

Forbidding or Allowing Student Religious Speech

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One challenge in figuring out what religious speech is permitted for students is that it depends on whether the school is trying to prevent the speech or allow it. A January 2013 Second Circuit case, *A.M. v. Taconic Hills Central School District*, gives some insight, though it is a summary order that is not precedential.

In this case, A.M. was an 8th grade student who had the opportunity to deliver a message at the school's Moving-Up ceremony because she was co-president of the student council. The final sentence of her speech was a blessing, "May the Lord bless you and keep you; make His face shine upon you and be gracious to you; lift up His countenance upon you, and give you peace." When A.M. reviewed her speech with her English teacher, the teacher was concerned about that sentence and drew in administrators to review it. Ultimately, administrators decided that A.M. would not be able to speak unless she removed the last sentence. A.M. removed the sentence, gave her speech, and later filed a lawsuit.

The court analyzed the case under A.M.'s free speech claim and began with an important distinction. If the student's speech takes place as "school-sponsored expressive activities," then educators may exercise editorial control over student speech if the control is "reasonably related to legitimate pedagogical concerns."¹ But if the student address is "personal expression that happens to occur on the school premises" (*id.*), a *Tinker* standard applies.² Under this standard, educators can exercise editorial control only if the speech would materially interfere with school discipline. The court agreed that A.M.'s speech was "school-sponsored expressive activity" and that a reasonable observer would believe that A.M.'s speech was endorsed by the school.

Next, the court had to decide whether the school was discriminating against A.M.'s viewpoint (the ideology, opinion, or perspective of the speaker) or the content (a particular subject matter). This matters because viewpoint discrimination requires an overriding state interest, but content discrimination only requires that government restrictions be reasonable. Usually, courts consider it reasonable if a school imposes speech restrictions in an effort to avoid violating the Establishment Clause, even if the disputed speech would not actually violate the Establishment Clause.

Rather than deciding that A.M.'s speech was a religious viewpoint about a particular topic, the Court decided that her blessing had no real secular analogue. The speech was purely religious and the discrimination was content-based, not viewpoint-based.

¹ *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

² *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

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Complying with the Establishment Clause was a legitimate pedagogical concern. Therefore, the case was dismissed.

Note that this case could have turned out differently with another set of facts. If the school had less involvement in reviewing or organizing the speech, the speech might not have been school-sponsored, and the more generous standard would apply. And, if the school had not seen a pedagogical reason to ban student expression of religious content, that approach would not have necessarily violated the Establishment Clause. These student speech cases turn on whether the school's conduct met constitutional standards, not whether that was the only approach the school could have taken. Unfortunately, when schools take the position that religious speech does not belong in the public square, students may have little recourse.

Still, the case may not be over. The Alliance Defending Freedom has petitioned for a rehearing en banc (by the entire Second Circuit), on the basis that students of faith should not be excluded from fully participating in important events, and that personal speech and well-wishes should not be shut down just because of a religious reference. ADF argues that well-wishes and blessings do have a secular analogue, as expressed by the entire Hallmark industry.³ If this argument shifts the analysis to viewpoint discrimination, the standard becomes much tougher for the school to meet, even under *Hazelwood*.

³ <http://www.christianpost.com/news/8th-grade-students-god-bless-grad-speech-ruling-needs-rehearing-says-adf-90310/>