

**2003-2004 ALVINA RECKMAN MYERS
FIRST-YEAR MOOT COURT COMPETITION**

Official 2003-2004 Competition Problem

James Wright, Principal, Faber High School v. Rob Rogers

This problem shall form the basis of all written pleadings and oral arguments for the 2003-2004 Alvina Reckman Myers First-Year Moot Court Competition. The facts described in the problem are fictional. Any resemblance to persons living or dead is purely coincidental.

**IN THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MONT**

Rob Rogers,
Petitioner

v.

1126-01

James Wright, Principal, Faber High School and Faber School District
Respondent

Heard before Everett, J.

Everett, J., for the Court:

OPINION

The petitioner, Rob Rogers, is a student at Faber High School who was suspended for five (5) days for his part in creating and maintaining an Internet web site that contained threatening references to James Wright, the principal of Faber High School. By and through this petition, Rogers challenges his suspension from Faber as a violation of his First Amendment rights to freedom of speech and expression. Petitioner's challenge is two-fold. First, the web site postings that constituted his "speech" were created at his personal residence, off school grounds, and therefore should receive broad First Amendment protection and should not be subject to school regulation. Second, Petitioner argues that even if the speech is subject to school regulation, the punishment meted out to Petitioner constituted punishment for offending the Principal's personal

values and beliefs, and was otherwise unrelated to any legitimate school interests or concerns.

This Court disagrees with Petitioner on both claims. The speech was sponsored by Faber High School, and as such was subject to the school's regulation and reasonable attempts to maintain order and discipline within the school. The Court hereby declares that the suspension represents a constitutional restriction on potentially dangerous and disruptive speech, and orders Petitioner to begin serving his suspension, subject to appeal to the Court of Appeals for the Moot Circuit.

I. FACTUAL AND PROCEDURAL HISTORY

Petitioner, Rob Rogers, is an eighteen-year old student in his senior year at Faber High School. At the end of his junior year, Rogers' classmates overwhelmingly elected him, in a landslide vote, to serve as the senior class president, a post typically reserved for popular and influential individuals within the school community.

Following his election as class president, Rogers paid a courtesy visit to the Faber High School principal, James Wright, to discuss activities and issues that Rogers hoped to address during his tenure as class president. In court documents, Wright has indicated that following this meeting he was impressed by Rogers' assertive and proactive attitude, including Rogers' widely recognized and orderly efforts to organize rallies with political agendas. Wright also was pleased to engage in positive interaction with a popular student leader, as rumors had been circulating that Wright's job was at stake due to the lack of school and community spirit. Among the issues Wright and Rogers discussed was school

morale. Both agreed morale was low. In discussing potential methods of improving morale, the following colloquy took place (as stipulated to by both parties):

Wright: What about this “Internet” stuff? Is there any way we can use that to help increase school spirit?

Rogers: I don’t know. That’s a good idea. I’ll ask around and find out what student reaction to a web site would be, and I’ll see what it would take to set one up. I’ll get back to you as soon as I gather some information and I’ll let you know what I find.

Rogers failed to discuss the idea of developing a web site to increase student morale with Wright before the summer break, and Wright soon forgot about the idea altogether.

After the summer and in the weeks leading up to the homecoming football game, Rogers attempted to increase Faber’s school spirit. In addition to more traditional means of improving school spirit, Rogers took time out of his personal schedule at home to create a web site that he hoped would boost Faber’s image among his fellow students. Rogers was able to set up the web site without paying for a domain name, as his personal dial-up Internet Service Provider (ISP) provided him with several free domain names as a perk to attract customers. The web site was located at www.FaberHighSchool.com (“web page” or “web site”); the content of the site itself neither represented nor disclaimed official sponsorship by Faber High School. Rogers told his friends and classmates about the site in an effort to gauge their reaction and determine whether it would achieve Rogers’ aspirations. Following a positive response to the web site by Faber students, Rogers decided to maintain the web site following the football game and use it to post current events that would be of interest to members of the Faber High School community. Rogers presented his ideas to Principal Wright, who encouraged Rogers and offered to provide any reasonable assistance with the site if Rogers needed it.

Two weeks after the homecoming football game, Rogers and several other students in leadership positions accompanied students in Faber's alternative education program¹ on a field trip. The field trip consisted of a tour of the local maximum-security prison and was designed to scare at-risk youths by showing them the dire consequences of pursuing criminal careers and habits. One portion of the tour, intended to provide the students with a perspective of what prison life is really like, required the students to undergo a full body cavity strip search. When the students, including Rogers, complained to prison officials that the strip searches were humiliating, demeaning, and unnecessary, the prison warden responded by telling them that Principal Wright wanted the students to get an up-close view of prison life and had specifically authorized the strip searches.

Outraged by this intrusive violation, Rogers wrote about the prison strip search in an editorial on the FaberHighSchool.com web site. In the editorial, Rogers used explicit but anatomically accurate language to describe the searches, and then went on to harshly criticize Principal Wright for authorizing the searches. The text of the web site and Rogers' editorial is contained in Appendix I.

Upon checking the FaberHighSchool.com web page to view Rogers' progress in creating the online journal for Faber students, Principal Wright was shocked to find Rogers' critical and crude editorial. The next school day, Wright suspended Rogers for five (5) days for threatening and harassing a faculty member, in violation of the school

¹ The alternative education program at Faber High School is reserved for students with serious disciplinary and motivational problems. Principal Wright decided to send the student leaders along with the alternative students in an effort to inspire the alternative students.

code.² Viewing the situation as an educator, Wright has stated that he treated the issue as a matter falling under school disciplinary measures and declined to contact police/law enforcement authorities. Wright also has submitted affidavits claiming he has been extremely upset, scared, and has had trouble sleeping because of the web site. He also certified that he has not taken any time off from work, as he “refuses to give in and submit to these rogue-like and sophomoric intimidation tactics.”

Media reports about the strip searches filled television and news reports and caused an uproar in the community, prompting discussion both in and out of school. The in-class discussions occurred mainly in civics classes that often addressed current events implicating constitutional issues; teachers in several other non-civics classes also reported discussing these issues in response to student questions. The debates discussed the propriety of Wright’s decision, and also focused a substantial degree of attention on Rogers’ editorial. Several students were quoted in news reports as saying they were “inspired” by Rogers’ and were looking forward to “seeking swift and unequivocal justice.”

Rogers appealed to the School Board and won a stay of the suspension pending his petition to this Court. Both parties to this litigation have stipulated to the facts stated above and waived challenges to any other procedural or substantive arguments in their favor, agreeing to focus solely on legal analysis of the First Amendment issues implicated by these facts.

² Section 4 of the Faber High School Code of Conduct provides: “Any student who threatens or abuses any teacher, administrator, or any other staff member employed by Faber High School, verbally or otherwise,

II. LEGAL ANALYSIS

The question in this case, whether Principal Wright violated Rob Rogers' First Amendment rights by suspending him for the content of speech expressed on the Internet away from the school facility, presents an issue of first impression in this circuit. Because neither the United States Supreme Court nor any of the courts in this jurisdiction have yet addressed this issue directly, the following opinion necessarily relies upon and extrapolates legal opinions from other jurisdictions in the United States. See Leora Harpaz, Internet Speech and the First Amendment Rights of Public School Students, 2000 B.Y.U. Educ. & L.J. 123, 135-36 [hereinafter Internet Speech] (noting the Supreme Court has not addressed or defined key terms in the analysis of off-campus student speech that is critical of faculty). The resolution of this case turns on the answers to the following questions: (1) whether the speech at issue was sponsored by Faber High School, and (2) whether the regulation of Rob Rogers' speech was appropriate, in accordance with the determination of the first question.

A. The content of the web site represented speech sponsored by Faber High School

The United States Supreme Court consistently has recognized that public school students do not "shed their constitutional rights of freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines Independent Community Sch. Dist., 393 U.S. 503, 506 (1969). Despite the seemingly broad implications of this oft-cited axiom, however, the Court has also preserved the right of schools to regulate expression that, but for its school-related context, would otherwise receive protection by the First

shall be suspended from attendance at Faber High School for five (5) days.

Amendment. See, e.g., Tinker, 393 U.S. at 507 (emphasizing schools’ right to regulate speech “to control conduct in the schools”); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (upholding school’s editorial control over school-sponsored newspaper as necessary to achieve “legitimate pedagogical concerns”); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (noting that students’ speech rights “are not automatically coextensive with the rights of adults in other settings” and upholding discipline of student for speech that was vulgar but not unconstitutionally obscene).

It is necessary, then, as a preliminary matter, to determine whether the speech at issue in this case falls within the realm of expression over which schools may exercise control otherwise inconsistent with First Amendment doctrine. Based on the factual record, this Court finds that the contested speech does indeed fall within the province of the school district’s regulatory jurisdiction and, therefore, is subject to censorship not otherwise permissible in a non-school-related context.

When the speech at issue is sponsored by the school or remains part of the academic curriculum, schools “need not tolerate student speech that is inconsistent with its ‘basic educational mission.’” Kuhlmeier, 484 U.S. at 266 (quoting Fraser, 478 U.S. at 685). As such, schools retain control over speech that “members of the public might reasonably perceive to bear the imprimatur of the school,” regardless of whether that speech occurred within the “traditional classroom setting.” Kuhlmeier, 484 U.S. at 271. Given this standard, it comes as no surprise that schools may constitutionally regulate speech sponsored by the school, such as the content of an official school newspaper or speeches at student body election assemblies. See id. (upholding censorship over student articles appearing in school paper); Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989)

(upholding punishment of student for remarks insulting school faculty during election speech at school assembly).

The present case is unique in that the contested expression occurred not at a school function on school grounds, but rather through that amorphous medium of expression known as the Internet or world wide web (“web”). Yet this Court can divine no reason why the same analysis should not apply, and we therefore analyze the case under existing First Amendment principles.

1. Content of the web page

The first thing the average viewer would see upon accessing the www.FaberHighSchool.com web page is the masthead welcoming her to the “Support Faber High” site. While admittedly not a part of the “traditional classroom setting,” this factor itself appears enough to convince the technological layman that the web site is sponsored by Faber High School. The very next line goes on to reiterate the school motto, while the content of the page presents an editorial by a student identifying himself as the Senior Class President and describing a school-sponsored field trip. By virtue of Rogers’ repeated entreaties and references to “my fellow students,” one reasonably might assume the web page represents a school-sponsored forum for students to express their views on school-related activities. It is noteworthy that the page did not contain any type of statement disclaiming sponsorship or an association with Faber High School’s administration. See Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp.2d 1088, 1089 (W.D. Wash., 2000) (noting that student’s personal web site, which the court found was not school-sponsored, contained a warning disclaiming school-sponsorship of the site).

2. Factors leading to creation of the web page

Aside from the obvious implications engendered by the *content* of the site, the factors leading to its creation solidify the conclusion that the page is an extension of school-sponsored activities. First, Principal Wright suggested the creation of the site to Rogers while meeting with the student in their official school capacities of principal and student/leader, respectively. Second, the factual record reveals that Rogers specifically created the site pursuant to his meeting with Wright and in an effort to achieve their collective, school-related goal of improving morale. Moreover, when Rogers continued to maintain the site after the Homecoming football game, he sought authorization from Principal Wright, who offered his official encouragement and support for the endeavor. In addition, Rogers intended the site to consider issues that would be of interest primarily to Faber High students. This set of circumstances directly contradicts the assertion that the speech was not related to school activities. Compare Emmett, 92 F. Supp.2d at 1090 (holding student speech was not school-sponsored because “[i]t was not produced in connection with any class or school project”).

By directing and overseeing the web site’s creation, Principal Wright essentially created a limited public forum (thereby subject to editorial control and regulation by the school), similar to the school newspaper in Kuhlmeier. See 484 U.S. at 267. By acting as a faculty supervisor of a school-related endeavor – as evidenced by the fact that Rogers felt compelled to seek Wright’s permission to modify the structure of the web page – Principal Wright retained ultimate authority over the site. See Kuhlmeier, 484 U.S. at 271 (recognizing that activities may be considered part of the school curriculum “so long as they are supervised by faculty members and designed to impart particular

knowledge and skills to student participants and audiences”); see also Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 802 (1985) (“The government does not create a [traditional] public forum [thus precluding regulation, except under strict circumstances] by inaction or by permitting a limited discourse, but only by *intentionally* opening a nontraditional public forum for public discourse.”) (emphasis added).

B. Punishment of Petitioner for school-sponsored speech that was inconsistent with school’s educational mission did not violate the First Amendment

1. Punishment of Petitioner was reasonably related to a legitimate pedagogical concern

The U.S. Supreme Court provides school officials with substantial authority to control school-related speech, as it has held that “educators do not offend the First Amendment by exercising editorial control over the . . . content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” Kuhlmeier, 484 U.S. at 273. Therefore, since Rogers’ speech was school-sponsored, the present case simply requires a finding that the censorship of the speech was related to goals consistent with the educational process. Principal Wright and the Faber School District have met this low burden and thereby justified the punishment imposed on Rogers, consistent with First Amendment principles.

The “legitimate pedagogical” process the Supreme Court contemplates extends far beyond in-class academic assignments; it also encompasses “schools . . . teach[ing] by example the shared values of a civilized social order.” Fraser, 478 U.S. at 683. It hardly

requires articulation that a civilized social order does not include and will not tolerate threats of physical violence against the educators of our youth. Yet that is precisely what Petitioner would have us believe.

The title of Rogers' editorial ("It's Your Turn, Principal Wright: Remove Your Underwear and Bend Over") is just the opening salvo in a long litany of thinly veiled threats of physical violence. Rogers' manifesto goes on to advocate, through suggestive rhetorical questions, that Principal Wright be held down and essentially raped. See Appendix I (asking how Wright would like to be held down and probed, and then asking students to help "avenge" this act). Rogers announces his willingness to go to "any lengths" to teach Wright a lesson and intimates that fellow students would be justified in "making the unilateral decision to 'scare' and humiliate Principal Wright" See id. (quotations in original).

Not only are Rogers' writings abusive and threatening, they could also tend to disrupt the academic environment by requiring students to contemplate the potential for violence against the school's role model and authority figure. High school students who face the growing pains of insecurities ranging from their respective popularity to tastes in fashion should not also be forced to consider a more serious insecurity about physical safety. See Pangle v. Bend-Lapine Sch. Dist., 10 P.3d 275, 286 (Or. App. 2000) ("When children are within the school environment, parents must rely on school personnel to provide a safe . . . learning environment."). In this respect, courts have previously recognized that student speech that casts a negative light on school authority figures and disciplinarians carries the potential to disrupt the learning environment. See New Jersey v. T.L.O., 469 U.S. 325, 350 (1985) ("Without first establishing discipline and

maintaining order, teachers cannot begin to educate their students.”); J.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412, 421 (Pa. Commw. Ct. 2000) (citing student statements leading to a negative perception of teachers as one justification for upholding student expulsion for derogatory comments on student’s private web site); Baker, 307 F. Supp. at 521 (recognizing the significant impact on the education process caused by student speech that would “diminish control and discipline”). Students go to school to learn, not to face the possibility that they or their teachers will be physically assaulted. This Court does not hesitate to follow the lead of its sister courts in this respect in finding that Petitioner’s writings would disrupt the learning environment and students’ feeling of security in that environment. As such, the punishment for Rogers’ writings was reasonably related to a legitimate pedagogical concern.

2. Petitioner’s speech constituted a threat and does not deserve First Amendment protection

The punishment of Petitioner was also appropriate because Rogers’ speech on the web site constituted a threat against the physical safety of Principal Wright. Such speech should not and does not receive First Amendment protection. See Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 371 (9th Cir. 1996) (“Threats of physical violence are not protected by the First Amendment under either federal or state law . . .”). This Court recognizes the Supreme Court’s emphasis on distinguishing political hyperbole from “true threats,” but given the extreme physical impact of Rogers’ speech on Principal Wright, i.e., sleepless anxiety, this Court finds no basis to determine that Rogers’ speech was anything but threatening in this case. See Watts v. United States, 394 U.S. 705, 706 (1969) (*per curiam*) (distinguishing between political hyperbole and “true threat[s]” in

overturning conviction for threatening the President of the U.S.); see also J.S., 757 A.2d at 421 (finding that the harsh physical and emotional impact of a student web site upon a reasonable person, in this case a high school teacher, essentially negated the contention the site's speech constituted mere hyperbole).

Although the Supreme Court has not adopted an explicit test to facilitate the determination of what constitutes a true threat, the Lovell court set forth an objective test which we adopt today. The test examines the totality of the circumstances surrounding the alleged threat to determine "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." Lovell, 90 F.3d at 372 (citation omitted). In the instant case, Principal Wright has certified in affidavits that he has been "extremely upset, scared, and has had trouble sleeping because of the web site."

The web page did not discuss abstract and vague forms of retaliation against faceless victims; instead it specifically referenced Principal Wright and explicitly suggested a means of retaliation against him. Moreover, media reports quoted students indicating their desire to harm Wright through "swift and unequivocal justice." Finally, the underlying message of the article is loud and clear, notwithstanding any attempt by Petitioner to explain it away after the fact. The web site quoted the school motto – advocating tireless tenacity to achieve goals – as Rogers declared his determination to "go to any lengths" to "avenge" his alleged subjugation by promising to "show *him* some authority" by making sure Wright would "take it in the end."

If he did not mean to convey a message of violence, Rogers – apparently a skilled linguist – easily could have chosen different words to express his feelings. To

Principal Wright, and to the objective reasonable person, the web site is an unequivocal warning shot across the bow of physical safety.

Finally, it is possible that Rogers' statements might have been less threatening years ago, but in light of the high-profile instances of violence perpetrated by students against within America's schools, the web site's statements present a threat which Principal Wright and the school district would ignore at their own peril. See J.S., 757 A.2d at 422 ("Regrettably, in this day and age where school violence is becoming more commonplace, school officials are justified in taking very seriously threats against faculty and other students."). The analysis of Rogers' speech as a threat is consistent with other courts' application of First Amendment principles to student speech. See Lovell, 90 F.3d at 371-72 (finding student's threat to shoot guidance counselor was "unequivocal and specific enough to convey a true threat of violence . . . [especially] when considered against the backdrop of increasing violence among school children"); In re A.S., No. 99-2317, 2001 WL 515268, at ¶¶ 22-23 (Wis. May 16, 2001) (applying an objective test and finding student's statements constituted threats because, *inter alia*, others "would foresee that reasonable listeners would interpret his statements as serious expressions of an intent to intimidate or inflict bodily harm.").

C. Petitioner's speech substantially disrupted the educational environment

Because the Supreme Court has not yet addressed, directly, the issue of student Internet speech, it bears noting that the punishment of Petitioner's speech was appropriate even if the analyses above are otherwise rendered moot or overturned. The web site's content carried over into the school environment and interrupted the normal educational

process in a manner which the Supreme Court *has* held to be amenable to regulation. See Tinker, 393 U.S. at 513 (“But conduct by the student . . . which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.”). Administrators may properly regulate student speech that ‘materially disrupts’ the educational environment, or threatens to do so, even if such speech is not sponsored by or connected to school-related activities. See id.; see also Boucher v. Sch. Board of Greenfield, 134 F.3d 821, 827 (7th Cir. 1998) (“the relevant test is whether school authorities ‘have *reason to believe*’ that the expression will be disruptive”) (quoting Kuhlmeier, 484 U.S. at 266) (emphasis in original).

In the present case, Principal Wright determined that the web site reasonably threatened order within the school, as well as his own personal safety. His conclusion is well supported by the record. Based on Rogers’ stature among his peers, his past ability to mobilize grass roots rallies, and the fact that the web page “inspired” students, Wright reasonably feared a physical uprising or rebellion within the school. See Boucher, 134 F.3d at 827 (asserting that evidence of past disruption “which would support an inference of potential future disruption” may be considered as a reason justifying punishment for speech). Especially in light of the instances of school violence, e.g., the school shootings at Columbine and other schools nationwide, Wright took proper precautions to stabilize the school community. Moreover, the web page affected normal academic training by apparently altering the curricula of several classes, requiring teachers to address the issue during class time. Cf. Pangle, 10 P.3d at 285 (concluding the *Tinker* Court would have

found no constitutional violation if the relevant conduct had disrupted classroom instruction).

Not only are Rogers' writings and ramblings abusive and threatening, they also tend to substantially disrupt the school environment by subverting the discipline required in the high school context. Petitioner's claims that Principal Wright encouraged a violation of students' rights and the invocation of visceral images of the Principal being subordinated – as well as the suggestion that students could achieve this subordination of Wright by ganging up against him – erodes the authority of the school's anointed disciplinarian. These factors substantially disrupt school operations and administrators have broad authority to counterbalance their effect. See Tinker, 393 U.S. at 507 (affirming “the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools”). The punishment handed down by Principal Wright was entirely appropriate and necessary, under the circumstances, to maintain proper control over the student body. See J.S., 757 A.2d at 421 (noting negative effect of web site on students' perception of teachers as a reason justifying student's expulsion); Boucher, 134 F. 3d at 827 (“it is enough to show that school discipline, undertaken reasonably and in good faith to protect the school's vital interest, is being undermined”); Harpaz, Internet Speech, 2000 B.Y.U. Educ. & L.J. at 160 (“Even insults directed at teachers may disrupt the classroom by making the teacher a subject of mockery instead of any authority figure.”).

Taking all of these reasons together, it is clear that Petitioner's Internet prattling was intended to, and seriously threatened, to substantially disrupt the operation of Faber High School. As such, the actions of Principal Wright and the Faber School District were

“as consistent with First Amendment rights as are constitutional limitations on free speech in other environments, such as constraints on yelling ‘Fire!’ in a crowded movie theater.” Pangle, 10 P.3d at 286.

III. CONCLUSION

At a time when teachers and school administrators must concern themselves with violence that once seemed to exist in only in the minds of hardened criminals, the courts must provide school officials with the tools necessary to maintain safety while teachers inculcate students with the values of a civilized society. Against this backdrop, this Court finds that Petitioner’s electronic speech was school-sponsored, and as such was properly regulated and punished by school officials. Even in the event the speech was not connected to school activities, the Principal and school district took appropriate action against a threatening and substantially disruptive publication to maintain the operation of the school. For the foregoing reasons, this Court finds that punishment of Petitioner was carried out in accordance with First Amendment standards and principles. This Court hereby denies Petitioner’s motion to reverse his punishment and orders him to begin serving his suspension from school, pending appropriate appeal to the Circuit Court.

So ordered.

APPENDIX I

Text of the FaberHighSchool.com web site:

Welcome to the "Support Faber High" web site!!

Remember our motto: "It's only through action and participation that we can achieve our goals."

IT'S YOUR TURN, PRINCIPAL WRIGHT: REMOVE YOUR UNDERWEAR AND BEND OVER

I recently took a field trip, along with other students, to the Bigouse Maximum Security Prison. The field trip was designed to show us the unpleasant reality of prison life and the consequences of criminal activity, in an attempt to scare us away from criminal acts by exposing us to the grim realities of prison life.

Sounds pretty cool, right? It was – until all the students on the field trip were forced to undergo a strip search. Not just a pat down of our clothes, but a full search of our body cavities, if you know what I mean. Despite our complaints to the guards providing the tour, we were all forced to strip down completely naked and bend over. It was not long before we heard the elastic snap of a white, latex glove and then were probed around our genitalia and anal regions, in the same way a dangerous convict would be.

Our rights and physical integrity were callously and intrusively violated that day. And all of this was done not only with the authorization, but with the *encouragement* of Principal Wright. He exploited us – and it's about time he realizes the consequences of the activity he encouraged.

Do you know what it's like to strip completely nude, Principal Wright, under the watchful eye of everyone in the room, at the request of gun- and baton-toting guards? Do you think Principal Wright would like it if he was forced, under threat of physical violence, to bend over and spread his buttocks while somebody felt around to see if *he* is carrying contraband?? Was it your job – and was it worth your job, Principal Wright – to subject us to that type of disrespectful treatment??

I ask you, my fellow students – don't you think Principal Wright should also experience the fear and degradation that we all went through that day? Don't you think we're all justified in making the unilateral decision to "scare" and humiliate Principal Wright, just to teach *him* a lesson? I'm prepared to go to any lengths to make sure this happens, and to make sure he realizes the consequences of *his* decisions. I hope you'll all join me in avenging this horrible violation of our rights by instilling in Principal Wright the same type of feelings we experienced that horrible day at the prison. This was a horrible, horrible decision and we must join together to take action to ensure that Principal Wright never has the thought or ability to make the same mistake again. We must now stand up for our rights and show Principal Wright who is really in charge, show *him* some authority. If we all join together, I'm sure he'll take it in the end – if you know what I mean.

--Rob Rogers, Sr. Class President and Anti-Wright Activist

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE MOOT CIRCUIT**

Rob Rogers,
Petitioner

v.

1126-01

James Wright, Principal, Faber High School and Faber School District
Respondent

Heard before Martinez, C.J., Garciaparra, J., and Ramirez, J.

Martinez, J., for the Court:

OPINION

The appellant was suspended from his high school for five days for violating a school policy proscribing threatening words or acts against school personnel. In the District Court, Appellant argued that the suspension violated his First Amendment rights by punishing him for personal speech solely because the school official found the speech personally objectionable. The District Court found that the speech in fact was school-sponsored, and in any event the speech was properly regulated because it substantially interfered with operation of the school. We hereby find the student expression on the web site was purely personal and not subject to regulation by the school. Furthermore, we also find the speech was not threatening or disruptive to operation of the school. For these reasons, we overrule the District Court and find the suspension of Appellant violated the rights reserved to him under the First Amendment.

I. Factual and Procedural History

Appellant Rob Rogers is an eighteen-year old student in his senior year at Faber High School. Faber Principal Wright suspended Rogers for 5 days after reading the contents of a web site created by Rogers that was critical of Wright's administrative decisions. Appellant challenged this punishment in the District Court, contending the suspension unfairly punished Appellant for personal opinions published on a personal web site, outside of the educational arena. The District Court disagreed with Appellant and upheld his suspension, finding the speech was school-sponsored and properly regulated. Appellant subsequently appealed to this Court to seek relief.

The main issue on appeal is whether a school may punish a student for Internet speech that is related to and critical of the school administration. Appellant contends that the speech at issue was his alone and thus not sufficiently connected to school activities to justify regulation by school officials. Furthermore, he argues that the opinions represented a political statement designed to criticize a school official – which deserves constitutional protection – rather than a threat of physical violence.

II. Legal Analysis

In its opinion, the District Court made several findings of fact that were essential in drawing its legal conclusion that the Appellant's suspension did not impinge on his First Amendment rights. With respect to the District Court, we now review the facts of this case *de novo* and reverse. See Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 370 (9th Cir. 1996) (“When the district court upholds a restriction on speech as constitutional, this court conducts a *de novo* review of the facts.”).

A. The speech at issue represented Petitioner’s personal views and was not sponsored or in any way connected with school-related activity

In its First Amendment analysis, the District Court correctly noted that the United States Supreme Court has not yet directly addressed the issue at hand, i.e., off-campus student Internet speech that is critical of the school administration. The District Court, however, properly extrapolated Supreme Court precedent in recognizing that school officials are measured against lower standards when regulating school-sponsored student speech as opposed to personal student speech which is not related to school activities. Compare Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding educators may censor school-sponsored student speech pursuant to “legitimate pedagogical concerns”) with Tinker v. Des Moines Independent Community Sch. Dist., 393 U.S. 503, 513 (1969) (holding that schools may regulate off-campus student speech only if it “materially disrupts classwork or involves substantial disorder . . .”).

While the District Court invoked the appropriate legal standards, its factual analysis – finding that Appellant’s speech was school-sponsored – was clearly erroneous in light of the factual record and existing opinions applying these same standards. At the outset, it is important to remember that “school ‘sponsorship’ of student speech is not lightly to be presumed.” Saxe v. State College Area Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2001) (citing Hedges v. Wauconda Comm. Unit Sch. Dist. No. 118, 9 F.3d 1295, 1299 (7th Cir. 1993)).

1. Factors leading to creation of the web site

With that premise as a starting point, the factual record supports Appellant’s assertion that the Internet speech was personal and therefore was not sponsored by Faber

High School. The idea that Principal Wright had somehow created a limited public forum over which he exercised editorial control is simply untenable. While it is true that Wright offered his assistance to Appellant, the record clearly indicates that Rogers did not feel the need to follow up with Wright after their first visit, after which Rogers independently decided to create and maintain the web site, only discussing the site with Wright as an afterthought. It is also obvious that Wright did not oversee Rogers in this endeavor, as the principal was “shocked” at the content of the editorial contained on the web page.

In fact, it appears that Wright tried to exploit Rogers’ work for his own personal job security. The record reflects that Wright was worried about job security, and indeed was pleased to associate with a popular entity within the school in an attempt to salvage his floundering reputation and career. Wright’s limited association with Rogers, however, does not necessarily imply the school initiated or sponsored the web site. To the contrary, it is readily apparent that “[a]lthough the intended audience was undoubtedly connected to [Faber] High School, the speech was entirely outside the school’s supervision or control.” See Emmett v. Kent Sch. Dist., 92 F. Supp.2d 1088, 1090 (W.D. Wash. 2000). Given these facts, this Court refuses to presume school sponsorship of this student’s speech.

Moreover, Rogers created the web site at home, during his personal time, using his own personal computer equipment; at no time did Rogers ever request or exploit school resources. Under similar circumstances, the courts have consistently held the student speech to be personal and independent of school sponsorship. See Emmett, 92 F. Supp.2d at 1090 (concluding student web site was not school-sponsored because it was

“not at a school assembly . . . and was not in a school-sponsored newspaper . . . nor produced with any class or school project); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp.2d 1175, 1177 (E.D. Mo. 1998) (noting that the student’s was created at his home, during his personal time, without using school resources, in finding speech was not school-sponsored); J.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412, 419 (Pa. Commw. Ct. 2000) (finding that student web site created at his home, during his personal time should be treated as personal, rather than school-sponsored, speech).

The District Court also overlooked the important fact that the web site maintained its Internet address at a “.com” domain, which indicates a personal (or commercial) purpose, rather than a “.edu” or “.gov” domain, which are reserved for school and government endeavors, respectively. That the site was created and maintained entirely through a personal Internet Service Provider account strongly indicates the speech was personal to Rogers rather than an extension of school speech.

2. Content of the web site

In its analysis, the District Court found significant the facts that Rogers signed the editorial as the “Senior Class President,” discussed a school field trip, and addressed his “fellow students.” In its analysis, however, the District Court completely ignored the fact that Rogers had been politically active prior to becoming Class President, had been vocal on political issues he considered important, and also identified himself as an “Anti-Wright activist.” It is patently unreasonable to presume the average member of the public would believe that a “.com” web site serving as a format for grass-roots activism against the school principal “bear[s] the imprimatur of the school.” Kuhlmeier, 484 U.S. at 271 (establishing the standard to determine school sponsorship of student

publications). Simply because Rogers maintained a school leadership position does not mean his personal political proclivities and statements represent school-sponsored speech.

The present case is factually similar to a recent opinion in which a federal court found that a student – a member of the track and field team – published a “Top Ten” list on his personal web site ridiculing and criticizing the coaching techniques of his coach. See Killion v. Franklin Regional Sch. Dist., 136 F. Supp.2d 446 (W.D. Pa. 2001). In *Killion*, the court held the speech was not school-sponsored – despite the student’s position on the track team – because he created the site at home and “was not engaged in any school activity or associated in any way with his role as a student when he compiled” the list. *Id.* at 457.

Similarly, we refuse to allow those who purport to be ‘educators’ to censor speech simply because it is critical of school administration. See Tinker, 393 U.S. at 511 (“[Students] may not be confined to the expression of those sentiments that are officially approved.”). Indeed, this runs counter to Supreme Court precedent and First Amendment principles. See id. (“In our system, state-operated schools may not be enclaves of totalitarianism . . . [students] may not be confined to the expression of those sentiments that are officially approved.”); see also Burch v. Barker, 861 F.2d 1149, 1159, 1151 (9th Cir. 1988) (holding that underground student newspaper which was “generally critical of school administration policies” and was created off-campus without using school resources was “in no sense school-sponsored”).

B. Appellant’s speech did not constitute a threat

The Supreme Court has not yet taken a position on “when school officials can punish students for advocating violence or other unlawful conduct.” Bystrom v. Fridley High Sch., 686 F. Supp. 1387, 1393 (D. Minn. 1987). The District Court once again invoked the proper standard to analyze Appellant’s speech under the Supreme Court’s “true threat” standard; and once again, the District Court failed to address facts and precedent that undermine its ultimate conclusion. In fact, it is apparent that Appellant’s speech is the epitome of the “political hyperbole” against which the Supreme Court has specifically admonished lower courts from punishing. See United States v. Watts, 394 U.S. 705, 708 (1969) (emphasizing the importance of distinguishing between a “true threat” and “political hyperbole”). As such, Rogers’ speech constituted political dissent – rather than threats to physical security – and is therefore protected by the First Amendment.

After examining the context and totality of the circumstances, school officials may properly consider student speech to be threatening when a reasonable person would foresee that the intended audience would interpret the speech “as a serious expression of intent to harm or assault.” Lovell, 90 F.3d at 372; In re A.S., No. 99-2317, 2001 WL 515268, at ¶¶ 22-23 (Wis. May 16, 2001) (adopting similar objective test). It is particularly noteworthy here that the authorities cited by the *Lovell* court all at least considered the imminence of the purported threat and its immediate impact on the intended audience. Lovell, 90 F.3d at 372 (citing cases discussing “reaction of the listeners” and the “imminent prospect of execution” of the threat).

In the present case, these factors are not relevant, due to the content and medium of communication. Because Rogers did not include a time and a place to carry out the threat, for example, there was no threat of imminent danger to Principal Wright – unless all the students who viewed the site independently arrived at the same time and place and with the exact same intent to inflict physical violence on Wright, which is simply untenable. Moreover, there was no way of even knowing how many students would view the site – which also decreases the potential for a lynch mob mentality – and no way of ensuring that the students who *did* view the site would access it at the same time. In short, there were no elements of immediacy or a mob mentality that would support concluding that the speech was threatening.

In addition, the alleged threat was not communicated directly to the subject of the alleged threat, i.e., Principal Wright, and there was no reason to believe Rogers had made similar statements against Wright in the past or to believe that Rogers had a propensity to engage in violence. See In re A.S. at ¶ 23 (listing these factors as relevant significant in determining whether student speech constitutes a true threat). In fact, Principal Wright admitted that he considered the “sophomoric intimidation tactics” to represent a traditional disciplinary matter, and did not actually feel threatened enough to contact the police. It strains credulity to think that a principal who genuinely feared for his physical safety and integrity would – without any type of police protection – calmly approach and inflict a harsh discipline on a student he ostensibly believed had the power to bring those threatened acts to fruition.

To specifically address the District Court’s conclusions, we have assumed for argument that Rogers actually intended to threaten or harm Principal Wright. We refuse

to accept that hypothesis, however, when the facts so clearly suggest that Appellant's speech actually represented a cogent political statement intended to criticize Principal Wright's policy decisions. This conclusion is supported by the fact that Rogers identified himself in the editorial as an "Anti-Wright Activist," as well as by the factual record, which reflects that the Faber community recognized Rogers as a politically active individual who was known to proactively stand up for causes in which he believed. It was public knowledge that Wright's job was not secure, and Rogers' rhetorical question – "was it worth your job, Principal Wright [] to subject us to that type of disrespectful treatment?" – indicates his intent to embark on a political crusade to hold Wright accountable for his actions, at the expense of Wright's job, if necessary.

Some of Rogers' remarks were indeed harsh, but graphic speech is far more effective in relating the students' humiliation during the strip search. Rogers should not be punished just for using an anatomically correct portrayal of what actually happened at the jail. See Watts, 394 U.S. at 708 ("We agree with petitioner that his only offense here was 'a kind of very crude offensive method of stating a political opposition'"). Quite frankly, this Court believes the statements were appropriate under the circumstances and refuses – in accordance with existing precedent – to silence Rogers' sophisticated, political criticism of the principal's decision. See id. (finding a speaker's remarks to constitute hyperbole because "[t]he language of the political arena . . . is often vituperative, abusive and inexact."); Tinker, 393 U.S. at 512 ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of the multitude of tongues, (rather) than through any kind of authoritarian selection.") (citation omitted).

C. The punishment of Appellant for expression of his personal political views violated the First Amendment

1. Appellant's speech was not substantially disruptive

Upon reviewing cases involving student expression, “[t]he overwhelming weight of authority has analyzed student speech (whether on or off campus) in accordance with *Tinker*.” Killion, 136 F. Supp.2d at 455. The *Tinker* standard places a “significant burden” on school officials attempting to limit or punish student speech. Id. at 452. The *Tinker* Court counseled that the First Amendment will not support a restriction on student speech unless the expression “materially and substantially interferes” with school administration. See Tinker, 393 U.S. at 509 (citation omitted) (“[W]here there is no finding and no showing that engaging in the forbidden conduct would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,’ the prohibition cannot be sustained.”).

To satisfy this burden, school officials regulating student speech must show “something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” Tinker, 393 U.S. at 509. Applying this standard, the courts have consistently required school officials to demonstrate with “specificity and concreteness” the alleged substantial disruption the officials purport to avoid prior to allowing regulation of student expressive activities. See, e.g., Saxe, 240 F.3d at 212 (citing a case that “confirms *Tinker*’s requirements of specificity and concreteness”); Burch, 861 F.2d at 1153 (same).

The school officials in the case at bar point to no specific, concrete disruption that would justify Appellant’s punishment. The District Court hinted at the possibility of an uprising within the school against Principal Wright, but this vague possibility does not

satisfy First Amendment standards. See Tinker, 393 U.S. at 509 n. 3 (refusing to find a concrete threat of substantial disruption even though “it was felt that if any kind of demonstration existed, it might evolve into something which would be difficult to control.”). The District Court placed a heavy emphasis on the potential for the web site to vanquish Principal Wright’s stature and reputation among the Faber community. Even if this were the case, such a result would be the consequence of Wright’s decision, not Rogers’ editorial. However, we decline the invitation to find that a student’s “sophomoric” critique – in Wright’s words – has the independent capability to erode discipline within the school. See Killion, 136 F. Supp.2d at 456 (“We cannot accept, without more, that the childish and boorish antics of a minor could impair the administrators’ abilities to discipline students and maintain control.”). It is far more likely that Rogers, who was known for organizing *orderly* political rallies, would seek Wright’s termination by lobbying the school board rather than advocating anarchy within the school.

Similarly, despite Appellee’s contention that Principal Wright’s anxiety and insomnia – for which he declined to take a leave of absence – were a sufficient disruption to punish Rogers’ speech, the courts have consistently held that the one person’s lack of comfort does not constitute material disruption. See Lovell, 90 F.3d at 373 (“we do not mean to suggest that one need only assert that he or she felt threatened by another’s conduct in order to justify overriding that person’s right to free expression”); Burch, 861 F.2d at 1151 (finding no substantial disruption even though “a few teachers who had been mocked . . . became emotionally upset”); Killion, 136 F. Supp.2d at 455 (finding no disruption even though a student’s derogatory “Top Ten” list was “upsetting” to a

teacher, because the teacher did not take a leave of absence); Beussink, 30 F. Supp.2d at 1180 (“Disliking or being upset by the content of a student’s speech is not an acceptable justification for limiting student speech under *Tinker*.”).

The strongest argument for finding a material disruption of school operations involves the fact that teachers took class time to address the issue. Even this fact is not sufficient to justify Rogers’ punishment. First, many of the classes affected were civics classes that normally discussed current constitutional events anyway. Although other classes were also affected by these discussions, it is important to note that it was Wright’s decision to order the strip search – rather than Rogers’ editorial – that precipitated media outcry; the same discussions might have occurred even if Appellant never published his opinions.

Assuming *arguendo* that Rogers’ web site caused the classroom discussions, the Supreme Court has held that this fact does not warrant a restriction on student speech. See Tinker, 393 U.S. at 517-18 (Black, J., dissenting) (finding no substantial disruption even though a teacher had his lesson period “wrecked” and student minds were “diverted” by student expression). Indeed, the present circumstances are clearly distinguishable from the facts in Boucher v. School Board of Greenfield, 134 F.3d 821 (7th Cir. 1998), in which an underground student newspaper suggested ways to “hack” into the school’s computer network. In *Boucher*, the court found a substantial disruption because the speech was a “call to action detrimental to the tangible interests of the school,” and was not “a mere hostile critique” of the school administration. *Id.* at 828. The case at bar is clearly the latter, and presents no threat of substantial disruption.

In fact, the present case is remarkably similar to circumstances in the *Beussink* case. The court in *Beussink* found that the student demonstrated a likelihood of success on the merits of his First Amendment claim after the school principal suspended the student for 10 days after viewing the contents of his web site. *Beussink*, 30 F. Supp.2d at 1179. The court found that the student was unconstitutionally disciplined solely for the content of his opinions, even though the web site used harsh language to criticize the principal and teachers at the school, it caused students to discuss the suspension incident in the hallways, and the web page prompted the principal and a teacher to become upset. *Id.* at 1181, 1177-78.

The present case is also analogous to the *Emmett* decision, in which that court found that a student's First Amendment claim had a substantial likelihood of success on the merits. *Emmett*, 92 F. Supp.2d at 1090. As in the case at bar, the student in *Emmett* was a student leader (co-captain of basketball team) with no apparent disciplinary history, and he maintained a web site that listed mock obituaries. *Id.* at 1089. The *Emmett* court found the site posed no threat of substantial disruption with school operations because there was "no evidence the [web site was] intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever." *Id.* at 1090. Similarly, there is no evidence indicating Rogers intended harm to anybody, and we find he did not manifest violent tendencies. Accordingly, this Court finds that Appellant's web site posed no threat of a material and substantial disruption of school operations or discipline.

III. Conclusion

We hold that Appellant's web site was personal and did not represent a school-sponsored publication. Furthermore, the school officials have failed to justify their punishment of Appellant with anything more than an "undifferentiated fear or apprehension of a disturbance." Tinker, 393 U.S. at 508. For these reasons, we conclude that the Appellant must prevail in his assertions that the punishment handed down by the school officials was unconstitutional and hereby reverse the ruling of the District Court below.

Reversed.