

June 23, 2022

Sent Via E-Mail

Anne Savage
President – Board of Education
City School District of Albany

Ellen Krejci
Member – Board of Education
City School District of Albany

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Vice President – Board of Education
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Sridar Chittur, Ph.D.
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Dear President Savage, Vice President Smith, Secretary Chittur, Board Members, and Mr. Aloy:

The ACLU Women’s Rights Project and the New York Civil Liberties Union (NYCLU) write to express serious concerns regarding the recent suspensions of thirteen Albany High School athletes on the girls’ track and field team for practicing in sports bras during practice and protesting the City School District of Albany’s (“the District”) dress code. Based on our investigation of recent reports by students and parents, it appears that District officials have discriminatorily enforced the dress code against girl athletes—and particularly against Black girls and other girls of color—in a manner that reinforces invidious race and sex stereotypes potentially in violation of the Fourteenth and First Amendments to the U.S. Constitution, Title IX of the Education Amendments of 1972, and corresponding state and local constitutional and statutory protections. Additionally, the District’s athletic suspensions of the student athletes for wearing sports bras and speaking out against its dress code may run afoul of the First Amendment to the U.S. Constitution and corresponding protections in the New York State Constitution.

The District’s dress code policies and actions harm all students, regardless of gender, but have particularly egregious consequences for Black girls and other girls of color and transgender, non-binary, and gender-nonconforming students. We therefore urge the District to lift and expunge the athletic suspensions of all girls disciplined for practicing in sports bras and speaking out against the enforcement of its dress code in this manner, revise its dress code to eliminate provisions that reflect and reinforce gender stereotypes, and take immediate steps to remedy and guard against discriminatory enforcement of its dress code.

I. Factual Background

On May 11, 2022—an especially hot spring day with temperatures of over 80 degrees—several athletes on the Albany High School girls’ track and field team wore sports bras and shorts to their practice to cope with the extreme heat. During practice, the District’s Athletic Director, Ashley Chapple, approached the girls and told them that they were not permitted to practice in sports bras because doing so was a “distraction” to their male coaches. When the girls pointed out that the boys were routinely permitted to practice shirtless without issue, Chapple responded that the girls were in violation of the District’s dress code because sports bras qualified as underwear.¹ After the girls expressed frustration at the differential treatment between boys and girls, Chapple approached members of the boys’ team to tell them that they needed to wear shirts, and then returned to the girls’ team to reiterate that they were not allowed to practice in sports bras.

The next day, all thirteen members of the girls’ track and field team—the vast majority of whom are Black or Latina—came to practice in sports bras to protest the District’s dress code. As soon as Chapple saw them, she approached them and ordered them to leave practice. Chapple also walked up to a boy practicing shirtless, asked him to put his shirt on, and allowed the student to comply with her instructions while remaining on the field for practice. The girls complied with Chapple’s orders and left practice.

Later that evening, the girls returned to campus to watch a lacrosse game. As soon as they arrived, Chapple and three security guards approached the girls and told them to leave because they were wearing sports bras. The girls repeatedly asked why they were not allowed to stay and why their outfits were inappropriate, and expressed their view that the dress code was sexist and unfair. Chapple and the security guards refused to answer their questions and took down the students’ names and student ID badge numbers. The girls left campus shortly afterward.

Following this incident, the girls created an online petition asking the public to support the Albany High School’s girls’ track and field team as they “protest the gender biased dress code.” The petition stated: “The athletic administration staff is attempting to exclude us from our sport as a result of the misinterpretation of the dress code. We’re being punished for practicing in sports bras in the presence of male coaches, while the boys’ team was asked nicely to put shirts back on and was not punished.”²

¹ The District’s Code of Conduct mandates that “a student’s dress, grooming and appearance, including hair style and color, jewelry, make-up and nails, shall:

1. Be safe, appropriate and not disrupt or interfere with the educational process.
2. Recognize that extremely brief garments such as tube tops, net tops, halter tops, spaghetti straps, plunging necklines (front and/or back) and see-through garments are not acceptable.
3. Ensure that underwear is completely covered with outer clothing”

City Sch. Dist. of Albany, Code of Conduct, <https://www.albanyschools.org/pps/code-of-conduct/section-viii>.

² Stop Gender Biased Dress Codes: Allow the Girls Track Team to Wear Sports Bras, <https://www.change.org/p/girls-track-team-wearing-sports-bra?redirect=false>.

The following day, all thirteen athletes who had worn sports bras received via telephone athletic suspensions from practices and competitions. One athlete received an athletic suspension for the remainder of the season. As a result, the girls' track and field team was unable to compete that evening at a scheduled invitational game and lost a chance to qualify for state trials.

Over that weekend, each girl received a hand-delivered letter stating that the District was suspending her from athletic participation for "inappropriate and disrespectful behavior at Albany High School on Thursday, May 12." The letter stated that each student was "insubordinate when she refused to follow the rules set forth and enforced by" Chapple on May 11—specifically, Chapple's order that the girls could not practice in sports bras. The letter further asserted that the athletes "used inappropriate and disrespectful language" and "caused a disturbance at a lacrosse game" by "yelling, being belligerent, using vulgar language, and [being] disrespectful" to Chapple. The letter concluded that each student "pose[d] a *continuing danger* to persons or property or an *ongoing threat of* disruption to the academic and athletic process."

On Monday, May 16, the District held a meeting with the athletes but denied their requests to have their parents present. Based on reports from students and parents, school officials explained that the athletes received suspensions for practicing in their sports bras in violation of the dress code and for questioning the dress code at the lacrosse game, and requested that the athletes apologize for their conduct and participate in a committee to review the dress code. The athletes complied with the school officials' requests. However, they have not yet been given the opportunity to present their recommendations to the District regarding the dress code.

As of the date of this letter, the athletic suspensions for all but one athlete has ended. The District has denied the athletes' appeals and refused to remove the suspensions from their records. Based on reports from students and parents, the suspensions resulted in the denial of opportunities to compete in state trials, with significant implications for the students' prospects for college, scholarships, and other athletic opportunities. The District's unjust dress code enforcement also caused several students to feel belittled, shamed, and discouraged from participating in school athletics.

II. Legal Concerns

The District's biased dress code and its enforcement against thirteen Albany High School girl athletes may run afoul of the First and Fourteenth Amendments to the U.S. Constitution, Title IX of the Education Amendments of 1972 ("Title IX"), and corresponding state constitutional and statutory protections.

It is well established that the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution prohibits school officials from treating students differently based on, or forcing students to conform to, gender stereotypes or "overbroad generalizations about the different talents, capacities, or preferences of males and females." See *United States v. Virginia*, 518 U.S. 515, 533 (1996); *Glenn v. Brumby*, 663 F.3d 1312, 1313–20 (11th Cir. 2011); *Peltier v. Charter Day School, Inc.*, Nos. 20-1001, 20-1023, 2022 WL 2128579, at *11 (4th Cir. June 14, 2022) (en banc); *Sturgis v. Copiah Cnty. Sch. Dist.*, No. 3:10-CV-455-DPJ-FKB, 2011 WL 4351355, at *4–5 (S.D. Miss. Sept. 15, 2011); *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 150–

52 (N.D.N.Y. 2011). Schools may not impose different terms based on gender without an exceedingly persuasive justification or rely on gender stereotypes when creating and enforcing dress code policies. *See, e.g., Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 583 (7th Cir. 2014) (requiring male athletes to have short hair discriminated on the basis of sex in violation of the Equal Protection Clause and Title IX); *Peltier*, 2022 WL 2128579, at *13 (holding that a school’s requirement that girls wear skirts violated the Equal Protection Clause and Title IX because it was based on harmful gender stereotypes that girls require protection against boys and warrant different treatment than boy students).

In addition, as a recipient of federal funding, the District must comply with Title IX and the U.S. Department of Education’s implementing regulations, which prohibit differential treatment of students based on gender.³ *See, e.g., Peltier*, 2022 WL 2128579, at *15. Title IX regulations prohibit the District from “[s]ubject[ing] any person to separate or different rules of behavior, sanctions, or other treatment.”⁴ Title IX further protects students at federally-funded institutions from retaliation for engaging in protected activity, such as protesting discriminatory treatment. *See, e.g., Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005).

The U.S. Department of Education and the U.S. Department of Justice have recently reiterated that Title IX prohibits discrimination in dress and grooming policies in schools.⁵ The District also must comply with corresponding New York state laws prohibiting discrimination in education, including the New York State Human Rights Law⁶, the Dignity for All Students Act, and other provisions of the New York Education Law, which contain similar protections against gender discrimination in school programs and activities that receive federal or state financial assistance.⁷

Here, the District’s dress code enforcement subjected the girl athletes to differential treatment based on sex and based on harmful gender stereotypes, which resulted in their exclusion from and denial of participation in school programs and activities—programs and activities that often provide important educational opportunities for students of color and

³ 20 U.S.C. § 1681(a); *see also* 34 C.F.R. §§ 106.31(a) and (b)(4).

⁴ 34 C.F.R. §§ 106.31(a) and (b)(4).

⁵ United States’ Statement of Interest, *Arnold v. Barbers Hill Sch. Dist.* (S.D. Tex. filed on July 23, 2021), <http://cdn.cnn.com/cnn/2021/images/07/26/usabarbershill.pdf>.

⁶ N.Y. Exec. Law § 292 et seq.

⁷ The Dignity for All Students Act, N.Y. Educ. Law § 12 et seq. (“No student shall be subjected to harassment or bullying by employees or students on school property or at a school function; nor shall any student be subjected to discrimination based on a person’s actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, or sex by school employees or students on school property or at a school function.”); N.Y. Educ. Law § 3201-a (McKinney) (“No person shall be disqualified from state public and high school athletic teams, by reason of that person’s sex, except pursuant to regulations promulgated by the state commissioner of education.”); 8 N.Y.C.R.R. § 100.2(k) (“No student shall be denied membership or participation, on the basis of race . . . sex, marital status, color, religion, national origin or disability, in any program or activity which is included in a school program of curricular or extracurricular activities. . .”). Additionally, Albany’s local law protects against gender discrimination by city entities. *See* City of Albany General Code Chapter 28, Art. III, § 48-26 E(1).

students from other marginalized backgrounds. Additionally, the District’s failure to adhere to its own procedural policies in suspending these athletes is a cause for concern.⁸

As described above, the District subjected the impacted student athletes to “different rules of behavior, sanctions or other treatment” based on their sex, in violation of Title IX and of the Constitution. Until this incident, boys were routinely permitted to practice shirtless. When the girls practiced in their sports bras to prevent heat exhaustion and maintain comfort on a hot day, they were disciplined. Although school officials attempted to impose a similar rule on the boys after the fact, the boys were permitted a chance that girls were not afforded: the opportunity to put on shirts. The girls were summarily ordered to leave the field, and were not permitted to put on shirts or to return to practice in attire that the District deemed acceptable. This is clear disparate treatment based on sex.

Moreover, the justification offered—specifically, that permitting girls to practice in their sports bras would “distract” the male coaches—does not come close to meeting the demanding requirements necessary to satisfy heightened scrutiny. On the contrary, it rests on the same harmful and archaic gender stereotypes that the Supreme Court has rejected time and again as *per se* unlawful.⁹ Specifically, it reflects the view that girls’ bodies are inherently shameful or vulgar, that boys—or in this case, adult male coaches—will be “distracted” by girls’ bodies, and that girls’ dress and appearance require more regulation than that of boys. These stereotypes reflect broad and archaic generalizations about boys’ and men’s inability to control their sexual impulses and girls’ inability to make their own decisions about the clothing that makes them safe and comfortable. The District’s policies and practices prioritize boys’ and men’s freedom from hypothetical “distraction” over girls’ autonomy, and physical comfort and wellbeing, causing girl athletes to wear more layers of clothing despite the hot weather to avoid scrutiny and further disciplinary action. Importantly, these stereotypes reflect and reinforce a longstanding culture of victim-blaming, rooted in misogyny, that conveys the message to girls that their clothing choices may justify anything that happens to them. Such attitudes smack of the very sort of “romantic paternalism” that the U.S. Supreme Court has recognized puts women “in practical effect . . . not on a pedestal, but in a cage.”¹⁰

Critically, this enforcement of the dress code is consistent with national and local trends of disparate enforcement against Black girls and other girls of color, who are disproportionately

⁸ While suspensions from extracurricular activities are not governed by the same provisions of the New York Education Law as suspensions from academics, procedures for imposing extracurricular suspension must still be fair and give students and their parents a meaningful opportunity to discuss the conduct and penalties. *See* N.Y. Educ. Law § 3214. The District’s Student Code of Conduct states that “the student and the student’s parent/guardian will be provided with a reasonable opportunity for an informal conference” in the case of extracurricular suspensions. Further, the District’s Code of Conduct Interscholastic Athletics sets out procedures for notification of suspension that include a meeting with the student and their parent/guardian. *See* Code of Conduct Interscholastic Athletics 5280-R IV(B). In this case, the students’ request to have their parents at the May 16 meeting to discuss the suspension was denied by the District. Additionally, the District’s initial letter to the girls’ parents informing them of the athletic suspensions failed to communicate both the opportunity and timeline for an appeal, violating the procedural requirements for notice and a fair hearing. *See* Appeal of D.O., 53 Ed. Dept. Decision No. 16,543 (2013) (expunging a suspension record in part because the suspension notice containing an “oblique” reference to a code of conduct prescribing a district timeline for an appeal was insufficient to provide notice for said appeal).

⁹ *See, e.g., Sessions v. Morales Santana*, 137 S. Ct. 1678 (2017); *United States v. Virginia*, 518 U.S. 515 (1996).

¹⁰ *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

targeted for dress and grooming code enforcement because of internalized intersecting race and gender stereotypes about proper feminine behavior and appearance.¹¹ Black girls are often denied the benefit of the doubt that is bestowed on white girls and are perceived as less innocent, and more adult-like, aggressive and threatening, and needing less support and protection—otherwise known as the “adultification bias.”¹² Black and Latina girls also are frequently hypersexualized, making them more vulnerable to harassment and misconduct by adults and peers alike.¹³

Further, this overly harsh punishment reflects and compounds existing racial disparities in New York school discipline rates. In its analysis of the 2015-2016 data released by the U.S. Department of Education, the NYCLU found that Black students in the Capital Region (including Albany County) were, on average, nearly four times more likely to be suspended than their white peers.¹⁴ These disparities are especially stark for Black girls, who are far more likely than white girls to be harshly disciplined in school, particularly for minor and subjective infractions like dress code violations, instead of given a second chance.¹⁵ Biased dress code enforcement contributes to such disproportionate discipline, excluding Black girls and other girls of color from class and extracurricular activities and too often pushing them out of school altogether.¹⁶

In this case, the District’s biased dress code enforcement has jeopardized the students’ equal access to education by forcing them to miss important athletic events and activities and subjecting them to harsh discipline, including verbal and written reprimands, removal from campus and school events, and suspensions.¹⁷ As described above, the girls were publicly

¹¹ Nat’l Women’s Law Ctr., *Dress Coded: Black girls, bodies, and bias in DC schools*, https://nwlc-ciw49tixgw51bab.stackpathdns.com/wp-content/uploads/2018/04/Final_nwlc_DressCodeReport.pdf; see also Rachel Anspach, *School dress codes unfairly target Black girls. But students are fighting back*, Mic, Oct. 30, 2019, <https://www.mic.com/p/school-dress-codes-unfairly-target-black-girls-but-students-are-fighting-back-19276290>.

¹² Rebecca Epstein et al., *Girlhood Interrupted: The Erasure of Black Girls’ Childhood*, Georgetown Law Ctr. on Poverty & Inequality, <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf>; see also Alex Laughlin, *The startling thing that happens to black girls in preschool*, Wash. Post, Apr. 25, 2016, <https://www.washingtonpost.com/news/wonk/wp/2016/04/25/monique-morris-pushout/> (noting that Black girls are stereotyped as being “social deviants” and having “certain attitude”).

¹³ Rebecca Epstein et al., *Girlhood Interrupted: The Erasure of Black Girls’ Childhood*, Georgetown Law Ctr. on Poverty & Inequality, <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf>; see also Nat’l Women’s Law Ctr., *Let Her Learn: A Toolkit to Stop School Push Out for Girls of Color* (2016), at 1, https://nwlc.org/wp-content/uploads/2016/11/final_nwlc_NOVO2016Toolkit.pdf.

¹⁴ NYCLU, *Equal Justice? Disproportionate Racial and Ethnic Disciplinary Rates in Capital Region School Districts*, https://www.nyclu.org/sites/default/files/field_documents/20190522_capitolregioneducationdataanalysis_final.pdf.

¹⁵ P.R. Lockhart, *Black girls are disciplined more harshly in school. Dress codes play a big role.*, Vox, Apr. 26, 2018, <https://www.vox.com/identities/2018/4/26/17274996/dress-codes-uniforms-black-girls-race-school-discipline-disparity>; see also Girls, Inc., *What You Need to Know About School Pushout and How to Combat It*, <https://girlsinc.org/school-pushout-and-how-to-combat-it/>.

¹⁶ It is also possible that the District’s actions violated Title VI of the Civil Rights Act of 1964 which prohibits discrimination based on “race, color, or national origin . . . under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d.

¹⁷ See, e.g., Nat’l Women’s Law Ctr., *Dress Coded: Black girls, bodies, and bias in DC schools*, at 16–20, https://nwlc-ciw49tixgw51bab.stackpathdns.com/wp-content/uploads/2018/04/Final_nwlc_DressCodeReport.pdf.

reprimanded, shamed, and humiliated in front of their peers and coaches for wearing sports bras—clothing items that are designed and commonly worn as athletic outerwear, during outdoor track and field practice.¹⁸ When the girls spoke out against the unjust dress code, the District issued even harsher penalties. These harsh penalties directly impacted the girls’ school records and interfered with their opportunities to compete and qualify for state trials. Moreover, biased dress code enforcement can negatively affect students’ confidence and psychological wellbeing. Based on accounts from impacted students and their parents, the District’s actions have caused several of the students to feel belittled, shamed, and discouraged from participating in school athletics. These effects can constitute cognizable harms under the U.S. and New York Constitutions, as well as concrete violations of Title IX.

The District’s suspensions of these students for speaking out against the dress code and its discriminatory enforcement against them may constitute a violation of Title IX’s prohibition against retaliation and raise serious concerns under the First Amendment to the U.S. Constitution and corresponding protections in the New York state constitution. Courts have long recognized that students retain their First Amendment rights to protest on school grounds so long as their activities do not cause a “material and substantial interference with schoolwork or discipline” or “collid[e] with the rights of others.”¹⁹ The student athletes’ protest is of the sort protected by the First Amendment—it was entirely peaceful, involving students wearing sports bras during sports practice and on an athletic field, asking questions about the dress code and its rationale, expressing concerns about the dress code, and subsequently creating an online petition “critici[zing] . . . the [school] rules” and collecting signatures in service of their cause.²⁰ The athletes’ protests were intended to convey a message entitled to First Amendment protection, and the means they chose to express it did not involve “the sort of ‘substantial disruption’ of a school activity or a threatened harm to the rights of others that might justify the school’s action.”²¹ Moreover, the disproportionate consequences imposed (*i.e.*, athletic suspensions) may constitute impermissible viewpoint discrimination and retaliation for engaging in protected activity in violation of the athletes’ constitutional right to free speech.²²

¹⁸ See, e.g., Eddie Pells, *Women send powerful message in Olympic track and field*, AP News, Aug. 8, 2021, <https://apnews.com/article/2020-tokyo-olympics-track-and-field-womens-dominance-5d313065653c81aab1c04b842e1ed1d9>; Bethany Biron, *Nike just revealed the official uniforms designed for Team USA at the Tokyo Olympics, and it’s the most high-tech line from the sports retailer yet*, Business Insider, Feb. 5, 2020, <https://www.businessinsider.com/nike-uniforms-tokyo-olympic-athletes-high-tech-sustainable-2020-2>.

¹⁹ *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 511, 513 (1969) (holding that the school district violated students’ First Amendment right to freedom of expression when it adopted a policy prohibiting students from wearing black armbands to school to protest the Vietnam War and suspended students who violated the policy).

²⁰ See *Mahanoy Area School Dist. v. B.L.*, --- U.S. --- (2021) (finding that “crude” social media messages criticizing the school’s athletic department’s rules with profanity were protected by the First Amendment and reiterating that schools have a strong interest in “protecting a student’s unpopular expression”); see also *Tinker*, 393 U.S. at 509 (“for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint”).

²¹ See *Mahanoy Area School Dist. v. B.L.*, --- U.S. --- (2021) (quoting *Tinker*, 393 U.S. at 514).

²² Cf. *id.* (upholding the judgment of the courts below, which reversed the athletic suspension imposed in violation of the First Amendment).

III. Conclusion

For these reasons, the ACLU and NYCLU have serious concerns that the City School District of Albany, by discriminatorily enforcing its dress code against girl athletes in a manner that reflects and reinforces racial and gender stereotypes, may violate the First and Fourteenth Amendments to the U.S. Constitution, Title IX, and corresponding state and local constitutional and statutory protections.

We respectfully request a meeting with the District to discuss these concerns. The District should direct its response to Melanie Trimble, Regional Director of the NYCLU's Capital Region, via email at mtrimble@nyclu.org, by Thursday, June 30, 2022.

Thank you for your prompt attention to this matter. Please do not hesitate to contact us if you have any questions regarding this letter.

Sincerely,

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cc: Kaweeda G. Adams, Superintendent for the City School District of Albany
Tanya Bowie, Clerk for the Board of Education