CASE NO. 20-1001 (L)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BONNIE PELTIER, as Guardian of A.P., a minor child; ERIKA BOOTH, as Guardian of I.B., a minor child; and PATRICIA BROWN, as Guardian of K.B., a minor child,

Plaintiffs - Appellees, Cross-Appellants

v.

CHARTER DAY SCHOOL, INC.; ROBERT P. SPENCER; CHAD ADAMS; SUZANNE WEST; COLLEEN COMBS; TED BODENSCHATZ; and MELISSA GOTT in their capacities as members of the Board of Trustees of Charter Day School, Inc.,

Defendants - Appellants, Cross-Appellees

and

THE ROGER BACON ACADEMY, INC.,

Defendant - Cross-Appellee

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

APPELLANTS' RESPONSE AND REPLY BRIEF

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1. Whether the district court properly accorded *Chevron* deference to the Department of Education's authoritative view that Title IX does not prohibit sex-differentiated school dress codes.

2. Whether, even apart from the binding regulation, Plaintiffs failed to adduce sufficient evidence showing that the Uniform Policy disproportionately burdens female students and thus amounts to discrimination under Title IX, or in the alternative, whether fact issues prevent summary judgment on that question.

3. Whether Roger Bacon Academy qualifies as a state actor or is subject to Title IX despite having no formal relationship with the State and receiving no direct federal funding.

SUMMARY OF THE ARGUMENT

Our Constitution draws a critical dividing line between state action and private action. Only state action can violate Equal Protection. Regardless of whether one thinks that CDS Inc.'s Uniform Policy is unwise, unfair, or even discriminatory, it is not the policy *of North Carolina*. And therefore it cannot be unconstitutional. All agree the Uniform Policy was formulated by a private nonprofit corporation without input or influence from the State. And it is self-evident that education is not the sort of the historical and *exclusive* state function that is definitionally state action. Thus, as the Ninth Circuit has held, private corporations are not state actors even when they operate "public" charter schools. The constitutional judgment should be reversed without reaching the merits.

On the merits, it remains undisputed that American law has long permitted sex-specific dress codes that equally burden both sexes. Title VII has always allowed them in the workplace. And federal agencies enforcing Title IX across Democratic and Republican administrations have consistently allowed them in the school setting. The current EEOC enforcement manual—again, maintained across all recent administrations—specifically allows a dress code like the one at issue here. Plaintiffs do not dispute any of this. Nor, remarkably, do they bother to defend the district court's ruling that the Uniform Policy violates the governing unequal-burden framework. Plaintiffs argue instead that the Uniform Policy fails heightened

scrutiny under the Equal Protection Clause. But they do not cite *a single case* applying heightened scrutiny to a comprehensive dress code under the Equal Protection Clause, which is hardly surprising given that the civil rights statutes banning sex discrimination allow them. A policy is not discriminatory merely because it treats the sexes differently; it must treat one sex less favorably than the other to be unlawful.

Plaintiffs attack the Title IX regulation, to no avail. It is a reasonable interpretation of an ambiguous statute that is silent on dress codes, issued after full notice-and-comment procedures, and consistently maintained by twenty-three federal agencies for nearly forty years. But Plaintiffs' Title IX claim fails even if the regulation were disregarded. Plaintiffs apparently believe that the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), about LGBT discrimination somehow overrules decades of American law allowing dress codes, even though this case does not involve LGBT claims and even though *Bostock* expressly disclaims any intent to upset dress-code law. Not so. Chief Judge Schroeder's 2006 *Jesperson* opinion for the *en banc* Ninth Circuit, which crystallizes the established unequal-burden test, correctly states the governing law for claims that dress codes constitute sex discrimination. And Plaintiffs barely attempt to satisfy its framework, refusing to holistically evaluate the Uniform Policy's

requirements on both boys and girls and glossing over numerous factual disputes that, at minimum, preclude summary judgment in their favor.

Plaintiffs ask the Court to break new ground—(1) to be the first circuit court to hold that nonprofit charter corporations are state actors; (2) to be the first court to apply heightened scrutiny to a comprehensive, sex-specific dress code; and (3) to be the first court to disregard the Title IX regulation allowing such dress codes. Plaintiffs provide scant justification for any of these novel rulings, while their arguments would have far-ranging consequences, including diminishing the independence and innovation of charter schools and establishing federal judges as school superintendents charged with reviewing a flood of dress-code lawsuits that would follow in Plaintiffs' wake. Defendants respectfully urge the Court to decline Plaintiffs' invitation.

ARGUMENT

I. The district court erred in granting Plaintiffs summary judgment on their equal-protection claim.

Plaintiffs put the cart before the horse on their equal-protection claim. They first assume that the Equal Protection Clause applies and spend nearly twenty pages arguing that the Uniform Policy constitutes unconstitutional discrimination. Only then do Plaintiffs address the *threshold* issue of whether Defendants' promulgation of the Uniform Policy constitutes state action. Because it does not, the analysis ends at that preliminary step. And even if that were otherwise, the Uniform Policy passes

muster on the merits as well, as it satisfies the governing unequal-burden standard and would survive a heightened-scrutiny analysis if that applied.

A. CDS, Inc. and its Board's promulgation of the Uniform Policy does not constitute state action.

Plaintiffs agree with Defendants on the legal framework that governs whether Defendants are state actors:

> State action exists when the state "has exercised coercive power or has provided such significant encouragement that the action must in law be deemed to be that of the state"; or "when the private entity has exercised powers that are traditionally the exclusive prerogative of the state."

Appellees' Br. 50 (quoting *Mentavlos v. Anderson*, 249 F.3d 301, 313 (4th Cir. 2001)); *see* Appellants' Br. 18-22. Yet Plaintiffs fail to tether most of their arguments to those two hallmarks of state action. Because North Carolina did not coerce or encourage CDS, Inc. to promulgate its Uniform Policy, and because education is not a historically exclusive state prerogative, the state-action answer is clear under this Court's precedent.[1]

[1] The parties have focused on these two elements because, as the district court recognized, they are typically central in cases like *Rendell-Baker* and *Caviness* where a state contracts with a private corporation to provide education. Defendants fully respond to Plaintiffs' discussion of other state-action factors as well.

1. Plaintiffs cannot overcome the binding precedent and undisputed facts that establish that neither of the two hallmarks of state action is present here.

Despite Plaintiffs' lip service to the governing standard, Defendants' arguments that education is not a "traditional and exclusive state function" and that the Uniform Policy was not "compelled" by "extensive regulation" stand largely unchallenged. Appellants' Br. 22-36. Plaintiffs' only sustained effort on these dispositive issues is their brief attempt to distinguish *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), and the other analogous case law from the education field that precludes their constitutional claim. Appellees' Br. 57-58. But they come up short.

a. *Rendell-Baker* held that a private entity operating a free, publicly funded school was not acting as a state actor when it fired a teacher. Appellants' Br. 22-24. That holding consisted of two key parts: (1) that providing educational services is not "a function [that] has been 'traditionally the exclusive prerogative of the State,'" *Rendell-Baker*, 457 U.S. at 842, and (2) that the State's general regulations concerning personnel policies were "not sufficient to make a decision to discharge, made by private management, state action," *id.* at 841. The circuits, including this Court, have applied *Rendell-Baker* to reject state-actor status in similar educational contexts. *See, e.g.*, *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3 806 (9th Cir. 2010); *Logiodice v. Trs. of Maine Cent. Inst.*, 296 F.3d 22, 26 (1st Cir. 2002); *Mentavlos*, 249 F.3d at 314.

Plaintiffs try to distinguish *Rendell-Baker* in three ways that have little to do with the key attributes of state action. First, they claim the school in *Rendell-Baker* was "private" because "no state law designated it as 'public,' and the government referred to the school's operator as a 'contractor.'" Appellees' Br. 57. But, as *Rendell-Baker*'s silence on the matter indicates, the statutory label of "public" or "private" carries little weight. *See Caviness*, 590 F.3d at 813 (operator of "public" charter school not state actor); *accord Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 & n.7 (1974) (statutory designation as "public utility" insufficient); JA 2731 (district court: "public" label does not automatically mean defendants are "state actor[s] for all purposes"). And the fact that the school in *Rendell-Baker* was a government contractor aligns it with this case because CDS, Inc. is likewise a government contractor that operates a school under a charter contract with the State. *See* N.C. Gen. Stat. § 115C-218.15(b)-(c) ("A charter school shall be operated by a private nonprofit corporation. . . . A charter school shall operate under the written charter signed by the State Board and the applicant."); Appellants' Br. 23-25. Here, just as in *Rendell-Baker*, a private entity operates a publicly funded school pursuant to a contract with the State, free from state compulsion of the challenged policy.

Second, Plaintiffs argue that the *Rendell-Baker* school did not provide "free public education to students in general, but rather served only a sub-population of students" who had been referred to the school after misbehavior in public schools.

Appellees' Br. 57. That distinction makes no difference for state-actor purposes, for the court's analysis asks whether "the function performed has been traditionally the *exclusive* prerogative of the State." *Rendell-Baker*, 457 U.S. at 842 (emphasis in original). The answer to the question is the same whether one looks at special education or education more broadly. Education has been provided by private entities and parents, as well as the state, for centuries. *See* Appellants' Br. 25 (collecting cases holding education is not an exclusive public function); Civitas Br. 4-8.

Third, Plaintiffs note that the claim in *Rendell-Baker* (and *Caviness*) was employment-related rather than student-related. But, contrary to Plaintiffs' assertion, the court's analysis supports no distinction between "the school's provision of education to students" and its "status as an employer." Appellees' Br. 57. Indeed, in an *employment* case, the court focused on whether *the education provided to students* was an exclusive state function. *See Rendell-Baker*, 457 U.S. at 842 (holding that "the education of maladjusted high school students is a public function," but not "the exclusive province of the State"). And while the type of claim informs whether the specific action was "compelled" by "extensive regulation," it does so only in the sense that the Court examined regulations governing employment policies rather than those concerning dress codes. As explained in Defendants' opening brief (at 30-36), the State's nonexistent oversight

of charter schools' dress codes is even more attenuated than the government oversight of employment decisions in *Rendell-Baker* and *Caviness*.

On this point, Plaintiffs observe that North Carolina law "requires charter schools . . . to enact student codes of conduct." Appellees' Br. 55 (emphasis omitted) (citing N.C. Gen. Stat. § 115C-390.2(a)). But that vesting of broad discretion is the opposite of state compulsion of the challenged policy. Appellants' Br. 34-36. Indeed, Plaintiffs give away the game by conceding that "the statute does not *require* charter schools to adopt *dress codes* specifically." Appellees' Br. 55 (emphases in original). And it is undisputed that North Carolina does not instruct charter schools as to the content of dress codes. Much less did it coerce or influence CDS, Inc. to adopt the Uniform Policy in particular. There can be no plainer admission that the Uniform Policy is not "compelled" by "extensive regulation." *Rendell-Baker*, 457 U.S. at 841-42; *see Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (government must compel "specific conduct of which [plaintiffs] complain[]"); *Mentavlos*, 249 F.3d at 318 ("the choice" challenged by plaintiffs "must in law be deemed to be that of the State").

b. The First Circuit rejected many of the same arguments Plaintiffs raise in *Logiodice*. There, a Maine public-school district contracted with a private company to operate its *only* high school. 296 F.3d at 24-25. The arrangement, authorized by state law, stipulated that the school must "accept and educate all of

the school district's students" with public funding. *Id.* at 25. The student-plaintiff challenged a school disciplinary policy as a violation of due process. *Id.* at 25.

The First Circuit began its state-action analysis by applying the "public function" test. *Id.* at 26. The court emphasized that "where the party complained of is otherwise private, the function must be one '*exclusively* reserved to the State,'" *Id.* (emphasis in original). "Obviously, education is not and never has been a function reserved to the state," the court concluded. *Id.* The court then rejected plaintiff's attempt to distinguish *Rendell-Baker*'s holding from cases (1) brought by students, rather than teachers, and (2) where the school "provid[ed] a publicly funded education available to all students generally." *Id.* at 27. The First Circuit dismissed those arguments because "there is no indication that the Supreme Court had this kind of tailoring by adjectives in mind when it spoke of functions 'exclusively' provided by government." *Id.*; *see id.* ("[T]he Supreme Court's decision in *Rendell-Baker* did not encourage such a distinction.").

As for the "entwinement" theory of state action, *see Brentwood Academy v. Tennessee Secondary Schools Athletic Association*, 531 U.S. 288, 302 (2001), the First Circuit emphasized that "unlike the association in *Brentwood*, MCI is run by private trustees and not public officials." *Logiodice*, 296 F.3d at 28. "And looking to the particular activity sought to be classed as state action . . . —namely, the imposition of discipline on students—there is no entwinement" because the contract

entrusted disciplinary actions to the school's discretion, "subject only to an arguable obligation to comply with regulations governing the school district." *Id.* at 28.

Having concluded that neither the "public function" test nor the "entwinement" test demonstrated state action, the First Circuit declined an invitation to "creat[e] a new ad hoc exception" to state-actor doctrine for privately run schools with open enrollment and public funding. *Id.* at 29; *see id.* ("[C]reating new exceptions is usually the business of the Supreme Court . . . .").

The similarities between the two cases are striking. Like the school in *Logiodice*, Charter Day School provides free, public education and is run by a private entity (CDS, Inc.) with a wholly private governing board that operates the School pursuant to a state contract. As in *Logiodice*, the claim here concerns student complaints about school rules rather than an employment matter. And in both cases, there was minimal state regulation of the respective challenged actions and certainly no compulsion to adopt the challenged policy. *Logiodice* therefore provides a roadmap for faithfully following *Rendell-Baker* and rejecting Plaintiffs' arguments. Indeed, between *Logiodice* and *Caviness*, this Court would have to depart from materially indistinguishable decisions from two sister circuits to rule for Plaintiffs on the state-action question.

2. Plaintiffs' various arguments that are untethered from the two key hallmarks of state action do not change the result.

Instead of mounting a real effort to apply *Rendell-Baker* or advance arguments under the applicable state-action framework, Plaintiffs instead offer a smattering of contentions that are fatally flawed and largely irrelevant.

a. Plaintiffs begin with an argument that the State "expressly delegated" its "constitutional obligations to provide free public education and to promulgate policy governing student conduct" to CDS, Inc. Appellees' Br. 51-53, 56. But the delegation principle has been applied only where the State outsources a historical and exclusive state obligation. *E.g.*, *West v. Atkins*, 487 U.S. 42, 54-55 (1988) (medical care for prisoners). As *Rendell-Baker*, *Caviness*, and *Logiodice* attest, *West*'s narrow delegation doctrine has no application to a State's contracting with private entities to provide education to its students. Indeed, *Logiodice* rejected a similar delegation argument even though Maine contracted with the nonprofit to satisfy its obligation under its "Constitution and statutes to assure secondary education to all school-aged children." 296 F.3d at 29. The court distinguished *West* as a case where "the plaintiff was literally a prisoner of the state (and therefore a captive to whatever doctor the state provided)." *Id*. The court contrasted the student-plaintiff who "is not required to attend [the school]." *Id.* Even more so here: Plaintiffs can avoid their alleged injury by attending a traditional public school or a different charter school.

In any event, Plaintiffs are simply incorrect that North Carolina delegated its constitutional obligation to private entities. It is true that the North Carolina Constitution requires "a general and uniform system of free public schools." N.C. Const. art. IX, § 2. But Plaintiffs err in claiming that "[i]t was pursuant to [that] constitutional authority that the state later authorized the creation of charter schools via the Charter School Statute." Appellees' Br. 52. The session law that created the charter school system makes no mention of Article IX of the North Carolina Constitution, much less supports the notion that the Act was passed "pursuant to" that constitutional provision. *See* Charter Schools Act of 1996, 1996 N.C. Laws Ch. 731 § 2 (H.B. 955) (June 21, 1996). The State fulfils its constitutional obligation—without outsourcing—by maintaining traditional, state-run schools. Charter schools, by contrast, are separate by design from the "*uniform* system of free public schools" spoken of in the state constitution. *See* N.C. Gen. Stat. § 115C-218 (specifying that charter schools "operate independently of existing schools"—*i.e.*, the constitutionally mandated schools).

b. Plaintiffs next argue that charter-school operators are state actors for § 1983 purposes because the State allegedly considers them to be "public" in *other* contexts. Appellees' Br. 52-55. But Plaintiffs relentlessly conflate the non-Defendant School, which is nominally "public," with the Defendant here—CDS, Inc., which is statutorily recognized as a "private nonprofit corporation." *Compare*

N.C. Gen. Stat. § 115C-218.15(a)-(b) ("A charter school . . . shall be a public school . . . operated by a private nonprofit corporation . . . ."), *with* Appellees' Br. 53 ("both charter schools and their operators are definitionally public entities"). In any event, as explained above and in Defendants' opening brief (at 27, 36 n.5), Plaintiffs assign far too much weight to the "public" label, as opposed to the substantive realities assessed by state-action precedent. Labels aside, North Carolina's structure stems from the Legislature's choice to *remove* charter schools from pervasive state oversight and place policy making under the control of a private corporation. *See* Appellants' Br. 6-8; Civitas Br. 8-11 (chronicling the various ways "North Carolina law disentangles charter schools and the State"). That is precisely the same arrangement at issue in *Caviness*—a nonprofit corporation operating a "public" charter school for the very purpose of freeing the charter school from the state public-school hierarchy.[2]

That structure readily distinguishes the only cases Plaintiffs cite for their mistaken proposition that the public label can short-circuit the state-action analysis. Those cases—an unpublished case from this circuit and a pre-*Rendell-Baker* case

[2] Notwithstanding the "public" label in *Caviness*, Plaintiffs (at 57 n.12) seek to distinguish it because the Arizona statute excludes charter schools from the constitutional provision establishing public schools. The Ninth Circuit did not even mention that fact, and North Carolina charter schools also "operate independently of existing schools"—*i.e.*, the constitutionally mandated schools. N.C. Gen. Stat. § 115C-218.

from the Third Circuit—merely hold that employees of *government-run*, public entities are themselves state actors. *See Chalfant v. Wilmington Inst.*, 574 F.2d 739, 745 (3d Cir. 1978) (employees of "a public library, a university, or any other public educational institution" are state actors); *Tann v. Ludwikoski*, 393 F. App'x 51, 53 (4th Cir. 2010) (employees of public community college). Of course they are. *West*, 487 U.S. at 50 ("[G]enerally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law."). But that sheds no light on whether a private nonprofit entity, run by private citizens, that contracts to operate a nominally "public" school outside of the traditional-school chain of command is a state actor. *Rendell-Baker* and its progeny instruct that that question must be answered by inquiring into whether the State outsourced a historical, exclusive state function or compelled the particular policy challenged by Plaintiffs.

Nor does the State's treatment of a private entity as public in some other legal contexts—such as governmental immunity—provide a shortcut around the *Rendell-Baker* guideposts. *See* Appellees' Br. 52-53; *id.* at 60-61 (arguing that the State views charter-school operators as state actors). While Plaintiffs are correct that *one factor* of the federal-law state-action test is similar to the state-law inquiry for governmental immunity, Appellees' Br. 60 n.13, the tests serve different purposes and are otherwise quite divergent. *Compare Rendell-Baker*, 457 U.S. at 840-43

(§ 1983 state-action analysis), *with Yarbrough v. E. Wake First Charter Sch.*, 108 F. Supp. 3d 331, 336-38 (E.D.N.C. 2015) (North Carolina governmental-immunity analysis). The § 1983 test ultimately asks whether a policy can be fairly attributed to the State either because the State delegated a *historically exclusive* public function or compelled the *particular challenged* policy. Governmental immunity involves a statutory analysis that looks to whether the North Carolina legislature intended to extend immunity to charter schools from state-law money-damages suits. It is telling indeed that Plaintiffs cannot cite a single case—much less from the educational context—where a private entity's treatment as public *in other contexts* overrode the key § 1983 hallmarks identified in *Rendell-Baker*. *See, e.g.*, *Gorenc v. Salt River Project Agric. Improvement & Power Dist.*, 869 F.2d 503, 504 (9th Cir. 1989) (no state action although defendant was "designated as a political subdivision of the State" in the state constitution).[3]

c. Plaintiffs organize a few final arguments around other factors that this Court mentioned in *Mentavlos*. Appellees' Br. 59-62. There is no suggestion in *Mentavlos* or elsewhere that these additional factors could override a result dictated

[3] Statutes requiring charter-school operators to comply with open-records laws and nondiscrimination principles do not distinguish them from other government contractors and certainly do not reflect that the State views them as state actors.

by the two keystones of state action that the Supreme Court identified in *Rendell-Baker*. In any event, none of the factors changes the analysis.

Plaintiffs' only argument on the first factor—"whether the injury caused is aggravated in a unique way by the incidents of governmental authority," *Mentavlos*, 249 F.3d at 313—is that Defendants derive their authority to operate Charter Day School from the State. True enough, but that is no less true of any government contractor and certainly does not distinguish *Rendell-Baker* and its circuit-court offspring. Plaintiffs identify nothing about the charter contract or State oversight that "aggravated in a unique way" the injury complained of here.

On the second factor—"the extent and nature of public assistance and public benefits accorded the private entity," *id.* at 313—Plaintiffs note that like many government contractors—including the school in *Rendell-Baker*, 457 U.S. at 832—CDS, Inc. derives most of its revenue from the government. Aside from that, Defendants enjoy no public benefits.

On the third factor—"the extent and nature of governmental regulation over the institution," *Mentavlos*, 249 F.3d at 313—Plaintiffs claim there is an "extensive network of laws and regulations" that restrict CDS, Inc. Appellees' Br. 59-60. That is an exaggeration. Although the State imposes some general requirements, it takes a largely hands-off approach to the operations of charter schools. *See* Appellants' Br. 29-36; Civitas Br. 8-15. And, by Plaintiffs' own admission, the

State had nothing to do with the promulgation of the Uniform Policy, which is the critical inquiry here. *See, e.g.*, *Caviness*, 590 F.3d at 816 ("Even 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.'" (quoting *Rendell-Baker*, 457 U.S. at 841-42)).

* * *

"Careful adherence to the state action requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). Because Defendants do not perform a "traditional and exclusive state function" and because the Uniform Policy "turn[ed] on judgments made by private parties without standards established by the State," they did not act "under color of state law" when they designed and implemented the Uniform Policy. *Caviness*, 590 F.3d at 818.

While Defendants are not state actors, that does not mean they are free to violate constitutional principles. The charter agreement expressly requires charter operators to comply with the Constitution's anti-discrimination provisions. JA 214. The State may directly enforce that provision through contractual means. And Plaintiffs have a pending state-law claim seeking to enforce that contractual provision as third-party beneficiaries. JA 2762. But because Defendants are not state actors for purposes of the Uniform Policy, Plaintiffs may not sue Defendants

under § 1983. *Logiodice*, 296 F.3d at 30-31 (rejecting expansion of state-actor status where school district could protect plaintiff's rights against contractor and plaintiff "might" have a "third-party beneficiary claim" against defendant). North Carolina's carefully calibrated arrangement embodies the State's effort to ensure accountability while promoting innovation and protecting nonprofit operators and their volunteer boards from ruinous fee-shifting litigation. This Court may avoid the "last resort" of "constitutionalizing [the] regulation of private entities" when other safeguards are in place. *Id.* at 31.

B. RBA is a further step removed from state-actor status.

RBA is not a state actor for all the reasons just discussed as to CDS, Inc. Indeed, although the district erred in holding that CDS, Inc. and its Board were state actors, it recognized that its conclusion could not extend to RBA. Instead, the district court held that RBA was not a state actor based on two undisputed facts: (1) "RBA holds no direct contract with the State and receives no direct public funding," and (2) "RBA has no direct authority to change the uniform policy." JA 2736. CDS, Inc. and its Board fulfill both of those key roles. JA 2736-37. Thus, even if CDS, Inc. were a state actor, RBA is merely a contractor of a state actor rather than a state actor itself. *See id.*

Plaintiffs attempt to muddle both of those dispositive facts. First, they try to imply that RBA has a contract with the State as well. Appellees' Br. 62-63. The

record is unequivocal that RBA is not a party to CDS, Inc.'s charter agreement with the State. JA 223. Although CDS, Inc.'s charter application did include a copy of *its* "education management contract" with RBA, JA 195, that did not somehow create a direct relationship between RBA and the State. RBA lacks even a contractor relationship with the State, so it cannot possibly be a state actor.

Plaintiffs also argue that RBA is a state actor because it is "inextricably intertwined" with CDS, Inc. Appellees' Br. 63. While entwinement may be relevant to state action, it is entwinement *with the State*, that matters—not entwinement with another private corporate entity. Plaintiffs thus appear to be attempting to pierce the corporate veil between CDS, Inc. and RBA with this and similar arguments. But they do not even approach the strict standard for that extraordinary remedy—"that 'the corporation is so operated that it is a mere instrumentality or alter ego of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State.'" *Green v. Freeman*, 749 S.E.2d 262, 270 (N.C. 2013). Plaintiffs instead offer only that Mr. Mitchell has a role at both entities, although they conveniently omit he has no voting power at CDS, Inc. in his role as its Board Secretary. JA 2497. And mere overlap in officers or directors falls well short in any event. *Sprouse v. N. River Ins. Co.*, 344 S.E.2d 555, 561 (N.C. App. 1986). That is especially the case where, as here, it is undisputed that the two entities observe corporate formalities, have separate

bank accounts, and otherwise act independently. JA 1532-33, 1673-90. Thus, the district court correctly held that "RBA and CDS, Inc. are . . . legally distinct entities." JA 2737.[4]

Plaintiffs also implicitly invoke veil-piercing principles in their effort to show that RBA had power over the Uniform Policy. Unable to dispute that "[t]he uniform policy is set by the Board, and RBA's officers are not members of the Board of CDS, Inc.," JA 2736-37, Plaintiffs instead argue that Mr. Mitchell can somehow dictate the contents of the Uniform Policy from behind the scenes. Appellees' Br. 63-64. None of their record citations can bear the weight of that accusation or disprove that the Board is the ultimate decisionmaker; even if they could, Mr. Mitchell is not a defendant here. The record is undisputed that neither Mr. Mitchell nor RBA had the "final policymaking authority" over the Uniform Policy that is required for § 1983 liability. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989).

The same rule defeats Plaintiffs' contention that RBA can be held liable as the employer of the administrators who enforce the Uniform Policy. Appellants' Br. 64. Plaintiffs' citation, *New Jersey v. T.L.O.*, 469 U.S. 325, 334-36 (1985), stands for

[4] Nor does CDS, Inc.'s status as RBA's main client change anything on this or the state-action front. If government contractors are not state actors solely "by reason of their significant or even total engagement in performing public contracts," then that goes doubly so for their subcontractors like RBA. *Rendell-Baker*, 457 U.S. at 841.

the unsurprising notion that school officials may be state actors because they work *for the State*; it says nothing about a private corporation's § 1983 liability as an employer of school officials at a school run by a private contractor. *See id.* And it is well-established that even a government employer "may not be sued under § 1983 for an injury inflicted solely by its employees or agents." *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 694 (1978); *see Jett*, 491 U.S. at 737 (requiring "final policymaking authority").

C. The Uniform Policy does not violate the Equal Protection Clause.

Even if Defendants were state actors, Plaintiffs' claim would fail as a matter of law because the Uniform Policy does not constitute unlawful sex discrimination. American civil-rights law has long allowed sex-specific dress codes so long as, viewed as a whole, they do not impose unequal burdens on one sex. That is consistent with the fundamental principle that *different* treatment is only *discrimination* if one sex is treated less favorably. Unable to satisfy the unequal-burden test, Plaintiffs argue that the Constitution's heightened scrutiny outlaws what Title VII and Title IX has long permitted. But heightened scrutiny is the test for whether sex-based discrimination *can be justified*, not for whether a challenged policy *constitutes discrimination* in the first place. Because Plaintiffs cannot get past that initial hurdle, their equal-protection claim never reaches the heightened-scrutiny phase. And even if it were to make it that far, the Uniform Policy is substantially

related to the achievement of important government objectives and thus would satisfy the Equal Protection Clause.

1. Heightened scrutiny does not apply because the Uniform Policy, viewed as a whole, does not impose unequal burdens on girls.

Neither the district court nor any other court has ever applied heightened scrutiny to a comprehensive, sex-specific school dress code. This Court should reject Plaintiffs' invitation to be the first.

a. Title VII and Title IX prohibit sex-based discrimination, just as the Equal Protection Clause does. Under these statutes, the Supreme Court has defined "discrimination" not as mere different treatment, but as "less favorable" treatment, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005), or "treating [an] individual *worse than others* who are similarly situated," *Bostock*, 140 S. Ct. at 1740 (emphasis added). Thus, policies that "distinguish between the sexes" are lawful if they "impose an equal burden of compliance on both men and women." *Bauer v. Lynch*, 812 F.3d 340, 351 (4th Cir. 2016) (upholding sex-differentiated physical-fitness standards).

Applying those fundamental principles, courts have long recognized that comprehensive, sex-specific dress codes are lawful so long as, viewed holistically, they impose comparable burdens on both sexes. *See* Appellants' Br. 38-44; *infra* at 54-55. In *Jesperson v. Harrah's Operating Co.*, for example, the *en banc* Ninth

Circuit upheld a makeup requirement for female employees as part of a comprehensive dress code, reasoning that an "appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment." 444 F.3d 1104, 1112 (9th Cir. 2006).[5] And the EEOC has long recognized that a dress code requiring women to wear skirts is lawful so long as men face comparable requirements. EEOC Compliance Manual, 2006 WL 4672751, § 619.4(d) (June 2006).[6]

Rather than defend the district court's remarkable conclusion that the Uniform Policy imposes unequal burdens on girls as a matter of law, Plaintiffs instead argue that they can bypass their baseline burden to show *discrimination—i.e.*, less favorable treatment—and jump right to the heightened scrutiny that the Equal Protection Clause applies to sex-based discrimination. Plaintiffs erroneously contend that the "[t]he very purpose of the heightened scrutiny test is to determine

[5] Contrary to Plaintiffs' claim, the Seventh Circuit did not "cast doubt" on the unequal-burden framework in *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 577 (7th Cir. 2014). It merely noted that "[w]hether and to what extent these cases survive *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), is a question that we have not yet had occasion to address." *Hayden*, 743 F.3d at 578. The court noted, however, that "[t]he Ninth Circuit has concluded that sex-differentiated grooming standards remain permissible after *Price Waterhouse*." *Id.* (citing *Jespersen*, 444 F.3d at 1109-12).

[6] The law's acceptance of different but comparable dress codes for men and women is consistent with other instances where men and women are permissibly governed by parallel regimes under Title IX. *See infra* at 47-49.

whether a sex-based classification is *discriminatory*." Appellees' Br. 44. But that is not so. The heightened-scrutiny standard assumes that discrimination has *already* been established and asks whether the government can *nonetheless justify* that discrimination: "The State must show at least that the [challenged] classification serves important governmental objectives and that the *discriminatory* means employed are substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (emphasis added); *Wilcox v. Lyons*, --- F.3d ---, 2020 WL 4664794, at *4 (4th Cir. Aug. 11, 2020) ("The Supreme Court has subjected *discrimination on the basis of sex* to heightened equal protection scrutiny.") (emphasis added). In no instance, however, has the Supreme Court applied heightened scrutiny to determine in the first instance whether merely different treatment is discriminatory treatment that disfavors one sex.

Rather, the Supreme Court has applied heightened scrutiny only to government policies or actions that plainly treated one sex less favorably than the other. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017) (rules that treat unwed mothers better than unwed fathers for purposes of determining citizenship of their children); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994) (sex-based peremptory challenges that excluded males from jury); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 719-21 (1982) (denying male student access to all-women's nursing school); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (allowing 18-year-old

females, but not 18-year-old males, access to beer with a 3.2% alcohol content); *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) (granting females age-of-majority status at 18 but males at 21). Plaintiffs characterize these cases as imposing "parallel rules" on the sexes, Appellees' Br. 42-43, but it is clear from the face of each government action that one sex suffered less favorable treatment than the other. The same cannot be said here, where both boys and girls must comply with different but comparable requirements in the Uniform Policy and neither sex is excluded from the School's educational opportunities.

Virginia confirms that heightened scrutiny does not apply if the sexes are treated comparably. In assessing whether Virginia's creation of a separate, single-sex university for women remedied their unlawful exclusion from VMI, the Supreme Court inquired whether the women-only school exhibited "substantial equality [with] the separate educational opportunities the Commonwealth" offered at VMI. *Virginia*, 518 U.S. at 554. Virginia lost because the women-only school was a "'pale shadow' of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence." *Id.* at 553; *see also id.* ("Virginia, in sum, while maintaining VMI for men only, has failed to provide any 'comparable single-gender women's institution.'"). *Virginia* thus confirms that the threshold

question for Equal Protection analysis is whether the sexes are treated comparably; heightened scrutiny kicks in only when a policy treats one sex worse than the other.[7]

Nothing about this case could justify a novel extension of heightened scrutiny. Heightened scrutiny applies where courts must "carefully inspect[] official action that closes a door or denies opportunity to women (or to men)." *Id.* at 532. But Plaintiffs were not excluded from the School, nor did they suffer a legal disability of the types at issue in other heightened-scrutiny cases. Plaintiffs attend the School and excel, as do boys and girls alike in both athletic and academic endeavors. JA 1545, 1548, 2367-68, 2424; *see also* Appellants' Br. 12, 52-53 (detailing girls' extraordinary record of achievement at the School). What is more, constitutional rights apply less forcefully in the primary- and secondary-education context, *see* Appellants' Br. 41, and, perhaps consequently, Title IX—the statute specifically addressing educational sex discrimination—has long been interpreted to broadly

[7] For similar reasons, Plaintiffs cannot achieve a shortcut to heightened scrutiny by arguing that the Uniform Policy embodies sex stereotypes. As *Virginia* demonstrates, a policy's grounding in sex stereotypes can show that a discriminatory policy fails heightened scrutiny because it does not advance important governmental objectives. 518 U.S. at 545-46. But allegations that dress codes reflect sex-stereotypes do not establish the threshold showing that one sex was treated less favorably than the other. *Jesperson*, 444 F.3d at 1112-13 (rejecting sex-stereotyping challenge to makeup requirement); *see infra* at 56-58.

permit sex-specific dress codes in the education context.[8] This is hardly the case to break new ground on heightened scrutiny.

b. Because Plaintiffs refuse to acknowledge that they must first demonstrate discrimination under the unequal-burden test before moving on to heightened scrutiny, Defendants' application of that test stands largely unchallenged. Appellants' Br. 44-50. Plaintiffs contend that the frame of reference must be artificially narrowed to the single provision being challenged rather than the Uniform Policy as a whole, Appellees' Br. 46, but courts have rejected such "parsing" and confirmed that the "overall policy" is the focus of the test. *Jespersen*, 444 F.3d at 1109; *see also Hayden*, 743 F.3d at 580 (recognizing that a "comprehensive, evenly-enforced grooming code that imposes comparable burdens on both males and females alike" likely does not violate the Equal Protection Clause). Otherwise, a plaintiff could rig the test by restricting the analysis to one sex-specific component of the policy, which will always uniquely burden the sex to which it applies. Nor can Plaintiffs evade judicial consideration of the burdens that the dress code imposes on boys merely because Plaintiffs "are not personally harmed by those terms." Appellees' Br. 46. *Jesperson*'s approach recognizes that assessing

[8] As explained *infra* at 58-59, *Bostock* expressly disclaims addressing dress codes and does not prohibit applying the unequal-burdens test to dress-code challenges.

the dress code's burdens on boys is the only way to determine whether Plaintiffs are treated "worse than others who are similarly situated." *Bostock*, 140 S. Ct. at 1740.

Plaintiffs also fault Defendants for failing to adduce evidence of the Uniform Policy's burdens on boys. Appellees' Br. 47 n.10. That gets it backwards. Plaintiffs bear the initial burden of demonstrating that the challenged policy, viewed as a whole, treats girls less favorably than boys. *Jesperson*, 444 F.3d at 1112. Moreover, the types of burdens that Defendants identify—*e.g.*, the restriction of boys' clothing and appearance choices and the costs of belts and more frequent haircuts, *see* Appellants' Br. 48-49—are self-evident from the requirements themselves.[9]

Given Plaintiffs' wholesale failure to defend their lack of evidence under the applicable unequal-burden standard, the Court should reverse and render judgment for Defendants on the equal-protection claim. *See also infra* at 60-63 (further discussion of unequal-burden analysis under Title IX claim).

2. The Uniform Policy satisfies heightened scrutiny in any event.

Even if the Court were to apply heightened scrutiny in the first instance, Plaintiffs still would not be entitled to summary judgment because the Uniform

[9] In *Hayden*, by contrast, the school failed to identify any requirements at all that were imposed on girls. 743 F.3d at 580.

Policy "serves important governmental objectives" and is "substantially related" to their achievement. *Virginia*, 518 U.S. at 533.

a. Plaintiffs try to gerrymander this analysis at the outset by isolating the so-called "skirts requirement" and demanding that Defendants prove that *that* requirement advances important governmental interests. Appellees' Br. 32. But the Uniform Policy is an integrated whole, consisting of numerous sex-specific and sex-neutral requirements. Singling out each requirement in this manner would allow Plaintiffs to dismantle all sex-specific requirements piece-by-piece—even minimally burdensome ones—under heightened scrutiny. No authority supports such an approach. Courts instead consider the entire dress code when applying heightened scrutiny. *See, e.g.*, *Blau v. Ft. Thomas Pub. Sch. Dist.*, 401 F.3d 381, 391-92 (6th Cir. 2005) (applying similar heightened-scrutiny framework under First Amendment); *Canady v. Bossier Par. Sch. Bd.*, 240 F.3d 437, 443-44 (5th Cir. 2001) (same).

b. The broadest "important governmental objective" involved here is the Legislature's stated goal to "[p]rovide parents and students with expanded choices in . . . educational opportunities" through charter schools that are free to explore diverse educational methods. N.C. Gen. Stat. § 115C-218(a)(5). The School's freedom to employ its unique pedagogical approach—including the Uniform Policy—is a direct embodiment of that interest. The flexibility granted to charter

schools necessarily allows local communities to formulate a school around pedagogical methods that may be controversial or disagreeable to some. Parents and their children can then choose from an array of options, including traditional public schools, rather than being consigned to the educational uniformity the Legislature sought to change. Without freedom to innovate in matters such as dress codes, charter schools cannot serve the experimental and choice-enhancing function the Legislature intended.

The Uniform Policy is also "substantially related" to the "important governmental objectives" of maintaining student discipline and achieving academic success. The Uniform Policy "instills discipline" and reduces "distraction[s]." JA 1549. Defendants presented undisputed testimony from administrators showing that on days when the Uniform Policy is suspended, "the classroom level usually is not as orderly[;] the kids are excited." JA 1869-71. On those days, students are "more rowdy," "more excited," and "distracted." *Id.* They "tend to be less focused" and are "sillier and excited." JA 1889-90. That is concrete evidence that cannot be ignored. *See Blau*, 401 F.3d at 392 (crediting "affidavits from three teachers who agreed that the dress code has had a positive impact on the Highlands learning environment" in the heightened-scrutiny analysis). Plaintiffs assert contrary

evidence and speculate as to other possible causes of the change in behavior. Appellees' Br. 39. But, at best, that gets them a jury trial, not summary judgment.[10]

On academics, Plaintiffs do not question the School's indisputable record of success for boys and girls. *See* Appellants' Br. 12. They instead set an insuperable standard for tying the Uniform Policy to that success. Plaintiffs demand that Defendants must "show[] a correlation between the Skirts Requirement and better [academic] outcomes." Appellees' Br. 39. How one would even go about testing that is difficult to fathom. Instead, the only practical approach is to consider the entire Uniform Policy as a part of Defendants' broader pedagogical strategy. JA 1600, 1612, 1722, 1869-71, 1889-90 (Board members and administrators discussing the Uniform Policy's purpose in the School's broader, successful approach). And on that level, ED itself has "acknowledged the efficacy of school uniforms in advancing such state interests" as "increasing student achievement, enhancing safety, and creating a positive school environment." *Jacobs v. Clark Cty.*

[10] Plaintiffs assert that "this Court has rejected this type of justification for sex-specific appearance codes on similarly thin records." Appellees' Br. 39 (citing *Massie v. Henry*, 455 F.2d 779, 783 (4th Cir. 1972); *Long v. Zopp*, 476 F.2d 180, 181 (4th Cir. 1973); *Mick v. Sullivan*, 476 F.2d 973, 973 (4th Cir. 1973)). But those cases relied on a substantive-due-process right to govern one's personal appearance and have "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*, 743 F.3d at 575-76. Moreover, unlike in those cases, the evidentiary record supports the proffered justifications for the Uniform Policy.

Sch. Dist., 526 F.3d 419, 436 (9th Cir. 2008); *see id.* at 436 n.38 (discussing benefits of school uniforms listed by ED in its *Manual on School Uniforms*). That is why courts have often held that school dress codes survive heightened scrutiny. *See, e.g.*, *Blau*, 401 F.3d at 391; *Canady*, 240 F.3d at 443-44.

Finally, the Uniform Policy furthers the "legitimate and substantial community interest in promoting . . . traditional values be they social, moral, or political." *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 864 (1982) (plurality opinion of Brennan, J.). Courts have relied on that principle to reject a variety of constitutional challenges to actions taken by public schools. *See, e.g.*, *Henerey ex rel. Henerey v. St. Charles Sch. Dist.*, 200 F.3d 1128, 1135 (8th Cir. 1999) (rejecting First Amendment challenge to prior restraint on speech on school property); *Herndon ex rel. Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 899 F. Supp. 1443, 1447-49 (M.D.N.C. 1995) (rejecting constitutional challenges to school district's mandatory community-service program), *aff'd*, 89 F.3d 174 (4th Cir. 1996). The Uniform Policy likewise transmits the traditional values of the community of parents who founded and sustain the School. *See* Appellants' Br. 56-57; JA 1756-57 (parents formulated Uniform Policy); JA 2011 (Uniform Policy remains overwhelmingly popular with parents).

c. Plaintiffs primarily argue that the Uniform Policy fails heightened scrutiny because it is rooted in outdated stereotypes about women. Plaintiffs rely

heavily on email and testimony snippets from School founder Baker Mitchell. But it is the CDS, Inc. Board that exercises exclusive authority over the Uniform Policy, and Mr. Mitchell has no voting role on the Board. JA 1528, 1530.

In any event, the evidence Plaintiffs cite reflects no negative stereotypes of the sort the Supreme Court has condemned. The testimony does not suggest, for example, that women are to be devoted to childbearing or homemaking or to be restricted from particular academic, military, or athletic fields of endeavor because they are girls. *Virginia*, 518 U.S. at 534 (condemning stereotypes used "to create or perpetuate the legal, social, and economic inferiority of women"). Instead, the statements *trumpeted by Plaintiffs* reflect such permissible views as "the notion that boys and girls are different" and that "respect among young women and men" should flourish. Appellees' Br. 3, 6-7, 9; *cf. Virginia*, 518 U.S. at 533 ("Physical differences between men and women . . . are enduring."); *id.* ("'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration . . . ."); *infra* at 47-49 (Title IX provisions allowing different treatment of the sexes at school). Beyond this testimony, the balance of the record evidence powerfully illustrates that girls are empowered to thrive in math, archery, and all fields on equal footing with boys. JA 1545, 1548, 2424, 2786. At a bare minimum, a jury could reasonably conclude from that record evidence and ample board-member testimony that the Uniform Policy—including the challenged

component—was motivated by a desire to increase discipline, academic success, and mutual respect, rather than to promote impermissible stereotypes about women. JA 1600-01 ("promote a sense of pride and of team spirit" and "instill[] discipline" in classroom), 1610 (reduce peer pressure and parents' burden), 1612 ("deliver high quality education"), 1722 ("foster mutual respect").

II. The district court properly granted Defendants summary judgment on Plaintiffs' Title IX claim.

Plaintiffs ask this Court to be the first to invalidate a comprehensive sex-specific dress code under Title IX. But as the district court correctly held, a notice-and-comment regulation issued by the Department of Education (ED), adopted by twenty-two other agencies, and maintained across Republican and Democratic administrations forecloses Plaintiffs' argument. JA 2724-25 (citing *Nondiscrimination on the Basis of Sex*, 47 Fed. Reg. 32,526, 32,527 (July 28, 1982) [hereinafter, *Withdrawal Regulation*]). The district court applied the familiar framework of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), recognized that "Title IX does not directly speak to the 'precise question' of school uniform policies or appearance codes," and thus concluded that "Congress left this matter to the agency's discretion." JA 2726 (quoting *Chevron*, 467 U.S. at 842). Plaintiffs cannot show that Title IX unambiguously prohibits sex-specific dress codes or that ED's consistent interpretation of Title IX is unreasonable or otherwise unworthy of *Chevron* deference. And, in any event, Title IX would

dictate affirmance even in the absence of ED's regulation because Plaintiffs fail to establish that the Uniform Policy unequally burdens girls.

A. ED's regulation withdrawing its earlier regulation of sex-specific appearance codes is entitled to *Chevron* deference.

The original regulations under Title IX prohibited sex-differentiated dress codes. *Nondiscrimination on the Basis of Sex*, 40 Fed. Reg. 24,128, 24,141 (June 4, 1975). That approach drastically departed from Title VII's longstanding acceptance of comprehensive sex-specific dress codes in the workplace and thus briefly created an unusual tension between Title VII and Title IX. But in a notice-and-comment regulation originally proposed under President Carter and finalized under President Reagan, ED deleted from its Title IX regulations the provision that had "prohibit[ed] discrimination in the application of codes of personal appearance." *Withdrawal Regulation*, 47 Fed. Reg. 32,526; 43 Fed. Reg. 58,076-01 (Dec. 11, 1978) (original notice). Seeing no statutory text addressing personal-appearance codes, ED turned to the legislative history and found "no indication in the legislative history of Title IX that Congress intended to authorize Federal regulations in the area of appearance codes." *Id.* at 32,527. ED thus interpreted the statute to "permit[] issues involving codes of personal appearance to be resolved at the local level." *Id.* ED's longstanding Withdrawal Regulation meets all the requisites for *Chevron* deference, and the Title IX analysis should thus begin and end there.

Plaintiffs spend just over three pages on arguments that conceivably touch upon the validity of ED's regulation, and they cite in text but a single administrative-law case (*Chevron*) on the last line of that section. Appellees' Br. 72-75. While Plaintiffs do not explain how their arguments relate to principles of agency deference, Defendants will proceed through the well-worn *Chevron* path mapped out by the Supreme Court and this Court, responding to Plaintiffs' contentions at the relevant steps in that analysis.

1. ED's Withdrawal Regulation is an authoritative interpretation issued by the agency charged with promulgating Title IX regulations.

a. ED's Withdrawal Regulation satisfies the threshold step for *Chevron* deference—that "(1) Congress has given the agency authority to make rules carrying the force of law and (2) the agency's interpretation is rendered in the exercise of that authority." *A.T. Massey Coal Co. v. Holland*, 472 F.3d 148, 166 (4th Cir. 2006).

First, ED's regulatory authority in this area is undisputed. Congress broadly empowered ED to "propos[e] regulations implementing the provisions of [Title IX] relating to the prohibition of sex discrimination in federally assisted education programs." Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974); *accord* 20 U.S.C. § 1682 (same for all agencies that implement Title IX). ED is the "lead agency charged with administering Title IX." *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 287 (2d Cir. 2004). As

such, ED's "construction of [the] statutory scheme" must be given "considerable weight." *Chevron*, 467 U.S. at 844.

Second, ED promulgated the Withdrawal Regulation pursuant to its authority to issue regulations with the force of law. The regulation is a final rule that went through all the rigors of notice-and-comment rulemaking. *See Withdrawal Regulation*, 47 Fed. Reg. at 32,526-27. "When an agency's interpretation derives from notice-and-comment rulemaking, it will almost inevitably receive *Chevron* deference, since in that case, the interpretation results from a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of law." *Knox Creek Coal Corp. v. Sec'y of Labor, Mine Safety & Health Admin.*, 811 F.3d 148, 159 (4th Cir. 2016).

b. Plaintiffs assert that the regulation is nonetheless unworthy of *Chevron* deference because it "does not contain the agency's 'construction of a statutory scheme' or its interpretations of 'the meaning or reach of a statute.'" Appellees' Br. 75 (quoting *Chevron*, 467 U.S. at 844). Rather, according to Plaintiffs, the Withdrawal Regulation is a mere statement about "the priority to be given to administrative enforcement of claims of discrimination grounded in codes of personal appearance." *Id.* at 74.

The text and common sense prove otherwise. By "revoking" a regulation that had "prohibit[ed] discrimination in the application of codes of personal appearance,"

47 Fed. Reg. at 32,526, the Withdrawal Regulation necessarily altered the governing law and reflected ED's substantive interpretation that Title IX permitted sex-specific dress codes.[11] ED would not have undertaken notice-and-comment rulemaking merely to announce enforcement priorities. *See*, *e.g.*, *Wos v. E.M.A.*, 568 U.S. 627, 643 (2013) (discussing "enforcement guidelines" issued through informal processes).

The regulation's reasoning confirms that it contains ED's interpretation of Title IX. ED "revoked the appearance code regulation" because it saw "no indication in the legislative history of Title IX that Congress intended to authorize Federal regulations in the area of appearance codes." *Id.* at 32,527. While some commenters "opposed the elimination of appearance codes as an area for Federal regulation under Title IX," ED disagreed. *Id.* ED determined instead that Title IX "permits issues involving codes of personal appearance to be resolved at the local

[11]The first regulations issued under Title IX included eight "Specific prohibitions." *Nondiscrimination on the Basis of Sex*, 40 Fed. Reg. 24,128, 24,141 (June 4, 1975). ED has rescinded only one of those eight prohibitions—the one governing appearance codes. As such, the current Title IX regulations—that have been adopted by ED and twenty-two other agencies—maintain seven of the eight original prohibitions, but omit the appearance-code regulation, reflecting ED's ongoing view that Title IX does not govern school appearance codes. *See* 34 C.F.R. § 106.31(b); *Nondiscrimination on the Basis of Sex*, 65 Fed. Reg. 52,858, 52,859 (Aug. 30, 2000) [hereinafter, *Common Rule*] ("As set forth in this common rule, the substantive nondiscrimination obligations of recipients, for the most part, are identical to those established by [ED] under Title IX.").

level." *Id.*; *accord id.* at 32,526 ("Development and enforcement of appearance codes is an issue for local determination."). These statements interpret the scope of Title IX; they make no sense as mere declarations of enforcement priority. The question squarely before ED was whether "Congress intended to authorize regulation[]" of appearance codes. Dress codes would hardly be "left to local discretion," *id.*, if the regulation allowed "litigation by private parties," as Plaintiffs fancifully suggest (at 75).

While ED mentioned its intent to "concentrate on enforcing Title IX in cases involving more serious allegations of sex discrimination," that was not a mere statement of enforcement priority. *Id.* Instead, freeing up ED's enforcement resources was "one result of the regulatory amendment" revoking the appearance-code regulation. *Id.* at 32,527. Agencies receive deference when they consider the policy effects of a particular statutory interpretation. Indeed, 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." *Chevron*, 467 U.S. at 844-45. ED's formal decision to repeal the prohibition on sex-differentiated appearance codes—after

notice and comment—represents a considered effort to interpret and implement Title IX's ban on sex discrimination.[12]

c. Plaintiffs add the perplexing argument that ED's action repealing the appearance-code regulation had no effect because sex-based appearance codes are *also* regulated by one of *the other* seven prohibitions in the original Title IX regulations. *See* 34 C.F.R. § 106.31(b)(4) (prohibiting "separate or different rules of behavior, sanctions, or other treatment"). That was certainly not the view of ED when it left appearance codes "to be resolved by the local community" or of the commenters who worried that "elimination of appearance codes as an area of Federal regulation under Title IX" would have negative consequences. *Withdrawal Regulation*, 47 Fed. Reg. at 32,527. Plaintiffs' argument nonsensically presumes that ED's original appearance-code regulation was wholly superfluous and that the repeal of that specific provision is somehow rendered nugatory by a more general provision. Courts routinely reject such interpretive gymnastics. *See, e.g.*, *TRW Inc.*

[12] Commentators who oppose sex-specific dress codes candidly acknowledge that ED's regulation is an authoritative interpretation that forecloses dress-code claims under Title IX. *See* 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, based on ED's interpretation of Title IX, that the statute 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) ("Title IX has been rendered largely ineffective as a method of challenging dress codes.").

v. Andrews, 534 U.S. 19, 31 (2001) ("[N]o clause, sentence, or word shall be superfluous, void, or insignificant."); *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 302 (4th Cir. 2000) ("[A] specific statute closely applicable to the substance of the controversy at hand controls over a more generalized provision.").[13]

2. Title IX does not address the "precise issue" ED confronted in its Withdrawal Regulation.

The district court correctly held that the Withdrawal Regulation satisfies *Chevron* step one, and Plaintiffs do not directly confront that conclusion in their opening brief. "At step one, the Court determines 'whether Congress has directly spoken to the precise question at issue.'" *NLRB v. Bluefield Hosp. Co.*, 821 F.3d 534, 542 (4th Cir. 2016) (quoting *Chevron*, 467 U.S. at 842). "[I]f Congress has plainly addressed" that question, then "that is the end of the matter."

[13] The regulation prohibiting "separate or different rules of behavior, sanctions, or other treatment" on the basis of sex is most naturally read to prohibit sex-specific standards of "behavior"—as opposed to dress—and discriminatory *enforcement* of rules—*i.e.*, imposing "different . . . sanctions or treatment" on the sexes for the same behavior. *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).

Id. (quoting *Chevron*, 467 U.S. at 842-43). But "if the statute is silent or ambiguous, the Court will proceed to *Chevron*'s second step." *Id.*

It is undisputable that Title IX is silent on the precise question of sex-differentiated dress codes. Title IX's text provides generally that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681. There is no discussion of whether personal-appearance codes constitute "exclus[ion]," "deni[al] [of] benefits," or "discrimination." The district court thus rightly held that "Title IX does not directly speak to the 'precise question' of school uniform policies or appearance codes, suggesting that Congress left this matter to the agency's discretion." JA 2726.

Plaintiffs observe that "Title IX is a broad mandate to schools not to discriminate based on sex." Appellees' Br. 72. But neither this Court nor the Supreme Court has ever held that language at that level of generality is sufficient to directly speak to a "precise question." *Rust v. Sullivan*, 500 U.S. 173, 184 (1991) ("broad directive" not sufficient at step one). Instead, "the term 'discrimination' . . . is notoriously ambiguous," meaning "the Department of Education's interpretation is owed substantial deference." *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1033 (9th Cir. 1998) (Title VI); *see Stiltner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1482 (4th Cir. 1996) ("the phrase 'discriminate

against' in ERISA § 510 is ambiguous"). That is because "a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

Plaintiffs note (at 72-73) that outside the *Chevron* context, the Supreme Court has held that Title IX's non-discrimination language "reach[es] conduct, such as sexual harassment and retaliation, not explicitly mentioned in the statutory text, legislative history, or implementing regulations." But in both instances, the Supreme Court acted against the backdrop of the longstanding recognition that sexual harassment and retaliation are covered by core prohibitions on discrimination. *See Jackson*, 544 U.S. at 176 (explaining that Congress enacted Title IX three years after the Supreme Court had "interpreted a general prohibition on racial discrimination to cover retaliation"); *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 75 (1992) (noting Title VII holding that sex discrimination includes sexual harassment and stating "[w]e believe the same rule should apply when a teacher sexually harasses and abuses a student"). The opposite is true here. Title VII has long *allowed* sex-specific dress codes. Appellants' Br. 39-41.[14] Consequently, there is no basis to interpret Title IX's ambiguous language as somehow answering the precise question at issue.

[14] Moreover, both ED and the courts of appeals had consistently interpreted Title IX to cover retaliation. *Jackson*, 544 U.S. at 183. The converse is true here.

3. ED's widely adopted interpretation of Title IX in its Withdrawal Regulation is a reasonable interpretation of the statute.

Under *Chevron*'s second step, if ED's interpretation "is based on a permissible construction of the statute," it must be given "controlling weight." 467 U.S. at 843-44. Importantly, the Court "need not conclude that the agency construction was . . . the reading [the Court] would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11. The agency's interpretation must merely not be "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44. The district court properly concluded that ED's interpretation of Title IX easily passes that low bar.

a. Plaintiffs identify nothing in the statute's text, structure, or legislature history that rules out ED's regulation as unreasonable. To the contrary, ED's interpretation is consistent with the EEOC's and courts' long-established view that Title VII's cognate provisions permit sex-specific dress codes. Appellants' Br. 39-41. It is consistent with an early judicial interpretation of Title IX. *Trent v. Perritt*, 391 F. Supp. 171, 173 (S.D. Miss. 1975) (sex-specific hairstyle rules not "within the purview of" Title IX). It is consistent with numerous other Title IX regulations reflecting that distinct but comparable treatment of men and women does not violate the statute's core prohibition on sex discrimination. *See infra* at 49. And, as ED

explained, its interpretation is consistent with Title IX's legislative history. 47 Fed. Reg. at 32,527.[15]

ED and its sister agencies have maintained this interpretation for nearly 40 years across multiple Republican and Democratic administrations. *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 522 n.12 (1982) (according "great deference" to ED's "longstanding" interpretation of Title IX). In the decades since its promulgation, twenty-two other federal agencies have adopted ED's interpretation of Title IX. *See Common Rule*, 65 Fed. Reg. at 52,870 (adopting only the seven prohibitions that ED continued to recognize after its revocation of the appearance-code regulation). During that time, neither Congress nor the courts have called into question ED's

[15] ED did not rely on the legislative history's silence "to narrow the statute's expansive text." Appellees' Br. 75 n.16. ED properly consulted legislative history to confirm the text's silence on dress codes and the resulting delegation to the agency. *See Chevron*, 467 U.S. at 862 ("We find that the legislative history as a whole is silent on the precise issue before us. It is, however, consistent with the view that the EPA should have broad discretion in implementing the policies of the 1977 Amendments."). Plaintiffs, for their part, cite generic statements from the legislative history that have nothing to do with dress codes. *See id.* at 862 ("The general remarks pointed to by respondents were obviously not made with this narrow issue in mind and they cannot be said to demonstrate a Congressional desire [on this point]."). Given Title IX's prolix legislative history, replete with discussion of the ills Congress sought to address, the legislative history's silence on dress codes speaks volumes.

view. Plaintiffs bear a heavy burden in asking this Court to be the first to upend this settled view as unreasonable.[16]

b. Plaintiffs suggest that ED promulgated a "categorical exception to Title IX for dress codes," thus improperly adding to the "exceptions" already listed in Title IX. Appellees' Br. 72. Plaintiffs err in framing the Withdrawal Regulation as an exception to Title IX. And, in any event, they are incorrect that the existence of statutory exceptions limits an agency's ability to reasonably interpret an ambiguous statute pursuant to a broad grant of rulemaking authority.

The Withdrawal Regulation does not add a new exception to those contained in the statute. Title IX categorically exempts certain organizations and events entirely from Title IX's sex-discrimination ban. *See* 20 U.S.C. §§ 1681(a)(3)-(7), (9) ("this [sex-discrimination-ban] section *shall not apply*" to "religious

[16] Plaintiffs contend (at 72-73) that ED's interpretation is "absurd" because Title IX would permit outrageous dress codes such as miniskirts for girls and pants for boys. But ED made a reasonable judgment that Title IX does not address all imaginable ills, leaving "issues involving codes of personal appearance to be resolved at the local level." *Withdrawal Regulation*, 47 Fed. Reg. at 32,527. That is consistent with the default principle that "[s]chool boards, not federal courts, have the authority to decide what constitutes appropriate behavior and dress in public schools." *Canady*, 240 F.3d at 441. Absent evidence that schools are adopting ridiculously disproportionate dress codes with impunity, there is little basis to deride ED's judgment as "absurd." In any event, the Court need only decide whether ED's regulation reasonably permits sex-specific, comprehensive dress codes like the Uniform Policy. *Brown & Williamson*, 529 U.S. at 159 (*Chevron* inquiry "is shaped, at least in some measure, by the nature of the question presented").

organizations," "military" schools, admissions at traditionally single-sex schools, "fraternities or sororities," "boy or girl conferences," and certain "beauty pageant scholarships") (emphasis added). Title IX thus allows these entities to freely engage in practices *that constitute sex discrimination* because that prohibition simply "does not apply" to them. The Withdrawal Regulation, by contrast, does not license any entity to engage in conduct that constitutes sex discrimination. It instead recognizes that sex-specific dress codes *are not sex discrimination in the first place*, consistent with the longstanding view of Title VII and the absence of any concern about dress codes from Title IX's legislative history.

In this respect, the Withdrawal Regulation is consistent with certain other provisions of Title IX clarifying that the statute permits certain practices that treat the sexes separately but comparably. Unlike the exceptions, these provisions are not framed as permission to engage in sex discrimination, but as interpretive aids explaining that these practices are not sex discrimination at all. 20 U.S.C. § 1686 ("*Interpretation* with respect to living facilities: . . . nothing contained herein *shall be construed* to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes") (emphases added); *id.* § 1681(a)(8) ("*this section shall not preclude* father-son or mother-daughter activities at an educational institution, but if such activities are provided

for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex") (emphases added).

ED's Withdrawal Regulation reflects a reasonable interpretive and policy judgment that sex-specific dress codes—like sex-specific living facilities or father-son events—are the sort of sex-differentiated practices that do not constitute sex discrimination in the first place. Thus, Plaintiffs are mistaken in characterizing the Withdrawal Regulation as an additional exception from Title IX.

Indeed, ED's Withdrawal Regulation is consistent with numerous other ED regulations that permit sex-differentiated practices, embodying ED's longstanding interpretation of Title IX's ambiguous sex-discrimination prohibition. *See, e.g.*, 34 C.F.R. § 106.41 (authorizing sex-differentiated sports offerings and single-sex sports teams); *id.* § 106.34(a)(1)-(4) (allowing certain single-sex classes involving "Contact sports in physical education classes," "Ability grouping in physical education classes," "Human sexuality classes," and "Choruses"); *id.* § 106.34(b), (c) (allowing "single-sex classes" and "single-sex school[s]"); *id.* § 106.31(c) (allowing certain study-abroad scholarships to be "restricted to members of one sex"). Because none of these regulations is specifically listed in Title IX itself, Plaintiffs would presumably condemn them all as impermissible "implied, categorical exception[s] to Title IX." Appellees' Br. 72.

But Plaintiffs' position finds no footing in principles of statutory interpretation or administrative law, as courts' repeated deference to these and other ED regulations under *Chevron* illustrate. *See, e.g.*, *Kelley v. Bd. of Trs.*, 35 F.3d 265, 270 (7th Cir. 1994) (affirming ED's athletics regulation under *Chevron*); *Equity in Athletics, Inc. v. Dep't of Educ.*, 675 F. Supp. 2d 660, 675 (W.D. Va. 2009) ("[E]very court that has confronted the issue has held that the 1979 Policy Interpretation constitutes a reasonable and considered interpretation of § 86.41, and thus, that it is entitled to deference.") (collecting cases), *aff'd*, 639 F.3d 91 (4th Cir. 2011); *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1015 (5th Cir. 1996) ("When interpreting title IX, we accord the OCR's interpretations appreciable deference."). ED's Withdrawal Regulation is a reasonable interpretation of Title IX's open-ended language, consistent with a statutory and regulatory fabric that allows the agency to outline the boundaries of permissible sex-specific policies.

Even if Plaintiffs were correct that the Withdrawal Regulation constitutes an "exception" to Title IX, the existence of statutory exceptions does not prevent an agency from promulgating additional exceptions pursuant to a broad grant of rulemaking authority. The Supreme Court recently held as much in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020). The Affordable Care Act ("ACA") mandated that employers provide cost-free "preventive care and screenings," which HHS interpreted to include contraception.

Id. An HHS sub-agency later issued a rule exempting certain religious employers from the contraception mandate. *See id.* The plaintiff made a parallel argument to the one Plaintiffs press here—that the agency "lacked statutory authority to promulgate the rule[]" exempting religious employers, *id.* at 2379, because although the ACA included "exceptions aplenty," *id.* at 2392 (Alito, J., concurring), it did not include an exception for moral or religious objectors, *id.* at 2379; *see id.* at 2405 (Ginsburg, J., dissenting) ("Where Congress wanted to exempt certain employers from the ACA's requirements, it said so expressly."). The Supreme Court rejected that argument because the ACA's "sweeping" grant of authority to issue "comprehensive guidelines" gave the agency "broad discretion to define preventive care and screenings and to create the religious and moral exemptions." *Id.* at 2380-81. Justice Kagan concurred because, under *Chevron*, "a court facing statutory ambiguity should accede to a reasonable interpretation by the implementing agency." *Id.* at 2397. Noting that the agency's interpretation had been maintained "[o]ver the course of two administrations," Justice Kagan deferred to the agency's "longstanding and reasonable interpretation." *Id.* at 2397-98.

Much like the ACA, Title IX employs general mandates along with specific clarifications and exceptions. Congress recognized that there would be many gray areas in operationalizing Title IX's ambiguous prohibitions and expressly delegated to ED's predecessor (and other agencies) broad, ongoing authority to determine how

Title IX should be applied in those situations. *See* Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974); 20 U.S.C. § 1682. "*Chevron* deference was built for cases like these," and the Court should "defer to the [ED's] view of the scope of Congress's delegation." *Little Sisters*, 140 S. Ct. at 2397, 2400 (Kagan, J., concurring).[17]

B. Even absent ED's regulation, the Uniform Policy's comprehensive, sex-specific dress code does not violate Title IX.

Stripping away *Chevron* deference would not alter the result because Title IX permits comprehensive, sex-specific dress codes like the Uniform Policy. Longstanding Title VII case law reflects that such dress codes are lawful so long as they do not unequally burden one sex. Neither *Bostock* nor Plaintiffs' assertion that the Uniform Policy is rooted in stereotypes transform comprehensive, sex-specific

[17] Plaintiffs argue in a footnote a point they never pressed below—that the Withdrawal Regulation "failed to provide the reasoned analysis necessary when an agency changes its policy." Appellees' Br. 73 n.15. But "[w]hen a party in a civil case fails to raise an argument in the lower court and instead raises it for the first time [on appeal], [this Court] may reverse only if the newly raised argument establishes 'fundamental error' or a denial of fundamental justice." *Hicks v. Ferreyra*, 965 F.3d 302, 310 (4th Cir. 2020). Waiver is doubly confirmed by the fact that the argument appears only in a footnote. *United States v. Arbaugh*, 951 F.3d 167, 174 n.2 (4th Cir. 2020) ("We do not ordinarily entertain arguments made solely in a footnote . . . ."). In any event, ED gave the required reasoned analysis. As detailed above, ED acknowledged that it was changing its position on the issue and explained its reasons for doing so. *Withdrawal Regulation*, 47 Fed. Reg. at 32,526-27. That is all it was required to do. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (agency must "display awareness that it is changing position" and "show that there are good reasons for the new policy").

dress codes into discrimination, absent a showing that one sex is treated less favorably than the other. And if the unequal-burden standard applies, Defendants deserve summary judgment, or at least a trial.

1. *Distinct* treatment "on the basis of sex" does not suffice to establish a Title IX violation. Plaintiffs must show that the Uniform Policy "subject[s] [them] *to discrimination*" on the basis of sex. 20 U.S.C. § 1681(a) (emphasis added). Those are not the same. Discrimination requires proof not merely that plaintiff's sex-based treatment was distinct, but that it was "less favorable." *Jackson*, 544 U.S. at 174; *accord Parker v. Franklin Cty. Cmty. Sch. Corp.*, 667 F.3d 910, 922 (7th Cir. 2012) ("Title IX requires a systemic, substantial disparity that amounts to a denial of equal opportunity before finding a violation.").

While Plaintiffs tip their hat to the discrimination requirement, they overlook mountains of case law holding that there is nothing inherently discriminatory about sex-differentiated policies in the educational context. Courts have upheld all manner of such policies under Title IX. *E.g.*, *Kelley*, 35 F.3d at 270 (affirming ED's athletics regulation under *Chevron*); *Equity in Athletics*, 675 F. Supp. 2d at 675 (same, collecting cases upholding sex-specific programs); *A.N.A. ex rel. S.F.A. v. Breckinridge Cty. Bd. of Educ.*, 833 F. Supp. 2d 673, 678 (W.D. Ky. 2011) (upholding "single-sex programs in public schools" based on ED regulation).

For the same reason, Title IX does not prohibit sex-differentiated dress codes that impose comparable requirements on the sexes. Courts "look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX." *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007). Title VII cases decided around the time of Title IX's enactment upheld sex-specific appearance codes analogous to the one at issue here. *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 . . . ."); *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755 (9th Cir. 1977) (rejecting challenge to tie requirement for men because "[i]t is clear that regulations promulgated by employers which require male employees to conform to different grooming and dress standards than female employees [are] not sex discrimination within the meaning of Title VII"); *Lanigan v. Bartlett & Co. Grain*, 466 F. Supp. 1388, 1389-90 (W.D. Mo. 1979) (rejecting Title VII claim challenging a policy "prohibit[ing] women from wearing pants in the executive office[s]").

Recent Title VII authorities likewise uphold sex-differentiated policies, including appearance codes, that impose comparable requirements on men on women. *See, e.g.*, *Bauer*, 812 F.3d at 346 (approving sex-differentiated physical-fitness requirements under "equal burden" standard); *Hayden*, 743 F.3d at 580 (dicta in Title IX case suggesting that sex-specific hair-length policy could have been

upheld as "just one component of a comprehensive grooming code that imposes comparable although not identical demands on both male and female athletes")[18]; *Jespersen*, 444 F.3d at 1109 (holding that an "appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment"); *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1388 (11th Cir. 1998) ("[e]very circuit to have considered the issue" has agreed with this Court's *Earwood* decision). Indeed, the current version of the EEOC Compliance Manual—which Plaintiffs understandably ignore—permits a requirement for "female employees to wear skirts or dresses at all times" as long as "the requirements are equivalent for men and women with respect to the standard or burden that they impose." 2006 WL 4672751, § 619.4(d). Suffice to say that the law does not support the radical theory of Plaintiffs' expert witnesses that all sex-based distinctions are inherently harmful to females. Appellees' Br. 17-18, 66.

Plaintiffs assert (at 68) without explanation that the "unequal burden analysis" is "not binding in this circuit and was wrong when it was decided." *But see Bauer*, 812 F.3d at 346; *Earwood*, 539 F.2d at 1350. But Plaintiffs offer no reason to

[18] The policy in *Hayden* ran afoul of Title IX because it placed a burden only on male students. 743 F.3d at 583 ("The hair-length policy is applied only to the boys team, with no evidence concerning the content of any comparable grooming standards applied to the girls team."). Defendant apparently did not raise ED's Withdrawal Regulation.

believe that Title IX should be interpreted divergently from Title VII's analogous provision when it comes to comprehensive, sex-differentiated dress codes. Nor do Plaintiffs propose any legal substitute for the comparable-burdens approach that pervades the circuits. To the extent it can be discerned, Plaintiffs' position appears to condemn *any* sex-differentiated dress codes (or other distinctive sex-specific treatment) so long as the distinct treatment is allegedly rooted in sex stereotypes. This approach would delete the discrimination requirement from the statute and overrule decades of case law reflecting that distinct-but-comparable dress codes do not constitute the less-favorable treatment that exemplifies discrimination.

2. Plaintiffs seek to justify their revolution by arguing that *Price Waterhouse*'s discussion of sex stereotyping and the Supreme Court's recent decision in *Bostock* have "eviscerated" unequal-burden analysis. Appellees' Br. 67-68. While *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989), recognized that firing an employee for failure to conform with sex stereotypes may constitute some evidence of sex-based discrimination, it did not call into question the established rule that comprehensive, equally burdensome dress codes are permissible. That much is illustrated by the surfeit of post-1989 cases discussed above that uphold sex-differentiated dress codes. *See, e.g.*, *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*—that certain sex-

differentiated appearance standards did not constitute sex-based discrimination."); *accord Hayden*, 743 F.3d at 578 (noting that "[t]he Ninth Circuit has concluded that sex-differentiated grooming standards remain permissible after *Price Waterhouse*"). Plaintiffs' theory cannot be squared with this reality, for it would apparently condemn all sex-differentiated appearance requirements as unlawfully rooted in stereotypes without the need for an unequal-burdens analysis to determine if any *less favorable* sex-based treatment took place. Plaintiffs' expert goes as far to suggest that "by saying 'Good morning, boys and girls,'" a teacher could violate Title IX by injecting gender "grouping" into the classroom. JA 2443. Unsurprisingly, Plaintiffs cannot identify a single case where a court invalidated a sex-differentiated dress code based on sex stereotyping alone.[19]

Jespersen's allowance of a makeup requirement contained in a comprehensive appearance code confirms that a plaintiff may not prevail merely by identifying a sex-specific requirement that allegedly reflects stereotypes. As in *Jespersen*, the

[19] Plaintiffs' citation to *M.D. v. School Board of Richmond*, 560 F. App'x 199 (4th Cir. 2014), is off-base. Far from "recognizing [the] validity of sex stereotyping theory under Title IX," Appellees' Br. 67, the Court in that non-precedential opinion merely remanded to ensure that the mother's *pro se* representation in the trial court did not prejudice the minor's rights. *M.D.*, 560 F. App'x at 202 ("To ensure minors' rights are vigorously and competently protected, we have squarely held that non-attorney parents are barred from representing their children in federal court."). The Court said nothing about the viability of the students' sexual-harassment claim based on failure to conform to gender stereotypes.

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. In short, Plaintiffs must show that they suffered less favorable treatment than boys as a result of the alleged stereotypes, something they fail to do.[20]

Nor did *Bostock*'s consequential, but circumscribed, holding overrule decades of dress-code case law *sub silentio*. *Bostock* held that individuals fired "simply for being homosexual or transgender" suffered sex discrimination in violation of Title VII. 140 S. Ct. at 1737. *Bostock* expressly "d[id] not purport to address" whether "sex-segregated bathrooms, locker rooms, and dress codes" constitute discrimination, where, as here, sexual-orientation and gender-identity claims are not at issue. *Id.* at 1753. Plaintiffs thus vastly overread *Bostock* when they claim that a school imposing a traditional, sex-differentiated dress code is the same sort of "double discriminator" as an employer who fires all homosexuals or transgender

[20] If Plaintiffs are correct that a dress code's link to sex stereotypes can invalidate it, there is at least a fact issue as to whether the Uniform Policy was motivated by impermissible stereotypes. *See supra* at 34-35.

persons. Appellees' Br. 45-46.[21] Indeed, plaintiffs' counsel in *Bostock* assured the Court that ruling in their favor would not affect sex-specific dress codes. Oral Arg. Tr. 14:10-15, *Bostock*, No. 17-1618 (U.S. Oct. 8, 2019) ("[I]t probably doesn't violate [the law] to require men and women in business events for the women to wear skirts."); Oral Arg. Tr. 9:22-10:5, *Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (U.S. Oct. 8, 2019) (conceding that a "sex-specific dress code" is "not discrimination, even though it differentiates on the basis of sex"). Plaintiffs' novel, wooden reading of *Bostock* would apparently prohibit *all* appearance requirements that treat boys and girls differently.[22]

Plaintiffs also misread *Bostock*'s holding that sex discrimination must be assessed on an "individual" rather than "group level" as if it somehow eliminated their burden to prove that the Uniform Policy treats Plaintiffs *less favorably* than

[21] Plaintiffs (at 68) suggest that *Bostock*'s condemnation of a hypothetical employer who imposed "1950s gender roles" supports their view that all sex-differentiated dress codes are unlawfully rooted in stereotypes. But the hypothetical employer's policy dictated that he would "hire only men as mechanics and only women as secretaries"—a far cry from dress codes that impose comparable requirements on men and women.

[22] Similarly, this Court's recent opinion in *Grimm v. Gloucester County School Board*, No. 19-1952, 2020 WL 5034430 (4th Cir. Aug. 26, 2020), applied *Bostock*'s precise holding to conclude that a school violated Title IX by requiring a transgender student to use a restroom that did not correspond to his gender identity. The Court did not question the lawfulness of sex-differentiated policies outside the transgender context. *Id.* at *23 n.17 ("[We do] not think sex-separated restrooms are unconstitutional," even though they indisputably differentiate "on the basis of sex.").

boys. Appellees' Br. 68-69. Plaintiffs must show that the Uniform Policy "treat[s] [them] worse than others who are similarly situated." *Bostock*, 140 S. Ct. at 1740. The only way to make such a *comparative* assessment is to evaluate the burdens the Uniform Policy imposes on a similarly situated boy—something Plaintiffs steadfastly refuse to do. *Bostock* thus rejects, rather than endorses, Plaintiffs' view that they need only identify some sex-specific requirement that burdens them in order to prove sex discrimination.

3. Under the unequal-burden test that remains the governing law for evaluating sex-differentiated dress codes under Title VII (and Title IX if the Withdrawal Regulation is disregarded), an "appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment." *Jespersen*, 444 F.3d at 1109. Plaintiffs do not dispute that the Uniform Policy comprehensively imposes requirements on both sexes. *See* Appellants' Br. 11 (setting forth requirements). Plaintiffs nonetheless cursorily assert (at 69) that they "would prevail even under the unequal burden standard announced in *Jesperson* because . . . there is ample evidence in the Record that the Skirts Requirement harmed Plaintiffs' educational opportunities in unique ways because of their sex." Appellants have explained at length why Plaintiffs fail as a matter of law under the unequal-burden standard, principally because they make no effort to show that their alleged "harms" from the Uniform Policy are greater than

those suffered by boys who face their own restrictions of personal liberty and other costs under the policy. Appellants' Br. 44-50; *supra* at 29.

Moreover, Plaintiffs' "subjective reaction" to the Uniform Policy is quite similar to the testimony that *Jesperson* deemed legally insufficient to show that the policy "caused burdens to fall unequally on men or women." *Jesperson*, 444 F.3d at 1008 (testimony that makeup policy "prohibited [her] from doing [her] job" because "[i]t affected [her] self-dignity . . . [and] took away [her] credibility as an individual and as a person"). And the Uniform Policy's comparable requirements on both sexes are starkly different from the policies that categorically disfavored women in the two cases Plaintiffs cite. *See Frank v. United Airlines, Inc.*, 216 F.3d 845, 854 (9th Cir. 2000) (requiring females to comply with the "medium frame category of MetLife's Height and Weight Tables" while men could satisfy the "large frame" category); *Gerdom v. Cont'l Airlines, Inc.*, 692 F.2d 602, 605 (9th Cir. 1982) (finding discrimination where weight policy applied "only for women employees and it was never applied to male employees").

Even if Plaintiffs needed only to demonstrate that they suffered meaningful burdens (as opposed to unfavorable treatment relative to boys), fact issues would still preclude summary judgment. Plaintiffs certainly cannot meet the strict standard for showing that they were "denie[d]" or "exclude[d]" from an educational "program" or "activity." 20 U.S.C. § 1681(a). Plaintiffs testify that they felt

distracted in class, inhibited during recess, and taught by the Uniform Policy that girls "should be less active" and "are not in fact equal to boys." Appellees' Br. 34-35, 69-71. Substantial evidence in the record could cause a reasonable jury to discredit Plaintiffs' subjective testimony. Appellants' Br. 51-55. A jury could reasonably doubt that Plaintiffs are objectively distracted in class or taught to feel unequal or less physically active when it is undisputed that girls equal or outperform boys academically at the School (and girls and boys at other schools) and excel in athletics and other extracurriculars. JA 1545, 1548, 2424, 2786. The same goes for an administrator's testimony that CDS girls were "not, as a general matter, less physically active during recess" than girls at other schools, JA 2537, and an expert's testimony that girls "do not appear to be educationally impaired, in comparison to the boys, by having to wear dresses." JA 2787.[23] If girls perform superlatively at CDS and are unrestrained by the Uniform Policy, a jury could reasonably conclude that Plaintiffs' alleged burdens are either negligible or not caused by the Uniform Policy.[24]

[23] Plaintiffs mount drive-by attacks on Defendants' experts. Appellees' Br. 39-40 & n.7. But Plaintiffs lost their *Daubert* challenges below and have not appealed those rulings, so they must urge those arguments to the jury. JA 2759; DE 213.

[24] Contra Appellees' Br. 71 n.14, a jury could reasonably conclude from the nature of skorts or leggings, JA 324, that their availability would mitigate if not eliminate many of Plaintiffs' alleged burdens.

Plaintiffs argue (at 25-26, 70-71) that evidence about academic performance and the flourishing of all CDS girls is "irrelevant," citing *Virginia* and *Jennings.* While *Virginia* held that VMI could not justify excluding all women because most would not want to attend, the evidence here undermines Plaintiffs' claim that they have been objectively harmed by the challenged policy at all.[25] And contrary to Plaintiffs' statement, *Jennings* recognizes that academic performance is important to the burden analysis. It held that summary judgment for *the school* was improper in part because the plaintiff's "GPA was so low because the hostile soccer environment made it difficult for her to focus on her studies." 482 F.3d at 700. The pervasive environment of sexual harassment in *Jennings*—"supported by a psychiatrist's opinion" that the "verbal sexual abuse caused her to suffer severe emotional distress," *id.* at 699—illustrates the severity of harm a student must demonstrate to *survive* summary judgment on a claim that she was denied or excluded from a school activity. At minimum, this case must be remanded for trial.

[25] Plaintiffs cannot plausibly seek to disregard evidence about girls *at CDS* who are subject to the same Uniform Policy, while trumpeting their own expert's expansive views that all girls are harmed by all sex-differentiated policies, even though she did not bother to evaluate CDS or the Plaintiffs. JA 1815-16.

C. RBA is not subject to Title IX because it does not receive federal funds.

RBA is entitled to summary judgment on the Title IX claim for the additional reason that, as the district court held, it "receives no direct public funding but rather contracts with CDS, Inc. to provide 'necessary educational facilities and management services.'" JA 2736. RBA thus does not "receiv[e] Federal financial assistance." 20 U.S.C. § 1681(a).

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

As in *NCAA*, RBA "only benefit[s] economically from federal assistance" received by CDS, Inc. and the School. *Id.*; *see* JA 1532-34. CDS, Inc. maintains a

bank account for the School that a third-party financial services firm, Acadia NorthStar, L.L.C., manages. JA 1532. The School's funding from all sources, including federal assistance, flows into this Acadia-managed bank account. JA 1532-33. RBA does not own the funds in this account. JA 1532. Acadia—and not RBA—has the authority to disburse funds from the School's account. JA 1532-33. As in *NCAA*, none of the funding the School receives is earmarked for payment to RBA; RBA must first incur an expense in performance of its Management Agreement with CDS, Inc. and then request that Acadia disburse funds on behalf of the School. JA 1533. In sum, CDS, Inc. receives federal funding, which it then uses in part to compensate RBA for services rendered under the Management Agreement. Like the NCAA's receipt of dues from federally funded members, RBA's receipt of compensation from federally funded CDS, Inc. does not trigger Title IX's coverage. *NCAA*, 525 U.S. at 468; *see Campbell v. Dundee Cmty. Schs.*, 661 F. App'x 884, 886, 888 (6th Cir. 2016) (holding that contractor "did not receive federal funds" despite "benefit[ing] economically from federal assistance").

Plaintiffs ignore these dispositive facts and do not even cite *NCAA*. Instead, they assert that RBA is subject to Title IX because it "receives federal funds via CDS to operate the school." Appellees' Br. 75. But that is merely another way of saying that RBA "indirectly benefits from the federal assistance afforded" CDS, Inc. *NCAA*, 525 U.S. at 468. Nowhere do Plaintiffs assert, much less demonstrate, that

the government earmarked or otherwise directed the federal funds to RBA. They claim only that *CDS, Inc*. "earmarked for the direct benefit of students" *its* payments to RBA. Appellees' Br. 77. That argument would prove far too much, as virtually all federal education funding is "for the direct benefit of students." That is why the Supreme Court in *NCAA* required a much closer nexus between the funding and the indirect beneficiary—that the "federal funds [be] earmarked for that purpose," *i.e.*, payment to the NCAA. 525 U.S. at 468. There is no such nexus here.

Without the first element of "recipient" status, Plaintiffs' arguments on the second element—that RBA operates the School—are ineffectual. Unlike the defendants in Plaintiffs' cited authorities (at 77), RBA has no policymaking authority over the challenged conduct. And even if that were otherwise, RBA's operating the School and implementing the Board's Uniform Policy still would not subject it to Title IX because it is not a "recipient" of federal funding.

CONCLUSION

Defendants request that the Court (1) reverse the district court's grant of summary judgment to Plaintiffs on the § 1983 claim against CDS, Inc. and the Board and render judgment in their favor on that claim, or, alternatively, remand the case for further proceedings; (2) affirm the summary judgment awarded to RBA on the § 1983 claim; and (3) affirm the district court's grant of summary judgment to all Defendants on the Title IX claim.

September 14, 2020

Respectfully submitted,

By: */s/ Aaron M. Streett*

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and this Court's briefing order because this brief contains 14,976 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman font, size 14.

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CERTIFICATE OF SERVICE

On this 14th day of September, 2020 a true and correct copy of the foregoing was filed with the electronic case filing (ECF) system of the U.S. Court of Appeals for the Fourth Circuit, which currently provides electronic service to the following counsel of record:

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