



August 23, 2021

Dr. Todd Stephens, Superintendent
Chuck Adcox, President
Kristi Baker, Vice President
Joe Duncan, Secretary
Travis Moffatt, Assistant Secretary
Gary Blizzard, Trustee
Kelly McDonald, Trustee
Sonja Ebel, Trustee

Board of Trustees
Magnolia Independent School District
31900 Nichols Sawmill
Magnolia, Texas 77353

Via E-mail

Re: Discriminatory Grooming Policies at Magnolia ISD

Dear Superintendent Stephens and Magnolia ISD Board of Trustees:

We are attorneys with the American Civil Liberties Union of Texas (ACLU of Texas)¹ and Lambda Legal Defense and Education Fund, Inc. (Lambda Legal),² and we write to express our concerns about Magnolia ISD's gender-specific dress and grooming code. We have learned that many students in Magnolia ISD have recently been disciplined and threatened with discipline based on their gender, gender identity, and gender expression, in violation of the U.S. Constitution and Title IX of the Education Amendments of 1972 (Title IX).

We are especially concerned that Magnolia ISD is attempting to force a non-binary student, Tristan, to conform to gender stereotypes associated with that student's gender assigned at birth by keeping Tristan in in-school suspension (ISS) until they cut their hair.³ We ask that

¹ The ACLU of Texas is a nonpartisan, nonprofit organization dedicated to defending the civil rights and civil liberties of all Texans with nearly 50,000 members across the Lone Star State.

² Lambda Legal is the oldest and largest national legal organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, transgender, and queer ("LGBTQ") people and everyone living with HIV through impact litigation, education and policy advocacy.

³ This particular student is represented by attorney Pete Patterson, and neither the ACLU of Texas nor Lambda Legal represent that student or their family in this matter. We provide this letter to the District to notify the school board of the legal risks of maintaining an unlawful dress and grooming policy and to support students at Magnolia ISD.

Magnolia ISD immediately stop disciplining Tristan for expressing their gender identity, stop disciplining Tristan and other students for not conforming to gender stereotypes, and undergo a process to remove all gender stereotypes from the District's dress and grooming code.

Background

The ACLU of Texas has previously put Magnolia ISD on notice that its dress and grooming code violates the U.S. Constitution and Title IX. In October 2019, the ACLU of Texas filed a grievance on behalf of a parent who was told that her son would be forced to cut his hair or would be sent to ISS. Although this grievance was dismissed for procedural reasons, the District was informed that requiring boys, but not girls, to wear short hair was unlawful gender discrimination. Following this grievance, Magnolia ISD personnel did not vigorously enforce the boys-only hair-length rule against the student who filed that grievance.

Last September, the ACLU of Texas sent a letter to Magnolia ISD and nearly 500 school districts across the state that still had outdated dress codes with boys-only hair-length rules, and that letter explained how these policies are harmful and violate the U.S. Constitution and Title IX.⁴ Last school year, the District did not enforce its hair-length rules due to the COVID-19 pandemic and many boys in Magnolia ISD were allowed to wear long hair without any problems.

Although the COVID-19 pandemic continues—and the Delta variant is even deadlier and more transmissible for young people than previous strands of the virus—Magnolia ISD has now decided to vigorously enforce its boys-only hair-length rule. Earlier this summer, the ACLU of Texas once again followed up with Magnolia ISD's attorney to let the District know that the legal and practical reasons for updating the District's dress and grooming code to be gender-neutral have significantly strengthened since last summer.⁵ Across the country, there have been several additional court decisions that have found that dress and grooming policies that treat students differently based on gender are illegal under federal law.⁶ And here in Texas, many school districts have recently revised their dress code policies to no longer treat students differently based on gender or force students to conform to gender stereotypes.⁷

⁴ See *ACLU of Texas Urges School Districts to Remove Discriminatory Dress Code Requirements*, ACLU of Texas (Sept. 2, 2020), <https://www.aclutx.org/en/press-releases/aclu-texas-urges-school-districts-remove-discriminatory-dress-code-requirements>

⁵ See *ACLU Letter to Follow Up on Discriminatory Dress and Grooming Codes*, ACLU of Texas (July 9, 2021) (Exhibit A).

⁶ See, e.g., *Monegain v. Dep't of Motor Vehicles*, 491 F. Supp. 3d 117, 143 (E.D. Va. 2020) (forcing a transgender plaintiff to follow a gender-specific dress and grooming code at a state agency violated the Equal Protection Clause).

⁷ For example, Clyde CISD near Abilene, Texas adopted a gender-neutral dress code last school year after the district made national news for sending a gay male student to ISS for painting his nails. The ACLU of Texas and Lambda Legal sent a letter to the school district explaining why its gender-specific grooming code was unconstitutional and illegal under Title IX, and the Clyde CISD school board voted to revise the dress and grooming code to comply with federal law. See *Discriminatory Dress and Grooming Policies at Clyde CISD*, ACLU of Texas and Lambda Legal (Dec. 10, 2020), <https://www.lambdalegal.org/in-court/legal-docs/letter-to-clyde-cisd-from-aclutx-and-lambda-legal>

Since Magnolia ISD started back to school on August 11, the ACLU of Texas and Lambda Legal have heard numerous reports of boys in the District being threatened with discipline and sent to ISS for wearing long hair. While some of these students have temporarily cut their hair to avoid the harms that come from being stuck in ISS, separated from their friends, and denied the ability to participate in school activities, other Magnolia ISD students still remain in ISS simply because they have refused to conform to gender stereotypes required by the District's dress code.

In addition to the many boys who have been disciplined and threatened with discipline in Magnolia ISD, there is also a non-binary student named Tristan who is being discriminated against and punished by the District for expressing their gender identity. Gender identity is someone's deeply held sense of their own gender, which is different from sexual orientation, which is an inherent emotional, romantic, or sexual attraction to other people.⁸ Medical opinion is unequivocal that someone's gender identity is not a choice and many people have a powerful and enduring sense of their own gender identity from a young age.⁹

Non-binary people are those who have a gender identity that is not exclusively male or female, and their gender identity may be in between or outside of the gender binary. Non-binary individuals sometimes identify as genderfluid, agender (without gender), genderqueer, two-spirit, or something else.¹⁰ People who are non-binary often express their gender identity in ways that do not conform to gender stereotypes. School district policies that force students to fit within the gender binary and abide by gender stereotypes therefore discriminate against non-binary students and deny their right to express themselves at school.

Tristan is a fifth grade student in Magnolia ISD who is non-binary and they use they/them pronouns. Although Tristan was assigned the gender of male at birth, they sometimes feel like a boy *and* they feel like a girl. Tristan's gender expression floats in between and outside the gender binary and has never ascribed to the stereotypes associated with being exclusively male or female. Some days, Tristan expresses their gender identity more stereotypically like a boy; but on other days, Tristan expresses more feminine characteristics. Among these feminine characteristics is Tristan's long hair. Tristan does not want to look like a boy and wearing long hair is a critical part of their gender expression. Tristan also decorates their nails as a way to express their gender identity, which is permitted under Magnolia ISD's dress and grooming code. But if Tristan is forced to wear short hair based on their gender assigned at birth, they feel like they would be forced to sacrifice a central part of who they are.

⁸ See Glossary of Terms, Human Rights Campaign, <https://www.hrc.org/resources/glossary-of-terms>

⁹ Jason Rafferty, Am. Acad. of Pediatrics, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, 2 tbl.1, 142(4) Pediatrics (Oct. 2018) (Gender identity is a person's "deep internal sense of being female, male, a combination of both, somewhere in between, or neither.")

¹⁰ See Elizabeth Boskey, PhD, *What Does It Mean to Be Nonbinary?*, VeryWellMind (Nov. 16, 2020), <https://www.verywellmind.com/what-does-it-mean-to-be-non-binary-or-have-non-binary-gender-4172702>.

Magnolia ISD has previously allowed Tristan to wear long hair in school without any problems. Tristan has worn long hair for the last couple years, and their hair was particularly long last school year. When Tristan wore long hair at Magnolia ISD schools, no other student, teacher, or staff member had a problem with it, and Tristan's long hair did not affect the safety, hygiene, or discipline of the school environment.

Tristan was first sent to ISS on Tuesday, August 17, and for all of last week, Tristan has been stuck in ISS and continually punished for expressing their gender identity by wearing long hair. Tristan should not be separated from their friends and forced to miss out on educational opportunities because of their gender identity—and Magnolia ISD's actions against Tristan and other students violate federal law.

Legal Concerns

Tristan should not be punished for expressing who they are and Magnolia ISD should immediately stop disciplining them and other students who are being punished for not conforming to gender stereotypes in the District's dress and grooming code. Magnolia ISD should take action *today* to no longer punish Tristan and other students by releasing them from ISS and the District should embark on a process to revise and change the dress and grooming code to no longer treat students differently based on gender and comply with federal law.

Magnolia ISD's gender-specific dress and grooming code violates both the Equal Protection Clause of the U.S. Constitution and Title IX. All of those arguments were thoroughly explained to the District in previous letters by the ACLU of Texas.¹¹ Recently, the legal and practical reasons for changing Magnolia ISD's dress and grooming code have strengthened even more due to case law, statements by major medical organizations, and guidance from the U.S. Department of Education's Office for Civil Rights.¹²

The Equal Protection Clause has long prohibited government entities like school districts from drawing gender classifications based on "overbroad generalizations about the different talents, capacities, or preferences of males and females."¹³ When a government entity imposes a rule based on gender, that rule must be "substantially related to an important government objective" and must have a justification that is "exceedingly persuasive."¹⁴ Such justifications may not be based on "archaic" and "overbroad stereotypes" about different genders.¹⁵

¹¹ Exhibit A.

¹² See, e.g., U.S. Department of Education Notice of Interpretation (June 16, 2021) (clarifying Title IX's prohibition on sex discrimination encompasses discrimination based on sexual orientation and gender identity), available at <https://www.govinfo.gov/content/pkg/FR-2021-06-22/pdf/2021-13058.pdf>; OCR Resources for LGBTQI+ Students (stating that students who identify as male, female or nonbinary may file a complaint when they believe "they have faced discrimination at school based on sexual orientation or gender identity or because they do not conform with sex stereotypes"), available at <https://www2.ed.gov/about/offices/list/ocr/lgbt.html>

¹³ *United States v. Virginia*, 518 U.S. 515, 533 (1996).

¹⁴ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 137 (1994); and *Virginia*, 518 U.S. at 533.

¹⁵ *J.E.B.*, 511 U.S. at 131.

Under current precedent from the U.S. Supreme Court, Magnolia ISD may only impose a gender-specific grooming code if it has an “exceedingly persuasive justification” for treating students differently based on gender. Currently, Magnolia ISD states in its FNCA (Local) policy that its dress and grooming code is “established to teach grooming and hygiene, instill discipline, prevent disruption, avoid safety hazards, and teach respect for authority.”¹⁶ Yet each of these fails to provide a rationale for treating students differently based on gender—since each of these motivations applies with equal force to every student. If girls in Magnolia ISD can wear long hair without jeopardizing their health, hygiene, safety, discipline, or respect for authority, then other students can too.¹⁷ This is the exact conclusion that the U.S. District Court for the Southern District of Texas reached last year in *De’Andre Arnold v. Barbers Hill ISD*, where the federal court found that a boys-only hair-length rule was likely unconstitutional under the Equal Protection Clause for purposes of a preliminary injunction.¹⁸

Critically, Magnolia ISD has already shown that its gender-specific grooming code has no harmful effects on hygiene, discipline, disruption, safety, or respect for authority because the District has not vigorously enforced these policies for the last few years. Tristan and other students previously wore long hair in Magnolia ISD schools without any issue; and the only justifications for the District to maintain these policies now are based on outdated gender stereotypes.

In addition to violating the Equal Protection Clause, Magnolia ISD’s dress and grooming code runs afoul of Title IX, which protects all students from gender discrimination in programs that receive federal funding. As a recipient of federal funds, Magnolia ISD may not discipline or discriminate against any student because of their gender; and the U.S. Court of Appeals for the Fourth Circuit recently found that gender-specific dress and grooming codes are subject to the same legal standards under Title IX as other cases of gender discrimination.¹⁹

No student in Magnolia ISD may be discriminated against because of that student’s gender, and it is particularly concerning that the District is also discriminating against Tristan based on their gender identity. Under the Equal Protection Clause and Title IX, non-binary students cannot be forced to conform to gender stereotypes or follow gender-based rules based on their gender assigned at birth. A federal court in Mississippi previously found it

¹⁶ FNCA (Local), Magnolia ISD (June 4, 2007), available at [https://pol.tasb.org/Policy/Download/912?filename=FNCA\(LOCAL\).pdf](https://pol.tasb.org/Policy/Download/912?filename=FNCA(LOCAL).pdf)

¹⁷ The District’s policy with respect to permitting girls to wear earrings, but not boys, non-binary or gender nonconforming students, is also discriminatory for the same reason. *See* Magnolia ISD Student Handbook 2021-2022, p. 41-42 (“Earrings may be worn only by girls. Earrings worn by boys will be confiscated and may not be returned to the student.”), available at <https://4.files.edl.io/4255/08/03/21/133712-baf5d715-1a3a-4116-9a66-bc06865c8639.pdf>.

¹⁸ *Arnold v. Barbers Hill Indep. Sch. Dist.*, 479 F.Supp.3d 511, 521-22 (S.D. Tex. 2020).

¹⁹ *Peltier v. Charter Day School, Inc. et al.*, No. 20-1001m 2021 WL 3483288 (4th Cir. Aug. 9, 2021); *accord Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569 (7th Cir. 2014) (finding a boys-only hair-length policy unlawful under Title IX).

unconstitutional to require a gender non-conforming student to wear certain attire for a senior yearbook portrait based on that student's gender assigned at birth.²⁰

Forcing non-binary students to conform to gender stereotypes or express their gender in certain ways also infringes on the First Amendment. The Supreme Court has long held that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”²¹ The Fifth Circuit, which reviews Texas federal court decisions, has recognized that “an individual’s choice of attire also may be endowed with sufficient levels of intentional expression to elicit First Amendment shelter.”²² When students choose to dress or groom themselves to convey a particular message, express their identity, or show “affiliation to unique social groups,” the Fifth Circuit has found that such expression may be shielded by the First Amendment.²³ By prohibiting a non-binary student from expressing their gender identity through dress and grooming, Magnolia ISD is likely violating the First Amendment.

Magnolia ISD’s own recently adopted local policy, which addresses student welfare and freedom from discrimination, harassment, and retaliation,²⁴ states that the District prohibits discrimination, including harassment, against any student on the basis of race, color, religion, sex, gender, national origin, age, disability, or any other basis prohibited by law. The policy specifically prohibits gender-based harassment, which includes “conduct based on the student’s gender, the student’s expression of characteristics perceived as stereotypical for the student’s gender, or the student’s failure to conform to stereotypical notions of masculinity or femininity.”²⁵ Because Magnolia ISD’s dress and grooming code discriminates based on gender and gender stereotypes and no longer conforms to Magnolia ISD’s policy regarding freedom from discrimination, it should be revised.

Forcing students to conform to gender stereotypes in the District’s dress and grooming code is not only illegal under federal law, but also intrinsically leads to discrimination based on race, religion, and other characteristics in ways that hamper the future success of Magnolia ISD students. Maintaining discriminatory dress and grooming policies can also be expensive and cumbersome for the District. When the ACLU of Texas filed a grievance against Wimberley ISD in Central Texas to challenge district decisions that discriminated against LGBTQ students and parents, the district’s discriminatory actions cost local taxpayers nearly \$100,000 in attorney’s fees.²⁶

²⁰ See, e.g., *Sturgis v. Copiah County School District*, No. 3:10-CV-455-DPJ-FKB, 2011 WL 4351355, at *1 (S.D. Miss. Sept. 15, 2011).

²¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

²² *Canady v. Bossier Par. Sch. Bd.*, 240 F.3d 437, 440 (5th Cir. 2001).

²³ *Id.*

²⁴ FFH (Local), Magnolia ISD (July 14, 2020), available at [https://pol.tasb.org/Policy/Download/912?filename=FFH\(LOCAL\).pdf](https://pol.tasb.org/Policy/Download/912?filename=FFH(LOCAL).pdf)

²⁵ *Id.*

²⁶ Christian Flores, *Wimberley ISD spent nearly \$100,000 in fight over rainbow-altered logo*, CBS Austin (June 8, 2020), <https://cbsaustin.com/news/local/wimberley-isd-spent-nearly-100000-in-fight-over-rainbow-altered-logo>.

Conclusion

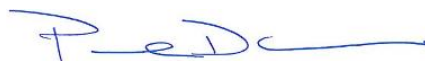
Magnolia ISD currently has an opportunity to resolve this situation without the time or expense of litigation or the resources necessarily incurred in multiple school district grievance processes. Through this letter, we urge you to take immediate action to stop disciplining Tristan and other students in Magnolia ISD and to revise the District's dress and grooming code to remove all provisions that are based on gender stereotypes.

We also trust that Magnolia ISD is aware of its ongoing obligation to ensure a safe and nondiscriminatory environment for its students and parents. When students and their families assert claims of discrimination, the District has legal obligations under federal and state law not to retaliate and to protect the private information of these students and families. We welcome any opportunity to discuss this matter further or answer any questions that you have.

Sincerely,



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Exhibit A



July 9, 2021

Via E-mail

Re: Discriminatory Dress and Grooming Provisions

Dear Superintendent:

We write to update you on recent developments regarding dress and grooming codes and to let you know that the legal and practical reasons to adopt policies that treat students equally based on gender, race, and religion have significantly strengthened since last September when we wrote to you on this topic.¹ Because your school district may still have policies that conflict with federal law, we ask that you amend discriminatory provisions of your district's dress and grooming code if you have not done so already. **Please let us know by August 15, 2021, if your district has taken any action to update your dress and grooming policies to no longer treat students differently based on gender, race, or religion.**

Legal Updates

The law is now clearer that dress and grooming policies that discriminate based on gender, race, or religion are unlawful and unconstitutional. Last September, we notified you that a federal court here in Texas found that Barbers Hill ISD's grooming code requiring boys, but not girls, to wear short hair was unconstitutional sex discrimination for purposes of a preliminary injunction.² That court also determined that requiring Black male students to cut their locs³ was unconstitutional race discrimination and that forcing boys to wear short hair likely violated the First Amendment. Although the school district initially appealed this ruling, Barbers Hill ISD

¹ We are following up on a letter that we sent to your school district on September 2, 2020, regarding discriminatory provisions in your district's dress and grooming code. In that letter, which we attach here, we explained how recent court decisions have found dress and grooming codes that treat students differently based on gender to be unconstitutional and in violation of federal law. We also provided examples of how dress and grooming codes grounded in gender stereotypes often lead to discrimination based on race, religion, and other identities. See Letter re: Discriminatory Dress and Grooming Provisions, ACLU of Texas (Sept. 2, 2020) (**Exhibit 1**).

² *Arnold v. Barbers Hill Indep. Sch. Dist.*, 479 F. Supp. 3d 511, 524 (S.D. Tex. 2020) (**Exhibit 2**).

³ "Locs" are ropelike strands of hair that form naturally and/or are styled in afro-textured hair. This letter uses the term "locs" instead of "dreadlocks" because of the negative and derogatory implications of the word "dread." See Shauntae White, *Releasing the Pursuit of Bouncin' and Behavin' Hair: Natural Hair as an Afrocentric Feminist Aesthetic for Beauty by Brown White*, International Journal of Media and Cultural Politics (December 2005), available at https://www.researchgate.net/publication/249919127_Releasing_the_pursuit_of_bouncin_and_behavin_hair_natural_hair_as_an_Afrocentric_feminist_aesthetic_for_beauty.

dismissed its appeal this May and told the federal appeals court that it “no longer wish[ed] to prosecute this appeal.”⁴

While this lawsuit continues in the district court, the court’s preliminary injunction against Barbers Hill ISD’s dress and grooming code remains in effect and the court’s reasoning for why the district’s dress and grooming code is unconstitutional remains good law and relevant to school districts across the state.

Another federal court also recently applied the rationale of last year’s U.S. Supreme Court decision in *Bostock v. Clayton County, Georgia* to find that dress and grooming policies that treat people differently based on gender are unlawful sex discrimination.⁵ This decision adds to longstanding Supreme Court precedent finding that government entities—including school districts—cannot force people to conform to “archaic and overbroad stereotypes” based on gender.⁶ While parents and students may determine how young people look and dress—within certain rules and guidelines from school districts—it is not the role of the government to force people to force students to conform to stereotypes based on gender, race, or religion.

Harms Imposed by Other Districts Here in Texas

In the midst of a global pandemic and one of the most challenging years in our nation’s history, some schools failed to prioritize students’ welfare and instead enforced gender-specific grooming codes this past school year in ways that inflicted harm on students and sparked significant backlash.

Last November, Clyde CISD, near Abilene, Texas, sent a high school senior to in-school suspension for painting his nails. Trevor Wilkinson decorated his nails to express himself as a gay male; and if he were a girl, he would not have broken any school rule. But because Clyde CISD had a policy prohibiting boys from wearing nail polish, long hair, and makeup, Trevor was forced to miss class and go to ISS. Trevor’s story sparked significant media attention from outlets like *CNN*,⁷ *USA Today*,⁸ *Good Morning America*,⁹ and *People* magazine.¹⁰ The ACLU of

⁴ Defendants’ Unopposed Motion to Dismiss Appeal, Case No. 20-20488 (5th Cir. May 20, 2021), at 2 (Exhibit 3).

⁵ *Monegain v. Dep’t of Motor Vehicles*, 491 F. Supp. 3d 117, 143 (E.D. Va. 2020) (forcing a transgender plaintiff to follow a gender-specific dress and grooming code at a state agency violated the Equal Protection Clause).

⁶ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136, 114 S. Ct. 1419, 1425, 128 L. Ed. 2d 89 (1994) (“Under our equal protection jurisprudence, gender-based classifications require ‘an exceedingly persuasive justification’ in order to survive constitutional scrutiny.”).

⁷ Alisha Ebrahimji, *This teenager’s painted nails got him suspended. Now his Texas school district has created a more gender-neutral dress code policy*, CNN (April 23, 2021), <https://www.cnn.com/2021/04/23/us/nail-polish-texas-school-gender-neutral-trnd/index.html>

⁸ Timothy Chipp, *Texas high school suspends student for painted fingernails: ‘I’ve been trapped in closed minded people’s minds’*, USA Today (Dec. 4, 2020), <https://www.usatoday.com/story/news/education/2020/12/04/texas-high-school-senior-serving-suspension-painted-fingernails/3828431001/>

⁹ *Student speaks out after being suspended for wearing nail polish*, Good Morning America (Dec. 7, 2020), <https://www.goodmorningamerica.com/living/story/student-speaks-suspended-wearing-nail-polish-74579948>

¹⁰ Joelle Goldstein, *Tx. School District Adopts Gender-Neutral Dress Code After Suspending Male Student for Nail Polish*, People (April 23, 2021), <https://people.com/human-interest/texas-school-district-adopts-gender-neutral-dress-code-after-suspending-male-student-for-nail-polish/>

Texas and Lambda Legal sent a letter to Clyde CISD explaining why its policies were unconstitutional and unlawful.¹¹ After reviewing its dress and grooming code and listening to input from parents, students, and members of the public, the Clyde CISD Board of Trustees voted this April to revise its dress and grooming code to no longer treat students differently based on gender.¹²

This spring, Troy ISD, near Temple, Texas, sent an 11-year-old student named Maddox Cozart to ISS for more than ten days for violating the district's dress and grooming code. Maddox is both Black and Native American and braids his hair in a top knot as a way to honor his heritage.¹³ The district's dress code stated that boys had to have short hair and could not wear "a ponytail, top knot, bun or similar styles," even though girls could wear these same hairstyles.¹⁴ Members of the Troy community criticized the district's policies as both sexist and racist, and the district's enforcement of these rules was reported by media outlets such as *ABC Dallas-Fort Worth*,¹⁵ *CNN*,¹⁶ the *Fort Worth Star-Telegram*,¹⁷ and *NBC Temple*.¹⁸ After the student's family filed a complaint of discrimination with the district, the Troy ISD Board of Trustees voted to amend its dress and grooming code this May to no longer treat students differently based on gender, race, or religion.¹⁹

The Need to Act Now

Both Clyde CISD and Troy ISD have now updated their dress and grooming policies to conform to federal law and no longer treat students differently based on gender, race, or religion, but only after their policies already caused significant harm to students. As students in your district are on summer break, you have an opportunity right now to update your dress and grooming policies—if you have not done so already—before these policies cause students harm and before any controversy erupts in your district.

Please let us know **by August 1, 2021**, if your district has taken any steps to amend your dress and grooming code to comply with federal law and treat students equally based on gender, race, and religion. We recommend that you review the legal guidance that Texas Association of

¹¹ Discriminatory Dress and Grooming Policies at Clyde CISD, ACLU of Texas and Lambda Legal (Dec. 10, 2020), <https://www.lambdalegal.org/in-court/legal-docs/letter-to-clyde-cisd-from-aclutx-and-lambda-legal>

¹² Ebrahimiji, *supra* note 7.

¹³ *Local student returns back to class after hairstyle controversy*, KWTX (April 24, 2021), <https://www.kwtx.com/2021/04/24/local-student-returns-back-to-class-after-hairstyle-controversey/>

¹⁴ *Id.*

¹⁵ Tashara Parker, *Rooted: Troy mother seeks changes to dress-code policy after son is placed in-school suspension over hairstyle*, WFAA (April 21, 2021), <https://www.wfaa.com/article/news/community/rooted/rooted-troy-isd-hair-style-policy-crown-act-hope-cozart/287-4d30548f-7543-402a-a6e0-eda6922d239e>

¹⁶ Texas 11-year-old suspended for wearing braids in celebration of African heritage, CNN Newsource (April 21, 2021), <https://kvoa.com/news/top-stories/2021/04/21/texas-11-year-old-suspended-for-wearing-braids-in-celebration-of-african-heritage/>

¹⁷ Mike Stunson, *'This is a racial issue.' Boy punished for hairstyle at Texas school, mom says*, Fort Worth Star-Telegram (April 16, 2021), <https://www.star-telegram.com/news/nation-world/national/article250722989.html>

¹⁸ Andrew Moore, *Troy mother says son is being isolated in school because of his haircut*, KCEN (April 15, 2021), <https://www.kcentv.com/article/news/local/troy-mother-says-son-is-being-isolated-in-school-because-of-his-haircut/500-fcac172c-3a6f-4b0d-a41e-719bf7716a1d>

¹⁹ *Revised Troy ISD Student Dress Code Now In Effect*, Troy ISD (June 1, 2021), <https://www.troyisd.org/36626?articleID=77749>

School Boards (TASB) has provided on this issue, which advises districts to “collaborate thoughtfully with parents from diverse backgrounds in setting grooming standards” and states that “districts may want to consider having a dress code that does not make distinctions based on gender.”²⁰

We know that your district is committed to being a place where every student is able to thrive and no one is discriminated against because of who they are. We hope that you take steps this summer to ensure that your policies align with your values, conform to federal law, and do not harm students in your district if you have not done so already. We welcome the opportunity to speak with you and answer any questions that you have, and we thank you for your time and attention to this matter.

Sincerely,



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²⁰ Student Dress and Appearance, TASB (September 2020), https://www.tasb.org/services/legal-services/tasb-school-law-esource/students/documents/student_dress_and_appearance.pdf. TASB also has available a model FNCA (Local) policy that does not make any distinctions based on race or gender, which other school districts are adopting across the state. We encourage you to ask TASB about this resource as you work to update your district’s policies.

Exhibit 1



September 1, 2020

Via E-mail

Re: Discriminatory Dress and Grooming Provisions

Dear Superintendent:

We write to inform you that your school district's dress and grooming code appears to contain provisions that were recently declared unconstitutional by a federal court in Texas. We ask that you revise your dress code to ensure that it conforms to federal law and does not contain any restrictions that discriminate against students based on sex, race, or religion.

On August 17, 2020, the U.S. District Court for the Southern District of Texas determined that a public school grooming code requiring male, but not female, students to wear short hair is unconstitutional while granting a preliminary injunction to enjoin the district's policy. In *De'Andre Arnold v. Barbers Hill Independent School District*, the court found that gender-specific grooming codes violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The court applied heightened scrutiny to this gender-specific dress code and found that the district did not provide a sufficiently persuasive or important justification for imposing a hair-length requirement on male, but not female, students.¹ The court also determined that the district's decision to discipline a Black male student for wearing locs² likely constitutes race discrimination in violation of the Equal Protection Clause.

Your school district's dress and grooming code appears to contain a hair-length requirement that applies only to male but not female students and is similar to the one the court struck down in Barbers Hill. As discussed below, this grooming restriction treats students differently on the basis of sex and is unconstitutional. This type of provision also leads to bias and discrimination against students on the basis of race and religion, and it conflicts with recent guidance updated this August by the Texas Association of School Boards (TASB), which cautions districts against imposing gender-specific grooming codes.³

¹ No. 4:20-CV-1802, 2020 WL 4805038 (S.D. Tex. Aug. 17, 2020) (**Exhibit 1**).

² Locs are ropelike strands of hair that form naturally and/or are styled in afro-textured hair. Locs have been traced to just about every civilization in history, starting in 2500 B.C. However, locs are directly related to the culture of members of the African diaspora. This letter uses the term "locs" instead of "dreadlocks" because of the negative and derogatory implications of the word "dread." See Letter from ACLU of Florida and NAACP Legal Defense Fund, p. 2 (Nov. 29, 2018) available at, <https://www.aclu.org/legal-document/clinton-stanley-v-books-christian-academy-complaint>

³ See *Student Dress and Appearance*, TASB (August 2020), at 4-5, https://www.tasb.org/services/legal-services/tasb-school-law-esource/students/documents/student_dress_and_appearance.aspx (urging "district leadership [to] collaborate thoughtfully with parents from diverse backgrounds in setting grooming standards" and

In this moment, as students and families in your district face unprecedented challenges, it is imperative that you do not add to their concerns by enforcing policies that discriminate on the basis of sex, race, or religion. We ask you to reexamine your district's dress and grooming code to ensure that it complies with federal law and is free from sex stereotypes and other discriminatory language.

Legal Concerns

The Constitution protects students from discrimination on the basis of sex, race, and religion, as well as other protected characteristics. Like many school districts across the state, Barbers Hill ISD in Mont Belvieu, Texas, which was the subject of the above-mentioned law suit, imposed a hair-length requirement on male, but not female, students.⁴ The district made national headlines this January when it told De'Andre Arnold that he would not be allowed to walk at graduation if he did not cut his locs.⁵ The district also enforced this gender-specific grooming policy against De'Andre's cousin, Kaden Bradford, who also wears locs and sought a preliminary injunction to allow him to return to school without being forced to cut his natural Black hair.⁶ Two weeks ago, a federal court declared Barbers Hill ISD's dress and grooming code to be unconstitutional under the heightened scrutiny test that is now required by the U.S. Supreme Court for every sex classification imposed by a government entity.

When the government treats people differently based on sex, it must provide an "exceedingly persuasive justification" for this differential treatment that is "substantially related to an important government objective."⁷ The Supreme Court has uniformly applied heightened scrutiny to every gender-based classification that it has considered "in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of 'archaic and overbroad' generalizations about gender."⁸

Although sex stereotypes and overbroad generalizations based on gender may be "descriptive . . . of the way many people still order their lives," the Supreme Court has consistently "reject[ed] measures that classify unnecessarily and overbroadly by gender when

stating that "[i]n light of the evolving law, districts may want to consider having a dress code that does not make distinctions based on gender") (**Exhibit 2**).

⁴ Barbers Hill ISD's Student Handbook states that "Male students' hair will not extend, at any time, below the eyebrows or below the ear lobes. Male students' hair must not extend below the top of a t-shirt collar or be gathered or worn in a style that would allow the hair to extend below the top of a t-shirt collar, below the eyebrows, or below the ear lobes when let down." Student Handbook. Barbers Hill ISD, at 53, <https://resources.finalsite.net/images/v1597847392/bhisd/t2sqvbxrmulol1osx5kv/Handbook-BHISD2020-21.pdf>

⁵ Leah Asmelash, *If this Texas student doesn't cut his dreadlocks, he won't get to walk at graduation. It's another example of hair discrimination, some say*, CNN (Jan. 24, 2020), <https://www.cnn.com/2020/01/23/us/barbers-hill-isd-dreadlocks-deandre-arnold-trnd/index.html>; Johnny Diaz and Jacey Fortin, *Student Suspended Over Dreadlocks Is Invited to the Oscars*, N.Y. Times (Feb. 1, 2020), <https://www.nytimes.com/2020/02/01/us/DeAndre-Arnold-dreadlocks.html>

⁶ The ACLU of Texas represented Kaden during the school district grievance process. *See Barbers Hill ISD School Board Denies Grievances on Discriminatory Grooming Policies*, ACLU of Texas (July 21, 2020), <https://www.aclutx.org/en/press-releases/barbers-hill-isd-school-board-denies-grievances-discriminatory-grooming-policies>

⁷ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994)

⁸ *Id.* (citing *Reed v. Reed*, 404 U.S. 71 (1971)).

more accurate and impartial lines can be drawn.”⁹ It is especially telling that the Supreme Court has applied this same heightened scrutiny to every government sex classification it has considered, without making any exception for the context of the military or public schools.¹⁰

In applying the heightened scrutiny required by the Supreme Court, the federal court in *De’Andre Arnold* rejected old precedent from the Texas Supreme Court and Fifth Circuit Court of Appeals that gave school districts greater deference in imposing gender-specific dress and grooming codes.¹¹ Two cases from the Texas Supreme Court, on which some districts in the state still rely, support the proposition that “Hair-length regulations that apply to boys but not to girls do not manifest such an affront to students’ constitutional rights to merit judicial intervention.”¹² But as state court decisions focused only on state law, neither of these cases applies to challenges based on federal law.¹³ This line of cases was also significantly undermined this June when the U.S. Supreme Court issued a landmark decision on sex discrimination under Title VII.

In *Bostock v. Clayton County, Georgia*, the Supreme Court affirmed that all individuals, including those who are lesbian, gay, bisexual, or transgender (LGBT), have a right to be free from sex discrimination in the workplace.¹⁴ Prior to this ruling, there was a line of Title VII cases in which gender-based classifications were considered permissible as long as they imposed “comparable burdens” or “equal burdens” on men and women. The Supreme Court has now clearly rejected this framework.¹⁵

⁹ *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017).

¹⁰ *See, e.g., United States v. Virginia*, 518 U.S. 515, 533 (1996).

¹¹ Barbers Hill ISD tried to argue that its dress and grooming code was constitutional in light of *Karr v. Schmidt*, 460 F.2d 609 (5th Cir. 1972), but the court concluded that *Karr* “does not address sex discrimination” and does not incorporate modern Supreme Court precedent that clearly requires heightened scrutiny. Opinion at 10-11 (“*Karr* simply does not bar K.B.’s claims.”).

¹² *See, e.g., FNCA (Legal)*, Bullard ISD (July 1, 2002), [https://pol.tasb.org/Policy/Download/1078?filename=FNCA\(LEGAL\).pdf](https://pol.tasb.org/Policy/Download/1078?filename=FNCA(LEGAL).pdf)

¹³ In *Barber v. Colorado Independent School District*, the Texas Supreme Court found that a hair-length requirement for male, but not female, students was permissible under the Texas Constitution. 901 S.W.2d 447, 451 (Tex. 1995). Two years later, in *Board of Trustees of Bastrop Independent School District v. Tountate*, the Texas Supreme Court applied this same ruling to conclude that gender-based hair length restrictions do not violate the non-discrimination requirements of Texas Civil Practices & Remedies Code § 106.001(a). 958 S.W.2d 365, 371 (Tex. 1997). The court relied heavily on cases related to Title VII, the federal employment nondiscrimination law, which previously sanctioned the imposition of gender-specific dress and grooming codes, but has now been called into question by *Bostock*.

¹⁴ 140 S. Ct. 1731 (2020).

¹⁵ In cases like *Jespersen v. Harrah's Operating Co.*, courts decided that “[g]rooming standards that appropriately differentiate between the genders are not facially discriminatory” unless they “place[] a greater burden on one gender than the other.” *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1109–10 (9th Cir. 2006) (en banc). In other words, as long as employers treated *groups* of male and female employees equally, then certain gender-specific grooming requirements did not run afoul of Title VII.

But in *Bostock*, the Court held that that private employers “discriminate” against someone “because of sex” when an employer “intentionally treats a person worse because of sex.” 140 S. Ct. at 1740. For purposes of Title VII, it does not matter whether an employer’s policies disadvantage an entire group of male or female employees. If a single employee is treated differently in part because of sex—and suffers an adverse employment action as a result—then that employee may now state a claim for sex discrimination.

Bostock's holding marks a dramatic shift in the context of employment discrimination, and it also applies to schools subject to Title IX, which bars discrimination "on the basis of sex" for any "person" in an education program or activity receiving federal financial assistance.¹⁶ Under *Bostock*'s logic, students who are adversely affected by gender-specific grooming codes may state a claim for sex discrimination, even if school district policies impose "comparable burdens" on entire groups of male and female students.

Yet even prior to *Bostock*, at least one federal court of appeals had already applied Title IX to invalidate a gender-specific grooming policy. In *Hayden ex rel. A.H. v. Greensburg Community School Corporation*, the Seventh Circuit held that a hair length requirement applying only to male but not female athletes at schools in Greensburg, Indiana, was illegal sex discrimination under Title IX.¹⁷ And other federal courts have found that imposing different dress and grooming codes on the basis of sex also violates the Equal Protection Clause.¹⁸

It is now clear that the Texas Supreme Court cases relied on by certain school districts to impose gender-specific dress and grooming codes are no longer good law. Under modern precedent from the U.S. Supreme Court, school districts may only impose a gender-specific dress and grooming code if they have an "exceedingly persuasive justification" for treating students differently based on sex. Currently, many districts state in their FNCA (Local) policies that dress and grooming codes are designed to teach grooming and hygiene, instill discipline, prevent disruption, avoid safety hazards, and teach respect for authority. Yet each of these fails to provide a rationale for treating male and female students differently—since each of these motivations applies with the same force to every student. If female students can wear long hair without jeopardizing their health, hygiene, safety, discipline, or respect for authority, then male students can too. This is the exact conclusion that the federal court reached in enjoining the grooming code at issue in *De'Andre Arnold*,¹⁹ and it is the same result that your district could face if sued in federal court.

TASB recently revised its dress and grooming code guidance in August of 2020 to comply with federal law. TASB's revised policies encourage Texas school districts to "collaborate thoughtfully with parents from diverse backgrounds in setting grooming standards" and warn that "[i]n light of the evolving law, districts may want to consider having a dress code that does not make distinctions based on gender."²⁰

By eliminating your school's gender-specific dress and grooming code provisions, you will be following federal law while protecting your district's students from discrimination.

¹⁶ Title IX states "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(a).

¹⁷ 743 F.3d 569, 583 (7th Cir. 2014).

¹⁸ See, e.g., *Sturgis v. Copiah County School District*, No. 3:10-CV-455-DPJ-FKB, 2011 WL 4351355, at *1 (S.D. Miss. Sept. 15, 2011) (requiring boys to wear tuxedos and girls to wear drapes violated the Equal Protection Clause); *Bonnie Peltier, et al. v. Charter Day School, Inc., et al.*, No. 7:16-CV-30-H, Dkt. 216 at *31 (E.D.N.C. Mar. 28, 2019) (requiring girls to wear skirts was an impermissible sex classification based on outdated stereotypes).

¹⁹ 2020 WL 4805038, at *9.

²⁰ See *supra* note 3 (**Exhibit 2**).

The Harms of Imposing Discriminatory Dress and Grooming Codes

In addition to being unconstitutional and unlawful, gender-specific dress and grooming codes are harmful to your district's students. Imposing sex-specific hair requirements is tied to racial and religious discrimination, since people of various faiths and ethnic backgrounds sometimes wear longer hair. For example, male students who are Jewish, Sikh, or Rastafarian may be unable to cut their hair due to religious reasons. Two male students who are Catholic recently sued a school district in South Texas and won after the district tried to suspend them for wearing long hair as a promise to God.²¹

Gender-specific hair length requirements also have a disparate impact on students who are Native American, since wearing long hair is sometimes an important part of their religious, cultural and/or spiritual identity. In 2014, a kindergarten student in West Texas who wore long hair as part of his Native American ancestry was suspended from school and told that he would be forced to cut his hair.²² In 2010, the ACLU of Texas won a lawsuit establishing that Native American students may wear long hair in public school for religious reasons,²³ yet male Native American students across the state still occasionally face challenges in vindicating this right.²⁴

Similarly, students of color sometimes wear longer hair as part of their ethnic heritage, and the harmful effects of gender-specific dress and grooming codes fall hardest on students who are Black. In October 2018, a Black male student in Greenwood, Texas, was told by school administrators that he might not be allowed to play football if he did not cut his cornrows.²⁵ In January 2019, a six-year-old Black student in Hewitt, Texas was sent home from school and forced to cut his locs because they touched his ears and collar.²⁶ And in October 2019, a school district in Tatum, Texas expelled two young Black male students because they wore natural Black hair that extended past their ears and collar.²⁷ The ACLU of Texas sent the district a letter

²¹ *Court approves religious accommodation for Texas students with long hair*, Catholic News Agency (Sept. 9, 2019), <https://www.catholicnewsagency.com/news/court-approves-religious-accommodation-for-texas-students-with-long-hair-77628>

²² Dan Solomon, *The Navajo Kindergartener from West Texas who Was Sent Home on His First Day of School for Long Hair Is Back in Class*, Texas Monthly (Sept. 3, 2014), <https://www.texasmonthly.com/the-daily-post/the-navajo-kindergartener-from-west-texas-who-was-sent-home-on-his-first-day-of-school-for-long-hair-is-back-in-class/>

²³ *See A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 253 (5th Cir. 2010).

²⁴ The ACLU of Texas has received numerous intakes from Native American students across the state who have found it difficult to exercise their right to wear long hair when their school district mandates that all male students wear short hair. In some circumstances, school administrators have tried to require Native American students to “prove” their ethnic heritage or tribal affiliation—which is not required by federal law—and students who wear long hair as part of their religion or heritage also feel ostracized from their peers.

²⁵ Gianni Windahl, *Proposed Greenwood ISD grooming code sparks controversy*, CBS 7 (Oct. 12, 2018), <https://www.cbs7.com/content/news/Greenwood-isd-grooming-code--497134531.html>

²⁶ Erin Donnelly, *Mom says elementary school is demanding that her first-grader cut his dreadlocks: ‘I won’t conform to racist policies,’* Yahoo Lifestyle (Jan. 9, 2019), <https://www.yahoo.com/lifestyle/mom-says-elementary-school-demanding-first-grader-cut-dreadlocks-wont-conform-racist-policies-120109868.html>

²⁷ Kristen Barton, *Mother, grandmother's grievances denied by Tatum ISD; lawsuit planned*, Longview News-Journal (Oct. 21, 2019), https://www.news-journal.com/news/local/mother-grandmothers-grievances-denied-by-tatum-isd-lawsuit-planned/article_93405944-f440-11e9-a5b9-931db1958a4f.html

explaining why Tatum ISD's actions were unlawful.²⁸ The district eventually changed its dress and grooming code this summer,²⁹ but only after two young Black male students were already denied educational opportunities.

The United States has a long history of using physical and cultural traits, like hair texture and hairstyle, as a proxy for discrimination against Black people. These policies actively devalue Black students by preventing them from fully presenting themselves with natural and protective hairstyles like cornrows, locs, and braids. By enforcing policies that operate as a ban on natural Black hair, schools send a negative message to Black students that natural hair is not “professional enough” or “up to standards.” In order to protect Black students, dress and grooming policies must recognize that prohibiting certain hairstyles is a proxy for racial discrimination.³⁰

These examples comprise only a handful of ways that gender-specific dress and grooming codes harm Texas students each year.³¹ Although your school district may not intend to discriminate against students in all of these ways, it has enacted policies that compel students to conform to gender and racial stereotypes about grooming and appearance, which has harmful and discriminatory effects based on sex, race, and religion.

Conclusion

You are in a unique position to help eliminate these harms, since your district looks to your guidance in developing its dress and grooming code. By reexamining and revising your dress and grooming code to remove all stereotypes based on race and sex, your district will abide by federal law while also becoming a more affirming and supportive environment for every student in your district. If your district eliminates these gender-based restrictions from its policies, it will be able to avoid the discriminatory effects caused by gender-specific dress and grooming codes and also will avoid being subject to the expensive costs of grievances or litigation pertaining to unconstitutional policies that cause students harm.

²⁸ *ACLU Letter to Tatum ISD School Board*, Longview News-Journal (Oct. 21, 2019), https://www.news-journal.com/aclu-letter-to-tatum-isd-school-board/pdf_00501b38-f41d-11e9-9a5e-d3e499516e2e.html.

²⁹ *See Dress and Grooming*, Tatum ISD (June 15, 2020), https://drive.google.com/file/d/1kpqUFK42wPfOMiidnt7_ivvLr9HafqJP/view

³⁰ According to New York City's Human Rights Commission, “Bans or restrictions on natural hair or hairstyles associated with Black people are often rooted in white standards of appearance and perpetuate racist stereotypes that Black hairstyles are unprofessional. Such policies exacerbate anti-Black bias in employment, at school, while playing sports, and in other areas of daily living.” Legal Enforcement Guidance on Race Discrimination on the Basis of Hair, NYC Human Rights Commission (February 2019), <https://www1.nyc.gov/assets/cchr/downloads/pdf/Hair-Guidance.pdf>

³¹ Gender-specific dress and grooming requirements also harm lesbian, gay, bisexual, transgender, queer, and questioning (LGBTQ) students, since not all students fit within the gender binary or conform to gender stereotypes. And gender-specific hair length requirements also harm students who cannot afford frequent haircuts. For example, in February 2019, a teacher in Hico, Texas, gave a student a choppy, uneven haircut during the school day because his family did not have money to get his haircut. This student was humiliated and embarrassed and did not know why he was forced to wear short hair while his female peers were allowed to wear long hair. *See Lindsay Lowe, Texas mom outraged after teacher cut her son's hair for dress code violation*, Today.com (Feb. 28, 2019), <https://www.today.com/style/texas-mom-outraged-after-teacher-cut-her-son-s-hair-t149597>

We welcome any opportunity to discuss this matter further or answer any questions.
Thank you for your time and attention to this matter.

Sincerely,

A handwritten signature in black ink on a light gray background. The signature reads "Brian Klosterboer" in a cursive script.

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Exhibit 2

ENTERED

August 17, 2020

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EVERETT DE'ANDRE ARNOLD, <i>et al</i> ,	§	
	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. 4:20-CV-1802
	§	
BARBERS HILL INDEPENDENT	§	
SCHOOL DISTRICT, <i>et al</i> ,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court is a motion for a preliminary injunction filed by Plaintiff K.B. The Court held an evidentiary hearing on the motion over the three days spanning July 22, 2020 through July 24, 2020. (Dkt. 77–Dkt. 79) After careful consideration of the parties' written submissions, the extensive evidentiary record developed at the hearing, and the other filings in the case, K.B.'s motion (Dkt. 44) is **GRANTED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

K.B. is preparing to enter his junior year of high school and has enrolled at Barbers Hill High School in the Barbers Hill Independent School District ("BHISD"). BHISD has an excellent reputation in the Texas educational community and Barbers Hill High School is the home of the award-winning Soaring Eagle Marching Band. K.B. has attended BHISD schools since the first grade, excepting part of his sophomore year of high school, when the events giving rise to this lawsuit forced him to transfer from Barbers Hill High School to Sterling High School in the Goose Creek Consolidated Independent School District. (Dkt. 44-4 at pp. 3, 7) K.B. has testified that, while he was

enrolled at Sterling High School, he missed Barbers Hill High School, where he was an A/B student and played trombone in the marching band, and wished to return to complete his education there. (Dkt. 44-4 at pp. 7–8)

The dispute that forced K.B.’s transfer to Sterling and ultimately led to this lawsuit revolves around K.B.’s hair. K.B. is African-American and wears his hair in locs¹ “because it is part of [his] Black culture and heritage” and because he wants to emulate “[his] loved ones, including extended family members with West Indian roots, [who] have locs.” (Dkt. 44-4 at p. 3) K.B. formed his natural hair into locs in the seventh grade and has not cut them since. (Dkt. 44-4 at p. 3; Transcript of preliminary injunction hearing, day one, pages 56–57) K.B. testified that “[l]ocs are meant to grow long” and that “[y]ou don’t cut locs” because “they would unravel,” undoing “all the hair process and growth” that the wearer spends years cultivating. (Dkt. 44-4 at p. 7; Transcript of preliminary injunction hearing, day one, pages 56–57)

Professor D. Wendy Greene, who testified as an expert for K.B., supported K.B.’s testimony with persuasive historical and sociological evidence showing that “hair texture, like one’s skin color, has long served as a racial marker.” (Dkt. 44-2 at p. 11) Professor Greene testified that locs are a long-recognized expression both of African-American identity and West Indian identity. (Dkt. 44-2 at pp. 4–8) According to Professor Greene, “K.B.’s claim that his natural hairstyle is an expression of his racial identity is routinely

¹ A common term for “locs” is “dreadlocks.” However, Professor D. Wendy Greene, who testified as an expert for K.B., pointed out that the term “dreadlocks” has its origins in slave traders’ describing slaves’ unattended hair as “dreadful” when those slaves emerged from slave ships after spending months at sea during the Middle Passage. (Dkt. 44-2 at p. 4)

asserted by African Americans today and is entirely consistent with African descendants' culture that has been widely understood in America since the era of slavery.” (Dkt. 44-2 at p. 4) Professor Greene also clarified that “[l]ocs are a symbol of reverence to West Indian ancestors” and that, furthermore, “West Indian cultural traditions prohibit cutting or trimming of locs.” (Dkt. 44-2 at p. 6)

When K.B. began his freshman year at Barbers Hill High School, BHISD had a hair-length policy, applicable only to male students, mandating that:

[b]oys' hair will not extend, at any time, below the eyebrows, below the ear lobes, or below the top of a t-shirt collar. Corn rows and/or dread locks are permitted if they meet the aforementioned lengths.
Dkt. 44-4 at p. 3.

To comply with this hair-length requirement without having to cut his locs, K.B. wore a “thin headband and t[ied his] locs up and back, so they did not extend past [his] earlobes, neck, or eyebrows.” (Dkt. 44-4 at p. 3) K.B. testified that his hair was scrutinized frequently and extensively by BHISD officials when he was a freshman. During that school year, Barbers Hill High School Assistant Principal Ryan Rodriguez “removed [K.B.] from class at least once per week to ensure [his] locs complied with the hair policy.” (Dkt. 44-4 at p. 4) K.B. testified that the intrusive monitoring continued into the fall semester of his sophomore year, when he “was regularly called out of class” so that school administrators could gauge his compliance with the hair-length policy. (Dkt. 44-4 at p. 4) K.B. “received verbal warnings . . . regarding [his] hair length” but was allowed to return to class because he “always complied with the hair policy.” (Transcript of preliminary injunction hearing, day one, pages 60–62; Dkt. 44-4 at p. 4)

But then BHISD changed its hair-length policy midway through K.B.’s sophomore year, in December of 2019. The new policy—still applicable only to male students—mandated that:

[m]ale students’ hair will not extend, at any time, below the eyebrows, or below the ear lobes. Male students’ hair must not extend below the top of a t-shirt collar or be gathered or worn in a style that would allow the hair to extend below the top of a t-shirt collar, below the eyebrows, or below the ear lobes when let down.

Dkt. 44-8 at p. 56.

The addition of the “when let down” language prevented K.B. from complying with the hair-length policy by tying his locs up and required K.B. to cut his locs to avoid punishment. K.B. did not cut his locs, and was punished with in-school suspension, which he described as being “what [he would] imagine prison to be like.” (Transcript of preliminary injunction hearing, day one, pages 65–69) While in in-school suspension, students were completely isolated; they were not allowed to leave the room, talk to any other students, or participate in extracurricular activities. (Dkt. 44-4 at pp. 6–7; Transcript of preliminary injunction hearing, day one, pages 65–69) Students in in-school suspension did not receive instruction from certified teachers and “had to figure out [their] schoolwork and homework on [their] own.” (Dkt. 44-4 at p. 7) Eventually, K.B. transferred to Sterling High School to finish out his sophomore year so that he could receive an education and continue to grow his locs without suffering further punishment. (Dkt. 44-4 at p. 7)

BHISD defends the mid-year hair policy change that resulted in K.B.’s transfer by asserting that it has a “legally acceptable right to still have gender-specific hair

expectations” and to prevent students from “circumventing” them. (Transcript of preliminary injunction hearing, day two, pages 555–58) Dr. Greg Poole (“Dr. Poole”), the Superintendent of BHISD, testified that the addition of the “when let down” language to the hair-length policy was needed to give “clarity that circumventing and manipulating the dress code policy is not permitted.” (Transcript of preliminary injunction hearing, day two, page 531) Dr. Poole also used the term “circumvent” when asked specifically about K.B.’s method of complying with the previous iteration of the hair-length policy by tying his locs up, saying of K.B., “He’s a great kid. I know that. But my impression he’s circumventing the process to get by the dress code.” (Transcript of preliminary injunction hearing, day two, page 554) Pressed on the meaning of these statements, Dr. Poole explained that he and the BHISD Board of Trustees aim to make BHISD’s students “clean-cut” and “presentable.” (Transcript of preliminary injunction hearing, day two, pages 555–58) Yet Dr. Poole also conceded that K.B. looked “clean-cut” and “very presentable” with his locs tied up. (Transcript of preliminary injunction hearing, day two, page 556) Pressed further, Dr. Poole ultimately simply asserted that, to his knowledge, BHISD “ha[s] a legal right to have gender-specific hair dress expectations.” (Transcript of preliminary injunction hearing, day two, page 558)

K.B. and his co-plaintiffs² subsequently filed this suit against BHISD, alleging the following causes of action: (1) intentional race discrimination under the Fourteenth Amendment’s Equal Protection Clause; (2) intentional race discrimination under Title VI

² K.B.’s lawsuit is brought on his behalf by his mother, Cindy Bradford. K.B.’s co-plaintiffs are his cousin, De’Andre Arnold, and De’Andre’s mother, Sandy Arnold.

of the Civil Rights Act of 1964; (3) sex discrimination under the Fourteenth Amendment's Equal Protection Clause; (4) sex discrimination under Title IX; (5) violation of his First Amendment right to free speech; (6) retaliation in violation of the First Amendment; (7) retaliation in violation of Title VI; (8) retaliation in violation of Title IX; (9) intentional race discrimination in violation of Section 106.001 of the Texas Civil Practice and Remedies Code; and (10) sex discrimination in violation of Section 106.001 of the Texas Civil Practice and Remedies Code. (Dkt. 1 at pp. 29–49) In the complaint, K.B. and his co-plaintiffs ask the Court to, among other things, enjoin BHISD from enforcing its hair-length policy against K.B.; enjoin BHISD and the other defendants in this case from making disparaging comments about K.B. to anyone; and enjoin BHISD and the other defendants in this case from retaliating against K.B. for refusing to cut his locs. (Dkt. 1 at pp. 49–50; Dkt. 44 at pp. 40–41)

“Irrespective of race, creed, and gender, education makes it possible for people to stand out as equal with all the other persons from different walks of life.” *Anon.* BHISD classes begin in two days on August 19, 2020. On that day, when K.B. arrives to attend his first class, he will be isolated from his classmates, placed in in-school suspension for violation of BHISD's hair policy, and remain there until the end of the school year. In the pending motion K.B. seeks to enjoin BHISD from denying him the opportunity to attend class and receive the same education, without fear of punishment or retaliation, as his classmates until a final judgment has been entered regarding his claims in this case. For the reasons stated in detail below, the motion for a preliminary injunction is granted.

II. THE LEGAL STANDARD

The purpose of a preliminary injunction is to preserve the status quo and prevent irreparable harm until the respective rights of the parties can be ascertained during a trial on the merits. *City of Dallas v. Delta Air Lines, Inc.*, 847 F.3d 279, 285 (5th Cir. 2017). In the Fifth Circuit, the following well-established framework generally governs the determination of whether to grant a preliminary injunction:

To be entitled to a preliminary injunction, the movant must satisfy each of the following equitable factors: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) the threatened injury to the movant outweighs the threatened harm to the party sought to be enjoined; and (4) granting the injunctive relief will not disserve the public interest. Because a preliminary injunction is an extraordinary remedy, it should not be granted unless the movant has clearly carried the burden of persuasion on all four requirements. Failure to sufficiently establish any one of the four factors requires this Court to deny the movant's request for a preliminary injunction.

Id.

In presiding over a preliminary injunction hearing, a district court may “give even inadmissible evidence some weight when it is thought advisable to do so in order to serve the primary purpose of preventing irreparable harm before a trial can be held[.]” *Federal Savings & Loan Insurance Corp. v. Dixon*, 835 F.2d 554, 558 (5th Cir. 1987) (quoting 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2949 at 471). In particular, “[a]ffidavits and other hearsay materials are often received in preliminary injunction proceedings. The dispositive question is not their classification as hearsay but whether, weighing all the attendant factors, including the need for expedition, this type of evidence was appropriate given the character and objectives of the injunctive proceeding.” *Dixon*,

835 F.2d at 558 (quoting *Asseo v. Pan American Grain Co., Inc.*, 805 F.2d 23, 26 (1st Cir. 1986)).

III. ANALYSIS

K.B. has carried his burden of persuasion on all four of the required elements.

a. Substantial likelihood of success on the merits

“To show a likelihood of success, the plaintiff must present a prima facie case, but need not prove that he is entitled to summary judgment.” *Daniels Health Sciences, L.L.C. v. Vascular Health Sciences, L.L.C.*, 710 F.3d 579, 582 (5th Cir. 2013). “To assess the likelihood of success on the merits, [courts] look to standards provided by the substantive law.” *Janvey v. Alguire*, 647 F.3d 585, 596 (5th Cir. 2011) (quotation marks omitted). When the plaintiff has brought multiple causes of action, he need only present a prima facie case on one of them. *Kalsi Engineering, Inc. v. Davidson*, No. 4:14-CV-1405, 2014 WL 12540550, at *2 & n.2 (S.D. Tex. Sept. 2, 2014); *Texas v. U.S.*, 95 F. Supp. 3d 965, 981 (N.D. Tex. 2015); *see also Butler v. Alabama Judicial Inquiry Commission*, 111 F. Supp. 2d 1224, 1230 (N.D. Ala. 2000) (“Under the first requirement for obtaining a temporary restraining order, the court does not have to find that Plaintiffs have a substantial likelihood of success on every claim set forth in their Complaint.”). K.B. has clearly shown a substantial likelihood of success on the merits of at least one claim.

1. Sex discrimination in violation of the Equal Protection Clause

K.B. has asserted a cause of action under 42 U.S.C. § 1983 for sex discrimination in violation of the Equal Protection Clause (Dkt. 1 at p. 36), and he has clearly shown a substantial likelihood of success on the merits on that cause of action. “To state a claim

under §1983, a plaintiff must (1) allege a violation of rights secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law.” *Piotrowski v. City of Houston*, 51 F.3d 512, 515 (5th Cir. 1995). The parties do not dispute that K.B. may use Section 1983 to vindicate his rights under the Equal Protection Clause, nor is there any dispute that the “color of state law” requirement is met. Such disputes would be fruitless. *See, e.g., Arceneaux v. Assumption Parish School Board*, 733 Fed. App’x 175, 177 (5th Cir. 2018) (noting that student’s claim against principal and school board for sex discrimination under the Equal Protection Clause “is actionable under 42 U.S.C. § 1983”).

The parties are in further agreement that the challenged hair-length policy applies only to male students and was explicitly intended to create a gender-based distinction; in its own papers, BHISD acknowledges that one “express distinction made in the dress code is between male and female students: girls may wear their hair long, boys may not.” (Dkt. 12 at p. 12) The parties diverge, however, on the question of whether this Court should apply the Supreme Court’s demanding intermediate-scrutiny standard in evaluating the Constitutionality of the challenged hair-length policy. The Supreme Court has described the intermediate-scrutiny standard in the following way:

To summarize the Court’s current directions for cases of official classification based on gender: Focusing on the differential treatment for denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is exceedingly persuasive. The burden of justification is demanding and it rests entirely on the State. 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. The justification must be genuine, not hypothesized or invented *post hoc* in

response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. *U.S. v. Virginia*, 518 U.S. 515, 532–33 (1996) (quotation marks, brackets, and citations omitted).

The Supreme Court has further clarified that “the classification must substantially serve an important governmental interest *today*, for in interpreting the equal protection guarantee, we have recognized that new insights and societal understandings can reveal unjustified inequality that once passed unnoticed and unchallenged.” *Sessions v. Morales-Santana*, 137 S.Ct. 1678, 1690 (2017) (quotation marks, brackets, and ellipsis omitted; emphasis in original). The Supreme Court’s “case law evolving since 1971 reveals a strong presumption that gender classifications are invalid.” *Virginia*, 518 U.S. at 532 (quotation marks and brackets omitted) (citing Justice Kennedy’s concurrence in *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 152 (1994)). The Supreme Court recently reiterated that this “heightened scrutiny . . . attends all gender-based classifications.” *Morales-Santana*, 137 S.Ct. at 1689 (quotation marks omitted).

In its early filings, BHISD did not contest the applicability of the intermediate-scrutiny standard and admitted that, “because it makes distinctions based on sex, [BHISD’s] dress code is subject to intermediate scrutiny.” (Dkt. 12 at p. 12) However now, relying on the holding in *Karr v. Schmidt*, 460 F.2d 609 (5th Cir. 1972), BHISD argues that “binding precedent precludes the Court from applying that standard.” (Dkt. 57 at p. 31) BHISD argues that this case requires the Court to apply a rational-basis review to its hair-length policy. Even assuming that a half-century-old opinion “precludes” the use of a standard that the Supreme Court said just three years ago is applicable to all

gender-based classifications, *Karr* does not address sex discrimination; to the contrary, it explicitly distinguishes a Seventh Circuit case, *Crews v. Cloncs*, 432 F.2d 1259, 1266 (7th Cir. 1970), that does discuss sex discrimination. The relevant passage of *Karr* states that:

[t]he Equal Protection clause has not generally been relied upon as a basis for invalidating hair-length regulations with the exception of a Seventh Circuit case [*Crews*] which held that hair regulations are violative of the Equal Protection clause because they apply solely to male students and not to female students. *In this case, however*, the theory of the district court is that, *as between male students*, any classification based upon hair length contravenes the Equal Protection guarantee.
Karr, 460 F.2d at 616 (footnote omitted) (emphasis added).

Karr did not discuss the questions presented by K.B.—let alone resolve them adversely to K.B.—because the *Karr* Court was not presented with those questions. It is materially distinguishable from this case. In any event, it predates the Supreme Court precedent the application of which it purportedly precludes. *See Virginia*, 518 U.S. at 558 (Rehnquist, C.J., concurring) (noting that the Supreme Court has applied the intermediate-scrutiny standard to classifications by sex since 1976, when it issued *Craig v. Boren*, 429 U.S. 190, 197 (1976)). *Karr* simply does not bar K.B.’s claims.

Next, relying on the Supreme Court’s plurality opinion in *Parham v. Hughes*, 441 U.S. 347, 351 (1979), BHISD argues that K.B. must prove “invidious discrimination [a]s a threshold inquiry” before intermediate scrutiny applies. (Dkt. 89 at p. 6) The Court finds this argument unmeritorious. The opinion does not create a threshold burden for

K.B. of proving “invidious discrimination;” only three other justices joined that opinion,³ and the more recently decided cases of *J.E.B.*, *Virginia*, and *Morales-Santana* neither cite *Parham* nor mention such a threshold inquiry. Accordingly, the Court will apply the intermediate-scrutiny standard articulated in *J.E.B.*, *Virginia*, and *Morales-Santana*.

Under this standard BHISD has the “demanding” burden of presenting an “exceedingly persuasive” justification for the hair-length policy, meaning that the hair-length policy must “at least” be “substantially related to the achievement” of “important governmental objectives[.]” *Virginia*, 518 U.S. at 532–33 (quotation marks omitted).⁴ Here, the evidence does not meet this burden.

Under the Supreme Court’s intermediate-scrutiny standard, K.B. has clearly shown a substantial likelihood of success on the merits on his cause of action for sex discrimination in violation of the Equal Protection Clause. In its briefing, BHISD proffers

³ The concurring and dissenting Justices in *Parham* all simply cited and applied intermediate-scrutiny cases. See *Parham v. Hughes*, 441 U.S. 347, 359 (1979) (Powell, J., concurring) (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)); see also *id.* at 362 (White, J., dissenting, joined by Brennan, Marshall, and Blackmun, JJ.) (citing *Caban v. Mohammed*, 441 U.S. 380, 388 (1979), which quoted *Craig*). In his concurring opinion, Justice Powell specifically clarified that he “arrive[d] at this conclusion by a route somewhat different from that taken by Mr. Justice Stewart.” *Id.* at 359 (Powell, J. concurring).

⁴ BHISD argues that K.B. should not prevail because “K.B. has not shown that BHISD will not be able to demonstrate that its hair length regulation is substantially related to important governmental objectives” (Dkt. 57 at p. 37). This statement flips the burden of justification, which, according to the Supreme Court, “rests entirely on the State.” *U.S. v. Virginia*, 518 U.S. 515, 533 (1996). Additionally, since “[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation[.]” *Id.*, BHISD is bound by the justifications that actually led it to create the hair-length policy and may not craft justifications during the course of this litigation just to stymie K.B. See *Janvey v. Alguire*, 647 F.3d 585, 596 (5th Cir. 2011) (“To assess the likelihood of success on the merits, [courts] look to standards provided by the substantive law.”) (quotation marks omitted). K.B. is not required now, and will not be required later, to defeat proffered justifications that had nothing to do with the formulation of the policy, much less to defeat every conceivable justification for it. *Virginia*, 518 U.S. at 533.

as justifications for its hair-length policy that the policy helps to “maintain a standard of excellence[;]” “maintain . . . an atmosphere conducive to learning[;]” “[p]repar[e] students for success in college, the military, and the workplace[;]” and “promot[e] educational goals.” (Dkt. 12 at p. 12; Dkt. 57 at p. 37) BHISD’s website states that “[t]he District’s dress code is established to teach grooming and hygiene, prevent disruption, avoid safety hazards, and teach respect for authority.” (Dkt. 61 at bates number 16) But at the hearing on K.B.’s motion, BHISD administrators could not articulate facts establishing any discernible relationship between the hair-length policy—particularly the most recently enacted iteration of the policy, which regulates the length of male students’ hair “when let down”—and the stated justifications for the dress code. Rather, Barbers Hill High School Principal Rick Kana testified that a male Native American Barbers Hill High School student was granted an exemption from the hair-length policy with no apparent effect on BHISD’s educational goals:

Q: Did allowing the Native American student to come to school with uncut hair interfere with your ability to cultivate a disciplined culture within your high school?

A: No.

Q: Did allowing the Native American student to come to school with uncut hair negatively affect the safety of the school?

A: Not that I’m aware of.

Q: Did allowing the Native American student to come to school with uncut hair affect his or any other student’s ability to academically achieve?

A: I don’t think I can answer that question, because I can’t speak on behalf of all students in that case.

...

Q: Did allowing a Native American student to come to school with uncut hair affect teachers' ability to teach hygiene?

A: I don't know if I can answer that for the teachers. I did want to say one thing on it. That when it first happened, it took a lot of—there were a lot of questions by students wondering why does this student get to have it, and we had to be very careful in how we answered that. But it did—it did disrupt for a while until students were used to it.

Q: And once students became used to seeing one of their school mates with uncut hair, did it continue to be a disruption to have a Native American student with uncut hair at your school?

A: No.
Transcript of preliminary injunction hearing, day two, pages 306–07.

Principal Kana testified that the exemption granted to the male Native American student was the only exemption to the hair-length policy that he had granted in his eight years as Principal. (Transcript of preliminary injunction hearing, day two, page 305)

BHISD Career & Technical Education Instructor Kirven Tillis seconded Principal Kana's testimony regarding the male Native American student and conceded that a male student could wear uncut locs let down without interfering with BHISD's goals:

Q: You testified yesterday that Native Americans having uncut hair was not problematic because the rest of the student population understood that it was for religious reasons, correct?

A: Correct.

Q: Would that not be also true for an individual who was wearing locks?

A: As I said, potentially, yes.

Transcript of preliminary injunction hearing, day three, page 751; *see also* transcript of preliminary injunction hearing, day two, page 683.

Moreover, Principal Kana, when questioned specifically about the connection between the hair-length policy and BHISD's educational goals, provided no support for such a connection and at times denied one:

Q: In your opinion, does the length of a male student's hair or, you know, whether it's all below the eyebrows, the earlobes, or the shirt collar, have anything to do with the male student's hygiene?

A: No.

...

Q: Does the length of a male student's hair have anything to do with whether they can display discipline?⁵ Besides self-control.

A: No.

Q: Does the length of a male student's hair have anything to do with their likelihood of success at school and after they graduate from high school?

A: I can't really determine that. I can't really determine any of the questions. I don't know.

Q: In your opinion, does the length of a male student's hair have anything to do with whether they can achieve academically?

A: I'm not sure.

Transcript of preliminary injunction hearing, day one, pages 209–10.

⁵ At this point, defense counsel objected, saying, "Objection. 'Discipline?'" The basis of the objection was not clear, and the questioning continued without defense counsel securing a ruling or further pressing the issue.

Dr. Poole, during a similar line of questioning, was unable to identify any peer-reviewed research linking the hair-length policy to BHISD's educational goals:

Q: Superintendent Poole, are you aware of any peer-reviewed research that shows that limiting the length of a boy's hair fosters excellence?

A: I am aware of research that indicates dress code and high expectations and standards, but, no, I'm not aware of that specific thing that you asked.

Q: And, Superintendent Poole, are you aware of any peer-reviewed research that shows that limiting the length of a boy's hair instills discipline?

A: No.

Q: And are you aware of any peer-reviewed research that shows that limiting the length of a boy's hair teaches hygiene?

A: No.

Q: Are you aware of any peer-reviewed research that shows that limiting the length of a boy's hair teaches respect for authority?

A: No.

Q: And are you aware of any peer-reviewed research that shows that limiting the length of a boy's hair fosters academic achievement?

A: No, ma'am.

Transcript of preliminary injunction hearing, day two, pages 562–63.

The present iteration of the hair-length policy, which regulates the length of male students' hair "when let down," seems particularly unmoored from any of BHISD's stated objectives. Before the current policy was enacted, K.B. was able to comply with the BHISD hair-length code by tying his locs so that they did not exceed the maximum

length. Principal Kana was unable to explain how K.B.'s tying his locs up created any sort of problem for K.B., BHISD, or K.B.'s fellow students:

Q: And had he cut his locks by the start of the fall 2019 school year?

A: Not that I was aware of, no, ma'am.

Q: So he had long—he had uncut locks at this time, but he was attending his regular classes?

A: Yes, ma'am.

Q: And he was—and he was participating in band?

A: Yes, ma'am.

Q: During that time, did KB's uncut locks prevent teachers from fostering academic excellence in their students?

A: I can't answer that.

Q: At that time, did KB's uncut locks prevent teachers from maintaining high standards for their students?

A: I can't answer for those teachers.

Q: Did KB's uncut locks cause a disruption?

A: I can't answer that. Not that I was aware of. I can answer that, yes, I can. Not that I was aware of.

...

Q: Would KB's uncut locks, or did KB's uncut locks cause a safety threat to anyone?

A: Can't answer that.

Q: Did KB's uncut locks threaten or hurt anyone in any way?

A: I have no idea.

Q: Would KB's uncut locks hurt anyone if he was allowed to return to school without cutting them in the fall of 2020?

A: Would they harm anyone?

Q: Yes. Would they harm anyone if he were to return to school into his regular classes and to band without cutting them, in the fall of 2020 semester?

A: What do you mean by "harm?"

Q: Would they hurt anyone in any way?

A: Not that I would be aware of, no.
Transcript of preliminary injunction hearing, day one, pages 188–90.

Notably, during closing arguments, BHISD's counsel admitted that the hair-length policy "seem[s] arbitrary" but contended that it still meets the requisite Constitutional standard because it is part of a proven "formula" that must be unquestioningly accepted:

They got something special going on here, and it's good. And to create, to tamper with their formula because you don't understand every jot and tittle of how the formula works, and say, "I don't understand what length has to do with it." It's like parenting. Children don't have to understand everything the parent does, but the parent has that exclusive authority to make some rules that seem arbitrary, but are supported by rational experience.

Transcript of preliminary injunction hearing, day three, page 991.

The lack of a persuasive justification for the hair-length policy establishes a substantial likelihood that K.B. will prevail on his cause of action under 42 U.S.C. § 1983 for sex discrimination in violation of the Equal Protection Clause.

2. Race discrimination in violation of the Equal Protection Clause

Next, K.B. has asserted a cause of action under 42 U.S.C. § 1983 for race discrimination in violation of the Equal Protection Clause. (Dkt. 1 at p. 29) Based on the

evidence discussed above and additional evidence discussed below, he has clearly shown a substantial likelihood of success on the merits on that cause of action. Although it makes an explicit distinction based on gender, the BHISD hair-length policy does not make explicit distinctions based on race. The Court will accordingly apply the Supreme Court's *Arlington Heights* analysis to evaluate K.B.'s likelihood of succeeding on the merits of his cause of action for race discrimination in violation of the Equal Protection Clause.

K.B.'s race-discrimination claim under the Equal Protection Clause requires him to provide proof of a racially discriminatory intent or purpose. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977). "However, racial discrimination need only be one purpose, and not even a primary purpose, of an official action for a violation to occur." *Veasey v. Abbott*, 830 F.3d 216, 230 (5th Cir. 2016) (quotation marks and brackets omitted); *see also Arlington Heights*, 429 U.S. at 266 n.14 ("A single invidiously discriminatory governmental act . . . would not necessarily be immunized by the absence of such discrimination in the making of other comparable decisions."). "In *Arlington Heights*, the Supreme Court set out five nonexhaustive factors to determine whether a particular decision was made with a discriminatory purpose, and courts must perform a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 230–31 (quotation marks and footnotes omitted). The *Arlington Heights* Court wrote that:

[t]he historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up to the challenged

decision also may shed some light on the decisionmaker’s purposes. For example, if the property involved here always had been zoned R-5 but suddenly was changed to R-3 when the town learned of MHDC’s plans to erect integrated housing, we would have a far different case. Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.

...

The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed.

Arlington Heights, 429 U.S. at 267–68 (citations and footnotes omitted).

K.B. bears the burden “to show that racial discrimination was a substantial or motivating factor” behind the creation of the hair-length policy. *Veasey*, 830 F.3d at 231 (quotation marks omitted). If K.B. meets that burden, the burden shifts to BHISD “to demonstrate that the [policy] would have been enacted without this factor.” *Id.* (quotation marks omitted). This Court has observed that a plaintiff relying on the *Arlington Heights* analysis to demonstrate discriminatory intent through direct or circumstantial evidence “need provide very little such evidence” to raise a genuine issue of material fact and that “any indication of discriminatory motive” may suffice to raise a jury question. *Rollerson v. Port Freeport*, No. 3:18-CV-235, 2019 WL 4394584, at *6 (S.D. Tex. Sept. 13, 2019), *adopted*, 2019 WL 6053410 (S.D. Tex. Nov. 15, 2019) (quotation marks omitted; emphasis in *Rollerson*).

Although the hair-length policy is facially race-neutral, K.B. has presented sufficient statistical and testimonial evidence that could establish, under the *Arlington Heights* analysis, that BHISD's hair-length policy—particularly the most recent iteration of that policy—was enacted with a racially discriminatory motive. First, K.B. has presented statistical evidence showing that, both before and after the most recent iteration of the hair-length policy was enacted, BHISD disproportionately enforced its hair-length policy against African-American students. K.B.'s attorneys have examined BHISD disciplinary records, which are contained in the evidentiary record at bates numbers 116 to 365 of docket entry 61, and calculated that, during K.B.'s sophomore year, African-American students at Barbers Hill High School were three times more likely than their white classmates to lose at least one day of instruction to hair-related in-school suspension. (Dkt. 92 at p. 1) According to those same calculations, African-American students at Barbers Hill High School who were placed in in-school suspension during K.B.'s sophomore year lost an average of 3.5 days of instruction; white students who were placed in in-school suspension lost an average of one day of instruction. (Dkt. 92 at p. 1) In other words, there is credible statistical evidence in the record showing that African-American students were more likely than white students to be punished, and to be punished harshly, on account of the hair-length policy.⁶

⁶ This morning the parties submitted further briefing and evidence regarding the background of the numbers provided by BHISD and used for K.B.'s statistical calculations. While BHISD provided argument and evidence that these calculations may not paint a clear view of the policy's effects, the Court finds that there is sufficient evidence at this stage of the litigation to find that these calculations are credible and relevant to the Court's adjudication of the pending motion.

The statistics compiled from BHISD's disciplinary records reflect the experiences described by K.B. and his cousin and co-plaintiff, De'Andre Arnold ("De'Andre"),⁷ in their testimony. Both K.B. and De'Andre have testified that they were singled out by school officials for near-constant scrutiny, and were often pulled out of class, because of their locs during their time at Barbers Hill High School, even though they complied with the hair-length policy by tying their locs up before BHISD made compliance in that manner impossible in December of 2019. (Dkt. 44-4; Dkt. 44-7) K.B. testified that he did not see anyone other than himself and De'Andre subjected to such scrutiny, and De'Andre testified that he saw white male students whose hair violated the hair-length policy but who were not pulled out of class. (Dkt. 44-4 at p. 4; Dkt. 44-7 at p. 7)

One particularly illustrative example of the alleged disparity in scrutiny between K.B. and De'Andre and their white classmates is a striking intersection between the statistics compiled from BHISD's disciplinary records and the events that caused K.B. and De'Andre to transfer to Sterling High School. In December 2019, BHISD amended its hair-length policy to bar male students from wearing any hairstyle that would allow the hair to extend below the top of a t-shirt collar, below the eyebrows, or below the ear lobes "when let down." (Dkt. 44-8 at p. 56) In his testimony, Dr. Poole justified the addition of the "when let down" language to the hair-length policy by claiming that the change was needed to give "clarity that circumventing and manipulating the dress code policy is not permitted." (Transcript of preliminary injunction hearing, day two, page

⁷ De'Andre was a senior during the 2019-20 school year. Like K.B., he transferred to Sterling High School, from which he graduated, so that he could continue receiving an education without cutting his locs. (Dkt. 44-7 at p. 9)

531) K.B. and De'Andre testified that their hair was again subject to intense scrutiny when the change was made: when school started on January 7, 2020 after Winter Break, they were told they would be sent to in-school suspension because of their locs. (Dkt. 44-4 at p. 6; Dkt. 44-7 at p. 9) However, *after* De'Andre gave an interview about the hair-length policy to a local news show on January 17, 2020, the number of disciplinary actions against *other* students increased to an apparently unprecedented level. (Dkt. 92 at pp. 2–3) K.B.'s analysis of the BHISD disciplinary statistics indicates that Barbers Hill High School personnel issued 91 hair-policy disciplinary referrals in the nine school days after De'Andre's interview, which was more hair-policy disciplinary referrals than they had issued in each of the three prior full school years. (Dkt. 92 at p. 3)⁸ During the 2019-20 school year, African-American students comprised only 3.94% of students at Barbers Hill High School and 3.82% of students in BHISD overall. (Dkt. 61 at bates number 115) This evidence would support a conclusion that numerous white male students had continued "circumventing and manipulating" the hair-length policy after the December 2019 amendment but had only been punished after De'Andre highlighted BHISD's alleged unconstitutional conduct and generated unfavorable media coverage for BHISD.

The process by which the hair-length policy was amended in December 2019 also supports K.B.'s claim. The December 2019 amendment to the hair-length policy was the culmination of a string of increasingly more restrictive recent amendments. De'Andre, who was two years ahead of K.B. and spent three and a half years at Barbers Hill High

⁸ In the 2018-19 school year, there were 66 hair-policy-related disciplinary referrals. In the 2017-18 school year, there were 43. In the 2016-17 school year, there were 36 (Dkt. 92 at p. 7).

School, testified that the hair-length policy was amended several times during his time at Barbers Hill High School, and it appears that each amendment was intended to be more restrictive than the last. (Dkt. 44-7 at pp. 5, 7) BHISD changed the hair-length policy before De'Andre's sophomore year so that male students were no longer allowed to use hair accessories, such as the headbands that De'Andre had been using, to tie their hair up, and before De'Andre's junior year BHISD changed its policy again to prohibit male students' hair from extending below the maximum length "at any time." (Dkt. 44-7 at p. 5)

The December 2019 amendment stands out not only for being the most restrictive iteration of the policy but also because of the procedure by which it was enacted. As Dr. Poole and Principal Kana both conceded, the hair-length policy is typically revised before the school year begins, not in December, which is in the middle of the school year. (Transcript of preliminary injunction hearing, day one, page 169, and day two, pages 569–70) Principal Kana could not recall seeing a mid-school-year revision of the hair-length policy in his eight years as principal, while Dr. Poole thought that he had seen such a revision in his 15 years as superintendent but could not be certain. (Transcript of preliminary injunction hearing, day one, page 169, and day two, pages 569–70)⁹

Moreover, there is evidence that the BHISD Board imposed restrictions on citizens' ability to put items on the agenda at the meeting at which the December 2019

⁹ BHISD officials testified that they understood the timing of the policy change was due to the conclusion of a Department of Justice investigation into the BHISD hair policy. However, there was no evidence provided that either the timing of the changes or the policy's new language was required because of the investigation.

revision to the hair-length policy was enacted. Sandy Arnold, De'Andre's mother, testified that she attempted to add public comment regarding the proposed hair policy as an agenda item for the December 2019 Board meeting. (Dkt. 44-5 at pp. 8–9) Ms. Arnold was told that she had to complete the required steps a month in advance of the Board meeting, but the BHISD Board's written policies state that the deadline is seven days in advance of the meeting. (Dkt. 44-5 at p. 9; Dkt. 44-16 at p. 2)

This evidence in the record of selective enforcement, procedural irregularities, and increasingly restrictive amendments, coupled with the lack of a persuasive justification for the hair-length policy, establishes a substantial likelihood that K.B. will satisfy the *Arlington Heights* analysis and prevail on his cause of action under 42 U.S.C. § 1983 for race discrimination in violation of the Equal Protection Clause.

3. *First Amendment right to free speech*

Finally, K.B. has asserted a cause of action under 42 U.S.C. § 1983 for violation of his right to free speech under the First Amendment (Dkt. 1 at p. 40), and he has clearly shown a substantial likelihood of success on the merits on that cause of action. As a threshold matter, the Court agrees with K.B., based on K.B.'s testimony and Professor Greene's testimony, that K.B.'s locs are sufficiently communicative to warrant First Amendment protection. "Visibly wearing one's hair in a particular manner is capable of communicating one's religion or heritage." *Gonzales v. Mathis Independent School District*, No. 2:18-CV-43, 2018 WL 6804595, at *7 (S.D. Tex. Dec. 27, 2018); *see also A.A. ex rel. Betenbaugh v. Needville Independent School District*, 701 F. Supp. 2d 863,

882 (S.D. Tex. 2009) (“A.A.’s braids convey a particularized message of his Native American heritage and religion.”).

When examining content-neutral restrictions on expressive activities, the Court must determine whether: (1) the restriction is within the Constitutional power of the government; (2) the restriction furthers an important or substantial governmental interest; (3) the government’s important or substantial interest is unrelated to the suppression of student expression; and (4) the incidental restrictions on First Amendment activities are no more than is necessary to facilitate the government’s important or substantial interest. *Littlefield v. Forney Independent School District*, 268 F.3d 275, 286 (5th Cir. 2001). There is scant evidence in the record tying the hair-length policy to any important or substantial government interest. Even if such an interest can be shown, the incidental restrictions on K.B.’s expressive conduct go far beyond what is necessary to facilitate that interest because the current iteration of the hair-length policy necessarily regulates the length of K.B.’s hair when he is not at school. *Cf. id.* at 287 (holding that a school uniform policy did not place an unconstitutional burden on First Amendment activities because the policy only governed student attire during school hours).

The lack of a persuasive justification for the hair-length policy, coupled with the overinclusive nature of the December 2019 amendment, establishes a substantial likelihood that K.B. will prevail on his cause of action under 42 U.S.C. § 1983 for violation of his right to free speech under the First Amendment.

K.B. has clearly shown a substantial likelihood of success on the merits of at least one claim. He has accordingly satisfied the first of the four equitable factors required to obtain preliminary injunctive relief.

b. Threat of irreparable injury

K.B. has clearly shown a substantial threat of irreparable injury. “To show irreparable injury if threatened action is not enjoined, it is not necessary to demonstrate that harm is inevitable and irreparable. The plaintiff need show only a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm.” *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390, 1394 (5th Cir. 1986) (footnotes omitted). “It has repeatedly been recognized by the federal courts at all levels that violation of constitutional rights constitutes irreparable harm as a matter of law[,]” *Cohen v. Coahoma County, Mississippi*, 805 F. Supp. 398, 406 (N.D. Miss. 1992) (collecting cases), and that principle includes violation of rights under the Equal Protection Clause. *Killebrew v. City of Greenwood, Mississippi*, 988 F. Supp. 1014, 1016 (N.D. Miss. 1997). In the educational context, courts have also found a substantial threat of irreparable harm when students have shown that they will be placed in in-house detention and as a result “given inferior instruction[.]” *Alabama and Coushatta Tribes of Texas v. Trustees of Big Sandy Independent School District*, 817 F. Supp. 1319, 1336–37 (E.D. Tex. 1993).

K.B. has presented ample evidence demonstrating a substantial threat of irreparable injury. For one, he has shown a substantial likelihood that his rights under the Equal Protection Clause and the First Amendment will be violated if his motion for a

preliminary injunction is not granted. Furthermore, if K.B. returns to Barbers Hill High School for the 2020-21 school year without cutting his locs, he will be either forced to do his schoolwork at home or punished with in-school suspension, which is exactly what happened to him when he did not cut his locs during the 2019-20 school year. K.B. described the experience during the hearing on his motion:

Q: And did you return to school or to campus the following day for in-class instruction?

A: No, I didn't.

Q: And why not?

A: Because I would be put into in school suspension if I were to return to the high school.

Q: So how did you receive continued instruction if you didn't report to class?

A: My mother went to the high school, and she picked up all of my homework and brought it to me, and I completed it to my best abilities.

Q: And did the homework that you received have accompanying instructions?

A: It had little to none explanations of what the new lesson was.

Q: And were you able to keep up with the instruction that was happening in class?

A: No, I was not.

...

A: I returned to school in the early days of February, when I had learned that I was in danger of losing credit.

Q: Okay. And what happened when you returned to school?

A: When I returned to school, I had been sent to ISS, in-school suspension.

Q: And can you explain for us what your in-school suspension experience was like?

A: My experience in ISS, the first word I can think of was it was a horrible experience. It's almost what I'd imagine prison to be like to take a social kid like myself who enjoys being around friends and, you know, talk with people and to isolate them from the rest of my peers.

ISS is you're in a separate classroom from everyone else, you're secluded from even the other students in ISS. You have your back facing toward the ISS teacher, and they even take your backpack away from you and they put it in a small cubby. There's no leaving the room for anything, there's no participating in any extracurriculars at all, there's absolutely no talking at all. And there's no going to any teacher's classrooms with any help or questions. You're in the classroom from the beginning of the day to end of the day. And it was a really hard and tough experience for me.

...

Q: And so, how was the instruction you received while in ISS? Can you just elaborate on that a little bit more? Was it akin to or similar to regular in-class instructions?

A: It wasn't like regular in-class instruction. I received little to none. It wasn't like my teachers could be the class they were teaching and come teach me a lesson as well.

...

Q: And what were your grades like from this period of working from home and working at ISS? What happened to your grades?

A: My grades had dropped dramatically. I was getting to—my grades were lowering. I wasn't getting that same in-class experience that I was supposed to be getting.

Transcript of preliminary injunction hearing, day one, pages 65–69.

K.B. has clearly shown a substantial threat of irreparable injury. He has accordingly satisfied the second of the four equitable factors required to obtain preliminary injunctive relief.

c. Relative weight of threatened harm

K.B. has clearly shown that the threat of harm he faces if his motion for a preliminary injunction is denied outweighs the threat of harm faced by BHISD if K.B.'s motion for a preliminary injunction is granted. Again, K.B. has shown a substantial likelihood that his rights under the Equal Protection Clause and the First Amendment will be violated if his motion for a preliminary injunction is denied, and he has additionally shown that he will receive either inferior instruction or no instruction if his motion is denied. On the other hand, there is no evidence that BHISD will suffer any harm if K.B.'s motion is granted: Principal Kana and Kirven Tillis testified that, when a male Native American high school student was given an exemption from the BHISD hair-length policy, there was no apparent effect on the school or its students. Kirven Tillis also conceded that a male student could wear uncut locs let down without interfering with BHISD's goals.

K.B. has satisfied the third of the four equitable factors required to obtain preliminary injunctive relief.

d. The public interest

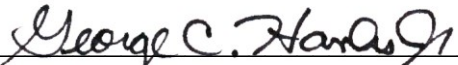
Finally, K.B. has clearly shown that granting his motion for a preliminary injunction will not disserve the public interest. K.B. has shown a substantial likelihood that his rights under the Equal Protection Clause and the First Amendment will be

violated if his motion for a preliminary injunction is denied. “It is always in the public interest to prevent the violation of a party’s constitutional rights.” *Jackson Women’s Health Organization v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014) (quotation marks and brackets omitted). Conversely, “[p]ublic interest is never served by a state’s depriving an individual of a constitutional right.” *Kite v. Marshall*, 454 F. Supp. 1347, 1351 (S.D. Tex. 1978).

IV. CONCLUSION

Accordingly, for all the reasons stated above, K.B.’s motion for a preliminary injunction (Dkt. 44) is **GRANTED**.

SIGNED at Houston, Texas, this 17th day of August, 2020.



GEORGE C. HANKS, JR.
UNITED STATES DISTRICT JUDGE

Exhibit 3

Case No. 20-20488

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

**Cindy Bradford,
Plaintiff – Appellee**

v.

**Barbers Hill Independent School District; Barbers Hill Independent School
District Board of Trustees; George Barrera; Fred Skinner; Cynthia Erwin;
Becky Tice; Benny May; Eric Davis; Clint Pipes; Greg Poole; Sandra Duree;
Mandy Malone; Rick Kana; Ryan Rodriguez; Doug Anderson; Kirven Tillis,
Defendants – Appellants**

On Appeal from the United States District Court, Southern
District of Texas, Cause No. 4:20-cv-01802

**DEFENDANTS-APPELLANTS’
UNOPPOSED MOTION TO DISMISS APPEAL**

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TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Barbers Hill Independent School District, Barbers Hill Independent School District Board of Trustees, George Barrera, Fred Skinner, Cynthia Erwin, Becky Tice, Benny May, Eric Davis, Clint Pipes, Greg Poole, Sandra Duree, Mandy Malone, Rick Kana, Ryan Rodriguez, Doug Anderson, and Kirven Tillis (collectively, the Defendants-Appellants) file this Motion to Dismiss Appeal as follows:

On September 15, 2020, the Defendants-Appellants filed a notice of appeal challenging the district court's Memorandum and Opinion and Order granting plaintiff K.B.'s motion for preliminary injunction.

Defendants-Appellants' brief is currently due May 24, 2021.

Defendants-Appellants no longer wish to prosecute this appeal and Plaintiff-Appellee consents to withdrawal of this appeal.

Accordingly, the Defendants-Appellants request the Fifth Circuit dismiss this appeal and vacate any remaining briefing deadlines.

ROGERS, MORRIS & GROVER, L.L.P.

/s/ - Richard A. Morris

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CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that counsel conferred in good faith *via* email with counsel for the Appellee on or about May 18, 2021. Opposing counsel are unopposed to the motion and the relief it requests.

/s/ Richard A. Morris

Richard A. Morris
Attorney for Defendants-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2021, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send electronic notification of such filing to all counsel of record.

I further certify that (1) the required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ Richard A. Morris

Richard A. Morris
Attorney for Defendants-Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 27 and Local Rule 27.4, the undersigned certifies that this Motion complies with the limitations of FED. R. APP. P. 27 and contains **131 words** excluding Appellant's Certificates of Conference, Service, and Compliance, prepared in a proportionally spaced typeface using Microsoft Office Word 2021 in 14 point Times New Roman font in text and 12 point Times New Roman font in footnotes.

The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5th Cir. R. 27 may result in the Court's striking the Motion and imposing sanctions against the person signing the Motion.

/s/ Richard A. Morris

Richard A. Morris
Attorney for Defendants-Appellants