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ABSTRACT

School regulations concerning hair have been successfully defended in appellate courts in about half the country. The most recent decision of a federal circuit court upholding a school's rules was decided in 1975. In this instance, the court reversed the position it held only three years earlier. There are some guidelines that should be kept in mind if a school has hair regulations or is considering their adoption: rules should be drawn as narrowly and specifically as possible and should be clearly related to the educational purposes of the school; the strongest legal basis for hair and grooming regulations are the protection of health, safety, or educational performance of the students; if the rule is based on the need to prevent disruption of the educational process, the school should be prepared to meet the test outlined in the Tinker decision; it should be made sure that the rule is not grounded solely on sexual stereotypes or other presuppositions that cannot be defended against charges of sex discrimination; and the rule should be spelled out, preferably in writing, and made known to everyone it will affect, before it is enforced against anyone. (Author/IRT)

# A Legal Memorandum

NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS
1904 Association Reston, Va 22091





January 1976

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## HAIR AND DRESS CODE: UPDATE

Few subjects caused more furor in the schools or occasioned more lawsuits to be lodged against school districts and administrators in the late 1960s and early 70s than did the attempt by school people to regulate the length and style of male students' hair. During the last few years, however, there has been a decline in the number of cases on the subject. Many schools have abandoned the effort to set or enforce hair rules, either because appellate courts in their jurisdictions have ruled against them on the issue, or because they think they have. Others merely are tired of fighting about it--or have come to accept long-haired males as the norm.

The legal issue is not dead, however, with the federal appellate jurisdictions widely split, and the United States Supreme Court having steadfastly refused to hear an appeal on the matter.[1]

Although fewer cases are reaching court, the issue apparently continues to be one that generates controversy in many schools, and in light of the unsettled state of the law, it seems worthwhile to review this issue again.[2] Finally, the subject has raised a number of important and fundamental legal issues involved in the relation of students to the public school, an awareness of which may be helpful to principals in dealing with other issues.

### Student Dress

One related issue which has also been the source of some controversy and discussion in schools is that of student dress. It is interesting to note, however, that despite the apparent similarity of the legal issues and personal interests involved, student dress has been far less difficult for the law to deal with than has the regulation of hair styles.

There are several reasons for this distinction. First, dress regulations and controls were clearly recognized by the courts long ago, so when the question was raised again more recently, there were precedents to turn to. Most of them had supported reasonable school regulations, especially when there was a clear and apparent relationship between the rule and a recognized public interest that required protection.

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1. The Court has agreed to hear a "hair case" during the 1975-76 term arising out of another context, however; a police officer has challenged rules of the Department in Suffolk County, N.Y., regulating both length and style of hair.
2. NASSP issued an earlier Legal Memorandum on the Regulation of Student Hair Styles on November 1, 1969.

In Pugsley v. Sellmeyer,[3] for example, the Supreme Court of Arkansas upheld a school board rule prohibiting the wearing of "transparent hosiery, low-necked dresses . . . or the use of face paint or cosmetics." Those aspects of the rule related to modesty were most easily recognized but even that portion concerning use of cosmetics was sustained without deciding whether or not the rule was essential to the maintenance of discipline. So long as no allegation was made that the rule interfered with a constitutional or other basic human right, it was sufficient that the rule not be arbitrary, capricious or discriminatory.

A few years later, the Supreme Court of North Dakota upheld the power of a school to bar metal heel plates from students' shoes. Stromberg v. French.[4] The simple basis for the rule was that the metal plates were injurious to the school floors, and in addition they caused a disturbance by their noise. The primary interest asserted against the school in this case was that of the parents to control the dress of their own children, but again in absence of some fundamental or constitutionally protected interest, the court was easily persuaded that the school should prevail.

It was just such other interests which were involved in cases like the famous Tinker v. Des Moines[5] where the attempt was made to prevent students from wearing black arm bands in school. The interest asserted in that case was freedom of expression, protected by the First Amendment to the U.S. Constitution.

In recent years, attempts have been made to contend that choice of clothing style is, in fact, a form of expression protected by the Constitution; and that blanket prohibitions against particular items such as slacks or blue jeans are unconstitutional attempts to interfere with this right.[6] More often, however, school regulations have been defeated as a result of a more tolerant definition of modesty or the requirement that the school demonstrate that the proscribed clothing would be unsafe, unhealthy, dangerous, or disruptive of school discipline.[7]

In short, as in so many other circumstances, the burden of proof was shifted from the individual objecting to a school rule to the school authority seeking to impose it. Where a reasonable case can be made, however, school dress rules continue to be upheld by the courts.

## Hair Length and Grooming

In light of the history of school dress cases, one is likely to ask why hair regulations should be the source of greater controversy in the schools and in the courts. Is hair length or hair style a higher kind of interest than choice of clothing? Is it deserving of greater legal protection? The answer to these questions is "probably not." The reason for the difference in treatment derives instead from a difference

3. 250 S.W. 538 (Ark. 1923).
4. 236 N.W. 477 (N.D.; 1931).
5. 393 U.S. 503 (1969).
6. Wallace v. Ford, 346 F. Supp. 156, 161-2 (E.D. Ark. 1972).
7. Bonnister v. Paradis, 316 F. Supp. 185, 188-89 (D.M.H.; 1970).

on the other side of the scale on which the interests at issue are balanced. Specifically, many courts have not been convinced that there is a sufficient public purpose in regulating hair length or hair style to justify the curtailment of personal choice of students by the schools.[8]

Where school authorities have been able to demonstrate the need for hair regulations on the basis of health, safety, damage to public property, or disruption of the educational process, they have often been sustained. It can be reasonably contended, for example, that hair over a certain length causes damage to the filtration system of the school swimming pool or poses a danger to students operating certain equipment in shops or labs. Such contentions are weakened, however, when hair length restrictions are applied to boys seeking to use the pool but not to girls, or where girls are permitted to wear hair nets in the labs.[9]

The cases that have caused the most argument, are those in which the major basis for the regulation is alleged to be the prevention of disruption. Nine of the ten federal courts of appeals and a number of state supreme courts have heard such cases. Of the federal appeals courts, the Fifth, Sixth, Ninth, and Tenth Circuits have supported the schools, while the First, Fourth, Seventh, and Eighth have not. The Third Circuit originally ruled against the school boards, but has now reversed itself.[10] Only the Second Circuit is not on record.

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| 1st Circuit: | Maine, Mass., N.H., R.I., Puerto Rico |
| 2nd Circuit: | Conn., N.Y., Vt. |
| 3rd Circuit: | Del., N.J., Pa., Virgin Islands |
| 4th Circuit: | Md., N.C., S.C., Va., W. Va. |
| 5th Circuit: | Ala., Fla., La., Miss., Tex., Ga., Canal Zone |
| 6th Circuit: | Ky., Mich., Ohio, Tenn. |
| 7th Circuit: | Ill., Ind., Wis. |
| 8th Circuit: | Ark., Iowa, Minn., Mo., Nebr., N.D., S.D. |
| 9th Circuit: | Alaska, Ariz., Calif., Hawaii, Idaho, Mont., Nev., Ore., Wash., Guam |
| 10th Circuit: | Colo., Kan., N.M., Okla., Utah, Wyo. |
| D.C. Circuit: | District of Columbia |

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8. Of course, there are those who contend that the school should not be obligated to prove the reasonableness of a rule unless the student can first produce evidence that it is unreasonable or that a legally protected interest has been interfered with. This was the approach of the courts in the early dress restriction cases reviewed at the beginning of this memo, and there is little doubt that the courts would have taken the same approach in regard to hair regulations--had anyone had the temerity to raise the question!

   Since the 1960s, however, most courts have expected school authorities to offer at least some reason for a rule of student conduct, and that the rule should have a reasonable relation to the educational process. And hair regulations seem not to have become an issue until very recent years.

9. Crews v. Cloncs, 432 F2d 1259 (C.A. 7th Circ.; 1970).
10. Zeller v. Donegal Bd. of Ed. 517 F2d 600 (C.A. 3rd Circ.; 1975).

## Constitutionality

The legal point that has entangled the courts in most of these cases has been whether or not the student's interest in the length and style of hair is one protected by the U.S. Constitution--and if so, by what specific provision. While it serves little purpose to go into the details of the debate here, it is interesting to note that at least five different sections of the Bill of Rights have been invoked, and four of them have actually been identified by appellate courts as sources of constitutional protection.[11]

What is important is whether a student's right to wear his hair as he chooses is a constitutionally protected interest at all. If it is not, the school need only demonstrate a reasonable relation between its rule and the educational function in order for the rule to prevail. If a constitutionally protected interest is involved, however, the school will be required to show a higher degree of justification for its rule. In those appellate courts that have sustained school board regulations, the critical point has been the determination that no constitutionally protected interest was involved. This is clearly stated, for example, in the court's summation in the decision of Karr v. Schmidt.[12]

> In conclusion, we emphasize that our decision today evinces not the slightest indifference to the personal rights asserted by Chesley Karr and other young people. Rather, it reflects recognition of the inescapable fact that neither the Constitution nor the federal judiciary it created were conceived to be keepers of the national conscience in every matter great and small. The regulations which impinge on our daily affairs are legion. Many of them are more intrusive and tenuous than the one involved here. The federal judiciary has urgent tasks to perform, and to be able to perform them we must recognize the physical impossibility that less than a thousand of us could ever enjoin a uniform concept of equal protection or due process on every American in every facet of his daily life.

Where a constitutional right is involved, and where the prevention of disruption is the basis of the rule it will only be sustained where a strong showing can be made that certain hair styles led to actual disruption. Even then, if the disruption was not serious, or if it seemed to be caused more by the intolerance of teachers or students other than those violating the hair regulations, courts have been reluctant to hold the long-haired students responsible.[13]

## Extra-Curricular Activities

Even when school authorities have decided that hair length or style cannot be a condition for attending a public school, many have continued to support efforts of athletic coaches or other staff to place such conditions upon participation in extra-curricular activities, such as interscholastic sports. It can be argued that the

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11. The First, Fifth, Ninth and Fourteenth Amendments.
12. 460 F2d 609 (5th Circ.), motion to vacate denied, 401 U.S. 1201 (1972). The vote of the Court (sitting enbanc) was 8-7.
13. Massie v. Henry, 455 F2d 779, 783 (4th Circ. 1972).

nature of a student's interest in participating in such activities is not the same as his interest in attending school generally, but this has not been the approach usually taken by the courts. Instead, most have looked at the basis for the rule and the reasonableness of its application to the specific activity involved. But even then, the results differ and are difficult to rationalize.

In a California case,[14] for example, a student challenged school rules that applied only to the members of interscholastic athletic teams. In support of these rules, the school had argued both that long hair might interfere with athletic performance (swimming, gymnastics, wrestling, basketball, and track) and for the general desirability of "the development of discipline, individual sacrifice, and teamwork not available in other school programs." The court decided that the rules were not arbitrary, capricious or unconstitutional and were reasonable "under all of the circumstances of this case."

Across the country in Vermont, another federal district court considered objections to hair rules for athletes the same year, however, and came to different conclusions.[15] No evidence was presented that the plaintiffs, members of the tennis team, caused dissension on the team or that their athletic performance was affected because of the length of the students' hair. It therefore appeared to the court that the only possible justification for the rules was "discipline for the sake of discipline" and this was not a sufficient reason. The court stressed, however, that the rule constituted a constitutional deprivation (equal protection of the law under the Fourteenth Amendment), and it may well have been this aspect of his opinion, as in many of the general hair regulation cases, that decided which way it came out.

## Conclusions

The continued disagreement of federal and state appellate courts together with the seemingly greater acceptance of long hair and facial hair on male students has convinced many school administrators and board members to abandon further attempts to make or enforce grooming regulations. (Interestingly enough, there is some evidence in certain sections of the nation that shorter hair may be returning as an acceptable style.)

The passage of Title IX of the Education Amendments of 1972 adds still another possible ground for legal objections, on the basis of sex discrimination.[16]

Nevertheless, hair regulations have been successfully defended in appellate courts in about half the country. The most recent decision of a federal circuit court upholding a school's rules was decided in 1975 in Pennsylvania and was heard by the full court (9 judges). It actually reverses the court's previous decision rendered only three years earlier,[17] but the issuance of several separate opinions indicates that there continues to be a wide disagreement on several points.

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14. Neuhaus v. Torrey, 310 F. Supp. 192 (N.D. Cal.; 1970).
15. Dunham v. Pulsifer, 312 F. Supp. 411 (D. Vt.; 1970).
16. Sec. 86.31(b) of the Regulations implementing the Act states that no one subject to it shall "discriminate against any person in the application of any rules of appearance."
17. Zeller v. Donegal Bd. of Ed., 517 F2d 600, (3rd Circ. 1975) reversing Stull v. School Bd.,459 F2d 339 (1972).

The basic issue upon which the case was decided is that the student's objection "does not rise to the dignity of a protectable constitutional right," as opposed to the conclusion in Stull that a student's interest in his hair length and style was implicit in the Fourteenth Amendment.

Having reached this conclusion, the court appears to take note of Justice White's admonition to the federal courts in the Supreme Court's decision in Wood v. Strickland,[18] not to interfere with every exercise of school board discretion. Whether this position of the Supreme Court portends further changes of attitude in the approach of lower federal courts to the control of student conduct, it is too early to tell, but on the subject of hair regulations it seems to have already had some effect.

## Recommendations

If your school has hair regulations, or is still considering their adoption, here are some guidelines to keep in mind:

1. Rules should be drawn as narrowly and specifically as possible, and should be clearly related to the educational purposes of the school.

2. The strongest legal basis for hair and grooming regulations are the protection of the health, safety, or educational performance of the students themselves. Consider the possibility of other methods of control, such as bathing caps or hair nets, rather than outright prohibitions that affect appearance outside of school.

3. If the rule is based upon the need to prevent disruption of the educational process, be prepared to meet the Tinker test: proving a reasonable apprehension of substantial disruption, and that such disruption is not the result of irrational prejudice of faculty or other students.

4. Make sure that the rule is not grounded solely on sexual stereotypes or other presuppositions that cannot be defended against charges of sex discrimination.

5. Like any other school rule, it should be spelled out, preferably in writing, and made known to everyone it will affect, before it is enforced against anyone.

Finally, remember that preparation or adoption of hair or dress codes by the student body or its representatives does not insulate such rules from legal challenge by individual students. Support of the majority of students as evidenced by their involvement does tend to discourage such challenges, however, and promotes acceptance of any school rule.

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18. 95 S.C. 992 (1975) See NASSP Legal Memorandum June 1975, p. 5.

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