



EDUCATION LAW NOTES

Federal and Virginia Developments in School Law

Bradford A. King, Attorney at Sands Anderson

A VASSP Bimonthly Publication • March, 2021 • Vol. 4, No. 4 • www.vassp.org

FOURTH CIRCUIT AFFIRMS PRINCIPAL'S RIGHT TO REGULATE STUDENT PUBLICATION CONTENT

Earlier this month, the United States Court of Appeals for the Fourth Circuit in *Robertson v. Anderson Mill Elementary School, et al.*, affirmed an elementary school principal's right to control the content of a student publication. The case featured a younger student, but the decision recognizes a principal's authority to regulate student speech in school-sponsored publications when based on pedagogical reasons and is relevant for VASSP members.

Ten-year-old fourth grade student R.R.S. wrote an "essay to society," a class assignment. The student essays were to be compiled in a booklet and distributed to the school community. According to the lawsuit later filed by R.R.S.' parent, R.R.S.' maternal grandfather is a member of the LGBTQ community and R.R.S. is a "proud advocate of LGBTQ rights." R.R.S. decided to write about LGBTQ equality. Here is the full text of R.R.S.' essay:

I don't know if you know this but peoples view on Tran's genders is an issue. People think that men should not dress like a women, and saying mean things. They think that they are choosing the wrong thing in life. In the world people can choose who they want to be not being told that THEIR decision is wrong. I hope people understand that people can hurt themselves from others hurting their feelings. People need to think before they speak because one word can hurt someone's feelings. We need to fix this because this is getting out of hand!

The principal reviewed all student essays before their publication. She directed R.R.S.'

fourth grade teacher to advise R.R.S.' parent that the essay would not be published in the booklet because its topic "was not appropriate." R.R.S. then submitted a revised essay, changing the references to LGBTQ to "bullying," but in all other essential aspects identical to the first essay. R.R.S.' parent alleged that the principal engaged in abusive, harassing and emotionally distressful communications in which she defended her decision, including saying that "the original paper would make other parents upset," would "create a[n] undesirable situation at the school," and "was not appropriate." The principal later wrote R.R.S.' parent that both of the student's essays would be published. The parent, citing concerns about R.R.S.' privacy, no longer wanted the essays to be included in the booklet and they were removed.

alleged that the principal engaged in abusive, harassing and emotionally distressful communications

In her lawsuit, which the parent attempted to amend several times, R.R.S.' parent asserted First Amendment and South Carolina state law claims against (1) the school and (2) the principal in her individual capacity. The district (trial) court dismissed all of the claims for various reasons. Of primary importance was the court's disposition of the First Amendment claims. Once the court disposed of the First Amendment claims the other related claims fell, too. The First Amendment claim asserted that the principal violated R.R.S.' right to free speech by forcing R.R.S. to change the essay topic. The district court granted the principal's motion to dismiss on qualified immunity grounds. R.R.S.' parent appealed to the Fourth Circuit only those parts of the constitutional claims.

The Fourth Circuit recited well-established rules applying qualified immunity. Government officials sued in their individual capacities are protected under this doctrine "unless (1) the allegations underlying the claim, if true, substantiate a violation of a federal statutory or constitutional right, and (2) this violation was of a clearly established right of which a reasonable person would know." Here, the courts disposed of the claim against the principal with the first prong – the allegations against the principal did not substantiate a First Amendment violation.

Affirming the district court, the Court of Appeals relied on the United States Supreme Court's oft-cited 1988 decision *Hazelwood Sch. Dist. v. Kuhlmeier*. The high court there established the test for First Amendment cases stemming from restrictions on school-sponsored student speech: school officials "do not offend the First Amendment by exercising editorial control over the style and content of student speech so long as their actions are reasonably related to legitimate pedagogical concerns." The *Hazelwood* case featured a school's refusal to publish articles in a school newspaper dealing with divorce and teenage pregnancy. The test applies to student speech disseminated under the auspices of the school: expressive activities that students, parents and members of the public might reasonably perceive bear the school's imprimatur.

The Fourth Circuit held that the *Reynolds* case fell neatly within this paradigm. Because the essay was to be published in a school-sponsored booklet (circulated to fourth grade student parents) and because R.R.S. wrote the essay pursuant to a class assignment, the Court found the project could reasonably be viewed by parents as bearing the imprimatur of the school.

The Court next found that the principal's regulation of R.R.S.' speech was reasonably related to a pedagogical concern. Notably, R.R.S.' parent in the complaint recognized that

the principal's initial refusal to include the essay was actuated in part by her concern that the topic was not age appropriate. The court wrote "while reasonable minds could debate the pedagogical efficacy of shielding fourth graders from topics like sexuality and gender identity, it cannot be denied that maintaining the age-appropriateness of school-sponsored activities is a pedagogical concern that passes muster under *Hazelwood*. Indeed, *Hazelwood* itself elucidates that schools 'must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics.'" The Fourth Circuit then cited

***the principal's
regulation of R.R.S.'s
speech was reasonably
related to a pedagogical
concern***

to its own opinion in a 2007 case for the proposition that "it is not a court's obligation to determine which messages of social or moral values are appropriate to a classroom. Instead, it is the school board, whose responsibility includes the well-being of the students, that makes such determinations." The *Reynolds* decision affirmed educators' authority to restrict even speech that may have "valid legitimate educational purposes" (here, LGBTQ issues) so long as the restriction is related to a legitimate pedagogical concern (here, age-appropriateness). The court also disposed of R.R.S.' parent's assertions that the principal engaged in viewpoint discrimination, finding that the restriction was not based on any specific view, but rather on the subject of the essay itself.

The *Reynolds* decision matters because it further supports school principals' editorial authority over school-sponsored publications. However, the fact pattern likely is unique; a similar fact pattern in a secondary school may have produced a different analysis and outcome. In other words, a court may well reason differently regarding the age-appropriateness of LGBTQ topics in a secondary school setting with the current social dialogue on these issues. Principals are well-advised to consult legal counsel regarding editorial decisions that might later be challenged.