

**American Civil
Liberties Union**

**American Civil
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September 21, 2007

Joseph B. Urban
Clark Hill PLC
255 S Old Woodward Ave Fl 3
Birmingham, MI 48009

Dear Mr. Urban:

The American Civil Liberties Union of Michigan represents the family of Claudius Benson II, a ninth grade student at Old Redford Academy who has been suspended and referred for expulsion based on the length of his hair -- even though he maintains long hair as an expression of his family's religious beliefs. We request that the suspension and/or expulsion be lifted immediately, and that he be allowed to return to school forthwith. Old Redford Academy cannot constitutionally force Claudius to choose between his religious beliefs and school.

On or about September 6, 2007, after having been a student at the school for only three days, Claudius was given a "Suspension Form" that indicated that he was "...expelled pending decision of board meeting of Sept. 11, 2007." This action was purportedly based on regulations found in the parent/family handbook requiring that male students have closely cropped hair. Ms. Alecha Benson, Claudius' mother, requested and received an opportunity to be heard on separate occasions by the school's governing board and the school's Chief Executive Officer, Mr. Melvin Smith. On those occasions, Ms. Benson explained in some detail that her sincerely-held religious beliefs are grounded in provisions of the Old Testament that prohibit the cutting of a male's hair. She has received no indication that any action will be taken on this matter until the board meets again on or about October 10.

Claudius' hair has not been cut since the age of four. He is now 14-years-old. Notwithstanding Ms. Benson's explanation, school authorities have, to date, failed to acknowledge that a special accommodation must be made for Claudius in much the same way that Jewish students who are required to wear a yarmulke would be exempt from rules that prohibit the wearing of hats in the school building.

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Old Redford's infringement upon Claudius Benson's right to practice his religion is truly remarkable in light of the fact that even prisons and the military will make exceptions to their dress codes to accommodate religious beliefs. See *Warsoldier v Woodford*, 418 F3d 989, 1000 (9th Cir 2005)(holding that a prison grooming policy imposed a substantial burden on a Native American inmate's religious practice and therefore violated federal law); see also *Cutter v Wilkinson*, 544 US 709 (2005)(upholding the constitutionality of Section 3 of the Religious Land Use and Institutionalized Persons Act). Congress has also enacted a federal statute that provides: "[Any] member of the armed forces may wear an item of religious apparel while wearing the uniform of the member's armed force." See 10 USC 744(a)-(b). Prisons and the U.S. military are by definition and design far more regimented and rigidly structured than a secondary school. Yet, both of these institutions provide exceptions for people who have sincerely held religious beliefs. Like prisons and the military, we strongly urge you to make an exception to your "close-cropped" hair rule to accommodate Claudius' religious beliefs.

If you insist on making Claudius choose between his religious beliefs and attending Old Redford Academy, we are prepared to represent Claudius in court. Old Redford Academy is a public charter school promulgated under the authority of MCL 380.501(1), which states that "a public school academy is a public school under section 2 of article VIII of the state constitution of 1963." Therefore, unlike some private educational institutions, it is bound by the constitutions and laws of Michigan and the United States. As explained below, Old Redford Academy is violating Claudius' rights under the Michigan State Constitution, the religion and free speech clauses of the United States Constitution, and the Michigan Elliott-Larsen Civil Rights Act of 1969.

The Michigan Constitution

The Michigan State Constitution provides strong protection for religious freedom: "Every person shall be at liberty to worship God according to the dictates of his own conscience...[t]he civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief." Mich Const Art 1 § 4. When interpreting this clause, the Michigan Supreme Court applies a "compelling state interest" test which was developed by the U.S. Supreme Court in *Sherbet v Verner* and *Wisconsin v Yoder*. See *McCready v. Hoffius*, 458 Mich 131, 143; 586 NW2d 723 (1998).

In *Wisconsin v Yoder* 406 US 205 (1972), the U.S. Supreme Court ruled that a law that "unduly burdens the practice of religion" without a compelling interest, even though it might be "neutral on its face," would be unconstitutional. The *Sherbert-Yoder* test requires a court to consider five factors in order to determine whether a rule which burdens religion is unconstitutional. Those factors are: (1) whether the belief at issue is sincerely held; (2) whether the belief at issue is religiously motivated; (3) whether the regulation at issue burdens the exercise of the belief at issue; (4) if there is a compelling state interest which justifies the burden; and (5) if there is a less obtrusive form of regulation. See *McCready* at 144 (citing *Yoder*, 406 US at 214-230).

Application of the five-part test in this case leads to the unavoidable conclusion that Claudius is unconstitutionally burdened. Specifically, the sincerity of the Bensons' belief is demonstrated by, among other things, a history of adherence to an identifiable doctrine for more than a decade.

The religious nature of these beliefs is plainly evident not only from the professed religious commitment of the family, but also from the fact that the doctrine is based on specific, identifiable passages of Old Testament scripture. There is an obvious burden on the exercise of the Bensons' faith because of an unavoidable clash between those portions of scripture that prohibit the cutting of hair, and a school regulation that requires the hair of male students to be "close-cropped." The school's regulation may manifest an administrative preference, but it certainly does not rise to the level of what would be regarded as a "compelling state interest." *People v DeJonge*, 442 Mich 226, 286; 501 NW2d 127 (1992); *People v Schwartzentruber*, 170 Mich App 682, 687; 429 NW2d 225 (1998).

Michigan courts have established a high threshold for rules that burden religious freedoms. The courts' strict scrutiny analysis requires that: "only state interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Dep't of Social Services v Emmanuel Baptist Pre-School*, 434 Mich 380, 394-95; 455 NW2d 1 (1990)(Cavanaugh, J., concurring). Old Redford Academy's interest in the management of student grooming habits will be no more burdened by Claudius Benson's neatly maintained hairstyle than it would be by deviations from dress code regulations that are compelled by other religious grooming and dress requirements that are a routine and accepted aspect of life in the institutions of a diverse and cosmopolitan society. Claudius is but a single student. Our courts have considered similar circumstances and allowed a single student to preserve his hair as required by his beliefs. See *Sheridan Road Baptist Church v Dep't of Education*, 426 Mich 462, 575 (1986)(interpreting *Yoder* to mean that "it [is] not quite sufficient for the state to show that an exemption would impair its ability to fully achieve its goals," and that a religious exemption which may result in adverse effects to state interests is still required as long as the exemption does not "unduly interfere" with the compelling interest).

Old Redford must do more than argue that the school's hair rule generally furthers a compelling interest. Instead, the school must demonstrate that the very denial of the religiously based exemption is itself essential to satisfying a compelling state interest. Michigan courts require that the state must provide a religious exemption even where this would result in a slight sacrifice to the school's objectives. See *Sheridan*, 426 Mich at 575. Moreover, there is a presumption in Michigan courts that rules that burden religious exercise are not written in the least restrictive means necessary to accomplish the state's interest and "in absence of contrary evidence, [courts] must assume that the state's interests can be otherwise served." See *Emmanuel Baptist*, 434 Mich at 417. Old Redford Academy's policy is not tailored narrowly enough to balance the state's educational interests with students' right to freely exercise and develop their religious beliefs.

Freedom of Religion and Speech Protections of the U.S. Constitution

Claudius' right to free exercise of religion is also protected by the United States Constitution. See *Alabama and Coushatta Tribes of Texas v Big Sandy Indep Sch Dist*, 817 FSupp 1319 (1993). Agents of the state may not deny receipt of an important government benefit, such as public education, because of conduct required by a religious belief which thereby places substantial pressure on a religious adherent like Claudius Benson to modify his behavior and desecrate his beliefs. Courts have consistently found this behavior violates the U.S. Constitution's free exercise clause. See *Thomas v Review Bd of Indiana Employment Sec Div*, 450 US 707, 717-718 (1981); *Sherbert v Verner*, 374 US 398 (1963). The U.S. Supreme Court

has made clear that “neutral and generally applicable” rules are constitutional. See *Employment Div, Dep’t of Human Resources v Smith*, 494 US 872 (1990). However, current free exercise jurisprudence demands that if secular exceptions are made to an otherwise neutral and generally applicable law, then religious exceptions to the rule must also be granted. See *Lukumi Babalu Aye v City of Hialeah*, 508 US 520 (1993).

Students also have a protected right to free speech in public schools. See *Tinker v DesMoines School Dist*, 393 US 503 (1969). The length of Claudius’ hair is religious speech which expresses a sincere commitment to his faith. Claudius’ right to convey this message to his classmates, the teachers, and administrators at Old Redford is well protected by First Amendment jurisprudence. Only “in the absence of infringement of constitutional rights” may a public school regulate a student’s manner of dress or hair style. See *Jackson v Dorrier*, 424 F2d 213 (6th Cir 1970); see also *Gfell v Rickelman*, 442 F2d 444 (6th Cir 1971). In Old Redford’s case there is a serious infringement upon Claudius fundamental constitutional rights to both free exercise and free speech. Claudius knows that his long hair will be identified by his colleagues as a continuously visible expression of his religious beliefs. See *Church v Bd of Educ of Saline*, 339 FSupp 538 (EDMich 1972). The religious conviction that his un-cut hair articulates will be particularly evident to members of the Old Redford community because of his near three-week absence from school.

If it becomes necessary to institute litigation, Claudius’ free speech and free exercise claims need not be brought separately. The U.S. Supreme Court has provided for “hybrid rights” situations akin to Claudius’ in which two fundamental civil rights have been violated by the same policy. The court laid out in *Smith* that the “decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause, in conjunction with other constitutional protections, such as freedom of speech... or the right of parents ... to direct the education of their children.” See 494 US at 881. “Hybrid rights” claims are often recognized when student’s rights are hampered. In *Big Sandy*, Native American students who wanted to wear their hair long – as required by their religion – were entitled to a preliminary injunction against enforcement of the school district’s dress code because the short-hair rule was a “hybrid rights” violation of free speech and free exercise. See 817 FSupp 1319. Similarly, in *Chalifoux v New Caney Indep Sch Dist*, 976 FSupp 659 (SDTex 1997), the court determined that students who wore rosaries as necklaces were entitled to strict scrutiny analysis according to *Smith*’s “hybrid rights” doctrine because the school’s dress code, which was intended to prevent students from wearing gang-related symbols, inhibited the students’ rights to both free exercise and free speech. Claudius’ conundrum at Old Redford Academy fits squarely within the Supreme Court’s theory of “hybrid rights” which undoubtedly protects his constitutional privileges.

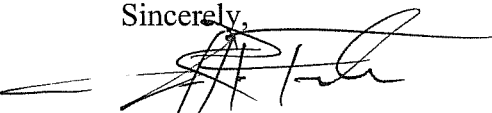
Disparate Impact Under the Michigan Civil Rights Act

In addition to state and federal constitutional protections, Michigan has enacted the Elliot-Larsen Civil Rights Act to prevent educational institutions from “discriminate[ing] against an individual in the full utilization of or benefit from the institution...because of religion, race, color, national origin, or sex.” MCL 37.2402(a). Furthermore, Elliott-Larsen decrees that a school may not “exclude, expel, limit, or otherwise discriminate against an individual seeking admission as a

student or an individual enrolled as a student in the terms, conditions, or privileges of the institution, because of religion.” MCL 37.2402(b). The grooming policy has excluded Claudius from admission to Old Redford Academy; therefore, the rule is in direct contradiction to the Civil Rights Act. There is substantial case law to support a claim for “disparate impact” under Elliott-Larsen. To make a showing of “disparate impact” in a religious discrimination action, a plaintiff must demonstrate that an otherwise facially neutral policy has a disproportionately negative or discriminatory effect on certain protected groups which cannot be justified by educational necessity. See *Muzquiz v WA Foote Memorial Hosp, Inc*, 70 F3d 422 (6th Cir 1995). Proof of discriminatory intent is not necessary under the disparate impact analysis of this act. See *Singal v General Motors Corp*, 447 NW2d 152 (Mich Ct App 1989). Although the school’s grooming policy is facially neutral, the rule had a discriminatory effect upon Claudius by preventing him from attending classes. Old Redford Academy cannot demonstrate an educational necessity which outweighs Claudius’ right to attend a public charter school.

We request that you confer with your client about these matters and that you advise Mark Fancher no later than the close of business on Monday, September 24, 2007 of Old Redford Academy’s decision regarding the readmission of Claudius Benson to the school. Thank you very much for your cooperation.

Sincerely,



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cc: Claudius Bension
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