

### **FACTS**

Kara Kowalski created a *MySpace* page, which the federal district court characterized as a chat group, using her home computer. Kowalski named the chat group page S.A.S.H. (Students Against Sluts Herpes) and invited approximately 100 individuals, some of whom attended Musselman High School (MHS), to join. Group members were free to post comments and other items. It became apparent quickly that the purpose of the group was to target a specific individual, S.N., who also attended MHS. Several members of S.A.S.H. posted false and derogatory comments about S.N. that were vulgar and offensive. One member posted an altered photo of S.N., making it appear as though she had herpes. Although Kowalski did not post any comments or photos aimed directly at S.N., she commented approvingly of many of the derogatory postings.

When S.N. and her parents learned of the chat group, they reported it to MHS officials, asking that the officials close down the site and punish those students involved in creating and posting comments on it. MHS officials conducted an investigation during which they interviewed Kowalski and the other students involved, and provided them with an opportunity to present their side of the story. Upon completion of the investigation, Kowalski was given a 10-day school suspension and a 90-day social suspension, during which she was barred from participating in cheerleading and "Charm Review." Kowalski was found in violation of Berkeley County Schools' (BCS) "Bullying, Harassment and/or Intimidation" policy (BHIP). Although the policy provided an appeals process, Kowalski's parents instead successfully petitioned the school board to reduce her punishment by half (to a 5-day school suspension and 45-day social suspension).

### **MOTION TO DISMISS**

Kowalski subsequently filed suit, alleging a number of federal constitutional claims. In October 2008, the district court granted in part and denied in part the defendants' motion to dismiss. It granted the motion with respect to Kowalski's First Amendment free speech claim on the ground that she lacked standing to bring the claim. Despite this ruling, the district court revisited the merits of Kowalski's free speech claim when it denied her subsequent motion for reconsideration and again when it considered BCS' motion for summary judgment on Kowalski's remaining claims.

The court granted in part and denied in part the defendants' motion to dismiss the due process claim. It found that the claim contained three allegations: (1) Kowalski's due process rights were violated because the BHIP failed to provide her with sufficient notice that her off-campus, nonschool related activity was prohibited under the policy; (2) BCS failed to follow its own appeals process or the appeals process was insufficient; and (3) Kowalski was barred from participating in cheerleading and "Charm Review" without notice or hearing.

The court granted the motion to dismiss Kowalski's claim regarding extracurricular activities on the ground it is well-settled law that students do not enjoy a protected liberty or property interest in participating in extracurricular activities. The court denied the motion in regard to the second allegation that BCS failed to follow its own appeals process or the appeals process was insufficient, concluding that the allegation was facially viable for purposes of a motion to dismiss and would be more properly subjected to a motion for summary judgment following additional discovery. The court denied the motion as to the allegation that BCS failed to provide sufficient notice that the ABHP applied to off-campus student activity unrelated to school. It found the allegation raised a valid question of whether application to off-campus nonschool related activity is a custom or policy.

**MOTION FOR SUMMARY JUDGMENT**

In December 2009, the district court ruled on the defendants' motion for summary judgment. In regard to the two due process allegations that survived the motion to dismiss, the court granted summary judgment in favor of the defendants on both.

As to the contention that BCPS failed to follow its own appeals or the process was inadequate, the court concluded that KK had received more process than BCPS was constitutional required to provide under *Goss*. Specifically, KK had been give oral notice of the charges against her and during the investigation was given an opportunity to present her side of the case to school officials. In addition, it found that ABHP provided KK with an opportunity to appeal the disciplinary decision, but that she had not availed herself of that appeals process. Instead, her parents had petitioned the school board directly for reduction of the punishment.

Turning to KK's allegation that the ABHP failed to provide her with notice that she could be disciplined under the policy for off-campus online activity, the court concluded the decisions in *Tinker* and *Fraser* provided such notice. Examining *Fraser's* reasoning, it found that the holding allowing school officials to prohibit lewd, vulgar and offensive speech was based on the principles that schools have a role in inculcating students with the values of citizenship and that students' free speech rights are more limited than the general public's. In addition, it found that notice was provided by the policy as spelled out in the student code handbook. The court rejected KK's contention that it should look to her subjective belief that she could not be disciplined for off-campus activity, finding that such belief was irrelevant to the court's determination of the parameters of the policy's reach.

Citing the Second Circuit's decision in *Doninger* (2008) prominently, the court concluded that school officials have the authority to regulate off-campus student activity if it is foreseeable that the conduct will cause disruption of the school environment. It found that it was reasonably foreseeable that KK's chat group S.A.S.H. would reach the school. The sole purpose of KK's chat group, noted the court, was to harass S.N. with vulgar and offensive postings that would spill over to school environment, given the number of MHS students who were members of the group, satisfying the *Doninger* requirement of reasonable foreseeability. The vulgarity and offensiveness contained in postings satisfied the *Fraser* standard. The reaction of S.N. and her parents satisfied the *Tinker* substantial disruption standard.

In sum, the court concluded that, based on the online nature of the postings making them accessible anywhere, the large number of individuals invited to join the group, the nature of the posting, and the purpose of group to bully, harass and intimidate S.N., it was reasonably foreseeable that it would carry over into school causing substantial disruption.