IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico

Civil Action No. 1:19-cv-03530-DDD-NYW

JOHN DOE through his mother and next friend JANE DOE,

Plaintiff,

v.

ROCKY MOUNTAIN CLASSICAL ACADEMY;
NICOLE BLANC, individually and in her official capacity as Dean of Students of Rocky Mountain Classical Academy; and
CULLEN McDOWELL, individually and in his official capacity as Executive Principal of Rocky Mountain Classical Academy,

Defendants.

ORDER GRANTING MOTION TO DISMISS

Defendants filed a Motion to Dismiss this case under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The court grants the motion because Plaintiffs have not alleged facts that make a case for unlawful sex discrimination or retaliation.

STANDARD OF REVIEW

When presented with a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), a court "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007) (internal quotation marks omitted). "Mere 'labels and conclusions' and 'a formulaic recitation of the elements of a cause of action' will not suffice." *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012) (quoting *Bell Atl. Corp. v.*

Twombly, 550 U.S. 544, 555 (2007)). A court can "disregard conclusory statements and look only to whether the remaining, factual allegations plausibly suggest the defendant is liable." *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

BACKGROUND

Rocky Mountain Classical Academy (RMCA) is a public charter school in Colorado Springs, Colorado that accepts kindergarten through 8th grade students and operates within Colorado School District 49.

John Doe attended RMCA in the fall of 2019, when he was five years old. [Doc. 12 at 2.] He wore earrings in violation of RMCA's rules. [*Id.* at 3.] The RMCA Parent-Student Handbook includes a uniform policy that states in relevant part: "Tattoos and body piercings, other than girls' earrings, are not allowed. Earrings must be limited to one earring per ear. Large, dangling, or hoop-type earrings are not allowed. Jewelry other than watches for boys or girls, and small earrings on girls, may not be worn." [RMCA Parent-Student Handbook, Doc. 22-1 at 43.][1] John's earrings were small, blue, and consistent with RMCA's uniform policy as it applies to female students. [Doc. 12 at 3.]

Prior to the beginning of the school year, RMCA staff conducted various evaluations on John. [*Id.* at 3.] John wore his earrings to those

[1] "[T]he sufficiency of a complaint must rest on its contents alone" and a court "typically must not look outside the pleadings when deciding a motion to dismiss." *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010). The Court may consider the Parent-Student handbook, however, since it is relied on in Plaintiff's complaint, it is central to Plaintiff's claims, and neither party disputes its authenticity. *See id.*

assessments, and no staff member expressed any concern regarding his earrings. [*Id.*] John consistently wore his earrings to school from the beginning of the year. [*Id.*] On August 27, 2019, John's kindergarten teacher emailed Ms. Doe to inform her that "per our dress code, boys [cannot] wear earrings at school." [*Id.*] Ms. Doe responded that she believed RMCA's earring policy was discriminatory and requested a formal meeting with the principal to discuss the policy. [*Id.*]

Three days later, Ms. Doe met with John's kindergarten teacher and with Defendant McDowell, the executive principal. [*Id.* at 4.] That meeting failed to resolve the matter of whether RMCA's dress code discriminated against John. *Id.* On August 30, 2022, Ms. Doe requested a formal meeting with the RMCA board of directors. [*Id.*.] After several further exchanges, Defendants invited Ms. Doe to address her concerns at the December 3, 2019 board meeting. [*Id.* at 5.]

In the interim, John continued to wear his earrings to school, and the school notified Ms. Doe several times via email and "Oops Slips" that John was in violation of the uniform policy. [*Id.* at 5.] Ms. Doe attended the meeting, but apparently, due to some miscommunication or procedural confusion, did not speak or address the board. [*Id.*] The Board did not appear to have any discussion regarding the potential discriminatory nature of the policy and did not modify the dress code. *Id.* Two days later, Mr. McDowell informed Ms. Doe that John would be required to comply with the dress code policy by Monday, December 9, 2019. [*Id.*]

John continued to wear his earrings to school the week of December 9, 2019. [*Id.* at 6] On December 11, 2019, John was suspended for violating the uniform policy, and he was suspended again on December 12, 2019. [*Id.*] On December 12, the school informed Ms. Doe that it would begin the process of dis-enrolling John. [*Id.*] Ms. Doe was

informed that John could continue to attend RMCA through Friday, December 20, 2019. [*Id.*]

On December 13, 2019, John filed this suit. [*Id.* at 16.] He brings claims for violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688. [*Id.* at 2.] On December 18, John filed a motion for preliminary injunction. [Doc. 13.] The Court denied that motion on January 20, 2020, finding that John was unlikely to succeed on the merits of his claims. [Doc. 33.]

APPLICABLE LAW

I. The Constitution and School Dress Codes

The Court notes at the outset that John asserts only Equal Protection and Title IX claims based on the differential treatment of male and female students. [Doc. 12 at 9-15.] He does not assert any First Amendment right to wear earrings based on freedom of expression or religion, nor does he assert any substantive Due Process right to wear earrings based on a liberty interest or otherwise. *Id.* There is also no claim or allegation that John wishes to be treated as a girl; he is simply a boy who wants to wear earrings at school as a matter of personal preference. *Id.* This is a pure Equal Protection case, based on the argument that RMCA treats boys less favorably than girls.

A. Equal Protection Analysis Generally

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The import of this clause is "essentially a direction that all persons similarly

situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

When government action is challenged on Equal Protection grounds, courts apply different levels of scrutiny to the action based on what type of characteristic the state has used to distinguish one group of citizens from anther. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). At a minimum, a classification is subject to "rational-basis" review. *Clark*, 486 U.S. at 461; *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 2008). Under rational-basis review, a classification is valid if it is "rationally related to a legitimate governmental purpose." *Clark*, 486 U.S. at 461. More stringent levels of scrutiny attach to classifications that are based on certain "suspect" characteristics. *Price-Cornelison*, 524 F.3d at 1109; *see also City of Cleburne*, 473 U.S. at 440.

Sex is considered a "quasi-suspect" classification that requires "intermediate scrutiny." *Price-Cornelison*, 524 F.3d at 1109; *Free the Nipple-Fort Collins*, 916 F.3d 792, 802 (10th Cir. 2019). To withstand intermediate scrutiny, a sex-based classification must have an "exceedingly persuasive justification," which means that (1) the classification must serve an important governmental objective; and (2) the sex-based means employed must substantially serve that objective. *United States v. Virginia*, 518 U.S. 515, 524 (1996); *Craig v. Boren*, 429 U.S. 190, 197 (1976).

B. Court Oversight of School Dress Codes

Although students do not "shed their constitutional rights . . . at the schoolhouse gate," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), judicial interference in the operation of public schools "raises problems requiring care and restraint." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). "By and large public education in our Nation is committed to the control of state and local authorities. Courts

do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Id.* The Supreme Court "has long recognized that local school boards have broad discretion in the management of school affairs." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 863 (1982); *see also New Rider v. Bd. of Educ. of Indep. Sch. Dist. No. 1, Pawnee Cty., Okla.*, 480 F.2d 693, 699-700 (10th Cir. 1973) ("[I]t is only where state action impinges on the exercise of fundamental constitutional rights or liberties that the court may interfere with its dedication to local control of education.").

Students' constitutional rights must be "applied in light of the special characteristics of the school environment." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Tinker*, 393 U.S. at 506). Thus, the rights of public school students "are not automatically coextensive with the rights of adults in other settings," *id.*, and state action that is impermissible in other spheres may be appropriate in the school setting, *Ebonie S. v. Pueblo Sch. Dist. 60*, 695 F.3d 1051, 1056 (10th Cir. 2012).

1. The Tenth Circuit's Deferential Approach

The Tenth Circuit has never struck down a school dress code on discrimination grounds. The most analogous Tenth Circuit cases addressing the constitutionality of school dress codes are hair length cases from the 1970s, in which the Circuit evaluated school grooming codes that prohibited long hair for male students. *See Freeman v. Flake*, 448 F.2d 258 (10th Cir. 1971); *New Rider*, 480 F.2d 693; *Hatch v. Goerke*, 502 F.2d 1189 (10th Cir. 1974). In those cases, the Tenth Circuit repeatedly and consistently declined to interfere with the schools' discretion to promulgate and enforce dress and grooming codes for students. *See Freeman*,

448 F.2d at 261 ("The states, acting through their school authorities and their courts, should determine what, if any, hair regulation is necessary to the management of their schools."); *New Rider*, 480 F.2d at 700 ("We believe that we would create a veritable quagmire for school boards, administrators, and teacher personnel, to attempt to wade through in their promulgation and enforcement of dress-hair codes which they may deem necessary . . . ."); *Hatch*, 502 F.2d at 1192 ("[T]he complaint against the hair style regulation lacks constitutional substance" and does not "directly and sharply implicate basic constitutional values.").

Of these Circuit cases, only *New Rider* explicitly involved an Equal Protection claim.[2] In that case, the court applied rational-basis review, and found that the male hair-length regulation at issue bore "a rational relationship to a state objective, *i.e.*, that of instilling pride and initiative among the students lending to scholarship attainment and high school spirit and morale." 480 F.2d at 693. Based on this holding, Defendants contend that this Court must apply rational-basis review to the male earring ban at issue in this case. But *New Rider* predates the Supreme Court's decisions in *Craig v. Boren* and its progeny, which hold that sex is a quasi-suspect classification that requires intermediate scrutiny. *See Boren*, 429 U.S. 190; *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Virginia*, 518 U.S. 515; *see also Free the Nipple-Fort Collins*, 916 F.3d 792 (10th Cir. 2019). Indeed, the Tenth Circuit in *New Rider* explicitly stated that no suspect classification was at issue in that case.

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[2] In *Freeman*, there was "[n]o apparent con[s]ensus . . . as to what constitutional provision afford[ed] the protection sought," and the plaintiffs relied "variously . . . on the First, Fourth, Eighth, Ninth, Tenth, and Fourteenth Amendments . . . and on the penumbra of rights assured thereby." 448 F.2d at 260. In *Hatch*, the plaintiffs asserted a parental right to raise their children according to their own religious, cultural, and moral values rooted in the First, Fifth, and Fourteenth Amendments. 502 F.2d at 1191-92.

480 F.2d at 698, 700. So, while *New Rider* is useful and important in expressing the deference with which federal courts should approach school decision-making, it is not binding on this Court with respect to the level of scrutiny to be applied in this case.

2. Other Authority

Outside of the Tenth Circuit, two recent decisions offer conflicting guidance as to how the Court should analyze school dress code rules. First, both parties point to *Hayden v. Greensburg Cmty. Sch. Corp.*, where the Seventh Circuit evaluated a school policy that required boys' basketball players at a public high school to keep their hair cut short, while girls' basketball players were not subject to the same requirement. 743 F.3d 569 (7th Cir. 2014). The Seventh Circuit began its analysis by acknowledging that intermediate scrutiny generally applies to sex-based classifications. *Id.* at 577. Yet, the court focused its inquiry on "a discrete subset of judicial and scholarly analysis" that addresses "[w]hether and when the adoption of differential grooming standards for males and females amounts to sex discrimination." *Id.* This subset of precedent is a line of case law that addresses dress and grooming standards in the workplace under Title VII of the Civil Rights Act of 1964. *See id.* at 577-78 (collecting cases). Under this line of precedent, employers may differentiate between men and women in workplace dress codes, so long as the differential standards imposed are part of a comprehensive dress code that imposes comparable burdens, consistent with community norms and not based on impermissible sex stereotypes, on both males and females alike. *Id.* at 577-78, 581.

Applying this precedent, the *Hayden* court found that the record lacked evidence both as to the broader set of grooming rules that were applicable to both male and female student-athletes, and as to whether

longer hair on males "would be out of the mainstream among males in the Greensburg community at large, among the student body, or among school athletes." *Id.* at 578-82. Due to this lack of evidence, the court was forced to evaluate the male hair-length policy in isolation.[3] *Id.* In doing so, the court found that the school had articulated legitimate reasons for imposing grooming standards on student-athletes—namely, promoting team unity and projecting a positive image. *Id.* at 582. But the school had not shown that the sex-based distinction in hair-length policy substantially served those objectives because "so far as the record reveals, those interests are articulated and pursued solely with respect to members of the boys basketball team," and the defendants had not shown that those interests were served through comparable grooming standards for female athletes. *Id.* Accordingly, the court held that no exceedingly persuasive justification had been shown for restricting the hair length of male athletes alone, and the plaintiffs were entitled to judgment on their Equal Protection claim. *Id.*

Second, in *Peltier v. Charter Day School, Inc.*, the Fourth Circuit evaluated a school uniform policy that required female students to wear skirts, skorts, or jumpers, while male students were required to wear shorts or pants. 37 F.4th 104 (4th Cir. 2022). That court subjected the dress code to a heightened level of scrutiny because it did not apply identical rules to boys and girls. *Id.* at 124. The Fourth Circuit held that the school's rationale of "help[ing] to instill discipline and keep order" and the comparable restrictions on boys were insufficient to overcome

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[3] The case had been jointly submitted to the district court for judgment based on a stipulated set of facts, and the district court ruled in favor of the defendants based on rationales that the Seventh Circuit rejected. 743 F.3d at 573, 579-80. The Circuit noted that had the district court instead granted a defense motion for summary judgment, it would have remanded the case for further proceedings on liability. *Id.* at 579.

heightened scrutiny. *Id.* at 125. Rather, the court held that sex-specific dress codes were based on impermissible gender stereotypes and therefore forbidden under the Fourteenth Amendment. *Id.* at 125-126.

In his dissent, Judge Wilkinson noted that sex-specific dress codes are not inherently discriminatory, since "[f]or every parent that seeks to disparage a dress code like this one as harmful or discriminatory, there is another who would seek it out as beneficial." *Id.* at 157 (Wilkinson, J., dissenting). "

It is not entirely clear just how the "comparable burdens" test applied in *Hayden* fits into the overarching intermediate scrutiny framework. Nor is it self-evident that the line of precedent addressing workplace dress codes under Title VII, while analogous, should necessarily be applied to school dress codes subject to an Equal Protection challenge. But the Court need not resolve these questions, because as discussed below, based on the undisputed facts, the Court finds that RMCA's prohibition on earrings for male students is part of a comprehensive school dress code that imposes comparable burdens on males and female students, and that it therefore does not constitute sex discrimination.

II. Title IX

Under Title IX, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Private parties have the right to seek monetary damages for Title IX violations if they can show that the violations were intentional. *Franklin v. Gwinnet Cnty. Pub. Sch.*, 503 U.S. 60, 72-75 (1992). While the Fourteenth Amendment authorizes sex discrimination that "serve[s] important governmental objectives and [is] substantially related to achievement of

those objectives," *Craig v. Boren*, 429 U.S. at 197, Title IX prohibits all discrimination based on sex, irrespective of justification.

The Fourth Circuit concluded that "Title IX unambiguously encompasses sex-based dress codes promulgated by covered entities" and that female students "are treated 'worse' than similarly situated male students if [they] are harmed by the requirement that only girls must wear skirts, when boys may wear shorts or pants." *Peltier*, 37 F.4th at 128-130. The Seventh Circuit found discrimination where a "hair-length policy is applied only to the boys team, with no evidence concerning the content of any comparable grooming standards applied to the girls team." *Hayden*, 743 F.3d at 583.

In this case, there does not appear to be any dispute that RMCA receives federal financial assistance, or that it is subject to Title IX's ban on sex discrimination as a general matter. There is some question, however, as to whether Title IX applies to school personal-appearance codes like the uniform policy at issue here. [Doc. 38 at 3-4]. But the Court need not resolve that question, because the parties agree that the standard for evaluating sex discrimination under Title IX mirrors that for evaluating sex discrimination under the Equal Protection Clause.

DISCUSSION

I. Discrimination

John brings three claims for discrimination, two under 42 U.S.C. § 1983 and one under 20 U.S.C. § 1681(a) *et seq*. The parties agree that the standard for discrimination is identical under both statutes.

Defendants argue that enforcement of the school's dress code is not discriminatory as a matter of law.[4]

Under 42 U.S.C. § 1983,

> [e]very person, who under color of any statute, ordinance, regulation, custom or usage of any state or territory or the District of Columbia subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the constitution and law shall be liable to the party injured in an action at law, suit in equity, or other appropriate proceeding for redress.

Plaintiff alleges that defendants intentionally discriminated against him, "thereby depriving him of his protected interest in a right to a public education free from sex-based discrimination." [Doc. 12 at 12.]

Section 1983 applies only to actions taken under color of state law and "excludes from its reach merely private conduct, no matter how discriminatory or wrongful." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (internal quotation marks omitted). It is at least questionable whether a charter school like RMCA's imposition of a dress code is taken under color of state law. See *Peltier*, 37 F.4th at 140-149 (Quattlebaum, J., concurring in part). But since the Tenth Circuit at least appears to assume that charter schools are state actors under § 1983, and neither party has argued otherwise here, I assume that RMCA and its employees are liable for violations of § 1983. *See Brammer-Hoelter v. Twin Peaks Charter Academy*, 602 F.3d 1175, 1188 (10th Cir. 2010) ("That is, because the Academy is a local governmental entity, it cannot

[4] With respect to the § 1983 claim, the individual Defendants argue that they did not violate the Fourteenth Amendment and that even if they had, they are shielded by qualified immunity. Since the Defendants did not engage in discriminatory behavior, the Court need not address the qualified immunity defense.

be held liable for the acts of its employees on a theory of *respondeat superior*.).

Title IX prohibits discrimination on the basis of sex in federally funded educational programs. 20 U.S.C. § 1681(a). The parties agree that RMCA receives federal financial assistance and that it is subject to Title IX's ban on sex discrimination as a general matter. The parties also agree that the standards for sex discrimination under Title IX and the Fourteenth Amendment are identical.

Because John is a boy, he is prohibited from wearing earrings to school; were he a girl, he would not be subject to that restriction. RMCA's dress code thus creates a sex-based classification on its face, and according to the John, RMCA cannot justify this differential treatment of boys and girls. But the constitutional question is not so straightforward. None of the relevant decisions definitively and explicitly lay out the entire analytical framework for a case like this, but in general the Court agrees with the parties that *Hayden* comes closest and is persuasive. *See Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569 (7th Cir. 2014).

Hayden cites a litany of cases from around the country from the employment (Title VII) context, all of which reach the same basic conclusion: so long as the burdens of the dress code on both sexes are comparable and evenly enforced, the fact that there are different rules for each sex does not amount to sex discrimination. *See* 743 F.3d at 577-78 (collecting cases from 4th, 5th, 6th, 7th, 8th, 9th, and D.C. Circuits). The *Hayden* court noted that a school grooming "policy that applies only to male [students], but which is just one component of a set of grooming standards that impose comparable, although not identical, responsibilities on male[s] and female[s] . . . does not constitute sex discrimination."

Id. at 579-80. That argument has been made here, and it is clear where the vast weight of precedent cited in *Hayden* points. If the RMCA uniform policy imposes comparable burdens on boys and girls, even though the rules for each sex are not identical, the policy does not constitute sex discrimination.

RMCA's uniform policy encompasses approximately two-and-a-half pages of a fifty-six-page Parent-Student Handbook. [RMCA Parent-Student Handbook, Doc. 22-1 at 41-44.] The uniform policy contains numerous rules that apply equally to both sexes. For example:

- All clothing must be properly fitting and conservative in nature.
- Pants must not be too tight. On days when jeans are allowed . . . . jeans that are deemed too tight or have holes or rips are not allowed.
- Shorts . . . should be no shorter than two inches above the knee when sitting.
- Acceptable shirt styles . . . are: Short sleeve polos[,] Long sleeve polos[, and] Turtlenecks.
- Students in grade K-4 must have shirts tucked in at all times. Students in grades 5-8 may leave their shirts untucked.
- Shoes should have closed toe and closed heel. The shoes must have no lights. . . . Shoelaces must be solid in color and match an accent color in the shoe. . . . No shoes will go above the height of the standard high top athletic shoe. No shoes will have separated toes. No clogs or slides. No sandals or flip flops.
- Students must wear socks or tights at all times. Socks should be solid in color and should coordinate with uniform pants or shirts. . . . Socks must match one another.

- RMCA spirit wear hoodies . . . or pullover hoodies . . . with no logos or designs as well as cardigan, fleece, zip-up, or pullover sweaters in approved uniform colors are allowed in the classroom. All other out wear must remain in lockers or designated storage areas during the school day.

- Appropriate undergarments must be worn and not visible.

- Bracelets are not allowed.

- Necklaces may be worn but should be inside the shirt.

- Hairstyle and hair color must be conservative in nature. . . . Mohawk, faux hawk, no symbols, shapes, or designs of any kind shaved into the head or anything that inhibits the learning environment as determined by the campus administration. Hair may not be spiked. Large hair decorations may not be worn. Bandanas may not be worn. Highlights must be two tones lighter or darker than the student's natural hair color. No highlights that are not a natural hair color.

Id.

The uniform policy also contains a number of rules that are sex-specific, including the earring policy:

- Boys may wear classic navy or khaki colored pants or shorts. Girls may wear classic navy or khaki colored pants, shorts, capris, skirts or jumpers. . . . Girls in grades K-5 may wear polo style dresses.

- Girls may wear tights or leggings under their skirts.

- Camis for girls and undershirts for boys are allowed, but not required, and must not show.

- Tattoos and body piercings, other than girls' earrings, are not allowed. . . . Jewelry other than watches for boys or girls, and small earrings on girls, may not be worn.

- Boys' hair must not extend below the top of the shirt collar in the back, the bottom of the ears on the sides or the eyebrows in front.

Id.

The only rules that differ for male and female students are that girls may wear capris, skirts, jumpers, or polo style dresses while boys may not; girls may wear earrings while boys may not; and girls' hair may be kept long while boys' hair may not. [RMCA Parent-Student Handbook, Doc. 22-1 at 41-44.] Plaintiffs contend that because all the sex-based differences in the dress code place restrictions on boys that are not also placed on girls, the dress code does not place comparable burdens on both sexes—girls are permitted several freedoms that are not afforded to boys. [Doc. 40 at 7.] Defendants contend that the sex-based differences within the dress code simply reflect community norms both in the Colorado Springs community at large and within the RMCA community in particular, which strives to uphold traditional standards of conservative dress. [Doc. 38 at 11.]

Having reviewed the RMCA uniform policy in its entirety, as well as the testimony and arguments of the parties, the Court finds that the policy imposes comparable burdens on students of both sexes. The uniform policy is comprehensive and thorough, and all students are subject to numerous restrictions designed to ensure a certain level of modest and conservative dress. This distinguishes this case from *Hayden*, in which the hair-length limitation was imposed only on male athletes, with insufficient evidence on female athlete grooming standards to determine whether the standards were comparable.

Ultimately, the uniform policy places the same essential burden on both boys and girls: they must limit their individuality and adhere

generally to a traditional, conservative appearance. If the policy said simply that, there would be no argument that it was facially discriminatory. *Cf.*, *Harper v. Edgewood Bd. of Educ.*, 655 F. Supp. 1353, 1356 (S.D. Ohio 1987) ("The school dress code does not differentiate based on sex. The dress code requires all students to dress in conformity with the accepted standards of the community."). But as it is, the effect is the same, and the policy merely provides specific rules that fit that broader one. While that means girls have a few more options than boys when it comes to dresses, capris, earrings, and haircuts, that is simply a reflection of the community norms for what constitutes a traditional, conservative appearance for boys and girls. It is not entirely uncommon in 2020 to encounter a male wearing earrings, long hair, or even a skirt, but these style choices remain less popular for males than for females. And RMCA's uniform policy is intended to reflect, less-expressive, traditionally conservative community standard.[5] That traditional standard is not one that every student or every school might prefer, but nor does it discriminate against males. Conforming to that standard is every student's burden, and while not identical, it is legally comparable.

John argues that the dress code is discriminatory under *Hayden* because "every sex-specific restriction in the dress code imposes greater restrictions on male students than female students," but this is irrelevant under *Hayden*. [Doc. 40 at 7.] *Hayden* upheld sex-specific dress codes that impose "*comparable* burdens on both males and females alike." *Hayden*, 743 F.3d at 581 (emphasis added). Although John is right that RMCA imposes greater restrictions on male students than

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[5] *Peltier* is again distinguishable here. In that case not only did the skirts requirement impose a tangible burden on girls, but it was inconsistent with community norms for even traditionally conservative settings.

female students, the burdens for girls and boys are comparable and therefore non-discriminatory. *See also Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 682, n. 22 (1983) (discrimination means "less favorable" treatment).

In sum, based on the motion to dismiss record, the Court finds that the prohibition on earrings for male students at RMCA is simply one component of a comprehensive uniform policy that imposes comparable, though not identical demands on male and female students. Thus, while on its face the policy differentiates between boys and girls, the differential standards imposed do not constitute sex discrimination under the Fourteenth Amendment and Title IX.

II. Retaliation

John alleges that Defendants retaliated against him after Ms. Doe complained of sex discrimination. The Supreme Court has held that Title IX provides a cause of action for individuals who are victims of retaliation after reporting sex discrimination. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 176-177 (2005); *Hiatt v. Colo. Seminary*, 858 F.3d 1307, 1345 (2017) ("Title IX also prohibits retaliation against individuals because they have complained of sex discrimination.").

To state such a claim, a plaintiff must allege that: (1) he engaged in protected activity; (2) the defendant had knowledge of the protected activity; (3) materially adverse school-related action was taken against the plaintiff; and (4) there was a causal connection between the protected activity and the adverse action. *Tackett*, 234 F. Supp. 3d 1100, 1109 (D. Kan. 2017) (citing *Yan v. Penn State Univ.*, 529 F. App'x 167, 171 (3d Cir. 2013); *Scott v. Metro. Health Corp.*, 234 F. App'x 341, 346 (6th Cir. 2007)).

John alleges that (1) his mother complained to RMCA officials and the RMCA board about discriminatory nature of the dress code; (2) RMCA was aware of this activity; and (3) RMCA retaliated against John by suspending and dis-enrolling him. [Doc. 12 at 10-11.] John argues that it is unnecessary for him to allege facts showing causation, and that he may simply show "protected conduct closely followed by adverse action." [Doc. 40 at 9 (citing *Williams v. W.D. Sports, N.M., Inc.*, 497 F.3d 1079, 1091 (10th Cir. 2007)).]

To be plausible, however, a claim must include "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*, 556 U.S. at (2009). This is not a case, however, where the complaint is silent about how and why an adverse action was taken and a juror must make reasonable inferences to fill in that blank. *Cf. Williams*, 497 F.3d at 1091. John's complaint itself alleges that he repeatedly violated RMCA's rules and was suspended, and later disenrolled, after repeated warnings, and consistent with RMCA policies. [Doc. 12 at 4-6.] It contains no allegations, other than the conclusory one that Defendants retaliated against Ms. Doe, that the true justification for John's suspension was his mother's complaints as opposed to his repeated dress code infractions. It would be unreasonable, on the facts alleged in the complaint, to draw that inference.

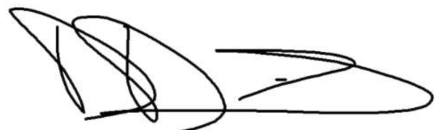
CONCLUSION

Although courts must accept all well-pleaded allegations as true at the Motion to Dismiss, Plaintiffs have failed to allege sufficient facts to allow the court to draw a reasonable inference that Defendants committed the alleged misconduct. Accordingly, for the foregoing reasons, it is

ORDERED that Defendant's Fed. R. Civ. P. 12(b)(6) Motion to Dismiss for failure to state a claim is GRANTED as to all of claims.

DATED: September 30, 2022

BY THE COURT:



Daniel D. Domenico
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:19-cv-03530-DDD-NYW

JOHN DOE through his mother and next friend JANE DOE,

Plaintiff,

v.

ROCKY MOUNTAIN CLASSICAL ACADEMY;
NICOLE BLANC, individually and in her official capacity as Dean of Students of Rocky Mountain Classical Academy; and
CULLEN McDOWELL, individually and in his official capacity as Executive Principal of Rocky Mountain Classical Academy,

Defendants.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to and in accordance with Fed. R. Civ. P. 58(a) and the Order Granting Motion to Dismiss, filed on September 30, 2022, by the Honorable Daniel D. Domenico, United States District Judge, and incorporated herein by reference as if fully set forth, it is

ORDERED that judgment is hereby entered in favor of Defendants, Rocky Mountain Classical Academy; Nicole Blanc; and Cullen McDowell, and against Plaintiff, John Doe through his mother and next friend Jane Doe, on Defendants' Motion to Dismiss. It is further

ORDERED that plaintiff's complaint and action are dismissed.

DATED at Denver, Colorado this 3rd day of October, 2022.

FOR THE COURT:

JEFFREY P. COLWELL, CLERK

s/ Robert R. Keech
Robert R. Keech,
Deputy Clerk