

# Of Nose Rings and Things: School Rules, The Right to Freedom of Expression, and Appearance

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‘Education is teaching a child to talk - and then how to keep quiet’ *anon*

## **Abstract**

The seriousness to children and young persons of the right to self expression through hair, dress and facial adornment should never be underestimated. There is evidence of an increase in the trend on the part of students to insist on this right and, as a result many face disciplinary actions taken by their schools, ranging from detention to suspension and expulsion. This article examines, in relation to school policy, rules and discipline concerning students’ appearance and dress; the application of the right to freedom of expression contained in Section 14 of the New Zealand Bill of Rights Act (1990); and the right to freedom from discrimination in educational establishments contained in Section 57 of the Human Rights Act (1993). The potential for conflict between students and schools in relation to compliance with the right to freedom of expression on the one hand and the enforcement of schools’ uniform codes and school rules which impose restrictions on appearance, on the other is considered.

While it is of assistance to examine U.S. and Canadian jurisprudence, the ‘different’ status of the New Zealand Bill of Rights Act (1990) in relation to the rights contained in the U.S. Constitution and the Canadian Charter of Rights and Freedoms means that much of this paper is of necessity speculative. However, while it is acknowledged that the New Zealand Bill of Rights Act (1990) does not share the supreme law status of the rights incorporated in the U.S. Constitution or the Canadian Charter of Rights and Freedoms, the interpretation which the courts have given it thus far indicates that it is of far greater constitutional importance than at first expected.<sup>1</sup> The effect on New Zealand law of the Canadian Charter was stated by Lord Cooke of Thorndon:

... the Canadian Charter of Rights and Freedoms was probably the precedent most influential in its content. Probably, too, Canadian jurisprudence has been that which the New Zealand courts have most consulted in the many cases already coming before us under the 1990 Act. We do not automatically follow Canadian decisions, but we certainly profit from them.<sup>2</sup>

## Introduction

Three decades ago three public school students in the United States publicised their objections to their country's involvement in the hostilities in Vietnam by wearing black armbands to school.<sup>3</sup> The Supreme Court upheld their right to express opinion in this way and said that a school regulation which prohibited the wearing of armbands violated their right to freedom of expression under the First Amendment. The right to such expression could be disallowed, the Court said, only when the exercising of it was causing disruption. What has happened since?

An item of a type which appears not uncommonly in our daily newspapers:

*Pupils unwanted: Four schools have declined to take in two West Auckland pupils indefinitely suspended for continuing to wear tongue studs. Green Bay High School suspended fourth-former Raquel Beaumont and third-former Ross James a fortnight ago for failing to adhere to the dress code.*<sup>4</sup>

There are many similar examples - in 1991 a schoolgirl was expelled from her New Zealand public high school for dying her hair blonde; an unshaven Auckland schoolboy was given a razor by school authorities and told to shave before returning to class; a Muslim student was refused the right to wear long trousers to school (which his religion requires) rather than the regulation shorts; a schoolgirl in Wellington was refused entry to a national English exam until she removed her nose ring. More recently, the Paul Holmes show<sup>5</sup> on New Zealand National television featured an interview with a schoolboy who had been suspended from school *essentially* because of his hair style.<sup>6</sup> Apart from a long piece at the front, his head was shaved - a style which the principal believed lowered the tone of the school.

Undoubtedly behind each of these stories lurks much that is unsaid. To the thoughtful observer, however, each case presents itself as a struggle for power between the school and the student. While reason may dictate a practical solution, rarely is it that easy. Of little consequence at first glance, each of these cases raises a plethora of significant legal and constitutional issues. The dilemma faced daily by parents of teenagers, and to an ever increasing extent by the schools they attend, is driven by a clash of wills. On one hand is the student to whom the ability to express him or her self through dress, hair and facial adornment is all important. On the other is the equally strong desire of their schools to require a certain standard of dress or to forbid certain forms of adornment.

Adults tend to trivialise a child's desire for such self expression, usually suggesting that the child should simply give up and conform. When they do not, however, the matter then assumes an importance that is anything but trivial. The entrenching of positions by the parties - well illustrated by the cases referred to above - can lead inexorably to outcomes that have catastrophic effects on a child's education.

To date in New Zealand, despite numerous reported incidents, there have been no cases in which students have used the New Zealand Bill of Rights Act (1990) to challenge their suspensions in the area of appearance. This may be due largely to cost, but importantly to the determined efforts of the many agencies in New Zealand concerned solely or in part with the protection of children's rights. There are no less than five such agencies. There is the Ministry of Youth Affairs, the Commissioner for Children, the Youth Law Project, the child

advocacy service operating through the Wellington Community Law Centre and the Human Rights Commission. Through education, advice and negotiation between schools and students these agencies strive to soften the attitudes of both sides. There have, however, been cases where the Human Rights Commissioner has been asked to investigate a claim of discrimination under the Human Rights Act (1993) (and its forerunners, the Race Relations Act (1971) and the Human Rights Commission Act (1977)) relating to appearance and dress.

### **A Common Scenario**

Joseph is a bright 16 year old attending his local public high school. He is asked by his teacher to trim his hair. A month later he has still not complied. In response to the school's invitation, he attends an interview with the Deputy Principal accompanied by his mother. Despite his mother's urgings, Joseph refuses to agree to trim his hair. He is told by the Deputy Principal that unless he cuts his hair he cannot attend school, and he is sent home. Joseph works at home until the end of the year when he is allowed back to the school to sit his national exams.

The next year Joseph arrives to re-enrol. Once again he is informed that until he cuts his hair he cannot attend the school. Joseph gives in and cuts his hair. He is let back into school but again he lets his hair grow. When he is sent home this time Joseph contacts the local Community Law Centre which advises the school that Joseph has been illegally suspended. The school allows him to return. At the beginning of the next term Joseph is advised that the School Board of Trustees intends to invoke its power under Section 13 of the Education Act (1989) to suspend him for 'continual disobedience'. Joseph is requested to attend a hearing in respect of the matter. As Joseph is now 16, rather than suspend him under Section 13, the Board of Trustees expels him under Section 14. Joseph decides not to take the matter any further and is now successfully attending university without the help of school qualifications.

Joseph is not unlike Sam Cope in Victoria.<sup>7</sup> Sam however chose to take official action and laid a complaint of discrimination on the grounds of gender under the Victorian Equal Opportunity Act (1994). As in Joseph's case, the parties became entrenched in their positions and they parted company in a similar fashion to Joseph and his school.

As one commentator saw the outcome:<sup>8</sup>

Sam won the battle, but lost the war ... He had learned a major lesson about the uses to which adults with authority may use it against those without it. What is important is not the hairstyle, but schools' treatment of students who are different and assertive.

Whatever other sentiments a person may have in respect of these encounters it is difficult to see them other than as a lamentable waste of student and school time, energy and financial resources.

When considering the legal issues it is useful to ask three questions:

1. What are the rights of students in relation to their school?
2. What are the rights and powers of schools in relation to students?
3. What role should the Courts play?

## **The Rights of Students in Relation to their School**

It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of the Court of almost 50 years.<sup>9</sup>

Children are people. Their rights are substantially the same as adults. In addition, their rights are specifically highlighted in the United Nations Convention on the Rights of the Child.<sup>10</sup> In New Zealand, human right protections in general are contained in the New Zealand Bill of Rights Act (1990) and the Human Rights Act (1993).

### **The New Zealand Bill of Rights Act (1990)**

According to its long title, the New Zealand Bill of Rights Act (1990) (hereinafter referred to as 'the Bill of Rights') is an Act –

- (a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
- (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

Section 3 of the Act gives it application in respect of -

- (a) Acts done by the legislative, executive or judicial branches of the government of New Zealand; and
- (b) Acts done by any person or body in the performance of any public function, powers, or duty conferred or imposed on that person or body by or pursuant to law.

Section 14 of the Act provides:

**14. Freedom of Expression** - Everyone has the right to freedom of expression including the freedom to seek, receive and impart information and opinions of any kind in any form.

Does this guarantee of freedom of expression extend to schools so as to constrain the rule-making and other powers of teachers and school administrators?<sup>11</sup>

Section 5 requires that the rights and freedoms contained in the Act are to be applied subject:

to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

And Section 6 provides:

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

Under Sections 75 and 76 of the New Zealand Education Act (1989) ('the Education Act') school principals and Boards of Trustees have complete discretion to control and manage

their school. Boards of Trustees are given the power to make by-laws ('the school rules') for that purpose.<sup>12</sup>

They must exercise this discretion, however, 'subject to any enactment and to the general law of New Zealand'.<sup>13</sup> This then gives rise to two issues. The first is: to what extent does the Bill of Rights confine the rule making powers of Boards of Trustees? Or, putting the matter in the present context, are Boards of Trustees constrained by the protections of the Bill of Rights in making and enforcing rules in respect of dress codes and appearance? This then leads on to the direction that these rules must, in terms of Section 6, be interpreted in a manner which best gives effect to those rights.

There now seems to be little doubt that public schools are subject to the Bill of Rights. Section 3(b) applies the Act to those performing a 'public function'. Public education is surely that. In this regard an analogy may be drawn between public schools and public bodies incorporated under the New Zealand State Owned Enterprises Act (1986).<sup>14</sup> In *Federated Farmers of New Zealand Inc v New Zealand Post Limited* McGechan J. considered the right to freedom of expression contained in Section 14 of the Bill of Rights in respect of the handling of mail by New Zealand Post, a state owned enterprise. He said:<sup>15</sup>

I have no difficulty regarding mail handling as a 'public function'. It is carried out for the public, in the public interest, and moreover by a company which while technically a separate entity presently is wholly owned and controlled by the Crown; a 'State Owned Enterprise'. For Bill of Rights purposes and as an ordinary use of language NZP can and should be regarded as exercising 'public functions'. I do not encourage fine distinctions amongst those functions.

The application of the Bill of Rights to actions done by public schools was confirmed in 1991 by the then Commissioner for Children, Ian Hassall. His office was required to report on a complaint relating to the strip searching of students at Hastings Boys High School, a public school. It was suspected that a number of boys at the school were cannabis users and eighteen boys were taken from their classrooms and strip searched. The students complained that the school had breached several rights guaranteed by the Bill of Rights, specifically Sections 9, 16, 17, 21, 22 and 23. These ranged from the right not to be subjected to cruel or disproportionately severe torture or punishment, to freedom of association, protection from unreasonable search and seizure and the particular rights of persons arrested or detained.<sup>16</sup> In concluding that Section 3(b) meant that the Bill of Rights applied to actions taken by teachers under the authority of the Education Act the Commissioner said: 'The New Zealand Bill of Rights Act (1990) provides a necessary counter to the otherwise unbalanced power conferred by Section 75 of the Education Act (1989)'.<sup>17</sup>

In New Zealand Boards of Trustees of public and integrated schools<sup>18</sup> are constituted as autonomous bodies. They are publicly funded and their provision of compulsory education (pursuant to Section 3 of the Education Act) is clearly a public function. The situation is less clear where the distinction between 'private' and 'public' is blurred. For example, is education provided by a public school on a fee paying basis for an overseas student a public function? A

public school provides boarding facilities on a fee paying basis. Is this a public function? What of wholly private (independent) schools themselves? It is hard to see a difference between private schools and any private organisation providing a public function. In *TV3 Network Ltd v Eveready NZ Ltd* [1993] 3 NZLR 435 the Court of Appeal held that the Bill applied to a broadcaster who was a private corporation on the basis that it was under a statutory duty (under the Broadcasting Act (1989)) and therefore its actions were within the ambit of S.3(b).

A recent decision of Goddard J in *M v The Board of Trustees of Palmerston North Boys High School & the Attorney General*<sup>19</sup> is helpful in this context. In this case the parents of a boy dismissed from a boarding house facility, provided privately but attached to a public school, challenged the dismissal on the grounds there had been a breach of Section 27(1) of the Bill of Rights.

In considering whether the Act applied in the boarding house context, Goddard J. applied the 'control' test used by the Supreme Court of Canada in its consideration of the application of the Canadian Charter of Rights and Freedoms to the rules of a university<sup>20</sup>. In so doing she found:<sup>21</sup>

... the Education Act 1989 makes no express reference to government input or control over the actions of boards of trustees in terms of the management of boarding establishments, including disciplinary processes and thus it cannot be said that any close and direct relationship exists for the purposes of this case.

Applying Goddard J's test of 'government input and control' in the converse supports the proposition that the Bill of Rights applies to the provision of all educational services whether public, integrated or private. While private schools provide education privately pursuant to contract, they are still subject to 'government input and control' in respect of institutional accreditation and course prescription. The Education Act makes education compulsory from six to sixteen. Accordingly, it follows that the provision of statutory mandated education is a 'public function' within the meaning of Section 3(b) of the Bill of Rights whatever the arrangements by which that function is performed.

This view is supported by Radich and Best in a paper in which they consider the application of the Bill of Rights to non-Crown entities. In referring to the White Paper discussion on the breadth of Section 3(b) they note:<sup>22</sup>

The White Paper, then, draws two key distinctions: first, between government action and public action, both of which are subject to the Act; and secondly, between public action and private action, of which only the former is subject to the Act. Thus, both the wording of the section and the White Paper make it clear that the Act is to apply beyond the three arms of government. Non-governmental bodies exercising a public function, power or duty may be subject to the Act, provided one can say the function, power or duty exercised was conferred or imposed by or pursuant to law. With the restructuring of the state this conclusion seems entirely appropriate.

On this basis they respectfully disagree with the decision of Goddard J. in *M's* case. Accordingly if, as McGechan J. suggested in the *Federated Farmers* case referred to above,

one considers the origin or generation of the functions or powers and if these are found to lie in statutory provisions, then the exercise of the power is subject to the Bill of Rights.

In response to the decision in *M*'s case a proposed amendment to Section 75 of the Education Act has been introduced into Parliament. This aims to ensure that all aspects of a school's activities are administered in a manner which is consistent with the Bill of Rights. The Bill expressly provides that boarding hostels are part of a school for this purpose. This is, in this context, a restatement of Section 6 of the Bill of Rights. If all enactments are to be interpreted in a manner which is consistent with the rights contained under the Bill of Rights, it follows that all school rules and regulations made by a Board of Trustees pursuant to Sections 72 and 75 of the Education Act (1989) must be interpreted in this way.

### **Is Appearance 'Expression'?**

While it is clear that the freedom of expression guaranteed by Section 14 of the Bill of Rights includes views expressed in student newspapers or by students verbally, the question arises as to whether this freedom extends to forms of non verbal and non written expression. For many children and young people, control over their dress and appearance is central to their self expression. In a paper analysing policies pertaining to school dress codes formulated recently by state education bureaucracies in Australia the authors note that: 'As an integral part of the presentation of self, dress is a significant element in the social formation of the body'.<sup>23</sup>

In the United States, which has a long and vibrant tradition of constitutional rights, it is well established that the guaranteed freedom of speech includes a diverse collection of forms of expression. For example, in the *Tinker* case, referred to above, the wearing of black armbands at school in protest against the war in Vietnam was held to be 'closely akin' to speech because of its symbolic quality.

For a student one of the most clear and easily accomplished means of self-expression is his or her appearance. One cannot ignore the impact on a student of a world where anything goes in terms of hair, facial adornment, tattoo and dress. As Rishworth says<sup>24</sup>

... the weight of American law is that the appearance of a person, both as to clothing and hair style etc, is a matter of freedom of expression because, through appearance and clothing, students attempt to express themselves. The starting point, then, is that freedom or expression is a wide concept and is definitely implicated in matters of student dress and appearance as well as in pure speech and symbolic expression.

Over the last few years a debate has raged in the United States in relation to appearance and dress codes that have been instituted by public schools in an attempt to curb rising gang violence. In many cases students have asked the courts to re-examine the principles set out in the *Tinker* case. The cases cover a wide range of circumstances, from the wearing of blue jeans to school to cross-dressing for a school prom, from the wearing of earrings to sagging pants and tattoos.<sup>25</sup> In most cases there has been a tacit acceptance that the constitutional right to freedom of speech includes appearance and the guiding principle has

been that students can express themselves however they wish unless this expression threatens the school environment.

In *Stephenson v Davenport Community School District*<sup>26</sup>, a recent decision of the U.S. Eighth circuit Court of Appeals, the Court adopted a ‘two-identifier’ approach in relation to anti-gang dress code.<sup>27</sup>

Schools intervene only when students’ conduct shows two factors that indicate gang activity. Merely wearing gang related clothing won’t trigger intervention, though wearing gang-related clothing and engaging in other suspicious non-criminal conduct - such as acts of intimidation - will prompt intervention.

*Stephenson* provides a very clear example of the attitude of the U.S. judiciary towards a school’s overreaching in this area. The case concerned a schoolgirl, Brianna Stephenson, who tattooed a small cross between her thumb and forefinger. The cross was intended by her to be a form of self expression, not as a religious symbol or to signify any gang affiliation. In response to increasing gang activity within the school’s district, the school introduced a regulation prohibiting any display of gang affiliation. Any breach would result in immediate suspension and/or expulsion. Staff at the school formed the opinion that Brianna’s tattoo was a gang symbol and that it evidenced her involvement in gang activity. Despite a total absence of evidence of gang affiliation, Brianna was suspended and advised that she could not attend the school until she had the tattoo removed. Brianna did this in a process which was long, very painful, and expensive. She succeeded in her action against the school. The Court held that the relevant school regulation was ‘void for vagueness’ in that it did not identify ‘gang’ apparel with sufficient specificity. It restated the *Tinker* principle - that students do not shed their constitutional rights to freedom of speech or expression when they enter the school.

In New Zealand and Australia challenges to school rules on dress and adornment have generally centred on non-discrimination legislation. In Australia, most issues in respect of student rights to expression have been considered in relation to the human rights legislation of the particular state, for example, the Victorian case of Sam Cope referred to earlier, and the case of the Canberra schoolboy who was expelled from school for wearing an ear stud.<sup>28</sup> In New Zealand the rights are contained in the Human Rights Act (1993) ( hereinafter called ‘the Human Rights Act’). This is the companion legislation to the Bill of Rights and prohibits discrimination on a long and elaborate list of grounds.

### **The Human Rights Act (1993)**

Section 21 of the Human Rights Act sets out the prohibited grounds of discrimination. These include religious belief, gender, political opinion, sexual orientation, family status and race. In respect of educational establishments Section 57 provides:

**57 Educational establishments** - (1) It shall be unlawful for an educational establishment, or the authority responsible for the control of an educational establishment, or any person concerned in the management of an educational establishment or in teaching at an education establishment, -



- (a) To refuse or fail to admit a person as a pupil or student; or
- (b) To admit a person as a pupil or a student on less favourable terms and conditions than would otherwise be made available; or
- (c) To deny or restrict access to any benefits or services provided by the establishment; or
- (d) To exclude a person as pupil or a student or subject him or her to any other detriment, -  
by reason of any of the prohibited grounds of discrimination.

In many cases, where action may lie in respect of a breach of the right to freedom of expression (under the Bill of Rights), an action may also lie in respect of gender or racial discrimination (under the Human Rights Act). Complaints under the Human Rights Act are made in the first instance, to the Human Rights Commission. Disputes are determined before the Complaints Review Tribunal. Where a prohibition applies equally to both genders, for example the wearing of earrings, nose-rings or studs (or any facial piercing for that matter) or prohibitions on hair styles or colours, the Human Rights Act has no application. However, gender neutral prohibitions may still give rise to complaints under the Act on the basis of discrimination on racial or religious grounds, for example, in the case of the Muslim boy and his long pants or in the case of the 14 year old Maori girl who claimed the right to wear a moko tattoo.<sup>29</sup>

The Human Rights Commission has held that it is discriminatory for a school to prohibit a Muslim boy to wear to school the long trousers required by his religious belief. It has also held it discriminatory for a school to prohibit the wearing of shorts to school by girls. The *Sunday Star*<sup>30</sup> reported that the two girls involved in the shorts complaint were considering a High Court bid to have rules relating to school uniforms declared illegal under the Bill of Rights. Though their lawyer was quoted as saying that a requirement to wear the same thing to school every day was a breach of freedom of expression under the Bill of Rights, there has been no further publicity about the matter.

### **The Rights and Powers of Schools in Relation to Students**

*'We don't go by the law here, we just go by what is fair and reasonable'* Principal who suspended a student for 'continual disobedience' relating to hair length.

### **The Making of School Rules**

Boards of Trustees are comprised of elected parent representatives, a staff representative and the School Principal. Initially the Education Act required Boards of Trustees to include an elected student representative but this provision was soon repealed. As noted previously, the Act gives each School Board of Trustees the power to make any bylaws which they consider necessary for the control and management of the school. This power is 'subject to any enactment, the general law of New Zealand, and the school's Charter'.<sup>31</sup> The Act requires the

Board to consult with the community in the formulation of the school Charter.<sup>32</sup> Required to be included within the Charter are mandatory core charter elements prescribed by the Minister of Education as 'National Educational Guidelines'. Specifically included within these core charter elements and referred to as a 'Guiding Principle' is the requirement that:

The Board of Trustees accepts that all students in any school or schools under its control are given an education which enhances their learning, builds on their needs and respects their dignity.

Accordingly, Boards are required to formulate their policies and make their school rules both in consultation with the community and having regard to the guiding principle referred to above. Needless to say, school rules are not always made this way.

Whatever the merits of any school rule limiting a student's right to freedom of self expression, the criterion for its legitimacy under the Education Act (1989) is that it is deemed necessary for the control and management of the school.<sup>33</sup> The question then arises as to the effect of Section 5 of the Bill of Rights on this capacity.

Section 5 provides that the rights contained therein may be subjected to 'reasonable limits as are demonstrably justified in a free and democratic society'. The test which has been applied in respect of the equivalent provision in the Canadian Charter of Rights and Freedoms is known as the *Oakes* test.<sup>34</sup> In that case the question before the court was whether Section 8 of the Narcotic Control Act R.S.C. (1970), which imposed a burden of proof on the Defendant to show that they were not in possession of the drug for the purpose of trafficking, was inconsistent with the presumption of innocence contained in Section 11(d) of the Canadian Charter of Rights and Freedoms. The test used by the court was whether the objective of the measures which place a limit on a Charter right or freedom is of sufficient importance so as to warrant the overriding of the right or freedom. What this means is that first, the measures adopted must be carefully designed to achieve the object in question and secondly, they should impair the right or freedom as little as possible. This approach has been adopted by the New Zealand Courts<sup>35</sup>. The result of its application in this context could be that once it is established that a school rule has the effect of limiting the right contained in the Bill of Rights, the school seeking to enforce the rule would have the burden of establishing that the objective the rule seeks to achieve is sufficiently important to justify the rule as a reasonable means of achieving it.

Justifications commonly given for school rules prescribing certain standards of dress and prohibiting certain styles or lengths of hair, jewellery and personal adornments are:

- i. The fostering of neatness and pride in appearance so as to produce citizens with socially desirable characteristics for the community at large and the work force in particular.

This is an old idea as is illustrated by an extract from the 1875 Regulations of the Department of Public Instruction in Queensland which required that 'children must come to school respectably clothed and clean'. Accordingly a school principal could exclude temporarily a child from attendance at a state school for want of cleanliness or

want of respectable dress.<sup>36</sup> The fostering of school spirit and the establishment of a feeling of school identity are also relevant here.

ii. For safety.

In certain areas of a school, a science laboratory for example, or during sport, the wearing of certain styles of dress might reasonably be prohibited on grounds of safety. Examples of this may be a type of footwear, rings or other jewellery, or long hair which could, in certain circumstances, pose a danger to the student or to others. One might argue that this is not a health and safety issue for which the school is responsible but rather one that is the responsibility of the student. On the other hand a student is best able to learn in a safe environment. Safe in this context may also include free from disruption.

iii. To prevent disruption.

If certain hairstyles or adornments, for whatever reason, threaten to cause or contribute to disruption in class then they may fairly be regarded as interfering with the educational process. Many school communities in the United States adopt school uniform policies as part of an overall program to improve school safety and discipline. Those in favour of these policies claim that school uniforms decrease violence and clothing theft among students, prevent the wearing of gang apparel, help students focus on school work and help parents and schools resist peer pressure.<sup>37</sup> In the words of one commentator:<sup>38</sup>

As a general matter, I believe the Constitution permits a school board to prohibit the wearing or display of gang clothing, jewellery or symbols because such activity can seriously disrupt school life. It can cause fights that might lead to serious injury or death; it can so intimidate other students that they cannot participate fully in classes and activities; and it can undermine the authority of teachers and administrators

The third justification has merit on educational grounds, albeit to a lesser extent perhaps in Australia and New Zealand where the gang problem in schools is not (yet) as prevalent as it is in schools in the United States. The first two, however, may indeed be nothing more than justifications for rules which have as a primary goal the achieving of conformity through threat of disciplinary tactics. School Boards of Trustees are entrusted with fostering a school community in which children are best able to learn. Before making rules in this area they should ask themselves the basic question of whether the rules are justified on educational grounds. While in some circumstances the wearing of certain apparel may significantly disrupt the learning process, witness the gang problem in the United States for example, it is difficult to imagine how the wearing of a nose stud or having long or blue or pink hair can have any significant negative influence on a student's education.

It is true that the regulation of appearance in schools is supportable when its purpose is to create an educational environment which is free from substantial distraction and disruption and which is safe. It becomes questionable when it does little more than reflect the personal preferences of those in authority.

### **The Enforcement of School Rules**

One argument for enforcement of school rules relating to appearance is that upon being accepted for admission a student agrees to abide by the rules - usually by a document signed by their parents. This seems to be based on the notion that this document forms a legally binding agreement. Even if it were to be accepted that public education is provided pursuant to a contract, there are two problems here. The first relates to privity and the second relates to the enforceability of contracts entered into by minors. The doctrine of privity of contract means that a person may not generally be bound by a contract to which they are not a party. In other words, even though parents may agree to use their best endeavours to ensure that their children abide by the school rules, they can not sign away their children's rights.

Even if a student enters into an agreement with the school personally the issue of the enforceability of contracts against minors arises. In New Zealand the relevant law is contained in the Minor's Contracts Act (1969). Section 6 of this Act provides that a contract is not enforceable against a minor under the age of eighteen years unless it is fair and reasonable in all the circumstances<sup>39</sup>. The onus of proving an agreement is fair and reasonable in all the circumstances would fall on the school. The Canadian *Oakes* test of reasonable 'ends to justify the means' discussed above is relevant here.

Section 5 of the Act provides that a contract is enforceable against a minor aged 18 and over unless the minor can prove that the contract or a provision thereof is 'harsh or oppressive'.<sup>40</sup> Whatever test applies the common sense approach must be to ask whether the rule can reasonably be justified in the interests of the minor's education and the welfare of the educational environment generally.

The case of long-haired Joseph illustrates the usual sequence of events in most disputes between school and student, with the school at some stage invoking the power of suspension or expulsion. The power to suspend and expel is given to School Principals and Boards of Trustees by sections 13 to 17 of the Education Act. Under the Act, a pupil may be suspended or expelled only where '[t]he student's gross misconduct or continual disobedience is a harmful or dangerous example to other students at the school...'. In many cases the students themselves add weight to the argument for suspension by developing aggressive and hostile behaviour in response to what they consider to be a school's unreasonable adherence to restrictive rules. As in Joseph's case, the attitude may turn a good student into a bad student. While there are many cases where a student chooses to conform rather than be suspended or expelled, unhappily there are equally many cases where a student either leaves before the suspension process is completed, is formally suspended or, if over the age of 16, is expelled.

There is a great deal of concern in New Zealand about the rising numbers of suspensions from schools.<sup>41</sup> It is clear from a review of the cases that the rigid enforcement of rules relating to appearance contributes not insignificantly to these numbers.

### **What Role Should the Courts Play?**

The withdrawing of a student's right to attend the school of his or her choice is a serious matter with profound consequences for the student. Despite this, in New Zealand legal challenges by students in respect of their suspension or expulsion are rare. Those that have

been brought have tended to be challenges in respect of the procedures of the suspension or expulsion rather than the substance that underlay them. This may be largely explained by a lack of knowledge and lack of financial means on the part of the student and his or her family.

Given that a School Board of Trustees is accountable to its community, and is required to make its decisions on the basis of its knowledge of its school and its community, in what circumstances should the Court intervene and find that the decision of a Board of Trustees is unreasonable? In addition to *M*'s case discussed earlier, there are three New Zealand cases which are illustrative of the approach adopted by the New Zealand Courts in respect of these matters.

***Edwards v Onehunga High School.***<sup>42</sup>

This case involved an Application for Judicial Review of the decision of a School Board of Governors<sup>43</sup> of a public school to suspend a pupil for refusing to comply with the school rule relating to hair length. The student justified his refusal to obey directions that he cut his hair on the basis that the direction and the rule that underlay it was an intrusion of his personal liberty<sup>44</sup>. The student was suspended by the School Principal under the power contained in Section 130 of the Education Act (1964) (the 'old' Act). The old Act contained provisions similar to the present Act except that the 'continual disobedience' requirement of the present Act was drafted as 'incurrible disobedience' in the old Act.

The primary focus of the Court was the student's submission that the school rule which regulated hair length was *ultra vires* or was outside the Board's powers of control and management. The Court held that regulating dress and appearance was within the ambit of those matters properly to be controlled by the Board. The Court upheld the student's suspension in respect of his refusal to obey the principal's direction that he cut his hair on the grounds that his behaviour constituted a serious and direct challenge to the authority of the school. The behaviour set such a bad example, the Court said, that it was in contravention of the maintenance of control and discipline within the school. It has been suggested by many commentators that it is unlikely that a similar case would be decided in the same way now in light of the passage of the Bill of Rights, which was not in effect at the time of the decision. In addition, it has been suggested that underlying that decision may have been the prevailing *in loco parentis* doctrine. This rests on the historical notion that in placing a child in a school the parents delegated to the school their authority over the child while the child was under the school's care and control. In New Zealand, and Australia, the doctrine is regarded as having little significance today. In the case of *Gillick v West Norfolk Area Health Authority*<sup>45</sup> the House of Lords held that parental rights of control over a minor in reality only now exist in so far as they are needed for a child's benefit and protection. In the words of one commentator:<sup>46</sup>

Not only is it a fiction in the modern context to speak of the parent voluntarily entrusting the child to the school (or teacher) and thereby delegating his or her parental disciplinary authority; but in modern legal theory, not even the concept of parental authority survives without significant legal qualification.

The decision in *Edwards* is significant however in showing the court's reluctance to involve itself in such school matters.

### ***Maddever v Umawera School Board of Trustees***

A contemporary case reflecting a similar view in the 'new' 'Tomorrow's Schools'<sup>47</sup> environment is the case of *Maddever v Umawera School Board of Trustees*<sup>48</sup>

Jack Maddever was involved in a playground incident. He was disciplined by the principal. The parents withdrew Jack from the school and complained to the Ombudsman. When the Ombudsman supported the school the parents sought a declaration from the Court that in making decisions relating to the parents' complaint the Board of Trustees had breached rules of natural justice and their actions were therefore illegal. In striking out the application Williams J. concluded strongly that it was the scheme of 'Tomorrow's Schools' that matters concerning a school should be resolved at a local level with the involvement of locally elected parent representatives on the School Board of Trustees, whose accountability was to the community. He said:<sup>49</sup>

Indeed, even in cases where pupils' rights are concerned it seems to me, with respect, that there is need for very considerable judicial caution. In the sensitive area of education there is a significant risk that the courts will, in administering judicial review, unwittingly impose their own views on the educational issues when they have no special competence for that task and the legislature has made it tolerably clear that such matters are not primarily judicial issues but rather issues of educational policy for school boards operating against the broad backdrop of the national educational guidelines.

Williams J. may have been influenced to some extent by the apparently trivial incident underlying the action, and by the fact that the student's parents had already moved him from the school.

### ***M & R Syms and the Board of Trustees of Palmerston North High School***

*M & R v Syms and the Board of Trustees of Palmerston North High School*<sup>50</sup> involved two students who, had in breach of school rules, consumed a small amount of alcohol while on a school ski trip. The offending was out of character for the two 'good' students involved. The relevant school rules provided that any breach would result in immediate suspension. Both the Rector of the school and the Board of Trustees took the view that the rule must be applied absolutely and the students were suspended indefinitely. One of the students was due to sit a national examination. The students applied for an order to have the Board's decision overturned.

While the case does not concern the right to freedom of expression, the decision of the Court is relevant in the present context because of McGechan J.'s observations in respect of the criteria for suspension, in particular that of 'gross misconduct'.

First, the statutory criterion is not simple 'misconduct'. It is 'gross misconduct'...if the stated criterion was simple 'misconduct', any infraction at

all of standards of proper conduct, whether laid down by school rules or more general standards of accepted behaviour, however minor, would place students at risk of suspension and expulsion. Such a situation would not have been intended. The legislature inserted the qualifying adjective 'gross', with its connotations of the striking and reprehensible to ensure a child is not suspended or expelled for relatively minor misconduct.

In overturning the Board's decision to suspend the two students, McGechan J. observed that what amounted to 'gross misconduct' under the Education Act needed to be considered in relation to the conduct in question in each case. He did not believe that the legislature would have envisaged that the statutory controls would have been so open to 'outflanking' by school rules which, in effect, made any infraction, however minor, 'gross misconduct'<sup>51</sup>. McGechan J. took the uncommon step of adding a postscript in which he said:<sup>52</sup>

Indeed, it is not a decision that the conclusion reached by the principal and Board in this case was 'wrong' in an absolute sense; but merely that those involved went about making the decision in some respects in the wrong way. Rather, this decision holds...

- iii. that even where gross misconduct and harmful and dangerous example have been found to exist, principals must not suspend automatically. Principals must pause and consider whether in all the circumstances of the particular case, suspension for an unspecified period is warranted as a matter of discretion. Boards must consider whether, in all the circumstances of the particular case, uplifting of suspension (conditionally or otherwise) or extended suspension or expulsion is warranted as a matter of discretion. At each of the latter discretionary states, special circumstances of humanity and mercy may be brought into account.

These statutory approaches are designed for the protection of children. They are not to be sacrificed to administrative or disciplinary efficiency, or some supposed need for absolute certainty. Results must not be fixed, they must instead be fair.

## **Conclusion**

In considering the attitude to adopt in respect of students' desires to wear nose rings, have dreadlocks or tattoos or to simply wear what they like, school principals and Boards of Trustees should remember two points. The first is that what is at stake is a student's right of freedom of expression. The principles guiding the limiting of that freedom should be the same within the school grounds as they are in the community at large. Few would argue that schools should not have rules which have as their objective the creation of a safe and orderly learning environment. Accordingly, those making and enforcing rules in respect of appearance and dress need to be clear on the rationale for those rules. If those rules are challenged it is they who have the burden of persuading the Court that there is a reasonable justification for them.

The second point worth considering is the extremely serious consequences for a student of suspension and expulsion. Before this step is taken principals and Boards of Trustees should carefully re-examine the foundation of their stance and not retreat into an entrenched position on the issue. In addition, they should fully explore other less drastic means of resolving the issue. Of course students also have a responsibility to explore their own motives and to act reasonably in the circumstances. Litigation is time consuming, expensive and destructive. Because of the special nature of the relationships that underlie 'good' education, it is questionable in any event whether the Courts are an appropriate or desirable forum for the resolution of these type of disputes. With this in mind, serious consideration should be given to the establishment of an Education Tribunal similar to the Complaints' Review Tribunal set up under the Human Rights Act. The need for the establishment of an Education Review Tribunal was argued in a 1997 Briefing Paper for the Minister of Education from the Office of the Commissioner for Children. This was prepared in response to mounting concern about the rising number of school exclusions and the inadequacy of present review procedures. An Application for Judicial Review is as daunting and expensive as any other court action which could be taken, for example, in the tort of negligence. Even though parents may in many cases qualify for legal aid, schools generally will not. Complaint to the Ombudsman is lengthy due to pressures on that office, and can only result in a recommendation. Complaint to the Human Rights Commission is possible only where the allegation is of discrimination on one of the prohibited grounds under the Human Rights Act. The Education Review Office, which carries out periodic reviews of schools' performances, has limited resources to act on individual complaints and has statutory power only to report to the Minister of Education.

In her address to the 1998 conference of the New Zealand School Trustees Association Anna Fitzgibbon said:<sup>53</sup>

Discipline can take many forms. Writing lines and detention are punishments which infringe to a degree on student's rights and freedoms, but it is a completely different matter when a school dictates what a student can or cannot do to his or her own body.

Schools are a microcosm of a colourful and diverse society. They should be encouraged to celebrate freedom of expression and diversity in their students and not be concerned with the suppression of it.

### **Keywords**

School; Rules; Student Rights; Appearance; Freedom, New Zealand.

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## Endnotes

- 1 For example, *Simpson v Attorney-General* (Baigent's case) [1994] 3 NZLR 667.
- 2 Then Sir Robin Cooke, President, Court of Appeal of New Zealand [1993] The Australasian Law Teachers' Association Annual Conference, Christchurch, New Zealand, Vol.5(2) 203.
- 3 *Tinker v Des Moines Independent School District* 393 U.S. 503 (1969)
- 4 *The Dominion*, Wellington, New Zealand, 26 March 1998,1.
- 5 Wednesday 9 September 1998.
- 6 The term 'essentially' is used because in most disputes of this kind there are imputations of bad behaviour on the part of the child - generally arising from frustration with school attitudes.
- 7 *Cope v Girton Grammar College* (1995) EOC 92-713,92-680.
- 8 Rayner, M. (1996) Students' Rights. In D. Stewart (ed) Proceedings of the 5th Annual Conference of the Australia and New Zealand Education and Law Association (Inc.) Brisbane, pp.26-27.
- 9 *Tinker v Des Moines Independent Community School District*, 393 U.S. 503 (1969) per Fortas J. p.506.

10 Of which Australia and New Zealand became parties in 1990, and which New Zealand ratified  
in 1993.

11 Boards of Trustees incorporated under the Education Act (1989).

12 Section 72.

13 Sections 75 & 76.

14 This Act allowed for the corporatisation of government departments and agencies.

15 *Federated Farmers of New Zealand Inc. v New Zealand Post Limited* High Court, Wellington  
CP 661/92, 1 December 1992, p.55.

16 *Re Strip Search at Hastings Boys High School* [1990-92] 1 NZBORR 480.

17 At p.495.

18 Once private (independent) schools now established under the Conditional Schools Integration  
Act (1976) and publicly funded.

19 [1997] 2 NZLR 60.

20 *McKinney v University of Guelph* (1990) 76 D.L.R. (4th) 545.

21 High Court, Palmerston North Registry, CP36/95, p.31.

22 (1997) *New Zealand Law Journal*, July, 251, p. 255.

23 Meadmore, D. & Symes, C. (1997) Keeping up Appearances: Uniform Policy for School  
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24 (1996) Freedom of Expression by Students in Schools, School Discipline and Students' Rights,  
*Legal Research Foundation Seminar* 38, p.40.

25 For a discussion of these actions in the US courts see Fossey, R. & DeMitchell, T.A. (1997)  
Litigating School Dress Codes: Are the courts playing 'Trivial Pursuit'? *Education Week*,  
March 19, 42.

26 110F.d. 1307 (8th Circ 1997).

27 Dowling-Sendor, B. (1998) Watching what students wear, *The American School Board  
Journal*, January, 12, p.12.

28 An item in the New Zealand Herald contained in Walsh, P. (1997) *Educational Management  
and the Law*, (1st edition). Auckland: Addison, Wesley, Longman.

29 This was referred to in the editorial 'Bristling about beards at school', *The Evening Post*,  
Wellington, New Zealand, Tuesday, April 30 1996.

30 Auckland, New Zealand, 1 March 1993.

31 Section 72.

32 Sections 61,62 .

33 Section 75 Education Act (1989).

34 From the case of *R v Oakes* (1986) 26 DLR 4th 200 by which it was established.

35 Greig J. in *Zdrahal v Wellington City Council* [1995] 1 NZLR 700.

36 Meadmore, D. & Symes, C. (1997) Keeping up Appearances: Uniform Policy for School  
Diversity? 45,2 *British Journal of Educational Studies*,174, p.175.

37 1996 Manual on School Uniforms, Department of Justice, Washington D.C., U.S. Department  
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38 Dowling-Sendor, B. (1998) Watching what students wear. *The American School Board*  
*Journal*, January, 12, p.12.

39 Section 6(2) & (3).

40 Section 5(2).

41 The Education Amendment Act (1998) which comes into force this year will introduce new  
measures in relation to the use of this disciplinary procedure by schools.

42 [1974] 2 NZLR 238 (CA).

43 The term used prior to 1989 for the loose equivalent of Board of Trustees.

44 This case preceded the New Zealand Bill of Rights Act 1990.

45 [1986] AC 112

46 Harrison, R.H. (1996) Student Discipline by School Principals and Board of Trustees: Powers,  
Procedures and Remedies, School Discipline and Students' Rights, *Legal Research Foundation*  
*Seminar Papers*, 56 at p.68.

47 The regime of devolution of school administration from central government to locally elected  
Boards of Trustees, introduced by the Education Act (1989).

48 [1993] 2 NZLR 478.

49 At p.507.

50 High Court, Palmerston North Registry. 5 December 1990, CP 302 & 303/90.

51 n.52, p.28-29.

52 n 52, p 58-59

53 Fitzgibbon, A. quoted in *Education Today*, September/October 1998, 7.