

STATE OF RHODE ISLAND
AND
PROVIDENCE PLANTATIONS

COMMISSIONER OF EDUCATION

H. DOE

V.

PORTSMOUTH SCHOOL COMMITTEE

Decision

Held: School Committee's exclusion of student's photograph from the senior portrait section of the high school yearbook is unreasonable and arbitrary.

January 19, 2007

Introduction

This is an appeal by student Doe's mother from the decision of the Portsmouth School Committee to uphold the exclusion of a photograph of Doe from the senior portrait section of the Portsmouth High School yearbook.¹

Background

Student Doe is a 17-year-old senior at Portsmouth High School. In early September 2006, he received a yearbook-related notice entitled "Attention Seniors!!" The notice advised seniors of a due date for the submission of 5 items for the school's yearbook. Three of the items were "Senior Photos," "Blurbs," and "Remember When's." For these items, the notice states as follows:

Senior Photos: If it was taken by Armor & Martel you do not need to give us a paper photo. You must inform A&M of the photo you would like appear (sic) in the yearbook. All other students must send in their senior photo by the date above, otherwise we will take your senior picture for you.

Blurbs: Cannot exceed 500 characters including spaces. All of the blurbs will be read by Mr. Littlefield and will be edited for profanity and any inappropriate statements . . .

Remember When's: Up to 5 Remember When's and they will also be edited by Mr. Littlefield and the yearbook staff . . . [Petitioner's Exhibit 2].²

In response to the notice, Doe submitted a photograph of himself wearing chain mail on his head and body and holding a broadsword in his right hand and a dagger in his left hand. Both of Doe's hands are at his belt, with the broadsword resting on this right shoulder. Doe is turned slightly to his right in the photograph.

When asked at the hearing why he chose to dress the way he did in the photograph, Doe testified that "It's one of my favorite hobbies and interests . . . re-creation of the medieval times .

¹ The Commissioner of Education designated the undersigned hearing officer to hear and decide the appeal. At the request of the United States District Court for the District of Rhode Island, where related litigation between the parties is currently pending, this case was handled on an expedited basis. A hearing was held on January 2, 2007 and the parties subsequently submitted memoranda.

² Mr. Littlefield is the principal of Portsmouth High School.

. . I really like this sort of thing and I wanted to be remembered as somebody who did.” [Transcript, pp. 16-17, 21]. Doe further testified that he takes part in archery tournaments and arrow-making workshops, and that he participates in faires while dressed as a medieval character. He is a member of the Society for Creative Anachronism, which provides learning experiences through the re-creation of medieval crafts and activities.

Doe submitted his photograph to the yearbook advisor, an educator at Portsmouth High School who also teaches two sections of a course entitled Principles of Publishing. According to the High School program of study, the curriculum for the course focuses on “the design, writing, layout and editing of major publications” whereby “the students will develop the skills necessary for producing the Portsmouth High School Yearbook, The Legend, and a spring supplement.” [School Committee Exhibit 3].

Doe testified that following the submission of the photograph, the advisor told him that it was Mr. Littlefield’s decision not to accept the photograph for the senior portrait section of the yearbook. Doe then briefly spoke to Mr. Littlefield who stated that he was concerned that parents might take offense to the photograph. Doe’s mother subsequently spoke to Mr. Littlefield and the latter indicated that the photograph could be perceived as an endorsement of weapons in school. Doe’s mother asked for a written explanation for the refusal to accept the photograph and Mr. Littlefield suggested that they look at a digitally altered version of the photograph.

Mr. Littlefield later provided Doe’s mother with a photograph that was digitally altered so as to remove the sword and dagger. The altered photograph came with a letter that stated that the new version would be “consistent with our no tolerance policy on weapons, drugs, alcohol, etc.” [Petitioner’s Exhibit 4]. The letter also offered the option of an alternative photograph and concluded by stating that

Another alternative is to place the unedited photo in the advertisement section of the yearbook where many families submit additional photos. It is easier for a school to disavow endorsement or approval of a photo when it is included in the advertising section. I have included a price list. [Ibid.].

Doe’s mother informed Mr. Littlefield that the digitally-altered photograph was not acceptable because it did not provide “a complete representation of what he was looking to

be seen as. It looks silly without the props . . .” [Tr., p. 31].³ She again asked for a letter of explanation, which was provided on November 28, 2006. The letter reads as follows:

Thank you for meeting with me regarding [Doe’s] yearbook senior portrait.

As I stated in our meeting I believe it is irresponsible of me to allow a senior portrait of a student posing with a weapon. To allow such a photo in our senior section could easily be construed to mean that Portsmouth high School has anything but a no tolerance policy for weapons that is consistent with the attorney general’s guidelines for schools.

As principal of the school I am often required to make decisions that strike a balance between personal expression of students and the general interests of the school. In this instance I believe that it is not in the best interest of our school to place a photo of a student and a weapon in the senior portrait section of our yearbook.

You should know that both the editorial staff of the yearbook and the yearbook advisor considered the picture and felt it was inappropriate for an official publication sponsored by Portsmouth High School.

We will not alter/edit the content of the photo submitted to us. If you wish for [Doe’s] portrait to be included in the yearbook please submit a more appropriate picture. [Petitioner’s Exhibit 7].

The senior student editor of the yearbook testified that when she first saw the photograph submitted by Doe

It immediately shocked me. We had never allowed weapons before. This book is seen throughout the nation. It’s put in contests with other books . . . and it does represent us, what we’re about, and I wasn’t going to allow a weapon. . . [The advisor] was in the other room and I called him in to ask him what we would typically do about this. I had never been put in the situation. He had just previously seen it, almost the same time, and [he said] that he would speak to [Doe] to see if he wanted to get a new picture, we could edit it for him or what else could be done. [Tr., pp. 108-109].

³ Doe’s mother also stated that the weapons “were a part of the theatrical representation as him posing as a knight or as a fighter from that period.” [Tr., p. 36].

The teacher/advisor testified that he spoke to Doe and told him that “he’d have the opportunity to submit another photo if he’d like, or I could alter the photo, digitally alter the photo, and if he wasn’t comfortable with my decision, then he could talk to Mr. Littlefield about that.” [Tr., p. 130]. The teacher/advisor then informed Mr. Littlefield that there was “a picture in question and that [Doe] would probably be coming to see him.” [Tr., pp. 130-131].

The educator who had been the yearbook advisor for the previous 6 years, and the teacher of the Principles of Publishing class for the last 5 of those years,⁴ testified that it was her practice to inform students that “whatever we do in the book, sure, students have some free rein, if you will, what colors they want to choose or what font style, but ultimate decision goes to Mr. Littlefield.” [Tr., p. 53].⁵ The former teacher/advisor described the submission of a photograph by a student marksman for the 2004 senior portrait section which showed the student holding a rifle. She testified that “because there was a weapon in the photo, I told the parents that that would not be acceptable in the senior section of the book, but if they wanted to [they could] buy an advertisement . . . [and] put that particular photo in the advertising section. [Tr., p. 57]. The parents agreed.⁶ She also testified about an earlier submission of a photograph of a student “in Civil War regalia with a musket.” [Tr., p. 59]. Again, “the parents put [the weapon photo] in the advertising section and a different one in the senior section.” [Ibid.].⁷ When asked to explain the distinction between the senior portrait section and the advertising section of the yearbook, the former teacher/advisor testified that

The advertising section is bought and paid for by other people. From page one until we get to the advertising section, that part of the book is representative of Portsmouth High School. And in that respect, we would censor things that would go there because if there’s something in that opening section . . . the first hundred and however many pages until the advertising section . . . that would detract from what we as students and faculty and community, as to who we are, then we wouldn’t necessarily want it in that opening section, because it is representative of our school. [Tr., pp. 57-58].

⁴ The course was instituted in 2001.

⁵ The educator later answered “yes” to a question as to whether Mr. Littlefield had the “final say” over the inclusion or exclusion of a particular photograph. [Tr., p. 73].

⁶ The photograph of the student with the rifle that appeared in the advertising section is twice the size of the photographs contained in the senior portrait section.

⁷ The photograph of the student dressed as a Civil War soldier was not presented at the hearing.

The former teacher/advisor testified that yearbooks carried advertisements for liquor stores and tattoo parlors, and that parents published Bible verses in the advertising section. She further testified that editorial control was exercised over the advertising section as well, describing how an open beer bottle was deleted from a baby picture in last year's book. As for the final question posed to this educator at the hearing, she answered "yes" when shown a sampling of senior portraits and asked if "students are permitted to express their interests in photographs?" [Tr., pp. 105-106].⁸

Principal Littlefield described his yearbook responsibilities as being "in my building, the final say on content in our annual publication." [Tr., p. 140]. He stated that the Principles of Publishing course exists "so that our students can learn publishing, [while] at the same time producing our annual publication." [Ibid.]. With regard to the funding of the yearbook, the teacher/advisor and the classroom amenities are financed through the school's operating budget and the book's production costs are generally covered by book sales, advertising and fundraising activities.

Mr. Littlefield testified that he rejected Doe's photograph because

it was a student brandishing a weapon to be placed in the official signature part of our yearbook. And I did not think that that was in keeping with the spirit or would be consistent with our existing policies . . . [and] since it's in the signature part of our yearbook, then it carries . . . with it sort of the endorsement of the school -- I think the word is 'imprimatur,' which is the official seal of the institution. [Tr., p. 145].⁹

When asked why Doe's photograph would be appropriate in the advertising section of the yearbook but not in the senior portrait section, he testified that

the short answer is we've done it before and I was trying to be consistent. We had had instances where kids had asked to be depicted with weapons, and we've offered that as a sort of compromise that . . . you are free to purchase advertising space. And I look at it as there's a difference between the portion of the publication that we present as ours, generated by our students, as opposed to the commercial speech that's at the end of the book where private concerns, either private individuals or private businesses, purchase advertising space. [Tr., p. 142].

⁸ The former teacher/advisor also testified that all of the students who worked on the yearbook were enrolled in her Principles of Publishing class, and that the class and what was represented as the "Yearbook Club" were one and the same.

⁹ Mr. Littlefield later referred to the senior portrait section as "the most formal part of our yearbook." [Tr., p. 177].

The record contains numerous pages from several recent editions of "The Legend." These pages include senior portrait photographs in which students are pictured with musical instruments, horses, cars and, in one instance, flying through the air on a skateboard. There are photographs from other student sections of the yearbook that show students engaged in various activities holding objects that are covered by School Committee policies. These objects include a corn cob pipe, liquor bottles, a beer stein, toy guns, bows and arrows, swords, a knife, color guard rifle shapes, and an axe made of foil. Several photographs of the school band's banner, depicting a musket-carrying patriot, appear in the yearbooks.

Mr. Littlefield was questioned about some of these photographs. He testified that the senior portrait in last year's book showing a student mid-flight on a skateboard¹⁰ is not inconsistent with school policy because skateboards are "not strictly prohibited" or covered by "an absolute zero tolerance" policy. [Tr., pp. 165, 169]. He stated that the 2005 senior portrait of a student wearing a t-shirt bearing the words "A dollar won is sweeter than a dollar earned" over a picture of a hand of cards is inconsistent with the school's gambling policy, but that the picture was obviously taken at the last minute and the yearbook editing process is not perfect. As for the school nickname, i.e., the "Patriots," the depiction of a patriot carrying a rifle on the school band's banner was never adopted as the official illustration of the High School.

The policy statement for the School Committee's "Weapons and Violence in Schools" policy states that

the purpose of this policy is to ensure a school environment that is conducive to learning. The underlying belief of this policy is that all children have the right to be educated in a safe and nurturing environment. Therefore, each school shall enforce a policy of zero tolerance for weapons and violence in school. [School Committee Exhibit 1].

The skateboard and roller skates policy states that

Skateboards and roller skates are generally prohibited on school property and always prohibited on school buses. Principals may allow their use for special programs, but parents or guardians will have to bring the equipment to school.

¹⁰ Or "doing a stunt on a skateboard" as described by Mr. Littlefield. [Tr., p. 164].

Positions of the Parties

Petitioner contends that for purposes of the First and Fourteenth Amendments, the yearbook is a public forum in light of the written policies and practices of the High School and the expressive nature of the book itself. Contrary to the assertion of the School Committee at the hearing, the United States Supreme Court's decision in the Hazelwood case does not change the public-forum status of the yearbook because the student newspaper in that case had never operated outside of a journalism class, whereas the Principles of Publishing class here was created to serve the pre-existing purposes of "The Legend." The Committee's post-litigation attempts to "shroud the yearbook in the guise of a lesson plan" cannot eliminate the yearbook club or alter its independent purpose as an avenue of student speech. Further, the High School has not, by policy or practice, imposed clear limits on this public forum that would justify the exclusion of Doe's photograph. Past yearbooks are rife with photographs that are inconsistent with school policies. Nor has the Committee provided a rational explanation as to why individual expression is less prevalent in the senior portrait section than in the remaining student sections of the yearbook. The principal's purely subjective editing standards amount to the type of plenary control that violates the Constitution and therefore cannot stand. Finally, whether a "reasonableness" or "substantial interference with educational interests" standard is applied, the exclusion of Doe's photograph is an invalid restriction on his freedom of expression. In discussing the presence of weapons-related photographs in past yearbooks, Petitioner finds

a credible explanation for the inclusion of these photographs. They do not convey a message of violence. The presence of "weapons" in these photographs is a theatrical representation, a comic representation, or, especially with respect to the School's mascot, a historical representation. No one could reasonably view the innocuous messages communicated by the photographs as conflicting with or undermining the School's weapons policy. So too, is the case with [Doe's] portrait, which is simply a historical representation designed to express an interest in medieval history. [Petitioner's memo, p. 30].

Petitioner requests that the exclusion of Doe's chosen senior portrait from the yearbook be found to be violative of Doe's right of free expression under the First and Fourteenth Amendments, and that the School Committee be ordered to revise the yearbook so as to include Doe's chosen photograph in the senior portrait section.

The School Committee contends that Doe's chosen photograph is not the type of expression protected by the First Amendment because the record does not establish that his intended message, i.e., the communication of his interest in medieval history and his affiliation with the Society for Creative Anachronism, would likely be understood by the general public without the prior assistance of some background information. Moreover, the First Amendment does not apply to this case because the decision to reject Doe's photograph came from the student editor of the yearbook, not from any "state actor." Under the Hazelwood case, "The Legend" is a school-sponsored publication produced in the context of an academic course and therefore subject to school officials' reasonable editorial control so that legitimate pedagogical interests may be fulfilled. The function of producing the yearbook was transferred to the Principles of Publishing course several years ago. In fact, the yearbook club and the academic course are indistinct. Furthermore, Hazelwood is not limited to publications produced in the context of an academic course. It has broader application, covering all publications, even those generated outside the traditional classroom setting that could "reasonably be understood to bear the imprimatur of the school." "The Legend" is clearly school-sponsored, tied to the curriculum and therefore part of the school's programming that is "designed to impart particular knowledge and skills." It also is not to any degree a public forum, as the creation of such must be an intentional act. The evidence in this case shows that the faculty at all times asserted its authority to determine the content of the yearbook and to conduct its publication as a school-sponsored activity. Lastly, the High School's refusal to publish senior yearbook portraits containing weapons was a reasonable exercise of editorial control over a school-sponsored publication in order to fulfill a legitimate pedagogical interest. The school's action constituted a warranted reinforcement of its "zero tolerance" no-weapons policy in a school-sponsored publication. The school's approach promotes administrative simplicity, eliminates difficult line-drawing disputes, and fosters student freedom to make personal contributions to the yearbook. The option to publish the photograph in the advertising section did not undermine the principal's safety concerns. The Committee asserts that the advertising section

is not considered by the faculty to be as clearly understood as the school's own speech. The advertising section has always been the setting in which outsiders might publish items that would not be deemed to representative of the school, such as Bible verses or advertisements from the local liquor store. The presence of a

student with a weapon in the advertising section would not be as likely understood as undermining the school's position on weapons . . . Principal Littlefield's offer represented a reasonable compromise . . . Had [Doe] accepted Principal Littlefield's offer, he could have the photograph of his choice printed in the yearbook. The school, on the other hand, is allowed to distance itself from material potentially undermining its "no weapons" policy.

Discussion

The School Committee's contention that the decision to reject Doe's photograph was not made by school officials, but instead came from the student editor, raises a threshold issue in this case. That issue is whether Petitioner was subjected to any "state action," thereby activating a First Amendment claim. As stated by the First Circuit Court of Appeals in Yeo v. Town of Lexington,

The essential state action inquiry is whether the government has been sufficiently involved in the challenged actions that it can be deemed responsible for the plaintiff's claimed injury. [footnote omitted]. If there is no state action, then the court may not impose constitutional obligations on (and thus restrict the freedom of) private actors. [footnote omitted].¹¹

We find that the record in this case clearly establishes that the rejection of Doe's photograph from the senior portrait section of the yearbook was the result of "state action." While the senior student editor objected to the photograph and did not want to allow its publication, she immediately summoned the teacher/advisor and asked him "what we would typically do about this." From that point, school officials handled this matter, culminating with the November 28, 2006 letter from Principal Littlefield to Doe's mother. The testimony of the present and former teacher/advisors and Principal Littlefield clearly shows that the latter has the "final say" and makes the "ultimate decision." Finally, in our view, the November 28th letter to student Doe's mother dispels any doubt that may exist as to who made the decision to exclude the photograph: it was Principal Littlefield. Although Mr. Littlefield references the views of the student editor and teacher/advisor near the end of his letter, he does so to convey the unanimity of opinion that existed on this issue. Because Mr. Littlefield, acting in his capacity as principal of Portsmouth High School, met with Doe's mother and ultimately made the decision to reject

¹¹ 131 F.3d at 248-249 (1997).

the photograph from the senior portrait section of the yearbook, we find that there is “state action” in this matter to support Petitioner’s First Amendment claim.

The next issue to be addressed is whether “The Legend” is a forum for public expression. This issue brings us to the United States Supreme Court’s decision in Hazelwood School District v. Kuhlmeier,¹² previously referenced in our recitation of the parties’ arguments in this case. The Court stated in Hazelwood that

The public schools do not possess all of the attributes of streets, parks, and other traditional public forums that ‘time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. [Citations omitted]. Hence, school facilities may be deemed to be public forums only if school authorities have ‘by policy or by practice’ opened those facilities ‘for indiscriminate use by the general public,’ . . . or by some segment of the public, such as student organizations. [Citations omitted]. If the facilities have instead been reserved for other intended purposes, ‘communicative or otherwise,’ then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community. [Citation omitted]. ‘The government does not create a public forum by inaction or by permitted limited discourse, but only by intentionally opening a non-traditional forum for public discourse.’ [Citation omitted].¹³

Applying the Hazelwood standard, we find that Petitioner has failed to establish that “The Legend” operates as a public forum at Portsmouth High School. Instead, the evidence shows, as it did in Hazelwood, that the publication in question is part of the educational curriculum and a regular classroom activity. Although the “Yearbook Club” continues to survive as an apparent relic of the past, the record in this case demonstrates that since 2001 the yearbook has been the product of the Principles of Publishing class, a formal course offered for academic credit and taught by a certified educator during the regular school day. As will be discussed later, school officials exercised final editorial control over the contents of the entire yearbook. Because the production of “The Legend,” through the Principles of Publishing class, is conducted as a supervised learning experience for students within a reserved forum, officials of Portsmouth

¹² 484 U.S. 260 (1988).

¹³ Ibid. at 264.

High School are permitted under the First Amendment to regulate the contents of the yearbook in any reasonable manner.¹⁴

Following the Hazelwood analysis, we are in the realm of

educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences. [footnote omitted].¹⁵

Furthermore,

educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns. [Footnote omitted].¹⁶

The School Committee contends that it excluded Doe's photograph from the senior portrait section of the yearbook in an effort to reinforce the message contained in its zero-tolerance policy for weapons and violence in schools. The objective embodied in the Committee's action obviously bears a rational relationship to legitimate pedagogical concerns. The problem with the School Committee's approach, however, is that the action taken by the Committee does not bear a rational relationship to its stated objective.

We start with the School Committee's objective: to reinforce its policy of zero tolerance for weapons and violence in schools. We understand zero tolerance to mean no tolerance.

We next look at the action taken by the Committee in furtherance of its objective: a refusal to publish Doe's photograph in the senior portrait section of the yearbook but to allow Doe's family to publish the photograph in the advertising section of the yearbook by purchasing the amount of space it desires. In taking this action, the School Committee in effect has applied its zero tolerance policy in full to one section of the yearbook but completely waived the policy

¹⁴ Ibid. at 272.

¹⁵ Ibid. at 271.

¹⁶ Ibid. at 273.

with regard to another section. In the case of student Doe's photograph, as it was with the markswoman and the Civil War re-creator, no tolerance for a yearbook photograph with a weapon becomes full tolerance when the family pays for the publication of the photograph. Tolerance for weapons can be purchased. This is illogical.

The only written policy with respect to senior portrait photographs in the record of this case is contained in the "Attention Seniors!!" document distributed at the beginning of the school year. The policy is notable in that it does not impose any standards or limitations with respect to the content or the source of the photograph.¹⁷ The record clearly demonstrates a practice by which students are permitted to use senior portrait photographs as a means to express their interests and hobbies. The musical instruments, cars, horses, and skateboard certainly illustrate that proposition. So do student Doe's chain mail, broadsword and dagger, which clearly are presented in a historical context.¹⁸ The expressive elements of the broadsword and dagger are essential to what Doe wanted to say about himself in his senior portrait. The same with the mid-flight element of last year's skateboarder, whose photograph, in terms of school policy and message reinforcement, does not seem significantly different from Doe's.¹⁹ A comparison of these photographs does point out the need for policy guidance in this area and the difficulties that arise when there is no policy to guide administrator's decisions.

In our view, Portsmouth High School is represented in the entire contents of its yearbook. Returning to Hazelwood, we find that students, parents, and members of the general public may reasonably perceive that the entire yearbook, from cover to cover, bears the imprimatur of the school. The evidence in this case shows that school officials also share this perception. Testimony at the hearing establishes that the advertising section of the yearbook is subject to editorial control. A specific example of how this control was applied to an advertisement in last year's book was described at the hearing. Mindful of the adage that actions speak louder than words, we think it is clear from the attention and the editing of the advertising section that school

¹⁷ Unlike the policies for "Blurbs" and "Remember When's," which contain references to profanity, inappropriateness, and editing by Principal Littlefield.

¹⁸ We specifically limit our decision to a broadsword and dagger that appear in a photographic representation of a student as a medieval figure. Student Doe clearly is presenting himself outside of his own time. Any other weapons appearing in any other student photograph would have to be analyzed within their own context and circumstances.

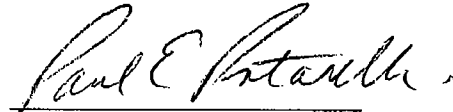
¹⁹ We acknowledge that mistakes and oversights inevitably will occur in the production of a major publication such as a school yearbook, and we do not hold these against the School Committee. We include the gambling t-shirt in this category, although we have much difficulty reconciling the failure to edit this photograph with the proclaimed prominence and importance of the senior portrait section of the yearbook.

officials actually consider that section of the yearbook to be representative of Portsmouth High School.

To exclude a photograph from the front of the yearbook for "policy reasons" but allow it to be magnified in size and published in the back of the same book upon the payment of a fee is irrational. To selectively apply the full force of a policy to one section of the yearbook, while ignoring another section, is arbitrary and capricious. Furthermore, we find that given the context and circumstances of Doe's photographic historical representation of himself as a medieval figure, his photograph does not conflict with the School Committee's zero-tolerance weapons policy. For these reasons, we sustain Petitioner's appeal.²⁰

Conclusion

The Portsmouth School Committee's exclusion of the photograph of student Doe submitted by Petitioner from the senior portrait section of the High School yearbook is unreasonable and arbitrary. We hereby order the School Committee to include the submitted photograph in the senior portrait section of the yearbook.



Paul E. Pontarelli
Hearing Officer

Approved:



Peter McWalters
Commissioner of Education

January 19, 2007

²⁰ Ultimately, the problem in this case is the lack of any policy governing the types of photographs that can be published in the senior portrait section. In the absence of a photograph policy that has been developed in conjunction with other relevant policies, school officials have no alternative but to make *ad hoc* decisions that may or may not serve the objectives of other school policies. Despite Mr. Littlefield's best efforts in this regard, he was not able to overcome this problem.