



## THE COMMONWEALTH EDUCATIONAL POLICY INSTITUTE

CENTER FOR PUBLIC POLICY - L. DOUGLAS WILDER SCHOOL OF GOVERNMENT AND PUBLIC AFFAIRS

**CEPI Education Law Newsletter**

Dr. Richard S. Vacca, Editor; Senior Fellow, CEPI

SEPTEMBER 2008: Vol. 7-1

**STUDENT EXPRESSION AND ELECTRONIC COMMUNICATION****Overview**

In my opinion student First Amendment disciplinary issues in the 2008-2009 school year will be less associated with hair styles and attire, and will focus more on student expression using technology (*electronic communication*). In addition to problems with cell phones (especially those equipped with cameras) public school administrators likely will wrestle with incidents involving student access, use, misuse, and abuse of the internet. If my prediction is accurate the following four modes of on-line use will garner the most attention: (1) student independent research to complete course required assignments, (2) “chatting” through e-mails and instant messaging, (3) personal postings (e.g., on MySpace, YouTube, facebook, and others), and (4) allegations of students “cyber bullying” other students.

To mitigate potential issues involving possible misuse and abuse of electronic technology in their schools, local boards of education here in Virginia and across the country have made it clear that student computer use will be continuously monitored. As one local school system director of technology here in Virginia recently stated, school principals and assistant principals will frequently observe student computer use from their offices using remote “spy ware” in an effort to crack down on misuse of school system technology. He also warned that swift disciplinary action will be taken when infractions are discovered. Richmond Times-Dispatch (August 31, 2008)

*Student Speech and Expression 2008-2009.* Over the past two decades of court decisions it has become evident that the United States Supreme Court’s Hazelwood v. Kuhlmeier(1988) standard of “reasonable pedagogical concerns,” when linked to its earlier decision in Bethel School District No.403 v. Fraser (1986), is applied by judges deciding student First Amendment expression (i.e., speech) cases. More specifically, over the past decade courts have consistently relied on Hazelwood and Fraser and, in doing so, have granted public school officials broad discretion in judging the appropriateness of student expressive acts. As the United States Supreme Court stated in Morse v. Frederick (2007), the “Bong Hits for Jesus” banner case, public school officials may restrict student speech they “reasonably view” to be in violation of school system policy, regardless of the location of the expressive act.

There is little doubt that Fraser, Hazelwood, and Morse (three *content-oriented* cases), when taken together, represent a major departure from the traditional lock-step reliance on the *action-oriented* “material and substantial disruption” standard set forty-years earlier in Tinker v. Des Moines (1969). To state it another way, school officials do not need to wait for disruption to occur before acting.

In the post Fraser, Hazelwood, Morse era, public school officials need not tolerate student speech that is inconsistent with the basic educational mission of the school system. More specifically, school officials are empowered to act quickly and decisively in situations where student expression (verbal, written, symbolic) is threatening, or vulgar, or obscene, or indecent. Vacca and Bosher (2008) This is especially true in situations where the student-initiated expressive act might be perceived by a reasonable observer to be school-sponsored or school-sanctioned. What is not clear, however, is whether or not the Supreme Court intended for the newly created judicial rationale to be applied to contemporary issues involving the expanding world of electronic communication—especially the internet.

The purpose of this commentary is to acquaint the reader with a recent case on point—one that I came across while doing research in the law library. In my opinion the court’s rational and analysis of the issues in Doninger v. Niehoff (2nd Cir. 2008), involving student internet use and subsequent school disciplinary action, will prove both instructive and valuable to public school officials as they work to develop school system policies.

### **Doninger v. Niehoff (2nd Cir. 2008)**

*Facts:* The mother of a Connecticut high school student filed suit in state court on behalf of her daughter. In her law suit she named the school superintendent and the high school principal and alleged that her daughter’s First Amendment and other federal and state rights had been violated when she was barred (disqualified) from running for senior class secretary. Her daughter was disqualified based upon a derogatory blog (independently operated, publicly accessible web log), which school officials characterized as a “vulgar and misleading message.” The blog dealt with the possible cancellation of an upcoming student planned school event called “Jamfest.”

The specific situation that triggered the disciplinary action began when school officials announced that “Jamfest,” would be cancelled. Distressed by the announcement, four council members including plaintiff’s daughter decided to take action by alerting the broader community to the situation. Subsequently, an e-mail was signed and sent out by the four students enlisting help and support in persuading school officials to let “Jamfest” take place, as planned, in the school auditorium. Subsequently, the superintendent and principal received an influx of telephone calls and e-mails.

Shortly thereafter the high school principal encountered plaintiff’s daughter in the school hallway. The principal expressed disappointment that council members did not first come to her with their issue instead of resorting to a mass e-mail. The principal also asked that another e-mail be sent out to correct “inaccuracies in the original e-mail.”

That night, plaintiff’s daughter posted another e-mail message on her publicly assessable blog-- hosted by *livejournal.com*, a web site not affiliated with the high school. In her blog she referred to central office administrators as “douchbags,” and she specifically referred to the superintendent’s reactions as: “she got pissed off and decided to cancel the whole thing all together.” Also, the blog contained a letter sent by her mom to the principal and superintendent and advised her blog readers “to get an idea of what to write if you want to write

something or call her to piss her [the superintendent] off more.” Subsequently several high school students posted comments to the blog including one that referred to the superintendent as a “dirty whore.”

When phone calls and e-mails continued to come to the superintendent and principal, school officials met and decided to reschedule the “Jamfest” event. The principal announced in a school newsletter and via e-mails that the matter had been resolved. It should be noted that “Jamfest” was eventually held (June 8, 2007).

The superintendent became aware of the student’s second e-mail (containing the derogatory name calling) sent on May 7, 2007, when her son found it while searching the internet. She alerted the school principal. After reading the e-mail the principal concluded that plaintiff’s daughter had “failed to display civility and good citizenship expected of class officers.” What is more, the principal characterized the blog posting as containing “vulgar language and inaccurate language.” Thus, when plaintiff’s daughter came to the office on May 17, 2008, to accept the nomination for senior class secretary, the principal requested that she, the student, (1) apologize, in writing, to the superintendent; (2) show a copy of the blog posting to her mother; and (3) withdraw her candidacy. She complied with numbers (1) and (2), but not (3). Subsequently, the principal refused to endorse her candidacy which in effect prohibited her from running for office. In addition, her name could not be placed on the official ballot and she could not give a campaign speech in the auditorium. It should be noted, however, that she went on to receive a plurality of votes as a write-in candidate but was not permitted to take office.

*Trial Court Action:* As noted above, the student’s mom filed suit in a Connecticut Superior Court asserting claims under both 42 U.S.C. 1983 and state law. In her lawsuit she alleged that the principal’s disciplinary actions abridged the First Amendment and analogous clauses of the Connecticut Constitution. More specifically she sought damages and injunctive relief claiming that her daughter’s Fourteenth Amendment rights to due process and equal protection had been violated resulting in emotional distress. The superintendent and principal successfully had the suit removed to the United States District Court of Connecticut where subsequently the mom was not successful in making her case. She failed to demonstrate a sufficient likelihood of success on the merits regarding both her First Amendment and equal protection claims. Mom appealed to the United States Court of Appeals for the Second Circuit where the District court was upheld.

*Second Circuit Opinion.* The Second Circuit utilized its own past decisions to construct a primary First Amendment issue analysis. In Wisniewski v. Board of Education (2nd Cir. 2007), the Second Circuit held that a student may be disciplined for expressive conduct, “even conduct occurring off school grounds, when the conduct would foreseeably create a risk of substantial disruption within the school environment, at least when it was similarly foreseeable that the off-campus expression might also reach campus.” The Court also cited Thomas v. Board of Education (2nd Cir. 1979) where a distinction is drawn between “student activity that ‘affects matters of legitimate concern to the school community,’ and activity that does not.”

To reach a final determination regarding the First Amendment issues raised the Second Circuit had several questions to answer. For example, it had to decide whether or not the disciplinary acts of school officials fell within the scope of the Supreme Court’s decision in Fraser (1986). Acknowledging that Fraser “does not justify restricting a student’s speech merely because it is inconsistent with an educator’s sensibilities...”, the Second Circuit had to be satisfied that the student’s postings on the blog, in which she called school administrators “douchbags, and used phrases such as “to piss her off more,” fell within Fraser’s scope. Also, the Second Circuit acknowledged that Fraser did not involve off-campus speech, and that the student speech in this case took place in her home. Therefore, said the Court, it is beyond the disciplinary reach of school authorities unless

it is reasonably foreseeable that the posting would create a risk of substantial disruption within the school environment—the standard enunciated in Tinker and Wisniewski....” Doninger (2nd Cir. 2008)

Based upon the facts presented, the Second Circuit concluded that: (1) it was reasonably foreseeable that her posting would reach school property, (2) her posting, although created off-campus, was designed to come onto campus, (3) her blog posting was directly related to high school events, (4) the intent of her posting was to encourage her fellow students to read and respond, and (5) her posting foreseeably created a risk of substantial disruption within the school environment. The Court also concluded that the language used in the blog “was not only plainly offensive, but also potentially disruptive of the efforts to resolve the ongoing controversy.” Doninger (2nd Cir. 2008) To the Court the derogatory words and phrases used in the blog “were hardly conducive to cooperative efforts to resolve the conflict.” In fact, said the Court, some of the name calling “was not only vulgar but potentially ‘incendiary.’” Doninger (2nd Cir. 2007)

The Second Circuit next interpreted and applied Tinker (1969). In the Court’s view, the Supreme Court in Tinker (1969) did not intend that school officials wait for actual disruption to occur before acting. Rather, the Supreme Court in Tinker (1969) required that school officials be able to reasonably forecast (*i.e.*, reasonably portend) disruption from the student expression as their basis for taking disciplinary action

Finally, the Court emphasized the need to differentiate between student discipline in extra curricular settings and curricular settings, Lowery v. Euveard (6th Cir. 2007), and the importance of applying the “reasonable pedagogical concern” standard set in Hazelwood (1988). In the case now before us, said the Court, the student’s behavior “undermined the values that student government, as an extra curricular activity, is designed to promote.” School policy provided that student government “should teach good citizenship and that any student who does not maintain a record of such citizenship may not represent fellow students.” Doninger (2nd Cir. 2008)

The Second Circuit closed with the following quotation from the Supreme Court’s benchmark decision in Wood v. Strickland (1975): “[t]he system of public education in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members....” As such, said the Second Circuit, “...we are not authorized to intervene absent ‘violations of specific constitutional guarantees.’” Doninger (2nd Cir. 2008)

### **Policy Implications.**

Because case law involving the First Amendment, student discipline, and electronic communication issues is sparse, it is too early to predict with certainty what a court will or will not say and decide in a future case. Moreover, I recognize that one court decision does not settle all potential issues presented in such a complex area of constitutional law. However, in my opinion the Second Circuit’s issue analysis in Doninger v. Niehoff (2nd Cir. 2008) presents public school policy-makers with important food for thought.

Especially important in Doninger is the appellate court’s reliance on Fraser (1986), Hazelwood (1988), and Morse (2007) and its reinterpretation of the age worn Tinker “material and substantial disruption” standard in which the emphasis is placed on *foreseeability* (*i.e.*, *reasonable forecast*) and not solely on actual disruption. In my opinion this fresh look at Tinker gives judges a viable standard to apply when dealing with First Amendment issues arising from student internet use—including situations where a student privately, on his/or her own computer, gains access to and uses the internet off school property, and the resulting communication holds the potential to provoke harm in the school.

When reviewing existing policies and drafting new policies addressing student speech and expression using electronic communication, local school boards must make it clear that:

- While the Board respects student First Amendment rights and protections, student speech and expression that is threatening, or vulgar, or profane, or obscene, or plainly offensive, or advocates illegal and/or other harmful activities, or in any way presents a risk of provoking disruption in school or at school sponsored and/or sanctioned activities will not be tolerated.
- School administrators are empowered to act quickly and decisively in situations where student expression (speech), in the opinion of the administrator, meets one or more of the criteria listed in the item above and presents a reasonably foreseeable risk of creating substantial disruption on campus.
- School owned computers and other electronic communication devices are to be used as intended by school system policy and under the direction of school principals and instructional staff.
- Students will be subject to immediate disciplinary action in situations where school system policies and school rules governing the use of electronic communication are violated.

Finally, it would be wise to remember what the United States Supreme Court said more than two decades ago when it offered the following thought: “The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct....” Bethel School District No. 403 v. Fraser (1986)

### **Resources Cited**

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986)

Crutchfield, Lisa, “Schools tighten restrictions on computer use,” Richmond Times-Dispatch, at B4

Doninger v. Niehoff, 527 F.3d 41 (2nd Cir. 2008)

Hazelwood v. Kuhlmeier, 484 U.S. 260 (1988)

Lowery v. Euveard, 497 F.3d 84 (6th Cir. 2007)

Morse v. Frederick, 127 S.Ct. 2618 (2007)

Thomas v. Board of Education, 607 F.2d 1043 (2nd Cir. 1979)

Tinker v. Des Moines, 393 U.S. 503 (1969)

Vacca, Richard S., and Bosher, William C., Jr., LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS, Seventh Edition (LexisNexis 2008)

Wisniewski v. Board of Education, 494 F.3d 34 (2nd Cir. 2007), *cert. denied*, 128 S.Ct. 1741 (2008)

Wood v. Strickland, 420 U.S. 308 (1975)

Richard S. Vacca  
Senior Fellow CEPI

**Note:** The views expressed in this commentary are those of the author.