

July 3, 18

***VIA ELECTRONIC MAIL***

Dr. Sue Savaglio-Jarvis  
Superintendent Kenosha Unified  
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Mr. Dan Wade  
Kenosha Unified School Board President  
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**Re: Kenosha Unified School District Dress Code**

Dear Dr. Savaglio-Jarvis and Mr. Wade:

The ACLU of Wisconsin and the ACLU Women's Rights Project write to express serious concerns regarding the ongoing discriminatory enforcement of the Kenosha Unified School District (KUSD) dress code, despite recent amendments. We were pleased to see that after a coalition of community partners in Kenosha successfully advocated for a change to discriminatory provisions of the dress code policy banning yoga pants, leggings, and tank tops that exposed shoulders, the KUSD Board voted on March 27, 2018 to rescind those discriminatory provisions effective in the 2018-2019 school year.

Although KUSD Board's rescission of these provisions is a welcome development, it does not go far enough in ensuring that KUSD students are guaranteed equal educational opportunities regardless of sex, as required by federal and state law. We have received reports from student and parents in KUSD that the dress code is still being selectively enforced against female students in a manner that reinforces invidious sex stereotypes. This discriminatory enforcement violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, Title IX of the Education Amendments of 1972, and the Wisconsin Pupil Nondiscrimination Law.

**I. Statement of Facts**

The previous version of the KUSD dress code in effect during the 2017-2018 school year prohibited, among other types of clothing,



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tank tops, yoga pants, and leggings.<sup>1</sup> These types of clothing are typically worn by female students. The justification proffered by a KUSD board member for these particular provisions of the dress code was the desire to “protect” female students from harassment. For example, when defending these provisions, KUSD board member Gary Kunich, stated, “People want to say ‘Well, teach your boys not to look at a girl’s butt in leggings or not to say something sexually inappropriate.’ That’s very simplistic and easy to say in a conversation, at a podium, in theory.”<sup>2</sup> According to a news account, Kunich went on to state that he worried that “allowing leggings and tank tops could make it easier for students to bully young women.”<sup>3</sup>

The dress code had been the subject of considerable student protest due to students’ and parents’ perceptions of discriminatory enforcement. At a school board meeting on October 24, 2017, female students testified that “the majority of the contents of the dress code are at the expense of young women,” and that “staff members are largely targeting female minors.”<sup>4</sup> One student described how teachers applied the dress code against female students to humiliate them, including by pulling her out of class in the middle of a test because she was “distracting to others” for wearing a sweater that exposed her collarbone.<sup>5</sup> Another student described how in middle school, she was stopped when wearing leggings and a shirt that was a fraction of an inch too short.<sup>6</sup> She was told she could either sit in a secluded room for the remainder of the school day or put on a tight miniskirt that administrators provided and that she considered more “provocative” than the outfit she was already wearing.<sup>7</sup> In high school, the same student was again penalized for wearing leggings, and lost a full day of education including three tests.<sup>8</sup> The students discussed feeling objectified, revolted, and dehumanized when teachers and administrators looked them up and down and scrutinized their bodies and their clothing.<sup>9</sup>

Similar concerns have been echoed by other students across the district. One student reported to the ACLU that she finds leggings significantly more comfortable than

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<sup>1</sup> Kenosha Unified School District, *Rule 5431: Student Dress Code* (last updated Aug. 26, 2014), <http://www.kusd.edu/sites/default/files/document-library/english/5431.pdf>.

<sup>2</sup> See Daniel Gaitan, *What is Appropriate Clothing for School?*, KENOSHA NEWS (Jan. 21, 2018), [http://www.kenoshanews.com/news/local/what-is-appropriate-clothing-for-school/article\\_dea620ae-01b7-5663-9e5c-bbb139919fae.html](http://www.kenoshanews.com/news/local/what-is-appropriate-clothing-for-school/article_dea620ae-01b7-5663-9e5c-bbb139919fae.html).

<sup>3</sup> *Id.*

<sup>4</sup> See KUSD Regular Board Meeting 10-24-17, YOUTUBE, <https://www.youtube.com/watch?v=ZKIMotTPMgs&index=9&list=PLFygMZ6I-z0xA8YCiA5Z4IL9kOnceiT0n>; see also Daniel Gaitan, *Students Demand Change in Dress Code*, KENOSHA NEWS (Oct. 24, 2017), [http://www.kenoshanews.com/news/local/students-demand-change-in-dress-code/article\\_1e3c3bd5-fe0e-5e2c-836f-11249cb2431a.html](http://www.kenoshanews.com/news/local/students-demand-change-in-dress-code/article_1e3c3bd5-fe0e-5e2c-836f-11249cb2431a.html);

<sup>5</sup> KUSD Regular Board Meeting, *supra* note 20.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

other pants because of her body type. Another student described an incident in which she chose not to take her sweatshirt off on a day when she was overheating, even though she was wearing a tank top underneath, because she did not want to be disciplined and publicly humiliated. As a result, she passed out at her desk from heat exposure.

Students report that school officials enforcing the dress code have scrutinized their bodies in a sexualized manner. Teachers have on numerous occasions discussed students' body parts, such as exposed shoulders, or debated whether their shirts are long enough to cover their buttocks when they are wearing leggings. These experiences have heightened students' self-consciousness and insecurities about their bodies: One student equated this experience of having adult teachers scrutinize them in this manner to the experience of "predator and prey."

Administrators have stated or implied that it is female students' fault if they are sexually harassed due to their clothing. One student described how she and her female friends were repeatedly sexually harassed by male classmates who would talk about their bodies in a sexual manner and grab their buttocks in the hallways. The students and their parents repeatedly reported the harassment to the school administration. Instead of responding adequately to remedy the sexual harassment, the administration told the female students that they should stop wearing leggings because they are "sexually provocative." Frustrated by the administration's refusal to help her and safeguard her right to learn in an environment free from sexual harassment,<sup>10</sup> the female student left the school and enrolled in eSchooling for two years.

Moreover, KUSD students at Tremper and Bradford high schools organized a protest in which they planned to violate the dress code by wearing leggings and yoga pants, and other items prohibited by the dress code. Before the students could engage in their protest, however, both the Bradford and Tremper school administrations announced that any student found in violation of the dress code on the planned day could be suspended, removed from participating on the school's homecoming court, or even barred from attending the homecoming dance altogether. The same week, students circulated a petition opposing the dress code that garnered more than 3,000 signatures within five days.

After the KUSD Board voted to remove the ban on yoga pants, leggings, and tank tops effective the 2018-2019 school year, students, parents, and even teachers across the KUSD breathed a sigh of relief. Yet the KUSD Board have yet to release guidelines directing KUSD teachers and administrators not to enforce the dress code in a

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<sup>10</sup> See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 633 (1999) (holding that a recipient of federal funds is liable under Title IX when it "acts with deliberate indifference to known acts of [peer-to-peer] harassment in its programs or activities" when the harassment is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.").

discriminatory manner. As a result, KUSD teachers and administrators have continued to enforce the dress code in a manner that degrades and discriminates against female students.

On June 22, 2018, the ACLU received notice that a female student enrolled in a summer gym class at Tremper was disciplined, humiliated, and threatened to be sent home for wearing a sleeveless shirt to class. The student was wearing a standard sleeveless athletic shirt to prevent overheating because there is no air conditioning in the Tremper gym. The teacher who reprimanded the student in front of her peers was not the student's instructor for that particular class and continued a pattern of inappropriate conduct with this student for two days by threatening the student with being sent home and vocally criticizing the student's top in front of an entire class. We also learned that a school nurse called the student's parent to demand a doctor's note allowing the student to wear a tank top to gym class. This incident strongly suggests that teachers have yet to receive notice of or training regarding the changes to the dress code, and that the rescinded policy continues to be enforced to this day.

## **II. Equal Protection Clause and Title IX Concerns**

KUSD's discriminatory enforcement of its dress code against female students raises serious concerns under the Equal Protection Clause of the U.S. Constitution, Title IX of the Education Amendments of 1972 ("Title IX"), and the Wisconsin Pupil Nondiscrimination Law.

Under the Equal Protection Clause, government actors must not treat male and female students differently because of "overbroad generalizations about the different talents, capacities, or preferences of males and females."<sup>11</sup> Instead, any differential treatment between male and female students must be substantially related to an "exceedingly persuasive justification" for the treatment.<sup>12</sup>

Additionally, as a recipient of federal funds, KUSD must comply with Title IX, which prohibits sex discrimination in education programs that receive federal funds, as well as with similar provisions of Wisconsin Education law.<sup>13</sup> KUSD must also comply with the U.S. Department of Education's Title IX implementing regulations, including the prohibition on "Subject[ing] any person to separate or different rules of behavior,

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<sup>11</sup> *U.S. v. Virginia*, 518 U.S. 515, 533 (1996).

<sup>12</sup> *Id.* at 531–33.

<sup>13</sup> 20 U.S.C. § 1681(a); Wis. Stat. § 118.13(1) ("[N]o person may be denied admission to any public school or be denied participation in, be denied the benefits of or be discriminated against in any curricular, extracurricular, pupil services, recreational or other program or activity because of the person's sex.").

<sup>13</sup> *Hayden v. Greensburg Cmty. School Corp.*, 743 F.3d 569 (7th Cir. 2014).

sanctions, or other treatment.”<sup>14</sup> Wisconsin’s Pupil Nondiscrimination Law contains similar prohibitions.

The Seventh Circuit Court of Appeals, which has jurisdiction over Kenosha, has held that a grooming policy that imposed unequal burdens on male and female students violated both the Equal Protection Clause and Title IX.<sup>15</sup> The court held that the school district failed to provide an “exceedingly persuasive” justification for subjecting male and female students to unequal grooming requirements as required by the Equal Protection Clause—in fact, the school district could not even articulate a *rational* justification for its unequal treatment.<sup>16</sup> The court also held that the school district had engaged in intentional sex discrimination in violation of Title IX by failing to amend the policy after it received a parent’s complaint that it was being administered in a discriminatory manner.<sup>17</sup>

As described above, the justification for the 2017-2018 dress code’s prohibition on tank tops, leggings, and yoga pants appears to be rooted in impermissible sex stereotypes and a paternalistic desire to “protect” female students by regulating girls’ dress and appearance, rather than addressing harassing behavior.<sup>18</sup> The justification reflects overly broad and archaic generalizations about boys’ inability to control their sexual impulses as well as girls’ inability to make their own decisions about the clothing that makes them feel safe and comfortable. These stereotypes reinforce a culture of victim blaming in which schools convey the message to female students that they are at fault for experiencing sexual harassment if they make certain clothing choices. The Supreme Court has long struck down policies based on “‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.”<sup>19</sup>

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<sup>14</sup> 34 C.F.R. §§ 106.31(a) and (b)(4).

<sup>15</sup> *Hayden v. Greensburg Cmty. School Corp.*, 743 F.3d 569 (7th Cir. 2014).

<sup>16</sup> *Id.* at 582.

<sup>17</sup> *Id.* at 583.

<sup>18</sup> See Daniel Gaitan, *What is Appropriate Clothing for School?*, KENOSHA NEWS (Jan. 21, 2018), [http://www.kenoshanews.com/news/local/what-is-appropriate-clothing-for-school/article\\_dea620ae-01b7-5663-9e5c-bbb139919fae.html](http://www.kenoshanews.com/news/local/what-is-appropriate-clothing-for-school/article_dea620ae-01b7-5663-9e5c-bbb139919fae.html) (KUSD board member Gary Kunich stated that telling “boys not to look at a girl’s butt in leggings or not to say something sexually inappropriate” is “very simplistic and easy to say in a conversation, at a podium, in theory” but that the dress code’s prohibition of leggings and tank tops was necessary to protect young women from bullying).

<sup>19</sup> *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (invalidating statutory scheme presuming that spouses of male armed services members were dependents for purposes of obtaining benefits, with parallel provision requiring proof that spouses of female armed services were actually dependent on their wives); see also *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692 (2017) (“if a ‘statutory objective is to exclude or ‘protect’ members of one gender’ in reliance on ‘fixed notions concerning [that gender’s] roles and abilities,’ the ‘objective itself is illegitimate.’”) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (striking down a statutory scheme that provided that husbands, but not wives, may be required to pay alimony because of the “inherent risk of reinforcing the stereotypes about the proper place of women and their need for special protection”) (internal quotation marks omitted).

Although the KUSD Board voted to remove the discriminatory provisions of the dress code effective the 2018-2019 school year, it has failed to address the ongoing discriminatory enforcement of the dress code. As described above, female students testified in front of the school board on October 24, 2017 that “staff members are largely targeting female minors.”<sup>20</sup> The students provided numerous compelling examples of instances in which they were pulled out of class, missed important exams, and felt objectified and dehumanized by teachers or administrators who scrutinized their bodies and their clothing.<sup>21</sup> The latest incident of this inappropriate enforcement this June indicates that while KUSD changed its policy, it has not yet taken the steps necessary to reform its practices.

The disproportionate enforcement of the dress code against female students jeopardizes their equal access to education by forcing them to miss important instruction time and exams. It prioritizes male students’ freedom from “distraction” over female students’ physical comfort. The students we have spoken with described how the enforcement of the dress code policy has made them feel as though their school does not value their comfort or trust them to choose the clothing that would enable them best to focus in class. As described above, it has also caused them real physical discomfort. In the summer months at Temper, in gym class with intense physical exercise without air conditioning, it is preposterous to threaten a young woman with being sent home for exposing her shoulders. If a KUSD student has fainted sitting at her desk from heat exposure, the consequences of heat mixed with strenuous physical activity are likely to be much more significant.

Further, the selective enforcement of the dress code against female students negatively affects their confidence and psychological wellbeing, and subjects them to humiliation, anger, disgust, and anxiety as teachers called attention to their clothing or their body parts in front of the entire class. And it reflects and reinforces harmful gender stereotypes and a culture of victim-blaming. All of these effects represent cognizable harms under the Equal Protection clause, as well as concrete violations of Title IX’s prohibition on discrimination and denial of educational opportunities on the basis of sex.<sup>22</sup>

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<sup>20</sup> See KUSD Regular Board Meeting 10-24-17, YOUTUBE, <https://www.youtube.com/watch?v=ZKIMotTPMgs&index=9&list=PLFygMZ6I-z0xA8YCiA5Z4IL9kQnceiT0n>; see also Daniel Gaitan, *Students Demand Change in Dress Code*, KENOSHA NEWS (Oct. 24, 2017), [http://www.kenoshanews.com/news/local/students-demand-change-in-dress-code/article\\_1e3c3bd5-fe0e-5e2c-836f-11249cb2431a.html](http://www.kenoshanews.com/news/local/students-demand-change-in-dress-code/article_1e3c3bd5-fe0e-5e2c-836f-11249cb2431a.html);

<sup>21</sup> See *supra* Section I.

<sup>22</sup> In addition, the ACLU received reports in 2017 that students planning a protest of the dress code through wearing leggings and tank tops were threatened with suspension. This excessive punishment of dress code violations—which in this context were a form of expressive conduct, *Texas v. Johnson*, 491 U.S. 397, 404 (1989), amounted to a prohibited prior restraint on protected speech and expression in violation of the First Amendment. See *Spence v. Washington*, 418 U.S. 405, 409 (1974); *Boos v. Barry*, 485 U.S. 312, 321

### III. Conclusion

For these reasons, the ACLU of Wisconsin and the ACLU Women's Rights Project have serious concerns that KUSD is continuing to violate the Fourteenth Amendments to the U.S. Constitution, Title IX, and the Wisconsin Pupil Nondiscrimination Law because KUSD officials are continuing to selectively enforce the dress code against female students in a manner that reinforces invidious sex stereotypes, despite the amendments to the dress code this past March.

Accordingly, we urge the KUSD School Board to take immediate steps to ensure the new policy is enforced in a non-discriminatory manner going forward. These steps should include district wide training for all teachers, staff, and administrators with responsibility for dress code enforcement on the contours and enforcement of the new dress code as soon as possible. Additionally, we urge the KUSD School Board to release written guidelines to all KUSD schools prohibiting school officials from enforcing the dress code in a discriminatory manner during the school year and summer school. These guidelines should explicitly prohibit the public humiliation and degradation of students through practices such as measuring their skirt lengths or commenting on their bodies in front of their peers. We also urge the KUSD to publish notice to all KUSD parents and students that the new dress code and enforcement guidelines have been distributed and all educators and school officials have undergone training to ensure that the dress code is no longer enforced in a discriminatory manner.

Thank you for your prompt attention to this matter. We look forward to hearing from you by August 1, 2018 or sooner to discuss the steps the District plans to take to address these ongoing violations of students' rights.

Sincerely,



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(1988). In the future, KUSD should ensure that students engaging in peaceful and non-disruptive expressive activity are not threatened with more severe forms of punishment than would apply to their conduct under usual circumstances.

A handwritten signature in black ink, appearing to read 'Galen Sherwin'.

Galen Sherwin

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