



December 10, 2020

Kenny Berry, Superintendent
Greg Welch, President
Darryl Harris, Vice President
Mitch Ezell, Secretary
Jerry Don Black, Member
Patrick Burson, Member
Robert Frost, Member
Russell Chapman, Member

Clyde Consolidated Independent School District (“Clyde CISD” or “District”)
526 Shalimar Drive
Clyde, Texas 79510
Phone: (325) 893-4222
Fax: (325) 893-4024

Via E-mail

Re: Discriminatory Grooming Policies at Clyde CISD

Dear Superintendent Berry and Members of the Board:

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 in support of Trevor Wilkinson and his great-grandfather, Leroy Wilkinson, to request that you allow Trevor to wear nail polish at school and that you revise Clyde CISD’s dress and grooming code to remove discriminatory gender stereotypes for all students.

Trevor is currently a senior at Clyde High School who received an in-school suspension for wearing nail polish to school. If Trevor were a female student, he would be allowed to wear nail polish under Clyde CISD’s policies. But because he is male and the District’s dress and grooming code discriminates based on gender, Trevor is not able to express himself at school and is being forced to conform to gender stereotypes in violation of the Equal Protection Clause of

¹ The ACLU of Texas is a nonpartisan, nonprofit organization dedicated to defending the civil rights and civil liberties of all Texans. With nearly 60,000 members across the Lone Star State, we strive to protect all Texans from discrimination, including LGBTQ students in schools.

² Lambda Legal is the oldest and largest national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people (“LGBT”) and everyone living with HIV through impact litigation, education and public policy work.

the U.S. Constitution, Title IX of the Education Amendments of 1972 (“Title IX”), and the First Amendment.

On September 2, prior to Trevor’s in-school suspension, the ACLU of Texas sent a letter to Clyde CISD and other school districts explaining why gender-specific dress and grooming code provisions are deeply harmful to Texas students and are also unconstitutional under federal law. *See Ex. 1, ACLU of Texas Letter to Clyde CISD.* In this letter, we explained that the Texas Association of School Boards (“TASB”) updated its legal guidance based on changing case law to recommend that school districts adopt gender-neutral dress and grooming codes. *See Ex. 2, TASB Guidance on Student Dress and Appearance.* In light of governing case law and TASB guidance, we hope that you will decide to allow Trevor to wear nail polish without being punished and that you also revise Clyde CISD’s dress and grooming code to remove discriminatory and unlawful gender stereotypes.

Factual Background

Trevor is currently 17 years old and a senior at Clyde High School. He is an honor student and has spent his entire high school career at Clyde High School. As an openly gay male student, Trevor feels that wearing nail polish is an important aspect of his identity. It helps him feel connected to the LGBTQ community and helps him feel comfortable expressing himself at school. Every school day, Trevor sees female students wearing nail polish at Clyde High School without repercussion. But because of Clyde CISD’s discriminatory dress and grooming code, Trevor is not permitted to express himself by wearing nail polish at school.

On Monday, November 30, Trevor arrived at school after having his nails painted over Thanksgiving break. When his teacher saw his nails, she immediately escorted Trevor to the office where an assistant principal placed him in “in school suspension” (ISS) for refusing to remove his nail polish. The principal made clear that Trevor would continue to be subject to ISS until he complied with the dress and grooming code, as written in the school handbook. However, on Monday, December 7, Trevor was allowed to return to regular class pending a school board meeting and executive session scheduled for Thursday, December 10.

Clyde CISD’s dress and grooming code currently contains several provisions that treat students differently based on gender, and impermissibly force students to conform to gender stereotypes, including the following examples:

- Earrings for boys are prohibited at school;
- Boys’ hair “may not extend below the base of the ear (hair and/or sideburns), not below the eye brows in front”;
- “Makeup and nail polish are prohibited” for male students.”³

Students who fail or refuse to comply with such standards are subject to disciplinary action in accordance with the Student Code of Conduct. However, each of the provisions that treat male

³ Dress and Grooming (All Grade Levels), Clyde High School Student Handbook 2020-2021, Clyde CISD, <https://www.clydeisd.org/upload/page/0044/docs/2020-21/Clyde%20High%20School%20Student%20Handbook%202020-2021.pdf>

and female students differently are grounded in gender stereotypes and would likely be declared unconstitutional if challenged in federal court.

Legal Concerns

By prohibiting Trevor from wearing nail polish and maintaining a dress and grooming code based on gender stereotypes, Clyde CISD is likely violating the Equal Protection Clause of the U.S. Constitution, Title IX, the First Amendment, and its own local policies prohibiting gender-based discrimination.

The Constitution and Title IX protect people from discrimination on the basis of gender, which includes gender stereotypes imposed by the government or government-funded entities. On August 17, a federal court in Texas declared that a public school grooming code requiring male, but not female, students to wear short hair is unconstitutional for the purposes of a preliminary injunction. Specifically, in *De'Andre Arnold, et al. v. Barbers Hill Independent School District, et al.*, the court found that gender-specific grooming codes are subject to heightened scrutiny under the Equal Protection Clause and that Barbers Hill ISD provided no “exceedingly persuasive justification” for imposing different grooming requirements on male and female students.⁴ See Ex. 3. Clyde CISD’s gender-specific dress and grooming policy is similar to the one in Barbers Hill ISD and would likely also be declared unconstitutional if challenged in federal court.

The Equal Protection Clause has long prohibited government entities from drawing gender classifications based on “overbroad generalizations about the different talents, capacities, or preferences of males and females.”⁵ 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.”⁶ Such justifications may not be based on “archaic” and “overbroad stereotypes” about different genders.⁷

Recently, in *Bostock v. Clayton County, Georgia*, the Supreme Court lent further support to this legal conclusion in holding that sex discrimination occurs for purposes of Title VII when any “individual” is discriminated against “because of sex.”⁸ *Bostock*’s holding also applies to Title IX, which bars discrimination “on the basis of sex” for any “person” in an education program or activity receiving federal financial assistance.⁹ Under *Bostock*, individual students who are adversely affected by gender-specific grooming codes may state a claim for gender discrimination.

⁴ No. 4:20-CV-1802, 2020 WL 4805038, at *5-9 (S.D. Tex. Aug. 17, 2020).

⁵ *United States v. Virginia*, 518 U.S. 515, 533 (1996).

⁶ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 137 (1994); and *Virginia*, 518 U.S. at 533.

⁷ *J.E.B.*, 511 U.S. at 131.

⁸ 140 S.Ct. 1731, 1737 (2020).

⁹ 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).

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 was illegal sex discrimination that violated Title IX.¹⁰ In another Title IX case, a federal court recently recognized that discriminating against a male student for wearing nail polish may constitute evidence of impermissible gender stereotyping, along with other grooming habits that are traditionally associated with gender stereotypes.¹¹

Other courts across the country have also struck down public school dress and grooming codes that treat male and female students differently. A federal court in North Carolina found it unconstitutional to require female students, but not male students, to wear skirts; and a federal court in Mississippi found it unconstitutional to require female students to wear drapes for senior portraits while allowing male students to wear tuxedos.¹² In each of these cases, the federal courts applied the same legal principles that apply with equal force to Clyde CISD’s decision to prohibit male students, but not female students, from wearing nail polish.

Under current precedent from the U.S. Supreme Court, Clyde CISD may only impose a gender-specific grooming code if it has an “exceedingly persuasive justification” for treating students differently based on gender. Currently, Clyde CISD states in its FNCA (Local) that its dress and grooming code is designed to teach grooming and hygiene, instill discipline, prevent disruption, avoid safety hazards, and teach respect for authority.¹³ Yet each of these fails to provide a rationale for treating male and female students differently—since each of these motivations applies with equal force to every student. If female students can wear nail polish without jeopardizing their health, hygiene, safety, discipline, or respect for authority, then male students can too. This is the exact conclusion that the Texas federal court reached in enjoining the grooming code at issue in *Arnold*,¹⁴ and it is the same result that Clyde CISD would likely face if sued in federal court.

In addition to running afoul of the Equal Protection Clause and Title IX, Clyde CISD is also likely infringing on Trevor’s freedom of expression protected by the First Amendment. The Supreme Court has long held that students do not “shed their constitutional rights to freedom of

¹⁰ 743 F.3d 569, 583 (7th Cir. 2014).

¹¹ *S.E.S. as next friend of J.M.S. v. Galena Unified Sch. Dist. No. 499*, 446 F. Supp. 3d 743, 789 (D. Kan. 2020) (noting that “wearing make-up or eye-liner, using nail polish, dress[ing] in a skirt, carrying a purse or engaging in other behaviors that might be traditionally associated with being female” are all examples of evidence of impermissible gender stereotyping) (emphasis added); see also *Doe v. Triangle Doughnuts, LLC*, No. 5:19-CV-5275, 2020 WL 4013409, at *2 (E.D. Pa. July 16, 2020) (recognizing that for purposes of Title VII employment discrimination, prohibiting a transgender individual from wearing nail polish may constitute impermissible gender stereotyping).

¹² See, e.g., *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); *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).

¹³ FNCA (Local), Clyde CISD (May 22, 2007), available at [https://pol.tasb.org/Policy/Download/250?filename=FNCA\(LOCAL\).pdf](https://pol.tasb.org/Policy/Download/250?filename=FNCA(LOCAL).pdf)

¹⁴ 2020 WL 4805038, at *9.

speech or expression at the schoolhouse gate.”¹⁵ The Fifth Circuit, which reviews Texas federal court decisions, has also recognized that “an individual’s choice of attire also may be endowed with sufficient levels of intentional expression to elicit First Amendment shelter.”¹⁶ 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.¹⁷

Here, Trevor has painted his nails to express a particular message about his LGBTQ identity and the need to support LGBTQ students at Clyde CISD. If the District insists on prohibiting Trevor from engaging in speech through this form of self-expression, while simultaneously permitting female students to paint their nails, such a decision would clearly violate the First Amendment.

Finally, Clyde CISD’s own recently adopted local policy, which addresses student welfare and freedom from discrimination, harassment, and retaliation,¹⁸ 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.”¹⁹ Because Clyde CISD’s dress and grooming code discriminates based on gender and gender stereotyping and no longer conforms with Clyde CISD’s policy regarding freedom from discrimination, it should be revised. No student should be punished for failing to conform to gender stereotypes.

As described in our letter to Clyde CISD on September 2, forcing students to conform to gender stereotypes in the District’s dress and grooming code is not only unconstitutional and in violation of Title IX, but also intrinsically leads to discrimination based on race, religion, and other characteristics. Ex. 1. In particular, dress and grooming codes that treat students differently based on gender have a disproportionate impact on students who are Black, Native American, from various religious backgrounds, and who are LGBTQ. Continuing to enforce a discriminatory dress and grooming code will not only harm Trevor, but will also reverberate throughout the District and harm present and future Clyde CISD students.

Apart from impeding the success of these 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

¹⁵ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

¹⁶ *Canady v. Bossier Par. Sch. Bd.*, 240 F.3d 437, 440 (5th Cir. 2001).

¹⁷ *Id.*

¹⁸ FFH (Local), Clyde CISD (July 7, 2020), *available at* [https://pol.tasb.org/Policy/Download/250?filename=FFH\(LOCAL\).pdf](https://pol.tasb.org/Policy/Download/250?filename=FFH(LOCAL).pdf)

¹⁹ *Id.*

that discriminated against LGBTQ students and parents, the district's discriminatory actions cost local taxpayers nearly \$100,000 in attorney's fees.²⁰

Conclusion

Clyde CISD currently has an opportunity to resolve this situation without the time or expense of litigation or the resources necessarily incurred in the school district grievance process. Through this letter, we urge you to allow Trevor to wear nail polish at school without repercussion, remove any record of discipline from his school record related to attending school with nail polish, and to revise the District's dress and grooming code to remove all provisions that are based on gender stereotypes, and that treat students differently based on gender.

We trust that the Clyde CISD is aware of its ongoing obligation to ensure a safe and nondiscriminatory environment for Trevor. Since Trevor has engaged in protected activity by bringing concerns of the District's discriminatory dress and grooming code to the attention of the school, the community, and media, it is also imperative that Clyde CISD fulfills its legal obligations to protect him from retaliation. We welcome any opportunity to discuss this matter further or answer any questions that you have, and we hope to hear a response from you by Friday, December 18.

Sincerely,



Brian Klosterboer
Staff Attorney
ACLU of Texas



Paul D. Castillo
Counsel and Students' Rights Strategist
Lambda Legal Defense and
Education Fund, Inc.

/s/ Shelly L. Skeen

Shelly L. Skeen
Senior Attorney
Lambda Legal Defense and
Education Fund, Inc.

²⁰ 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>.