METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

BILL PURCELL
MAYOR

DEPARTMENT OF LAW
METROPOLITAN COURTHOUSE, SUITE 108
P O BOX 196300
NASHVILLE, TENNESSEE 37219-6300
(615) 862-6341
(615) 862-6352 FAX

Legal Opinion No. 2007-03

To: Members of the Metropolitan Board of Public Education
2601 Bransford Avenue
Nashville, TN 37204

Date: July 23, 2007

You have requested the Department of Law provide a legal analysis of the Standard School Attire Policy ("the Policy"), Attachment A. Based on discussions of the Policy between the Metropolitan Board of Public Education and members of the public, the Department of Law has identified the following questions:

QUESTIONS

1. Whether the Policy violates students' free speech and free expression rights?
2. Whether the Policy inhibits parents' due process rights to direct the upbringing and education of their children?
3. Whether the Policy violates students' due process rights?
4. Whether the Policy violates students' rights to equal protection under the law?
5. Whether the Policy violates students' religious rights under either the free exercise or establishment clauses of the Constitution?

SHORT ANSWERS

1. No. It is unlikely a court will find that a student's attire is conduct protected under the First Amendment. Even if student attire constituted "speech" under the First Amendment, the Policy is constitutional because the Policy is unrelated to the suppression of student expression, it furthers legitimate objectives, it does not burden more expression than necessary to further those objectives, and it is not overbroad.

2. No. It is unlikely a court will find that parents have a fundamental right to control the way their children's schools regulate school attire. A court is likely to find the Policy is constitutional because it is rationally related to the school's substantial interest in improving student achievement and ensuring student safety.
3. No. It is unlikely a court will find that students have a fundamental right to choose their school clothing. A court is likely to find the Policy is constitutional because it is rationally related to the school's substantial interest in improving student achievement and ensuring student safety.
4. No. The Policy is neutral and will be applied to all students equally.
5. No. The Policy neither advances nor inhibits religious beliefs and applies to all students equally, regardless of their religious beliefs.

ANALYSIS

The U.S. Supreme Court "has frequently emphasized that public schools have considerable latitude in fashioning rules that further their educational mission and in developing a reasonable fit between the ends and means of their policies." *Blau v. Fort Thomas Public Sch. District,* 401 F.3d 381, 393 (6th Cir. 2005) (School dress code held constitutional and not violative of First Amendment or Due Process Clause); citing *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 267, 108 S.Ct. 562 (1988)(the determination of whether classroom speech is inappropriate rests properly with the school board and not the federal courts); see also *Jackson v. Dorrier,* 424 F.2d 213, 218-19 (6th Cir. 1970), *cert. denied* 400 U.S. 850, 91 S.Ct. 55 (1970)("the responsibility for maintaining proper standards of decorum and discipline and a wholesome academic environment at Donelson High School is not vested in the federal courts, but in the principal and faculty of the school and the Metropolitan Board of Education of Nashville and Davidson County, Tennessee"). [1]

In Tennessee, its Supreme Court has consistently observed that since the passage of the General Education Act in 1925, the local board of education is "the supreme authority in school matters within the county." Tenn. Op. Atty. Gen. No. 99-141; citing *Howard v. Bogart,* 575 S.W.2d 281, 283 (Tenn. 1979). In 1996, the Tennessee Code was amended to require "the State Board of Education to develop

[1] In *Tinker v. Des Moines Ind. Comm. Sch. Dist.,* in which the Court found black armbands worn by students constituted protectable First Amendment speech, and stated: students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," the Court was careful to narrow the scope of its holding by stating "[t]he problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment.... Our problem involves direct, primary First Amendment rights akin to 'pure speech.'" *Tinker v. Des Moines Ind. Comm. Sch. Dist.,* 393 U.S. 503, 506-08, 89 S.Ct. 733 (1969).

guidelines and criteria for local adoption and enforcement of uniform clothing for public school students." T.C.A. § 49-1-302(j).

> "... [t]hese guidelines and criteria shall require that uniform clothing be simple, appropriate, readily available, and inexpensive." And "[a]doption of uniform clothing policies shall be at the discretion of the local board of education."

T.C.A. § 49-1-302(j).[2] Pursuant to this authority, the Metropolitan Board of Public Education ("the Board") adopted the Policy to regulate the clothing students may wear to school. *MNPS Standard School Attire Policy,* Attachment A. The objective of the Policy is to further the Board's commitment "to providing a safe and secure school environment" and states that the Board considers implementation of the Policy "an effective strategy to promote enhanced student appearance and behavior," explained as "key ingredients of a positive learning environment in which student safety and achievement are the highest priorities."[3] *Id.* In addition to listing

---

[2] The Tennessee Code also sets forth a duty of the local board of education to "manage and control all public schools established or that may be established under its jurisdiction." T.C.A. § 49-2-203(a)(2).

[3] The Policy outlines the following forms of acceptable and unacceptable standard school attire:

Acceptable attire:

- Pants, shorts, capri pants, skirts, skorts or jumpers in the colors of navy blue, black or any shade of khaki, straight-legged or boot-cut;
- Shirts with short or long sleeves and a collar (polo, dress-style with or without buttons, or turtleneck), a single blazer, suit jacket, vest, sweater, or cardigan in the solid colors of white or navy blue;
- All pants, shorts, skirts and skorts must be worn at the waist, and those with belt loops must be worn with a belt. Shorts, jumpers, dresses, skirts or skorts must extend below the fingertip;
- All shirts should be properly buttoned and tucked inside pants, shorts, skorts or skirts; and
- School logos of any size.

Unacceptable attire:

- Writing on clothing (except logos or manufacturer trademarks which may be no larger than two inches);
- Logos or manufacturers' trademarks with writing or images of substances that are illegal for teens (i.e., drugs, alcohol, or tobacco products) or are otherwise offensive, lewd, indecent, vulgar, obscene, profane, gang-related or constitute racial or ethnic slurs may not be worn;
- Denim jeans of any color, "cargo" shorts or pants, and hooded sweatshirts;
- Blouses or shirts without buttons along the front opening;
- Outerwear such as raincoats, windbreakers and cold-weather jackets and coats;
- Torn and/or see-through clothing;
- Visible tattoos that display drugs, alcohol or tobacco products, or gang- or sex-related words or images;

acceptable and unacceptable forms of school attire, the Policy provides an opportunity for students to request an exemption from the Policy if their bona fide religious beliefs, medical conditions or disabilities require them to wear special clothing not in compliance with the Policy.[4]

1. FIRST AMENDMENT: FREE SPEECH

The First Amendment to the United States Constitution states, in part: "Congress shall make no law abridging the freedom of speech...."[5] U.S. CONST. amend. I. Similarly, Article 1, Section 19 of the Tennessee Constitution states, in part: "The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." TENN. CONST. art. 1, § 19; *State v. Marshall,* 859 S.W.2d 289, 291 (Tenn. 1993), *aff'd* 859 S.W.2d 289 (1993)("This Court is of the opinion that the Tennessee constitutional provision assuring protection of speech and press...should be construed to have a scope at least as broad as that afforded those freedoms by the First Amendment of the United States Constitution").

a. STUDENT ATTIRE IS NOT PROTECTED SPEECH

To qualify for free speech protection, a plaintiff must show that student attire may properly be considered "speech" and not "conduct." This is because "the

---

- Chains, spiked accessories, belt buckles with concealed weapons, and belts may not hang down as a "tail" from the belt loop;
- Head coverings such as bandanas, scarves, sweatbands, caps, do-rags, or hairnets; and
- Clothing that is more than one size smaller or one size larger than the student's actual clothing size. Pants, shorts, capri pants, skorts or skirts must fit at the waist and must not sag.

[4] The Policy states: "Schools will provide reasonable accommodation to students whose bona fide religious belief, medical condition or disability requires special clothing." The procedure for requesting an accommodation is as follows: "(1) Parents must obtain a copy of this policy and an exemption form from their school or the Customer Service Center. The exemption form must be completed by the parent and returned to the school; (2) The principal of the school will review the exemption request. The parent will be notified in writing of the status of the request within 10 days; (3) To appeal, the parent may request a meeting with the principal. Based upon the outcome of that meeting, the principal will notify the parent in writing of the status of the request within five days; (4) A further appeal may be made to the Director of Schools pursuant to DSOP 0110." Further, the Policy states: "District or campus personnel will not discriminate against any student who has been exempted from the mandatory use of Standard School Attire because of objections based on bona fide religious, medical or disability needs." *MNPS Standards School Attire Policy,* Attachment A.

[5] The First Amendment is applicable to the States by incorporation under the Fourteenth Amendment. *Employment Div., Oregon Dep't of Human Resources v. Smith,* 494 U.S. 872, 876-77, 110 S.Ct. 1595 (1990).

protections of the First Amendment do not generally apply to conduct in and of itself." *Blau v. Fort Thomas Public Sch. District,* 401 F.3d 381, 388 (6th Cir. 2005). The U.S. Supreme Court has determined that conduct or expression must be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Spence v. Washington,* 418 U.S. 405, 409, 94 S.Ct. 2727 (1974). In cases where conduct was protected as speech, "an intent to convey a particularized message was present, and ... the likelihood was great that the message would be understood by those who viewed it." *Id.* at 410-411. The burden of proving such intent and understanding is on the plaintiff; mere "vague and attenuated notions of expression" will not warrant First Amendment protections. *Blau,* 401 F.3d at 390. For example, the *Blau* court found the plaintiff's testimony insufficient to invoke First Amendment protection because she did not intend to convey a particular message with her clothes, but wished only to wear clothes that looked nice on her and made her feel good. *Id.*; citing *Zalewska v. County of Sullivan,* 316 F.3d 314, 320 (2d Cir. 2003)(the act of wearing a skirt was not "conduct" under the First Amendment because "a person's choice of dress or appearance in an ordinary context does not possess the communicative elements necessary to be considered speech-like conduct entitled to First Amendment protection"); *Stephenson v. Davenport Cmty. Sch. Dist.,* 110 F.3d 1303, 1307 n. 4 (8th Cir. 1997)(student's tattoo did not amount to "conduct" under the First Amendment because it was "nothing more than self-expression"); *Bivens v. Albequerque Public Schools,* 899 F.Supp. 556, 560-561 (D.N.M. 1995)(student's wearing of sagging pants did not amount to constitutionally protected speech). Based on the majority of the cases, it is the opinion of the Department of Law that a court is likely to hold that the Policy does not regulate speech and is not protected by the First Amendment.

One court, however, has held that student attire may constitute pure speech when it bears printed language, and/or demonstrates group affiliation by indicating ethnicity, social class, religion, political affiliation, or other symbols signifying group or viewpoint association. *Jacobs v. Clark County Sch. District, et al.,* 373 F.Supp.2d 1162, 1172 (D.Nev. 2005). The *Jacobs* court also held that a student's "refusal to comply with the uniform requirement on the basis of religious and moral objection constitute[d]...expressive conduct within the ambit of the First Amendment." *Id.* at 1173. In so finding, the court likened a student's refusal to abide by the uniform policy to the issue presented in the Supreme Court case of *Wooley v. Maynard,* in which a New Hampshire woman objected to the State printing its slogan, "Live Free or Die," on her license plate. *Id.,* citing *Wooley v. Maynard,* 430 U.S. 705, 97 S.Ct. 1428 (1977). Like the *Wooley* Court, the *Jacobs* court found the rights protected by the First Amendment "include both the right to speak freely and the right to refrain from speaking at all." *Id.*, citing *Wooley,* 430 U.S. at 714. Accordingly, while the weight of authority would likely lead a court to find otherwise, it is possible a court may find

that a student's choice of attire constitutes conduct protected by the First Amendment.

b. POLICY IS CONSTITUTIONAL UNDER O'BRIEN TEST

If a court determines a student's choice of attire is a form of protected speech, then the constitutionality of the Policy will be considered. The United States Supreme Court has held that "when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important government interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien,* 391 U.S. 367, 376, 88 S.Ct. 1673 (1968). Courts generally apply the test as set forth in *O'Brien* to analyze regulation of content-neutral expressive conduct, such as school attire. Under this test, regulation will be upheld if it: (1) is unrelated to the suppression of expression; (2) furthers an important or substantial government interest; and (3) does not burden more speech than necessary to further a substantial government interest. See *Blau,* 401 F.3d at 391 and *Jacobs,* 373 F.Supp.2d at 1181; citing *O'Brien,* 391 U.S. 367, 376-77. For the reasons set forth below, it is the opinion of the Department of Law that the Policy will satisfy each prong of the *O'Brien* test.

First, in analyzing whether a public school board regulation suppresses student expression, courts are reluctant to second-guess the stated purpose of a regulation and, generally, "will not consider whether the regulations are wise or expedient, but merely whether they are a reasonable exercise of the power and discretion of the board." *Jacobs,* 373 F.Supp.2d at 1178, citing *Pugsley v. Sellmeyer,* 250 S.W. 538, 539 (Ark. 1923). As stated in *King v. Saddleback Jr. College District,* a court may disagree with the professional judgment of a school board "but it should not take over operation of their schools." *King v. Saddleback Jr. College District,* 445 F.2d 932, 940 (9th Cir. 1971), *cert. denied,* 404 U.S. 979, 92 S.Ct. 342 (1971); citing *Epperson v. Arkansas,* 393 U.S. 97, 104, 89 S.Ct. 266 (1968). Here, the stated purpose of the Policy is to further the Board's commitment "to providing a safe and secure school environment." *MNPS Standard School Attire Policy,* Attachment A. The Board considers its Policy "an effective strategy to promote enhanced student appearance and behavior, which are key ingredients of a positive learning environment in which student safety and achievement are the highest priorities." *Id.* Like the policy in *Blau,* the Policy generally "does not regulate any particular viewpoint, but merely regulates the types of clothes that students may wear."[6] *Blau,* 401 F.3d at 391. Further, the Policy's

[6] While a plaintiff may argue the school logo regulation is a content-based regulation because it allows for school logos of any size but prohibits non-school logos larger than two inches, a court will likely find such a distinction insufficient to classify the regulation as unconstitutionally content-based. *Jacobs,* 373 F.Supp.2d at 1184("[a]ssuming, *arguendo,* that wearing a piece of clothing bearing the school logo constitutes 'speech,'" the exception for large school logos is sustained on health and safety bases as allowing for quick identification of who is and who is not a student of the school).

objectives are similar to the objectives of the policy analyzed in *Blau* that the court classified as "First Amendment-benign." *Id.* It is the opinion of the Department of Law that because the Policy is unrelated to the suppression of expression, it will likely pass the first prong of the *O'Brien* test.

Second, the Policy furthers a substantial government interest, as the Policy's objectives of student safety and achievement are analogous to other schools' policy objectives found to constitute substantial government interests. For instance, the Sixth Circuit found the following objectives clearly further an important government interest: "focusing attention on learning..., enhancing school safety, promoting good behavior, reducing discipline problems, [and] improving test scores." *Blau,* 401 F.3d at 391; see also, *Canady v. Bossier Parish Sch. Board,* 240 F.3d 437, 443 (5th Cir. 2001)(increasing test scores and reducing disciplinary problems are important and substantial government interests); *Jacobs,* 373 F.Supp.2d at 1186-87 ("improving the educational process" is unrelated to the suppression of student expression); *Ferrell v. Dallas Ind. Sch. Dist.,* 392 F.2d 697, 703 (5th Cir. 1968), *cert. denied,* 393 U.S. 856, 89 S.Ct. 98 (1968)(the school's authority in maintaining an effective and efficient school system found to be "compelling" and "of paramount importance"). It is the opinion of the Department of Law that the Policy will likely pass the second prong of the *O'Brien* test because it furthers a substantial government interest.

Third, the Policy does not suppress substantially more expressive conduct or impose greater restrictions on student speech than necessary to further the Board's interests. Again, like the policy found constitutional in *Blau,* the Policy applies only during school hours and students "remain free to dress as they (and their parents) wish in the evenings and on the weekends." *Blau,* 401 F.3d at 392. Further, students "have other outlets of expression during school hours" despite being required to wear standard attire. *Id.* Like the policy found constitutional in *Jacobs,* the Policy "allow[s] for a range of clothing and color options."[7] *Jacobs,* 373 F.Supp.2d at 1187 ("students may continue to express themselves through other and traditional methods of communication throughout the school day; only their ability to communicate through their choice of clothing is incidentally restricted"). It is the opinion of the

[7] In two cases involving severely restrictive school policies regulating student hair length and grooming, the Sixth Circuit Court of Appeals upheld such regulations as constitutional. *Gfell v. Rickleman,* 441 F.2d 444 (6th Cir. 1971); *Jackson v. Dorrier,* 424 F.2d 213 (6th Cir. 1970). Such holdings are significant to the analysis of the Policy, because, as stated by the *Bivens* court, "hair length, in contrast to sagging pants, is a relatively permanent condition that stays with a student after he or she exits the schoolhouse gates." *Bivens,* 899 F.Supp. at 560 n. 7. If a school policy regulating student hair length – a relatively permanent aspect of a student's individuality – is constitutional, it is likely that a policy regulating clothing, which students can easily change after school and on weekends, will be upheld. Therefore, even if student attire is found to constitute constitutionally protected speech, it is the opinion of the Department of Law that a court is likely to find that the Policy is constitutional as the Policy satisfies all three prongs of the *O'Brien* test.

Department of Law that the Policy will likely pass the third prong of the *O'Brien* test as the Policy is no greater than is essential to the furtherance of the Board's substantial governmental interests.

c. POLICY IS NOT OVERBROAD

If a court determines a student's choice of attire is a form of protected speech, then the constitutionality of the Policy may be analyzed to determine whether it is overly broad such "that the sweep of the prohibitions may bring within their ambit speech, performance, or expression protected by the First Amendment." *City of Chattanooga v. McCoy*, 645 S.W.2d 400, 401 (Tenn. 1983). Where conduct and not just speech is involved, a court will require "that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep" before it will be held unconstitutional. *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908 (1973)(State statute regulating political activity by state employees was valid.); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 525-26 (Tenn. 1993)(Display statute was not unconstitutionally overbroad as interpreted). If a facial challenge due to overbreadth is made to the Policy, a student would need to "establish that no set of circumstances exist under which the Act would be valid."[8] *Id.* It is the opinion of the Department of Law that it is unlikely that a court would determine that the Policy is overbroad.

2. DUE PROCESS

The Fourteenth Amendment of the United States Constitution and Article I, Section 8, of the Tennessee Constitution contain synonymous Due Process clauses. U.S. CONST. amend. XIV; TENN. CONST. art. 1, § 8; *State ex rel. Anglin v. Mitchell,* 596 S.W.2d 779, 786 (Tenn. 1980)(principles of the Due Process, or law of the land, clause under the Tennessee Constitution are identical to the principles of the Due Process clause of the United States Constitution). These Due Process clauses are read to have both procedural protections and substantive law protections.

> Due process under the state and federal constitutions encompasses both procedural and substantive protections. The most basic principle underpinning procedural due process is that individuals be given an

[8] "It is well recognized, however, that '[a] facial challenge to a legislative Act is ... the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exist under which the Act would be valid.' ... Because of the wide-reaching effects of striking down a statute on its face, the overbreadth doctrine has been characterized as 'strong medicine' which should be employed 'with hesitation, and then only as a last resort.'" *Davis-Kidd Booksellers, Inc.,* 866 S.W. 2d at 525. (internal citations omitted).

> opportunity to have their legal claims heard at a meaningful time and in a meaningful manner. In contrast, substantive due process limits oppressive government action, such as deprivations of fundamental rights like the right to marry, have children, make child rearing decisions, determine child custody, and maintain bodily integrity. Substantive due process claims may be divided into two categories: (1) deprivations of a particular constitutional guarantee and (2) actions by the government which are "arbitrary, or conscience shocking in a constitutional sense." In short, substantive due process bars certain government action regardless of the fairness of the procedures used to implement them. (internal citations omitted).

Lynch v. City of Jellico, 205 S.W.3d 384, 391-92 (Tenn. 2006)

> [A] substantive due process claim is based on the exercise of power without reasonable justification. Where government action does not deprive a plaintiff of a particular constitutional guarantee, that action will be upheld against a substantive due process challenge if it is rationally related to a legitimate state interest. *Valot v. Southeast Local School Dist. Bd. of Educ.,* 107 F.3d 1220, 1228 (6th Cir. 1997), *cert. denied,* 522 U.S. 861, 118 S.Ct. 164 (1997).

Consolidated Waste Systems, LLC v. Metropolitan Government of Nashville and Davidson County, 2005 WL 1541860 *5 (Tenn.Ct.App. 2005)(June 30, 2005); see also *Troxel v. Granville,* 530 U.S. 57, 65, 120 S.Ct. 2054 (2000). If the governmental action deprives a plaintiff of a particular constitutional guarantee – certain fundamental rights – the courts provide heightened protection by applying a "strict scrutiny" test. A rational basis test is applied in cases involving rights that do not rise to the level of fundamental rights. *Seal v. Morgan,* 229 F.3d 567, 575 (6th Cir. 2000); *Jacobs,* 373 F.Supp.2d at 1194 ("where parents' Due Process interest in directing the upbringing and education of their children conflict with the state's interest in providing and regulating a state public education system, the states' regulation is appropriately considered under rational basis review"); citing *Littlefield,* 268 F.3d at 290-91; see *Immediato v. Rye Neck Sch. Dist.,* 73 F.3d 454, 461-62 (2d Cir. 1996), *cert. denied* 519 U.S. 813, 117 S.Ct. 60 (1996)(parents' right to direct their children's education is subject only to rational basis review). A law will be upheld under a rational basis test if it is "rationally related to a legitimate state interest." *Ohio Ass'n of Independent Schools v. Goff,* 92 F.3d 419, 423 (6th Cir. 1996), *cert. denied* 520 U.S. 1104, 117 S.Ct. 1107 (1997); citing *Lyng v. International Union,* 485 U.S. 360, 370, 108 S.Ct. 1184 (1988).

a. PARENTS' DUE PROCESS

Among the fundamental rights to which strict scrutiny is applied is the "right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville,* 530 U.S. at 65. However, as the court stated in *Blau,* "[w]hile parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child." *Blau,* 401 F.3d at 395; see *Littlefield v. Forney Independent Sch. District,* 108 F.Supp.2d 681, *aff'd* 268 F.3d 275, 291 (5th Cir. 2001)("While [p]arents may have a fundamental right in the upbringing and education of their children, this right does not cover [parents'] objection to a public school Uniform Policy"). Therefore, concluded the *Blau* court, parents "do[ ] not have a fundamental right to exempt [their children] from the school dress code." *Id.* at 396. It is the opinion of the Department of Law that a court is likely to find that parents do not have a fundamental right to control the way their children's school regulates school attire and, if challenged under the Due Process clause, a court will not apply a "strict scrutiny" test, but apply a rational basis test, instead. Further, it is the opinion of the Department of Law that the Policy will withstand rational basis review. The Policy is rationally related to the Board's legitimate interest in increasing student achievement and enhancing student safety. *MNPS Standard School Attire Policy,* Attachment A; *Jacobs,* 373 F.Supp.2d at 1194 (the school's policy satisfies the requirement of the rational basis test); *Jackson,* 424 F.2d at 217 (hair length regulation was rationally related to school's interest in preventing disruptions and disturbances in the classroom, and interference with the educational process); *Littlefield,* 268 F.3d at 291 ("the Uniform Policy is rationally related to the state's interest in fostering the education of its children and furthering the legitimate goals of improving student safety").

b. STUDENTS' DUE PROCESS

Generally, students have "a property interest in those benefits derived from their education and a liberty interest in their reputation, both of which implicate Due Process rights." *Jacobs,* 373 F.Supp.2d at 1191; citing *Goss v. Lopez,* 419 U.S. 565, 95 S.Ct. 729 (1975)(Ohio statute mandating a hearing in conjunction with school suspension created a property interest, and a liberty interest resulted from the state's threatened injury to the student's good name, reputation, honor, or integrity). However, the *Blau* court held this property right is not so extensive to "include the wearing of dungarees." *Blau,* 401 F.3d at 393; see *Gfell,* 441 F.2d at 446 (no student property interest found in hair length). The Sixth Circuit does not consider students' decisions to choose the clothes they wear to school a "benefit derived from education," and, therefore, students do not have a property interest with respect to their choice of school attire. *Blau,* 401 F.3d at 394-95.

To claim a liberty interest, student plaintiffs must prove their interest in choosing the way to dress at school rises to the level of fundamental significance. *Littlefield,* 108 F.Supp.2d at 695; citing *Karr v. Schmidt,* 460 F.2d 609, 615 (5th Cir. 1972), *cert. denied,* 409 U.S. 989, 93 S.Ct. 307 (a student's asserted freedom to wear his hair as he pleases "does not rise to the level of fundamental significance which would warrant our recognition of such a substantive constitutional right"). In *Jacobs,* one student plaintiff tried unsuccessfully to claim such an interest by arguing that his "educational record has been tarnished...by [the discipline received for] his failure to abide by the uniform requirement." *Jacobs,* 373 F.Supp.2d at 1193. That argument is likely to fail if the Policy is challenged on that basis because the Policy provides a specific disciplinary notice and hearing provision that serves to limit the imposition of discipline until the occurrence of repeat offenses.[9] *Id.; Gfell,* 441 F.2d at 446 ("regulations which deal generally with dress and the like are a part of the disciplinary process which is necessary in maintaining a balance as between the rights of individual students and the rights of the whole in the functioning of the schools"); *MNPS Standard School Attire Policy,* Attachment A.

Accordingly, it is the opinion of the Department of Law that a court will likely find that students do not have either a fundamental property right or a fundamental liberty right to choose the attire they wear to school. Therefore, a court will review the property and privacy rights under a rational basis review rather than a strict scrutiny review. It is also the opinion of the Department of Law that the Policy will withstand rational basis review, as the Policy is rationally related to the Board's legitimate interest in increasing student achievement and enhancing student safety. *MNPS Standard School Attire Policy,* Attachment A; *Seal v. Morgan,* 229 F.3d 567, 575 (6th Cir. 2000); *Jacobs,* 373 F.Supp.2d at 1194.

Students have a procedural due process right to have a policy that is clear in order to give notice of the conduct that is prohibited and prevents arbitrary or discriminatory enforcement.[10] *City of Chicago v. Morales,* 527 U.S. 41, 56, 119 S.Ct. 1849, 1859 (1999). In reviewing a criminal statute on trespass and disorderly conduct, the Tennessee Supreme Court stated:

> The vagueness doctrine does not invalidate every statute which a reviewing court believes could have been drafted with greater precision, especially in light of the inherent vagueness of many English words. ...

---

[9] The Policy states that subsequent and repeated infractions beyond the third offense "will be treated as disruptive behavior and/or defiance of school authority." Such violations may result in out of school suspension as prescribed by the Student Code of Conduct.

[10] "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." An ordinance is unconstitutionally vague when a person of "common intelligence must necessarily guess at its meaning." (internal citations omitted). *Morales,* 527 U.S. at 56.

> Nor does the fact that a statute like § 39-3-1201, applicable in a wide variety of situations, must necessarily use words of general meaning, because greater precision is both impractical and difficult, render that statute unconstitutionally vague. ... It is the duty of this Court to adopt a construction which will sustain a statute and avoid constitutional conflict if its recitation permits such a construction. (internal citations omitted).

State v. Lyons, 802 S.W.2d 590, 592 (Tenn. 1990). It is the opinion of the Department of Law that a court is likely to find the Policy will pass scrutiny under a vagueness challenge and find it constitutional.

4. EQUAL PROTECTION

The Fourteenth Amendment of the United States Constitution and Article XI, Section 8, of the Tennessee Constitution both contain Equal Protection clauses, and each prohibits the Board from denying any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV; TENN. CONST. art. XI, § 8; *Tennessee Small Sch. Sys. v. McWherter,* 851 S.W.2d 139, 152 (Tenn. 1993)(The Tennessee Constitution's Equal Protection clause confers essentially the same protection as the Equal Protection clause of the U.S. Constitution). To provide equal protection is to provide similarly-situated people similar treatment under the law. *Mascari v. Int'l Broth. of Teamsters,* 215 S.W.2d 779, 781 (Tenn. 1949), *cert. dismissed* 335 U.S. 907, 69 S.Ct. 410 (1949). To prevail on an equal protection claim, plaintiffs must prove they are being favored or disfavored as compared to persons of a different class or that a law is being selectively enforced against one class of persons. *Jacobs,* 373 F.Supp.2d at 1190. The level of scrutiny applied to an equal protection claim depends on whether the plaintiff belongs to a protected class of persons. *Id.* In *Jacobs,* the court found that students are "not recognized as a suspect or otherwise specially-protected class," and, therefore, plaintiffs' equal protection claims were evaluated using a rational basis test. *Id.*; citing *Vance v. Bradley,* 440 U.S. 93, 97, 99 S.Ct. 939 (1979)(the Court will not overturn a statute that does not burden a suspect class "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legitimate actions were irrational"); see also *Littlefield,* 108 F.Supp.2d 681, 709 (the court dismissed plaintiffs' equal protection claims after determining neither students nor parents constitute a class of persons eligible for equal protection).

Here, as in *Jacobs,* students are not a suspect class and the Policy does not make any distinction "between different classes of persons other than students subject to the uniform requirement and non-students that are not" subject to the uniform requirement. *Jacobs,* 373 F.Supp.2d at 1190. Further, like the policy found constitutional in *Jacobs,* the Policy is neutral and will be applied to all students, not

"selectively to certain individuals on the basis of their speech or any other distinguishing factor." *Jacobs,* 373 F.Supp.2d at 1190. Therefore, as "students" are not recognized as a suspect class of persons, a court would apply a rational basis review of an equal protection claim. *Id.* As stated above, the Board has a legitimate governmental reason for implementing its Policy that is rationally related to improving student achievement and ensuring student safety. *MNPS Standard School Attire Policy,* Attachment A. Accordingly, it is the opinion of the Department of Law that a court is likely to find that an equal protection challenge to the Policy will fail. *Jackson,* 424 F.2d at 218; *Gfell,* 441 F.2d at 447.

5. FIRST AMENDMENT: RELIGION - EXEMPTION PROVISION

The First Amendment to the United States Constitution states, in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise therof...."[11] U.S. CONST. amend. I. Offering the same protection is Article 1, Section 3 of the Tennessee Constitution, which states, in part: "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience...and that no preference shall ever be given, by law, to any religious establishment or mode of worship." TENN. CONST. art. 1, § 3. The same standards and principles used to interpret the First Amendment to the United States Constitution are applied to interpret Article 1, Section 3 of the Tennessee Constitution. *Carden v. Bland,* 288 S.W.2d 718, 721 (Tenn. 1956) (The Tennessee Constitution Freedom of Worship provision and First Amendment Free Exercise clause are "practically synonymous"). Should a plaintiff challenge the Policy based on religion, the challenge is likely to be brought under either the Free Exercise Clause or the Establishment Clause of the First Amendment.

The Free Exercise of religion clause provides absolute protection of religious beliefs and, to a limited extent, extends to conduct based on religious beliefs. *Employment Div., Dept. of Human Resources of Oregon v. Smith,* 494 U.S. 872, 879-80, 110 S.Ct. 1595 (1990)("[O]ur decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'"); citing *United States v. Lee,* 455 U.S. 252, 263, n. 3, 102 S.Ct. 1051 (1982). In such cases, a rational basis test is applied to determine the validity of a neutral, generally applicable government regulation. *Smith,* 494 U.S. at 889. The Policy is facially neutral and generally applicable, as it applies to all students regardless of their religion. *MNPS Standard School Attire Policy,* Attachment A. Further, the Policy was not enacted to inhibit any religious beliefs and only mentions religion in terms of the exemption provision in

[11] The First Amendment is applicable to the States by incorporation under the Fourteenth Amendment. *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900 (1940).

"an attempt to accommodate, not hinder, the religious beliefs of the students and their parents." *Littlefield,* 108 F.Supp.2d at 704. Like the policy in *Littlefield,* the Policy "was not adopted 'because of' [the students'] beliefs, but 'in spite of' them." *Id.* It is unlikely that a court would find that the Policy impacts a student's religious practices in any significant manner. *Smith,* 494 U.S. at 878-879 (The Supreme Court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate"). Additionally, it is unlikely that a court would find the Policy unconstitutional because students must explain their reasons for applying for a religious exemption.[12] "[A] process to determine the sincerity of a religious objection, while fraught with difficulty, is necessary to separate sincere beliefs from fraudulent beliefs." *Littlefield,* 268 F.3d at 293; citing *Patrick v. LeFevre,* 745 F.2d 153, 157 (2d Cir. 1984)(a sincerity analysis "provides a rational means of differentiating between those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud"). It is the opinion of the Department of Law that a court is likely to find that the Policy is rationally related to substantial government interests and, therefore, does not unconstitutionally infringe on students' right to the free exercise of religion.

The Establishment Clause of the First Amendment "prohibits government from appearing to take a position on questions of religious beliefs." *American Civil Liberties Union of Ohio Foundation, Inc., v. Ashbrook,* 375 F.3d 484, 490 (6th Cir. 2004), *cert. denied* 545 U.S. 1152, 125 S.Ct. 2990 (2005); citing *County of Allegheny v. American Civil Liberties Union,* 492 U.S. 573, 593-94, 109 S.Ct. 3086 (1989). A three-part test is used to determine whether a government action violates the Establishment Clause: (1) whether the regulation has a secular purpose; (2) whether the regulation's primary effect neither enhances nor inhibits religion; and (3) whether the regulation fosters excessive entanglement with religion. *Id.,* citing *Lemon v. Kurtzman,* 403 U.S. 602, 612-613, 91 S.Ct. 2105 (1971), *aff'd* 411 U.S. 192, 93 S.Ct. 1463 (1973). The Policy passes the test set forth in *Lemon.* First, the Policy is secular in purpose, as the purpose of the Policy is to improve student achievement and enhance student safety, not to further or restrain any religious beliefs. *MNPS Standard School Attire Policy,* Attachment A. Second, the Policy applies without regard to students' religious beliefs and, therefore, does not enhance or inhibit those beliefs. *Id.* Lastly, the Policy does not foster excessive entanglement with religion because the schools become involved in religious matters if and only if a student requests an exemption. Such a tangential relationship to students' religious beliefs is not likely to be found "excessive." *Littlefield,* 268 F.3d at 295. Therefore, it is the opinion of the Department of Law that a court is likely to find that the Policy's religious exemption provision does not violate the Establishment Clause.

---

[12] The full procedure for determining whether an exemption is granted has not been provided or reviewed by the Department of Law. Such a procedure should be a ministerial act and not grant unfettered discretion to the decision makers.

CONCLUSION

The Metropolitan Nashville Public Schools Standard School Attire Policy will likely withstand constitutional scrutiny regardless of whether a free speech, due process, equal protection, or freedom of religion claim is pursued. Both the Supreme Court and the Sixth Circuit Court of Appeals have consistently held that local school boards are afforded great deference in regulating student conduct and are well within their bounds of authority to implement a student dress code to further interests such as improving student achievement and ensuring student safety. The Policy furthers those objectives without infringing on the constitutional rights of students or their parents. Should the Policy be challenged as infringing on student or parental rights, it is the opinion of the Department of Law that a court is likely to find that the Policy is constitutional as a legitimate exercise of local school board power and was promulgated with the intent of furthering its stated objectives.

THE DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY

Megan A. Landreth
Assistant Metropolitan Attorney

Mary E. Johnston
Assistant Metropolitan Attorney

APPROVED BY:

Sue B. Cain
Deputy Director of Law
(Acting Director)

cc: Mayor Bill Purcell
Vice-Mayor Howard Gentry