Alabama & Coushatta Tribes v. Big Sandy School District: The Right of Native American Public School Students to Wear Long Hair

Timothy S. Zahniser

Follow this and additional works at: https://digitalcommons.law.ou.edu/ailr

Part of the Indian and Aboriginal Law Commons

Recommended Citation

This Note is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.
NOTE

ALABAMA & COUSHATTA TRIBES V. BIG SANDY SCHOOL DISTRICT: THE RIGHT OF NATIVE AMERICAN PUBLIC SCHOOL STUDENTS TO WEAR LONG HAIR

Timothy S. Zahniser*

Our people are eager to learn. They are proud of being American. They are proud of being Indians.¹

After being confined to the back burner of legal issues for a number of years, Alabama & Coushatta Tribes v. Trustees of the Big Sandy School District² reintroduced an issue which was very much boiling over in the Federal courts in the late 1960s and early 1970s. At that time, public school regulations which prohibited male students from wearing long hair were challenged as violating constitutional rights.³ These claims were usually met by determined school boards and officials who argued a state interest in maintaining a proper public education. Over the past two decades, many courts have faced this issue but have not come to any consensus. These holdings illustrate a wide variety of judicial approaches. The dispute quickly developed and involved a multitude of so-called "long hair cases." Many jurists believed that the long hair issue was among the most confusing and unsettled issues in American jurisprudence.⁴ When the Supreme Court denied certiorari in New Rider v. Board of Education,⁵ Justice William O. Douglas

* Third-year law student, University of Oklahoma College of Law.

3. See Recent Cases, 84 HARV. L. REV. 1702, 1703 n.3 (1971).
4. One court remarked:
   "It appears that long hair cases are among the most confusing and unsettled in the federal courts. What is arbitrary and capricious to one court is reasonable and rational to another court. Even more unsettled is the very question which must be answered before the merits of the questions are reached, that being whether there is a "right" under the federal Constitution, no matter which provision therein, for a student to wear long hair.

5. 480 F.2d 693 (10th Cir.), cert. denied, 414 U.S. 1097 (1973).
summed up his concerns in a dissenting opinion by stating, "I have noted the deep division among the Circuits on this issue, and have thought that it is an issue of particular personal interest to many and of considerable constitutional importance."6

To some, long hair may seem to be a trivial issue. What is not trivial is a study of *Big Sandy* and its predecessors, which provides an excellent academic study of constitutional personal liberty. This note examines the *Big Sandy* case, and the court's approach to the constitutional questions raised. The *Big Sandy* court's discussion of the unique issue of religious freedom of wearing long hair in relation to school regulations is also examined.7 This note concludes with an analysis of *Big Sandy*, a criticism of the so-called "sincerity test," and the abuse the test presents.

I. Challenges to Public School Hair Length Regulations

A variety of constitutional rights may be burdened by a hair length regulation. Many constitutional arguments have been successfully used in challenging public school hair length or grooming regulations. The most often used (or abused, as some courts would view)8 will be discussed herein.

A. Due Process

Under the Fourteenth Amendment of the United States Constitution, no state may deprive any person of life, liberty, or property without due process of law.9 Recognizing the right to wear one's hair as he wishes as a right

---

7. Only a very few cases involve students claiming a religious right to wear long hair in public schools. The plaintiffs in *New Rider* claimed a violation of their free expression of religion. *New Rider*, 480 F.2d at 695. Chief Justice Lewis, concurring in this opinion, considered evidence presenting the religious aspects of long hair among the Pawnee Tribe as insignificant: "Their present contention of religious oppression rises no higher under this record than a desire to express pride in their heritage through wearing long braided hair. Their desire so to do is understandable but not a constitutionally protected right." *Id.* at 700-01.
8. See *Zeller v. Donegal Sch. Dist. Bd. of Educ.*, 517 F.2d 600 (3d Cir. 1975). In upholding a high school hair length regulation in the face of a constitutional claim, the court showed its distaste for this type of case: "[T]he proliferation of claims with exotic concepts of real or imagined constitutional deprivations may very well dilute protections now assured basic rights. We have a genuine fear of 'trivialization' of the Constitution." *Id.* at 607. The court continues with an ominous warning, that the Constitution must not be seized upon on wholesale fashion, recklessly or indiscriminately. Otherwise in every case where the defendant has acted under color of state law, the visible rules and principles of traditional disciplines of state law may be discarded for comparatively imprecise newly-formed dimensions of the Fourteenth Amendment's "due process" and "liberty" concepts. Predictability and reckonability of societal regulations will lessen, and order and regularity of the law will suffer.

9. U.S. CONST. amend. XIV.
implicit in "liberty," the First Circuit in Richards v. Thurston provides a thorough analysis of that concept. The Richards court pointed out that "momentous" acts are protected, that is, "liberty" includes the rights of parents to educate their children in private schools, to travel to foreign countries, and to travel interstate. The Richards court did not consider the issue trivial, even though it was cognizant of the fact that this was an element of life which had no direct bearing on the ability of others to enjoy their liberty. On the contrary, the Richards court held that the right of self control and "to be let alone" is the most "sacred" of all rights.

The Richards court warned that a narrow interpretation of liberty might result in a uniform national hairstyle. While the right to wear long hair may appear trivial, the court noted that the right to assembly was considered "mere surplusage" by some during the debate surrounding the formulation of the First Amendment. The Richards court believed that there is a "sphere of personal liberty," and the government's power to intrude upon it is limited. The Richards court concluded the discussion by stating that the Founding Fathers believed it unnecessary to include an amendment about personal appearance, and that "within the commodious concept of liberty embracing freedoms great and small, is the right to wear one's hair as he wishes."

Accordingly, other courts have recognized the freedom to govern one's hairstyle as a right retained by the people, deserving due process protection.

10. 424 F.2d 1281 (1st Cir. 1970).
11. Id. at 1284.
12. Id. (citing Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925)).
13. Id. (citing Kent v. Dulles, 357 U.S. 116, 125 (1958)).
15. Id. at 1285.
16. The Richards court was explicit:
No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless under clear and unquestionable authority of law. As well said by Judge Cooley, "The right to one's person may be said to be a right of complete immunity: to be let alone."

17. Richards, 424 F.2d at 1285 ("[A] narrower view of liberty in a free society might allow a state to require a conventional coiffure of all its citizens, a governmental power not unknown in European history.").
18. Id.
19. Id.
20. Id.
21. Id.
22. Bishop v. Colaw, 450 F.2d 1069, 1075 (8th Cir. 1971); see also Berryman v. Hien, 329 F. Supp. 616, 618 (D. Idaho 1971) (holding that personal appearance, including hair length, is
This right is present even for public school students. The right to be secure in one's person was the basis for other holdings. Every individual should have the right to express his individuality and personality.

In Breen v. Kahl, the right to wear long hair was compared to the right of a married couple to use contraceptives. The Breen court held that human dignity and individuality would be violated, and that the highly protected freedom of presenting one's self to the world should not be impaired, absent a compelling state interest.

A long hair case can involve not only substantive due process but procedural due process as well. The "right to be heard" is violated where a long-haired student is expelled or suspended for a lengthy or indefinite time without at least an informal hearing. A due process violation occurs when school officials, in the absence of any reasonable justification, suspend a student for no more compelling reason than his long hair.

B. Freedom of Speech

There appears to be some diversity among courts on where to classify the "freedom" to govern one's hair length, if indeed that freedom is found to exist. As previously stated, some courts identify long hair as a right included in the Fourteenth Amendment's concept of liberty. Other courts have considered this a right retained by the people; one of the personal liberties held for every individual under the Ninth Amendment. From this, some long-haired
plaintiffs have attempted to gain the higher protection offered by the First Amendment by claiming their long hair as a "freedom of expression," which may not fall under the First Amendment. While recognizing that a symbolic expression of individuality may deserve some constitutional protection, it may not be within the First Amendment.

When plaintiffs allege that their long hair is "symbolic speech," courts must utilize a First Amendment analysis. Courts may be reluctant to recognize such First Amendment protection, in part because when such a paramount right as freedom of speech is violated, federal courts are required to act swiftly and give thorough and exhaustive consideration to all issues presented. Plaintiffs in a long hair case, attempting to show that their hairstyle is a form of symbolic speech, must show some moral, sociological, political, religious, or ideological viewpoint. The scope of symbolic speech has been very limited: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." One court found elements of "speech" and "nonspeech" combined. Some courts have recognized that long hair could have communicative intent, containing an element of expression and speech, though that intent may be only a general disdain for the "establishment." Even when such a communication is found, it is not usually seen as sufficiently communicative to warrant the full protection of the First Amendment.

The long-haired student could make a showing that his long hair represents a symbolic expression or an idea. A student's long hair can come under the First Amendment umbrella if such a showing is made (that his hair represents, say, a political viewpoint). This was a common argument during the years...
circa 1970, when federal courts heard most of the long hair cases. These students also frequently relied on the recently decided *Tinker v. Des Moines Independent Community School District.* In *Tinker,* a school policy which prohibited students from wearing black armbands in protest of the Vietnam War was found to violate the First Amendment, because such symbolic speech was considered akin to pure speech. Most courts believed any reliance by such students was misplaced, since the Supreme Court specifically distinguished *Tinker* from regulations on hairstyle. Many courts saw long hair as a fad and believed that it symbolized nothing. A symbol is a vehicle by which a concept is transmitted from one to another, and to be entitled to First Amendment protection, that symbol must represent a specific idea or viewpoint. Further, that idea must make a significant contribution to the "marketplace of ideas" to warrant First Amendment protection. Long hair is usually viewed as not meeting the specificity requirement to constitute symbolic speech.

C. Equal Protection

The Equal Protection Clause requires that people under like circumstances be given equal protection in the enjoyment of personal rights and the protection and redress of wrongs. This means that no class of persons shall be denied the same protection enjoyed by another class of persons. Some courts presiding over cases challenging hair length regulations have found the Equal Protection Clause to apply. This is because any limitation of the right to wear such hair, and the promulgation and enforcement of the school regulations prohibiting such right, are done by a state actor: the public school official. An equal protection violation does not occur merely because only one school out of many in a district has a hair length regulation. It has been noted that an inequitable application of health and safety objectives can constitute a denial of equal protection, if they are applied only to male students.

---

46. Id. at 505-06.
47. Id. at 507-08.
49. Id.
51. U.S. CONST. amend. XIV ("No State shall ... deny to any person within its jurisdiction equal protection of the laws.")
55. Crews v. Cloncs, 432 F.2d 1259, 1266 (7th Cir. 1970). The court stated: [A]lthough girls engage in substantially the same activities in gym and biology classes, only boys have been required to cut their hair in order to attend classes.
Classification of students by the length of their hair also appears to be a violation of equal protection, unless a reasonable basis for the classification can be discerned.\footnote{66} Placing violators of the hair length regulations apart from the other students, such as in a detention study hall, could constitute an equal protection violation. If the practice is imposed to induce compliance with the regulation, the one subjected to the detention should have the protection of the Fourteenth Amendment.

Justification of hair length regulation through allegations of public disapproval, or student body disapproval if such regulations are not enforced, has not been viewed favorably by courts, such as in \textit{Turley v. Adel Community School District}.$^{57}$ A student's constitutional rights may not be forfeited simply because his fellow students object to the exercise of such rights.\footnote{58} The court in \textit{Turley} stated, "Such a precedent would result in nothing more than mob tyranny."\footnote{59} When the defendants in \textit{Turley} attempted to put forth the "public wants it" argument, the court said this was analogous to another argument proposed following the \textit{Brown v. Board of Education}\footnote{60} decision. The Little Rock School Board had asked to delay desegregation of a school, arguing that "extreme public hostility" should allow for a delay.\footnote{61} Also quoting \textit{Brown}, the court in \textit{New Rider v. Board of Education}\footnote{62} put forth the ideal: "[E]ducation is perhaps the most important function of state and local governments."\footnote{63} However, the \textit{New Rider} court did not find merit in the equal protection argument, stating that uniform regulations are necessary due to student diversity.\footnote{64}

The Equal Protection Clause permits a wide scope of discretion in enacting laws which affect some groups of citizens differently than another.\footnote{65} However, the court fails to explain how a uniform haircut will perpetuate the

\begin{footnotes}
\item Although classification has been held constitutional in certain circumstances, defendants have offered no reasons why health and safety objectives are not equally applicable to high school girls.
\item \textit{Id.} (citations omitted).
\item \textit{Id. at} 410.
\item \textit{Id. at} 410.
\item \textit{Id. at} 410.
\item \textit{Id. at} 410.
\item \textit{Id. at} 410.
\item \textit{Id. at} 410.
\item \textit{Id. at} 410.
\item \textit{Id. at} 410.
\item \textit{Id. at} 410.
\item \textit{Id. at} 410.
\end{footnotes}
ideals espoused by them. This allowance of classification, justified by the
court in New Rider, is illogical.

II. The Balance: State Interests v. Personal Liberties

Since courts recognize that at least some individual liberty is held by a
student who wishes to choose his hairstyle,66 courts must look to the
challenged regulation to determine if such regulation is reasonable.69 This is
done by balancing the interest of the student in engaging in the particular
prohibited activity (wearing long hair), against the State's interest in
prohibiting that activity.68

The question of whether there is an outweighing state interest justifying an
intrusion upon personal liberty was answered by the court in Richards v.
Thurston,69 by applying three considerations: (1) the nature of the liberty
asserted; (2) the context in which it is asserted; and (3) the extent to which
the intrusion is confined to the legitimate public interest to be secured.70

The interest of the State is generally described as the need to have an
orderly and efficient educational system.71 The interest in educating the
children of this nation has been classified as "compelling."72 This compelling reason, wrote one court, "is obvious."73 Therefore, school
boards are able to argue that the freedom to wear long hair in school should
be circumscribed because "[t]hat which so interferes or hinders the state in
providing the best education possible for its people, must be eliminated or
circumscribed as needed. This is true even when that which is condemned is
the exercise of a constitutionally protected right."74 According to some
courts, the "compelling reason" is enough to infringe upon the constitutional
rights of free exercise of speech, press, assembly, and religion.75 In stating
that student liberty is not absolute, one court rationalized school regulation by
noting that schools set standards for grading and promulgate rules for the
conducting of courses.76 The fact that schools have a structure seems to infer

67. Id.
68. Id.; see also New Rider, 480 F.2d at 698.
69. 424 F.2d 1281 (1st Cir. 1970).
70. Id. at 1285.
71. Crews v. Cloncs, 432 F.2d 1259, 1263 (7th Cir. 1970).
72. New Rider, 480 F.2d at 698; see Freeman v. Flake, 448 F.2d 258, 261 (10th Cir. 1971).
See supra notes 62-64 and accompanying text.
73. Ferrell v. Dallas Indep. Sch. Dist., 392 F.2d 697, 703 (5th Cir. 1968).
74. Id.
75. Id. at 702, 703; see also Bishop v. Colaw, 450 F.2d 1069, 1075 (8th Cir. 1971) (holding
that personal freedoms not absolute, and must yield when they intrude upon freedom of others);
New Rider, 480 F.2d at 698 (holding that First Amendment rights are not absolute, and courts
must balance them against a compelling public interest).
76. Zeller v. Donegal Sch. Dist. Bd. of Educ., 517 F.2d 600, 606 (3d Cir. 1975); see also
that the structure can be expanded at the school official's discretion. Indeed, such officials have been given broad powers of enforcement and regulation of student activities. Indeed, "They must control all student conduct which bears some substantial relationship to the educational function." However, school officials may not act autocratically or exercise absolute authority over students.

In formulating their rules and regulations, school officials are charged with ensuring such rules do not operate in an arbitrary or capricious manner. Such school officials will have the burden of showing the necessity of infringing upon students' freedom. When making a showing against a personal freedom, the school officials must affirmatively show the controlling interest of the State, or it must be self-evident to justify an intrusion. Many courts have required a "substantial burden of justification" for the regulation.

The United States Supreme Court has stated that a governmental regulation is substantially justified if: (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

In justifying school regulations and their reasonableness, the evidence must show that school officials could reasonably foresee a "substantial disruption of, or a material interference with the educational process." If school officials are unable to show any reasonable relationship of the regulation to the conduct of the educational process, or the functions of the school, and also show that the sanctions imposed were for the purpose of alleviating a

Sims v. Colfax Community Sch. Dist., 307 F. Supp. 485, 487 (S.D. Iowa 1970) (stating that rules and regulations governing student conduct are required to maintain an orderly educational program).

77. Berryman v. Hien, 329 F. Supp. 616 (D. Idaho 1971); see also Sims, 307 F. Supp. at 487 (stating that school officials are of necessity given "a wide latitude of discretion in formulating rules and regulations" to control student conduct).


81. Massie v. Henry, 455 F.2d 779, 783 (4th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069, 1075 (8th Cir. 1971).

82. Richards v. Thurston, 424 F.2d 1281, 1286 (1st Cir. 1970).


substantial interference with that educational process, then such regulations have been deemed arbitrary by some courts and therefore unreasonable.  

School officials have attempted to show an interference with the educational process by claiming that long hair tends to disrupt school activity and distracts teachers and students, and that long hair "has endangered the conduct of normal activities at [the school] which require a fairly strict form of discipline." One form of disruption may be possible violence from other students. However, threats of violence against one asserting a constitutional right are not a justification for the imposition of state sanctions. The court in Westly v. Ross held: "An undifferentiated fear of disturbance is not sufficient to override significant individual freedom afforded by the Federal Constitution." Such an argument has more merit if school officials have tried, and failed, to silence those persons actually engaged in disruptive conduct. A showing of the ineffectiveness of normal disciplinary procedures may be required.

Hair rules can be upheld where school officials demonstrate an actual disruption from harassment, obscene language, fights, and obscene appearance. However, sanctioning the long-haired student for the conduct of others is clearly inappropriate, and a majority of courts will not recognize this type of conduct as "disruption" caused by the prohibited activity; wearing long hair. The disruption must be caused by the hair itself: health or safety problems, distractions, or actual disturbance by the student with long hair.

Safety is an often used argument by school officials. Long hair could get caught in a power tool in shop class or be ignited by a bunsen burner in a science lab. Such arguments generally fail, since the hazards averred to by school officials are easily remedied by protective devices such as hairnets, headbands, and the like.

Some officials attempt to argue that students with long hair perform more poorly academically then do those students in compliance with the hair regulation. School boards may attempt to defend the regulation by claiming

86. Id. at 620.
89. Crews v. Clones, 432 F.2d 1259, 1265 (7th Cir. 1970); Berryman, 329 F. Supp. at 619.
90. Id.
92. Id. at 711.
93. Crews, 432 F.2d at 1265.
97. Id.
98. Massie, 455 F.2d at 783.
99. Id.; e.g., Seal v. Mertz, 338 F. Supp. 945, 950 (M.D. Pa. 1972); Massie, 455 F.2d at 783.
that an academic disruption of the learning experience has occurred. Courts see large evidentiary problems with this argument and usually give it no weight.  

When balancing a school regulation against a personal liberty, courts should carefully consider the regulation's purpose. Tenuous claims of disruption turn schools into the "enclaves of totalitarianism," and regulations should only further the educational process. In balancing a school regulation against a personal liberty, perhaps the only consideration should be: (1) does the regulation significantly further the educational process, and (2) will absence of the regulation cause substantial harm to school functions.

III. Alabama & Coushatta Tribes of Texas v. Trustees of the Big Sandy School District

A. Facts Leading to the Case

The plaintiffs, Alabama and Coushatta Tribes of Texas (the Tribe) and twelve Native American students, brought suit seeking a preliminary injunction and challenging a school dress code promulgated by the Big Sandy School District. These plaintiffs contended that the dress code, as enforced, violated various First and Fourteenth Amendment rights, including the right to free exercise of religion. Defendants named in the suit were the Trustees, Superintendent, and Principal of the Big Sandy Independent School District. The challenged regulation was a portion of the dress code which restricted the hair length of all male students in the school district. The reasons given for enforcement of the dress code were to: create an educational atmosphere, minimize disruptions, promote respect for authority, prepare students for the workplace, and ensure that students involved in extracurricular activities provide a favorable impression for the District.

100. Holsapple v. Woods, 500 F.2d 49 (7th Cir. 1974).
106. Id. The regulation read: "Boys hair should be of reasonable length and style so as not [to] interfere with the instructional program. Boys hair should [be] no longer than the top of a standard dress collar." Id.
107. Id. at 1323-24. The reasons given for the regulation were:
   a. To create an atmosphere conducive to learning and to minimize disruptions attributable to personal appearance, conduct, grooming, and hygiene, and attire.
   b. To foster an attitude of respect for authority, and to prepare students to enter the workplace, which often has rules regarding dress, conduct and appearance.
At the beginning of the 1992 school year, one plaintiff, a seventeen-year-old tenth grader, was told by the principal of Big Sandy to cut his hair. The student did not comply and was placed in "in-school detention." Four other students, also plaintiffs to the action, were threatened with discipline for their long hair. These four cut their hair after being told they could not return to school until they complied. Throughout September 1992, five other Native American students were subjected to in-school detention for wearing their hair long. The Native American students were the only ones disciplined for violation of the dress code prohibition on long hair.

In-school detention was supervised by a teacher's aide, who gave some assistance to the students. The suspended students were not given regular instruction, but met with the regular teachers during scheduled conference periods, and could request assistance from the teachers.

The plaintiffs generally fell behind the other students academically while suspended. Testimony was heard from one student who worked hard to keep up, while another was called "a poor student whether he was in in-school detention or not." The student plaintiffs were allowed to return to regular classes after the court issued a temporary restraining order.

B. Facts Presented at the Preliminary Injunction Hearing

At the preliminary injunction hearing held on January 4, 1993, an expert for the plaintiffs gave testimony about the Tribe's history and religious beliefs. Many southeastern tribes have traditionally worn long hair as a symbol of moral and spiritual strength. Hair was sacred, and to cut it involved a complicated procedure. To cut one's hair was viewed as the equivalent of cutting off a body part. Usually, hair was cut only as a sign of mourning upon the death of a close family member. Hair provided spiritual protection, and to cut it at any other time would subject one's body to invasion by witchcraft.
The expert further testified about a lack of detailed information concerning the Tribe's beliefs. Such beliefs are the property of the Tribe's members, and to share them with outsiders is generally considered taboo. The Tribe has historically practiced animism, where everything in nature is believed sacred and filled with a spirit. Shamanism formed part of the beliefs, with "medicine men" taking responsibility for healing people, controlling events, and divining the future.

Christianity came to the Tribe during the 1890s in the form of Presbyterian missionaries. The missionaries discouraged manifestations of traditional beliefs, such as stick-ball and dancing. The early 1900s brought a movement to pressure the Tribe to assimilate into Caucasian culture, including pressure put upon Native American men to cut their hair short, in imitation of the hairstyles worn by white men at that time.

To the Tribe, Christianity and their own beliefs were compatible, and tribal members continued to practice traditional beliefs. The overall religion of the Tribe encompassed every aspect of one's life, and was not confined to formal, scheduled religious services held in a church or temple. The modern Tribe encourages education and the continuation and preservation of traditional culture to the extent possible. The Tribe's language survives, as do such practices as ceremonial dances, and dance competitions, which are expressions of Native American traditions and religion.

Young Native Americans across North America have combined traditional belief into a "pan-tribal" reinvigoration of traditional culture and heritage. A uniform belief system has emerged in place of a revival of each tribe's individual religion. One facet of this new movement is the wearing of long hair.

At the conclusion of the expert testimony, the court heard testimony from student plaintiffs about their beliefs concerning long hair, and its significance to them as part of their religion and cultural heritage. Such beliefs included a refusal to cut their hair, except when a family member dies, a

118. Big Sandy, 817 F. Supp. at 1326.
119. Id. at 1325.
120. Id.
121. Id.
122. Id. But see Massie v. Henry, 455 F.2d 779 (4th Cir. 1972), where the court noted that "many of the founding fathers, as well as General Grant and General Lee, wore their hair . . . in a style comparable to that adopted by plaintiffs." Id. at 780. "Substantially every president of the United States serving before Woodrow Wilson would also have been in violation of this [hair length] regulation." Id. at 780 n.1.
123. Big Sandy, 817 F. Supp. at 1325.
124. Id.
125. Id.
126. Id.
127. Id.
128. Id.
belief that hair was a body part, which, if cut, would have to be searched for in the afterlife, and a releasing of the spirit during ceremonial dances.\textsuperscript{129} Both the parents of the students and the Tribe approved of the wearing of long hair because of its religious significance. The tribal counsel testified to their desire to preserve their cultural heritage and about concern for their young people, who were feeling isolated in school as a result of the problems caused by the hair issue.\textsuperscript{130} Some disparity was shown between the parents' beliefs and those of the students.\textsuperscript{131} While some parents practiced Christianity and did not consider long hair spiritually significant, they fully supported their children's belief in the spiritual aspects of hair, and encouraged respect of their tribal heritage and traditions.\textsuperscript{132}

The Tribe attempted to get the school board to change its dress code to allow Native American students to wear their hair long.\textsuperscript{133} At a board meeting, one student stated that he desired to wear his hair long because of his religious beliefs, but a board member responded by telling him that long hair went out with the hippies.\textsuperscript{134} At the next board meeting, two weeks later, the board voted to leave the dress code unchanged.\textsuperscript{135}

Testimony was presented by some teachers about some disciplinary problems which had arisen since the entry of the temporary restraining order, which allowed students in violation of the dress code to return to regular classes. The problems included tardiness, student responses in Alabama-Coushatta language, racial epithets, and social polarization between Native American students and other students. However, a trustee and the superintendent testified that there were no significant discipline problems in the district.\textsuperscript{136}

C. Conclusions of Law

The plaintiffs were seeking a preliminary injunction for the alleged violation of their civil rights. The allegations included First Amendment violations of the plaintiffs' right to free exercise of religion and free speech, and Fourteenth Amendment violations of plaintiffs' right to equal protection and due process. Plaintiffs also asserted a claim for damages under 42 U.S.C. § 1983.\textsuperscript{137}

\textsuperscript{129} Id. at 1326.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Id. at 1326-27.
\textsuperscript{136} Id.
\textsuperscript{137} Id. at 1327. The findings of the court concerning the constitutional issues are discussed \textit{infra}. The § 1983 claim will not be discussed, nor will other considerations and holdings in this case, including the Tribe's standing as parens patriae, the necessary showings required to get a
1. The Right To Wear Long Hair

The Big Sandy court began its constitutional analysis by stating that school boards must perform their functions within the bill of rights. The court cited Karr v. Schmidt, which held that there is no constitutionally protected right to wear one's hair in a public high school in the length and style that suits the wearer. However, language taken from Karr suggests that federal court intervention into local school affairs is appropriate when fundamental rights are at stake.

2. Free Exercise of Religion

The Big Sandy court noted that an infringement of fundamental rights was alleged by plaintiffs. The United States Supreme Court has held that states may impose restrictions and regulations which they may have a "rational basis" for adopting. Such regulations may not violate due process. However, the freedom of worship may not be infringed on these "slender grounds." The freedom of religion may be restricted only to prevent a grave and immediate danger to state interests. Since an infringement of a fundamental right had allegedly occurred, the Big Sandy court distinguished Karr.

a) Sincerity

The Big Sandy court stated that plaintiffs must show a sincerely held religious belief to establish their claim that a regulation violates their First Amendment right to free exercise of religion. To determine sincerity, the factfinder is not to delve into questions of "religious verity or the reasonableness of the belief." The beliefs themselves need not be preliminary injunction, official immunity of school officials, and attorney's fees.

139. 460 F.2d 609 (5th Cir. 1972).
140. Id. at 615. Karr represents the extreme view in long hair cases. The court found no communicative intent, id. at 613, no privacy right, or invasion thereof, id. at 614, no significant liberty associated with long hair, and that any interference with that liberty is temporary and inconsequential, id. at 615. Further, the court was determined not to hear any more cases on this subject, stating "the federal judiciary has urgent tasks to perform . . . ." Id. at 618. The court declared a per se rule that public school grooming regulations are constitutionally valid, and that future complaints alleging the constitutional invalidity of a high school hair regulation should be immediately dismissed for failure to state a claim for which relief can be granted. Id. at 617, 618.
141. Big Sandy, 817 F. Supp. at 1328.
143. Id.
144. Id.
145. Big Sandy, 817 F. Supp. at 1328.
146. Id.
147. Id.
acceptable, consistent, or logical to warrant First Amendment protection. Whether such beliefs are reasonable or not is of no consequence.

To determine whether an issue is of "religion," and therefore entitled to First Amendment protection, courts should consider orthodox concepts, such as belief in a supreme deity and a purpose for human existence. Courts should also consider other nontraditional characteristics if the belief system addresses fundamental questions of the nature of reality. Although the Native American Indian movement might appear "nebulous and unstructured," the court nevertheless held that it was a religion entitled to First Amendment protection.

Even if the wearing of long hair is not a fundamental tenet of Native American religion, the practice will still be protected if it is deeply rooted in religious belief. The court found that the Native American religion was not exclusive. Therefore, plaintiffs could still have a sincerely held religious belief in the sacredness of long hair and still, without contradiction, participate in other religions such as Christianity.

b) The School's Interest in Regulating Hair Length

After sincerity of the religious belief is shown, the burden shifts to the state to show that an unusually important governmental goal is advanced by the regulation, and that an exemption would substantially hinder that goal. The court then analyzed the appropriate standard of review to use when regulating conduct which is a religious practice or belief. If a compelling state interest in protecting public health and safety is challenged, the state need not employ the "least restrictive means" of regulating that conduct.

The court discussed Employment Division, Department of Human Resources of Oregon v. Smith and whether strict scrutiny necessitated by the least restrictive means standard or the compelling state interests standard should be applied to a free exercise claim. The court

148. Id. (citing Thomas v. Review Bd., 450 U.S. 707, 714 (1981)).
149. Id. at 1329.
150. Id.
151. Id.
152. Id.
153. Id. (citing Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975)).
154. Id. at 1329, 1330.
155. Id. at 1330.
156. Id.
157. 494 U.S. 872 (1990). Smith rejected the "least restrictive means" test when reviewing a challenge to a criminal statute which was facially nondiscriminatory and neutrally applied. The query in Big Sandy was whether a free exercise claim, standing alone, in a civil context, should be subject to only a rational basis review; there was no clear precedent in the Fifth Circuit on the level of scrutiny to be applied to independent free exercise challenges. Id.
determined that when the claim is brought in a civil setting, the least restrictive means standard should be used.\textsuperscript{158} To apply Smith to every free exercise challenge, whether in the civil or criminal context, would be a gross aberration from decades of established Supreme Court precedent in the First Amendment area. Moreover it would represent the erosion if not the absolute obliteration of one of the most basic principles our Founders . . . sought to establish through the Bill of Rights — the free exercise of religion as a fundamental right of the new American democracy.\textsuperscript{159}

All of this analysis was unnecessary, since the Big Sandy court then stated that plaintiffs had presented a "hybrid claim"; that is, a claim alleging that in addition to the free exercise claim, another constitutional right had also been burdened by the regulation. When such a hybrid claim is presented, the state will be held to a higher standard, and be required to show more than a mere "reasonable relation to a valid secular state purpose to sustain the validity of the regulation over First Amendment concerns."\textsuperscript{160}

A survey of cases involving grooming regulations in the prison setting shows that courts noted a higher state interest in regulating the grooming of prisoners. Yet those courts still held that there were indeed less restricting means of achieving those state interests than the hair length regulation in question.\textsuperscript{161} Since the Trustees of the Big Sandy School District had failed to show that the objectives of discipline, fostering respect, and projecting the proper image to the community were achieved by valid means, the court held that alternatives which do not unduly burden the plaintiffs' sincerely held religious belief should be sought.\textsuperscript{162}

### 3. Free Speech

The plaintiffs asserted that their long hair was a communicative activity to a Native American and is protected by the Free Speech Clause. Once again, the court distinguished Karr, since plaintiffs in Karr presented no facts showing that wearing long hair is a form of expressive activity.\textsuperscript{163} Plaintiffs in Big Sandy had presented compelling evidence that long hair in Native American culture was symbolic.\textsuperscript{164} The court compared this "silent, passive

\begin{itemize}
  \item \textsuperscript{158} Big Sandy, 817 F. Supp. at 1331.
  \item \textsuperscript{159} Id. at 1331, 1332 (citation omitted).
  \item \textsuperscript{160} Id. at 1332 (citing Smith, 494 U.S. at 881).
  \item \textsuperscript{161} Id. For a discussion on Native American prisoners' rights and prison grooming regulations, see William Norman, Note, Native American Inmates and Prison Grooming Regulations: Today's Justified Scalps: Iron Eyes v. Henry, 18 AM. INDIAN L. REV. 191 (1993).
  \item \textsuperscript{162} Big Sandy, 817 F. Supp. at 1333.
  \item \textsuperscript{163} Id.
  \item \textsuperscript{164} Id.
\end{itemize}
expression of . . . faith and heritage to the black armbands used to protest the Vietnam War, worn by plaintiffs in Tinker. Therefore, the plaintiffs' wearing of long hair was a protected activity, and the regulation as enforced, violated the Free Speech Clause.

4. Right of Parents To Direct Their Children's Upbringing

The right of parents to participate and direct their children's education and religious upbringing is a firmly established constitutional doctrine. Parents and fellow tribal plaintiffs fully supported the students' decision to wear long hair. Plaintiffs claimed that the regulation unduly burdened the parental right to instill respect for Native American tradition and religion and the right to guide these youth's religious beliefs. The Big Sandy court held that this issue was a valid constitutional claim. The lack of analysis from the court suggests either a strong claim on the part of the plaintiffs or a lack of rationale to justify the court's opinion.

5. Due Process

a) Procedural Due Process

Students have a legitimate claim of entitlement to public school education. A student's right to be free from any deprivation of liberty or property without due process of law is implicated when that student is suspended. Students must be afforded notice before they are suspended from school for a lengthy time. Students are entitled to be heard so that they can argue for leniency or special consideration. Here, there was no evidence that notice was given to the students placed in in-school detention, nor were the students given the opportunity to be heard. This lack of procedure was found by the Big Sandy court to violate the Due Process Clause of the Fourteenth Amendment.

b) Substantive Due Process

Plaintiffs also asserted a substantive due process claim, that the punishment imposed on them was disproportionate to their offense and that the hair length regulation had no rational basis. For a violation of substantive due process to

165. Id.
167. Big Sandy, 817 F. Supp. at 1334.
168. Id.
169. Id.
171. Big Sandy, 817 F. Supp. at 1335.
172. Id.
173. Id.
occur, action by school officials must have been arbitrary and capricious. The suspensions are valid if: (1) not made in bad faith; (2) fair procedures are used; and (3) there was no substantial departure from accepted academic norms demonstrating a lack of professional judgment.

Here, the court held that a substantive due process violation could occur during a lengthy period of suspension, which results in a learning disadvantage by the suspended students. However, plaintiffs in this case were only subjected to in-school detention for six weeks, until the temporary restraining order released the students. The punishment was not unreasonable. Also, the Big Sandy court, following Karr on this issue, held that the regulation was rationally related to the goals of creating an atmosphere conducive to learning, minimizing disruptions, and fostering an attitude of respect.

6. Equal Protection

Finally, plaintiffs alleged that they were arbitrarily denied educational benefits because of their race, through enforcement of the dress code. The Fourteenth Amendment's guaranty of equal protection requires similar treatment under the law for similarly situated persons. The hair length regulation was racially neutral, with no group or individual singled out. If such a neutral law results in disproportionate treatment of a racial minority, it may violate the Equal Protection Clause. The disproportionate impact must be traced to a discriminatory purpose. It must also be shown that a decision maker "selected a particular cause of action at least in part because of, and not simply in spite of, the adverse impact it would have on an identifiable group."

The Big Sandy court found that the defendants had presented reasonable nondiscriminatory reasons for the enforcement of the dress code. The plaintiffs had not disputed the validity of the goals underlying the dress code. Here, the court used a rational basis test, as allowed absent evidence of discriminatory purpose underlying a racially neutral regulation. "Any conceivable state purpose" served by the regulation in this situation would result in a finding of its validity. The hair regulation in this situation did

174. Id.
175. Id.
176. Id.
177. Id. at 1336.
178. Id.
179. Id.
180. Id.
181. Id. (citing United States v. Galloway 951 F.2d 64, 65 (5th Cir. 1992)).
182. Id.
183. Id.
184. Id. (citing Cunningham v. Beavers, 858 F.2d 269, 273 (5th Cir. 1988)).
not deny plaintiffs of equal protection because of a finding of legitimate purpose.  

In conclusion, the court issued a preliminary injunction enjoining the defendants from enforcing the school district's hair regulation against Native American Students. Plaintiffs had presented a number of constitutional claims, which the court recognized as valid. Big Sandy was decided correctly, but the reasoning employed by the court merits further analysis.

**D. Analysis of the Case**

The plaintiffs in Big Sandy presented claims that were unavailable (or not presented) by plaintiffs in previous long hair cases. The claim that the hair length regulation violated the plaintiffs' free exercise of religion and their parental rights undeniably tipped the scales in their favor. Indeed, the allegations are lumped together, resulting in a weighty hybrid claim, to be thrown on plaintiffs' side of the balancing test scales. Further, the hybrid claim results in a different scale being used, that being the one already weighted in their favor: strict scrutiny to ensure the least restrictive means were used in controlling the prohibited conduct.

**1. The Sincerity Test**

The Big Sandy court stated that the plaintiffs must show a "sincerely held religious belief," and the court cited Professor Laurence Tribe's Constitutional Law Treatise. The test used by the court in Big Sandy is taken from United States v. Ballard, a mail-fraud prosecution in which the defendants had solicited money by representing themselves as divine messengers. The Supreme Court attempted to keep the inquiry into a party's religion as narrow as possible. A jury could determine whether religious beliefs were sincerely held but not whether they were true. Justice Jackson, in his dissent, argued it was impossible to separate verity from sincerity when questioning a religious belief.

Professor Tribe found merit in Justice Jackson's opinion when the government is seeking to protect citizens from fraudulent religious claims, "since protection is precisely what the Constitution put beyond the prosecutors reach." Such an argument is less persuasive, Professor Tribe continued, when individuals challenge a regulation and "seek special treatment from the

---

185. Id.
186. Id. at 1338.
188. 322 U.S. 78 (1944).
189. Id. at 86, 87.
190. Id. at 92 (Jackson, J., dissenting).
191. TRIBE, supra note 187, § 14-12, at 1245.
state, because the whole community...suffers from the dilution of a governmental program."

To force the plaintiffs to show a sincerely held religious belief in a case like Big Sandy is clearly inappropriate. Violation of the challenged hair length regulation did not interfere with the rights of other students, nor did it interfere with the education process. Therefore there was no "dilution of a governmental program." Even if a governmental entity is lawfully exercising its authority to protect a state interest, there must be a grave and immediate danger to that interest before a restriction on one's religion can occur. Forcing one to show the sincerity of their beliefs could result in a restriction upon those beliefs if the believer cannot "pass" the test.

Professor Tribe further stated that the rights protected by the Free Exercise Clause may be endangered by "any but the most minimal inquiry" into the sincerity of one's religious beliefs. Professor Tribe argued that if religion is being used as a "completely fraudulent cloak," extrinsic evidence showing such fraud must be considered. For example, the sincerity inquiry has been used when evidence exists to show that the religion is being used as a pretext.

While Professor Tribe believes any test of sincerity must be limited to a neutral sort, he certainly does not go far enough. The sincerity test should only be used in appropriate cases. Limiting the test itself is not enough. When the test is actually applied must also be limited. The court in Big Sandy recognized the importance of the Free Exercise Clause and the need for strict scrutiny by courts reviewing regulations that may violate that right. However, the court added credibility to the sincerity test by using it. The sincerity test is, at best, difficult to apply, and an attempt to prescribe orthodox beliefs and weed out unacceptable religions at worst. Despite all of its noble rhetoric about the Free Exercise Clause, the Big Sandy court still performed the role of deciding whether a religion was valid or not. The Big Sandy court examined the beliefs, and heard "expert" testimony on Native American religion. The court then decided that the students did really believe

192. Id.
194. Tribe, supra note 187, § 14-12, at 1245.
196. Tribe, supra note 187, § 14-12, at 1242.
197. Id.
198. Dobkin v. District of Columbia, 194 A.2d 657 (D.C. 1963) (denying exemption from court appearance on Saturday to attorney who actually went to his office and worked on Saturdays, despite his claim that he was a Sabbatarian).
199. Tribe, supra note 187, § 14-12, at 1246.
what they had claimed to believe, and put a judicial stamp of approval on their religion. The sincerity test should only be used in cases involving criminal statutes, and only after the state has presented compelling evidence to show that the sincerity of a religious belief should be questioned. The implementation of a "presumption of faith" would help safeguard the religious beliefs of citizens. These measures would help ensure that the questions of "Do you really believe?" and "Is this really a religion?" are asked only in the rarest of circumstances.

The Big Sandy court rightly held that the wearing of long hair for religious reasons is protected, even though it is not a fundamental tenet of Native American religion. The practice need only be a "deeply rooted belief." However, it may be difficult for a plaintiff to show a deeply rooted belief, since courts consider the sincerity of the specific plaintiff's beliefs and should not consider the sincerity of the "average" believer. What is fundamental and deeply rooted to one member of a religious group may not be to a majority of other believers. The use of the sincerity test should be severely limited, both in scope and in frequency of use. Putting one's religious beliefs under scrutiny by using the sincerity test offers too much opportunity for abuse. Courts must not be permitted to use an expansive sincerity test in all situations involving religion and state regulations.

2. Free Speech

The Big Sandy court took an unusual step in comparing long hair with the armbands worn by plaintiffs in Tinker. Most courts have not found Tinker persuasive as to this issue, nor have they found long hair a form of speech. The difference in Big Sandy was the fact that Native Americans were "communicating" to each other, and to the world in general, that they were believers, and promoters of Native American culture and heritage. These message seemed specific enough for the court to view the long hair as symbolic speech.

3. Parental Rights

As stated supra, the plaintiffs' allegation that parental rights were burdened by the hair-length regulation helped tip the balance in plaintiffs' favor. The fact that Native American parents were instilling into their children pride in their culture and religion made a convincing argument that parental rights were being subrogated.

201. Id. at 1329.
203. See supra notes 31-50 and accompanying text.
4. Due Process

Here, the Big Sandy court took another look at the regulation they previously stated to be unconstitutional. However, the court was now looking without its "strict scrutiny" magnifying glass, and instead used dark "rational basis" sunglasses. It seems absurd for the court to come to diametrically opposed conclusions when looking at the same regulation. Notice that the Big Sandy court held that defendants "have failed to show that the restriction on hair length is a valid means of achieving its objectives of maintaining discipline . . . ."\textsuperscript{204} The court then stated the inverse by holding that the regulation "is rationally related to the legitimate goals of creating an atmosphere conducive to learning . . . ."\textsuperscript{205}

Apparently, even if the regulation is not a valid means of achieving objectives, it will still pass Fourteenth Amendment muster if it is rationally related to those objectives. The court does not state how "rational" or how closely "related" the regulation must be. Therefore, this certainly provides a wide latitude to courts to uphold regulations of a wide variety.

Conclusion

Students challenging a hair length regulation can prevail if enough rights are burdened by the regulation. Simply wearing long hair as a personal preference may be a right, but it will likely not be considered a First Amendment right. Native American students can have an especially important claim. To such students, the wearing of long hair can have a religious significance and can be regarded as representative of pride in their culture and traditions. Parents have a right to encourage and supervise that pride. Such long hair can have communicative intent, particularly within the Native American paradigm. Big Sandy reached the correct result. However, the court's reasoning was misguided in several significant respects. The courts of this nation must be limited as to their inquiries into the religious beliefs of its citizens, especially Native American citizens belonging to a non-mainstream or minority religion. The right of Native American students in public schools to wear long hair should not be infringed.

\textsuperscript{204} Big Sandy, 817 F. Supp. at 1333.
\textsuperscript{205} Id. at 1335.