

Case • Alert

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SECOND CIRCUIT COURT OF APPEALS AFFIRMS DENIAL OF STUDENT'S REQUEST FOR INJUNCTIVE RELIEF, FINDING THAT THE STUDENT WAS PROPERLY DISQUALIFIED FROM SERVING AS CLASS SECRETARY BASED ON NATURE AND CONTENT OF THE STUDENT'S OFF-CAMPUS INTERNET POSTING

In its second ruling in two years on student discipline and the Internet, the United States Court of Appeals for the Second Circuit ("Second Circuit") again affirmed a school district's decision to discipline a student based on the student's off-campus posting on the Internet. Although the Second Circuit found in favor of the school district in both cases, these rulings do not provide school districts with the ability to discipline students for all off-campus use of the Internet. Rather, the rulings only permit a school to discipline a student when it is reasonably foreseeable that the student's off-campus Internet postings will come to the attention of school administrators and that the postings will create a risk of substantial disruption to the work and discipline of the school. The facts presented in both cases, which involved threats to a teacher's life and an invitation for others to call the superintendent to "piss her off more," allowed the Court to find that the foreseeable risk standard had been satisfied.

In the current case, *Doninger v. Niehoff*, Docket No. 07-3885 (2d Cir., May 29, 2008), the student was a member of the Student Council at Lewis Mills High School and was involved in the planning of Jamfest, a battle-of-the-bands contest at the high school. A dispute arose between the administration and the student, concerning, among other matters, the scheduling of Jamfest. After a meeting with the Principal to discuss an email concerning Jamfest that the student and three others had previously disseminated, the student returned to her home and posted a message about Jamfest on an independently operated, publicly accessible Internet blog. In the message, the student referred to the superintendent with a vulgar term and encouraged others to write and call the superintendent in order to "piss her off more." The student also stated inaccurately that the event had been cancelled by the administrators. After obtaining a copy of the message, the Principal refused to give the student administrative endorsement for her candidacy for Senior Class Secretary, thereby preventing her from appearing on the ballot. The Principal then disqualified the student from serving as Senior Class Secretary after she won the election as a write-in candidate.



The student subsequently filed a complaint in court against the Superintendent and the Principal, alleging that they had violated her First Amendment right to freedom of speech and expression. In an effort to reclaim the Secretary position before the completion of her senior year of high school, the student also filed a motion for a preliminary injunction. In that motion, the student requested that the district court order the school to hold a new class election in which she was allowed to run, and that she be permitted to speak at the 2008 commencement ceremony as a duly elected class officer. Because she was seeking a mandatory, affirmative injunction, the student had to demonstrate a clear or substantial likelihood of success on the merits of her First Amendment claim. After holding a hearing in which ten witnesses testified, the district court denied the student's motion for a preliminary injunction. The student appealed.

The Second Circuit began its opinion in *Doninger* by noting that, although students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” the United States Supreme Court had held that school administrators may “prohibit student expression that will materially and substantially disrupt the work and discipline of the school.” The Supreme Court has yet to address, however, the scope of a school's authority to regulate expression that does not occur on school grounds or at a school-sponsored event. Addressing that issue, the Second Circuit held that, when the Internet message in question is created and posted off-campus, discipline is permissible when it is “reasonably foreseeable” that (1) the posting will come to the attention of school authorities and (2) that it will create a risk of substantial disruption.¹

Because the student's posting was purposefully designed to encourage people to contact the superintendent and “piss her off more” about the scheduling of Jamfest, the Second Circuit had little difficulty finding that the first criterion was established. The Second Circuit then set forth three reasons why the second criterion was also established. First, the language and tenor of the student's posting were potentially disruptive of the efforts to resolve the controversy over the scheduling of Jamfest. Second, it was reasonably foreseeable that the Principal and Superintendent would have to spend time responding to and managing calls based on the student's “at best misleading and at worst false” language concerning the cancellation of Jamfest, thereby further disrupting the work and discipline of the school. Third, the posting also violated the school's policy of civility and cooperative conflict resolution, as well as the school's expectation of behavior from class leaders. The Second Circuit placed great emphasis on the fact that the student was merely prevented from participating in an extracurricular activity; noting that extracurricular activities are a “privilege” that can be rescinded when students fail to comply with the obligations inherent in the activities themselves. For those reasons, the Second Circuit affirmed the district court's denial of the requested injunctive relief.

As students continue to use the Internet as their primary means of communication outside of school, administrators will increasingly be called upon to determine whether a student should be disciplined in school for Internet messages and content created and posted off-campus. *Doninger* does not conclusively determine what off-campus Internet postings permit

¹ In its previous ruling on student discipline and the internet, the Second Circuit held that a school properly disciplined an eight grade student after that student sent a drawing that depicted and called for the killing of his teacher to other individuals over the Internet. See *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 30 (2d Cir. 2007). The Court in *Wisniewski* concluded that it was reasonably foreseeable that the drawing would come to the attention of the school and that it would create a risk of substantial disruption.

discipline and what postings do not permit discipline. *Doninger* does, however, provide that discipline is permissible for Internet postings that are reasonably foreseeable to come to the attention of school administrators and create a risk of material and substantial disruption to the work and discipline of the school.

In addition to the Constitutional considerations set forth in *Doninger*, administrators considering discipline for a student's off-campus conduct must also ensure compliance with Connecticut law. See *Packer v. Bd. of Educ. of the Town of Thomaston*, 246 Conn. 89, 109 (1998); Conn. Gen. Stat. § 10-233d(a)(1). Under Connecticut law, a student maybe disciplined for off-campus conduct that markedly interrupts or severely impedes the operation of a school, as such conduct is seriously disruptive of the educational process.

QUESTIONS OR ASSISTANCE?

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