St. Mary's Law Journal

Volume 4 | Number 2 Article 10

6-1-1972

# Regulation Governing the Length of Hair Is One That Is Not Cognizable in the Federal Courts, Nor Is Such Right to be Found within the Plain Meaning of the Federal Constitution.

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SCHOOLS—CONSTITUTIONAL LAW—HAIR REGULATIONS—REGULATION GOVERNING THE LENGTH OF HAIR IS ONE THAT IS NOT COGNIZABLE IN THE FEDERAL COURTS, NOR IS SUCH RIGHT TO BE FOUND WITHIN THE PLAIN MEANING OF THE FEDERAL CONSTITUTION. *Karr v. Schmidt*, 460 F.2d 609 (5th Cir. 1972).

On August 12, 1970, Chesley Karr, age 16, was informed that until he conformed to the adopted student dress code, specifically to the rules governing hair length, he would not be allowed to register for his junior year in Coronado High School.[1] After the school's refusal to admit Karr, several conferences were arranged with the school board officials by Karr's parents seeking to have him reinstated. It was concluded by the school authorities that the action taken on the part of the principal was appropriate and in accordance with the school board's policy.[2]

Karr filed suit in the United States district court against the principal, the superintendent and the El Paso Independent School District alleging that the regulation and its enforcement violated his rights under the first, ninth and fourteenth amendments of the United States Consitution, and sought injunctive and declaratory relief. After a four day trial, the district court held that the classification of male high school students on the basis of the length of their hair was unreasonable and violated the due process and equal protection guarantees of the Federal Constitution.[3] The district court barred the defendants from further enforcement of the hair regulations and enjoined the school board from refusing to enroll Karr.[4]

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1 Karr v. Schmidt, 320 F. Supp. 728 (W.D. Tex. 1970). The dress code contained the requirement that pupils be properly dressed and groomed at all times. No child would be admitted to school or be allowed to continue in school who failed to conform to the proper dress standards. *Id.* at 732.

2 *Id.* at 730. The birth of such a restriction was christened when the Board of Trustees of the El Paso Independent School District first codified a policy regarding student dress regulations in March 1969. The code remained substantially unchanged until July 24, 1970, when the Board of Trustees adopted the recommendations of the ad hoc committee. The committee had been previously organized in order to decide whether a dress code was needed, and if so, what the dress code should entail for the El Paso public schools.

It was determined that a policy was needed. The code adopted included guidelines for dress and grooming of which the following, guideline No. 1 for boys, was to apply:

1. Hair may be blocked, but is not to hang over the ears or the top of the collar of a standard dress shirt and must not obstruct vision. No artificial means to conceal the length of the hair is to be permitted; *i.e.*, ponytails, buns, wigs, combs, or straps. *Id.* at 732.

3 *Id.* at 736. The court found no reasonable relationship between the forbidden hair length and the educational process and, therefore, the regulation was an unjustified infringement of the plaintiff's constitutionally protected rights.

4 *Id.* at 737. The district court reasoned that the evidence in the case indicated the presence and enforcement of the hair regulation caused far more disruption of the classroom instructional process than the hair it sought to prohibit. The court also held that in Texas, a free public education is not simply a privilege but instead is a right guaranteed by the Texas Constitution (TEX. CONST. art. VII, § 1). The court concluded that under the equal protection clause of the fourteenth amendment, as well as the corresponding provisions in the Texas Constitution (TEX. CONST. art. I, § 3), any distinctions between those who re-

The defendants, upon the decision of the district court, filed a motion with the United States Court of Appeals for the Fifth Circuit to stay the district court's injunction pending appeal. Karr then petitioned the late Mr. Justice Black, in his capacity as Circuit Justice for the Fifth Circuit to vacate the stay of injunction pending appeal. Mr. Justice Black denied Karr's petition.

> [I]t 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 fifty States. Perhaps if the courts will leave the States free to perform their own constitutional duties they will at least be able successfully to regulate the length of hair their public school students can wear.[5]

With the denial of plaintiff's petition by Justice Black, the Court of Appeals for the Fifth Circuit was left to decide the case. Held-*Reversed.* The regulation governing the length of hair is one that is not cognizable in the federal courts, nor is such a right to be found within the plain meaning of the Federal Constitution.[6]

The court of appeals decision in *Karr* upholding the school board's authority on such student regulations follows the trend of the Court of Appeals for the Fifth Circuit[7] in resolving the question of hair and grooming restrictions. The appellate court prior to the holding in *Karr,* had never ruled "explicitly" on the question of whether the right to wear one's hair in any desired manner was a fundamental right guaranteed by the Constitution. Nevertheless, the Court of Appeals for the Fifth Circuit "indicated" or "assumed" that there was such a right. In 1968 when the court ruled on *Ferrell v. Dallas Independent School District,*[8] it upheld hair regulations on the general ground that constitutional rights may be abridged where there is a compelling reason for state infringement.[9] In *Ferrell,* that compelling reason was found, based on the state's interest in an effective and efficient school system, which therefore justified the regulation. In arriving at is decision, the

ceive this right and those who do not, must have a reasonable basis, and must reasonably relate to the purpose for which the classification is made. The court was of the opinion that the defendants did not establish a reasonable basis for granting the right of a public education to those with hair above their ears and collar, and denying the same education to those whose hair is longer. *Id.* at 736.

5 Karr v. Schmidt, 401 U.S. 1201, 1203, 91 S. Ct. 592, 593, 27 L. Ed.2d 797, 799 (1971).

6 Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972).

7 Dawson v. Hillsborough County School Bd., 445 F.2d 308 (5th Cir. 1971); Whitsell v. Pampa Ind. School Dist., 439 F.2d 1198 (5th Cir. 1971); Wood v. Alamo Heights Ind. School Dist., 433 F.2d 355 (5th Cir. 1970); Stevenson v. Board of Educ., 426 F.2d 1154 (5th Cir. 1970); Griffin v. Tatum, 425 F.2d 201 (5th Cir. 1970); Davis v. Firment, 408 F.2d 1085 (5th Cir. 1969); Ferrell v. Dallas Ind. School Dist., 392 F.2d 697 (5th Cir.), *cert. denied,* 393 U.S. 856, 89 S. Ct. 98, 21 L. Ed.2d 125 (1968).

8 392 F.2d 697 (5th Cir. 1968).

9 *Id.*

panel "assumed" that a hair style was a constitutionally protected mode of self expression, although they did not decide "explicitly" on the question.

The decision in *Ferrell* serves as a firm foundation for the numerous hair cases that followed, and it prevails as the leading case upholding hair regulations and their enforcement. Likewise, the dissenting opinion in *Ferrell* has carried substantial importance in justifying those decisions invalidating hair restrictions. In the dissenting opinion, Judge Tuttle expressed his deference to the views of the majority by stating:

> [W]e find courts too prone to permit a curtailment of a constitutional right of a dissenter, because of the likelihood that it will bring disorder, resistance or improper and even violent action by those supporting the status quo. It seems to me it cannot be said too often that the constitutional right of an individual cannot be denied him because his exercise of them produces violent reaction by those who would deprive him of the very rights he seeks to assert.[10]

Thus the courts were left with an historical argument of whether the length of a student's hair was to be protected from infringement by either state or the federal government.

Although the appellate courts have found themselves increasingly "dispersed" and "divided"[11] in hair length controversies, the Supreme Court has refused to review the constitutional questions involved.[12] Mr. Justice Douglas, in his dissenting opinion on the Supreme Court's recent denial of a writ of certiorari[13] from the Court of Appeals for the Ninth Circuit holding in *Olff v. East Side Union High School District*,[14] expressed great personal concern in hopes of resolving the constitutional question of such school regulations. He strongly recommended the petition for certiorari be granted and expressed himself by stating:

> One's hair style, like one's taste for food, or one's liking for certain kinds of music, art, reading, and recreation, is certainly fundamental in our constitutional scheme—a scheme designed to keep government off the backs of the people. . . . The question tendered

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10 *Id.* at 705.

11 *Compare* Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970) [*and*] Breen v. Kahl, 419 F.2d 1034 (7th Cir.), *cert. denied*, 398 U.S. 937, 90 S. Ct. 1836, 26 L. Ed.2d 268 (1970) *with* Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), *cert. denied*, 400 U.S. 850, 91 S. Ct. 55, 27 L. Ed.2d 88 (1970) [*and*] Ferrell v. Dallas Ind. School Dist., 392 F.2d 697 (5th Cir. 1968).

12 Olff v. East Side Union High School Dist., 445 F.2d 932 (9th Cir.), *cert. denied*, — U.S. —, 92 S. Ct. 703, 30 L. Ed.2d 736 (1972); Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), *cert. denied*, 400 U.S. 850, 91 S. Ct. 55, 27 L. Ed.2d 88 (1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir.), *cert. denied*, 398 U.S. 937, 90 S. Ct. 1836, 26 L. Ed.2d 268 (1970); Ferrell v. Dallas Ind. School Dist., 392 F.2d 697 (5th Cir. 1968).

13 Olff v. East Side Union High School Dist., — U.S. —, —, 92 S. Ct. 703, 705, 30 L. Ed.2d 736, 737 (1972).

14 445 F.2d 932 (9th Cir. 1971).

> is of great personal concern to many and of unusual constitutional importance which we should resolve.[15]

In order to assess the legitimacy of the school regulations, the courts are confronted with the most difficult chore of reconciling the student's right which is "questionably" protected by the fourteenth amendment, as against the equally "questionable" authority of the local school boards to insure an atmosphere conducive to the educational purposes. It is well recognized that school boards are empowered to adopt and enforce reasonable rules for regulating and controlling school affairs.[16] But it is equally well settled that ". . . [s]chool officials do not possess absolute authority over their students,"[17] and when the constitutionality of a school regulation is in question, the burden is on the school board to justify such regulation.[18]

The justification of such regulations is usually based on the test of reasonableness and the district court in *Karr v. Schmidt*[19] held that the school authorities had failed to prove to the satisfaction of the court that the hair regulation was reasonable. The standard of "reasonableness" was properly stated by the court in *Burnside v. Byars*.[20]

> In formulating regulations, including those pertaining to the discipline of school children, school officials have a wide latitude of discretion. But the school is always bound by the requirement that the rules and regulations must be reasonable. It is not for us to consider whether such rules are wise or expedient but merely whether they are a reasonable exercise of the power and discretion of the school authorities.[21]

There are certain limits that must be established in order that the power of the school board be restrained. *Tinker v. Des Moines Independent Community School District*,[22] as compared to *Karr*, expressed favor in limiting the authority exercised by school officials over students. That court emphasized that students in school are persons under the constitution and are possessed with fundamental rights which the state must respect, just as they, the students, must respect their obligations to the state.[23] Our constitutional system does not permit any school

15 Olff v. East Side Union High School Dist., — U.S. —, —, 92 S. Ct. 703, 705, 30 L. Ed.2d 736, 737 (1972).
16 Farrell v. Smith, 310 F. Supp. 732, 737 (D. Me. 1970); Griffin v. Tatum, 300 F. Supp. 60, 62 (M.D. Ala. 1969); Breen v. Kahl, 296 F. Supp. 702, 707 (W.D. Wis. 1969), *aff'd*, 419 F.2d 1034 (7th Cir.), *cert. denied*, 398 U.S. 937, 90 S. Ct. 1836, 26 L. Ed.2d 268 (1970).
17 Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503, 511, 89 S. Ct. 733, 739, 21 L. Ed.2d 731, 740 (1969).
18 *Id.* at 511, 89 S. Ct. at 739, 21 L. Ed.2d at 740.
19 320 F. Supp. 728 (W.D. Tex. 1970).
20 363 F.2d 744 (5th Cir. 1966).
21 *Id.* at 748.
22 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed.2d 731 (1969).
23 *Id.* at 511, 89 S. Ct. at 739, 21 L. Ed.2d at 740.

board or administrator, despite good intentions, to be the "unaccountable imperator" of the lives of its students.[24] Prudence and caution surely should, it would seem, be visible in establishing school policies. In *Stevenson v. Wheeler County Board of Education*[25] the court upheld the dress code but stressed the need for allowing more discretion on the part of the school authorities in their promotion of discipline in the school. *Karr's* appellate court majority felt compelled to recognize and give weight to the very strong policy considerations in favor of giving the school authorities the widest possible latitude in the management of school affairs.[26]

The invoking of the fourteenth amendment was another alternative considered as early as 1943 by the United States Supreme Court in *West Virginia State Board of Education v. Barnette*.[27]

> The fourteenth amendment, as now applied to the States, protects the citizens against the State itself and all its creatures—Board of Education not excepted. . . . That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual . . . .[28]

The denial of the state's free education to Karr on the basis of the length of his hair was viewed by the district court as an arbitrary classification which violated the equal protection clause of the fourteenth amendment, and therefore "infringed" on Karr's constitutional rights. In contrast, the Court of Appeals for the Fifth Circuit's majority composed a novel concept of ranking individual liberties on a "spectrum of importance." The great liberties are those guaranteed in the Bill of Rights; while the lesser liberties are those which may be invaded by the state.[29] Because the restriction was only a "temporary interference" with the student's liberty and "relatively inconsequential," it therefore left the students a wide range of personal choice in their dress and grooming. Therefore Karr's asserted freedom did not rise to the level of fundamental significance which would warrant the court's recognition.

Did the majority's examination justify the state infringement on Karr's right of presenting himself to the general public as he pleases so long as he causes no one any harm? Is hair length not one of the individual's personal prerogatives?

> Whether hair styles be regarded as evidence of conformity or individuality, they are one of the most visible examples of personality.

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24 Stanley v. Northeast Ind. School Dist., — F.2d — (5th Cir. 1972).
25 306 F. Supp. 97 (S.D. Ga. 1969) (the student restriction was the prohibition of mustaches).
26 Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972).
27 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943).
28 *Id.* at 637, 63 S. Ct. at 1185, 87 L. Ed. at 1637.
29 Karr v. Schmidt, 460 F.2d 609, 615 (5th Cir. 1972).

> This is what every woman has always known. And so have many men. . . .[30]

The justification by the courts for upholding such hair codes varies widely. To demonstrate the divergence in courts' opinions, a new and different concept of dealing with hair codes was presented in *Brownlee v. Bradley County Board of Education.*[31] The court rationalized the school's restriction by applying the theory of aesthetic ideology.

> In these days of growing environmental concern any court denying that aesthetic considerations may form the basis for public regulations would doubtless find itself swimming against the current in very murky legal waters.[32]

In *Karr,* the court pivots on a different issue. Its argument is based on the controversial question of whether the federal courts have the power to step in and determine school rules involving such matters as the length of male students' hair. The Court of Appeals for the Fifth Circuit has, by their decision, reaffirmed their position that the courts should not interfere with the day to day operation of schools[33] since such restrictions have been declared not a fundamental constitutional issue. Not only has the court rejected the student's rights under the fourteenth amendment but they have also found it hard to approach the problem relying on the first amendment. The court, in rejecting the first amendment approach, relied on *United States v. O'Brien*[34] which held a limitless variety of conduct cannot be labeled "speech." The court also took note of the Supreme Court's decision in *Tinker,*[35] but distinguished the two cases since the black arm bands in *Tinker* were considerably more akin to pure speech. The reliance on the first amendment theory in order to support hair regulations, as a form of nonverbal speech, has been more frequently rejected by the courts than all the other constitutional suppositions.[36]

The Court of Appeals for the Fifth Circuit has been firm in expressing themselves explicitly on the federal courts' posture in the hair controversies. But what of the decisions from the other courts of appeals

30 Richards v. Thurston, 304 F. Supp. 449, 451 (D. Mass. 1969).
31 311 F. Supp. 1360 (E.D. Tenn. 1970).
32 *Id.* at 1366.
33 Ferrell v. Dallas Ind. School Dist., 392 F.2d 697 (5th Cir.), *cert. denied,* 393 U.S. 856, 89 S. Ct. 98, 21 L. Ed.2d 125 (1968); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966); Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966).
34 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed.2d 672, *reh. denied,* 393 U.S. 900, 89 S. Ct. 63, 21 L. Ed.2d 188 (1968).
35 Tinker v. Des Moines Ind. Community School Dist., 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed.2d 731 (1969).
36 *See, e.g.,* Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), *cert. denied,* 400 U.S. 850, 96 S. Ct. 55, 27 L. Ed.2d 88 (1970); Cordova v. Chonko, 315 F. Supp. 953 (N.D. Ohio 1970); Brownlee v. Bradley County Bd. of Educ., 311 F. Supp. 1360 (E.D. Tenn. 1970); Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1967).

which have held that students do possess a constitutionally protected right to govern their appearance,[37] or where the court justifies such curtailment only where it is in the interest of the state,[38] or even go as far as to base their decision on aesthetic values?[39] *Gere v. Stanley*[40] held that if student conduct is in conflict with the educational process, a narrow rule circumscribing that behavior is not insecure under the Constitution when conclusively justified. The holding in *Gere* can be compared to that of *Epperson v. Arkansas*[41] which held that public education is committed to the manipulation and control of state and local authorities. Courts therefore cannot intervene in order to resolve conflicts which arise in the daily operation of school systems and which do not directly implicate basic constitutional values. Such conflicts and disruptions caused by the school codes herein discussed were recently summarized in the *Harvard Law Review*.

> What is disturbing is the inescapable feeling that long hair is simply not a source of significant distraction and that school officials are often acting on the basis of personal distaste amplified by an overzealous belief in the need for regulations.[42]

Supposing that students do not already have enough rules, regulations and laws to comply with, it appears that further enforcement of hair codes will force the students either to give up what they believe to be their constitutional right, or to violate a rule which is unnecessary and repressive.[43]

The en banc court could only assemble on an eight to seven majority for the proposition that the right to wear long hair is not one of the appellee's asserted freedoms and does not rise to the level of the fundamental significance which would warrant the court's recognition of such a substantive constitutional right. In addition, the majority felt "compelled to recognize and give weight to the very strong policy considera-

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37 Bishop v Cowlaw, 450 F.2d 1069 (8th Cir. 1971); Parker v. Fry, 323 F. Supp. 728 (E.D. Ark. 1971); Turley v. Adel Community School Dist., 322 F. Supp. 402 (S.D. Iowa 1971); Westly v. Rossi, 305 F. Supp. 706 (D. Minn. 1969).

38 Dawson v. Hillsborough County School Bd., 445 F.2d 308 (5th Cir. 1971).

39 Brownlee v. Bradley County Bd. of Educ., 311 F. Supp. 1360 (E.D. Tenn. 1970).

40 453 F.2d 205 (3d Cir. 1971). The court upheld the hair portion of the dress code, its reasoning being that it was not an arbitrary exercise of the school board's power of enforcing such restrictions where the educational process had been disrupted. The court held the educational process had been disrupted due to a student's refusal to sit near the plaintiff in class because of the dirtiness of his shoulder length hair and the refusal to sit near him in the school cafeteria because of his habit of dipping his hair into his food and then throwing his head back. This was not the case in Karr v. Schmidt, 320 F. Supp. 728 (W.D. Tex. 1970), since the facts showed Chesley Karr was a good student, participating and representing his school in extracurricular activities. Karr had no discipline problems except on one prior occasion when he was told to cut his hair.

41 393 U.S. 97, 89 S. Ct. 266, 21 L. Ed.2d 228 (1968).

42 84 HARV. L. REV. 1702 (1971).

43 Dawson v. Hillsborough County School Bd., 445 F.2d 308 (5th Cir. 1971).

tions in favor of giving local school boards the widest possible latitude in the management of school affairs."[44]

Five dissenting judges held that the right to wear one's hair as one pleases is a fundamental right protected by the due process clause of the fourteenth amendment, although such right is unspecified in the Bill of Rights. The dissenters also concluded that the public school authorities lack the constitutional authority to prevent a student from wearing his hair in any manner he chooses, whether it be to show his feelings, attitudes, or merely to wear his hair long because of his preference.[45]

In the eight to seven decision of *Karr v. Schmidt*, the judges of the Court of Appeals for the Fifth Circuit emerged as divided as the circuits themselves over the issue of a student's right to wear his hair at the length he chooses. The federal courts have viewed the issue in such diverse[46] ways that the resulting decisions are in conflict and have only served to confuse the scope of school-student relationships. Not only is the conflict satirical, but the disagreement is recurring continuously. In the nearly 60 reported cases, the decisions have been almost equally split between the students and the school authorities.

The Supreme Court of the United States has denied certiorari where the court of appeals had sustained the school board[47] and also where the lower court had overruled the school board.[48] With the eight to seven decision of *Karr v. Schmidt*, the apparent diversity on hair regulations has once again been demonstrated. It seems apparent that the time is ripe for the Supreme Court to grant a writ of certiorari. It is the high court that can establish the unmistaken guidance for which the lower courts can turn in order to ascertain the authority on which they can rest their decisions. The expert navigation by the Supreme Court would also benefit the school authorities since they would be able to confine their school restrictions within established limits. The question tendered is of great personal concern to many and of unusual constitutional importance which the Supreme Court should resolve.[49]

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44 Karr v. Schmidt, 460 F.2d 609, 615 (5th Cir. 1972).

45 *Id.* at 619.

46 *Compare* Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970) [*and*] Breen v. Kahl, 419 F.2d 1034 (7th Cir.), *cert. denied*, 398 U.S. 937, 90 S. Ct. 1836, 26 L. Ed.2d 268 (1970) *with* Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), *cert. denied*, 400 U.S. 850, 91 S. Ct. 55, 27 L. Ed.2d 88 (1970) [*and*] Ferrell v. Dallas Ind. School Dist., 392 F.2d 697 (5th Cir.) *cert. denied*, 400 U.S. 850, 91 S. Ct. 55, 27 L. Ed.2d 88 (1970).

47 Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), *cert. denied*, 400 U.S. 850, 91 S. Ct. 55, 27 L. Ed.2d 88 (1970).

48 Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937, 90 S. Ct. 1836, 26 L. Ed.2d 268 (1970).

49 Olff v. East Side Union High School Dist., — U.S. —, 92 S. Ct. 703, 30 L. Ed.2d 736 (1972).