

MEMO

FR: Amy White

TO: Luke Schroeder

DATE: April 15, 2020

RE: Dress Code/Piercings

The legal analysis of a dress code issue in the context of a public school is an analysis in the context of a constitutional First Amendment Freedom of Speech claim, as one's attire is viewed as "expressive speech."

The specific question raised by your inquiry was in regard to "piercings" of a student and if/when such can be limited or prohibited in the context of an Idaho public school. While there are not reported cases¹ in relation to the specific issue of piercings, a traditional first amendment expressive speech dress code analysis is applicable.

A school's authority to impose a dress code is not unlimited. First it is important to touch upon a few fundamental issues:

1. A school cannot impose a dress code that has a negative impact upon religious expression. i.e. a dress code cannot prohibit a headscarf.
2. A school can consider safety in the imposition of a dress code. Using the facial piercing example, a school could limit a student's wearing of facial piercings IF such piercings can be considered a legitimate

safety concern – i.e. long dangle earrings or facial piercing hoops in PE class where there is physical contact or where such could be caught, pulled or otherwise injure a student; in a CTE shop setting where the same piercings could get caught in equipment or tools being used.

Such a safety concern is not going to necessarily eliminate all facial piercings – for example an earring or facial stud (nose, eyebrow, and tongue) is not as likely to bring about an injury than a dangle or hoop. Such a safety concern may also be able to address in a different manner such as covering over the piercing with athletic tape or simply removing the facial piercing during the class in question, as opposed to a total dress code ban.

3. Maintaining and protecting the public school setting from educational disruption is a compelling state interest however, such must be considered in the context of a First Amendment Expressive Speech claim in the context of a school setting. This is a balancing test that is often examined in the context of a dress code claim. In order to prevail on a claim of this nature – in association with the current dress code issue relating to piercings – the school would have to establish that the existence of piercings on a student hampered the regular school activities and was of such a disrupting that it interfered with or disrupted the educational setting. This is the same analysis that is applied in issues of hair length, articles of attire, arm bands/supportive

buttons etc. The U.S. Supreme Court in *Tinker v. Des Moines Independent Community School District* phrased the test stating that school authorities could not justify the prohibition of student expression unless the school could prove that the conduct would “materially and substantially interfere [] with the requirements of appropriate discipline in the operation of the school or collide with the rights of others. Thus, a restriction on student expressive attire, through the implementation of a dress code, must be supported by a showing or reasonable forecast, of material substantial disruption. This is a very high standard for school personnel to meet.

In the context of piercings on a student, absent a safety limitation, it is likely an uphill battle to include limitations on facial or body piercings on a student if there is no documented history of disorder or distraction. Further, considerations would have to be given to gender equity in the prohibition as well as the enforcement of such prohibition as well as any religious considerations for exception. A student is going to argue and consider a piercing to be no different than a non-traditional choice of hair color, non-traditional application of cosmetics, hair length or style or other non-permanent appearances that teen aged students exhibit in current trend. From the perspective of a high school student these types of appearance changes are likely not distracting or interfering of the educational process but rather something that they consider on a more normal basis than adults who are viewing such.

ⁱ Very few court decisions are actually reported cases. Appellate cases such as Idaho or US Supreme Court cases are reported cases. Cases at the state and federal district court levels are very rarely reported or published opinions. Thus, while there are no obvious reported cases on the issue of dress codes and piercings, we do not know and cannot know the number of cases relating to this subject matter that are not reported cases for research and reference.