DOCUMENT RESUME

ED 411 577 EA 028 608

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TITLE Student Dress Codes.
PUB DATE 1997-06-00
NOTE 39p.
PUB TYPE Information Analyses (070)
EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Compliance (Legal); *Constitutional Law; *Court Litigation; Discipline Policy; *Dress Codes; Elementary Secondary Education; Freedom of Speech; School Policy; State Legislation; *Student Rights; Student School Relationship

ABSTRACT

School officials see a need for regulations that prohibit disruptive and inappropriate forms of expression and attire; students see these regulations as unwanted restrictions on their freedom. This paper reviews court litigation involving constitutional limitations on school authority, dress and hair codes, state law constraints, and school uniforms. It concludes that school officials have authority to regulate student appearance; however, that authority must be exercised within the bounds of the Constitution and any pertinent state law. At some point, school officials can and should impose some restrictions on student appearance; the question is whether the regulation at issue is both legally sound and practical in application. Student dress codes are common but highly variable. Courts will support student dress and grooming code provisions that are necessary to maintain an educational environment that is free from substantial distractions and disruptions. Courts, however, will not support regulations of student appearance that reflect little more than officials' personal preferences. Regulations of hair style are more difficult to justify than regulations of attire. During recent years, however, hair codes have seldom been contested, while dress codes have often been at issue because of gang problems and inappropriate messages on clothing. Policies that regulate explicit forms of expression are more easily justified than those that regulate symbolic forms. Finally, regulations pertaining to student appearance should be sufficiently specific to provide notice to those subject to the regulations and guidance to administrators, yet be sufficiently general to allow for some administrative discretion. (Author/LMI)

STUDENT DRESS CODES

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I. Introduction

Student dress codes have long been common in American elementary and secondary schools. During the late 1960s and early 1970s, students challenged these regulations with some frequency, with lawsuits over school boy hair cuts being the most numerous. Sometime during the mid-1970s, the haircut wars ended in a somewhat uneasy truce. Then, during the early 1980s, students began to mount new challenges to dress codes, primarily against those provisions that prohibit attire with messages deemed inappropriate or styles of dress thought to be gang-related.

School officials see a need for regulations that prohibit disruptive and inappropriate forms of expression and attire; students see these regulations as unwanted restrictions on their freedom. The legal issues arising from this conflict have tended to change with the times, as norms and needs of school and society evolve.

II. Constitutional Limitations on School Authority

A. School district boards and administrators have extensive, but not unlimited, authority to regulate student affairs. Many courts have determined that there are constitutional limitations on school authority to regulate student appearance.

B. The Supreme Court has provided guiding principles for striking the balance between government power and personal liberty.

1. In *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), the Court stated that

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and

officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Id. at 638.

2. As the Supreme Court noted in *Epperson v. Arkansas*, 393 U.S. 97 (1968),

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . 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. On the other hand, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." [citation deleted]

Id. at 104.

C. Enforcement of school regulations regarding student appearance must be consistent with the protections afforded by the Due Process Clause of the Fourteenth Amendment.

1. Due process requires that students have notice of the rules they are expected to abide by. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986), while implicitly acknowledging that students need to be informed of conduct that may lead to disciplinary sanctions, stated that

> We have recognized that "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." . . . Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code

which imposes criminal sanctions." [citations deleted] *Id.* at 686.

2. Procedural due process requires that if students run afoul of school rules so as to incur disciplinary sanctions that put at risk constitutionally protected interests, they must at a minimum be afforded notice of the charges and an opportunity to give their side of the story. *Goss v. Lopez*, 419 U.S. 565 (1975), held that even a short-term suspension of 10 days or less implicates protected property and liberty interests and that due process requires that a student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.

3. Substantive due process pertains to the adequacy of the government's justification for a rule or decision. At a minimum, administrative rules must be reasonable and quasi-judicial decisions must be supported by some evidence. In *Wood v. Strickland*, 420 U.S. 308 (1975), students challenged their suspension for spiking punch at a school activity, bringing a § 1983 suit alleging a violation of due process. At issue *inter alia* were a school board's construction of a rule prohibiting use or possession of intoxicating beverages at a school activity and the evidentiary basis for the board's decision to suspend students. The Supreme Court held in favor of the school board on these substantive due process issues and reaffirmed that federal courts should defer to board authority to adopt and implement rules for student conduct, at least when no specific constitutional right is at issue. First, the Court accepted the school board's construction of its own policy; it then stated that

> Given the fact that there *was* evidence supporting the charge against respondents, the contrary judgment of the Court of Appeals is improvident. It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. Public high school students do have substantive and procedural rights while at school. . . . But § 1983 does not extend the right to relitigate in federal court evidentiary questions

arising in school disciplinary proceedings or the proper construction of school regulations. The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members, and § 1983 was not intended to be a vehicle for federal-court corrections of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees. [citations deleted]

Id. at 326.

4. The protections of personal liberty afforded by the Due Process Clause often come into play in disputes over school regulation of student dress and hair style, as is illustrated by a number of cases discussed in subsequent sections of this paper.

D. Because many schools impose restrictions on student dress that conveys either verbal or symbolic messages, the protections of freedom of expression grounded in the First Amendment are often at issue.

1. While First Amendment protections extend beyond the spoken or written word, not all conduct intended to convey an idea comes within the scope of constitutional protections. For particular conduct to possess sufficient communicative elements to bring the First Amendment into play, there must be (a) an intent to convey a particularized message, and (b) a great likelihood that the message would be understood by those who viewed it. *Texas v. Johnson*, 491 U.S. 397 (1989) (person has right to burn American flag); *United States v. O'Brien*, 391 U.S. 367 (1968) (person does not have right to burn Selective Service Registration Certificate).

The Court noted in *O'Brien* that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *O'Brien* at 376.

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of

free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien at 377.

2. The Supreme Court has rendered a trilogy of First Amendment decisions that lower courts often cite in student dress code cases.

a. *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969) was a "landmark" student rights case. Students suspended for wearing black armbands to protest the war in Vietnam brought suit, alleging that their constitutional rights had been violated. The Court noted that "[i]t can hardly be argued that either students or teacher shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Id.* at 506.

The problem posed by this case did "not relate to regulation of length of skirts or type of clothing, to hair style, or deportment," *id.* at 507-08, nor did it concern either aggressive, disruptive action or even group demonstrations; nor was there evidence of any "collision with the rights of other students to be secure and to be let alone." *Id.* at 508. Rather, it involved direct, primary First Amendment rights akin to "pure speech."

Furthermore, it was relevant that school authorities did not seek to prohibit the wearing of all symbols of political or controversial significance. Only this particular symbol--black armbands protesting the war in Vietnam--was singled out for prohibition.

The Court held that prohibition of expression of this one particular opinion, at least without evidence that the prohibition was necessary to avoid material and substantial interference with school affairs or intrusions on the rights of others, was not constitutionally permissible.

But the *Tinker* opinion also reaffirmed the authority of school officials to maintain an orderly learning environment.

> [C]onduct by the student, in class or out of it, which for any reason--whether it stems from time, place, or type

of behavior--materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

Id. at 513.

b. Twenty-seven years later, the constitutional parameters of *Tinker* were defined more clearly in *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). School officials disciplined a student for delivering for a friend at a school assembly a nominating speech, laced with "elaborate, graphic, and explicit sexual metaphor." *Id.* at 678. The Court set the stage for its decision by giving its view about one purpose of public education.

> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the 'fundamental values necessary to the maintenance of a democratic political system' disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the 'work of the schools.' The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.
>
> The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers--and indeed the older students--demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates

lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy. [Citations deleted]

Id. at 683.

The Court held that the school district acted entirely within its permissible authority in imposing sanctions on the student in response to his offensively lewd and indecent speech.

> Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission . . . . Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education.

Id. at 685-86.

c. About 18 months after *Fraser* came *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), which affirmed the authority of school officials to exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum. The Court first held that the school newspaper was not a public forum. School officials had not intentionally opened this nontraditional forum for public discourse, but had reserved the forum for its intended purpose--a supervised learning experience for journalism students. Accordingly, school official could regulate the contents of the school newspaper in any reasonable manner.

The Court distinguished *Tinker*, which addressed educators' ability to silence a student's personal expression that happens to occur on school premises, from the question in this case, which concerned educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the

school.

Reaching beyond the specific facts of the case, the Court held that

> [E]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.
>
> This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges. . . . It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid education purpose that the First Amendment is so "directly and sharply implicated," as to require judicial intervention to protect students' constitutional rights. [citations deleted]

Id. at 273.

III. Dress and Hair Codes--The Early Years

A. Board Authority and Personal Rights

1. Challenges to the authority of school boards to enforce dress codes are not a new phenomenon, as shown by three early dress code cases from state supreme courts. In *Jones v. Day*, 89 So. 906 (Miss. 1921), the court affirmed the authority of the board of trustees to require boys enrolled in a county agricultural high school to wear khaki uniforms while in school, boarding in the dormitory, and anywhere within five miles of school, until they returned to the control and custody of their parents. In *Pugsley v. Sellmeyer*, 250 S.W. 538 (Ark. 1923), the court upheld the denial of admission to school of an 18-year-old girl for wearing talcum powder in violation of a board rule prohibiting "the wearing of transparent hosiery, low-necked dresses or any other style of clothing tending toward immodesty in dress, or the use of face paint or cosmetics." The

court found that the rule in question was reasonable and that the board had the right to make it. In *Stromberg v. French*, 236 N.W. 477 (N.D. 1931), the court sustained a rule forbidding boys from wearing metal heel plates on their shoes because of noise and damage to floors. The basic issue was whether the school board had authority to enforce such a rule against the explicit directions of a boy's parents that he wear such plates; the court held that the board could exercise such authority, as long as the rule was reasonable under the circumstances. These three decisions focused on the authority of the board rather than on the rights of the student.

2. But later decisions, although still acknowledging board authority, recognized that students had constitutionally protected rights to be taken into account.

Bannister v. Paradis, 316 F. Supp. 185 (D. N.H. 1970), involved a sixth-grade boy who was sent home for wearing blue jeans, which was a violation of the school dress code. Suit was brought challenging the rule, and the district court enjoined its enforcement. The court determined that enforcement of the rule implicated a personal liberty protected by the Constitution and ruled that school officials had not justified the intrusion of the rule on that personal liberty. The court noted that the liberty interest at stake was a relatively minor one, but found that there was no showing that the wearing of blue jeans inhibited or tended to inhibit the education process. The principal had testified that proper dress is part of a good educational climate, and the chairman of the school board had testified that the relaxed atmosphere induced by wearing work or play clothes to school does not fit into the atmosphere of discipline and learning. The court "confessed" that it had considerable difficulty accepting school officials justifications for the rule.

But the court also noted that

> We realize that a school can, and must, for its own preservation exclude persons who are unsanitary, obscenely or scantily clad. Good hygiene and the health of the other pupils require that dirty clothes of any nature, whether they be dress clothes or dungaree, should be prohibited. Nor does the court see anything unconstitutional in a school board prohibiting

scantily clad students because it is obvious that the lack of proper covering, particularly with female students, might tend to distract other pupils and be disruptive of the educational process and school discipline.

Id. at 189.

In *Wallace v. Ford*, 346 F. Supp. 156 (E.D. Ark. 1972), the court recognized that students had a liberty interest in their choice of both hair styles and clothing styles. Because school officials failed to provide adequate justification for some parts of the dress code, the court stuck down the provisions relating to hair cuts and facial hair, as well as some of the provisions that prohibited certain styles of dress; however, the court sustained those provisions that prohibited short skirts or excessively tight skirts or pants, finding that these provisions had a valid relationship to the legitimate objective of prohibiting immodest or suggestive clothing.

B. Freedom of Expression

1. Whether students could wear buttons with a message was at issue in three early court of appeals cases. Two companion cases illustrate that such expression may be suppressed only if there is evidence to support the need for such restriction. In *Burnside v. Byers*, 363 F.2d 744 (5th Cir. 1966), the court struck down as an unreasonable restriction on freedom of expression a rule prohibiting school children from wearing "freedom buttons" because there was a lack of evidence that such conduct interfered with the educational process; however, in *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966) the court upheld as reasonable and necessary a school regulation prohibiting school children from wearing "freedom buttons" because the evidence clearly demonstrated that such activity interfered with the efficient operation of the school.

2. In the third case, *Guzick v. Drebus*, 431 F.2d 594 (6th Cir. 1970), *cert. denied* 401 U.S. 958 (1971), the court upheld a high school rule that prohibited students from wearing buttons, emblems, or other insignia on school property during school hours unless these

emblems or insignia were related to a school activity. The rule had been consistently applied. The court found that the blanket prohibition of buttons and other insignia significantly contributed to the preservation of peace and order and was reasonably related to the prevention of distractions and disruptive and violent conduct. Although the prohibition implicated constitutionally protected forms of expression, the evidence in the case made it clear that school authorities had a factual basis on which to forecast substantial disruption and material interference with school activities.

3. A fourth case, *Melton v. Young*, 465 F.2d 1332 (6th Cir. 1972), *cert. denied*, 411 U.S. 951 (1973), upheld the suspension of a student from an integrated school for refusing to stop wearing a Confederate flag patch on the sleeve of his jacket, which was in violation of a "code of conduct" provision stating that provocative symbols on clothing would not be allowed. Although the provision had been held unconstitutionally "vague, broad, and imprecise," both the district court and the court of appeals concluded that evidence of disorder throughout the prior year supported a determination that, even in the absence of a valid regulation, school officials were justified in prohibiting the flag patch because of the tense racial situation in the school.

IV. Hair Code Cases, 1970-1975

A. To provide some insight into the law pertaining to constitutional constraints on public school regulation of student appearance, selected "school boy hair cut" cases are set out below. These cases represent the current state of the law in those circuits where United States courts of appeals have rendered pertinent decisions. The cases are presented according to the writer's estimate of the extent of constitutional protection afforded the student, with those cases extending more protection discussed before those extending less. It should be noted that the development of this body of law began in the 1960s and basically ended about 1975.

B. Courts of Appeals in the First, Third, Fourth, Seventh, and Eighth

Circuits found that hair cut rules implicate constitutionally protected interests, and placed the burden on school officials to justify such rules. At shown in the cases that follow, school officials were unable to do so.

1. *Holsapple v. Woods*, 500 F.2d 49 (7th Cir. 1974), *cert. denied*, 419 U.S. 901 (1974)

A high school student was suspended for not conforming to a hair length provision in school board policy. He brought suit, challenging the constitutionality of the provision. The district court issued an injunction and declared the policy unconstitutional, and the court of appeal affirmed.

The court of appeals stated that the law of the Seventh Circuit was well settled. In a school context, the right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution. To limit or curtail this or any other fundamental rights, the state has a "substantial burden of justification." In this case, school officials had not carried that burden, as had been defined by the Court in *United States v. O'Brien*, 391 U.S. 367 (1968).

2. *Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971)

A high school student was suspended for not conforming to a hair length provision in the school dress code. He brought suit, challenging the constitutionality of the provision. The district court denied relief. The court of appeals reversed.

The court of appeals found no merit in the free speech, equal protection, or parental rights arguments; however, the court held that a student did have a constitutionally protected right to govern his personal appearance while attending public high school. The Constitution guarantees rights other than those specifically enumerated, and the right to govern one's personal appearance is one of those other guaranteed rights. But personal freedoms are not absolute; they must yield when they intrude upon the freedoms of others. A balancing of the interests is required.

The court proceeded from the premise that the school administration carried the burden of establishing the necessity of infringing upon the student's freedom in order to carry out the educational mission of the school.

> [It] is apparent that the opinion testimony of the school teachers and administrators, which lacks any empirical foundation, likely reflects a personal distaste of longer hairstyles . . . . *Id.* at 1076.
>
> Of the justifications advanced by the school administrators in support of the regulations, only those relating to swimming pool sanitation and shop class safety bear any rational relation to the length of a student's hair. The school administration has failed to show why these particular problems cannot be solved by imposing less restrictive rules, such as requiring students to wear swimming caps or shop caps. *Id.* at 1077.

Because the evidence presented by the school administrators failed to demonstrate the necessity of regulating the length and style of male students' hair, the court held the regulation to be invalid and unenforceable.

3. *Massie v. Henry*, 455 F.2d 779 (4th Cir. 1972)

Male students were suspended for refusing to conform to a "guide line," recommended by a student-faculty-parent committee and adopted by the high school principal, regulating the length of hair and side burns. The district court had found the regulation justified, but the court of appeals and reversed and remanded.

The court of appeals discussed the lack of agreement among other circuit courts as to the precise source, if any, of a constitutionally protected right to wear one's hair as one wishes. The court thought perhaps in some circumstances the length of one's hair might be a form of protected expression, but in this case the record failed to establish any motivation other than personal preference, so it finally settled on the aspect of the right to be secure in one's person as guaranteed by the Due Process Clause. The court followed *Bishop* in weighing the competing interests asserted, and in proceeding from the premise that the school administration has the burden of establishing the necessity of infringing upon the student's freedom in order to carry out the education mission of the school.

4. *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970)

A boy was suspended at the beginning of his senior year for refusing to cut his hair so as to come into compliance with an

unwritten rule that unusually long hair was not permitted. The district court granted a permanent injunction and ordered the plaintiff reinstated; the court of appeals affirmed.

The court of appeals first sought the source of the constitutional right at issue. It rejected the notion that the plaintiff's hair length was of a sufficiently communicative character to warrant the full protection of the First Amendment; however, it did believe that the Due Process Clause established a sphere of personal liberty for every individual, subject to reasonable intrusions by the state in furtherance of legitimate state interests. The court concluded that "within the commodious concept of liberty, embracing freedoms great and small, is the right to wear one's hair as [one] wishes," *id.* at 1285; however, this liberty interest is not so fundamental as to require a compelling state interest to justify its impairment.

Having determined that a personal liberty was at stake, the court turned to the state interest justifying the intrusion. The nature of the interest was to be taken into account, but once a personal liberty is implicated, the school's countervailing interest must either be self-evident or be affirmatively shown. On its face this rule had no inherent, self-evident justification; thus, the burden was on the defendant to offer a justification for the rule, but he had not done so.

5. *Zeller v. Donegal Sch. Dist. Bd. of Educ.*, 517 F.2d 600 (3rd Cir. 1975)

The issue in the case was whether a schoolboy's complaint for money damages, filed after his exclusion from a soccer team for noncompliance with an athletic code regulating hair, stated a claim for which relief could be granted under 42 U.S.C. §1983. The district court dismissed the complaint, and the court of appeals affirmed *en banc*, but with judges voting on different grounds.

The court of appeals offered a rather fractured analysis of the constitutional implications of hair cut codes. The four-judge plurality held that the plaintiff's contention did not rise to the dignity of a protectable constitutional right; a concurring judge (deciding on basis of qualified immunity of school officials) believed that a student's right to groom his hair is part of the personal liberty protected by the due process clause, and that school

officials must prove a rational basis for such regulations; the four dissenting judges agreed that hair cut regulations implicate a constitutionally protected liberty interest and that such an infringement may only be permitted when the state can provide a reasonable justification for its action.

C. Courts of Appeals for the Fifth, Sixth, Ninth, and Tenth Circuits held that no substantive constitutional rights are implicated by hair cut rules, and affirmed the authority of schools to regulate student appearance in this way. One circuit court found a justification for such regulations; another placed the burden on those challenging the regulation; two others held that such suits should be dismissed out of hand.

1. *Gfell v. Rickelman*, 441 F.2d 444 (6th Cir. 1971)

A high school student was suspended for not conforming to a hair length regulation in the school dress code. He brought suit challenging the constitutionality of the regulation. The district court dismissed the complaint, finding that the regulation did not deprive the student of any constitutional rights and was not unreasonable, arbitrary, or capricious, and further that there was a rational basis for the provision when considered in light of the functions and purposes of the school. The court of appeals affirmed.

The court of appeals did not believe that the freedom to choose one's hair style is either a fundamental constitutional right or a serious First Amendment issue. The evidence supported the finding that there was a reasonable relationship between the rule adopted by the school and the maintenance of discipline, the promotion of safety in certain courses, and the furtherance of valid educational purposes, including the teaching of grooming, discipline, and etiquette.

2. *King v. Saddleback Junior College Dist.*, 445 F.2d 932 (9th Cir. 1971), *cert. denied*, 404 U.S. 979 (1971); (and *Olff v. East Side Union High Sch. Dist., cert. denied,* 404 U.S. 1042 (1972)).

This consolidated appeal involved two plaintiff male students, one from a high school and one from a junior college. In each case, the district court had enjoined the enforcement of a provision of a school dress code providing for limitations on the length of hair of

male students.

After considering assertions of violations of freedom of speech, equal protection, and due process, the court of appeals concluded that the plaintiffs had not established the existence of any substantial constitutional right that was infringed in either instance. The court also assumed that in the absence of a clear violation of a constitutional right, the burden is on those who assail the regulations to prove their invalidity, and this they had not done. The cases were disposed of accordingly.

3. *Freeman v. Flake*, 448 F.2d 258 (10th Cir. 1971), *cert. denied*, 405 U.S. 1032 (1972)

This consolidated appeal considered three cases from three different states, each of which involved the suspension of students for violating school regulations on the length of hair of male students. The only common theme in the three appeals was a reliance on *Tinker*. The court of appeals noted that *Tinker* was about "pure speech" and not about hair style; "The wearing of long hair is not akin to pure speech. At the most it is symbolic speech indicative of expressions of individuality rather than a contribution to the storehouse of ideas." *Id.* at 459.

The court thought perhaps the strongest constitutional argument that could be made on behalf of the students is based on the protections of liberty afforded by the Due Process Clause, but doubted the applicability of the test of reasonableness in the determination of the nebulous constitutional rights asserted.

The court of appeals held that "[c]omplaints which are based on nothing more than school regulations of the length of a male student's hair do not 'directly and sharply implicate basic constitutional values' and are not cognizable in federal courts under the principles stated in *Epperson v. Arkansas*." *Id.* at 262. The three cases appealed were disposed of accordingly.

4. *Karr v. Schmidt*, 460 F.2d 609 (5th Cir. 1972), *cert. denied*, 409 U.S. 989 (1972)

A high school student was prevented from enrolling in school because he was not in compliance with a school board regulation limiting the length of male students' hair. He brought suit against

the school officials, claiming violation of various constitutional rights. The district court found that the provision was constitutionally impermissible, but the court of appeals reversed.

The court of appeals held that high school students have no constitutionally protected right to wear their hair in the length and style that suits the wearer. The court rejected the arguments that the First, Eighth, Ninth, Tenth, and Fourteenth Amendments and the penumbras therefrom supply a basis for any substantive constitutional right. Given the very minimal test of rationality to which such regulations are properly subject, the court announced a per se rule that such regulations are constitutionally valid. The court of appeals directed district courts, when presented with complaints merely alleging the constitutional invalidity of a high school hair and grooming regulation, to grant an immediate motion to dismiss for failure to state a claim for which relief can be granted.

D. An Equal Protection Clause argument was advanced by plaintiffs in several court of appeals cases, but with mixed success. In *Crews v. Cloncs*, 432 F.d 1259 (7th Cir. 1970), the court concluded that a hair cut code that prohibited boys, but not girls, from wearing long hair in certain classes and activities constituted a denial of equal protection. But the equal protection argument was rejected in *Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971), even though the court recognized a constitutional protected liberty interest. Also, in *New Rider v. Board of Educ. of Indep. Sch. Dist. No. 1*, 480 F.2d 693 (10th Cir. 1973), *cert. denied*, 414 U.S. 1097 (1973), the court rejected an equal protection argument advanced by Pawnee Indian children.

E. If a court determined that a hair cut code implicated a student's constitutionally protected rights, absent a showing that the haircut provision is necessary to serve some legitimate school purpose, the fact that the code was developed according to some "democratic" process and has general support within the school community did not save it.

1. That a dress code was developed through a democratic process by a committee of students, teachers, and administrators did not per se justify the denial of a student's constitutional right to wear his hair

in the mode he chose. To justify this denial, school officials had the burden of showing that the code hair provision had a reasonable relation to some purpose within the school's competence, and this they failed to do. *Arnold v. Carpenter*, 459 F.2d 939 (7th Cir. 1972).

2. *See Massie v. Henry*, 455 F.2d 779 (4th Cir. 1972), holding unconstitutional a student hair cut "guide line" recommended by a student-faculty-parent committee.

3. In *Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971), the court noted that

> Nor does the acceptance of the dress code by the majority of the St. Charles community and students justify the infringement of Stephen's liberty to govern his personal appearance. Toleration of individual differences is basic to our democracy, whether those differences be in religion, politics, or life-style.

Id. at 1077.

F. In deciding hair cut cases during this era, courts recognized that hair codes are more restrictive of personal freedoms than are dress codes.

1. Because the impact of hair regulations extends beyond the school-house gate, the state infringement on personal rights is significantly greater than in many other areas of school discipline. *Crews v. Cloncs*, 432 F.d 1259, 1264 (7th Cir. 1970).

2. A school rule forbidding skirts shorter than a certain length while on school grounds would require less justification than one requiring hair to be cut, which affects the student at all times. *Richards v. Thurston*, 424 F.2d 1281, 1285 (1st Cir. 1970).

3. In ruling on a school code that included provisions pertaining to both hair and clothing, a federal district court stated that

> One's hair is an integral part of his person. If his hair is required to be short on the school grounds during school hours, it will certainly be short during the remaining hours of the day while away from school. But if one is limited in his attire at

school because of a dress code he will not necessarily be so limited after school hours. The restriction upon one's freedom is not as great or obvious or dramatic, overall, as a result of dress regulations as it is as a result of hair regulations. Although this is simply a matter of degree, it makes clear, as stated in *Richards*, that, generally, "less justification" is needed to sustain dress regulations than is need to sustain hair regulations. Yet in neither case may one's liberty be restricted by school regulations unless that restriction is necessary to effectuate the state's legitimate interest in carrying out its educational mission.

Wallace v. Ford, 346 F. Supp. 156, 162-63 (E.D. Ark. 1972).

V. Dress Code Cases: 1980s and 1990s

During the late 1970s, there were few reported cases involving public school student dress and hair codes. But beginning in the early 1980s, with the hair cut issue apparently laid to rest, a new series of dress code cases emerged. These are discussed below, organized according to the primary constitutional principles involved.

A. Freedom of Expression

When school officials have enforced dress codes that prohibit students from wearing messages or symbols contended to be disruptive, courts have put the burden on those school officials to produce evidence supporting that contention. That modes of student dress are involved is more or less incidental; these are really First Amendment "freedom of expression" cases.

1. *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524 (9th Cir. 1992)

In response to a lawful teacher's strike, a school district hired replacement teachers. Students wore buttons to school that were derogatory of "scabs," and administrators insisted that the buttons not be worn. Students sued, alleging violations of First Amendment rights. The district court dismissed for failure to state a claim, but the court of appeals reversed and remanded.

The court of appeals majority concluded that the standard for

reviewing the suppression of vulgar, lewd, obscene, and plainly offensive speech is governed by *Fraser*, school-sponsored speech by *Hazelwood*, and all other speech by *Tinker*. Although the court thought that "school officials may suppress speech that is vulgar, lewd, obscene, or plainly offensive without a showing that such speech occurred during a school-sponsored event or threatened to 'substantially interfere with [the school's] work," *Id.* at 529, it was satisfied that these buttons could not be considered per se vulgar, lewd, obscene, or plainly offensive within the meaning of *Fraser*. Nor could the buttons reasonably have been viewed as bearing the imprimatur of the school, as per *Hazelwood*. The court of appeals put this case in the third category, applied the *Tinker* standard, and held that the "scab" buttons were not inherently disruptive.

> In a case such as this one, where arguably political speech is directed against the very individuals who seek to suppress that speech, school officials do not have limitless discretion. . . . Subsequent proof may show that the word "scab" can reasonably be viewed as insulting, and may show that the slogans were directed at the replacement teachers. Such evidence would bear upon the issue of whether the buttons might reasonably have led school officials to forecast substantial disruption to school activities. Mere use of the word "scab," however, does not establish as a matter of law that the buttons could be suppressed absent the showing set forth above.

978 F.2d at 531.

Also, the students' claim contended that school officials violated their First Amendment rights by suspending them in order to preclude them from associating with other students and disseminating their views on the strike. The district court was to consider this claim on remand.

2. *McIntire v. Bethel Sch.*, 804 F. Supp. 1415 (W.D. Okla. 1992)

The Bethel Public School dress code included a provision proscribing the wearing of apparel bearing any message that advertises alcoholic beverages. A number of students wore to school T-shirts bearing the message "The best of the night's adventures are reserved for people with nothing planned." The superintendent, believing that this message came from an

advertisement for Bacardi rum, ordered that the students be suspended for wearing the T-shirts. The students brought suit, alleging a violation of First Amendment rights and seeking an injunction against school officials that would prevent enforcement of the rule. The district court found that the application of the rule did violate the students' rights and granted a preliminary injunction.

The court determined that the phrase displayed on the T-shirts, because it conveyed an idea, was speech presumptively protected by the First Amendment. School officials then had the burden of establishing that the T-shirts were proscribed by the dress code and that the dress code as applied was constitutional. The court concluded that the dress code provision proscribing the wearing of apparel advertising alcoholic beverages was not facially unconstitutional; however, school officials failed to prove that the message was a liquor advertisement, or would be so understood by reasonable people, and that the application of the policy to the message on the T-shirts did not violate the students' First Amendment rights.

The court determined that because the T-shirts did not bear the imprimatur of the school, the *Hazelwood* and *Bethel* standards were inapplicable. Rather, *Tinker* provided the standard for determining whether school officials could sanction this particular form of student expression, and school officials had failed to prove that the message on the T-shirts was disruptive or intruded on the rights of others.

3. *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728 (7th Cir. 1994)

Parents claimed that their daughter's right to speak out on matters of public concern at Lost Creek Elementary School was violated when the principal prevented her from wearing T-shirts that read "Unfair Grades," "Racism," and "I Hate Lost Creek." The district court dismissed the principal in his individual capacity based on qualified immunity; to overcome that defense, the parents had the burden of showing that their daughter enjoyed a clearly established right to wear her expressive T-shirts while in school, and they relied on *Tinker* to do so.

The court of appeals affirmed. The principal did not argue that the T-shirts caused any disruption; instead, he maintained that

Tinker was not dispositive because it involved students older than this elementary school student. The court noted that in both *Fraser* and *Kuhlmeier* the Court had indicated that age is a relevant factor in assessing the extent of a student's free speech rights in school; thus, the parents had not demonstrated that their daughter's rights, which the principal allegedly violated, were clearly established, and he was entitled to qualified immunity.

4. *Jeglin v. San Jacinto Unified Sch. Dist.*, 827 F. Supp. 1459 (C.D. Cal. 1993)

A school district regulation denied students the right to wear clothing bearing writing, pictures, or any other insignia that identifies any professional sports team or college on school district campuses or at school district functions. (The regulation was adopted, at least in part, to counter gang activity.) Students sued, claiming a violation of their First Amendment rights and seeking declaratory and injunctive relief. The district court applied First Amendment principles from *Tinker* to the evidence presented.

Public school students have a right to freedom of speech that encompasses the wearing of clothing that displays a student's support of a college or university or a professional sport team. The state, however, has a compelling interest in the maintenance of its education system. The First Amendment does not require school officials to wait until disruption actually occurs before they may act to curtail exercises of free speech; they have a duty to prevent the occurrence of disturbances. But a student's rights to free speech may not be abridged in the absence of facts that might reasonably lead school authorities to forecast substantial disruption of or material interference with school activities.

As for the elementary schools, school officials had offered no proof of any gang presence or of any actual or threatened disruption or material interference with school activities. Accordingly, there was no justification for application of the restrictive dress code to the elementary school students.

As for the middle schools, school officials offered some evidence of gang presence, but that evidence showed only a negligible presence and no actual or threatened disruption of school activities. Again, school officials did not carry their burden of showing

justification for application of the restrictive dress code to middle school students.

As for the high school, the evidence was conflicting; however, school officials did carry their burden of showing both a gang presence, albeit of undefined size and composition, and activity resulting in intimidation of students and faculty that could lead to disruption or disturbance of school activities and may justify curtailment of student First Amendment rights to the extent found in enforcement of the dress code.

The court enjoined enforcement of the dress code against elementary school students and middle school students, but allowed enforcement of the dress code at the high school.

Courts have been supportive of school officials in their efforts to prohibit apparel with messages they think are simply inappropriate.

5. *Broussard v. School Bd. of Norfolk*, 801 F. Supp. 1526 (E.D. Va. 1992)

A seventh-grade student wore a T-shirt to school that carried the words "Drugs Suck." School officials informed her that the expression was offensive and in violation of the dress code. Because she refused to change or turn her shirt inside out, school officials imposed a one-day suspension.

The student sued, claiming school officials had violated her First Amendment rights. The district court stated that this was not a content-based restrict, but rather concerned only the authority of school officials to regulate language displayed on clothing that they reasonably regarded as inappropriate and offensive. After much conflicting testimony on the current meaning of "suck," the court determined that the word could reasonably be considered vulgar and offensive under *Fraser* , as well as disruptive under *Tinker,* and concluded that school officials did not act improperly in prohibiting the T-shirt and disciplining the student.

6. *Gano v. School Dist. 411 of Twin Falls City*, 674 F. Supp. 796 (D. Idaho 1987)

A high school student drew a caricature depicting three school administrators leaning against a fence on school premises, each

holding a different alcoholic beverage and appearing to be intoxicated. The caricature was transferred to T-shirts, which were to be sold to students during homecoming week. A student was suspended for wearing one of the T-shirts and warned that if he wore one again he would be sent home to change it. He filed suit, with a motion for a preliminary injunction to enjoin school officials from suspending him or interfering with his attendance. The district court denied the motion.

The court found that school officials had determined that the T-shirt, which was clearly offensive, could not be tolerated. The T-shirt caricature falsely depicted the administrators of committing a misdemeanor and severely compromised their positions as role models. The court compared *Tinker* and *Bethel*, and found this case to fall within the *Bethel* precedent.

> To understand these cases, one must first understand that discipline and debate are equally effective teaching tools. A robust exchange of ideas can only occur effectively within a civilized context. The school is actively engaged in teaching when it sets the bounds for proper conduct. As the United States Supreme Court stated in the *Bethel* case:
>
> > The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; school must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers--and indeed the older students--demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in [here].
>
> 674 F. Supp. at 798.

Students claiming that their style of dress constitutes a form of constitutionally protected expression have not been able to maintain that claim successfully.

7. *Bivens v. Albuquerque Pub. Schs.*, 899 F. Supp. 556 (D. N.M. 1995)

A student sued to challenge his suspension from high school for violation of the school dress code provision that prohibited wearing sagging pants, which had been adopted in response to a gang problem. He asserted that he wore sagging pants as a statement of his identity as a black youth and as a way for him to express his link with black culture and the styles of black urban youth; he contended that the prohibiting of sagging pants violated his First Amendment rights to freedom of speech, expression, and association.

The district court granted summary judgment for defendant school system, concluding that plaintiff had failed to meet his burden of demonstrating a genuine issue for trial as to whether his wearing of sagging pants is constitutionally protected speech.

The court noted that wearing of a particular type or style of clothing usually is not seen as expressive conduct and that not every defiant act by a high school student is constitutionally protected speech. Under *Texas v. Johnson*, 491 U.S. 397 (1989), a two-part test must be met for non-verbal conduct to be expressive conduct protected by the First Amendment. First, the actor must intend to convey a particularized message; second, there must be a great likelihood that the message would be understood by those who observe the conduct. The court believed that while the plaintiff may have intended to convey a particularized message, he had failed to satisfy the objective part of the test, which required him to show that others would understand his message.

The student also argued unsuccessfully that the dress code suffered from unconstitutional vagueness. The court stated that

> I reject the notion that a school dress code prohibiting sagging must be expressed in terms of inches or millimeters, any more than other styles prohibited by the dress code must be quantified exactly. For example, short shorts are not described in terms of a measurement, and "half-shirts" and "inappropriate tank tops" are prohibited without further precision. The need to maintain appropriate discipline in schools must favor more administrative discretion than might be permitted in other parts of our society.

899 F. Supp. at 563.

8. *Oleson v. Board of Educ. of Sch. Dist. No. 228*, 676 F. Supp. 820 (N.D. Ill. 1987)

A school board rule forbid all gang activities at school, including the wearing of gang symbols, jewelry, or emblems, which included wearing of earrings by male students. A male student who had been suspended for wearing an earring to school brought suit, seeking an injunction against enforcement of the policy and an expungement of his disciplinary records. The court denied his request.

The student claimed the prohibition violated his right of free speech and expression. To claim the protection of the First Amendment, the student needed to demonstrate that his conduct intended to convey a particularized message and that the likelihood was great that the message would be understood by those who viewed it. But his only message was one of his individuality, a message not within the protection of the First Amendment.

The court noted that the First Amendment does not necessarily protect an individual's appearance from all state regulation, and that those who challenge such a regulation must show the absence of a rational connection between the policy and the accomplishment of a public purpose. The court distinguished the Seventh Circuit's hair length decisions, where school officials had been unable to articulate a rational basis for their rules.

> Here, by contrast, the Board has convincingly enunciated a rationale directly related to the safety and well-being of its students--curtailment of gang activities. Further, the stricture involved here requires only that the student not wear his earring during school hours and on school grounds.

Id. at 823.

The student also made a Fourteenth Amendment equal protection argument--that earrings were prohibited on boys, but permitted on girls. The court placed the burden on the challenger to show that the gender-based classification did not substantially relate to a legitimate government object and found that the student had failed to carry this burden.

B. Due Process; Equal Protection

Most students contending that dress and grooming codes violate their

rights under the Due Process Clause and the Equal Protection Clause have met with little success in the courts.

But one recent exception invalidated a regulation under the "void-for-vagueness" doctrine, which school districts seeking to quell gang-related problems may find troublesome.

1. *Stephenson v. Davenport Com. Sch. Dist.*, No. 96-1770 (8th Cir. 1997), *petition for rehearing en banc filed April 23, 1997*

Because of increasing problems with gang activity, in August 1992 school district administrators adopted a regulation stating that "[g]ang related activities such as display of 'colors,' symbols, signals, signs, etc., will not be tolerated on school grounds. Students in violation will be suspended from school and/or recommended to the board for expulsion." The regulation did not include any definitions of "gang related activities" or of "colors, symbols, signals, signs, etc."

In February 1990, a girl had tattooed a small cross between her thumb and forefinger. She intended the tatoo to be a form of "self expression"; she did not consider the tatoo to be a religious symbol, nor did she intend it to communicate gang affiliation. There was no evidence that she was ever involved in gang activity. She wore the tatoo without incident until August 1992, when she was informed that because the tatoo was a gang symbol she needed to have it removed or altered. She had the tatoo removed, which cost about $500 and left a scar.

She filed suit, alleging violations of various constitutional rights. On appeal of summary judgment for the school district, the court of appeals affirmed in part, but reversed on the grounds that the regulation was void for vagueness.

Although the court declined to imbue her tattoo with first amendment protections, her void-for-vagueness claim was valid because it alleged inadequate notice of proscribed behavior. The void-for-vagueness doctrine is embodied in the due process clauses of the Constitution. A vague regulation is constitutionally infirm in two significant respects. First, a regulation violates due process if it fails to provide adequate notice of prohibited conduct; second, a vague regulation delegates basic policy matters to officials and may

lead to arbitrary and discriminatory enforcement. Also, a vague regulation may sweep within its parameters constitutionally protected expression.

The court of appeals noted that on the one hand a lesser standard of scrutiny was appropriate because of the school setting, but on the other hand a greater level of scrutiny was required because the regulation reached the exercise of protected expression, such as religious symbolism.

Because the regulation failed to define pivotal terms, such as "gang" and "gang related activities," it violated the central purposes of the vagueness doctrine; the regulation failed to provide adequate notice to students of what conduct was unacceptable, and it failed to offer clear guidance to those who must enforce it.

Other due process and equal protection cases have been more supportive of school authority. Courts have upheld the authority of school officials to prohibit cross-dressing at a school prom and to forbid boys wearing earrings at school.

2. *Harper v. Edgewood Bd.of Educ.*, 655 F. Supp. 1353 (S.D. Ohio 1987)

School officials did not permit a brother and a sister to attend a school prom dressed in clothing of opposite sex. Students sued; the court granted summary judgment for the board.

The school officials did not deny plaintiffs any rights they may have had under the First Amendment. "The school board's dress regulations [were] reasonably related to the valid educational purposes of teaching community values and maintaining school discipline." Id. at 1355. Nor did school officials violate any rights plaintiffs may have had under the Equal Protection Clause. The dress code did not differentiate on the basis of sex; all students were required to dress in conformity with the accepted standards of the community.

3. *Hines v. Caston Sch. Corp.*, 651 N.E.2d 330 (Ind. App. 1995)

Suit was brought on behalf of an elementary school boy, challenging school policy that forbid wearing of earrings by boys. The trial court found that the rule did not violate the boy's constitutional rights grounded in the Due Process Clause and the

Equal Protection Clause, and the court of appeals affirmed.

The parents stipulated that they did not seek to establish that wearing of an earring was protected speech; rather, they contended that the rule violated due process and equal protection. In regard to both constitutional claims, the court of appeals placed the burden on the challenger to show that there was no rational basis for the policy and held that the parents had failed to carry that burden.

The court found that it was reasonable for a community's schools to reflect its values and to instill discipline and create a positive educational environment by means of a reasonable, consistently applied dress code. The court also found that evidence was presented demonstrating that the wearing of earrings by males was inconsistent with community standards of dress.

Also, student-athletes challenging regulations requiring them to be clean-shaven to participate in athletics have not been successful; however, this may be in part a function of the jurisdictions involved.

4. *Davenport v. Randolph County Bd. of Educ.*, 730 F.2d 1395 (11th Cir. 1984)

High school athletes challenged the constitutionality of a "clean shaven" policy, contending that it was arbitrary and unreasonable to require adolescents to shave in order to participate in athletics. The district court denied relief, and the court of appeals affirmed.

The court of appeals found that the case fell squarely within the holding of *Karr*. Although parents testified that shaving had caused them problems, there was no evidence that shaving would cause the students problems; furthermore, the coach testified that he would not enforce the policy if it would have injurious results. The court of appeals found that the disputed policy was within the school board's power to regulate grooming and that the plaintiffs had not proved unique circumstances that would render the policy arbitrary or unreasonable.

5. *Humphries v. Lincoln Parish Sch. Bd.*, 467 So. 2d 870 (La. App. 1985)

Two high school students were removed from the football team for refusing to remove their mustaches, as required by the coach's

rules. They alleged that the rule was not uniformly applied and that it violated their rights to due process and equal protection. The trial court dismissed the action, and the court of appeals affirmed.

The court of appeals determined that there is no constitutionally protected right for a public high school student to wear his hair as he wishes and that school authorities have the power to regulate hairstyles if the regulations are reasonably intended to accomplish a constitutionally permissible objective. The coach testified that the grooming rule was part of a "total discipline program" intended to promote both academic and athletic excellence by football team members, and the evidence showed noteworthy progress in both academics and athletics.

C. Freedom of Religion

When a dress and grooming code implicates freedom of religion, courts have required school officials to demonstrate that the regulation is both necessary and not overly restrictive.

1. *Menora v. Illinois H.S. Assoc.*, 683 F.2d 1030 (7th Cir. 1982), *cert. denied*, 459 U.S. 1156 (1983)

Jewish basketball players brought suit against the Illinois High School Association, challenging a rule forbidding players to wear hats or other headwear, with the sole exception of a headband no wider than two inches. The reason for the rule was that headwear might fall off in the heat of play and pose a safety hazard. The rule was challenged as an infringement of the religious freedom of orthodox Jewish males, who are required by their religion to cover their heads at all times, with some exceptions that did not include playing basketball. Orthodox Jews who played basketball tried to comply with this requirement by wearing yarmulkes fastened to their hair with bobby pins. Because this is not a secure method of fastening, the Association has interpreted its rule to forbid wearing of yarmulkes during play.

The plaintiffs contended that this interpretation forced them to choose between either observing the requirements of their religion or participating in interscholastic basketball, which was the only interscholastic sport in which the two plaintiff schools

participated. The district court held that the application of the rule violated the Free Exercise Clause of the First Amendment; the court of appeals vacated and remanded.

The court of appeals believed that in this case it was not necessary to balance the competing interests of religious freedom and state authority. As plaintiff's counsel acknowledged at oral argument, the precise nature of the head covering and the method of keeping it on are not specified in Jewish law. The court concluded that plaintiff's had failed to make out a case that their First Amendment rights had been violated by the application of this safety rule to the insecurely fastened yarmulkes; however, the court believed that plaintiffs would be able to propose an alternate, more secure method of covering basketball players' heads. If plaintiffs refused or were unable to offer such an alternative, then their claim would fail, given the state's compelling interest in safety. On the other hand, if the Association refused to accommodate plaintiff's religious beliefs by accepting a proposed alternative that satisfied safety concerns, then the district court should proceed to determine whether plaintiffs were entitled to have the rule enjoined as a violation of religious freedom.

2. *Alabama & Coushatta Tribes v. Big Sandy Sch. Dist.*, 817 F. Supp. 1319 (E.D. Tex. 1993), *remanded*, 20 F.3d 469 (5th Cir. 1994)

Indian students sued school district, challenging dress code that restricted the hair length of male students, as violating their rights to free exercise of religion (along with their rights to free speech, due process, and equal protection and the right of parents to direct their children's education and religious upbringing). Because plaintiffs alleged a hybrid claim of involving their rights to free exercise of religion, free speech, due process, and equal protection, the court subjected the dress code claim to the highest level of scrutiny. The court held that, because the hair length regulation violated the students' First Amendment rights, the plaintiffs' were entitled to a preliminary injunction.

Plaintiffs established that minor members of the Tribe have a sincerely held religious belief in the spiritual properties of wearing their hair long. Although establishment of a dress code is a proper function of a school board, an exemption to school dress codes is

necessary where the regulation unduly burden the sincerely held religious beliefs of students. The board failed to show that the restriction on hair length was a valid means of achieving its objectives of maintaining discipline, fostering respect for authority, and projecting a good public image; however, school officials should be able to implement less restrictive alternatives that would be constitutional.

Testimony also established that long hair in Native American culture and tradition is rife with symbolic meaning; thus, the wearing of long hair by Native American students was a protected expressive activity, and one that did not unduly disrupt the educational process or interfere with the rights of other students. Therefore, the hair length regulation, as applied to these students, violated the free speech clause.

Although the hair regulation did not satisfy the heightened scrutiny applied to the First Amendment issues, it did satisfy the requirements of substantive due process. The regulation was rationally related to the legitimate goals of creating an atmosphere conducive to learning, of minimizing disruptions attributable to personal appearance, of fostering an attitude of respect for authority, and of preparing students to enter the workplace.

In one case, plaintiffs relied successfully on the Religious Freedom Restoration Act, rather than on the Free Exercise Clause.

3. *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995)

A central tenet of the Khalsa Sikh religion requires adherents to wear at all times five symbols of their faith, one of which is a ceremonial knife called a "kirpan." School officials refused to allow three young children who were members of this religion to wear their kirpans to school, because the school district banned all weapons, including knives, from school grounds. Students brought suit against the school officials, contending that the ban violated their rights to free exercise of religion as guaranteed by the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq.*, and asked for a preliminary injunction enjoining enforcement of the ban.

In ruling on the preliminary injunction, the district court had to

determine whether or not the children had demonstrated sufficient hardship together with a fair chance of success on the merits. Initially, the district court denied the motion, but the court of appeals reversed and remanded. On remand, the parties were unable to reach agreement and the district court imposed a compromise that permitted wearing of the kirpans, provided a number of restrictive safety precautions were observed. Finding no abuse of discretion, the court of appeals affirmed the issuance of the preliminary injunction.

To prevail under the Religious Freedom Restoration Act, the plaintiffs had to demonstrate that the application of the ban imposed a substantial burden on their exercise of religion, which they did. The burden then shifted to the school district to save its policy by proving that the ban on wearing kirpans was necessary to serve a compelling governmental interest. Although the school district had a compelling interest in school safety, school officials did not demonstrate that an absolute ban was necessary to serve that interest. The court of appeals suggested that if school officials disliked the injunction, they should use the opportunity to litigate the case on the merits to present adequate evidence from which a fully informed decision could be made.

VI. State Law Constraints

A. In addition to federal constitutional constraints on school authority to regulate student dress and grooming in the public schools, a number of states have constitutional or statutory provisions that sometimes, but not always, extend even greater protections to individual student freedoms. Two cases from Texas and one from Massachusetts serve to illustrate this recent development in the law.

1. *Barber v. Colorado Indep. Sch. Dist.*, 901 S.W.2d 447 (Tex. 1995)

An 18-year-old boy initiated a class-action lawsuit against the school district, contending that school rules regulating length of boys' hair and prohibiting boys from wearing earrings violated his constitutional rights. The trial court held that the rules about hair length and earrings violated the Equal Rights Amendment of the Texas Constitution. The court of appeals reversed, holding that the

student's cause of action did not justify judicial intervention in the school district's enforcement of the grooming code.

The Texas Supreme Court affirmed, holding that the student's claims did not manifest such an affront to his constitutional rights as to merit judicial intervention in the case. The supreme court noted that the constitutional rights of students in public high schools are not coextensive with the rights of adults in other settings, and expressly followed the Fifth Circuit's approach to reviewing high school grooming codes.

> There can, of course, be honest differences of opinion as to whether any government, state or federal, should as a matter of public policy regulate the length of hair cuts, but it would be difficult to prove by reason, logic, or common sense that the federal judiciary is more competent to deal with hair length than are the local school authorities and state legislatures of all our 50 states. *Karr v. Schmidt*, 460 F.2d 609, 611 (5th Cir. 1972).

2. *Bastrop Indep. Sch. Dist. Bd. of Trustees v. Toungate*, 922 S.W.2d 650 (Tex. App. 1996)

Plaintiff sued board contending hair length rule that applied only to boys was a violation of the Texas Equal Rights Amendment and a Texas anti-discrimination statute. An eight-year-old third-grade male student had been subjected to a 4-month in-school suspension, in which his "educational experience shrank to a stigmatizing isolation and deprivation of all social activities," *id.* at 654, for insisting on wearing a pig tail that hung below his collar.

The district court rendered judgment in favor of plaintiff, enjoining enforcement of the rule and declaring that the rule violated both the Equal Rights Amendment and the anti-discrimination statute. In regard to the Equal Rights Amendment, the court of appeals followed the supreme court's decision in *Barber v. Colorado Indep. Sch. Dist.*, 901 S.W.2d 447 (Tex. 1995), which held that no Texas court may act on an ERA challenge to a hair-length rule promulgated by a public school, and held that the trial court erred. But in regard to the claim based on the anti-discrimination statute, the court of appeals determined that "the statute has a pedigree independent of the ERA," 922 S.W.2d at 655, and held that

the *Barber* abstention rule did not apply.

The court of appeals balanced the boy's right to be free from gender discrimination against the board's legitimate goal of providing a quality education to its students. "To justify the heavy burden imposed on Zachariah by its discriminatory rule, the Board must show at a minimum that the rule actually furthers legitimate educational goals." *Id.* at 657. The court of appeals held that the trial court's well-reasoned decision and findings that none of the goals offered by the Board justified the rule were amply supported by the evidence and that the Board violated the anti-discrimination statute by imposing on the boy an unreasonably burdensome discipline and by refusing to let him participate in a regular school program, all on the basis of his sex.

3. *Pyle v. School Comm. of South Hadley*, 667 N.E.2d 869 (Mass. 1996)

Two high school students wore T-shirts--one reading "See Dick Drink. See Dick Drive. See Dick Die. Don't be a Dick" and the other reading "Coed Naked Band: Do It to the Rhythm"--that school officials decided were unacceptable school dress. Students sued in federal district court, alleging that the application of the dress code to the two T-shirts, violated their freedom of expression as protected by the First Amendment and by Massachusetts G.L. c. 71, § 82, which stated that "[t]he rights of students to freedom of expression in the public schools of the commonwealth shall not be abridged, provided that such right shall not cause any disruption or disorder within the school. Freedom of expression shall include without limitation, ..."

The federal judge decided the case solely on First Amendment grounds, after first determining that the state statute was a "red herring" and had no relevance to the analysis of a school administrator's efforts to curb vulgarity and sexual innuendo. The court did enjoin enforcement of that part of the dress code that prohibited the wearing of apparel that "harasses, intimidates, or demeans an individual or group of individuals because of sex, color, race, religion, handicap, national origin or sexual orientation." The court upheld, however, that part of the dress code prohibiting students from wearing clothing that "[h]as comments, pictures,

slogans, or designs that are obscene, profane, lewd or vulgar." *Pyle v. South Hadley Sch. Comm.*, 861 F. Supp. 157 (D. Mass. 1994).

On appeal of the denial of injunctive relief against the provision addressing vulgar language, the First Circuit Court of Appeals did not address the constitutional issue, but certified this question to the Massachusetts Supreme Court: "Do high school students in public schools have the freedom under G.L. c.71, § 82 to engage in non-school-sponsored expression that may reasonably be considered vulgar, but causes no disruption or disorder?" *Pyle v. South Hadley Sch. Comm.*, 55 F.3d 20 (1st Cir. 1995).

The Massachusetts Supreme Court answered the question certified in the affirmative. The court found the statutory language to be unambiguous and mandatory; the students' rights include expression of views through speech and symbols, "without limitation," and with no room to construe an exception for arguably vulgar, lewd, or offensive language absent a showing of disruption.

B. Those promoting the enactment of state laws that extend protections of personal liberty beyond those afforded by federal law need to think about the consequences for public education.

VII. School Uniforms

A. The United States Department of Education has published a "Manual on School Uniforms." <http://www.ed.gov/updates/uniforms.html>. Included is a "Users' Guide to Adopting a School Uniform Policy" recommending that schools:

1. Get parents involved from the beginning
2. Protect students' religious expression
3. Protect students' other rights of expression
4. Determine whether to have a voluntary or mandatory school uniform policy
5. When a mandatory school uniform policy is adopted, determine whether to have an "opt out" provision
6. Do not require students to wear a message
7. Assist families that need financial help
8. Treat school uniforms as part of an overall safety program

B. According to the Education Commission of the States, by February 1997 about ten states (not entirely clear how many) had statutes authorizing school boards to adopt school uniform policies. *See* "Education Watch - School Uniforms," <http://www.ecs.org>.

VIII. Concluding Observations

School officials do have authority to adopt and implement regulations for student appearance; however, that authority must be exercised within the bounds of the Constitution and any pertinent state law.

At some point, school officials can and should impose some restrictions on student appearance; the question is whether the regulation at issue is both legally sound and practical in application.

Student dress and grooming codes are a common feature of public school systems; however, the specifics differ from state to state, from district to district within a state, and from school to school within a district.

Courts will support student dress and grooming code provisions that are necessary to maintain an educational environment that is free from substantial distractions and disruptions. Courts, however, will not support regulations of student appearance that reflect little more than personal preferences of school officials.

Regulations of hair style are more difficult to justify than regulations of attire. During recent years, however, haircut codes have seldom been contested, while dress codes have often been at issue because of problems with gangs and with disruptive and inappropriate messages on clothing.

Many dress codes not only have provisions that regulate modes of dress, but also have provisions that implicate both explicit and symbolic forms of expression. The former are more easily justified than the latter.

Regulations pertaining to student appearance should be sufficiently specific to provide notice to those subject to the regulations and guidance to those charged with enforcement, yet sufficiently general to allow for some administrative discretion.

As noted in *Stoppkotte v. Grand Island Northwest High Sch.*, CV4: CV91-3034 (D. Neb. 1991) (unpublished memorandum and order), "An important factor in determining which party is likely to succeed on the merits of a case is who has the burden of proof, and can that party meet the burden." In the Eighth Circuit, public school officials should proceed on the assumption that (1) both dress and grooming codes will implicate a constitutionally protected liberty interest, (2) school officials will have the burden of justifying the regulation, and (3) they should be prepared to demonstrate that the regulation is necessary to carry out the educational mission of the school, but this they can do by producing evidence that establishes a rational and justifiable reason for the regulation.

Nebraska Council of School Attorneys
School Law Seminar
June 13, 1997
Donald F. Uerling

EA028608

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