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THE SCHOOLS VERSUS THE LONG HAIRS: AN EXERCISE IN LEGAL GOBBLEDYGOOK

Few issues currently being adjudicated before the federal courts produce as directly conflicting results as those involving the public school's power to regulate the personal appearance of its students. This inconsistency of precedent places a heavy burden upon students and school administrators, who must conduct themselves according to what courts determine to be the proper limits of school regulation and of the individual's right to dress and groom as he pleases. An equal burden is borne by attorneys confronted with the standard "long hair" situation. This note presents a survey of the federal litigation arising out of the conflict between the schools and the long hairs.¹ It will focus on the few

1. The cases surveyed include: *Ferrell v. Dallas Ind. School Dist.*, 261 F. Supp. 545 (N.D. Tex. 1966) [Dec. 9], *aff'd*, 392 F.2d 697 (5th Cir. 1968), *cert. denied*, 393 U.S. 856 (1968) (Held: School); *Davis v. Firment*, 269 F. Supp. 524 (E.D. La. 1967) [June 13], *aff'd*, 408 F.2d 1085 (5th Cir. 1969) (Held: School); *Zachry v. Brown*, 299 F. Supp. 1360 (N.D. Ala. 1967) [June 30] (Held: Student); *Breen v. Kahl*, 296 F. Supp. 702 (W.D. Wis. 1969) [Feb. 20], *aff'd*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1969) (Held: Student); *Griffin v. Tatum*, 300 F. Supp. 60 (N.D. Ala. 1969) [May 9] (Held: Student); *Crews v. Cloncs*, 303 F. Supp. 1370 (S.D. Ind. 1969) [Sept. 17] (Held: School); *Richards v. Thurston*, 304 F. Supp. 449 (D. Mass. 1969) [Sept. 23], *aff'd*, 424 F.2d 1281 (1st Cir. 1970) (Held: Student); *Giangreco v. Center School Dist.*, 313 F. Supp. 776 (W.D. Mo. 1969) [Sept. 25] (Held: School); *Miller v. Gillis*, 315 F. Supp. 94 (N.D. Ill. 1969) [Sept. 25] (Held: Student); *Westley v. Rossi*, 305 F. Supp. 706 (D. Minn. 1969) [Oct. 9] (Held: Student); *Brick v. Board of Educ.*, 305 F. Supp. 1316 (D. Colo. 1969) [Nov. 7] (Held: School); *Stevenson v. Wheeler County Bd. of Educ.*, 306 F. Supp. 97 (S.D. Ga. 1969) [Nov. 17], *aff'd*, 426 F.2d 1154 (5th Cir. 1970), *cert. denied*, 91 S. Ct. 355 (1970) (Held: School); *Calbillo v. San Jacinto Junior College*, 305 F. Supp. 857 (S.D. Tex. 1969) [Nov. 17] (Held: Student); *Sims v. Colfax Community School Dist.*, 307 F. Supp. 485 (S.D. Iowa 1970) [Jan. 16] (Held: Student); *Pritchard v. Spring Branch Ind. School Dist.*, 308 F. Supp. 570 (S.D. Tex. 1970) [Jan. 22] (Held: School); *Wood v. Alamo Heights Ind. School Dist.*, 308 F. Supp. 551 (W.D. Tex. 1970) [Jan. 27] (Held: School); *Crossen v. Fatsi*, 309 F. Supp. 114 (D. Conn. 1970) [Feb. 16] (Held: Student); *Newhaus v. Torrey*, 310 F. Supp. 192 (N.D. Cal. 1970) [Mar. 10] (Held: School); *Schwartz v. Galveston Ind. School Dist.*, 309 F. Supp. 1034 (S.D. Tex. 1970) [Mar. 10] (Held: School); *Reichenberg v. Nelson*, 310 F. Supp. 248 (D. Neb. 1970) [Mar. 10] (Held: Student); *Lovelace v. Leechburg Area School Dist.*, 310 F. Supp. 579 (W.D. Pa. 1970) [Mar. 17] (Held: Student); *Farrell v. Smith*, 310 F. Supp. 732 (S.D. Me. 1970) [March 18] (Held: School); *Brownlee v. Bradley County, Tennessee Bd. of Educ.*, 311 F. Supp. 1360 (E.D. Tenn. 1970) [April 10] (Held: School); *Gfell v. Rickleman*, 313 F. Supp. 364 (N.D. Ohio 1970) [April 28] (Held: School); *Dunham v. Pulsifer*, 312 F. Supp. 411 (D. Vt. 1970) [May 5] (Held: Student); *Corley v. Daunhauer*, 312 F. Supp. 811 (E.D. Ark. 1970) [May 8] (Held: School); *Christmas v. El Reno Bd. of Educ.*, Ind. School Dist. No. 34, 313 F. Supp. 618 (W.D. Okla. 1970) [June 4] (Held: School); *Livingston v. Swanquist*, 314 F. Supp. 1 (N.D. Ill. 1970) [June 9] (Held: School); *Alexander v. Thompson*, 313 F. Supp. 1389 (C.D. Cal. 1970) [June 12] (Held: Student); and *Jackson v. Dorrier*, 424 F.2d 213 (6th Cir.), *cert. denied*, 91 S.Ct. 55 (1970) (Held: School). Case order determined by trial date.

similarities or trends which can be gleaned from the fact patterns, the purposes for which the school grooming codes were adopted, and legal issues which were raised by the litigants.

Although as one judge put it, "each case must be decided upon its own particular facts,"² there is little in the way of significant factual difference among the cases. The most common controversy features a high school student³ who has been suspended⁴ from school because the length or style of his hair⁵ was in violation of a written dress code.⁶ The student wears his hair long because he likes it that way,⁷ and the Board

2. *Farrell v. Smith*, 310 F. Supp. 732, 738 (D. Me. 1970) (Gignoux, J.). This standard was clearly set by the appellate court decision in *Ferrell v. Dallas Ind. School Dist.*, 392 F.2d 697, 702 (5th Cir. 1968), where Judge Gewin said: "The decided cases clearly demonstrate that each case must be decided in its own particular setting and factual background and within the context of the entire record before the court in determining whether the rule or the action about which the complaint is made is arbitrary, capricious, unreasonable or discriminatory. . . ."

3. Of the thirty cases utilized for this analysis, twenty-six involved high school students. The non-high school cases were: *Farrell v. Smith*, 310 F. Supp. 732 (S.D. Me. 1970) (post-high school technical institute); *Reichenberg v. Nelson*, 310 F. Supp. 248 (D. Neb. 1970) (State College); *Calbillo v. San Jacinto Junior College*, 305 F. Supp. 857 (S.D. Tex. 1969) (Public Junior College); *Zachry v. Brown*, 299 F. Supp. 1360 (N.D. Ala. 1967) (Public Junior College). The arguments made on each side do not differ from those made where a high school student is involved. The last three held for the student, while *Farrell* held for the school. *Farrell* determined that the school's interest in students' employment opportunities was reasonable and the regulation was directly related to that end. See also *King v. Saddleback Junior College Dist.*, 425 F.2d 426 (9th Cir. 1970).

4. Students were refused admission in *Miller v. Gillis*, 315 F. Supp. 94 (N.D. Ill. 1969); *Crews v. Cloncs*, 303 F. Supp. 1370 (S.D. Ind. 1969); *Westley v. Rossi*, 305 F. Supp. 706 (D. Minn. 1969); *Ferrell v. Dallas Ind. School Dist.*, 261 F. Supp. 545 (N.D. Tex. 1966). This distinction has not been used as a basis for decision, nor does it justify distinguishing cases. But see *Giangreco v. Center School Dist.*, 313 F. Supp. 776, 780 (W.D. Mo. 1969), where a student was denied admission rather than admitted and then expelled or suspended; therefore, procedural due process requirements are not as rigid.

5. Cf. *Jackson v. Dorrier*, 424 F.2d 213 (6th Cir. 1970) (mustache, beard and hair); *Alexander v. Thompson*, 313 F. Supp. 1389 (C.D. Cal. 1970) (sideburns); *Crossen v. Fatsi*, 309 F. Supp. 114 (D. Conn. 1970) (mustache and sideburns); *Farrell v. Smith*, 310 F. Supp. 732 (S.D. Me. 1970) (mustache and beard as well as hair); *Lovelace v. Leechburg Area School Dist.*, 310 F. Supp. 579 (W.D. Pa. 1970) (mustache); *Stevenson v. Wheeler County Bd. of Educ.*, 306 F. Supp. 97 (S.D. Ga. 1969) (mustache and beard); *Giangreco v. Center School Dist.*, 313 F. Supp. 776 (W.D. Mo. 1969) (beard and hair); *Calbillo v. San Jacinto Junior College*, 305 F. Supp. 857 (S.D. Tex. 1969) (beard). In one case, a girl was suspended because her bangs came below her eyebrows. *Sim v. Colfax Community School Dist.*, 307 F. Supp. 485 (S.D. Iowa. 1970).

6. There was no written regulation in *Ferrell v. Dallas Independent School Dist.*, 261 F. Supp. 545 (N.D. Tex. 1966); *Richards v. Thurston*, 304 F. Supp. 449 (D. Mass. 1969); or *Stevenson v. Wheeler County Bd. of Educ.*, 306 F. Supp. 97 (S.D. Ga. 1969). In the appellate decision of *Richards v. Thurston*, 424 F.2d 1281, 1282 (1st Cir. 1970), Judge Coffin determined the absence of a written regulation to be immaterial and said ". . . we would not wish to see school officials unable to take appropriate action in facing a problem of discipline or distraction simply because there was no preexisting rule on the books." He affirmed the District Court holding for the student.

7. Students frequently supplement this reason with additional purposes related to a form of expression, a mustache, or a beard, as a reflection of older generation's values, and as an

promulgated the code because non-conforming hair styles might tend to disrupt the normal and orderly operation of the school.⁸ The student has no financial need for wearing his hair long;⁹ his parents don't like it, but accede to his wishes because they believe he has a right to wear his hair the way he wants to;¹⁰ and his unusual appearance has not created any disruption in the school, nor has it endangered anyone's health.¹¹ The

expression of self. *See, e.g.*, *Alexander v. Thompson*, 313 F. Supp. 1389, 1393 (C.D. Cal. 1970); *Giangreco v. Center School Dist.*, 313 F. Supp. 776 (W.D. Mo. 1969); *Westley v. Rossi*, 305 F. Supp. 706, 709 (D. Minn. 1969).

8. This is the primary purpose for regulation in almost every instance. Some schools have offered supplementary purposes. *See Brownlee v. Bradley County, Tennessee Bd. of Educ.*, 311 F. Supp. 1360, 1366 (E. D. Tenn. 1970); *Farrell v. Smith*, 310 F. Supp. 732 (D. Me. 1970); *Wesley v. Rossi*, 305 F. Supp. 706, 711 (D. Minn. 1969). *See also* note 24 *infra* and accompanying text.

9. In three cases the students were members of local bands and claimed that long hair was necessary to maintain their image. This was a primary issue in *Ferrell v. Dallas Ind. School Dist.*, 261 F. Supp. 545 (N.D. Tex. 1966), *aff'd*, 392 F.2d 697 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968), because the students' agent used the expulsion incident as a promotion gimmick. The appellate court said:

. . . The action taken by the school authorities does not, in our view, interfere with appellants' right to continue in their chosen occupation of professional rock and roll musicians. It is common knowledge that many performers are required to use special attire and makeup, including wigs or hairpieces, for their public appearances. At this stage in appellants' lives school may be more important than their commercial activities. In any event, we do not feel that their business activity is eliminated, as a practical matter because of the school's rules and regulations.

392 F.2d at 704. Immediately after the boys were denied admittance they walked out of the school and held a press conference which had been arranged by their "agent". They then proceeded directly to a local recording studio and recorded a song describing the incident which was distributed to the local radio stations. The court held for the school as did the court in *Jackson v. Dorrier*, 424 F.2d 213 (6th Cir.), *cert. denied*, 91 S. Ct. 55 (1970). This factor aided the junior college student in *Zachry v. Brown*, 299 F. Supp. 1360 (N.D. Ala. 1967). *See also* *Leonard v. School Committee of Attleboro*, 349 Mass. 704, 212 N.E.2d 468 (1965) (one of the first state court decisions).

10. The two sets of parents involved in *Livingston v. Swanquist*, 314 F. Supp. 1, 5 (N.D. Ill. 1970) received a reprimand from the judge:

Although parents of both boys oppose the long hair style affected by their sons, they apparently find it easier to acquiesce rather than discipline them in this matter. The parents thus pass on their responsibility to the school and community as too many parents are doing in this permissive age, and the parents thereby contribute to the lack of discipline and lawlessness among the youth of our country.

11. In *Crews v. Clones*, 303 F. Supp. 1370 (S.D. Ind. 1969), the court indicates that "considerable testimony" was presented by defendants that "long hair on boys created class disruption and discipline problems," and that "there were health and safety hazards involved in physical education classes." *Id.* at 1373. Later the court found ". . . that plaintiff's appearance directly caused disturbances and disruption of the educational process, both in the academic classroom and during physical education classes." *Id.* at 1375-76. No specific instances were cited. This was the sole basis for distinguishing away *Breen v. Kahl*, 296 F. Supp. 702 (W.D. Wisc. 1969) and *Griffin v. Tatum*, 300 F. Supp. 60 (N.D. Ala. 1969). *Giangreco v. Center School Dist.*, 313 F. Supp. 776 (W.D. Mo. 1969); *Brick v. Board of Educ.*, 305 F. Supp. 1316 (D. Colo. 1969) also used

code is a general school policy,¹² developed by a committee of parents, teachers, students and administrators;¹³ and was not designed to apply to a particular student or any class of students in an arbitrary or capricious manner.¹⁴

Discrepancies from this general factual situation are usually immaterial except when a disruption or disturbance has in fact occurred as a result of the student's long hair.¹⁵ In these cases, when the school can show that prevention of disruption in the classroom and campus is the primary purpose behind the code, and that a disturbance has occurred as a result of the long hair, precedent strongly supports upholding the regulation.¹⁶ This is true even when the disturbance is caused by other students responding to plaintiff whose only irregular act was letting his hair grow.¹⁷ The difficulty for the schools is proving a causal relationship between the hair and the disturbance. Only three of the thirty cases

disruptive incidents as a basis for upholding the school's regulation. *But see* *Sims v. Colfax Community School Dist.*, 307 F. Supp. 485 (S.D. Iowa 1970) (eye observation in typing class).

12. Two cases dealt with grooming regulations for participation in athletic events and were not a part of general school policy. *Neuhaus v. Torrey*, 310 F. Supp. 192 (N.D. Cal. 1970) (held for the school); *Dunham v. Pulsifer*, 312 F. Supp. 411, 414 n. 1 (D. Vt. 1970) (held for the student) where the court said: "It is to be noted that under the existing athletic code, Billy Kidd, the world famous skier, would be unable to make the ski team. Joe Pepitone and Ken Harrelson, two colorful and popular major league ball players, would be unable to make the baseball team. Joe Namath would be barred from the football team and Ron Hill who won the Boston Marathon on April 19 of this year would not even be permitted to try out for the track team." *Corley v. Daunhauer*, 312 F. Supp. 811 (E.D. Ark. 1970) found a hair regulation for students playing in the school band to be valid.

13. *See* *Crossen v. Fatsi*, 309 F. Supp. 114 (D. Conn. 1970); *Alexander v. Thompson*, 313 F. Supp. 1389 (C.D. Cal. 1970). The fact that students had a role in drafting the regulation appears to have been a significant factor in only one decision. *Wood v. Alamo Heights Ind. School Dist.*, 308 F. Supp. 551, 552 (W.D. Tex. 1970).

14. *Lovelace v. Leechburg Area School Dist.*, 310 F. Supp. 579 (W.D. Pa. 1970), upheld the school's regulation as reasonable but found its application to plaintiff arbitrary. ". . . [T]hough we find the Leechburg regulation reasonable and valid, we are not persuaded of its reasonableness as applied to plaintiff. His mustache is *de minimis* and practically imperceptible. It is merely a natural growth, not a cultivated adornment. We do not believe that plaintiff has violated the code. To exclude him from school for such a non-violation is arbitrary, and a violation of due process." *Id.* at 588.

15. The degree to which the relationship between long hair and disturbance must be established requires something more than an analysis of the cases to ascertain. *See* note 11 *supra*.

16. The disruption factor in these cases is very similar to the disruption factor in the "freedom button" cases where the same court speaking through the same judge in back to back decisions on the same issue upheld the students' right in *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966) and upheld the school's regulation in *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966) because there were disturbances related to the buttons. Several of the "hair" courts have indicated that if there had been a disturbance created by the "long hair", the regulation would be justified. *See, e.g.*, *Westley v. Rossi*, 305 F. Supp. 706 (D. Minn. 1969).

17. *See* *Giangreco v. Center School Dist.*, 313 F. Supp. 776, 779 (W.D. Mo. 1969).

surveyed found that a related disruption occurred.¹⁸ The result is that the presence of actual disruption is a significant factor favoring the school but the relationship must be established in the face of the total absence of any logical relationship.¹⁹

Other distinguishing factors become relevant when the purpose of the regulation is something other than preventing disruption. It is clear that if the regulation is designed to protect the health or safety of school citizens, it will be upheld.²⁰ In one instance, community "aesthetic" standards were considered a valid purpose to which the grooming regulation reasonably applied, particularly "[I]n these days of growing environmental concern."²¹ Safeguarding students' future employment opportunities has been found to be a valid purpose for regulating appearance.²² Generally, where the regulation was promulgated for some purpose other than ". . . undifferentiated fear or apprehension of

18. See note 11 *supra*.

19. The argument favoring the regulation in these situations is not dissimilar to that found in the line of cases beginning with *Feiner v. New York*, 340 U.S. 315 (1951), where the Court held that police could restrict an individual's right to free speech if his actions and speech were likely to invite riotous behavior in others and place the speaker in jeopardy. An individual's hair length is unlikely to invite a riot but it is always easier for school authorities to remove the innocent source of the problem than to protect it from many culprits. In one case the court notes that the principal conceded that it was the boys who were picking on the plaintiff that should have been disciplined. *Miller v. Gillis*, 315 F. Supp. 94, 98 (N.D. Ill. 1969).

20. No regulation has been challenged that has been designed for health purposes alone and "health and safety" has generally not been effective where preventing disruption has been the regulation's aim. See, e.g., *Crews v. Cloncs*, 303 F. Supp. 1370 (S.D. Ind. 1969) where the argument was raised but did not play an important role in the decision, and *Breen v. Kahl*, 296 F. Supp. 702, 704 (W.D. Wisc. 1969), where Judge Doyle said: "The record contains no suggestion that the length of the hair constituted a health problem or physical obstruction or danger to any person; I find that it did not." In the cases involving athletic regulations the health argument was not even discussed. See note 12 *supra*.

21. *Brownlee v. Bradley County, Tennessee Bd. of Educ.*, 311 F. Supp. 1360, 1366 (E.D. Tenn. 1970). The judge reasoned: While at one time aesthetics was not considered a valid ground for regulation, "aesthetic considerations have increasingly come to be recognized as a proper basis for regulation. . . ." He then referred to such examples as zoning regulations, appearance of junk yards, signs and billboards along interstate highways and the use and maintenance of residential property as based on aesthetics. "A sense of orderliness, a sense of propriety, and a sense of beauty are distinguishing characteristics of the human species. While not always explainable in terms of concrete reason, these matters are facts of human life. They form the basis of the concept commonly referred to as aesthetics. In these days of growing environmental concern any court denying that aesthetic considerations may form the basis for public regulation would doubtless find itself swimming against the current in very murky legal waters." *Id.* at 1366-67. Based on these "aesthetic" considerations the court concluded that "the regulation of hair length on male students at Bradley Central High School was neither arbitrary nor capricious, nor was it devoid of reason." *Id.* at 1367.

22. *Farrell v. Smith*, 310 F. Supp. 732 (S.D. Me. 1970). See note 3 *supra*.

disturbance”²³ it was usually upheld if any reasonable relationship between means and end can be shown. But even where the regulation’s sole purpose is prevention of disruption, some cases have held it to be nonetheless valid.²⁴

A good example of the serious difficulty judges have in dealing with almost identical fact patterns can be found in a comparison of *Miller v. Gillis*²⁵ and *Livingston v. Swanquist*²⁶ from the Northern District of Illinois. *Miller* was decided first²⁷ and placed great reliance on *Breen v. Kahl*,²⁸ though the court reached its decision on different grounds. The court held that the regulation, designed to prevent disruption, violated the equal protection clause of the fourteenth amendment because it was “incapable of meeting the need to which the regulation was directed,”²⁹ and it “creates an arbitrary class of those few people who wish to wear their hair in a manner differing from the masses—arbitrary in that the regulation makes the acquisition of all education depend upon the length of one’s hair.”³⁰

Livingston, on the same basic facts, with a similar regulation

23. *Tinker v. Des Moines Ind. Community School Dist.*, 393 U.S. 503, 508 (1968).

24. See *Livingston v. Swanquist*, 314 F. Supp. 1 (N.D. Ill. 1970); *Gfell v. Rickleman*, 313 F. Supp. 364 (N.D. Ohio 1970); *Pritchard v. Spring Branch Ind. School Dist.*, 308 F. Supp. 570 (S.D. Tex. 1970); *Wood v. Alamo Heights Ind. School Dist.*, 308 F. Supp. 551 (W.D. Tex. 1970); *Stevenson v. Wheeler County Bd. of Educ.*, 306 F. Supp. 97 (S.D. Ga. 1969), *aff’d*, 426 F.2d 1154 (5th Cir.), *cert. denied*, 91 S. Ct. 355 (1970); *Davis v. Firment*, 296 F. Supp. 524 (E.D. La. 1967), *aff’d*, 408 F.2d 1085 (5th Cir. 1969); *Ferrell v. Dallas Ind. School Dist.*, 261 F. Supp. 545 (N.D. Tex. 1966), *aff’d*, 393 F.2d 697 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968). Each of these cases upheld the school’s regulation even though it was promulgated for the purpose of preventing disruption.

25. 315 F. Supp. 94 (N.D. Ill. 1969) (Parsons, J.).

26. 314 F. Supp. 1 (N.D. Ill. 1970) (Perry, J.).

27. *Miller* was decided on September 25, 1969 and *Livingston* was decided on June 9, 1970. The cases were reported in the reverse order with *Livingston* in volume 314 and *Miller* in 315 of the Federal Supplement.

28. 296 F. Supp. 702 (W.D. Wis. 1969). See *Miller v. Gillis*, 315 F. Supp. 94, 99, 100 (N.D. Ill. 1969).

29. 315 F. Supp. at 100 where the court says:

A regulation promulgated under the authority of a state violates the equal protection clause of the Fourteenth Amendment if it falls within one of [sic] more of the following four categories:

(1) The regulation is not necessary to the exercise of the inherent police powers of the state to provide for the health, education and general welfare of the people of that state;

(2) The regulation once promulgated is incapable of meeting the need to which the regulation is directed;

(3) The regulation creates, by its enforcement, an evil greater than that evil sought to be corrected; and

(4) The regulation is arbitrary in defining a class of people to which it applies.

30. *Id.* at 101.

designed for the same purpose, came to the opposite conclusion and said: "In this court's opinion defendants have established that violations of the school's dress code can be disruptive and can adversely affect discipline and decorum in the classroom."³¹ Neither court found any disruptions that were directly related to the length of plaintiff's hair³² and there is no indication that the evidence or testimony on this point was more impressive or credible in *Livingston* than in *Miller*.³³ The task of distinguishing the two cases fell upon the judge in *Livingston* who said: "A careful reading of that case [*Miller*] reveals that Judge Parsons was concerned with the equal protection clause of the Fourteenth Amendment as it applied to students" at the school plaintiff attended. "The record showed that several male teachers at the school were in violation of the school's dress regulations and that the Barrington dress code required different treatment of the student from his teacher, which was clearly unreasonable and violated the equal protection clause."³⁴ The *Miller* code³⁵ did not *require* different treatment of student and teacher, and the discussion of the long haired teachers was used to exemplify the arbitrariness of a rule designed to prevent disruption when teachers, without administrative restraint, as well as plaintiff students,

31. *Livingston v. Swanquist*, 314 F. Supp. 1, 6 (N.D. Ill. 1970).

32. There apparently was a difference in the kind of minor plaintiffs involved in the two cases or at least a difference in the judge's perception of them. In *Livingston* the court said:

From all of the evidence and its observation of minor plaintiffs' attitudes, the court finds and concludes Jack Livingston and Tim Hellberg are not interested in attending school. Once readmitted under the agreement, they were truant. They do not want to go to school.

314 F. Supp. at 6. Compare *Miller v. Gillis*, 315 F. Supp. at 95:

It must be made clear from the outset that this is not a case involving a revolutionary type young man, who by bizarre attire, filth of body and clothes, obscene language and subversive-like organizational activity, seeks to wage war against the established institutions of the community or nation. It is not a case involving youth commonly referred to as "beatnik" or "hippies" or "yippies". It is simply a case of a seventeen year old boy wearing hair substantially longer than that permitted by the school's regulations.

33. *Livingston* pointed out that defendants had produced four "expert" witnesses who claimed that there was a "direct correlation between dress and grooming and good behavior, discipline and a teaching climate in the classroom." Plaintiff, evidently, produced no testimony to refute this. 314 F. Supp. at 6. Compare *Miller*, where the court said: "The School Board and its lawyers, having exhaustively argued and extensively briefed this point, have failed to show that the dress code, in its present form, is necessary to prevent disruptive incidents in the school." 315 F. Supp. at 101.

34. 314 F. Supp. at 9.

35. 315 F. Supp. at 97:

IV. Hair

- A. Hair should always appear clean and neat, tapered up the back of the neck, and not protruding over the ears or the eyebrows.

1. Students must be clean-shaven and sideburns should not extend lower than the earlobes.

wore their hair beyond the limits of the code and no disruption occurred.³⁶ The difference in treatment of students and teachers was not the basis for the decision and the arguments presented give no indication that Judge Parsons should be any more concerned about equal protection than should Judge Perry.³⁷

Besides the precariousness of relying on factual distinctions, the attorney can find little guidance in an analysis of the legal issues and judicial reasoning. Once in the federal court on a constitutional question,³⁸ the student must show that some right exists and has been violated.³⁹ If successful, the school must bear a "substantial burden of

36. *Id.* at 101.

37. After discussing the details in the procedure followed in adopting the dress code, Judge Perry said:

Minor plaintiffs simply refuse to comply, wanted the code repealed, and demanded that school authorities readmit them in spite of the fact they were admittedly in violation and defiance of the grooming provision. They, in effect, asked unequal protection of the law for themselves, that a special exception be made for them, and that the code apply to all others but not to them.

314 F. Supp. at 4-5. Other than the last statement, which is inconsistent with a demand that the code be repealed, this is basically the same request made by plaintiffs in all long hair cases. It is identical to the plea of plaintiff in *Miller v. Gillis*, 315 F. Supp. at 97-98.

38. Jurisdiction is generally admitted without controversy under 42 U.S.C. § 1983 (1968). *See Westley v. Rossi*, 305 F. Supp. 706 (D. Minn. 1969); *Zachry v. Brown*, 299 F. Supp. 1360 (N.D. Ala. 1967). Other sections frequently invoked include 28 U.S.C. §§ 1343(3) & (4). In *Crews v. Cloncs*, 303 F. Supp. 1370, 1372 (S.D. Ind. 1969), jurisdiction was invoked under "Title 28 U.S.C. §§ 1331, 1343(3) and (4), 2201 and 2202; Title 42 U.S.C. §§ 1981 *et seq.*: 'The Civil Rights Act of 1964'; and the Constitution of the United States, more particularly the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments thereto." The only case to refuse jurisdiction because of failure to exhaust state administrative and judicial remedies, was *Schwartz v. Galveston Independent School Dist.*, 309 F. Supp. 1034 (S.D. Tex. 1970). The court there went into considerable detail in discussing the applicability of 42 U.S.C. § 1983 and held that § 1983 required complete exhaustion of all state remedies before it could be invoked to support federal jurisdiction. The court abstained from accepting jurisdiction and made no determination on the merits. *Contra Westley v. Rossi*, 305 F. Supp. 706 (D. Minn. 1969). In *Alexander v. Thompson*, 313 F. Supp. 1389 (C.D. Cal. 1970), the court granted the student an interim injunction on the merits but abstained from making final judgment until the state courts could act, and reserved jurisdiction in the case in the event it was not satisfied with the state courts' decision.

39. Many courts have not required this first step, placing the burden of justifying the regulation immediately upon the school. The sole issue on appeal in *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970), was which party had the burden of proof. The school claimed that the student "had failed to carry his burden of showing either that a fundamental right had been infringed or that defendant had not been motivated by a legitimate school concern." *Id.* at 1282. Judge Coffin, writing the unanimous opinion of the three judge panel, disagreed and held that the liberty in question was within the "sphere of personal liberty" protected by the due process clause of the fourteenth amendment and "[I]n the absence of an inherent, self-evident justification on the face of the rule, we conclude that the burden was on the defendant." *Id.* at 1286.

justification”⁴⁰ to uphold the regulation.⁴¹ A formidable alternative for the student is to claim that the regulation violates the equal protection clause of the fourteenth amendment.⁴² Courts have come to contrary conclusions on all three of these issues.

The student claims: (1) that his long hair is a form of expression and emanates from and is protected by the first amendment;⁴³ (2) the fourth amendment, combined with the first amendment, form a “vast ‘penumbra’ of constitutional protection,” which makes free choice regarding personal appearance a constitutional liberty;⁴⁴ (3) length of hair and choice of clothing are within the scope of the right to privacy

40. This is the most frequently used description of the test determining the validity of the regulation. It was first applied to hair cases in *Breen v. Kahl*, 296 F. Supp. 702 (W.D. Wis. 1969) and strongly supported on appeal in 419 F.2d 1034 (7th Cir. 1969) by Judge Kerner. The language is adopted from Mr. Justice White’s concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479, 503 (1965).

41. The alternative to the “substantial burden of justification” test is a reasonableness test. See *Ferrell v. Dallas Ind. School Dist.*, 392 F.2d 697 (5th Cir. 1968); *Brownlee v. Bradley County, Tennessee Bd. of Educ.*, 311 F. Supp. 1360 (E.D. Tenn. 1970); *Davis v. Firment*, 269 F. Supp. 524 (E.D. La. 1967). Other tests have been applied which are similar to these two. See *Sims v. Colfax Community School Dist.*, 307 F. Supp. 485 (S.D. Iowa 1970); *Westley v. Rossi*, 305 F. Supp. 706 (D. Minn. 1969); *Ferrell v. Dallas Ind. School Dist.*, 261 F. Supp. 545 (N.D. Tex. 1966). The various tests may in theory be different, but as applied to long hair it is very difficult to identify distinguishing characteristics either in reasoning or result.

42. See, e.g., *Zachry v. Brown*, 299 F. Supp. 1360 (N.D. Ala. 1967); *Miller v. Gillis*, 315 F. Supp. 94 (N.D. Ill. 1969).

43. The primary source for this argument is *Tinker v. Des Moines Ind. Community School Dist.*, 393 U.S. 503 (1968), where the Court declared that wearing armbands in protest of the war in Vietnam was a form of “symbolic” expression protected by the first amendment. Quotations from *Tinker* litter the pages of long hair cases in support of various student arguments, but one statement by Justice Fortas has created a great deal of confusion: “The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or department. [Citing *Ferrell*] *Id.* at 507-08. Some courts upholding the regulation have used this statement to show Supreme Court approval of their decision and an acceptance of *Ferrell*. See, e.g., *Giangreco v. Center School Dist.*, 313 F. Supp. 776, 780 (W.D. Mo. 1969). Other cases have distinguished hair length from regulations on clothing, skirts, smoking, etc., because restrictions on hair length “invades private life beyond the school jurisdiction,” *Westley v. Rossi*, 305 F. Supp. 706, 713 (D. Minn. 1969), and suggest the Supreme Court was merely limiting the issues involved in *Tinker*. See, e.g., *Farrell v. Smith*, 310 F. Supp. 732 (D.Me. 1970).

44. This argument derives its source from *Griswold v. Connecticut*, 381 U.S. 479 (1965). The “penumbra” theory has attracted considerable attention in some decisions but no judge has held that the right to free choice in personal grooming emanates from this source. See, e.g., *Breen v. Kahl*, 296 F. Supp. 702 (W.D. Wis. 1969), *aff’d*, 419 F.2d 1034 (7th Cir. 1969); *Richards v. Thurston*, 304 F. Supp. 449 (D. Mass. 1969), *aff’d*, 424 F.2d 1281 (1st Cir. 1970). One student contended that his expulsion from school for violating the regulation was cruel and unusual punishment thus violating the eighth amendment. The contention was dismissed as being “wholly without merit.” *Davis v. Firment*, 269 F. Supp. 524, 529 (E.D. La. 1967).

and emanate from the ninth amendment.⁴⁵ If the liberty does not find its source in the Bill of Rights, applicable to the states through the fourteenth amendment, then (4) the due process clause of the fourteenth amendment itself supplies the source.⁴⁶ A final and less frequently used argument is that (5) the regulation creates an arbitrary class of individuals and denies those individuals the equal protection of the law.⁴⁷

The school claims: (1) that the student has no right to appear in school with an extreme hair style or outlandish appearance;⁴⁸ (2) the school board is given authority by the state legislature to adopt any rules necessary to maintain the smooth and orderly operation of the educational process;⁴⁹ (3) questions involving school board authority should be resolved on a non-constitutional basis;⁵⁰ (4) the presence of long haired boys in the school is a disruptive influence and the hair regulation is reasonably designed to prevent those disturbances;⁵¹ (5) the

45. This is another *Griswold* argument based on Justice Goldberg's concurring opinion, 381 U.S. 479, 497 (1965) which is frequently raised and has received similar treatment to the "penumbra" theory, see note 44 *supra*. Compare *Davis v. Firment*, 269 F. Supp. 524 (E.D. La. 1967), *aff'd*, 408 F.2d 1085 (5th Cir. 1969) with *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970). *Griffin v. Tatum*, 300 F. Supp. 60, 62 n.6 (M.D. Ala. 1969), identified *Griswold* as a case "involving somewhat similar issues. . . ."

46. See *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970); *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970); *Farrell v. Smith*, 310 F. Supp. 732 (D. Me. 1970).

47. See, e.g., *Zachry v. Brown*, 299 F. Supp. 1360 (N.D. Ala. 1967); *Miller v. Gillis*, 315 F. Supp. 94 (N.D. Ill. 1969).

48. This argument has received very little support and has fallen into disuse since *Breen*. *Davis v. Firment*, 269 F. Supp. 524, 529 (E.D. La. 1967), *aff'd*, 408 F.2d 1085 (5th Cir. 1969), held that "free choice of grooming" was not a fundamental right. The right is generally accepted to exist and deserve protection under the due process clause of the fourteenth amendment. See, e.g., *Sims v. Colfax Community School Dist.*, 307 F. Supp. 485, 488 (S.D. Iowa 1970).

49. School board authority to make rules and regulations is not subject to debate. State legislatures have not involved themselves in the "long hair" controversy and, therefore, statutes empowering school boards "to establish rules with respect to discipline" are not at issue. ILL. REV. STAT. ch. 122, § 24-24 (1963).

50. See Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373 (1969); 3 HARV. LEGAL COMM. 1 (1966). See also *Leonard v. School Committee of Attleboro*, 349 Mass. 704, 212 N.E.2d 468 (1965). This is generally agreed to, but where a person's constitutional rights are involved, the nonconstitutional approach is inadequate. *Richards v. Thurston*, 424 F.2d 1281, 1282 (1st Cir. 1970).

51. This argument, combined with the following one, has been by far the most effective for the schools. See *Ferrell v. Dallas Ind. School Dist.*, 261 F. Supp. 545 (N.D. Tex. 1966), *aff'd*, 392 F.2d 697 (5th Cir. 1968), *cert. denied*, 393 U.S. 856 (1968); *Davis v. Firment*, 269 F. Supp. 524 (E.D. La. 1967), *aff'd*, 408 F.2d 1085 (5th Cir. 1969); *Wood v. Alamo Heights Ind. School Dist.*, 308 F. Supp. 551 (W.D. Tex. 1970); *Gfell v. Rickleman*, 313 F. Supp. 364 (N.D. Ohio 1970); *Livingston v. Swanquist*, 314 F. Supp. 1 (N.D. Ill. 1970); *Jackson v. Dorrier*, 424 F.2d 213 (6th Cir.,) *cert. denied*, 91 S. Ct. 55 (1970); *Christmas v. El Reno Bd. of Educ.*, Ind. School Dist. No. 34, 313 F. Supp. 618

regulation is reasonable, clear, applicable to all male students, and was not arbitrarily applied to the plaintiff.⁵²

Two judicial attitudes emerge. If the judge is convinced that personal choice in grooming is in the nature of a fundamental right protected by the fourteenth amendment, a substantial burden of showing a compelling need for the regulation falls on the school. Once this standard is established, it becomes very difficult for the school to meet its requirement of justification. If, on the other hand, the judge accepts the school's conviction that disturbances can be caused by non-conforming student appearance, then the student faces the near impossible task of showing that this liberty emanates from a constitutional source which requires something greater than "reasonableness" as the test for infringement. When the judge is convinced that the regulation is reasonable and for a valid purpose, he is clearly within the bounds of good faith when he holds this liberty not to be protected by the Constitution, since the Supreme Court has not yet decided the issue. These two factors should not be confused with the language of the cases. The words and the tests are and have been used interchangeably. In almost every case the fundamental attitude of the judge or judges toward nonconforming youth and the schools as an arm of almighty government comes through with unspoken clarity.⁵³

The literature on the subject continues to grow.⁵⁴ Student writers are

52. Cf. note 51 *supra*.

53. See *Farrell v. Smith*, 310 F. Supp. 732 (D. Me. 1970). The court had more difficulty with this conflict than most because it was inclined to follow *Breen* and *Richards* on behalf of the student, but the argument for the school was so different and so much more reasonable under the *Breen-Richards* standard, that the judge found for the school even though his sympathies lay with the student. See note 3 *supra*.

54. The law student commentary on the question supports the student's right to govern his own appearance. See Comment, *The Personal Appearance of Students—The Abuse of a Protected Freedom*, 20 ALA. L. REV. 104 (1967); Note, *School Student Dress and Appearance Regulations*, 18 CLEV.-MAR. L. REV. 143 (1969); Comment, *The Power of School Officials to Regulate Student Appearance*, 3 HARV. LEG. COMM. 1 (1966); Comment, *Public Schools, Long Hair, and the Constitution*, 55 IOWA L. REV. 707 (1970); Comment, *Constitutional Law—A Student's Right to Govern his Personal Appearance*, 17 J. PUB. L. 151 (1968); Note, *Constitutional Law—Public School Authorities Regulating the Style of Student's Hair*, 47 N.C.L. REV. 171 (1969); Note, *A Short History and Future Developments Regarding School Dress and Grooming Codes*, 31 OHIO ST. L.J. 351 (1970); Comment, *A Re-evaluation of School Appearance Regulations: Is Free Choice in Grooming Accorded Constitutional Protection?*, 15 S.D.L. REV. 94 (1970); Comment, *Constitutional Law—Long Hair Bans in Public Schools*, 4 U. RICHMOND L. REV. 338 (1970); Note, *Constitutional Law—High School Authorities' Power to Expel Students for Wearing Long Hair*, 1969 WIS. L. REV. 303; see generally Note, *The Emerging Law of Students' Rights*, 23 ARK. L. REV. 619 (1970); *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045 (1968);

generally convinced that the "better reasoning" lies on the side of the student, but the cases in no way indicate a trend in that direction.⁵⁵ The appellate courts have failed to produce "better" thinking on the problem and have been unable to set forth reasonable guidelines within which consistency might be achieved.⁵⁶ The Supreme Court, with determination, has decided not to get involved at all.⁵⁷ The judicial

Note, *Public Secondary Education: Judicial Protection of Student Individuality*, 42 S. CAL. L. REV. 126 (1969).

The professional writers have discussed hair regulation problems within the broad spectrum of student rights. See Abbott, *Due Process and Secondary School Dismissals*, 20 CASE-W. RES. L. REV. 378 (1969) (Expressly excludes discussion of the hair problem; supports application of constitutional principles to students attending public schools.); Goldstein, *Reflections on Developing Trends in the Law of Student Rights*, 118 U. PA. L. REV. 612 (1970) (General discussion of the development of the law of student rights with an emphasis on appearance regulation decisions.); Haskell, *Judicial Review of School Discipline*, 21 CASE-W. RES. L. REV. 211 (1970) (The problem should be resolved by professional educators and the courts should stay out of it.); Haskell, *Student Expression in the Public Schools: Tinker Distinguished*, 59 GEO. L.J. 37 (1970) (Distinguishes *Tinker* from other student expression problems and suggests that all these problems should be left to professional school administrators.); Nahmod, *Beyond Tinker: The High School as an Educational Public Forum*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 278 (1970) (General discussion of students' first amendment rights; expressly excludes discussion of personal appearance problems.); Sweezy, *Free Speech and the Student's Right to Govern his Personal Appearance*, 7 OSGOODE HALL L.J. 293 (1969) (While there have been no cases on the question in Canada, the author hopes the Canadian courts will uphold the student's right to govern his own appearance.); Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969) (Discussion of the history, substance and procedures involved in applying the Constitution to the total campus community.).

For discussions of related problems, see Comment, *Dismissal of Public School Teacher Without Prior Notification of Charges and a Hearing Which Affords the Opportunity to Present Evidence Constitutes Deprivation of Due Process*, 22 ALA. L. REV. 349 (1970) [Comment on *Lucia v. Duggan*, 303 F. Supp. 112 (D. Mass. 1969), where the court ordered that plaintiff teacher, who had been fired for growing a beard, be reinstated to his position]; Comment, *Constitutional Law—Free Speech Rights of School Children*, 16 LOYOLA L. REV. 165 (1969-70) (Comment on *Tinker* and general survey of first amendment problems.).

55. Of the thirty cases surveyed for this comment, seventeen held for the school and thirteen for the student. Sixteen of the cases surveyed were decided in the district courts in 1970. In those cases, ten held for the school and six held for the student. The district court decisions prior to 1970 were evenly divided at seven each. The bulge in favor of the schools is not sufficient to indicate a trend, but it certainly shows that the arguments presented in the legal commentary on the subject have not been adopted by the courts. (For district court decision dates see note 1 *supra*).

56. See *Ferrell v. Dallas Ind. School Dist.*, 392 F.2d 697 (5th Cir. 1968); *Davis v. Firment*, 408 F.2d 1085 (5th Cir. 1969); *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969); *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970); *Stevenson v. Wheeler County Bd. of Educ.*, 426 F.2d 1154 (5th Cir. 1970); *Jackson v. Dorrier*, 424 F.2d 213 (6th Cir. 1970); *King v. Saddleback Junior College Dist.*, 425 F.2d 426 (9th Cir. 1970).

57. See *Ferrell v. Dallas Ind. School Dist.*, *cert. denied*, 393 U.S. 856 (1968); *Breen v. Kahl*, *cert. denied*, 398 U.S. 937 (1969); *Stevenson v. Wheeler County Bd. of Educ.*, *cert. denied*, 91 S. Ct. 355 (1970); *Jackson v. Dorrier*, *cert. denied*, 91 S. Ct. 55 (1970). If the Court ever decides to hear the issue, a sample of the range of opinions to be expected can be found by comparing portions of Mr. Justice Douglas' dissenting opinion when *certiorari* was denied in *Ferrell* with Mr. Justice Black's

treatment of this issue is, indeed, an exercise in legal gobbledygook. It may be that the schools will soon find their way out of "the first half of the twentieth century,"⁵⁸ and eliminate the problem before the Supreme Court is compelled to resolve it. In the meantime, the absence of reasonable Supreme Court guidelines for judges who, with increasing frequency, are called upon to resolve the issue, is bringing about more disruption and frustration in our nation's schools than "long hair" has ever created.

vigorous dissent in *Tinker v. Des Moines Ind. Community School Dist.*, 393 U.S. 503, 525-26 (1969). Compare Douglas in *Ferrell*:

. . . I suppose that a nation bent on turning out robots might insist that every male have a crew cut and every female wear pigtails. But the ideas of "life, liberty, and the pursuit of happiness," expressed in the Declaration of Independence, later found specific definition in the Constitution itself, including of course Freedom of expression and a wide zone of privacy. I had supposed those guarantees permitted idiosyncracies to flourish, especially when they concern the image of one's personality and his philosophy toward government and his fellow men. Municipalities furnish many services to their inhabitants; and I had supposed that it would be an invidious discrimination to withhold fire protection, police protection, garbage collection, health protection, and the like merely because a person was an off-beat, non-conformist when it came to hair-do, and dress as well as to diet, race, religion, or his views on Vietnam.

393 U.S. at 856, with Black in *Tinker*:

. . . I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school systems in our 50 States. I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent.

393 U.S. at 525-26. (Footnote to statistical source omitted.)

58. *Richards v. Thurston*, 304 F. Supp. 449, 451 (D. Mass. 1969) (Wyzanski, J.).

