cir. 2000) (invalidating weight limit that allowed men to weigh as much as a "large-framed" man, while women could weigh no more than a "medium-framed" woman); *Gerdom v. Cont'l Airlines, Inc.*, 692 F.2d 602, 605 (9th Cir. 1982) (en banc) (invalidating weight limit that applied only to female flight attendants); *Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi.*, 604 F.2d 1028, 1029 (7th Cir. 1979) (invalidating policy that required female employees to wear uniforms but allowed similarly situated male employees to wear "customary business attire").[9] Unlike the Uniform Policy, the policies challenged in these cases facially "place[d] a greater burden on one gender than the other." *Jespersen*, 444 F.3d at 1109.

[8] The closest they come is a citation to testimony by Ms. Booth about the different ways that her son and daughter sit because one wears pants and the other skirts. (Plaintiffs' Opp'n at 45 n.19 (citing Dkt. No. 178 at 33, ¶ 18).) Whatever burden this creates on her daughter, Ms. Booth does not compare it to the burden created by the Uniform Policy's male-only requirements. (*See* Defendants' MSJ at 20–22.)

[9] Plaintiffs misstate the holding of the Michigan Supreme Court decision they cite. *See Dep't of Civil Rights ex rel. Cornell v. Edward W. Sparrow Hosp. Ass'n*, 377 N.W. 2d 755, 758 (Mich. 1985) (interpreting Michigan civil rights act, not Title VII as stated by Plaintiffs).

Nothing about these Title VII principles is inconsistent with Title IX's legislative history, as Plaintiffs suggest. Senator Bayh was concerned with "such crucial aspects as admissions procedures, scholarships, and faculty employment"—not quotidian concerns like whether boys and girls wear the same clothing. 118 Cong. Rec. 5,803, 5,803 (1972); *see id.* at 5,804–06 (organizing his remarks under three headings—"hiring and promotion," "scholarships," and "admissions"). Indeed, he made clear that Title IX would "permit differential treatment by sex" in certain cases, *id.* at 5,807, contrary to Plaintiffs' argument that the statute intended to eradicate all sex distinctions from American education. (*See* Plaintiffs' Opp'n at 38–39.)

Faced with the insurmountable task of showing an unequal burden, Plaintiffs urge this Court to ignore Title VII—and Fourth Circuit precedent looking to Title VII to interpret Title IX—and turn to Title VI instead. But race and sex are fundamentally different, as Title IX itself shows. Title IX permits sex-segregated housing and bathrooms; similar race-based segregation would be outrageous. And when HEW first proposed to withdraw its prohibition on sex-based appearance codes under Title IX, it assured schools that it would continue to prohibit race-based appearance codes under Title VI.[10] *Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance*, 43 Fed. Reg. 58,076, 58,076 (Dec. 6, 1978).

As this discussion shows, Defendants do not seek any "implied exception" from Title IX's requirements. (*See* Plaintiffs' Opp'n at 37.) Title IX, like Title VII, forbids "disparate treatment" on the basis of sex. *Frank*, 216 F.3d at 853. But "[a]n appearance standard that imposes different but essentially equal burdens on men and women *is not disparate treatment*." *Id.* at 854 (emphasis added). Because Plaintiffs have failed as a matter of law to show that the

[10] This Carter Administration proposal inspired ED's 1982 decision to withdraw the appearance-code prohibition, as ED noted in the relevant notice of proposed rulemaking. *See* 46 Fed. Reg. at 23,081.

Uniform Policy unequally burdens girls, Defendants would be entitled to summary judgment on Plaintiffs' Title IX claims—even if ED had not construed the statute to foreclose these claims.

B. Plaintiffs' constitutional claims fail as a matter of law.

Just as Plaintiffs hide ED's dispositive construction of Title IX at the end of their Opposition, they devote little ink to *Caviness v. Horizon Community Learning Center, Inc.*, 590 F.3d 806 (9th Cir. 2010), which defeats their constitutional claims on the threshold question of state action. And they cite not a single authority supporting the novel theory that comprehensive appearance codes like the Uniform Policy receive intermediate scrutiny whenever they contain sex-differentiated requirements. Plaintiffs' constitutional claims thus fail as a matter of law.

1. The Uniform Policy is not state action because North Carolina does not participate in the promulgation or enforcement of the Uniform Policy.

a. Only one court of appeals has considered whether "a private, non-profit corporation that operates a charter school," like CDS, Inc., satisfies § 1983's state-action requirement. *Caviness*, 590 F.3d at 808. There, the Ninth Circuit held that the corporation was not a state actor. *Id.* at 818. Arizona, like North Carolina, statutorily "designate[d] charter schools as 'public schools.'" *Id.* at 813. But that designation was "not necessarily dispositive" regarding state action. *Id.* at 814. And that plaintiff, like Plaintiffs here, argued charter schools perform the traditionally exclusive public function of "engag[ing] in the provision of 'public educational services.'" *Id.* But *Caviness* rejected this argument. *Id.* at 814–16. Finally, that plaintiff, like Plaintiffs here, argued that state regulation rendered charter schools state actors. *Id.* at 816–17. But the Ninth Circuit made clear that "[e]ven extensive government regulation of a private business is insufficient to make that business a state actor if the challenged conduct was 'not compelled or even influenced by any state regulation.'" *Id.* at 816 (quoting *Rendell-Baker v.*

Kohn, 457 U.S. 830, 841 (1982)). The upshot: In *Caviness*, the Ninth Circuit considered and rejected all the state-action arguments presented by Plaintiffs. (*See* Plaintiffs' Opp'n at 7–9.)

Yet Plaintiffs devote no more than two sentences and a footnote to *Caviness*. (*Id.* at 10 & n.4.) They suggest that the decision's extensive state-action reasoning, *see* 590 F.3d at 812–18, turned on some peculiarity of Arizona's charter-school statute. (*See* Plaintiffs' Opp'n at 10 n.4.) But despite the implication of Plaintiffs' footnote, the *Caviness* court never even mentioned the status of charter schools under the Arizona Constitution.[11] (*See* Plaintiffs' Opp'n at 10 n.4 (citing Ariz. Const. art. XI, § 1).) And later cases apply *Caviness* beyond Arizona without hesitation. *See Sufi v. Leadership High School*, No. C-13-01598 (EDL), 2013 WL 3339441, at *5, 9 (N.D. Cal. July 1, 2013) (applying *Caviness* to California charter school).

Plaintiffs implausibly attempt to limit *Caviness* to "employment claims" against charter schools, but other courts have already rejected this evasive maneuver. (*See* Plaintiffs' Opp'n at 10.) In *I.H. ex rel. Hunter v. Oakland School for the Arts*, the court relied on *Caviness* to dismiss a student's constitutional sex-discrimination claim against a charter school on state-action grounds and rejected the plaintiff's argument "that the holding of that case [*i.e.*, *Caviness*] should be limited to the employment context." 234 F. Supp. 3d 987, 990–93 (N.D. Cal. 2017). The *Hunter* court also rejected the plaintiff's argument that "charter schools are acting as state agents when they are attempting to fulfill the role of providing students with a public education." *Id.* at 993. This Court should reject the similar arguments made by Plaintiffs here. (*See* Plaintiffs' Opp'n at 11.)

[11] Although *Caviness* does quote part of Arizona Revised Statutes § 15-181, the portion it quotes has a parallel in North Carolina law. *Compare Caviness*, 590 F.3d at 809 ("Charter schools 'serve as alternatives to traditional public schools' by 'provid[ing] additional academic choices for parents and pupils,' and they are intended 'to provide a learning environment that will improve pupil achievement.'" (quoting Ariz. Rev. Stat. § 15-181(A)) (brackets in *Caviness*)), *with* N.C. Gen. Stat. § 115C-218(a) (establishing charter schools "that operate independently of existing schools" to "[p]rovide parents and students with expanded choices in . . . educational opportunities" and to "[i]mprove student learning").

b. *Caviness* faithfully applies the Supreme Court's state-action precedents that ask whether the specific "challenged conduct" was "'compelled'" or "'influenced by'" the state, 590 F.3d at 816 (quoting *Rendell-Baker*, 457 U.S. at 841–42), or whether it was "'made by concededly private parties, and turn[ed] on judgments made by private parties without standards established by the State,'" *id.* at 818 (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999)) (alteration in *Caviness*). Plaintiffs argue, however, that because (1) charter-school operators allegedly serve an exclusive public function or (2) are tantamount to a traditional public school, it is unnecessary to inquire whether the state was involved in promulgating or approving the Uniform Policy. (Plaintiffs' Opp'n at 8–11.) Plaintiffs' premises are mistaken.

Caviness is not alone in rejecting Plaintiffs' central state-action premise, that the "provision to students in the general population of a 'free, public education, whether provided by public or private actors, is an historical, exclusive, and traditional state function.'" (*Id.* at 10 (quoting *Riester v. Riverside Cmty. Sch.*, 257 F. Supp. 2d 968, 972 (S.D. Ohio 2002).) According to the Fourth Circuit in *Mentavlos v. Anderson*, "educat[ing] civilian students and produc[ing] community leaders . . . has never been held to be the exclusive prerogative of a State."[12] 249 F.3d 301, 314 (4th Cir. 2001) (citing *Rendell-Baker*, 457 U.S. at 842). Or, as the First Circuit put it in a case involving the general high-school population, "education is not and never has been a function reserved to the state." *Logiodice v. Trs. of Maine Cent. Inst.*, 296 F.3d 22, 26 (1st Cir. 2002) (finding no state action in student's claim against private school contracted by government to provide general high school education in three-county area). "[S]chooling . . .

[12] Plaintiffs misunderstand *Mentavlos* and use it to make the odd argument that training soldiers is somehow less of an exclusive public function than educating children. But the Fourth Circuit did not rest on The Citadel's "use of a military-style environment" in finding that The Citadel was not fulfilling an exclusive public function. 249 F.3d at 314–15. To the contrary, after discussing the school's "stated mission"—"to educate civilian students and produce community leaders"—the court had this to say: "Noticeably absent, of course, is a mission to train soldiers for the military." *Id.*

is regularly and widely performed by private entities; this has been so from the outset of this country's history." *Id.* at 26–27. Plaintiffs' only response to this body of law, which contradicts their state-action arguments at every turn, is to state that none of these cases "concerns the provision of general education *to public school students*." (Plaintiffs' Opp'n at 9 (emphasis added).) But this response will not do. It "merely restates [the] erroneous argument that the state's statutory characterization is necessarily controlling." *Caviness*, 590 F.3d at 815–16.

Plaintiffs commit a similar fallacy by relying on cases holding that officials at traditional public schools are state actors. (Plaintiffs' Opp'n at 6.) Traditional public schools are state actors because—unlike charter schools—they are *operated by the government*, not because general public education is a traditionally exclusive public function. In the cases cited by Plaintiffs, the school's status as a state actor was beyond question—*the state itself was the defendant*. *See New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *State v. Jones*, 216 N.C. App. 225, 715 S.E.2d 896 (2011). Those cases considered whether, at schools that were indisputably state actors, school officials were also state actors, a question not presented here. *T.L.O.*, 469 U.S. at 334; *Jones*, 216 N.C. App. at 232–33, 715 S.E.2d at 902.[13] No Defendant here is a governmental entity or employee: they are private corporations and CDS, Inc.'s board members.

c. Finally, Plaintiffs point to a variety of North Carolina's charter-school regulations, none of which relate to the Uniform Policy. (Plaintiffs' Opp'n at 8–9.) "[S]tate regulation unrelated to the alleged constitutional violation, even if extensive, is not sufficient, in itself, to transform private action into state action." *Mentavlos*, 249 F.3d at 320 (quotation marks

[13] The short unpublished opinion in *Tann v. Ludwikoski* contains no detail about the organizational structure of the school at issue but appears to present the same question as *T.L.O.* and *Jones*. *See* 393 F. App'x 51, 53 (4th Cir. 2010). There is no indication in *Tann* that any party questioned whether Baltimore Community College was a state actor; the only question was whether a teacher and an administrator at the community college were themselves state actors. *Id.* *Chalfant v. Wilmington Institute* likewise involved a "state instrumentality" and, in any event, predates *Rendell-Baker*. *See* 574 F.2d 739, 746 (3d Cir. 1978).

omitted). Plaintiffs cite general provisions of North Carolina law related to charter schools' funding, instructional, and nondiscrimination obligations. (Plaintiffs' Opp'n at 8.) They cite the legal provision that requires charter schools to establish a code of student conduct. (*Id.* at 9.) But showing that the state requires all public schools to establish a disciplinary code or refrain from discrimination is a far cry from showing that "'the Government[] encourage[d], endorse[d], and participat[ed]' in the challenged actions"—in this case, the Uniform Policy. *Mentavlos*, 249 F.3d at 318 (quoting *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 615–16 (1989)). Plaintiffs do not dispute the legally dispositive fact: Defendants designed, implemented, and enforced the Uniform Policy *on their own*, with no involvement or approval whatsoever from state officials. *See Caviness*, 590 F.3d at 818 (finding no state action where "state was [not] involved in the contested employment actions," nor "showed any 'interest in the school's personnel matters'").

Plaintiffs therefore fail as a matter of law to show that the Uniform Policy was "compelled or even influenced by any state regulation." *Rendell-Baker*, 457 U.S. at 841. A straightforward application of *Caviness* and the underlying Supreme Court precedents leads to the conclusion that the Uniform Policy is not state action.[14]

2. Even if the Constitution applied to the Uniform Policy, it would not violate the Equal Protection clause.

a. In the 100 pages of briefing that Plaintiffs have filed thus far, they have not cited a single Equal Protection decision that applied intermediate scrutiny to a comprehensive appearance code. They instead continue to rely heavily on 1970s cases regarding the purported

[14] Plaintiffs argue incredibly that RBA is a state actor, despite not even holding a contract with North Carolina. (*See* Defendants' MSJ at 32–33.) That argument fails for all the reasons given above. Moreover, RBA does not control the Uniform Policy. (Defs.' Facts, Dkt. No. 160 ¶ 52 (summarizing the evidence that "RBA has no authority to change the requirements of the Uniform Policy").) The evidence offered by Plaintiffs shows only what is obvious from the Management Agreement between CDS, Inc. and RBA—that RBA has the authority to "recommend reasonable rules, regulations, and procedures applicable to [the School]." (Management Agreement, Defs.' MSJ Ex. 30, Dkt. No. 163-1 § 4.09.)

substantive-due-process right to govern one's personal appearance. *E.g.*, *Massie v. Henry*, 455 F.2d 779, 783 (4th Cir. 1972). But the reasoning of those "cases has been circumscribed by [*Washington v. Glucksberg*, 521 U.S. 702 (1997)] to the extent [they] held that one's hair length implicates a fundamental right." *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 575–76 (7th Cir. 2014). (*See* Defendants' Opp'n at 19–20.) Moreover, *Massie* and the other older cases Plaintiffs cite all predate the enunciation of the intermediate-scrutiny standard in *Craig v. Boren*, 429 U.S. 190 (1976). They cannot bind this Court to apply intermediate scrutiny to the Uniform Policy.

b. The Supreme Court's intermediate-scrutiny decisions do not apply to a dress code that imposes comparable burdens on boys and girls. All the decisions that Plaintiffs cite involved a decision to exclude one sex from a benefit open to the other. In *VMI*, for example, "[t]he constitutional violation . . . [was] the *categorical exclusion* of women from an extraordinary educational opportunity afforded men." *United States v. Virginia*, 518 U.S. 515, 547 (1996) (emphasis added). Similarly, *Mississippi University for Women v. Hogan* reviewed "a state statute that *exclude*[*d*] *males* from enrolling in a state-supported professional nursing school." 458 U.S. 718, 719 (1982) (emphasis added). So too with the exclusion of unwed fathers from the ability to pass on their U.S. citizenship or the exclusion of women from juries. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017) (citizenship for children of unwed citizen-fathers); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994) (peremptory strikes to exclude women). It is inconceivable that sex-differentiated policies that do *not* exclude or impose unequal burdens on one sex would trigger heightened scrutiny under the Constitution.

c. Plaintiffs' blithe reliance on the Supreme Court's intermediate-scrutiny cases also fails to account for the specific context in which their claims arise—the education of young

children. "[C]onstitutional claims generally receive less rigorous review in the secondary and middle school setting than they do in other settings." *Blau v. Ft. Thomas Pub. Sch. Dist.*, 401 F.3d 381, 393 (6th Cir. 2005). What is more, the Supreme Court has expressly freed schools to exercise a "custodial and tutelary" power over their students. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995). That includes the power "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) (citation omitted). A school therefore has constitutional leeway to structure the academic environment to transmit the local community's values to the students.

Given that schools perform this constitutionally sanctioned value-transmission function, it follows that, at least in the primary- and secondary-education context, "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." *Hayden*, 743 F.3d at 581 (emphasis added). Plaintiffs do not dispute that the Uniform Policy is consistent with the community norms of the parents who opt to send their children there. (Response to Defendants' Facts, Dkt. No. 178 at 21 ¶ 89.) At minimum, the school setting and the Uniform Policy's reliance on community norms mean that intermediate scrutiny does not apply.

d. Plaintiffs seek nothing less than a constitutional revolution that would invalidate wide swaths of regulations and case law under the relevant civil-rights statutes. If the Uniform Policy is unconstitutional, then it is difficult to imagine how Title VII's longstanding allowance of sex-specific grooming codes would not also be unconstitutional as applied to public employers. Sex-segregated primary and secondary schools would almost certainly violate the Equal Protection Clause. *See* 34 C.F.R. § 106.34(c) (Title IX regulations allowing single-sex

schools). And sex-specific bathrooms, housing, and contact sports would all be in jeopardy. Instead of explaining why a ruling in their favor would not punch a hole through Title VII and Title IX, however, Plaintiffs double down. They insist that the Court has no choice but to rule for them, whatever the consequences. (Plaintiffs' Opp'n at 19–20.)

But applying the Title VII equal-burdens analysis to Plaintiffs' constitutional claims, as other courts have suggested, would avoid this dilemma. *See Hayden*, 743 F.3d at 577–78. Intermediate scrutiny would distort the reality of the Uniform Policy, treating it as though it contains only the "Skirts Requirement." (*See* Plaintiffs' Opp'n at 30–34.) The equal-burdens analysis, by contrast, would allow the Court to consider whether the Uniform Policy as a whole "impose[s] comparable, although not identical, responsibilities on male and female" students. *Hayden*, 743 F.3d at 580. That makes sense: Unlike the "categorical exclusion" of one sex, *see VMI*, 518 U.S. at 547, comprehensive sex-differentiated rules like the Uniform Policy or ED's rules for single-sex bathrooms or housing place comparable burdens on both sexes, without excluding one from any relevant opportunity. Because the Uniform Policy places comparable burdens on both sexes, it "does not constitute sex discrimination." *Hayden*, 743 F.3d at 580.

Plaintiffs make no argument that they can prevail on their constitutional claim if intermediate scrutiny does not apply. Because intermediate scrutiny does not apply as a matter of law to a sex-differentiated school dress code that imposes comparable burdens on boys and girls, Defendants are entitled to summary judgment.[15]

C. Plaintiffs' derivative state-law claims fail as a matter of law.

Plaintiffs' constitutional and contractual state-law claims fail at the outset because they have not stated a claim for unlawful sex discrimination, for all the reasons given above.

[15] As Defendants have explained at length, they are entitled to summary judgment even if intermediate scrutiny somehow applied. (*See* Defendants' MSJ at 39–42; Defendants' Opp'n at 31–39.)

1. Plaintiffs attempt to evade this barrier by arguing that, although their complaint alleged no violation of the state constitutional right to an education, that provision somehow heightens the scrutiny applicable to their state-law sex-discrimination claims. Even if they had pleaded such a violation, Plaintiffs' claim would not receive strict scrutiny because it challenges school rules, not the denial of an education. *See State v. Davis*, 126 N.C. App. 415, 421, 485 S.E.2d 329, 333 (1997) (school rules "deny the right to engage in the prohibited behavior," not the right to an education). For the reasons laid out in Defendants' prior briefing, the Court should grant summary judgment against Plaintiffs' state constitutional claims. (*See* Defendants' MSJ at 43–45; Defendants' Opp'n at 39–41.)

2. Plaintiffs cannot rely on the Supreme Court's interpretation of Title IX to prove that North Carolina law would treat them as third-party beneficiaries of the contracts between North Carolina and CDS, Inc. In *Cannon v. University of Chicago*, the Supreme Court implied a private cause of action under Title IX based on its interpretation of congressional intent, not contract law. 441 U.S. 677, 689–94 (1979). And the Supreme Court has since decisively rejected the practice of implying private causes of action based on factors like those it considered in *Cannon*. *Alexander v. Sandoval*, 532 U.S. 275, 287–89 (2001). In their Opposition, Plaintiffs do not cite a single North Carolina contract-law decision—much less one that would entitle them to bring their third-party-beneficiary claim. As discussed elsewhere, Defendants are entitled to summary judgment on this claim. (*See* Defendants' MSJ at 45–50; Defendants' Opp'n at 42–43.)

III. CONCLUSION

For these and previously briefed reasons (*see generally* Dkt. Nos. 159, 170), the Court should deny Plaintiffs' Motion for Summary Judgment and grant Defendants' Motion.

Respectfully submitted, this 17th day of January, 2018.

BAKER BOTTS L.L.P.

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CERTIFICATE OF SERVICE

On January 17, 2018, I electronically filed this document using the Court's CM/ECF system, which will serve all counsel of record.

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