

# FREEDOM OF EXPRESSION AND SCHOOL DRESS CODES: SOUTH AFRICAN AND INTERNATIONAL PERSPECTIVES

KEN ALSTON<sup>†</sup>

UNIVERSITY OF FORT HARE, EAST LONDON, SOUTH AFRICA

*South Africa's very liberal entrenched Constitution<sup>1</sup> is just ten years old. With it have come far reaching legal implications for the entire South African community, from the declaring of a critical concept in customary society to be unconstitutional, to what boys and girls may wear to school. The paper begins with an explanation of the power of the South African Constitution. This sets the scene for examining school dress codes in respect of school uniforms, hairstyles and jewellery. The Constitution declares that 'everyone has the right to freedom of expression' while the National Education Department, in its guidelines to schools on developing codes of conduct, specifically refers to freedom of expression as including dress and hairstyles. In order to comprehend the extent of this entrenched right it is essential to see it against the backdrop of the founding principles of the Constitution, namely dignity, equality and freedom, principles reiterated three times in the Bill of Rights. School dress codes in four other countries receive particular attention and provide a broader perspective and motivation for some of the original work done on this topic in South Africa. Reference is made to a number of reported incidents involving elements of dress codes in South African schools and special mention is made of the case of *Antonie v Settler's High School Governing Body 2002 (4) 738 (C)*, the one High Court judgment particularly relevant to dress codes and their place in the context of teaching and learning. The strongly emerging connection between freedom of religion and freedom of expression as seen in dress, found both in South Africa and internationally, receives attention. Further, the issue of limitations on rights in the form of dress is examined. The paper raises a number of critical questions about school dress codes and their impact on the rights of school students.*

## I INTRODUCTION

The radical reshaping of so much of South African life by the introduction of the 1996 Constitution<sup>2</sup> and consequent change to a Constitutional democracy, has had and continues to have a profound effect on schools. Prior to the changes, school principals were *de facto* if not *de jure* almost untouchable. Their powers and that of their staff were vast. The rights of learners were not even a topic of discussion. Overnight, schools, constitutionally, became *organs of state* in terms of the Constitution, subject to and bound by the provisions of that Constitution with all its implications.

Section 16 of the Constitution states, 'Everyone has the right to freedom of expression which includes...' and the section spells out four of the included items which are neither in rank order of importance nor an all inclusive list. In attempting to spell out some of the implications for the South African school communities, s 4.1 of the *Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners* (RSA 1998a),<sup>3</sup> hereafter referred to as the

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<sup>†</sup>Address for correspondence: Dr Ken Alston, University of Fort Hare, P.O.Box 19711, TECOMA, East London, 5241, South Africa. Email: [ksalston@mweb.co.za](mailto:ksalston@mweb.co.za)

*Guidelines*, requires that schools protect, promote and fulfil the rights identified in the Bill of Rights. Section 4.5.1 of the same document states,

Freedom of expression is more than freedom of speech. Freedom of expression *includes* (italics added) the right to seek, hear, read and wear. Freedom of expression is extended to forms of outward expression as seen in *clothing selection and hairstyles* (italics added).

It is important to note that this right is for *everyone* without reference to age or any other limiting criteria. That is not to imply that the clause is without any possible limitations.

For purposes of this paper ‘dress codes’ represent school uniforms, hairstyles, jewellery, and casual dress and its limitations.

It is important to recognise that once a school uniform is enforced, restrictions on other aspects are almost certain to follow. The argument introduced is that since the uniform indicates the school from whence the child comes, the ‘*image*’ of the identified school must be protected—under such guise, almost any rules become plausible to those wishing to impose them.

However, school dress is no longer just about the school. Issues of religion and culture, the right to dignity and equality of value as an individual all make demands to be respected. To declare that such issues are trivial, is to trivialise the individual person concerned.

It is useful to consider some learned judges’ opinions. Judge Fortas in *Tinker*,<sup>4</sup> reminded us all that neither students nor teachers leave their constitutional rights to freedom of speech and expression at the school gate.

As early as 1819 in *McCulloch v Maryland*<sup>5</sup> the court stated that

[S]hould Congress under the pretext of exercising its powers, pass laws for the accomplishment not entrusted to government... such [enactment would not be] the law of the land.

When a school, as an organ of state (or state institution) restricts freedom of expression in the form of dress for motives, under whatever disguise, such as ‘upholding the good name of the school’, the school is really saying ‘We don’t like what you are wearing or the way you do your hair’. Such limitation, at least in the South African context, is unconstitutional since, as Meyerson<sup>6</sup> says, the limitation has ‘an impermissible purpose behind permissible sounding language’.

In the United States case of *Stull*,<sup>7</sup> a neatly groomed student, whose hair was longer than school’s arbitrarily determined length, was suspended. In court, the justification given for the rule was that it was ‘helpful to maintain a proper academic discipline’ and was ‘conducive to good education’. However not a shred of evidence was offered to support such contentions. Nimmer<sup>8</sup> refers to this desire for uniformity and stifling of a different ‘life style’ as simply because the decision makers are uncomfortable with it. The court in *Bishop*<sup>9</sup> similarly stated that such restrictions on ‘a young person’s liberty to mould his own lifestyle through personal appearance ... turns a deaf ear to the basic values of individual privacy’. He added that institutions do not rely on submerging individual personality in order to create an ‘idealised’ citizen. In *Zeller*<sup>10</sup> the court quoted from an 1879 ruling by Judge Cooley that,

There is and can be no authority of the state to punish as criminal such practices and fashions as are indifferent in themselves... No better illustration of one’s rightful liberty in this regard can be given than the fashion of wearing one’s hair.

These quotes are relevant at a time and place where dress codes are being enforced with rigidity and inflexibility on school going young people without any defensible justification. It is

a clear example of the words of an old pop song, ‘*and we all get put in little boxes, and we all come out just the same*’! Can schools claim to be educating children for the 21<sup>st</sup> century while still continuing to make 19<sup>th</sup> century demands?

As stated above, schools are faced with the reality of multi-cultural, multi-religious school communities, be it in the United States, Canada, Britain, Australia, New Zealand or South Africa. One of the truly great dissenting judgments on issues of negating cultural values came from Justice Douglas in the case of *New Rider*<sup>11</sup> where young Pawnee Indians were suspended because their hairstyle was not in conformity with school rules. Instead they wore their hair in their traditional way as ‘one way of telling people that I am proud [to be an Indian]’, and ‘as an expression of their new found pride in their heritage ... and culture’. Justice Douglas’ judgment dealt with the reports of previous American ‘self-righteous intolerance of tribal communities and cultural differences’ and slammed the court’s majority decision as reinforcing the attempts to impose uniformity on the Indian children.

Justice Douglas sounded a note to all who dare to claim to uphold the Universal Declaration of Rights that they dare not ignore. Be the school students Xhosa, Zulu, Maori, Aborigine, Eskimo, American Indian or from any other diverse culture or religion, the imposition of rules which belittle, negate or fly in the face of, or fail to uphold, such culture or religion are no less than flagrant violations of such students right to respect and dignity, and no such ‘impermissible purpose’ will be covered by even the most permissible sounding language.

While the major focus of this paper is the South African Constitution and its impact on dress codes it is valuable to place the issues within certain international perspectives and experiences.

## II INTERNATIONAL PERSPECTIVES AND EXPERIENCES

In examining experiences of Canada, Great Britain, New Zealand and the United States it is crucial to see the different frameworks of these countries. Canada and the United States have entrenched Constitutions and Bills of Rights, while New Zealand has a Bill of Rights which is not entrenched, and Great Britain has a Bill of Rights by which British courts are required to apply the *European Convention on Human Rights* (ECHR) (1950) to law cases. The common factor is the right to freedom of expression in each document. Secondly, cognisance must be taken of the federal nature of the states in the United States, and the provincial/federal nature of Canada and the impact these particular aspects have on the implementation of judgments from one court district to another. The contextualising of legal contexts is crucial, as is the powerful impact of decentralisation of school control and powers of local communities or provinces in the United States and Canada. These latter two issues are critical in understanding why different, even contradictory, decisions and consequences can be found within the same country.

### A *The United States*

In any comparative study the issue of contextualisation is critical. In understanding the United States decisions on dress codes or any form of uniform, two things are vital to such understanding. Firstly, the United States has a very strong federal system of government where local control is of high priority and decisions of circuit courts can be seemingly contradictory. This was most evident in the period from the late 1960s to the mid 1970s where the circuit Courts differed strongly with each other in cases involving male school students’ haircuts. Secondly, there is a tendency for courts to defer to educational authorities when faced with education related cases. This fact is illustrated in the 2005 case of *Alwood v Clark*<sup>12</sup> where the court stated that

the Supreme Court had frequently expressed the view that ‘the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local officials, and not federal judges’.

According to Edwards,<sup>13</sup> only one school uniform case (*Jones v Day*)<sup>14</sup> has ever reached an American court. However, McCarthy<sup>15</sup> has suggested that ‘... some further controversies will likely focus on the increasing number of school boards that are specifying uniforms for students’. The surge in the demand for uniforms comes from the belief, in certain quarters, that it will eliminate gang-related clothing and, thereby, reduce violence and improve the school climate. Opponents of uniforms see such a move by school boards as compromising the First Amendment rights of students to express themselves through what they wear.

The focus on dress issues, where there are no school uniforms, focuses rather on what may or may not be worn by students at school, and where, if any, lines must be drawn.<sup>16</sup> McCarthy<sup>17</sup> refers to two cases where bans on the wearing of jeans have been overturned, but also refers to courts having upheld School Board decisions to impose bans on other clothing seen to be offensive, for example, offensive wording or pictures on T-shirts.

Furtwengler and Konnert<sup>18</sup> suggest two questions to be asked in developing rules and/or deciding on whether particular behaviour (or dress) need to be limited or acted against, namely:

1. Will/Have the actions of the student(s) cause(d) substantial disruption to the educational process and/or normal operation of the school?
2. Will/Has the freedom of expression of the student(s) be(en) an invasion of the rights of others?

Provided the rules are not vague and open to wide interpretation, the above questions provide a base from which to begin making sound decisions about dress in the educational context of the school.

On school boys’ hairstyle issues, the United States has a host of court decisions, dating mainly from the late 1960s to the mid-1970s. However, the Supreme Court resolutely refused to hear any such case. It appears that girls’ hairstyles were never an issue dealt with by the courts. When hairstyles changed and longer hair became more acceptable, challenges to haircut rules ceased. However, in the recent case of *Fenceroy v Morehouse Parish School Board*<sup>19</sup> the issue of hairstyles are again come to the fore where the School Board placed a ban on boys wearing hair in braids, one reason being that such a style caused disruption in classes. Given that no such ban existed in regard to girls’ hair, such reasoning is seemingly extraordinary. Other claims that uniform hairstyles promoted school unity, discipline, respect for authority and a positive school environment are very difficult to understand at a distance. Two other 2005 cases, that of *Alwood v Clark*<sup>20</sup> and *Jacobs v Clark County School District*<sup>21</sup> are less helpful. The first case was challenged on procedural issues while the later case is likely to be referred to the 9<sup>th</sup>(US) Circuit Court of Appeal and the decision of the initial case is thus in dispute, at least for the present.

Although hairstyles enjoyed such high profile attention, jewellery is hardly mentioned in United States school legal issues. McCarthy<sup>22</sup> mentions the case of *Oleson*<sup>23</sup> where the court upheld a ban on boys wearing earrings because they were seen as gang-related. In the case of *Stephenson*<sup>24</sup> a student was ordered by her school to have a tattoo removed because they believed it was gang related.

In an internet search it became clear that there are strong feelings on issues of imposing school uniforms, these being largely negative. Whether uniforms will be imposed in some local

areas, only time will tell. That there will be national swing in favour of school uniforms seems, at a distance, to be highly unlikely.

McCarthy<sup>25</sup> draws the conclusion that ‘given the current student interest in tattoos, body piercing, and other fads’, there is likely to be ongoing legal controversy over the attire of students.

## B New Zealand

In terms of s 72 of the *Education Act 1989* (New Zealand), each school’s Board of Governors may make any by-laws or rules they think necessary, provided such rules conform to New Zealand law. Like any other rules, dress rules must be made known and have legal certainty. Certain dress restrictions can be imposed for *safety reasons*.

In terms of the *Bill of Rights Act 1990* (New Zealand) and its successor, the *Human Rights Act 1993* (New Zealand), everyone has the right to freedom of expression, while discrimination on various grounds, including sex, age, religion and ethnicity, are forbidden.

After 1990 the *status quo* in respect of school uniforms was disturbed by young people, including primary school children, launching challenges to uniform and other dress code regulations, with a fair deal of success. Cases involving human rights were heard by the New Zealand Human Rights Commission. In one case the Commission ruled that ‘a requirement that you wear exactly the same thing every day is a breach of freedom of expression under the *Bill of Rights Act*. In another case, where the school insisted on their uniform being strictly adhered to, regardless of their pupils’ racial, cultural, economic or social backgrounds, the Commission ruled that not allowing a Moslem child to dress in accordance with religious requirements to wear long pants, was unacceptable discrimination against the boy concerned.

Allen, a school principal, stated that almost all New Zealand secondary schools have compulsory school uniforms.<sup>26</sup> However, it is suggested that this does not imply that they are enforceable. Rather, New Zealand legislation suggests that challenges to such uniforms may be upheld. However, on the issue of compulsory hairstyle rules, Allan’s response was ‘No! No! No!’.

On the issue of jewellery, Walsh<sup>27</sup> indicates that restrictions on jewellery are legitimate when based on safety, such restrictions being equally applicable to both girls and boys. There are clearly places where jewellery can be hazardous for school going people, be it in contact sport, working with machinery, or in playgrounds.

However, Maori culture and the *taonga* introduces the issue of jewellery with particular cultural and spiritual significance. Trainor<sup>28</sup> refers to one form of the *taonga* as ‘a significant adornment’. She refers to a Maori child who wished to wear his *taonga* at school. The Principal agreed on condition that it was not visible which meant wearing it low, away from the neck, or having his shirt continuously buttoned up. The mother insisted that her son be allowed to wear it in its usual position at the base of the throat, the position chosen by the *whanan* (extended family) at birth. The New Zealand Human Rights Commission found in favour of the boy and agreed that ‘it was important that the *taonga* be able to be worn openly as they were symbolic of cultural identity’. The *taonga* is covered by the *Treaty of Waitangi 1840* (New Zealand). School councils are reminded that the Maori retain control over the *taonga* under Article Two and they, the school councils, must ensure that dress and appearance regulations are consistent with this.

The *taonga* is one form of jewellery but Passmore (in Walsh)<sup>29</sup> states

... some schools allow crosses or other items of religious significance and the Human Rights Commission has upheld claims that bone carvings should be allowed on cultural grounds.

### C Great Britain

In England the wearing of school uniforms, in government schools, cannot be enforced. However, a head-teacher could, at least to up to the time of the *Human Rights Act 1998* (UK) coming into force in October 2000, ban the wearing of almost any item of clothing or jewellery, including jeans, leather jackets, high heeled boots and even trousers for girls.<sup>30</sup>

The often quoted case of *Spiers v Warrington Corporation*<sup>31</sup> highlights the previous powers of head teachers. The headmistress banned 13-year old Eva Spiers from wearing slacks to school. Eva suffered several attacks of rheumatic fever and the wearing of slacks was seemingly justifiable for health reasons. Every time Eva went to school in slacks she was sent home. The Court ruled in favour of the school.

Parker-Jenkins<sup>32</sup> states that the right to ‘freedom in personal appearance’ has direct relevance for schools and there is a need for rules which take account of gender, cultural and religious factors. The request to parents to sign an undertaking that their children will wear school uniform, she believes, is a mild form of blackmail on parents and may be invalid.

Jeffs<sup>33</sup> was severely critical of the lack of freedom of expression in English schools. He described a school’s power to impose rules upon its students as immense. Many of the rules related to, amongst other things, dress and appearance which, in their application, could go as far as invasion of privacy by marching girls into changing rooms and checking that they were wearing regulation underwear.

Under the new *Human Rights Act 1998* (UK) which incorporates the European Convention, Articles 9 and 10 of that Convention are particularly relevant. Article 9 provides ‘the right to freedom of thought, conscience and religion’ and Article 10 refers to the right to ‘freedom of expression’. In a guide paper for schools entitled ‘*Human Rights Act 1998 - a brief introduction*’ the following is applicable here,

- **Article 10** the right to ‘freedom of expression’ could feature in challenges around uniforms and dress codes ...
- **Article 10 (2)** ...freedoms...may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ....

Given the very limited case law on school dress codes from the European Court, and the fact that s 12 of the Human Rights Act of 1998 (the ‘freedom of expression’ clause) provides no specifics on the issue, early legal challenges will be the only sure way to see how the right to freedom of expression will be applied to British schools and, in this case, particularly with respect to dress codes.

The power of Governing Bodies and Head Teachers, in terms of s 61 of the *School Standards and Framework Act of 1998* (UK), to regulate the conduct of pupils can be described as extensive, including the right to prescribe hairstyles. The Act makes no reference is made to any form of consultation with either parents or pupils.

## D Canada

Any reference to dress codes and the *Canadian Charter of Rights and Freedom* (1982) must keep in mind both s 1 of the Charter (the limitations) and s 2 (freedom of expression). There are few cases to draw on. However two cases in quick succession provided an interesting perspective on dress codes. In *Devereux v Lambton County (R.C. Separate School Board)*,<sup>34</sup> quoted by Black-Branch,<sup>35</sup> the court rejected the claim that the dress code violated Devereux's freedom of expression, his liberty and his equality, and ruled that the School Board had the power to institute a policy regarding 'school attire' and any violation of the Charter would be saved by s 1 of the Charter. The Court added, '... to hold otherwise would be to trivialise those rights'. The deference to school authorities seems to be a major reason for the decision.

In the same year as *Devereux*, 1988, the dress code was again the issue in *Sehdev v Bayview Glen Junior Schools Ltd*<sup>36</sup> where a Sikh student claimed that the school dress code violated his rights under the Charter. The Court ruled in the student's favour stating that the school's dress code discriminated against Sikh religious dress requirements, and ordered the school to adjust its dress code. The case above serves as an example of the powerful influence of religious issues in dress code challenges.

## E The South African Experience

The legitimacy or not of dress codes, and the extend of such codes demands consideration of four sections of the Constitution,<sup>37</sup> namely s 9, the right to equality including gender equality, s 10, the right to dignity, and s 15 and s 16, the rights to freedom of religion and freedom of expression. Further, the *South African Schools Act 84*, 1996, and the Guidelines for Codes of Conduct (*Guidelines*)<sup>38</sup> have direct relevance.

All four of the rights are applicable to *everyone* without any reason why age should be seen as a limiting factor. Dignity is a founding principle of the South African Constitution and listed as a non-derogable right. The equality clause includes non-discrimination on a number of grounds including sex, gender and sexual orientation. The right to freedom of thought, opinion, believe and religion is inseparable from the right to freedom of expression of what one thinks and believes. Section 8(2) of the *South African Schools Act 1996* (RSA) provides important provisos for a school code of conduct, namely that such code

... must be aimed at establishing a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process.

If the *Guidelines* are to be taken seriously, and specifically *the right to wear* as an aspect of freedom of expression, then there is an implication that a learner may dress as he/she pleases when attending school (within the bounds of 'modesty', and 'common decency', however those two terms may be defined).

The exercise of the right in such a way has the potential for confrontation. This raises critical questions. Are school uniforms either compulsory and/or enforceable? Is a school entitled to enforce a wider dress code? What action can a school take against the non-conforming student? Can a school refuse to admit a student whose parents refuse to sign acceptance of the school's dress code?

The issue of dress is further complicated when students (or their parents) insist on the right to wear strict religious dress or traditional cultural dress. A further complication arises when poverty

plays a role in a parent's inability to pay for the often very expensive school uniform. Can the poor be denied access to specific schools for such a reason?

In South Africa, with its wide socio-economic discrepancies, there is possibly a strong case to be made for school uniforms. The uniform, it can be argued, tends to minimise or cover such differences, or 'level the playing field'. However, the argument only has validity when uniforms are kept affordably simple.

The following cases illustrate something of the complexity of the issues.

In East London a Grade 4 student was turned away from his new school because he did not have shoes. The single mother asked for time, until she was paid at the end of the month, to purchase the shoes.<sup>39</sup> Following bad press coverage the school relented and purchased a pair of shoes for the child concerned. The argument forwarded by the school that their uniform included the wearing of shoes and that no exception could be made, might be seen as blatant discrimination on socio-economic grounds. An incident of this kind places the school in a dilemma of trying to maintain standards and satisfy the broader parent body whose children are conforming to the dress code. At the same time poverty is a harsh reality and one may ask whether shoes are essential for education.

The second case involved cultural dress. Following Xhosa initiation rites, initiates are required to wear particular cultural dress at all times for some weeks. A secondary school student approached his principal with his problem.<sup>40</sup> An agreement was reached whereby the student would wear required Xhosa dress to and from school but would change into school uniform once inside the building and change out of uniform at the end of the school day. During breaks he was permitted to remain within the buildings. This amicable agreement avoided a serious cultural confrontation and met the needs of both the school and the learner. One of the reasons for wearing the required cultural clothes was the student's fear of victimisation, ridicule or attack if he were seen by other initiates to be in the 'wrong' clothes, for example. school uniform. Peer or initiate pressure is very powerful.

The amicable solution may have been impossible to reach if more than one initiate had attended the school at the same time. What right would the school have had to insist on such an arrangement if students insisted on attending school all day in the required initiate dress? The potential for confrontation would be enormous. To refuse permission to the initiates to attend in their required initiate clothes could be interpreted as disrespect of Xhosa culture and the specific learner's pride in his cultural heritage. Further, given that the initiation practice is the Xhosa boy's entry into manhood, a negative action on the part of the school would be seen as insulting a Xhosa *man*. Again, the school's dilemma is that of being both culturally sensitive and maintaining standards expected by the majority of its community.

The third case revolves around religious dress. While the case concerns a KwaZulu Natal secondary school, the issue has been repeated in several other schools and is likely to occur in many more.

The specific case is described by Liversage<sup>41</sup> and further clarified by two personal interviews.<sup>42</sup> The school concerned, a school which formerly had only White students, had a clearly laid down dress code, approved by the parent body and with strong support from the learner body. In 1997 a girl was enrolled by her father to start in Grade Eight in January 1998. The parent signed an undertaking which included, 'I will ensure that my child attends school regularly and complies with the rules and regulations of the school, which I endorse'. On the first day of the 1998 school year the student arrived at school in Moslem dress, was intercepted and the father was asked to

fetch her. She could return to school when dressed in the prescribed uniform. So began a year long battle involving heavy legal costs.

The father began action against the school via the KwaZulu Natal Education Department. The school was informed that it could not refuse the girl admission to the school. While the school engaged legal counsel, the girl attended school in Moslem dress. When, at the end of 1998 the same parent enrolled a second daughter, to start in Grade Eight in 1999, he signed the Code of Conduct but crossed out references to the dress code. His second daughter was refused admission to the school. Finally the principal was given an ultimatum to accept the child and to accept that Moslem dress had to be permitted, or face removal from his post. The Governing Body relented and a negotiated settlement was reached. The basis of the settlement is that Moslem girls may wear either Moslem dress or school uniform but not in combination. In 2001 there were seven girls attending the school in Moslem dress. The school has become a tranquil place. The seven girls are quiet, dedicated, hard working students.

This case raises a number of questions. The father signed the Code of Conduct but the daughter's dress was in defiance of the code the father had signed. The case has a similar ring to the case of *Mfolo and others v Minister of Education, Bophuthatswana*.<sup>43</sup> In the latter case the students had signed a code of conduct which included agreeing to a statement that any student who became pregnant would have to leave. When Mfolo and others fell pregnant they were asked to leave. Their court challenge was upheld. One of the key points in the *Mfolo* judgment revolved around the signing of rules which were not in line with the Constitution. The court, for that reason, refused to bind the students to what they had signed.

In the case of the Moslem students, the will of the majority of parents and students was not upheld but rather the *counter-majoritarian dilemma*<sup>44</sup> played itself here in this situation. Thus one student was allowed to exercise her freedom of expression and freedom of religion in terms of the Constitution.

These cases raise a number of questions. Will demands for variations in school dress based on religion enjoy more support than demands based on freedom of expression? If the answer is 'yes', then one will be forced to ask, 'Why?' Secondly, will all religions enjoy such protection? What if an exclusive group considers itself so bound by the biblical injunction to 'be separate'<sup>45</sup> and believes they can best comply with their interpretation of Scripture by refusing to allow their children to conform to uniform requirements?

But the issue goes beyond religious dress to the heart of the right to freedom of expression. Can schools enforce school uniform? Is it merely maintained by tradition and learners need to conform to their peers? Is there a case for a more standardised and cheaper uniform for the country with minor variations for each school?

One of the dilemmas which may yet face schools is their use of 'civvies days' for fund raising. The very act of allowing students to come to school in 'civvies' at all, may be construed as acceptance that the school can survive without an enforced uniform.<sup>46</sup>

At face value, freedom of expression appears to outweigh any claim to a right to enforce the wearing of school uniforms. The issues of uniforms is complicated by a further less obvious pressure brought to bear on students wearing uniforms, namely that 'those who wear our uniform must be a good advert for the school' implying that all the other 'prescriptions' such as hairstyles, no jewellery, go with wearing the uniform. The issue then becomes muddled.

Hairstyles have been and continue to be a highly contentious issue, both for boys and girls. Schools have demanded 'short back and sides' for boys, that girls tie back long hair using only

accessories that are in school colours and using no colouring. Students have been suspended for the most trivial of reasons with common sense cast aside in favour of conformity. But, the shaving of the head by a Xhosa boy as a mark of respect for a deceased relative touched on deep cultural issues. The Rastafarian hairstyle took hairstyles into the issue of both freedom of religion and expression. The latter issue came to a head in the High Court case of *Antonie v Settler's High School Governing Body*<sup>47</sup> where the court took a strong stand against the school, providing strong case law for all future hairstyle cases. The court totally rejected the notion that having a Rastafarian hairstyle was serious misconduct.

On jewellery issues schools are faced with a range of issues, safety being the first priority.

However, jewellery is also an issue touching culture, religion and sexual orientation. In a multi-cultural, multi-religious country there is an ever present potential for a legal showdown. In an as yet unreported case in 2006, a school rule forbidding the wearing of a nose ring led to the suspension of a Hindu girl at a prominent girls' high school. The High Court overturned the suspension on the grounds of the girl's right to freedom of religion and expression. While the school is considering an appeal to the supreme Court of Appeals, for now the judgment is part of South African case law and can be used to challenge bans on nose rings in any public school in South Africa. As in other countries, issues of body piercing and tattoos are issues with which schools will have to come to grips.

The real problem of uniform and related issues probably lies more in deeply ingrained traditions and attempts to restrict changes. To quote Meyerson,<sup>48</sup> it is important to check that the reasons for limitations [to what learners may wear to school] are not driven by an 'impermissible purpose behind permissible-sounding language'.

### III FINDINGS

The educational advantages of a uniform, outside of conformity, are hard to find. The suggestion that it promotes discipline and/or improves academic performance is negated by evidence of extremely well disciplined and/or very high performing schools without uniforms.

How young people dress and what they wear to school has been a long standing issue in many countries, giving rise to conflicts between students and staff in countries far apart and very different from one another. Examining the experiences of the United States, Canada, Britain and New Zealand, the four countries do not present a common approach to uniforms. They do, however, together illustrate that uniforms are not only a legal issue but an issue strongly touched by culture, religion, traditions and socio-economic factors. Where uniforms are enforced, it is clear that religion plays a powerful role in obtaining exemptions.

The issue of student dress relates to more than outward appearance, but relates to an expression of individual personality, religious and cultural identity, or an attempt to send a message of 'this is who I am'. Thus, focusing on the external alone and enforcing dress codes can portray a lack of concern for the individuality and dignity of the student or students concerned. In the South African context such denial moves the matter into a denial of the individual's entrenched right to freedom of expression. As indicated, the *Guidelines* point to freedom of expression as including 'clothing selection', a statement students could use as a strong argument for dressing in other than school uniform, and equally presenting a case for a Constitutionally backed challenge.

It might have been expected that uniforms might have been the subject of an early challenge in South Africa after the Interim Constitution<sup>49</sup> came into force. However, school uniform was a tradition rather than being enforceable by law. Up to the present there is no report of a court

challenge to uniforms. In former White schools there are deep traditions which are used to enforce dress codes. For how long those traditions will be a source of persuasion is hard to estimate. However, a few schools have made moves toward simpler, modern and climate appropriate uniforms. Beyond uniforms, schools continue to take a hard line on issues of hairstyles and jewellery.

In the overall South African context, particularly in rural Black schools, it is probable that many students don't wear uniforms for reasons of poverty, lack of access to suppliers and a lack of a tradition of wearing uniforms. There is evidence of a shift towards uniforms in urban Black schools and schools on the outer fringes of towns, but that these uniforms are not rigidly enforced.

While it is impossible to predict what changes will be forthcoming in South African schools, it seems unlikely that the status quo on uniforms will remain unchallenged for long. Constitutionally, and in terms of the *Guidelines*, there is little doubt that compulsory school uniforms and other dress code issues are unlikely to enjoy support from the Courts. The *Antonie* case, and the nose ring case referred to above, were major High Court decisions which have implications for the more than 30,000 South African schools and the Courts are now more likely to demand a clear connection between the dress code and the educational purpose of the school if schools are challenged on uniform issues. Further, schools will face great opposition if they attempt to have the courts limit religious and cultural freedom for the sake of a dress code.

The days of restrictive school uniforms seem numbered.

#### ENDNOTES

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5. *McCulloch v Maryland*, 17 US 316, 429 (1819).
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9. *Bishop v Colaw*, 450 F 2d 1069 (1971).
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12. *Alwood v Clark*, WL 2001317 (S.D. Ill) (2005).
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