

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 09-20091

A.A., by and through his parents and legal guardians, MICHELLE
BETENBAUGH and KENNY AROCHA; MICHELLE BETENBAUGH,
individually; and KENNY AROCHA, individually,
Plaintiffs-Appellees

v.

NEEDVILLE INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellant

On Appeal from the United States District Court
For the Southern District of Texas

BRIEF OF *AMICI CURIAE*
AMERICAN INDIAN STUDIES PROFESSORS
DR. SUZANNE L. CROSS AND DR. K. TSIANINA LOMAWAIMA

Matthew L.M. Fletcher
Kathryn E. Fort
MICHIGAN STATE UNIVERSITY COLLEGE OF LAW
405B Law College Building
East Lansing, MI 48824-1300
Telephone: (517) 432-6909
Fax: (517) 432-6879

ATTORNEYS FOR *AMICI CURIAE*

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Dr. Suzanne L. Cross and Dr. K. Tsianina Lomawaima, as *amici curiae*,
respectfully submit this Brief, with the consent of all the parties, in support of
Appellees A.A., Michelle Betenbaugh, and Kenny Arocha.

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici Dr. Suzanne L. Cross and Dr. K. Tsianina Lomawaima are scholars in the general area of American Indian Studies, experts in American Indian education history and policy, especially the history and inter-generational consequences of American Indian boarding schools.

Dr. Cross is Associate Professor for Michigan State University's School of Social Work. She is a member of the Saginaw Chippewa Indian Tribe of Michigan, and she was a member of the Council of Social Work Education (CSWE) Board of Directors 2005–2008, a CSWE Senior Scholar 2007–2008, and the Chair of the CSWE Native American Task Force 2008–2009. Her research areas include gerontology with a focus on American Indian elders, bereavement therapy relevant to historical grief, especially related to Indian boarding schools, and the Indian Child Welfare Act (ICWA), and Collaborations with local Tribal Nation communities. She has been a member of the Hartford Team with the goal of enhancing gerontology in the MSW Program, and is the primary investigator for the BEL grant, which was recently awarded. Dr. Cross has mentored several Tribal and non-Tribal students during her career, offering a unique cross-cultural approach to teaching and learning. Her latest publications are on the topics of kinship care and the ICWA.

Dr. Lomawaima is Professor and Head & Interim Director of American Indian Studies at the University of Arizona. Her 1994 book, *They Called it Prairie Light: The Story of Chilocco Indian School* (University of Nebraska Press) received the 1993 North American Indian Prose Award, the 1995 American Educational Association's Critics' Choice Award, and was nominated for 2 other honors. She co-edited and co-authored *Away from Home: American Indian Boarding School Experiences* (Heard Museum 2000) and co-edited a special issue of *The Journal of American Indian Education* (Spring 1996) on boarding school experiences.

ARGUMENT

I. Appellant’s Grooming Policy Reminiscent of Long History of Using Education to Undermine Tribal Culture and Religion

Appellant’s grooming policy, with its stated goals of “promoting order, discipline, safety, uniformity and hygiene,” Appellant’s Brief at 22, are all familiar goals to American Indian children subject to the 19th and early 20th century federal policy of using education to “assimilate,” “acculturate,” and “civilize” American Indian children. K. TSIANINA LOMAWAIMA, *THEY CALLED IT PRAIRIE LIGHT: THE STORY OF CHILOCCO INDIAN SCHOOL* 1-8 (1994). Discrimination against American Indians on religious grounds has been “commonplace” since long before the establishment of the American Republic. Senator Daniel K. Inouye, *Discrimination and Native American Religious Rights*, 23 U. WEST L.A. L. REV. 3, 12-13 (1992). While the appellant’s grooming code may not have been established to discriminate against American Indians on religious grounds, the enforcement of the code does just that. Appellee’s Brief at 6 (quoting Superintendent Curtis Rhodes). The code is typical of the long history of forced “conformity” and assimilation of American Indian students into non-Indian society.

The first efforts by non-Indians to formally educate American Indians—by the Jesuits in Florida during the 16th century—attempted to “‘Christianize’ and ‘civilize’ the heathen.” *Indian Education: A National Tragedy—A National*

Challenge, S. Rep. 91-501, 91st Cong., 1st Sess., at 140-41 (Nov. 3, 1969) (hereinafter “Kennedy Report”). President Washington articulated a policy favoring the acculturation or assimilation of American Indians, cheaper than declaring war on them. *Id.* at 142; Scott Laderman, “*It Is Cheaper and Better to Teach a Young Indian Than to Fight an Old One*”: Thaddeus Pound and the Logic of Assimilation, 26:3 AM. INDIAN CULTURE & RES. J. 85 (2002). Consequently, affairs between Indian tribes and American governments typically defined in Indian treaties often have revolved around the education of Indian children. Kennedy Report, *supra*, at 142. During the era of federal Indian law and policy in which the United States and Indian tribes engaged in treaty negotiations, tribal treaty negotiators often negotiated for treaty language requiring the federal government to provide funds for the education of American Indian children. Over 150 Indian treaties included provisions relating to Indian education. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 22.03[1][a], at 1356 (2005 ed.). In 1819, Congress established a fund—later known as the “civilization fund”—usually distributed to missionary societies for the purpose of transforming American Indians from “hunters to agriculturalists.” Kennedy Report, *supra*, at 143.

Tribal treaty negotiators who hoped to provide for their children a means to learn English as a second language or to learn a trade did not realize that they had inadvertently negotiated for the kidnapping of their children by American

government and military officials, the abuse of their children by educators and missionaries, and the ruinous undermining of their cultures and religions. Captain Richard H. Pratt, superintendent of the famed Carlisle Indian School from 1879 to 1904, is best known for his infamous statement that embodies American Indian education policy in the late 19th century: “A great general has said that the only good Indian is a dead one.... In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. *Kill the Indian in him, to save the man.*” Richard H. Pratt, *The Advantages of Mingling Indians with Whites* (1892), reprinted in *AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE “FRIENDS OF THE INDIAN” 1880-1900*, at 260, 260-61 (Francis Paul Prucha ed. 1973) (emphasis added). Meanwhile, “[i]n 1892 and 1904, federal regulations outlawed the practice of tribal religions entirely, and punished Indian practitioners by either confinement in agency prisons or by withholding rations.” Inouye, *supra*, at 14. Federal authorities also contracted with non-Indian religious groups to operate Indian schools in efforts to stamp out American Indian culture and religion. Jill E. Martin, *Constitutional Rights and Indian Rites: An Uneasy Balance*, 3:2 *WESTERN LEG. HIST.* 245, 248 (Summer/Fall 1990). Sometimes, the intent of American policymakers and educators may not have been to harm Indian people, but ostensibly to assist American Indians to survive inevitable colonization by Americans. Nevertheless, the end result was the near-destruction of tribal culture

and religion across the United States, often through the forced imposition of non-Indian religion upon American Indian students. “The history of the ‘lost generation’ of Native American children, shuffled off to BIA boarding schools, is itself a history of violence, intimidation, and repression.” BARBARA PERRY, *SILENT VICTIMS: HATE CRIMES AGAINST NATIVE AMERICANS* 32 (2008).

Federal Indian policy of the late-19th century moved into a new period of “civilizing” Indian children through coercive and destructive education, usually at federal and church-operated boarding houses located away from the children’s homes and communities. In 1880, the Board of Indian Commissioners wrote in their annual report, “As a savage we cannot tolerate him [the Indian] any more than as a half-civilized parasite, wanderer, or vagabond. The only alternative left is to fit him by education for civilized life.” Board of Indian Commissioners, *Annual Report of the Board of Indian Commissioners* (1880), reprinted in *AMERICANIZING THE AMERICAN INDIANS*, *supra*, at 193, 194. Using the limited funds Congress provided in accordance with treaty terms, and then greater appropriations beginning in 1870, federal bureaucrats intensified the brutal process of “civilizing” Indian children through education. “The federal government correctly assumed that the young are the life blood of a culture and that the molding and transformation of the children and their values might prove an effective way of destroying Indian heritage at its roots.” John W. Ragsdale, Jr., *The Movement to Assimilate the*

American Indians: A Jurisprudential Study, 57 UMKC L. REV. 399, 409 (1989). Despite reducing the number of Indian schools operated by church societies in the 1880s, non-Indian religion remained the dominant feature of American Indian education at the Bureau of Indian Affairs' schools. Martin, *supra*, at 250-51. On-reservation federal officials directed money appropriated by Congress to fulfill treaty obligations to church-run Indian schools, usually over tribal objections. *E.g.*, *Quick Bear v. Leupp*, 210 U.S. 50 (1908); Martin, *supra*, at 251-52. "Though the schools were run by the federal government, Christianity was mandatory.... 'For most secular as well as missionary educators, 'civilization' was inconceivable if not grounded in Christian—especially Protestant—values....'" AMELIA V. KATANSKI, LEARNING TO WRITE "INDIAN": THE BOARDING-SCHOOL EXPERIENCE AND AMERICAN INDIAN LITERATURE 33 (2005).

American policymakers harshly criticized the lifestyles of tribal Indians in the late 19th century and sought to eliminate any trace of Indian culture and religion in Indian children. In 1889, General Thomas J. Morgan, Commissioner of Indian Affairs, recommended that Indian children being educated in grammar schools should be structured in such a way as to eliminate "the irregularities of camp life, which is the type of all tribal life, [to force Indian youth to] give way to the methodical regularity of daily routine." Thomas J. Morgan, *Supplemental Report on Indian Education* (1889), reprinted in AMERICANIZING THE AMERICAN

INDIANS, *supra*, at 221, 231. Morgan also recommended that the United States withhold rations, use Indian police, and send United States soldiers to compel Indian children to attend school, Thomas J. Morgan, *Compulsory Education* (1892), *reprinted in* AMERICANIZING THE AMERICAN INDIANS, *supra*, at 252, 255-56, a recommendation endorsed by Congress explicitly in 1893, Kennedy Report, *supra*, at 151 (citing 25 U.S.C. § 283). Indian parents who opposed the taking of their children to these schools faced criminal prosecution and possible incarceration. *Id.*

Federal Indian affairs agents were obsessed with removing Indian children from their cultural roots. It typically began with literal kidnappings of Indian children, spurred on by rhetorical arguments from policymakers that the only way to effectively civilize Indians was to remove them forcibly from their homes and their cultures, “tak[ing] them in their infancy and plac[ing] them in fostering schools; surrounding them with an atmosphere of civilization, maturing them in all that is good, and developing them into men and women instead of allowing them to grow up as barbarians and savages.” Thomas J. Morgan, *A Plea for the Papoose* (n.d.), *reprinted in* AMERICANIZING THE AMERICAN INDIANS, *supra*, at 239, 243. A federal Indian agent at the Hopi Indian community described hunting down Indian children who had escaped to caves or cellars, sometimes defended by their parents, who would have to be restrained by force to prevent the kidnapping of their

children. Ragsdale, *supra*, at 410 (quoting LEO CRANE, INDIANS OF THE ENCHANTED DESERT 172-73 (1972)).

The Bureau of Indian Affairs developed and operated a large number of off-reservation boarding schools throughout Indian Country by the turn of the 20th century, using Capt. Pratt's Carlisle Indian School as a model. Sally J. McBeth, *The Primer and the Hoe*, NAT. HIST., Aug. 1984, at 4, 6; Kennedy Report, *supra*, at 147-48. Capt. Pratt introduced an "outing system" for Indian children, placing Indian children in non-Indian homes far from the reservation in the summer so that they never returned home during their eight-year tenure in his boarding school. *Id.* at 148; LOMAWAINA, *supra*, at 5. Interestingly, the strict regimen of military-style discipline pervaded federal boarding schools well into the 1960s and 1970s. Kennedy Report, *supra*, at 69-70.

Federal policy designed to eradicate American Indian culture and religion continued well into the 20th century. In 1928, Lewis Meriam of the Brookings Institute published a massive report of his investigation of American Indian affairs. The report concluded that American Indian education policy was an utter failure, doing egregious harm to Indian people by undermining their cultures and religions. LEWIS MERIAM, THE PROBLEM OF INDIAN ADMINISTRATION 11 (1982); Kennedy Report, *supra*, at 12-13, 152-56. Congress sought to restore some control over Indian education to Indian communities in the Indian Reorganization Act of June

18, 1934, but little changed on the ground. By 1952, federal bureaucrats still succeeded in sending American Indian children to federal boarding schools far from their homes—“Navajo children in Oregon, Northwest Indians in Oklahoma.” Kennedy Report, *supra*, at 14. Well into the 1960s, many non-Indian educators refused to incorporate American Indian history into their curricula on the theory that “their culture was going to be lost anyway and they would be better off in the long run if they knew less of it.” *Id.* at 26; *see also id.* at 61 (“Apparently, many [Bureau of Indian Affairs] teachers still see their role as that of ‘civilizing the native.’”). Of note, Indian school instructors believed that Indian children would either chose a life of “total ‘Indianness’ – whatever that is – and complete assimilation into the dominant society.” *Id.* at 61-62. This confusion is consistent with a deep misunderstanding of what it means to be an American Indian person in the modern era: Indian people coexist as fully functional American citizens while at the same time retaining significant connections to traditional tribal culture and religion.

II. School Grooming Policies Requiring Short Hair Historically Used to Undermine American Indian Culture and Religion

The school board’s stated goals for the grooming policy at issue are not considerably different than the reasons given by assimilationist schools in the 19th and 20th centuries. In fact, the school district’s goals for the grooming code

include “*teaching hygiene, instilling discipline, preventing disruption*, avoiding safety hazards and *asserting authority*,” Appellant’s Brief at 18 (emphasis added), are reminiscent of boarding school rationales.

The cutting of long Indian hair was part and parcel of the program to destroy Indian culture and religion throughout the late 19th and early 20th centuries. As John Collier, Jr., the son of the Commissioner of Indian Affairs during the 1930s and 1940s under President Roosevelt, wrote, “Indian children were lifted out of tribal homes by force. Their long hair was cut. They were dressed in military uniforms, given English names, and punished for speaking their own language.” John Collier, Jr., *Survival at Rough Rock: A Historical Overview of Rough Rock Demonstration School*, 19:3 ANTHROPOLOGY & EDUCATION Q. 253, 254 (Sept. 1988); *see also* McBeth, *supra*, at 4-11 (noting that Indian boarding schools routinely cut the hair of male Indian students, and used lye to wash out the mouths of students who spoke their language). The curriculum of these schools “was designed and applied with the idea of eradicating all signs of Indianness. Thus, the disciplinarian at each school cut off the boys’ long hair, punished children for not speaking English, and took away their clothes and replaced them with ill-fitting hand-me-downs.” LEONARD DINNERSTEIN ET AL., *NATIVES AND STRANGERS: ETHNIC GROUPS AND THE BUILDING OF AMERICA* 228-29 (1979). Boarding schools maintained large volumes of before-and-after photographs of their students:

The before photographs inevitably show the incoming students dressed in “tribal” clothing, with long hair, moccasins, and blankets, clearly representing the “wild Indians” who supposedly lacked culture, education and even the rudiments of hygiene. The after photographs, on the other hand, showed these same students with closely cut hair, often holding books or other accouterments of “civilization,” and dressed in the school’s military-style uniform.

KATANSKI, *supra*, at 39. In short, long hair was an iconic indicator of the very heathenism and “wildness” that Indian school administrators and federal policymakers wanted to eliminate from Indian children, while short hair was indicative of Christianity and “civilization.”

American Indians who received this treatment from their boarding school instructors and administrators spoke of the devastating impact the cutting of their long braids had on their self-respect, cultures, and religions. Lone Wolf, a Kiowa Indian, stated:

Once there our belongings were taken from us, even the little medicine bags our mothers had given us to protect us from harm. Everything was placed in a heap and set afire.

Next was the long hair, the pride of all Indians. The boys, one by one, would break down and cry when they saw their braids thrown

on the floor. All of the buckskin clothes had to go and we had to put on the clothes of the White Man.

PETER NABOKOV, *NATIVE AMERICAN TESTIMONY* 220-21 (1999). The cutting of long hair by the Indian school administrators created destructive emotional harm to Indian boys, undermining their sense of identity and their connection to their people and culture back home.

Though Indian school administrators tended to cut Indian boys' braids more often, they also would cut off the long braids of Indian girls. The famed writer and ambassador of the Yankton Sioux community, Zitkala-Ša (Gertrude Simmons Bonnin), wrote of the day the boarding school mavers cut her hair:

I cried aloud, shaking my head all the while until I felt the cold blades of the scissors against my neck, and heard them gnaw off one of my thick braids. Then I lost my spirit. Since the day I was taken from my mother I had suffered extreme indignities. People had stared at me. I had been tossed about in the air like a wooden puppet. And now my long hair was shingled like a coward's! In my anguish I moaned for my mother, but no one came to comfort me. Not a soul reasoned quietly with me, as my own mother used to do; for now I was only one of many little animals driven by a herder.

ZITKALA-SÁ, *The Cutting of My Long Hair*, in AMERICAN INDIAN STORIES 55-56 (1921). In Zitkala-Sá's culture, only "mourners" and "cowards" would allow their hair to be cut. MICHAEL C. COLEMAN, AMERICAN INDIAN CHILDREN AT SCHOOL, 1850-1930, at 82 (1983).

Haircuts have enormous cultural, political, and religious significance for most American Indian communities. Consider the male leaders of the Powhatan Indians of Virginia, who cut their hair short on one side and long on the other to demonstrate a connection to both genders. Margaret Holmes Williamson, *Powhatan Hair*, 14:3 MAN (NEW SERIES) 392 (Sept. 1979). Luther Standing Bear, a Lakota Indian, wrote that the long hair of his people was a fundamental characteristic:

The pride of both Lakota men and women was a splendid head of hair, and especial attention was given to its care as a mark of good breeding. The women were especially proud of long hair and brushed and smoothed their long braids to keep them from breaking. ... Every morning a woman had her hair brushed and her face painted for the day by her husband. This was a mark of respect that every Lakota [man] paid to his spouse.

LUTHER STANDING BEAR, LAND OF THE SPOTTED EAGLE 65 (1933). And, of course, Apache Indians are famed for their long hair, either kept in braids for day-to-day

life or left flowing for ceremonies. WILLIAM WILMON NEWCOMB, *THE INDIANS OF TEXAS: FROM PREHISTORIC TO MODERN TIMES* 196 (1972); JOHN UPTON TERRELL, *THE PLAINS APACHE* 35 (1975).

As a result of the long-standing and widespread Indian school policy to cut the long hair of Indian students, fewer Indians wore their hair long. But beginning in the 1960s and 1970s, more and more American Indians began to restore their customs and traditions, including the wearing of long hair. American Indian students, then more likely being educated in public schools, faced school grooming codes requiring short hair for boys. Once again, the question of long hair became a cultural and religious question:

In the early 1970s, [American Indians were] involved in organizing a successful challenge to an Oklahoma school board's restriction on men's hair length....

It had a big impact. People now wear long hair, people who said back then, "Are you sure you know what you're doing with this [protest]?" Now they can wear long hair—and they do.

JOANE NAGEL, *AMERICAN INDIAN ETHNIC RENEWAL: RED POWER AND THE RESURGENCE OF IDENTITY AND CULTURE* 192 (1997) (quoting Frances Wise). And the federal bureaucracy has long repudiated the policy of using education to

undermine tribal culture and religion, as evidenced by then-Assistant Secretary for Indian Affairs Kevin Gover's apology to Indian people in 2000:

This agency forbade the speaking of Indian languages, prohibited the conduct of traditional religious activities, outlawed traditional government, and made Indian people ashamed of who they were. Worst of all, the Bureau of Indian Affairs committed these acts against the children entrusted to boarding schools, brutalizing them emotionally, psychologically, physically, and spiritually. ***

We therefore begin this important work anew, a make a new commitment to the people and communities that we serve, a commitment born of the dedication we share with you to the cause of renewed hope and prosperity for Indian country. ... Never again will we attack your religions, your languages, your rituals, or any of your tribal ways. Never again will we seize your children, nor teach them to be ashamed of who they are. Never again.

146 Cong. Rec. E1453-03 (Sept. 8, 2000).

The school's grooming policy requires boys' hair to be worn so it does not touch the collar of the child's shirt nor cover his ears. While the appellant claims the grooming policy does not require hair to be cut, the options given to A.A.'s family (wearing the hair in a bun, wearing the hair in a single braid stuffed down

the back of his shirt) are still burdensome requirements by the school as to A.A.'s hair, as found by the District Court. In effect, by requiring an exemption to the grooming code, the school district continues to propagate its belief that the normal state for A.A.'s hair would be short, and in conformity with the other boys in the school district, and in conformity with the "beliefs" of the local non-Indian community. Appellee's Brief at 6.

CONCLUSION

Amici respectfully urge this Court to affirm the lower court's grant of a permanent injunction.

Dated June 19, 2009

Respectfully submitted,

Matthew L.M. Fletcher
Michigan State Bar No. P61593
Kathryn E. Fort
Michigan State Bar No. P69451
MICHIGAN STATE UNIVERSITY COLLEGE OF LAW
405B Law College Building
East Lansing, MI 48824-1300
Telephone: (517) 432-6909
Fax: (517) 432-6879

ATTORNEYS FOR *AMICI CURIAE*

CERTIFICATE OF SERVICE

This is to certify that on the 19th of June, 2009, a true and correct copy of the foregoing was served on all counsel of record in both paper and electronic form by placing the same in the United States mail, certified, return receipt requested, with proper postage affixed and addressed as follows:

Lisa Graybill
Flemming Terrell
ACLU of Texas
P.O. Box 12905
Austin, TX 78711

Daniel March – ACLU
915 15th St., NW
Washington, DC 20005

Sinead O'Carroll
Reeves & Brightwell
221 W. 6th Street, Ste. 1000
Austin, TX 78701

Jeffery L. Hoffman
Kristen Z. Foster
Henslee Schwartz LLP
3200 Southwest Freeway, Ste. 1200
Houston, TX 77027

Roger D. Hepworth
Henslee Schwartz LLP
816 Congress Ave.
Austin, TX 78701-2443

David M. Feldman
J. LeAnne Bram Lundy
Feldman, Rogers, Morris & Grover, LLP
5718 Westheimer, Ste. 1200
Houston, TX 77057

Matthew L.M. Fletcher

CERTIFICATE OF COMPLIANCE

I hereby certify on this 19th day of June 2009 that the accompanying brief of *amici curiae* complies with the type-volume limitation specified in Federal Rule of Appellate Procedure 32. Specifically, according to the word and line count of Word, which was used to prepare this brief, this brief contains 3248 words and 289 lines, excluding the table of contents, the table of authorities, and the statement of interest of *amici curiae*. In addition, this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32 and the type style requirements because it has been prepared in proportionally spaced typeface using Word in 14 point font Times New Roman.

Matthew L.M. Fletcher