CASE NOTES

Morrison ex rel. Morrison v. Board of Education: A Road Map to Constitutional Diversity Training in Schools

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I. INTRODUCTION

Following negotiations between the Boyd County High School Gay Straight Alliance and the Board of Education of Boyd County, Kentucky, the board implemented an antiharassment policy prior to the 2004-2005 school year.[1] Under the new guidelines, a student could be suspended up to five days for harassing students based on, among other things, actual or perceived sexual orientation or gender identity.[2]

Additionally, the school board agreed to implement mandatory staff and student diversity training that would address issues of sexual orientation and gender harassment.[3] As part of the training, students in the middle and high schools were shown age-appropriate, hour-long antiharassment videos with follow-up comments from an instructor.[4] Following the presentation, students had the opportunity to ask questions and were given blank comment cards where they could express their reactions to the video.[5] Just before the training began at the high school, the plaintiffs' parents and several other parents submitted homemade "opt-out" notices to the school; their children did not attend, and as a result received unexcused absences.[6]

Plaintiffs sued alleging that by forcing students to attend mandatory diversity training that promotes a respectful coexistence with homosexuals, the school violated their constitutional rights of free speech

1. Morrison *ex rel.* Morrison v. Bd. of Educ., 419 F. Supp. 2d 937, 939-40 (E.D. Ky. 2006).
2. *Id.* at 939. The guidelines define harassment as "unlawful behavior based on race, color, national origin, age, religion, sex, actual or perceived sexual orientation or gender identity, or disability that is sufficiently severe, pervasive or objectively offensive that it adversely affects a student's education or creates a hostile or abusive educational environment." *Id.*
3. *Id.*
4. *Id.* at 940-41.
5. *Id.* at 940.
6. *Id.*

and free exercise of religion.[7] Additionally, several parents claimed the mandatory diversity training interfered with their right to direct their children's religious and ideological upbringing.[8] The United States District Court for the Eastern District of Kentucky *held* that the diversity training did not violate any student's First Amendment rights. The court reasoned that the only restrictions placed on student speech related to disruptive harassment, and the training did not compel students to endorse or disavow any religious or moral beliefs relating to homosexuality. Furthermore, the court held that because the training was reasonably related to school safety, parents did not have the right to dictate how the school functioned. *Morrison ex rel. Morrison v. Board of Education*, 419 F. Supp. 2d 937, 942-97 (E.D. Ky. 2006).

II. BACKGROUND

While the United States Constitution clearly establishes that all citizens possess certain inalienable free speech rights, the protection of those rights in the context of education has required courts to balance both the individual rights of students and the schools' need to maintain discipline and promote legitimate pedagogical goals.[9] The Supreme Court of the United States has established that there are three categories of school speech that require varying levels of constitutional protection—student speech, speech by the school, and school-sponsored speech.[10]

First, the Supreme Court stated in *Tinker v. Des Moines Independent Community School District*, that students are persons under the Constitution and as such retain full possession of their free speech rights, even while at school.[11] In that case, the Court held that a student was entitled to wear a black armband as a silent protest to the Vietnam War.[12] The Court also established that schools could only regulate student speech if the speech would materially and substantially interfere with the operation of the school or abridge the rights of other students.[13] Additionally, the Court stated that a school's mere fear of discomfort or unpleasantness that might result from unpopular student speech was not enough to justify violating a student's First Amendment rights.[14]

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7. *Id.*
8. *Id.*
9. *See* Epperson v. Ark., 393 U.S. 97, 104 (1968).
10. *See* Hansen v. Ann Arbor Pub. Schs., 293 F. Supp. 2d 780, 793, 796 (D. Mich. 2003).
11. 393 U.S. 503, 512 (1969).
12. *Id.* at 514.
13. *Id.* at 509.
14. *See id.*

The Supreme Court established a second category of school speech in *Rosenberger v. Rector and Visitors of the University of Virginia*, speech by the school itself.[15] There, the Court explained that when the school itself, as an agent of the state, is advancing a particular viewpoint or agenda, it is permitted to regulate the content of its speech so as to best promote that end.[16] Importantly, the *Rosenberger* Court cautioned that while speech by the school itself need not be viewpoint neutral, where schools provide open forums for discussion they must not engage in viewpoint discrimination by encouraging certain viewpoints at the expense of others.[17] In that case, the defendant university had offered to fund the printing expenses for a wide array of student groups, but refused to reimburse a Christian student organization on the ground that it did not want to promote religion.[18] The Court held that the disparate treatment amounted to unconstitutional viewpoint discrimination.[19]

In addition to pure student speech and school speech, in *Hazelwood School District v. Kuhlmeier*, the Supreme Court established a third category of speech, school-sponsored speech.[20] The Court stated that a school acted constitutionally in censoring a student newspaper article that could potentially embarrass pregnant students or students who were children of divorced parents.[21] Furthermore, the Court explained that a school may regulate school-sponsored speech as long as the censorship is reasonably related to legitimate pedagogical concerns, such as preventing the personal embarrassment of pregnant students.[22]

The United States District Court for the Eastern District of Michigan recently addressed the issue of improper viewpoint discrimination in school-sponsored speech in *Hansen v. Ann Arbor Public Schools*.[23] The court held that a school had engaged in viewpoint discrimination by censoring a student who wished to make a speech at a "diversity fair" expressing the viewpoint that homosexuality is sinful, while simultaneously promoting speakers who advocated the acceptance and tolerance of homosexuals.[24]

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15. 515 U.S. 819, 833 (1995).
16. *See id.*
17. *See id.* at 834-35.
18. *Id.* at 835-37.
19. *See id.*
20. 484 U.S. 260, 273 (1988).
21. *Id.* at 274.
22. *See id.* at 273.
23. 293 F. Supp. 2d 780 (E.D. Mich. 2003).
24. *Id.* at 801-02.

The tension between a school's ability to regulate speech in accordance with educational goals and the First Amendment rights of students is further complicated when a school's curriculum collides with the religious or moral beliefs of students and their parents. In *West Virginia State Board of Education v. Barnette*, the Supreme Court held that despite the State's interest in promoting national unity, schools could not impose a requirement that all students salute the flag and pledge their allegiance to the United States.[25] The requirement violated the First Amendment rights of Jehovah's Witnesses who were religiously opposed to swearing to any entity but God.[26] Similarly, in *School District v. Schempp*, the Court held that an optional prayer read before each school day was in direct conflict with both the Free Exercise and Establishment Clauses of the First Amendment.[27] Recently, the United States District Court for the District of Maryland held that a school violated the Establishment Clause by praising the tolerance shown by certain religious groups while criticizing the Baptist Church for condemning homosexuality.[28]

The United States Court of Appeals for the Sixth Circuit addressed the issue of conflict between school curriculum and student religious beliefs in *Mozert v. Hawkins County Board of Education*.[29] There, the court held that to prevail on a claim of a Free Exercise violation, there must be some government coercion that compels a student to affirm or deny a religious belief.[30] In that case, because the plaintiffs could not demonstrate more than a mere objection to certain science fiction reading assignments, they failed to establish a burden on their free exercise of religion.[31]

The extent of parents' rights to control the religious and moral upbringing of their children has also been the subject of much litigation. In *Meyer v. Nebraska*, the Supreme Court held that parents have a fundamental right to control the moral and religious upbringing of their children.[32] While several circuits have examined the extent of this right, most agree that it does not permit parents to control the details of school curriculums or require that schools tailor curriculums specifically for

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25. 319 U.S. 624, 642 (1943).
26. *Id.*
27. 374 U.S. 203, 224 (1963).
28. Citizens for a Responsible Curriculum v. Montgomery County Schs., No. Civ.A.AW-05-1194, 2005 WL 1075634 (D. Md. May 5, 2005).
29. 827 F.2d 1058, 1065 (6th Cir. 1987).
30. *Id.*
31. *Id.* at 1070.
32. 262 U.S. 390, 399 (1923).

their children.[33] For example, in *Blau v. Fort Thomas Public School District*, the Sixth Circuit held that while parents have the right to control whether their child will attend a public school, they do not have the right to dictate how that school functions on a day-to-day basis.[34]

III. COURT'S DECISION

In the noted case, the United States District Court for the Eastern District of Kentucky addressed a three-part challenge to the Boyd County school board's diversity training program.[35] First, the court held that because the school's diversity training video did not favor one viewpoint over another regarding homosexuality, it was "viewpoint neutral" speech and therefore did not qualify as unconstitutional viewpoint discrimination.[36] Additionally, the court followed the *Tinker* Court's analysis and held that the diversity training program did not violate the students' First Amendment rights because the only restrictions placed on student speech related to potential harassment that would disrupt the educational process.[37] Second, the court held that the school did not burden the students' Free Exercise rights because the training did not compel students to reject their religious beliefs or endorse any sexual orientation or gender identity.[38] Third, the court held that because the diversity training was related to providing a safe environment, parents did not have the right to impede or opt out of the program.[39]

At the outset of the decision, the court provided an overview of the three types of school speech established by the Supreme Court, and the appropriate constitutional standards for each type of speech.[40] Also, the

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33. *See* Brown v. Hot, Sexy & Safer Prods., 68 F.3d 525, 533 (1st Cir. 1995) (holding that parents did not have the right to prevent their children from attending a mandatory sex education presentation because they thought it was too explicit); Leebaert v. Harrington, 332 F.3d 134, 142 (2d Cir. 2003) (holding that parents could not exempt their children from mandatory health education class because it conflicted with their religious views regarding drugs, tobacco, alcohol, and premarital sex).

34. 401 F.3d 381, 395-96 (6th Cir. 2005) (holding that parents did not have the right to opt out of a school dress code).

35. Morrison *ex rel.* Morrison v. Bd. of Educ., 419 F. Supp. 2d 937, 942-46 (E.D. Ky. 2006).

36. *Id.* at 942.

37. *Id.* at 943 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)).

38. *Id.* at 943-44.

39. *Id.* at 946.

40. *See id.* at 941 (citing *Tinker*, 393 U.S. at 509 (stating that noncurricular speech of students cannot be regulated unless it would disrupt school functions or impinge on the rights of other students); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (stating that speech by the school itself need not be viewpoint neutral as long as it does not violate the Establishment Clause or the Equal Protection Clause); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (stating that school-sponsored speech, such as a school newspaper, may be

court narrowed the scope of the decision to exclude the plaintiffs' complaint that the school's written harassment policies were overbroad.[41] Because the alleged defects in the policies had been cured through mediation, the court avoided the unnecessary adjudication of constitutional issues and held that it would not address the matter in this case.[42]

Plaintiffs claimed that the diversity training engaged in improper viewpoint discrimination because it consistently made positive statements regarding homosexuality while prohibiting negative ones.[43] The court, however, disagreed with both the plaintiffs' readings of the law and understanding of the facts.[44]

Plaintiffs relied on *Hansen* to demonstrate that where a school prevents students with an antigay bias from speaking at a diversity event, the school is engaging in viewpoint discrimination.[45] The court here indicated that engaging in viewpoint discrimination in school-sponsored speech would be unconstitutional. It avoided, however, clarifying the issue of whether school-sponsored speech need be viewpoint neutral by distinguishing the diversity training in the case at hand from the school assembly in *Hansen*.[46] Specifically, because the diversity training video in the instant case was speech by the school itself, as opposed to *Hansen*'s merely school-sponsored speech by a student, the court held that it need not be viewpoint neutral as long as the content was reasonably related to legitimate educational concerns.[47] The court, however, did not reach the issue of whether the diversity training was related to legitimate educational concerns because, based on its own factual analysis, the court found the diversity training to be viewpoint neutral.[48]

Regarding plaintiffs' claim that the school had improperly restricted their free speech, the court held that because the school provided open-

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regulated by the school as long as the censorship is related to a legitimate pedagogical purpose)).

41. *See id.* at 942.

42. *See id.* (citing United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 478 (1995); Bowman v. Tenn. Valley Auth., 744 F.2d 1207, 1211 (6th Cir. 1984)).

43. *Id.*

44. *See id.*

45. *Id.* (citing Hansen v. Ann Arbor Pub. Schs., 293 F. Supp. 2d 780 (E.D. Mich. 2003)).

46. *See id.*

47. *Id.* (citing *Hansen*, 293 F. Supp. 2d 780; Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)). In *Hansen*, the speech at issue was that of a student participating in a school assembly. In the instant case, the court characterized the speech at issue as speech by the school itself and distinguished it from the *Hansen* speech, which it found to be school-sponsored. *Id.*

48. *Id.* at 942-43.

ended response cards to students following the training presentation, the school gave all students the opportunity to express their own beliefs on homosexuality.[49] In fact, the court pointed out that at least one student took the opportunity to express her belief that, as a Christian, she felt homosexuality was a wrongful and unnatural attraction.[50] The court further stated that because the only restrictions on speech expressed in the training materials related to potentially disruptive student harassment, they were in line with *Tinker* and did not constitute a violation of the students' free speech rights.[51] Because there was no evidence in the record of either viewpoint discrimination or an inappropriate limitation on student speech, the court dismissed plaintiffs' free speech claims as baseless.[52]

The court also rejected plaintiffs' claims that the school diversity training violated the Free Exercise Clause because it promoted values that offended their deeply held religious convictions and attempted to change their beliefs toward homosexuality.[53] Relying on the Sixth Circuit decision in *Mozert*, the court stated that in order to establish a violation of the Free Exercise Clause, plaintiffs must do more than merely demonstrate that the student training offended their religious sensibilities.[54] Rather, to meet their burden, the plaintiffs needed to show that the diversity training somehow prevented them from practicing their faith.[55] Because no student was forced to disavow his or her religious beliefs or endorse homosexuality, the court rejected the plaintiffs' Free Exercise claims.[56]

In rejecting these claims, the court distinguished the noted case from *Citizens for a Responsible Curriculum*.[57] In that case, the court pointed out, the school program ran afoul of the Establishment Clause because it directly confronted Baptist students' religious beliefs and promoted certain moral attitudes over others.[58] In the noted case,

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49. *Id.* at 943.
50. *Id.*
51. *See id.* at 943-44 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)).
52. *Id.* at 943.
53. *Id.*
54. *See id.* (citing Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987)).
55. *See id.*
56. *See id.*
57. *Id.* at 943-44 (citing Citizens for a Responsible Curriculum v. Montgomery County Pub. Schs., No. Civ.A.AW-05-1194, 2005 WL 1075634 (D. Md. May 5, 2005)).
58. *See id.* at 944 (citing *Citizens for a Responsible Curriculum*, 2005 WL 1075634, at *3-5, 11).

however, the court pointed out that following the diversity presentation, a presenter read a statement that clearly intimated that the school was not attempting to influence student religious beliefs, and reminded students that the purpose of the training was merely to promote a respectful and safe school environment.[59]

The court held that the school's diversity training did not unduly burden the plaintiffs' free exercise of religion.[60] The court reasoned that the plaintiffs could not show a clear burden on their religious practices, and the evidence demonstrated that the school had taken affirmative steps to respect the students' religious beliefs.[61]

The parents of the plaintiff students also claimed that by requiring attendance at the diversity training, the school interfered with the parents' right to direct the ideological and religious upbringing of their children.[62] Relying on the Sixth Circuit decision in *Blau*, the court stated that while parents have the right to decide whether their children will attend a public or private school, they do not have a right to control the particulars of how a school educates their children.[63]

The court found the United States Court of Appeals for the First Circuit decision in *Brown v. Hot, Sexy & Safer Products* particularly significant.[64] In that case, the court refused to recognize a fundamental right to dictate curriculums. The court held that a mandatory health presentation that featured sexually explicit language and skits, and promoted oral sex, masturbation, and condom use during premarital sex did not violate the parental right to control the religious and ideological upbringing of their children.[65]

In analyzing the plaintiff parents' claims, the court also relied on the United States Court of Appeals for the Second Circuit's decision in *Leebaert v. Harrington*.[66] The court held that because the school's mandatory health education class was rationally related to the legitimate

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59. *See id.* at 944-45. At the conclusion of the training, students were read:

> We would never try to influence (your religious beliefs). They are very sacred and they should only be influenced by you, your parents and your family. Please realize that with the video we showed today we are only trying to instill a sense of honor amongst our students to learn not to treat someone unfairly or harass someone because they are different.

Id.

60. *Id.* at 945.
61. *Id.*
62. *See id.*
63. *See id.* (citing Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381 (6th Cir. 2005)).
64. *See id.* (citing 68 F.3d 525 (1st Cir. 1995)).
65. *See id.* (citing *Brown*, 68 F.3d 525).
66. *See id.* at 945-46.

goal of educating children regarding health, the plaintiff's son would not be excused from attendance.[67] The court likened the diversity training in the noted case to the health education class in *Leebaert* by stating that the diversity training was rationally related to the legitimate educational goal of stopping school harassment and providing a safe school environment.[68] Because the diversity training was related to a legitimate school objective, the court held that the plaintiff parents did not have the right to dictate the contents of the program or to excuse their children from attending.[69]

IV. ANALYSIS

The court's opinion in the noted case is a useful tool for advocates of homosexual, bisexual, and transgendered interests. In explaining why the Boyd County plan does not run afoul of the First Amendment, the court illustrated how other school districts can tailor their own diversity and antiharassment programs to avoid constitutional challenges from students and parents who feel such programs interfere with their religious beliefs. However, in analyzing the plaintiffs' claims of viewpoint discrimination, the court confused the constitutional protections of speech by the school itself and school-sponsored speech. This misclassification required the school to overcome a greater burden in defeating the plaintiffs' claims of unconstitutional viewpoint discrimination.

Throughout the opinion, the court highlighted specific measures that allowed the school board to advance the interest of a more tolerant student body, while at the same time preserving the First Amendment rights of individual students who opposed homosexuality on religious or moral grounds. The court specifically pointed to the school's provision of open-ended comment cards to students as evidence that the school was not stifling protected student speech.[70] Similarly, in analyzing the plaintiffs' Free Exercise claims, the court used the statement at the end of the diversity training as evidence that the program was not trying to alter student religious beliefs or force any student to adopt a particular ideology.[71]

In addition to clarifying exactly what the school board did right in this case, the court also highlighted what other schools have done wrong

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67. *Id.* at 945 (citing 332 F.3d 525 (2d Cir. 2003)).
68. *See id.* at 945-46.
69. *Id.* at 945.
70. *Id.* at 943.
71. *See id.* at 944-45.

in the past. Specifically, the court pointed out that the school board in *Hansen* may have violated a student's free speech rights by forbidding her to express the view that homosexuality is a sin at a school assembly that encouraged student participation.[72] While the court stopped short of endorsing the decision in *Hansen*, it did indicate that this type of school action would expose a diversity program to a constitutional challenge.[73] Also, in analyzing the plaintiffs' Free Exercise claims, the court noted that the school board in *Citizens for a Responsible Curriculum* went too far by venturing into biblical interpretation, and promoting faiths that they felt were more accepting of homosexuality at the expense of less tolerant religious sects.[74]

The net effect of this opinion is a clear roadmap for school boards that want to develop diversity programs but also fear a backlash from the religious community. The court clearly indicates which elements of diversity programs will run afoul of the First Amendment, and what measures a school board can take to shield itself from litigation.

While the court provided a useful guide for schools seeking to avoid litigation, it confused the constitutional standards for regulating speech by the school itself with the standards for school-sponsored speech, resulting in a higher burden for the school board in this case. The court clearly stated that the diversity training in this case was speech by the school itself as opposed to school-sponsored speech.[75] However, in explaining the applicable standard, the court stated that school speech does not have to be viewpoint neutral as long as it relates to legitimate pedagogical concerns.[76] That is the standard expressed in *Hazelwood* for school-sponsored speech, not for speech by the school itself.[77]

Under *Rosenberger*, unless the school provides an otherwise open forum for discussion, a school is entitled to full control of whatever message it sends out regardless of viewpoint neutrality or relation to a legitimate educational concern.[78] Because the court held the diversity training to be viewpoint neutral, this confusion of standards did not

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72. *Id.* at 942 (citing Hansen v. Ann Arbor Pub. Schs., 293 F. Supp. 2d 780 (E.D. Mich. 2003)).

73. *See id.*

74. *See id.* at 944 (citing No. Civ.A.AW-05-1194, 2005 WL 1075634, at *3-5, 11 (D. Md. May 5, 2005)).

75. *See id.* at 942.

76. *See id.* at 942-43 (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)).

77. *See Hazelwood*, 484 U.S. at 273.

78. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995).

change the outcome of the case. However, the court did subject the school board to a higher standard than required by precedent.

In finding that the diversity training was viewpoint neutral, the court did not reach the question of whether promoting gay rights was a legitimate pedagogical concern under the *Hazelwood* standard. By misapplying the constitutional standards concerning different types of school speech, and then leaving such a charged question unanswered, the court diminished the impact of its decision for gay rights advocates. Had the court properly used the *Rosenberger* standard, it could have simply stated that if the school wishes to deliver an antiharassment message, it need not be viewpoint neutral in doing so, provided it does not create an open forum discussion. Further, a more forceful opinion using the *Hazelwood* standard would clearly state that halting the harassment of gay students was a legitimate pedagogical interest, and therefore the school need not exercise viewpoint neutrality in promoting this goal. By using the *Hazelwood* standard without addressing the question of whether promoting a tolerant student body is a legitimate educational interest, the court leaves future diversity programs exposed to First Amendment challenges if they cannot demonstrate viewpoint neutrality in their message.

Despite the slight confusion of applicable constitutional standards, this decision is useful precedent for gay rights advocates who want to promote tolerance in schools. In addition to upholding the constitutionality of the Boyd County diversity and antiharassment programs, the court also delivered a clear message to parents that they may not use the courts to bar school boards from teaching their children lessons with which they disagree.

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