

MEMORANDUM

TO: Principal Ida B. Parks, Bayard Rustin High School
FROM: Patrick Collins
DATE: November 28, 2019
RE: *In re Brown*

You asked me to draft an objective memorandum for the Fulton County School district for the case regarding Rihanna Brown. Ms. Brown is a student of Bayard Rustin High School (BRHS), and the manager of a Fakebook page that has caused conflict at the school. BRHS principal Ida B. Parks wants the student suspended. She asked us to consider the legal and constitutional concerns of her actions, and to evaluate the prudence of these options. In order to evaluate the legal ramifications of Ms. Parks' actions, there needs to be an evaluation of the speech created and to whether or not it was on-campus speech. To determine if the speech is protected, then there needs to be an analysis of the speech under the test set out by *Tinker v. Des Moines*, to determine if the speech is protected *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). Finally, there needs to be a determination into whether the school has qualified immunity under the precedent laid out in *Doninger v. Niehoff* *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008). The analysis of these questions follow below.

STATEMENT OF FACTS

This case involves three people: Ms. Rihanna Brown, a rising senior at Bayard Rustin High School (BRHS); Mr. Kyle Brand, a math teacher at BRHS; and Ms. Ida Bethune Parks, the principal of BRHS.

In the Summer of 2018, Ms. Brown, then 15-years-old and a rising junior at BRHS, invited Mr. Brand to her tennis matches. Mr. Brown had shown an interest in the school's tennis team. According to Ms. Brown's deposition, "one thing led to another," and the two started a consensual sexual relationship [*Brown Dep. pg. 2, line 12*]. The relationship continued into the school year and at a certain point Mr. Brand approached Ms. Brown and told her that she had to keep their relationship secret. Ms. Brown honored this request.

On October 31, 2019, Mr. Brand ended his relationship with Ms. Brown, calling her a "clingy, emotional mess" [*Brown Dep. pg. 3, line 12*]. Later that day, Ms. Brown keyed Mr. Brand's car and wrote a message on his windshield in red lipstick.

At around 11:00pm, Ms. Brown created a Fakebook page called "The BRHS Tattler." The goal of the page, per Ms. Brown, was to expose Mr. Brand for who he really is. To create the page, she used her personal at-home Mac.

The Fakebook page was then promoted using the school's listserv. A listserv is a school resource that is a collection of students' emails for distribution. Ms. Brown had access to the listserv as a member of the BRHS Young Democrats Club. Ms. Brown then sent a link to the Fakebook page to the students on the listserv.

The morning following the creation of the page, Ms. Brown received a number of friend requests and the students started a conversation on their own alleged relationships with Mr. Brand.

The Fakebook page contained an initial post that asked "How many other students have slept with this man? Is he your teacher with benefits (TWB)?" [*Record, pg. 12*] Comments were left by multiple sources, alleging past relationships with Mr. Brand in past years. One comment alleged a relationship

with Mr. Brand in 2014, saying "...He came to my basketball practices and then I ended up on his California King. TWB 2014!" [*Record*, pg. 12]

Over the course of November, there was an uptick in school fights. Ms. Parks, the principal in the school, testified that there were five fights in the past five years, but saw ten fights in November 2018 alone. In late November, while Mr. Brand was walking down the hall, a group of girls giggled as he walked by, while others shook their heads. A group of boys applauded, patted him on the back, and pounded his fist.

On February 15, 2019, Ms. Parks checked the listserv, an activity that she admitted to only doing intermittently. It was the first time she had checked it since the creation of Ms. Brown's Fakebook page and its promotion on the listserv. As she checked the listserv, she saw the email that Ms. Brown had sent the students and followed the link to the Fakebook page. Mr. Brand then came into her office, his face bloodied. He claimed to have been hit by Chris Turner, a student of the school who had a current relationship with Ms. Brown. Mr. Turner accused Mr. Brand of sleeping with his girlfriend, and then struck Mr. Brand in his face, causing a bloody nose. Ms. Parks then showed Mr. Brand the Fakebook page, and he calls the accusations "preposterous" and "scurrilous attacks on [his] character." [*Parks Dep.* pg. 4, lines 1-2]

Four days later, on February 19, Ms. Parks called Ms. Brown into her office. Ms. Parks requested that Ms. Brown remove the page. Ms. Brown refused the request, saying that "[her] public has a right to know the truth." Ms. Brown countered, offering to make the page private. Ms. Parks called this concession "minor" and "insignificant since the damage had already been done" [*Parks Dep.* pg. 4, line 23].

After the meeting on February 15, Mr. Brand was placed on suspension with pay pending an investigation. In June, Mr. Brand reached out to Ms. Parks, asking

when he could return to work. He talked about his imminent divorce and said that the claims by Ms. Brown had ruined his life [*Parks Dep. pg. 4, lines 12-15*].

The Fakebook page is still active, and, in light of #MeToo, is more active than ever, with both current students and alumni posting to it [*Brown Dep. pg. 5, lines 1-2*].

Ms. Parks claims that the page broke the community, and that it tore the school in two. She views the page as an ongoing disruption at school, creating concerns for school safety and school reputation. Ms. Parks stated that “all of these distractions make it difficult to get about the business of learning.”

QUESTIONS PRESENTED

- I. Under the First Amendment of the United States and Georgia Constitutions, was the creation of the Fakebook page, which Ms. Brown created at home on her personal computer, and its subsequent promotion via the listserv the creation of on-campus speech?
- II. Under the First Amendment of the United States and Georgia Constitutions, is Ms. Brown’s Fakebook page subject to school control after distributing the link via the listserv, which increased school fights, caused the alleged assault of Mr. Brand by Chris Turner, and the gender segregation of students?
- III. Under the qualified immunity doctrine, can Principal Parks be released from liability from civil action for regulating Ms. Brown’s speech, if it contributed to material disruptions at school?

SHORT ANSWERS

- I. Probably yes. Courts have held that speech created using school resources, even when created off-campus, can be considered on-campus speech. Further, schools can exert control over speech that the public reasonably could perceive to bear the imprimatur of the school (*Hazelwood*). In addition, speech created off-campus can be considered to be moved on-campus if it is reasonable to expect to elicit a response from other students *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008). While Ms. Brown created the Fakebook page off-campus using her personal computer, she promoted the page using the listserv, which is a school-managed, on-campus resource. Further, the title of the page, “The BRHS Tattler,” contains the initials of the high school Ms. Brown attends, and thus can be reasonably perceived to bear the imprimatur of the school. As a result of Ms. Brown’s use of the listserv and the page bearing the school’s initials, coupled with the fact that the initial post asked a question that could reasonably foresee a response from students, it is likely that Ms. Brown’s page is on-campus speech.

- II. Probably yes. In order for the school to be able to regulate speech, we turn to *Tinker v. Des Moines*. In *Tinker*, the court gives us two factors in deciding how to regulate school speech: whether the speech created a material disruption or whether the speech impinged on the rights of other students. Further, schools are allowed to regulate speech that is lewd, vulgar, or offensive *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). Ms. Brown’s speech caused an increase in fights, the alleged attack of Kyle Brand by Chris Turner, and the gender segregation of students. All of these can be considered substantial disruptions. Further, these disruptions may cause an inability for students to learn, impinging on those students’ rights to an education. The content of the page, describing intimate relations between a teacher and students, is likely to be considered that the speech is lewd and vulgar. It is likely to result that Ms. Brown’s speech created material disruptions and impinged on the rights of other students, and thus can be regulated by the school.

III. Probably yes. In determining qualified immunity, we look at the two-part test laid out in *Doninger*. In *Doninger*, the court says that in determining the immunity, we evaluate whether or not the official's conduct violated a student's clear constitutional rights. We evaluate it in the light most favorable to the student plaintiff. If we establish the first qualifier, we then move to the official's conduct, and whether it was reasonable for the official to believe that his conduct did not violate those rights. It is likely to be found that principal's actions were not in counter to Ms. Brown's constitutional rights, since the speech is likely to be a material disruption that impinges on the rights of other students. Principal Parks' request that the page be taken down, then, cannot be reasonably believed to be an act to violate Ms. Brown's rights, but instead an action taken to prevent further disruption at school. It is likely that Principal Parks is afforded qualified immunity under the doctrine.

DISCUSSION

I. On-Campus or Off-Campus Speech

Schools can regulate speech if the speech is determined to be on-campus. On campus speech is created if the student either creates or promotes the speech on campus, or if the speech is promoted or created using school resources. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). These rules also apply to off-campus, school-sponsored activities *Morse v. Frederick*, No. 06-278 (2007). Schools can further exercise editorial control over school-sponsored publications, since the public may reasonably perceive the publication to be sponsored by the school. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). Schools can also police off-campus speech that creates a foreseeable risk of harm to come on-campus. *Wisniewski v. Weedsport Cent*, 494 F.3d 34 (2d Cir. 2007). Courts have also held that off-campus speech can be considered on-campus if it elicits a response from other students *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008).

Digital speech is evaluated using similar rules. Speech that is created online but is off campus and without school resources cannot be subject to school control *Emmett v. Kent School Dist. No. 415, 92 F. Supp. 2d 1088 (W.D. Wash. 2000)*. However, if the speech creates a foreseeable risk of harm to on-campus figures, like school administrators or teachers, the school is allowed to regulate the speech *Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015)*.

In the present case, the speech was moved on-campus by Ms. Brown. While the speech was created off-campus using her personal computer, Ms. Brown brought the speech on campus by using the listserv and by naming the page using the initials of the school. Further, the speech created a foreseeable risk that the speech would move on campus because it elicited a response from other students.

First, the speech was brought on-campus by Ms. Brown's use of the listserv, which bears the imprimatur of the school. In *Hazelwood School District v. Kuhlmeier* a student newspaper was going to publish some articles in the newspaper, and the school intervened. The court held that school was allowed to intervene since the newspaper bared the imprimatur of the school *Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)*. In the present case, the page was promoted via a school resource, and thus a reasonable person could perceive the speech to bear the imprimatur of the school. Further, the page was titled "The BRHS Tattler," with the initials representing Bayard Rustin High School. Even though the speech was created at home with a personal computer, the page contained the school's imprimatur in the form of its initials and its promotion on the listserv.

Ms. Brown will argue that the speech did not bear the imprimatur of the school, since a reasonable person will look at the totality of the circumstances and not conclude school-endorsed speech. First, the page itself is held off-campus on an unaffiliated social media site. This differs from the speech in

Kuhlmeier, which was an on-campus student newspaper. Second, the email sent using the listserv was only a link, and never hinted at it being endorsed content from the school, like a school newspaper would. Finally, the content of the site certainly doesn't sound like anything that a school would endorse, nor does "The BRHS Tattler" sound like anything official from the school. Thus, the speech does not bear the imprimatur of the school.

The likely outcome on this point is that the court will find that the speech did bear the imprimatur of the school, based on Ms. Brown's use of the school resource to promote the speech created by her page. On the argument about the initials of the school being used, it is difficult to determine the likely outcome, since the argument is so weak. Courts would likely find that point too weak to enforce.

Second, the speech was brought on-campus because the speech elicited a response that was likely to move into the school. In *Doninger*, the student posted an off-campus blog that was a call to action to contact school officials by phone and email to achieve her goals. The *Doninger* court held that this call to action, despite being created off campus, was foreseeable to come on campus and thus could be controlled by the court *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008). In the present case, Ms. Brown's initial post on her Facebook page asked a question, which is eliciting a response from other students. It was reasonably foreseeable that the speech would be moved on-campus, where students would continue to talk about the allegations contained on the page. Further, the allegations contained in the speech created a foreseeable risk of harm for Mr. Brand, making it on-campus speech. Compare this point to *Bell*, where a rap song was determined to have been a risk for the teachers accused of the misconduct alleged in the song, since the song continues to issue a threat *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015). Ms. Brown's speech did not illicitly threaten Mr. Brand, but the allegations contained on the page would certainly pose a security threat for Mr. Brand, since students may want to take justice to their

own hands. This foreseeable risk makes Ms. Brown's Fakebook page on-campus speech.

Ms. Brown will argue that as a general proposition, the Fakebook page post was not eliciting a response that would be reasonably foreseeable to come onto campus. She will concede the point that it was created to elicit a response, since a question posed on social media will almost certainly elicit a response. However, she will argue that she was not in control, nor was it her intention, to bring the speech on campus. Unlike in *Doninger*, there was no call to action to bring the school into the speech at all. She just wanted to discuss Mr. Brand's alleged relationships with students online and leave the speech on her Fakebook page. Further, she would argue that her speech was far from threatening, and thus any argument that the speech created a foreseeable risk of harm to Mr. Brand was incorrect. Thus, there was not a foreseeable risk that the speech would move on campus.

On this point, a court is likely to take a practical approach to this problem. While Ms. Brown's point about the differences between her and *Doninger* is true, as a practical matter, teenagers in high school gossip and share what they see on social media. As a result, even if Ms. Brown didn't foresee the risk, one almost certainly existed.

The court is likely to find that Ms. Brown's speech was moved on-campus. First, using *Kuhlmeier*, a court is likely to find that the promotion of the speech using the listserv was an act that moved the speech on-campus. Further, the speech elicited a response that had a foreseeable risk of coming on-campus, similar to the decision in *Doninger*.

II. ***Tinker* Analysis**

When evaluating on-campus speech, we turn to the test laid out in *Tinker v. Des Moines*. Speech is protected under *Tinker* if it is pure speech that does not cause a substantial disruption or impinge on the rights of other

students *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). Pure speech, as defined by the *Tinker* court, is “silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners” *Id.* To prove material disruption, the school has to show that the speech would cause a material disruption that would interfere with the operation of the school. Schools cannot point to a potential disruption to meet this part of the test, and, thus, cannot prevent student expression based on a potential disturbance that hasn’t materialized yet *Id.*

Schools are allowed to regulate speech that impinges on the rights of other students *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). They are also allowed to protect students from speech that is rude, vulgar, or offensive *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). Schools have the authority to dictate what speech is inappropriate in the classroom *Id.* In addition, schools have the authority to police speech that violates the policies of the school or school district *Morse v. Frederick*, No. 06-278 (2007). Further, schools are permitted to police speech that undermines the mission of the school *Id.*

The speech created by Ms. Brown is likely to be found to have created a material disruption and impinged on the rights of other students.

First, on the matter of substantial disruption. In order to prove this, the school can point to three specific incidents that have substantially disrupted the school’s ability to educate. First, as discussed above, *Bell* discusses foreseeable harm to teachers accused of misconduct. As a result, the school was allowed to discipline the student and patrol the speech. In the present case, the allegations contained within the page created a substantial risk to Mr. Brand, which materialized after the alleged attack by Mr. Turner. That alleged attack was a material disruption to the school’s ability to teach. Next, we look to disruption, and a foreseeability that the speech comes on campus. The increase of fights was a direct result of Ms. Brown’s speech, and thus

created another substantial disruption to the school day. Finally, the gender segregation in the school has created a substantial disruption. Ms. Parks, in her deposition, points to Ms. Brown's speech as "tearing [the school] in two" [*Parks Dep. pg. 4, line 22*]. Certainly, a school that is torn in two is unable to go about its normal business of educating students, and thus a substantial disruption occurred. These are all real and material disruptions, which Ms. Parks said "makes it difficult to go about the business of learning" [*Parks Dep. pg. 5, line 5*].

Second, on the matter of impinging on the rights of other students. The school can argue that Ms. Brown's speech both violated the student's rights to be protected from lewd speech as well as violated their rights to an education. On the first point, as discussed in *Bethel School Dist. No. 403 v. Fraser*, the speech given by the student was not protected because the school has the authority both to protect the students from lewd speech since it was a violation of school policy *Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986)*. In the present case, Ms. Brown distributed the Facebook page's link through the listserv, which makes it subject to the school's student-parent handbook. In part, the student parent handbook states that "the word 'computer' refers to... student owned hardware... containing school district programs or school district data or student data" [*Record pg. 13*]. Ms. Brown's personal computer with access to the listserv fits this definition. The handbook continues by saying "students may not create, copy, receive, or use data, language, or graphics that are obscene, threatening, abusive or otherwise inappropriate... on sign out equipment at home" [*Record pg.13*]. Since the speech Ms. Brown distributed via the listserv brought it within the purview of the school, the school was allowed to police it since it was lewd and vulgar in content. Further, the school can argue that all these disruptions caused by Ms. Brown's speech are impinging on the other students' ability to learn. The increase in fights and gender segregation would make it incredibly difficult to learn, and Ms. Parks testified the school has struggled to maintain

its ability to educate students. For these two reasons, the school can claim Ms. Brown's speech impinged on the rights of other students.

Ms. Brown is likely to argue that her speech is not what caused the material disruption, but instead that the nexus lies with Mr. Brand's actions. She's going to say that the students are allegedly fighting or segregating over her speech, they're doing these things because they feel certain ways about the actions of Mr. Brand. Further, Mr. Turner confirms that his actions weren't fueled by Ms. Brown's speech, but instead by the relationship Mr. Brand had with Ms. Brown [*Brown Dep. pg. 4, line 21*]. All these aren't material disruptions due to her speech, but my Mr. Brand's actions. Further, she may argue that the link was the only speech distributed by the listserv, and so there was no lewd or vulgar language that the school could regulate under the *Bethel* standard. As a result, the educational rights of the students were not violated by her speech, and there was no lewd speech present on school resources that could be regulated under the rules in *Bethel*.

A court is likely to find that the speech by Ms. Brown did, as a matter of law, cause the substantial disruption. The argument being that all of these events transpired as a result of Ms. Brown's speech, and had that speech not occurred, these disruptions would not have occurred. At a very minimum, the disruption between Mr. Brand and Mr. Turner would not have occurred when it did. The court is further likely to find that the lewd speech was represented by the link, since any student who clicked on it would be subject to its content. As a result, the students right to be protected from lewd speech at school was violated. Further, the argument that the educational rights of students were violated, since Ms. Parks testified that the school has struggled to go about the business of learning since this entire incident started.

III. Qualified Immunity

When resolving the issue about the school's qualified immunity, the court must make the determination as to whether the school's actions violated the constitutional rights granted to students, and if those rights were being properly exercised at the time the school's actions were taken. When determining the violation of a student's constitutional rights, the court looks at the facts in the light most favorable to the plaintiff student *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008). In contrast, if the actions taken by the school did not violate the rights of a student and if the school official reasonably believed they were not violation such a right, then the school is protected by qualified immunity *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008).

For example, in *Doninger v. Niehoff*, the student was planning a battle-of-the-bands concert, which was to be held in the school auditorium. From her home computer, student Doninger posted on an unaffiliated school blog, calling the school administrators profane names. She also encourages her fellow students to contact the school officials about the cancellation. The school later disallowed Doninger from running for elected class office. The school district, a government agency, claimed qualified immunity. The court granted this, saying that the school preventing her from running for office was not a violation of her constitutional rights, and that her speech, even if created off campus, was likely to produce on-campus, material disruptions.

In the present case, the school will argue they have qualified immunity under the *Doninger* precedent. Like in *Doninger*, the speech was started off-campus on an unaffiliated online entity but elicited a response that brought it on campus. Further, the speech online specifically named Mr. Brand, and so there was likely to be on-campus, material disruptions. In an effort to protect the students and to restore order, the school can claim immunity from civil actions brought on the basis of infringing on Ms. Brown's rights, since her on-campus speech is not protected under *Tinker*.

Ms. Brown will argue the school is not immune, since their standing under *Tinker* has no merit for the reasons stated above. She will claim her speech is protected, and thus any actions taken by the school to police her speech will be a violation of her first amendment rights.

A court is likely to find that the school will be granted immunity, since the speech was brought on campus under when she used the listserv. Further, the on-campus speech is not protected under *Tinker*. As a result, the school can claim immunity.

CONCLUSION

The court is most likely to rule that the speech was brought on-campus when Ms. Brown used the listserv to distribute her speech, which presented the speech with the imprimatur of the school. This point is furthered because the speech elicited a response from students by asking a question, which was reasonably foreseeable to start a conversation on campus. The court is also likely to find that the speech is not protected under both prongs of *Tinker*. Increased fights, Mr. Brand being allegedly attacked, and gender segregation at the school were all material disruptions caused by Ms. Brown's speech. Further, these disruptions impinged on the rights of other students to learn, and the nature of the speech was vulgar, which violated the other students' rights to be protected from this kind of speech. Finally, as a result of the on-campus speech not being protected under *Tinker*, the school is allowed to claim qualified immunity under the standard set forth in *Doninger*.

However, even though the school can police the speech, it doesn't mean that they should. If Ms. Parks is concerned about keeping the press out of this story, which she testified that "[the school] won't be able to keep the press out of this for much longer" [*Parks Dep. pg. 5, line 4*], there are public relations concerns that need to be addressed. Every action taken by the school should be under the premise that the press will find out. With that in mind, the

school does not want to be in the position of being in the middle of punishing a student who came forward about having an inappropriate sexual relationship with a teacher. That would make it seem like the school is covering for an alleged sexual predator, only exacerbating the situation at the school. Instead, the school should do a thorough investigation of the allegations, and, if true, should fire Mr. Brand. Further, they should leave Ms. Brown and any other potential victims to discuss their experiences, no matter the lewd or vulgar nature of the allegations. They should also adopt and exercise stricter control of the listserv, to prevent future distribution of unauthorized materials. This ensures that the school can prevent improper distribution of materials without looking like they are attacking the student victims of Mr. Brand's actions.

In conclusion, even though the school has the legal authority to exercise control over Ms. Brown's speech, they should not take this approach. Instead, they should work with potential victims so they can share their experience in a more responsible way that is friendlier to the school's objective. Meanwhile, the school needs to do their due diligence and investigate the allegations into Mr. Brand thoroughly and take appropriate action once that investigation is completed. Finally, they should establish new policies and procedures for both listserv access and monitoring, to ensure no more improper materials are distributed through those channels.