

identity. The Trial Court granted the preliminary injunction on the grounds that the School's actions infringed Pat's free speech rights, her liberty interest in appearance, and her freedom from sex discrimination and that her exclusion from school caused her irreparable harm. Because the Trial Court applied proper legal standards, had more than reasonable support for all determinations of factual questions, and properly issued an injunction requiring Brockton School to permit Pat to attend school in clothing and accessories that express her female gender identity, Defendants' petition should be denied.

COUNTER-STATEMENT OF FACTS

Plaintiff Pat Doe is a 15-year-old student in the Brockton Public Schools who has gender identity disorder ("GID"). (Add. at 22,² ¶ 1; Add. at 26, ¶ 4; Add. at 16, ¶ 3-4; Add. at 12, ¶ 3-4). Consistent with the guidance, counseling, and treatment of mental health professionals, Pat, who is biologically male, often wears clothing and fashion accessories typically worn by girls. (Add. at 24, ¶ 11, 15; Add. at 20, ¶ 26). Because of this she has been excluded from attending school. (Add. at 20, ¶ 26).

A. School's Exclusion Of Pat Because Of Her Gender Identity

Contrary to Defendants' characterization of the facts, the School has not permitted Pat to wear girls' clothing nor has it limited the restrictions imposed on Pat to instances where the clothing she wore caused alleged disruption in the School. Quite the opposite, the record shows that throughout Pat's 7th and 8th grade years, Principal Kenneth Cardone repeatedly sent Pat home on occasions when her outfits were too girl-like and went out of his way to ensure that Pat

² References are to Addendum to Petition for Interlocutory Relief, Add. at ____.

was wearing boy-like clothes at school (Add. at 22-23, ¶ 3-4; Add. at 17-18, ¶ 9, 13).³ Principal Cardone’s opposition to Pat’s expression of her female gender identity dates from the time Pat was in the 7th grade, nearly one and one-half years ago and continued up and through the time Pat stopped attending school because of her inability to endure this undue hostility. Id. By the time Pat was in the 8th grade, Principal Cardone asked Pat to check with him to have her clothing approved on a daily basis. (Add. at 19, ¶ 16; Add. at 23, ¶ 6). He often sent her home despite no disruption having occurred. (Add. at 18, ¶ 14; Add. at 23, ¶ 5).

At the beginning of this academic school year, 2000-2001, Jane Doe took her grandchild to enroll her in school. (Add. at 20, ¶ 24). At two different meetings with Principal Cardone and several other administrators, Pat Doe and Jane Doe were told that Pat would not be allowed to wear girls’ clothing or dress in a manner that allowed her to express her female gender identity. (Add. at 20, ¶ 21, 22; Add. at 24, ¶ 11, 12).

B. Gender Identity And Transgenderism In Adolescence

Toward the end of the 7th grade when Pat began wearing clothing typically worn by girls, a guidance counselor at the school recommended to Pat’s grandmother and legal guardian, Jane Doe, that she take Pat to see a therapist. (Add. at 18, ¶ 10; Add. at 22, ¶ 3; Add. at 17, ¶ 9). Around June 1999, Pat was diagnosed with GID. (Add. at 26, ¶ 4). Since receiving that diagnosis, consistent with the prescribed course of care, Pat has continued to wear clothing that expresses her female gender identity. (Add. at 26, ¶ 5, 8; Add. at 18, ¶ 12).

Gender Identity Disorder is a diagnosable condition which is evidenced by a “strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of

³ Examples given by the School include a “frilly” shirt, as well as skirts and dresses. (Add. at 141, ¶ 8).

the other sex.” Diagnostic and Statistical Manual of Mental Disorders: DSM-IV (1994) at 532, (Add. at 58). It is accompanied by a “persistent discomfort about one’s assigned sex or a sense of inappropriateness in the gender role of that sex.” *Id.* GID is also referred to as transgenderism; and people with GID are often called transgender. According to the DSM-IV, the “onset of cross-gender interests and activities is usually between ages 2 and 4” and typically increases as children develop to and through adolescence. At adolescence, transgender youth are particularly at risk of dropping out of school because of “pressure to dress in attire stereotypical of their assigned sex.” DSM-IV at 534.

Current medical standards counsel respect for a transgender person’s identification of his or her own gender. *See, e.g.*, 37 Transgender Care: Recommended Guidelines, Practical Information & Personal Accounts at 7 (1997) (Add. at 65). In all but extreme cases, “caregivers have a responsibility to acknowledge the self-chosen identity of their clients.” B.R. Beemer, Gender Dysphoria Update, 34 Journal of Psychosocial Nursing and Mental Health Services, 12 (1996). In the past, some practitioners tried to “cure” transgender people through aversion therapies and other techniques designed to alter cross-gender identification. *See, e.g.*, M.G. Gelder and I.M. Marks, Aversion Treatment in Transvestism and Transsexualism, in *Transsexualism and Sex Reassignment* (Richard Green & John Money, eds., 1969). Those efforts were not only unsuccessful, but caused severe psychological and in some cases even physical damage. (Add. at 85, ¶ 11). Today, efforts to alter a person’s gender identity are viewed as both futile and unethical. The treatment paradigm has shifted from attempting to “cure” the transgender person “to facilitating acceptance and management of a gender role transition.” Walter Bockting and Eli Coleman, *A Comprehensive Approach to the Treatment of*

Gender Dysphoria, in *Gender Dysphoria: Interdisciplinary Approaches in Clinical Management* 131, 131-132 (W.D. Bockting and E. Coleman, eds., 1992).

Unfortunately for many transgender people, ignorance and prejudice about gender abound, and Pat's case seems to fit a classic paradigm. As explained in a volume addressed to professional caregivers working with transgender youth:

“Children with gender issues frequently are regarded as unruly or disruptive in the classroom and more often than not are punished, expelled or otherwise made an example of by school administrators. This is tragic, particularly when we consider the plight of young individuals who receive substantial parental and peer support, yet receive none at all from the very place they spend most of their daytime hours. When encountering transgender youth, school administrators are advised to seek gender-specialized consultation and learn about the needs of these persons, just as they would for other minority groups. Interestingly, those youth who are most integrated within an established transgender identity are also those who function best within their general peer groups...Although they are disliked by administrators, typically these individuals receive far less harassment from their peers than those who remain closeted and isolated...”

Transgender Care at 135-136.

LEGAL ARGUMENT

I. THE COURT PROPERLY DETERMINED THAT BROCKTON SCHOOL'S PROHIBITION AGAINST PAT WEARING CLOTHING THAT EXPRESSES HER FEMALE GENDER IDENTITY VIOLATES HER RIGHT TO FREE EXPRESSION AND HER LIBERTY INTEREST IN APPEARANCE PROTECTED BY THE MASSACHUSETTS DECLARATION OF RIGHTS.

A. The Trial Court Reasonably Found For Pat On Her Free Expression Claim

The Massachusetts Declaration of Rights guarantees the right to free expression, see Article 16 (as amended by Article 77) and does not limit that right as it applies to students. See, e.g., Pyle v. School Committee of South Hadley, 423 Mass. 283 (1996) (affirming that the Tinker standard applies to students in Massachusetts). It is hard to imagine a case in which a student's expressive rights are more at risk than the one before the Trial Court in which Plaintiff

sought to protect not an expression of politics or belief – undeniably important expressions as well – but an expression of the core identity of how she sees herself as a person, what the Trial Court accurately described as her “quintessence.”⁴ In other words, if Plaintiff’s interest in expressing her gender identity was not protected by the Trial Court, the result would be not simply that she was barred from wearing a particular t-shirt with a political slogan (as in Pyle) or a religious article (like the rosary beads in Chalifoux v. New Ind. School Dist., 976 F. Supp. 659 (S.D. Tx. 1997)), but rather, the Plaintiff herself would be barred from attending school simply for being the person that she is.

1. The Trial Court reasonably found that Pat’s wearing of girls’ clothing is expressive speech understood by those perceiving it.

The Trial Court reasonably found that Pat’s expression of her female gender, achieved by wearing clothing and fashion accessories (including barrettes, bras and hair extensions) similar to girls in the school, sends a particularized message about her identity, and as the Trial Court pointed out, the vehemence of the School’s response attests to the fact that her message is understood. The Trial Court’s factual findings on these points are amply supported by the record.

“Symbolic speech is protectible...if the person displaying the symbol intends to convey a particularized message and there is a ‘great likelihood’ that the message will be understood by those observing it.” Chalifoux v. New Caney Ind. School Dist., 976 F. Supp. 659 (S.D. Tx. 1997) (striking school’s prohibition against gang symbols including the wearing of rosary beads as violative of First Amendment and “void for vagueness”); see also Texas v. Johnson, 491 U.S.

⁴ Although as explained below, see Section I(C) infra, there was ample support for the Trial Court’s determination that Pat has GID, this finding was not critical to its conclusion that for Pat wearing girls’ clothing is

397, 404 (1989). In Chalifoux, public high school students were prohibited from wearing rosaries as necklaces because of the school's concern that the religious articles, even though the students wore them with the intent to communicate their faith, could be mistaken for gang symbols. The school argued that many people are not familiar with the rosary and even those who are would not understand its message when worn as a necklace rather than used for prayer. The court rejected the school's narrow reading of the plaintiffs' message, holding that despite viewers' lack of familiarity with the specific message, observers will have a general understanding that the necklace has a symbolic meaning. Chalifoux, 976 F. Supp. at 665.

In Pat's case, the Trial Court reasonably found that wearing female clothing and accessories, including bras, makeup, skirts, and dresses expresses Pat's identification with the female gender, that "plaintiff's message is well understood by faculty and students" and that the "vehement response," (Add. at 169), of the school and some students is proof that plaintiff's message clearly has been received. Despite Defendants' protestations to the contrary, there is simply nothing in the record whatsoever that suggests these factual determinations were unreasonable or, for that matter, that they are even questionable. Therefore, Defendant's argument that "[i]t is not improbable that some of the students simply perceived Pat as gay [or] transvestite" (Def. Memo at 11) is an insufficient argument for reversal.⁵

As the Trial Court explained, Pat's case is easily distinguished from that of the Plaintiff in Bivens v. Albuquerque Public Schools, 899 F. Supp. 556 (D.N.M. 1995). In Bivens, the district court rejected the plaintiff's contention that wearing baggy pants expressed that student's

expressive.

black identity. In upholding the dress code prohibiting such attire, the court explained that there was no uniform or clear message attached to the wearing of the prohibited attire. The court pointed to the school's evidence that sagging pants can convey a number of different meanings, including gang affiliation, would-be gang affiliation, and simple acceptance of a “fashion trend followed by many adolescents all over the United States.” Id. at 561. As explained, supra, the Trial Court reasonably found that there was a general understanding on the part of administrators, teachers, and students of the symbolic meaning of Pat's dress as an expression of her female gender identity and no evidence from the School to support the hypothetical alternative meanings it now offers on appeal. The Trial Court's specific discussion of Bivens and its contrast to Pat's case demonstrates that Defendants have not shown that the court in any way misapplied the legal standard or abused its discretion.

Finally, contrary to Defendant's contention, there is no “well-entrenched constitutional principle that attire is not ‘expression.’” (Def. Memo at 8). There can certainly be no such rule in the Commonwealth where the SJC has held attire, t-shirts in that case, to be expressive. See Pyle v. School Committee of South Hadley, 423 Mass. 283 (1996). Moreover, other courts have found articles of clothing to be expressive. See, e.g., Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503 (1969) (armbands); Wallace v. Ford, 346 F. Supp. 156 (E.D. Ark. 1972) (shirts with slogans or pictures); Aguirre v. Tahoka Ind. School Dist., 311 F. Supp. 664 (N.D. Tex. 1970) (armbands). The cases upon which Defendants rely to support their overly broad statement of the law are simply ones in which the particular article of clothing at issue did

⁵ Indeed, consistent with the Trial Court's conclusion, a recent Boston Globe article including comments made by students at the school reported that “Doe's friends said [she] considers [her]self a woman trapped in a man's body.” See “Court Rules Brockton Boy Can Dress as Girl at School,” A1 Boston Globe, Oct. 13, 2000.

not serve an expressive purpose for the wearer. See Bivens v. Albuquerque Public Schools, 899 F. Supp. 556, 561 (D.N.M. 1995) (baggy pants not sufficiently expressive to support racial identity); Olesen v. Bd. of Educ. of School District 228, 676 F. Supp. 820 (N.D. Ill 1987) (male student's wearing of earrings did not express a particular message). In fact, that those courts evaluated whether the plaintiffs' wearing of the contested article of clothing was expressive for the individual litigants undercuts Defendants' broad statement that attire may never be protected expression.

2. United States v. O'Brien is not applicable to this case because the School's proscription is not content-neutral.

In addition, as the Trial Court explained, because the prohibition against Pat's wearing girls' clothing is meant to suppress Pat's expression of her female gender identity, it is not content-neutral. It is uncontested that the relevant dress code is by its terms gender-neutral but is being interpreted by the administrators to extend to any clothing Pat would wear that makes her look like a girl. As the School confirms, at a meeting on September 21, 2000, Kenneth Sennett, Director of Pupil Services, clarified the School's position that certain articles of clothing are per se disruptive, citing dresses, skirts, bras, and wigs as examples because such items make Pat appear like a girl. (Add. at 148, 149, ¶ 5, 8).

Brockton School attempts to play a shell-game with this Court. Rather than acknowledging that it prohibits boys from wearing girls' clothing because it makes boys appear like girls, the School explains that it prohibits boys from wearing girls' clothing because it is disruptive for boys to look like girls. The fact that the prohibited articles of clothing are ones that make a boy look like a girl can hardly be said to be "beside the point," as Defendants' contend. (Def. Memo at 12) According to the School, its interpretation of the dress code is

precisely to prevent boys from looking like girls. Even by Brockton School's own logic, the purpose of the prohibition against Pat wearing girls' clothing is to prevent her from looking like a girl, e.g. expressing her female gender identity.

The School's interpretation of its dress code is not a content-neutral regulation like the one at issue in United States v. O'Brien, 391 U.S. 367 (1968). Because the regulation is directly meant to prohibit Pat from looking like a girl, this is not a case which can be analyzed through the "reasonable time, place, and manner" lens or one which should take account of whether "alternative channels of communication" are available. Those inquiries only apply to content-neutral restrictions that have an incidental effect on expression. Because the Trial Court properly determined that Defendants' conduct was a suppression of Pat's speech, the test set out in United States v. O'Brien does not apply.

B. The Court Separately Found The School's Prohibition Against Pat Wearing Girls' Clothing Violates Her Liberty Interest In Appearance

Students, no less than non-students, have a liberty interest in their appearance. Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Cf. Board of Selectmen v. Civil Service Com., 366 Mass. 547, 556 (1974) (citing Richards with approval). Indeed, even for students, "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Richards, 424 F.2d at 1285. See also, Massie v. Henry, 455 F.2d 779, 782 (4th Cir. 1972) (same); Bishop v. Colaw, 450 F.2d 1069, 1075 (8th Cir. 1971) (students have liberty interest in governing their physical appearance in school); Breen v. Kahl, 419 F.2d 1034, 1036 (7th Cir. 1969) (same). Cf. Hodge v. Lynd, 88 F.

Supp. 2d 1234, 1241 (D.N.M. 2000) (student had liberty interest in wearing baseball cap backwards even though restriction would only have been imposed while attending a state fair).

Pat has not advanced her liberty interest in appearance claim as a “fallback,” as Defendants argue. Pat has separate claims of free expression, sex discrimination, and a liberty interest in appearance. These three are independently viable, separately protected, and appropriately addressed seriatim by the Trial Court below. Unlike the plaintiffs in Conn. v. Gabbert, 526 U.S. 286, 293 (1999) and Boroff v. Van Wert, 220 F.3d 465 (6th Cir. 2000), Pat has not failed to properly plead or argue her liberty interest nor does she bring an appearance claim as a “fallback.” With respect to the School’s argument that its restriction on her appearance is limited because it only prevents her from expressing her female gender identity during the school day, gender identity, unlike a t-shirt, is simply not something that can be shed, particularly by a transgender student, without serious emotional consequences, if at all. (Add. at 26, ¶ 8; Add. at 18, ¶ 13). The Trial Court therefore reasonably included potential harm to Pat in the balance respecting her liberty interest in appearance. See Richards v. Thurston, 424 F.2d 1281, 1285 (1st Cir. 1970).

C. All Of The Evidence Before The Trial Court Was Consistent With Its Determination That Pat Doe Has Gender Identity Disorder

Despite Defendants’ strenuous efforts to show otherwise, all the evidence before the Trial Court supported its conclusion that Pat Doe has GID. The evidence in support of its conclusion included the sworn statements of Pat Doe herself, her grandmother, her grandfather, and her treating therapist Judith _____, a licensed mental health professional with 20 years of experience in guidance and counseling who, unlike Dr. _____, has had a longstanding relationship with the Plaintiff who she has seen once a week for over a year and a half. Moreover, even the one-time

and “initial psychiatric evaluation” done by Dr. Ethan ____, M.D., for the purposes of prescribing and monitoring the medication provided to Pat Doe for bipolar disorder, is consistent with the conclusion drawn by the court as Dr. ____ now confirms.⁶

As Dr. ____ noted, Pat “presents as effeminate,” wears eyeshadow, lipstick, and feminine attire. (Add. at 156). The “impression” of Dr. ____, not a “diagnosis” as Defendants characterize it, was that Doe has “probable juvenile mania; ADHD.” (Add. at 157). Dr. ____’s impressions, far from being inconsistent with a diagnosis of GID, support Judith ____’ and the Trial Court’s conclusion. Because Dr. ____ was doing the evaluation to prescribe medication for Pat’s bipolar disorder, there would have been no reason to include his impressions that Pat has GID. Certainly there is nothing in Dr. ____’s report that could be characterized as being “directly to the contrary,” (Petition for Interlocutory Relief at 2), of ____’ clinical determination that Pat has GID. As a result, the judge’s conclusion more than satisfies the standard of review in an appeal of a preliminary injunction requiring that there need be only “reasonable support for [the trial court’s] evaluation of factual questions.” Planned Parenthood v. Operation Rescue, 406 Mass. 701 (1990). Surely nothing in Dr. ____’s report suggests that the Trial Court’s determination was unreasonable.⁷

II. THE TRIAL COURT PROPERLY DETERMINED THAT DISCIPLINING A BOY FOR WEARING CLOTHING THAT A GIRL COULD WEAR CREATES AN IMPERMISSIBLE SEX-BASED CLASSIFICATION.

⁶ Though not before the Trial Court, Pat submits to this Court an affidavit from Dr. ____ confirming the Trial Court’s conclusion. There is now no real dispute that Pat has GID. (See Exhibit A, attached).

⁷ The School inexplicably maintains that before this lawsuit was filed it had never received any information concerning Pat’s diagnosis of GID. Though Defendants’ point has no legal relevance and defies their experience with Pat for two school years, it bears mention that a document submitted to the Trial Court by the Defendants dated September 5, 2000 (three weeks before this case was filed) includes a statement from a DSS caseworker to Superintendent Joseph Bage that Pat Doe is a transgender youth who uses a female pronoun (Add. at 26, ¶ 5). The suggestion that the school was never aware of Pat’s GID diagnosis before this lawsuit is insupportable at best.

The Defendants do not contest that they would prevent Pat from attending school wearing clothing that a similarly-situated girl could wear solely because Pat was born male. As a result, she is being excluded from admission to the School on account of her sex. In other words, because she is biologically male she is being prevented from attending School in clothing and with the appearance that would be acceptable if she were biologically female. As the Trial Court properly determined, she is being denied the sex discrimination prohibition guarantees provided by Mass. Gen. L. c. 76, § 5 and the Declaration of Rights, Part I, Art. I.

The School on appeal incorrectly argues that to show sex discrimination Pat must engage in the burden shifting analysis set forth in McDonnell Douglas v. Green, 411 U.S. 792 (1973) and MCAD v. Wheelock College, 371 Mass. 130 (1976), relevant in the employment context where there is no direct evidence of discrimination. This case presents neither an employment matter nor an indirect evidence case. Rather, in this case, the School has explicitly stated that it is applying a neutral dress code in a sex-based way, such that girls can wear, for example, skirts and dresses but boys cannot. As a result, the McDonnell Douglas burden shifting framework is simply not applicable both because there is direct evidence of discrimination for the statutory claim and because under the constitutional provisions, any classification on the basis of sex is not permissible absent a demonstrably compelling interest.⁸ Attorney General v. Massachusetts Interscholastic Athletic Ass'n, Inc., 378 Mass. 342 (1979). Moreover, even if such demonstrably

⁸ Even in the employment context, a Plaintiff need not set forth the prima facie case articulated in McDonnell Douglas and Wheelock where there is, for example, a sex-based distinction between what men and women may wear in the workplace. See, e.g., Harding v. Goodyear Tire and Rubber Co., 929 F. Supp. 1402, 1406 (D. Kan. 1996); Carroll v. Talman Fed. Sav. & Loan, 604 F.2d 1028, 1030 (7th Cir. 1979); O'Donnell v. Burlington Coat Factory Warehouse, Inc., 656 F. Supp. 263, 266 (S.D. Ohio 1987).

compelling interest can be shown, the classification must be narrowly tailored to achieve the compelling interest. Id. at 354.

In addition to presenting a case with direct evidence of discrimination (insofar as boys may only wear clothing and accessories that make them appear boy-like, while girls enjoy a broader range of permissible gender expression including appearing either boy-like or girl-like), the school has also engaged in sex stereotyping, a practice the United States Supreme Court has recognized to be sex discrimination. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (members of an accounting firm that denied female associate promotion to partner because she failed to walk, talk, and dress in a feminine style engaged in impermissible sex stereotyping). See also, Rosa v. Park West Bank, 214 F.3d 213 (1st Cir. 2000) (cross-dressing man denied loan application for failure to look sufficiently masculine can state a claim of sex discrimination), Higgins v. New Balance, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (male employee could bring claim against employer where adverse action taken “because he did not meet stereotyped expectations of masculinity”). Cf. Montgomery v. Ind. School Dist. No. 709, 109 F. Supp. 2d 1081, 1092 (D.Minn. 2000) (in student harassment case, the District Court explained “the Higgins opinion reminds courts...that discrimination based on a client’s failure to satisfy the stereotypes associated with his or her sex constitutes discrimination ‘because of sex’”). The lesson drawn from Price Waterhouse and its progeny is that enforcing societal norms of how boys and girls must express their gender identity is sex discrimination, in this case, prohibited both by G.L. c. 76, § 5 and Article I of the Declaration of Rights.

Finally, Defendants have again articulated an incorrect legal standard in arguing that “schools operate by a different set of rules than the outside world” and may make sex-based

distinctions as long as they are “permissible within limits, when necessitated by established community standards.” (Def. Memo at 18). As the Trial Court found, a “community standards” exception to sex discrimination in schools has never been recognized by the Supreme Judicial Court or any court whose opinions are binding on the courts of the Commonwealth.⁹ To the contrary, the SJC has had occasion to interpret our Declaration of Rights’ sex discrimination prohibition in a school context and affirmed that strict scrutiny applies in that context just as it would in a non-school based setting. Attorney General v. Massachusetts Interscholastic Athletic Ass’n, Inc., 378 Mass. 342 (1979).

III. THE EVIDENCE OF DISRUPTION PROFFERED BY THE DEFENDANTS CANNOT DEFEAT PAT’S SEX DISCRIMINATION OR FREE EXPRESSION CLAIMS.

Under any applicable standard of scrutiny, the School’s justifications for its discriminatory treatment of Pat fail.

First, evidence of disruption is no justification for the School’s different treatment of boys and girls. Under settled Massachusetts law, a sex-based classification is presumptively invalid and will be upheld only if it is narrowly tailored to achieve a compelling state interest.

Id. Evidence of ordinary student disruption cannot meet heightened scrutiny in the education context.¹⁰

⁹ In a case closely related to the facts presented here, the Illinois Supreme Court struck a municipal cross-dressing statute that the country sought to justify as “protecting the public morals.” See, e.g., City of Chicago v. Wilson, 389 N.E.2d 522, 533 (Ill. 1978) (in a case brought by transgender plaintiffs, “the aesthetic preference of society must be balanced against the individual’s well-being”).

¹⁰ Indeed if disruption could justify either race or sex discrimination in schools, the Supreme Court would not have ordered desegregation in Brown v. Board of Education, 347 U.S. 483 (1954) or the admission of a female student to a previously all-male military academy. United States v. Virginia, 518 U.S. 515 (1996).

Second, the cited instances of misconduct do not justify the School's violation of Pat's right to free expression. As the Trial Court properly found, to the extent the School can prove that Pat engaged in incidents of disruption completely typical of the 7th and 8th grader that she was, "[t]his department...is separate from plaintiff's dress."¹¹ To the extent that Pat engages in conduct which is impermissible in school, the appropriate response is to discipline her, just as the School would any other student. Pat has never sought anything other than equal treatment from the School. As the Trial Court correctly explained, "[r]egardless of plaintiff's gender identity, any student should be punished for engaging in harassing behavior towards classmates." (Add. at 171). The Trial Court's order took careful account of the School's concern for maintaining order and discipline and toward that end included provisions that permit Brockton School to discipline Pat, where appropriate, as long as it does so in a manner consistent with the way in which it disciplines other students at the School.

What the School has failed to demonstrate is any connection between the incidents of disruption and Pat's clothing other than perhaps that, on occasion, a few other students respond disruptively to Pat's expression of her female gender identity. As the Trial Court held, to credit this justification would effectively permit the few students who may be made uncomfortable by Pat's difference to deprive Pat of her rights through their "heckler's veto." See Fricke v. Lynch,

¹¹ It bears mention that there is a disturbing thread of anti-gay sentiment running through the school's list of disruptive incidents. Some of the cited instances of misconduct appear objectionable by the school only because they involved same-sex flirtations, flirtations which one would assume are commonplace at a middle-school in an opposite-sex context (e.g. flirting in class with boys, telling one male classmate that "he was cute," and posting her attraction to another male student on an internet site). Other incidents pointed to by the school as disruptive may be a result of the school's failure to appropriately respond to Pat's GID (e.g. Pat skipping boys' gym class to participate with girls, using the nurse's bathroom and refusing to use the boys' bathroom). Finally, it is somewhat troubling that the school considers instances where Pat was victimized by other students to be occasions when Pat was disruptive (e.g. "causing numerous other students to refuse to sit next to [her] in class," (Def. Memo at 2), and being threatened by other students).

491 F. Supp. 381, 387 (D.R.I. 1980). Despite Defendants’ best efforts to distinguish Fricke from this case because it involved an alleged disruption to a school dance, rather than disruption in the classroom, the point remains. “Even a legitimate interest in school discipline does not outweigh a student’s right to” the peaceful expression of ideas or identity. Id. To rule otherwise would “completely subvert” the rights of some students “by granting other students a ‘heckler’s veto,’ allowing them to decide through prohibited and violent methods” the rights of the few. Id. The School’s position that a few students’ discomfort with difference may trump another student’s rights would lead to chaos for any student whose expression of his/her cultural difference, for example, might provoke classmates. For example, simply because a female student from a Middle Eastern country wearing culturally appropriate clothing elicits jeers or teasing from other students should not be a justification for disallowing her quiet expression of culture.

Schools routinely handle far more difficult disciplinary issues than students’ ordinary and predictable discomfort with difference. See Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 509 (1969). Cf. Weaver v. Nebo School Dist., 29 F. Supp. 2d 1279, 1285 (D. Ut. 1998) (to the extent that only evidence of disruption is inquiries or complaints because of a teacher’s sexual orientation, “one of the duties a school administrator undertakes is the handling of student, faculty, parent and community complaints”). As the Supreme Court in Tinker explained:

Any departure from absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk...and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Tinker, 393 U.S. 503 at 508-509. See also Alabama and Coushatta Tribes of Texas, v. Big Sandy Ind. School. Dist., 817 F. Supp. 1319 (E.D. Texas 1993) (granting preliminary injunction against enforcement of school dress code to allow Native American students with long hair to attend school), remanded without decision, 20 F.3d 469 (5th Cir. 1994). Cf. Ordway v. Hargraves, 323 F. Supp. 1155 (D. Mass. 1971) (school could not satisfy its burden to justify exclusion of pregnant student); Manor v. Rakiey, 20 Mass. L. Rptr. 506 (Mass. Sup. Ct. 1994 (even in case involving free expression challenge to prison, arguably a context involving the highest level of deference to state officials' decisions, Superior Court required that an institution's security concerns, though entitled to respect, must be more than conjectural)).¹²

IV. TWO HOURS OF HOME TUTORING CANNOT COMPARE TO THE MYRIAD BENEFITS AVAILABLE TO A STUDENT ATTENDING SCHOOL

It is beyond cavil that two hours of at-home tutoring cannot begin to approximate the myriad benefits available to a student by attending school. Regardless of the quality of those two hours, Pat Doe is being denied the interactive learning environment of the classroom, the benefits

¹² Three of Defendants' arguments merit only brief response. First, Defendants argue that the Trial Court used the incorrect legal standard evidenced by its reference to "separate but equal." The Trial Court's careful opinion makes clear that it specifically evaluated the harm this student faced and determined that being denied the benefits of attending school is irreparable. The fact that the Trial Court also gleaned parallels between Brockton School's justification for excluding a transgender student and those offered by the discriminatory schools in Topeka, Kansas during segregation, hardly undermines the careful legal analysis outlined by the judge below.

Second, the School argues that the Trial Court "improperly entered the arena of educational policy making" (Def. Memo at 5). The Trial Court's rhetorical flourish commenting on the value of "exposing children to diversity at an early age" (*id.*) can hardly be characterized as improper or an abuse of discretion. This case called for the judge to make a legal determination as to whether a school could permissibly exclude a student it perceived as different. Her 16-page decision carefully evaluated the record and articulated the legal reasons for the outcome. The School's argument that the judge's concluding comments on the effect of the outcome means she "donned the cloak of the school official" (Def. Memo at 6) simply by complying with her judicial duties is without merit.

Third, none of Judge Linda Giles' professional affiliations or previous work require her to have recused herself. See Menora v. Ill. High School, 527 F. Supp. 632, 634 (N.D. Ill. 1981); Blank v. Sullivan & Cromwell, 418 F. Supp. 1, 4 (S.D. N.Y. 1975); Pennsylvania v. Local Union 542, 388 F. Supp. 155 (E.D. Pa. 1974).

of attending school with peers and the full range of programming only available at school – including without limitation arts programs, science and computer laboratories, and the library. McLaughlin v. Boston School Com., 938 F. Supp. 1001, 1011-12 (D. Mass. 1996) (that plaintiff was receiving a “fine education at a comparable school” did not factor into the court’s irreparable harm analysis). See also, Doe v. Dolton, 694 F. Supp. 440 (N.D. Ill. 1988)(“the educational benefits of the school environment are far superior to those derived from two (2) hours of daily homebound education”).¹³

With respect to the Defendants’ argument that the McLaughlin plaintiff had been denied an injunction the year before the one granted in the reported case, that only goes to the court’s balancing of the harms at the time the first injunction was sought. Surely nothing in the earlier decision undermines in any way the courts’ conclusions either in this case below or in McLaughlin that a student excluded from attending school, even one who is getting some albeit minimal amounts of tutoring at home, suffers irreparable harm. Indeed it is doubtful that even Brockton School believes that two hours of home tutoring is comparable to the benefits obtained by a student attending school full-time.¹⁴

¹³ No cases categorically hold that “so long as a student receives an educational program while litigation proceeds, no irreparable harm is suffered.” (Def. Memo at 6). In Andrew S. v. Mass. Dept. of Educ., 917 F. Supp. 70, 72 (D.Mass. 1995), the district court found only that most of the essential elements of the special education plan sought by Plaintiff were already being provided in the existing school-based plan. Neither does this case involve, as did Valeria G. v. Wilson, 12 F. Supp.2d 1007, 1027 (N.D. Cal. 1998), a disagreement among experts about the “differences between two educational theories.”

¹⁴ Defendants’ argument that the McLaughlin Court declined to issue an injunction out of a concern for potential student disruption is not born out by the facts. The disruption the McLaughlin Court identified that would result from issuing the first requested preliminary injunction was the disruption that would result from modifying the entrance admissions requirement for a selective public school. McLaughlin, 938 F. Supp. at 1012. There is simply no basis for comparing that sort of disruption to the discomfort of other students the school suggests would result from Pat’s attendance in this case.

Further, the School’s argument that Pat Doe cannot demonstrate irreparable harm because she has “opt[ed],” (Def. Memo at 7), not to attend school fares no better. Because the Trial Court determined that the School’s discriminatory requirement that Pat not wear girls’ clothing is a likely violation of her constitutional rights, her attending school requires her to give up her constitutional rights and self-identity, a harm invariably found by courts to be irreparable. “When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.” 11 C. Wright and A. Miller Federal Practice and Procedure, §2948, at 440 (1973). See also Elrod v. Burns, 427 U.S. 347, 373-374 (1976); Romero Feliciano v. Torres Gaztambide, 836 F.2d 1 (1st Cir. 1987); T & D Video, Inc. v. Revere, 3 Mass. L. Rptr. 427 (Mass. Super. 1994). The School has offered Pat Doe a Hobson’s choice, stay home or give up her constitutional rights. Demonstrating that alone satisfies Pat Doe’s burden of showing irreparable harm.

CONCLUSION

For the above-stated reasons, Defendants’ Petition should be denied.

Respectfully submitted,
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