



April 4, 2007

Metropolitan Nashville Public Schools  
Board of Education  
2601 Bransford Ave.  
Nashville, TN 37204

Dear Board Members:

ACLU-TN has been closely monitoring the discussions regarding the proposed school uniform policy for the Metro Nashville Public Schools (MNPS). We share the concerns of many vocal parents, administrators, teachers, students and members of the community that the proposed Standard School Attire (SSA) policy would seriously infringe upon students' constitutional rights.

ACLU-TN believes that implementation of the proposed policy would raise significant freedom of speech, due process, equal protection and privacy concerns. Additionally, the practical effects of the enforcement of this vague and overbroad policy will potentially expose the schools to significant legal liability. In an effort to assist the Board in understanding the potential consequences of passing the SSA policy, we have outlined our concerns. We urge the MNPS Board either to vote against the proposal or to allow parents to "opt out" of the SSA policy.

**The Standard School Attire policy is content based  
and is ripe for viewpoint discrimination.**

MNPS's proposed SSA policy is rife with inconsistencies and ambiguities that amount to great potential for viewpoint discrimination. The First Amendment ensures that public school officials cannot engage in viewpoint discrimination (i.e. picking and choosing which messages are acceptable).

The proposed policy bans most forms of expression, but continues to allow students to display clothing brands and school emblems, while prohibiting expression of all other viewpoints. Section B.3 of the proposed policy allows for manufacturer or trademark logos to be displayed on a student's clothing so long as the expression is no more than two inches big. It also allows for the student to display school logos of any size. All other forms of expression are forbidden under the proposed policy.

Not only does the proposed policy allow labels and branding of particular clothing as permitted speech, it actually promotes school supported, school sponsored speech. The policy does not, however, allow for pure student speech, such as political buttons, ribbons, stickers, clothing or other adornments that express a message other than school support. This is a content based restriction on protected expression and is presumed unconstitutional. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992). A provision that allows only school approved emblems "goes much too far" and has "the effect of

excluding other legitimate forms of expression and speech and this violates students First Amendment rights.” Wallace v. Ford, 346 F. Supp. 156, 165 (E.D. Ark. 1972). See also Vinson v. Wilson County School Board, No. 3:00-0287 (M.D. Tenn. Sept. 1, 2000).

Additionally, section D.2 of the proposed policy allows for certain designated groups to receive exemptions from the requirements of the SSA. The examples cited in the proposed policy allow for exemptions for student athletes and student clubs. The determination of who qualifies for an exemption is left to the discretion of the principal. In order to avoid viewpoint discrimination, and significant equal protection liability, the principal would have to allow all student clubs and sports equal opportunity for exemptions from the SSA policy. For example, if the football team and spirit club were allowed to wear their club t-shirts or uniforms on designated days, the principal would have to allow the Gay Straight Alliance Club, the Students for Choice Club, and even the ACLU club, to wear its designated attire on its chosen days. To do otherwise would be viewpoint discrimination and would subject the school to significant legal liability.

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Section H.1, is another problematic provision of the SSA policy. This section allows for students to wear the uniforms of nationally recognized organizations. The proposed policy, however, does not define “nationally recognized organizations.” The determination of which groups are “nationally recognized” is left to the discretion of the school administrator. Without defining the term, however, the proposed policy cites the JROTC, Girl Scouts and Boy Scouts as examples of nationally recognized organizations that are acceptable under the SSA policy. ACLU-TN is especially troubled that the Board would specifically grant exemptions to these organizations, two of which have publicly embraced their disparate treatment of gay and lesbian community. ACLU-TN is not only concerned about the potential for viewpoint discrimination in the enforcement of such a policy, but the advancement of particular biased views appear quite likely if this policy were to be implemented by the school board.

### **The Student School Attire policy is unconstitutionally overbroad and vague.**

The proposed policy infringes on the constitutional rights of students to exercise their freedom of expression. Many crucial terms in the proposed policy are left undefined and are open to interpretation. Because of their vague nature, these terms have the potential for disparate application and leave the determination of what can be banned to the subjective opinion of the school administrator. These terms are vague and overbroad in violation of due process and forbid many forms of legitimate speech. For example, Section G.4 of the proposed policy states:

“Clothing that advertised substances that are illegal for teens (drugs, alcohol, tobacco products) or language or writing that is otherwise inappropriate or offensive (sex, profanity, racial or ethnic slurs, gang related attire, etc.) may not be worn.”

The terms “otherwise inappropriate or offensive” are vague and do not clearly articulate which forms of speech/expression are forbidden.

Section G.6 likewise, is prohibitive. This section bans “chains, spiked accessories, oversized jewelry, oversized belt buckles or belt buckles with concealed weapons.” Many of these terms are vague and subject to varying interpretations as to what is “oversized.” Additionally, there are a myriad of religious concerns with the banning of chains and oversized jewelry. Is a large cross on a chain banned under this policy, what about a discreet Star of David on a short necklace?

Section G.7 also bans “inappropriate head coverings such as bandanas, scarves, sweatbands, caps, do rags, or hairnets.” Again, the term “inappropriate” leaves a large area for interpretation. Would a yarmulke be banned? What about a scarf in a young woman’s hair tied as a headband? Would a Muslim headdress be banned under this policy? What about a scarf or cap for a child going through cancer treatment?

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**Implementation of the SSA policy will chill  
students’ rights of free speech and expression.**

The SSA policy is arbitrary and capricious as it does not adequately give notice of acceptable clothing. The SSA policy is not nearly narrowly tailored enough to be enforceable. The language in the proposed policy is laced with terms like “acceptable” and “appropriate.” Those words can be interpreted in a myriad of ways by different people. The policy carves out numerous exceptions for many different groups, reasons and dates. If this policy were to be implemented, students, who do not know precisely which items are prohibited and fearing disciplinary sanctions, will be chilled from exercising their constitutional right to self-expression.

While we acknowledge that the policy purports to provide some First Amendment protections for the students by including “[n]o portion of the Standard School Attire policy shall be construed as in conflict with a student’s constitutional right to free expression” in Section H.5 of the proposed policy, this language is not nearly sufficient to protect the constitutional rights of Nashville’s students. While freedom of expression is the primary concern of ACLU-TN, our concerns are much broader than just one particular right. Furthermore, the language of even this provision is so vague as to be rendered meaningless. Admittedly, the field of law concerning students’ rights to freedom of expression while in school is a complicated area full of complex interpretations that are oftentimes factually dependant. This language is so broad and sweeping that it would require a lawyer specializing in First Amendment law to accurately advise each principal as to the constitutional limitations allowed on student expression. In short, without prompt and specialized legal advice, the schools would be treading on thin constitutional ice with significant potential legal liability around every corner.

**The SSA policy infringes on the religious rights of students.**

MNPS's proposed policy also creates serious concerns about infringing on student's religion. Section G.7 purports to ban scarves and any type of headgear, seemingly precluding the wearing of a Muslim headdress, Jewish yarmulke, or any other religious wear. The Tennessee State Board of Education's own policy, however, states specifically that such items can not be banned.

"Students may display religious messages on items of clothing to the same extent that are permitted to display other comparable messages. Religious messages may not be singled out for suppression, but rather are subject to the same rules as generally apply to comparable messages. When wearing particular attire, such as yarmulkes and head scarves, during the day is part of a students' religious practice, under the Religious Freedom Restoration Act schools generally may not prohibit the wearing of such items."

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Tennessee State Board of Education, Uniform Clothing for Public School Students 4.203, quoting former U.S. Secretary of Education, Richard W. Riley.

As a result, the SSA policy provides exceptions for religious headwear; however they are narrowly drawn to include only a subjective group of "bona fide" religions as determined by the school administrator. See section H.2 of the SSA policy. The proposed policy then goes further and allows exemptions to the SSA policy only for "bona fide" religious practices of "bona fide" religions. In so doing, the policy makes the school administrator the final arbiter on what religious practices and customs are appropriate for certain mainstream religions.

It is not the role of the schools, or even the courts to determine what practices are tenants of particular faiths. Hernandez v. Commissioner, 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989). The First Amendment provides the same amount of protection for "bona fide" religions as it does for non-traditional, less established or individual based faiths. Wilson v. National Labor Relations Bd., 920 F.2d 1282, 1285-87 (6th Cir.1990) (holding that statute violated Establishment Clause because it accommodated the "established and traditional tenets" of "bona fide" religions, but not the sincerely held religious beliefs of individuals unassociated with established sects), cert. denied, 505 U.S. 1218, 112 S.Ct. 3025, 120 L.Ed.2d 896 (1992). Why should students be forced to justify to a school principal that their dress is a bona fide practice of their bona fide religion? Under this policy, if a school administrator doesn't believe that a religion is well established enough to qualify as "bona fide", the student will be denied their right to the free exercise of religion. This is clearly contrary to the free exercise clause of the First Amendment.

**The Student School Attire Policy violates the privacy rights of students.**

The provision of the SSA policy that refers to exemptions from the policy for medical reasons or because of disability could potentially violate a student's right to privacy. The proposed SSA policy states in section H.2:

“Where the bona fide religious beliefs, medical or special education needs of a student conflict with the Standard School Attire policy, the schools will provide reasonable accommodation. Any student desiring accommodation shall notify their school principal in writing of the requested accommodation and the factual basis for the request.”

The provisions in this section place an enormous burden on a child who has medical or disability issues to explain their situation to the school administrator. There are a variety of reasons, some quite personal, why a student would be unable to comply with the SSA policy. This policy puts the burden on the student to justify their need for an exemption and places the principal in a position to substitute his or her judgment for that of a medical doctor and be the final arbiter of whether the medical or disability condition stated is “bona fide.” In practice, the enforcement of this policy would force a child to divulge personal, confidential medical information to a school administrator. This requirement could, and likely would, run afoul of the privacy protections afforded to individuals under the Health Insurance Portability and Accountability Act (HIPAA) and expose the school to significant legal liability.

Additional privacy concerns arise with the practical enforcement of section B.2 of the policy which mandates that students are only allowed to wear clothing of “an appropriate size.” The policy defines “appropriate size” as “no more than one size smaller or one size larger than the student's actual clothing size.” The enforcement of this policy raises significant privacy issues. How does the school propose to determine what a student's actual clothing size is? Will school administrators be taking measurements of students to record their clothing sizes? Who will determine what a child's actual size is? Will special exemptions be made for obese students? What about the teenage girl who is self-conscious about her larger than normal chest size? Should she be denied the discretion to wear a large shirt to mask her chest size? How will such provisions be enforced? Practically, the enforcement of this provision will likely invade the privacy of many students and will potentially subject the school to significant legal liability.

**The Student School Attire policy authorizes  
the use of unchecked discretion in its enforcement.**

The SSA policy is arbitrary and capricious as the policy is ripe for selective and inconsistent enforcement. The proposed policy grants almost exclusive discretion to interpret and enforce the policy to the school administrator. Section D.1 of the proposed policy also permits the principal to designate 10 days a school year where the rules of the SSA policy do not apply. The principal has sole discretion to designate these days at will.

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Additionally, the policy vests the principal with the interpretive authority to determine which clothing is “appropriate” and “acceptable.” Not only is the principal the ultimate authority on what clothing is or is not in compliance with the policy, the principal has the authority to determine who is punished and who is not punished for violations. You can rest assured that the interpretations of these terms and who is punished will vary greatly from principal to principal creating wide disparity in treatment, selective enforcement and potential discrimination against particular students.

**The Standard School Attire policy violates students’ rights of free speech and expression.**

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ACLU-TN believes that all students should be free to express themselves. The right of self expression includes the right to protest policies with which one disagrees. MNPS’s proposed policy contains no provision protecting the rights of students to protest.

Children maintain their freedoms of speech and expression, even in a school environment. In fact, the Supreme Court in Tinker v. Des Moines, 393 U.S. 503 (1969), ruled that students can voice their political or religious opinions at school by wearing black armbands as symbolic speech. The Court found that this means of protest was not disruptive to school activity. Using the Tinker decision as a benchmark, courts around the country have embraced the fundamental rights of students to engage in nondisruptive protest. The methods of expression have grown to include political buttons, ribbons, patches, stickers and the like. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); see also Organization for a Better Austin v. Keefe, 402 U.S. 415, 418 (1971). Undoubtedly, the courts have agreed that students have a fundamental right to expression while in school.

A strict prohibition of all expressive accessories is a prior restraint on speech that violates the First Amendment and is presumed unconstitutional. MNPS’s SSA policy does not specifically forbid such adornments, nor can it under the First Amendment. The proposed policy, however, provides no avenue for students to express their views. All students must be permitted a way to express their views, whether the message is in opposition to a school policy, an expression of remembrance for the family of a crime victim, or some other form of protected speech. Students subject to a uniform policy should be permitted other avenues of free expression including buttons, ribbons, stickers, patches and other adornments. The proposed policy must include a specific provision protecting this fundamental right. As Senator J. William Fulbright once said, “[w]e must learn to welcome and not fear the voices of dissent.”

**Implementation of such a vague policy will be complicated at best.**

MNPS’s policy is vague and ambiguous. The language of the policy is so nonspecific that it will certainly be used at some point, by somebody to engage in viewpoint discrimination. There is little uniformity in the policy and it leaves most decision making

authority and ultimate interpretive authority to the individual principals of each school. The nonuniform implementation of this policy across the entire school district will expose the schools to significant potential legal liability.

Specifically, MNPS could potentially be exposed to legal liability for violating the equal protection rights of students if it does not mandate that school uniforms be provided for economically disadvantaged students. The current language of the proposed policy suggests that MNPS collaborate with various organizations to donate uniforms for those who are economically disadvantaged. The proposed policy specifically states, however, that "MNPS is not required to provide such Attire to students because of low income status." The nonbinding language proposed allows for a potential situation where a student can not afford the appropriate clothing and is disciplined for their lack of compliance with the SSA policy. Such a scenario could expose the schools to liability for violating the equal protection rights of the students.

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Apart from the legal aspects, the proposed policy will not achieve its stated goals. Some of the goals outlined in the SSA policy are among other things, to "minimize disruption caused by inappropriate clothing at school" and to "create an environment where students can be more focused on learning." Research indicates, however, that dress codes do not help with discipline issues and do not increase the productivity of students.

Another of the stated goals of the policy is to "reduce distraction and diminished self-worth caused by teasing or competition over clothing." This goal, while ambitious and good hearted, also will not be accomplished by MNPS's proposed policy. Under the proposed policy, students will still be permitted to display manufacturer and trademark labels on their clothing, creating a disparity between those who buy their shirts at discount stores and those who purchase designer labels. The proposed policy will not be an effective way to achieve the Board's stated goals. Instead, if this policy were to be implemented, students will be denied their constitutional rights to express themselves at the expense of a policy that has little hope of success.

ACLU-TN understands the concerns of the School Board and we sympathize with its position. However, we believe that students' freedom of expression rights should be protected. We urge you to vote "no" on the proposed SSA policy.

If, however, you choose to implement the proposed SSA policy, we urge you to include an "opt out" provision that allows parents to determine how their children dress. This position is endorsed not only by ACLU-TN, but also by the Tennessee State Board of Education, which states:

"When a mandatory school uniform policy is adopted, determine whether to have an 'opt out' provision: In most cases school districts with mandatory policies allow students, normally with parents consent, to 'opt out' of the school uniform requirement. Some schools have determined, however, that a policy with no 'opt

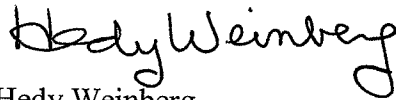
out' provision is necessary to address a disruptive atmosphere. In instances where the disruption of the learning environment has not reached the point that other lesser measures have been or would be effective, a mandatory uniform policy without an 'opt out' provision could be vulnerable to legal challenge.

Tennessee State Board of Education, Uniform Clothing for Public School Students, 4.203, Guidelines and Criteria for Uniform Clothing for Public School Students.

As the Supreme Court stated in Tinker v. Des Moines, "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech. . . . at the school house gates." We still believe in Tinker and hope that schools will teach students to become analytic and independent thinkers who are able to express themselves.

Please feel free to contact us at (615) 320-7142 if you have any additional questions.

Sincerely,



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