

**IN THE  
SUPREME COURT OF THE STATE OF GRACE**

**Kit Politte and Cory Towles,**

*Petitioners*

v.

Docket No. 05-1338

**Horton Hopkins School District and  
Keena Smalls,**

*Respondents*

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**BRIEF FOR RESPONDENT**

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On Writ of Certiorari to the Court of Appeals of the State of Grace

**Team No. 24**

## **QUESTIONS PRESENTED**

1. Whether Respondents' attempt to regulate students' Internet speech created off-campus was a violation of Plaintiffs' First Amendment rights.
2. Whether Respondents' warrantless search of Petitioner Towles on school premises violated Towles' Fourth Amendment rights, as applied to school officials by the Fourteenth Amendment.

**TABLE OF CONTENTS**

1. Table of Authorities.....4

2. Constitutional Provisions.....5

3. Statement of the Case.....6

    a. Facts.....6

    b. Procedural History.....9

4. Summary of the Argument.....11

5. Argument.....13

6. Conclusion.....35

7. Appendix.....36

**TABLE OF AUTHORITIES**

*Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598 (6th Cir. 2005) .....30, 31

*Board. of Educ. v. Earls*, 536 U.S. 822 (2002) .....25, 27-29, 31

*Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield*, 134 F.3d 821 (7th Cir. 1998).....17

*Buessink v. Woodland R-IV Sch. Dist.*, 30 F.Supp.2d 1175 (E.D. Mo. 1998).....14, 18, 19, 23

*Camara v. Municipal Court*, 387 U.S. 523 (1967) .....26

*Champion v. Outlook Nashville, Inc.*, 380 F.3d 893 (6th Cir. 2004).....32

*Cornfield v. Consolidated High Sch. Dist. No 230*, 991 F.2d 1316 (7th Cir. 1993).....29, 32

*Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008).....14, 19-23

*Emmett v. Kent Sch. Dist. No. 415*, 92 F.Supp.2d 1088 (W.D. Wash. 2000).....19

*Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir. 2003) .....32

*Fenton v. Stear*, 423 F.Supp. 767 (W.D. Pa. 1976).....17

*Griffin v. Wisconsin*, 483 U.S. 868 (1987) .....26, 28

*Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) .....31

*J.S. v. Bethlehem Sch. Dist.*, 757 A.2d 412 (Pa. Commw. Ct. 2000) .....17

*Layschock ex. rel. Layschock v. Hermitage Sch. Dist.*, 412 F.Supp.2d 502 (W.D. Pa. 2006) .....14

*Mahaffey ex. rel. Mahaffey v. Aldrich*, 236 F.Supp.2d 779 (E.D. Mich. 2002) .....17

*New Jersey v. T.L.O.*, 469 U.S. 325 (1985) .....23-28, 30, 31

*Pluet v. Frazier*, 355 F.3d 381 (5th Cir. 2004) .....13

*Politte v. Horton Hopkins Sch. Dist.*, Case No. 254 (Grace Ct. App. 2009) .....17

*Skinner v. Railway Labor Executives' Assoc.*, 489 U.S. 602 (1989) .....26, 27

*Terry v. Ohio*, 392 U.S. 1 (1968).....29, 30

*Thomas v. Bd. of Educ.*, 607 F.2d 1043 (2d Cir. 1979).....///...16-18

<i>Tinker v. De Moines Indep. Cmty. Sch. Dist.</i> , 393 U.S. 503 (1969) .....	13, 22, 28
<i>U.S. v. Martinez-Fuerte</i> , 428 U.S. 543 (1976) .....	25
<i>U.S. v. Sharpe</i> , 470 U.S. 675, 682 (1985) .....	26
<i>Vernonia Sch. Dist. V. Acton</i> , 515 U.S. 646 (1995) .....	25, 27, 28, 30
<i>Williams v. Ellington</i> , 936 F.2d 881, 883 (6th Cir. 1991) .....	33
<i>Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.</i> , 494 F.3d 34 (2d Cir. 2007)...	14, 16, 22

**CONSTITUTIONAL PROVISIONS**

U.S. CONST. amend. I.....	13
U.S. CONST. amend. IV .....	23

**STATUTES**

Fed. R. Evid. 401 .....	27
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## STATEMENT OF THE CASE

### **I. FACTS**

For the past twenty years, Keena Smalls has been the principal of Horton Hopkins High School (“Horton Hopkins”), a public school in the State of Grace. Over the past five years, Smalls has witnessed an ever increasing drug problem take hold of the Horton Hopkins campus. In just the first two months of this past fall semester, Smalls and other school officials caught fifteen students smoking marijuana on school grounds. During the previous school year, Horton Hopkins officials suspended twenty-five students for using illegal drugs on school grounds. In December of 2007, this drug problem reached tragic levels when seventeen-year old Kelly Smith, the captain of the Horton Hopkins volleyball team, died of a cocaine overdose. In light of this tragedy, Smalls requested that the school district enact a zero-tolerance policy towards student drug use, called the Drug and Alcohol Use Policy (“Policy”). The Policy allows school officials to conduct searches of lockers, desks, and a student’s personal property for evidence of illegal drugs. Under the Policy, if a school official finds a student in possession of illegal drugs, school officials may then suspend that student for no less than three days. Appendix A of this brief contains the Horton Hopkins Policy in its entirety.

In September of 2008, Petitioner Kit Politte founded a school-sponsored club, “Drug Use Damages Schools” (DUDS). DUDS sought to combat Horton Hopkins’ growing drug problem through anti-drug pamphleting and informational assemblies. After one such assembly, the guest speaker approached Politte and told her that the only way to curb the drug problem is to publicly identify the drug dealers and drug users to the entire Hopkinsville community. In light of this advice, Politte went home and created a web page on the social networking site, Friendkepidia.<sup>1</sup>

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<sup>1</sup> Friendkepidia allows its users to create personal networks with other members. Although the site is open to anyone, its primary user base consists of high school and college students.

Politte named this network “Fighting All Dealers.” (FAD). Her goal for the web page was to create forum where community members could anonymously submit information about drug dealers and drug users in the Horton Hopkins area. Politte would then post the strongest tips about who was selling or using drugs, in the hope that doing so would lead to subsequent arrests. On September 15, Politte advertised the FAD web page at a DUDS meeting, held in a Horton Hopkins classroom after school hours. After that meeting, all one-hundred and thirty members of DUDS joined the FAD network, along with sixty-eight other Horton Hopkins students. DUDS has two hundred and thirty-five members in total.

Corey Towles is a sophomore at Horton Hopkins. Towles transferred to Horton Hopkins from the State of Disarray where he had been an honor student and where he played on the junior varsity baseball team. On October 3, 2008 Towles attended a party at the house of Jeff Tweegs, the captain of the Horton Hopkins baseball team. In the week leading up to Tweegs’ party, rumors had circulated that marijuana would be available at the party. Nevertheless, Towles arrived at the party around 9 p.m. and stayed until 11 p.m. While at the party, Towles saw students drinking beer and smoking cigarettes but saw no usage of illegal drugs. Around 11:30 p.m., Tweegs’ neighbors called the police to report the noise coming from the party. When the police arrived at the party, they cited five Horton Hopkins students for underage drinking. In addition, the police cited a Horton Hopkins sophomore, Frank Conrad, for marijuana possession.

The following day, an anonymous tipster emailed Politte through the FAD network with a photograph taken at Tweegs’ party. The photo showed Towles sitting with Conrad and another Horton Hopkins student, John Thompson. The photo showed Conrad smoking a cigarette of some sort. Politte then posted this photograph on the FAD webpage, but did not list the names of the students in the photo. However, Towles’ face was readily distinguishable. Politte wrote a

caption for the photo that read, “Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?”

The following morning, the posting of this photograph began to reap its effects on Smalls and the students of Horton Hopkins. Parents began calling Smalls to express their concern about drug use at Horton Hopkins. In addition, the Hopkinsville police called Smalls to notify her of the students they had cited at Tweegs’ party. Based on these complaints, Smalls then viewed the photo at the FAD web page from her office computer. Upon viewing the photograph, Smalls called Towles, Conrad, Thompson, and Tweegs to her office for questioning about the party. When each student denied possessing drugs, Smalls conducted a search of their lockers and bags, per the school’s drug policy. The search revealed a bag of marijuana in Conrad’s locker. Thereafter, Smalls asked the four students to submit to a private search of their persons. All four students refused to consent to the search. Nonetheless, as allowed for under the Policy, the male gym teacher, Jim Waters, conducted a search of each student in a private room. Each student stripped down to their undergarments. Waters then searched their clothing only. At no time did Waters touch or search any student. These searches revealed marijuana in Thompson’s jean pocket. Waters found no drugs on the other three students.

Now aware of the photo on the FAD webpage, Towles created his own Friendkepedia web page titled “Students Against Defamatory Statements.” (SADS). Towles created and edited the SADS webpage from his home. Towles wrote the following on the SADS webpage:

“By taking unauthorized photographs of me during a Friday night out with my friends, and then posting inaccurate captions, DUDS, a school organization under the guise of FAD, committed a gross invasion of my privacy and defamed me in front of my friends and peers. What we do on our own time for fun is our

business. Horton Hopkins school officials committed a far worse injustice when they subjected my friends and me not only to an unreasonable search of our lockers, but also to strip searches. We need to fight this injustice. I call for all Horton Hopkins students to let our school administrators know that we will not tolerate this kind of treatment. Let's speak out against Smalls and the rest of these Hopkins idiots.”

After other Horton Hopkins students heard about Towles' webpage, they began accessing both his SADS page and Politte's FAD page. Students accessed these web pages not only from their home computers but also from school computers during and after school hours. As more students became enamored with the back-and-forth between the two web pages, Smalls realized the situation had reached disruptive levels. Smalls asked that Politte and Towles take down their respective web pages. Politte and Towles both refused to do so. Smalls then suspended both students until they agreed to take down their web pages.

Admittedly, Smalls was upset by Towles' criticism of her actions in addressing the drug problems at Horton Hopkins. However, her reason for requesting that Politte and Towles take down their web pages was to maintain discipline among the other students and to prevent the potential student protest. Smalls stated the websites were causing too much of a disturbance at school and were interrupting the education of other high school students.

## **II. PROCEDURAL HISTORY**

On October 15, 2008, Politte and Towles, along with their parents, filed this law suit in Badger County District Court, naming Horton Hopkins and Smalls as defendants. They sought injunctive relief pursuant to 42 U.S.C. §1983. Both Politte and Towles alleged that Horton Hopkins violated their First and Fourteenth Amendment rights when the school suspended them

for their refusal to take down their respective web pages. In addition, Towles alleged Horton Hopkins violated his Fourth and Fourteenth Amendment rights when it conducted a warrantless search of his backpack, wallet, and person. Following discovery, Horton Hopkins and Smalls moved for summary judgment on both counts. The Badger County District Court granted their motion for summary judgment on both counts. Both Politte and Towles appealed the judgment to the State of Grace Court of Appeals.

The appellate court upheld the trial court's grant of summary judgment on both counts. The appellate court held that Horton Hopkins had not violated either students' First Amendment rights when it suspended them for refusing to take down their web pages. In addition, the appellate court held that while the search of Towles was unreasonable, Horton Hopkins was entitled to qualified immunity with respect to his Fourth Amendment claim.

Petitioners subsequently appealed the decision to this Court, the Supreme Court of the State of Grace. This Court granted certiorari on January 26, 2009. This appeal now follows.

## SUMMARY OF THE ARGUMENT

### **I. PROPOSITION OF LAW NUMBER ONE**

HORTON HOPKINS DID NOT VIOLATE THE STUDENTS' FIRST AMENDMENT RIGHTS WHEN IT SUSPENDED THEM FOR REFUSING TO TAKE DOWN THEIR WEB PAGES BECAUSE THE SITES CAUSED SUBSTANTIAL DISRUPTION TO SCHOOL ENVIRONMENT.

- A. Federal courts have held that schools have the authority to regulate off-campus student speech when it is reasonably foreseeable that the speech will cause material and substantial disruption to the operation of the school and its students.
- B. The cases cited in the appellate court's dissenting opinion only strengthen Horton Hopkins' position because those cases follow the same "material and substantial" disruption analysis that *Doninger* set forth.
- C. Politte's off-campus web postings caused a material and substantial disruption to the Horton Hopkins environment and its students.
- D. Towles' off-campus web postings caused a material, and substantial disruption to the Horton Hopkins environment and its students.

### **II. PROPOSITION OF LAW NUMBER TWO**

HORTON HOPKINS DID NOT VIOLATE THE STUDENTS' FOURTH AMENDMENT RIGHTS WHEN IT SEARCHED PETITIONER BECAUSE THE SCHOOL OFFICIAL ACTED UPON A REASONABLE SUSPICION.

- A. Federal courts have routinely held that a search may properly be conducted on the grounds of "reasonable suspicion" especially when performed in a school setting.

B. Even if the search was improper under the Fourth Amendment, Horton Hopkins's actions are protected under the doctrine of Qualified Immunity

## ARGUMENT

### I. STANDARD OF REVIEW

*De novo* is the proper standard of review for a grant of summary judgment pursuant to Fed. R. Civ. P. 56(c). *Pluet v. Frazier*, 355 F.3d 381, 383 (5th Cir. 2004).

### II. FIRST PROPOSITION OF LAW

HORTON HOPKINS DID NOT VIOLATE THE STUDENTS' FIRST AMENDMENT RIGHTS WHEN IT SUSPENDED THEM FOR REFUSING TO TAKE DOWN THEIR WEB PAGES BECAUSE THE SITES CAUSED SUBSTANTIAL DISRUPTION TO THE SCHOOL ENVIRONMENT.

This case involves a student's right to speak on matters important to him. This case involves the right of a school district to maintain a prosperous and effective learning environment. These two interests often come in conflict, as they did on the Horton Hopkins campus.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I. It is axiomatic that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gates." *Tinker v. De Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). However, it is equally fundamental that a public school may regulate on-campus student speech that materially and substantially disrupts the proper functioning of the school or impinges upon the rights of the students. *Id.* This case presents a slightly different issue though because the speech here took place outside of these proverbial schoolhouse gates. The United States Supreme Court has not specifically ruled on the authority of school officials to discipline a student for his off campus speech. However, it is well settled among the lower federal courts that *Tinker's* "material and substantial" disruption

test applies just as readily to off-campus student speech. *See, e.g., Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008); *Wisniewski v. Bd. of Educ. of Weedsport Central Sch. Dist.*, 494 F.3d 34, 39 (2d Cir. 2007); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 412 F.Supp.2d 502, 508 (W.D. Pa. 2006); *Buessink v. Woodland R-IV Sch. Dist.*, 30 F.Supp.2d 1175, 1180 (E.D. Mo. 1998). Thus the constitutionality of off-campus student speech hinges on whether it is reasonably foreseeable that the speech will materially and substantially disrupt the operation of the school or the rights of its students. *See, e.g., Buessink*, 30 F.Supp.2d at 1180 (granting a preliminary injunction in favor of the student because the school failed to show that the student’s off-campus internet postings that criticized the school had materially and substantially interfered with the operation of the school).

Thus, this Court’s focus must be on the effect the speech had on the school environment, not on where the speech originated from. Accordingly the record in this case requires this Court to affirm the grant of summary judgment on the First Amendment claim because both web pages did in fact cause a material and substantial disruption to Horton Hopkins and its students.

- A. Federal courts have held that schools have the authority to regulate off-campus student speech when it is reasonably foreseeable that the speech will cause material and substantial disruption to the operation of the school and its students.

The case of *Doninger v. Niehoff* presents facts that are similar to this case and it should guide this Court’s decision. 527 F.3d at 48-52. In *Doninger*, members of the student council had a dispute with school officials regarding the scheduling of “Jamfest”, a battle-of-the-bands event. After reaching an impasse about the scheduling of Jamfest, one student council member, Avery Doninger, wrote a blog post on her private LiveJournal.com account. The post was critical of the school’s actions regarding Jamfest. The post referred to school officials as

“douchebags” and encouraged its readers to call the school in protest or simply to “piss [the principal] off more.” *Id.* at 45. Subsequently, community members and students called and emailed the school to protest the Jamfest controversy. Prior to these phone calls, the school principal had been unaware of Avery’s online blog posting. After the principal reviewed Avery’s blog post, she prohibited her from running for senior class secretary because Avery had not exhibited the character of such an office holder. Avery then brought suit alleging the school violated her First Amendment right to free speech by prohibiting her from running for class secretary.

The case proceeded to the Second Circuit in 2008. The court held that Avery’s off-campus blog post created a foreseeable risk of substantial disruption to the work and discipline of the school, a disruption that justified the school’s disciplinary action. *Id.* at 53. Relying on *Tinker*, the Second Circuit stated that a school may discipline a student for off-campus expressive conduct that “would foreseeably create a substantial risk disruption within the school environment.” *Id.* at 48. In reaching its conclusion that Avery’s blog post would foreseeably reach school grounds, the court highlighted various facts that supported its decision. First, Avery purposely designed the site to reach school grounds; second, the blog post directly concerned events at the high school; third, her intent was to encourage students to complain to school officials; fourth, the blog post did in fact come to the attention of school officials. *Id.* at 51. In addition, the court focused on three factors in holding that the post created a foreseeable risk of substantial disruption to the school environment. First, the language of the post was offensive and disruptive of efforts to settle the Jamfest dispute; second, the information in the blog post was inaccurate; third, school officials had to take students out of class to quell the growing dispute. *Id.*

In a Second Circuit decision from 2007, the court reached the same result when faced with another case of off-campus student speech. *Wisniewski*, 494 F.3d at 39. In *Wisniewski*, an eighth grade student, Aaron Wisniewski, created an AOL Instant Messenger buddy icon that depicted a gun firing a bullet at a person's head. Below the person's head appeared the words "Kill Mr. Vander-Molen." Vander-Molen was Aaron's current English teacher. Aaron had created the icon at his home computer and never sent the icon to a school computer. However, many of Aaron's classmates saw the icon in the course of their instant message conversations with Aaron. Subsequently, one of Aaron's classmates informed Vander-Molen of the picture and provided him with a copy of the image. The icon upset Vander-Molen and he brought the picture to the attention of the school officials. The school promptly suspended Aaron for five days. The school later lengthened this suspension to a full semester after a hearing officer determined the icon constituted a threat to a teacher. Aaron appealed the suspension, citing a violation of his First Amendment right to free speech. The Second Circuit disagreed with Aaron's arguments.

The *Wisniewski* court stated that *Tinker's* "material and substantial" disruption standard readily applied to off-campus student speech because "off-campus conduct can create a foreseeable risk of substantial disruption within a school." *Wisniewski*, 494 F.3d at 39 (citing *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1052 n. 17 (2d Cir. 1979)). The Second Circuit held it was reasonably foreseeable that Aaron's buddy icon would come to the attention of Vander-Molen and other school officials. *Wisniewski*, 494 F.3d at 39. The court held that when the image did in fact make its way to the school campus, the disturbing imagery and caption caused a substantial disruption to Vander-Molen's personal safety. *Id.* at 39-40. Thus, the court upheld the grant of summary judgment and dismissed Aaron's First Amendment claim. *Id.* at 40.

The Second Circuit is not the only court to hold that school officials may discipline a student for his off-campus speech when it is reasonably foreseeable that such speech will cause a material and substantial disruption to the school environment. *See, e.g., Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield*, 134 F.3d 821, 827 (7th Cir. 1998) (denying student’s motion for preliminary injunction because the school was likely to show that the off-campus article detailing how to hack into school computers would likely cause a substantial disruption to school operations); *Mahaffey ex. rel. Mahaffey v. Aldrich*, 236 F.Supp.2d 779, 784-85 (E.D. Mich. 2002) (holding that school violated student’s First Amendment right because it failed to show that the contents of a student’s personal web page substantially interfered with the operation of the school); *Fenton v. Stear*, 423 F.Supp. 767, 771 (W.D. Pa. 1976) (holding school did not violate student’s First Amendment rights when it disciplined him for insulting a teacher off campus); *J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 422 (Pa. Commw. Ct. 2000) (following the same “material and substantial disruption” test on the issue of off-campus student speech).

B. The cases cited in the appellate court’s dissenting opinion only strengthen Horton Hopkins’ position because those cases follow the same “material and substantial” disruption analysis that *Doninger* set forth.

Petitioners are likely to point to decisions where courts held that school officials violated a student’s First Amendment rights by disciplining him for his off-campus speech. *See, e.g., Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1048-050 (2d Cir. 1979) (holding school officials violated students’ rights when they suspended students for the content of their off-campus newspaper). In fact, Judge Evans relied on *Thomas*, in his dissenting opinion at the appellate level below. *See Politte v. Horton Hopkins Sch. Dist.*, Case No. 254 (Grace Ct. App. 2009)

(Evans, J., dissenting). However any argument that such cases support the students' position are misleading because those courts followed the "material and substantial disruption" test but simply found that the school had not met its burden on that issue. *See, e.g., Thomas*, 607 F.2d. at 1050 (noting the students labored to keep their newspaper away from the school and thus, any activity affecting the school environment was minimal). Furthermore, even if this Court determines that *Thomas* does support the petitioners' position, the recent Second Circuit decisions of *Wisniewski* in 2007 and *Doninger* in 2008 are more authoritative and indicative of that court's current reasoning. However an accurate reading of the cases cited by Judge Evans, and other similar cases, highlights that federal courts are clear on the rule for off-campus student speech cases: the school may regulate off-campus student speech that foreseeably will cause a material and substantial disruption to the school environment. *See, e.g., Thomas*, 607 F.2d at 1050.

In another off-campus student speech case, *Beussink v. Woodland R-IV Sch. Dist.*, 30 F.Supp.2d 1175, 1180 (E.D. Mo. 1980), the district court held that a school board wrongfully disciplined a student for the contents of his personal web page. Again though, this case only strengthens Horton Hopkins' position because it held that a school may discipline a student for off-campus speech that is likely to cause material and substantial disruption to the school environment. *Id.* In *Beussink*, the student created a web page that criticized his school officials. The student created this web page from his home computer. Much like the web page in *Doninger*, the student's site encouraged its readers to call the school and voice their complaints about school policy. When a teacher discovered the web site, she alerted the principal. The principal then immediately suspended the student because the contents of the site personally upset her. *Id.* at 1178. The principal provided no other legitimate reason for suspending the

student. *Id.* The court held that the suspension violated the student's First Amendment rights because the school failed to provide any evidence of a material and substantial disruption as a result of the students' speech. *Id.* The court noted that the principal's mere disdain for the contents of the web page was not enough to constitute a material and substantial disruption of the school environment. *Id.* at 1180. Thus, the outcome of *Beussink* hinged on a factual determination, not the legal standard the court applied. *See id.*

The same can be said for the case of *Emmett v. Kent Sch. Dist. No. 415*, 92 F.Supp.2d 1088, 1090 (W.D. Wash. 2000). In a short opinion, the district court held that the student's private webpage was not grounds for school discipline because the school board provided no evidence that the contents of the site disrupted any student's education. *Id.* The mock obituaries posted on the site were well understood by students and faculty to be a parody because the students recently had written their own obituaries for their English composition class. *Id.* at 1090. Given that the student body understood the context of the site's mock obituaries, the school failed to show a substantial disruption to the school environment. *Id.*

Thus, these cases finding in favor of the student on matters of off-campus speech actually support Horton Hopkins's legal position because the applicable rule in those cases is the same as it was in *Doninger*, *Wisniewski*, and *Fenton*, all cases that found in favor of the school. When a school shows that a student's off-campus speech constitutes a foreseeable, material and substantial threat to the school environment, the school is justified to discipline that student. *Doninger*, 527 F.3d at 48. The differing outcome among the cases cited above are due to factual and evidentiary differences, not the legal standard the various courts used. In light of this case law, the record in this case mandates a single conclusion: both Politte's and Towles' web pages

created a foreseeable (and actual), material and substantial disruption to the Horton Hopkins school environment. Therefore, Horton Hopkins' disciplinary actions were constitutional.

C. Politte's off-campus web page caused a material and substantial disruption to the Horton Hopkins school environment and its students.

Applying the *Doninger* analysis to this case, it was foreseeable that Politte's web page were likely to reach the Horton Hopkins campus. *See* 527 F.3d at 51 (discussing what facts constitute a material and substantial disruption). Once at Horton Hopkins, Politte's web page was likely to cause material and substantial disruption to the school environment because it accused students of dealing drugs. In fact, Politte's web page did cause such a disruption. Thus, Horton Hopkins was justified in suspending Politte for her disruptive off-campus speech.

Specifically, Politte advertised her FAD web page at a school organizational meeting on the Horton Hopkins campus, and all members of that school organization subsequently joined the FAD network. Thus, Politte knew that Horton Hopkins students would be following the content of her web page. In addition, the purpose of Politte's web page was to combat the drug problems facing the students of Horton Hopkins. Thus, the FAD web site directly addressed an issue that was critical to the students of Horton Hopkins. Furthermore, the contents of the FAD website reached school administrators because Smalls accessed the page from her office computer in order to view the image from Tweegs' party. In *Doninger*, factors such as these supported the finding that off-campus student speech had directly impacted the school. 527 F.3d at 51. The facts of this case require this Court to reach a similar conclusion.

Given that Politte's postings at her FAD page reached the Horton Hopkins' campus, the record also supports the conclusion that her postings created a substantial disruption to the school environment. Unlike in *Doninger*, Politte did not use vulgar or insulting language on her web

page. However, she did post inaccurate and misleading information by stating that the pictured persons were using illegal drugs when in fact the photograph did not show anyone using illegal drugs. In *Doninger*, the Second Circuit stated that posting false information regarding a school issue creates a foreseeable, material, and substantial disruption to the school environment. *Id.* Furthermore, it was foreseeable that falsely accusing a student of using drugs would disrupt that student's school environment because illegal drug use carried severe consequences to Horton Hopkins students. In addition, the caption inferred that the students in the photo were drug dealers, even though the photo showed only one person consuming a cigarette of some sort. It goes without saying that our society places a greater stigma on selling drugs as compared to simply consuming them. Politte's unsupported accusation that the pictured students were drug dealers could have severe ramifications for their reputations, e.g., Horton Hopkins may decide to keep Towles and Tweegs off the baseball team.

Turning to the third factor the *Doninger* court cited as evidence of a substantial disruption, Politte's accusations that Conrad, Thompson, and Towles were smoking illegal drugs in the photograph is what led to the numerous phone calls to Smalls about the school's growing drug problem. These complaints alerted Smalls to the photograph and led her to take Towles, Conrad, Thompson, and Tweegs out of their classes, thereby substantially disrupting their school day. The Second Circuit noted that pulling students out of class evidences a substantial disruption to their school day. *Id.* The disruption emanating from Politte's postings only grew more severe as Smalls ordered a search of the four students, undoubtedly a substantial disruption to their school day. This type of disruption takes students and faculty alike away from their normal educational roles, and was the basis for the Second Circuit's holding in *Doninger*, 527 F.3d at 51. Finally, Politte's posting of the photograph had another noteworthy and disruptive

effect on Horton Hopkins because it lead Towles to create his own web page to protest the school's actions regarding the drug debate.

D. Towles' off-campus web postings caused a material, and substantial disruption to the Horton Hopkins environment.

Towles' web postings are even more similar to the facts of *Doninger* and thus his web page also caused a substantial disruption to the Horton Hopkins environment. Towles explicitly accused the school-sponsored group, DUDS, of being behind the postings at the FAD web page. Openly accusing a school organization of posting false information will likely elicit a confrontational response from its student members. Such confrontation between students will only take time away from their education and take time away from the school officials who will inevitably have to dispel the dispute. In addition, just as the student in *Doninger* encouraged readers to call the school in protest, *id.* at 45, Towles called for a similar protest of Horton Hopkins' actions. Although the record is unclear as to whether anyone made such protesting calls, it is reasonably foreseeable that such complaints would be made as a result of Towles' posting because of the inflammatory language in his postings. Again, this incitement of protest is exactly the type of behavior that the *Doninger* court held to constitute a foreseeable, substantial disruption to the school environment. 527 F.3d at 51. This court need not find that Towles' web site caused an actual disruption to the Horton Hopkins' environment, although the record shows that his web page did cause such a disruption. The federal case law cited in this brief is clear in that a school has to show only a reasonably foreseeable material and substantial disruption, not actual disruption. *See, e.g., id.* at 53 (citing *Tinker*, 393 U.S. at 506); *Wisniewski*, 494 F.3d at 39.

Furthermore, Towles insulted school officials by calling them “idiots”, just as the student in *Doninger* insulted her school officials by calling them “douchebags.” *Doninger*, 527 F.3d at 45. Any difference in the severity of these terms is one of immaterial degree, and it does not diminish the insulting nature of Towles’ statement. While such insults admittedly hurt Smalls on a personal level, unlike in *Beussink*, 30 F.Supp.2d at 1180, where the principal suspended the student purely out of personal animus, Smalls requested that Politte and Towles take down their website because of the disruption the sites were causing to the school environment.

In conclusion, the legal standard on this question of off-campus student speech is clear: A school board may discipline a student for his off-campus speech by showing it is reasonably foreseeable that the speech will cause a material and substantial disruption to the school environment or the rights of the students. *Doninger*, 527 F.3d at 53. The record in this case shows that both Politte’s and Towles’ off-campus websites foreseeably, and in fact did cause material and substantial disruption to the Horton Hopkins campus and its students. Therefore this court must affirm the grant of summary judgment on the first assignment of error.

### **III. SECOND PROPOSITION OF LAW**

HORTON HOPKINS DID NOT VIOLATE THE STUDENTS’ FOURTH AMENDMENT RIGHTS WHEN IT SEARCHED TOWLES BECAUSE THE SCHOOL ACTED UPON A REASONABLE SUSPICION.

There exists a need to balance the student’s right to privacy, and the school’s right to maintain order and provide an environment conducive to learning. The Supreme Court stated it is a realism that students “within the school environment have a lesser expectation of privacy than members of the population generally.” *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985) (Powell, J., concurring). Justice Powell noted that students spend hours together both in and out

of the classroom. *Id.* Thus, students know each other, and their teachers, quite well. *Id.* Justice Powell adds that “teachers have a degree of familiarity with, and authority over, their students that is unparalleled except perhaps in the relationship between parent and child. It is simply unrealistic to think that students have the same subjective expectation of privacy as the population generally.” *Id.*

A. Federal courts have routinely held that a search may properly be conducted on the grounds of “reasonable suspicion,” especially when performed in a school setting.

In *T.L.O.*, the court held that a search based on reasonable suspicion that a crime had been committed is permissive. 469 U.S. 325. The student, T.L.O., was found smoking in the bathroom, but denied doing so. *Id.* at 327. She was taken to the Vice Principal’s office, where she was questioned, and her purse was searched. *Id.* The school official discovered cigarettes, marijuana, and evidence that T.L.O. was selling drugs. *Id.* The school subsequently suspended the student. *Id.* at 329-30.

The Supreme Court stated that “it is evident that school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject.” *Id.* at 340. Justice White, delivering the opinion, noted that “the warrant requirement . . . is unsuited to the school environment [and that] requiring a teacher to obtain [one] . . . would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in schools.” *Id.* The court wrote that “the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.” *Id.* at 341.

Horton Hopkins has in its Policy that the school reserves the right to conduct personal searches of students when “drug use or possession is suspected on school property.” See Appendix A, *infra*. Students are also on notice as the Policy states that the school has the right to

conduct a search even without the consent of the student. Cases such as *T.L.O.*, *Vernonia Sch. Dist v. Acton*, 515 U.S. 646 (1995), and *Board of Educ. v. Earls*, 536 U.S. 822 (2002), support Horton Hopkins' drug policy.

Towles argues that there was insufficient evidence and an insufficient basis for the school to strip search him. However, the *T.L.O.* court, quoting *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 560-561 (1976), held that while "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure . . . the Fourth Amendment imposes no irreducible requirement of suspicion." *T.L.O.*, 469 U.S. at 341. Accordingly, school officials are generally "justified at [the] inception" when reasonable suspicion exists that "the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.* Thus, the search was valid as Horton Hopkins's actions were proper. Horton Hopkins acted due to the posted photograph, police tip, and the fact that drugs were found in one of the boys' lockers. Any one of those events gives rise to reasonable suspicion.

The Supreme Court has long held that "students conform themselves to the standard of conduct prescribed by school authorities . . . [because of] the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *T.L.O.*, 469 U.S. at 342. Additionally, "courts should . . . defer to that judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not." *Id.* Students might feel outraged at the school for conducting a search without a warrant, or the students' consent. However, such actions are valid if the threshold of reasonable suspicion is met, as it is in the case at hand.

Even for situations outside schools, where generally individuals are afforded more rights, the Court allows for warrantless search conducted on reasonable grounds due to special needs. *Griffin v. Wisconsin*, 483 U.S. 868, 872-74 (1987). In *Griffin*, the court allowed a warrantless search of a probationer's home, as obtaining a warrant or requiring probable cause would "unduly disrupt" the probation regime. 483 U.S. at 878. The Wisconsin statute allowed for reasonable suspicion as being a sufficient reason to search the probationer's home. *Id.* at 880. The Supreme Court held as constitutional a search based on information from a detective of the local police department that the probationer had a weapon, because the tip constituted "reasonable grounds" for the warrantless search. *Id.* at 872-73. The court has held that "government investigators conducting searches pursuant to a regulatory scheme need not adhere to the usual warrant or probable-cause requirements as long as their searches meet 'reasonable legislative or administrative standards.'" *Id.* at 873 (quoting *Camara v. Municipal Court*, 387 U.S. 523 (1967)); *see also T.L.O.*, *supra*. Aside from the additional control the school environment gives officials, the special need of discovering and preventing distribution of drugs allows for the lesser requirement of reasonable suspicion as opposed to probable cause. Accordingly, Horton Hopkins acted permissibly in searching Towles.

The Supreme Court pointed out in *Skinner v. Railway Labor Executives' Assoc.* that the "Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable." 489 U.S. 602, 619 (1989) (quoting *U.S. v. Sharpe*, 470 U.S. 675, 682 (1985)). The *Skinner* case allowed the Railway Labor Executives' Association to perform drug tests on any employee involved in an accident while on duty. *Skinner*, 470 U.S. at 633-34. The court allowed for both urine and blood tests, stating those were constitutional searches, and necessary for the safety of the public and to discourage drug use. *Id.* at 632. The court stated that the

employer was not trained in the process of obtaining a warrant, and forcing them to do so would be unreasonable. *Skinner*, 489 U.S. at 623-24. The court extended that provision to schoolteachers and administrators as well. *Id.* Thus the interest of finding and preventing drug use outweighed the employee's privacy interests and rights. As students are afforded fewer rights than the general public, the search conducted by school officials was permissible.

The *Skinner* court also held that requiring a "particularized suspicion of drug or alcohol use would seriously impede [the] ability to obtain [information about drug use.]" *Id.* at 631. Accordingly, a school official not need be certain drugs will be found before conducting a search on a student. In *T.L.O.*, the court stated that evidence does not need to "conclusively prove the ultimate fact in issue, but only have 'any tendency to make the existence of any fact that is of consequence to the determination . . . more probable or less probable than it would be without the evidence.'" 469 U.S. at 345 (citing Fed. R. Evid. 401). Towles was known to associate with other students who did drugs, and more importantly the fact that one of his associates in fact had drugs in his possession more than legitimizes the search performed by Horton Hopkins. The Supreme Court has also considered if the administrative agency intends to deter and remove drug use, not merely try to find drugs and views such searches more favorably. *See, e.g., Skinner*, 489 U.S. at 632. Simply punishing students for breaking the law is not the school's purpose. Horton Hopkins's goal is to prevent drug use and foster a positive and productive learning environment.

In addition, the Supreme Court has upheld random searches of students as being constitutional a number of times, both for student athletes, and any students participating in competitive extracurricular activities. *Vernonia Sch. Dist v. Acton*, 515 U.S. 646 (1995); *Board of Educ. v. Earls*, 536 U.S. 822 (2002). In *Vernonia*, the Supreme Court upheld the searches a high school conducted, allowing for random drug tests on all student athletes throughout the

athletic season. *Id.* at 665. It follows that if conducting random drug tests is allowed in the interest of detecting and preventing drug use, then a targeted search based on tips would be allowed as well. Such practice is also supported by the *Griffon v. Wisconsin*, 483 U.S. 868, 868 (1987). Additionally, Horton Hopkins's interaction with Towles was minimally intrusive until drugs were found. While the official could simply have had the Petitioner empty his pockets, the nature of the search has no bearing. The court has never required that the least intrusive method for conducting searches. *T.L.O.*, 469 U.S. at 342. The court merely states that the "measures adopted [must be] reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* Attempting to find drugs on a student's person and having him strip is reasonable, and the school's interest in finding drugs outweighs the student's privacy interest. The fact that the school found no drugs in Towles' clothing no bearing on the reasonableness of the search because the only requisite requirement for the search is reasonable suspicion, which the official had.

Although students do not "shed their constitutional rights" upon entering school campuses, Fourth Amendment rights in public schools differ from other places. *Earls*, 536 U.S. at 829-30, quoting *Tinker*, 393 U.S. at 506, see also *Vernonia*, 515 U.S. at 656. In *Earls*, all students participating in competitive extracurricular activities were subject to random drug tests. 536 U.S. at 826. This included the students in choir, and on academic teams. *Id.* While the rationale behind testing athletes for drugs was personal safety, the court found that the school's interest in preventing drug use was sufficient to test students participating in non-athletic activities as well. *Id.* at 838. Furthermore, students routinely go through physical examinations in schools for health reasons, as well as vaccinations. *Vernonia*, 515 U.S. at 656. In both cases, the court upheld random searches as constitutional, and that such policies were "reasonable

means of furthering the . . . District’s important interest in preventing and deterring drug use among its schoolchildren.” *Earls*, 536 U.S. at 838. Here, the search occurred only once Horton Hopkins had reasonable suspicion that the students possessed drugs, and the school had the same interest of deterring drug use among its students.

The Supreme Court held in both *Vernonia* and in *Earls* that drug tests are insignificant when considered an invasion of student’s privacy. In both cases, bodily fluids are collected as part of the search. Taking something from a student (here a bodily fluid), might be considered a graver invasion of privacy than a private strip search where the school official does not touch the student and the student is allowed to retain some of his clothing. In *Earls*, the court stated that the government’s concerns in preventing the “nationwide epidemic of drug use” by schoolchildren is a major health and safety risk that must be addressed aggressively. 536 U.S. at 834-36.

Thus, the search Horton Hopkins conducted on Petitioner is constitutional, and supported by reasonable suspicion. The Supreme Court has upheld a strip search of a student where a teacher became suspicious of a student for being “too well endowed” and thought the student was “crotching” drugs. *Cornfield v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1319 (7th Cir. 1993). The school found no drugs on that student. *Id.* at 1319. In the case at hand, Horton Hopkins request that the students strip to their undergarments, only after drugs were found in one of their lockers.

The Supreme Court created a test for warrantless searches as a result of *Terry v. Ohio*. 392 U.S. 1 (1968). In *Terry*, a man was convicted for carrying a concealed weapon. The court declined to suppress the evidence, even though the arresting officer had neither a warrant or probable cause to search the defendant.. Nevertheless, the court upheld the search as being

constitutional because the officer had reasonable suspicion a crime was about to occur based on his experience. *Id.*

The first prong of the test is that the search must be “justified at its inception.” *Id.* at 20. A search of a student meets this test when the school has “reasonable grounds for suspicion that the search will turn up evidence that the student has violated or [is] violating either the law or the rules of the school.” *T.L.O.* 469 U.S. at 341-42. However, this does not allow school administrators to randomly search students. The administrator must believe that a particular rule has been violated. *Cornfield*, 991 F.2d at 1320. The second prong is that the “search must be permissible in scope: ‘[T]he measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.’” *Id.* (quoting *T.L.O.*, 469 U.S. at 341-42.). The third prong of the test is the severity of the school system’s needs that were met by the search. *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005), quoting *Vernonia*, 515 U.S. at 646.

Horton Hopkins meets the first prong because the school official believed that drugs would, or might be found on Petitioner’s person. The second prong in the test is also met because the administrator searched the boy’s lockers, and found drugs, which prompted the strip search. The third prong ties into the second prong, and due to the nature and gravity of drugs, conducting the strip search was necessary in order to find any drugs in the students’ possession. Accordingly, Horton Hopkins must be able to reasonable do what it must to preserve the academic atmosphere of schools.

Although strip searches to discover stolen money were found to be unconstitutional in *Beard*, the school was allowed to claim qualified immunity. 402 F.3d 598. Even aside from the issue of qualified immunity, *Beard* is materially distinct from this case. In *Beard*, the school did

not meet the third prong of the reasonable suspicion test because school officials were merely trying to recover money. Horton Hopkins, however, was dealing with drugs, and the court has allowed various types of searches to prevent the spread of drug use. In addition, in *Beard*, administrators required students to remove all their clothes. The Petitioner, however, was allowed to remain in his underwear. The difference between being fully nude in front of a school official and maintaining one's undergarments is immense and is not a fact this court should overlook.

Schools need to maintain order to ensure proper education of students can occur. Schools also have the responsibility of protecting students from mistreatment by other pupils, as well as protecting teachers from violence as well. *T.L.O.* 469 U.S. at 350. The Supreme Court's opinion on this matter of student searches reflect a deference to each school's custodial responsibility and authority. *Earls*, 536 U.S. at 831. Thus, it is evident that there is clear precedent that this search conducted by Horton Hopkins is constitutionally protected under the Fourth Amendment. Horton Hopkins did not need a warrant or probable cause because it acted under reasonable suspicion when searching Petitioner.

B. Even if the search was improper under the Fourth Amendment, Horton Hopkins's actions are protected under the doctrine of Qualified Immunity

The doctrine of qualified immunity protects government officials who perform discretionary functions from civil liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Beard*, 402 F.3d at 602 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). In *Beard*, the Court used a three part test to determine whether or not a government actor is protected under the doctrine.

First, we determine whether, based upon the applicable law, the facts viewed in the light most favorable to the plaintiffs showed that a constitutional violation had occurred. Second, we consider whether the violation involved a clearly established constitutional right of which a reasonable person would have known. Third, we determine whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in the light of the clearly established constitutional rights.

*Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 901 (6th Cir. 2004) (quoting *Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir. 2003)).

Towles cannot pass the first prong of the test, as numerous other searches imposed on students by school have been upheld, even a strip searched based on no more than the suspicion that a student was “crotching.” *Cornfield*, 991 F.2d 1316. Accordingly, even with the facts viewed in the light most favorable to the Towles, Horton Hopkins did not commit a constitutional violation. Thus, there is no reason to analyze the second or third prongs.

However, even if such a violation is found, Horton Hopkins is still protected under the doctrine of qualified immunity. Although Respondent maintains that there was no violation, as searching the students was not a clear violation of an established constitutional right which a reasonable person would have known. Nevertheless, if the court contends that a violation occurred, Petitioner does not meet the second prong. The Supreme Court has upheld a number of school searches as being constitutional. As a result, it is uncertain whether or not a clear constitutional right exists, and whether or not a reasonable person would have known conducting

the search was a clear violation. Lastly, the Petitioner had not offered sufficient evidence that what the official did was objectively unreasonable in the light of clearly established constitutional rights. Schools have an interest in preventing student drug use, and employing necessary means in order to find drugs, including strip searches, are not objectively unreasonable.

In *Williams v. Ellington*, the court did not find a strip search conducted on a student was unconstitutional as a matter of law. 936 F.2d 881, 883 (6th Cir. 1991). In *Williams*, the student was suspected not only of drug use, but having drugs on her person. Her locker was searched, as well as her books and purse. *Id.* at 883. All of those searched produced “no evidence of drugs.” *Id.* Nevertheless, the assistant principal asked Williams to remove her T-shirt, lower her blue jeans, and even had the elastic of her undergarments pulled “to see if anything would fall out.” *Id.* The school had a policy that stated “a pupil’s person will not be searched unless there is a reasonable suspicion that the pupil is concealing evidence of an illegal act.” *Id.* On appeal, the court only looked at the issue of qualified immunity, and held that the search was “performed in accordance with [the] constitutionally valid strip search policy” and was protected under the doctrine. *Id.* at 884. Respondent’s Policy is quite similar, and as a result, not only did Horton Hopkins act constitutionally, but it can avail itself of qualified immunity.

Accordingly, even if the court does not allow for the search being constitutional under the Fourth Amendment, at the time of the search, such conduct was allowed. There exists a considerable amount of case law that allowed for similar searches conducted by schools at the time Horton Hopkins officials conducted the searches. There is no clear rule that states searching students is a violation of a clearly established constitutional right. In fact, the court has held multiple times that searches conducted by school officials were reasonable, regardless of

whether or not drugs were found. Thus, Horton Hopkins is entitled to the doctrine of qualified immunity.

## CONCLUSION

Case law from the lower federal courts is clear in that a school may discipline a student for his off-campus speech when it is reasonably foreseeable that the speech will cause a material and substantial disruption to the school environment. Thus, the issue in these off-campus student speech cases is not where the speech originated from but what effect that speech had on the school environment. If a school can show that the off-campus speech had a substantial disruption on the school environment, then it may discipline the student without violating his First Amendment right. The record and the arguments in this brief show that both Politte's and Towles' web sites caused material and substantial disruption to the Horton Hopkins environment. Thus, this Court must affirm the district court's grant of summary judgment.

There exists clear precedence that schools may impose searches on students, even absent probable cause, when the interest is to deter drug use and ensure the academic quality of the school environment. As a result, the school acted properly in conducting searches of students suspected of possessing drugs. Horton Hopkins met all the requisite tests that allowed for such a search and its interest in eliminating drugs from the academic era outweighs the students' privacy interests. However, even if the searches are found to be unconstitutional, the school is protected under the doctrine of qualified immunity. Privacy rights of students while on campus are not constitutionally clear, and the arguments presented show for numerous federal cases where similar searches were upheld as being constitutionally allowed. As a result, this court must affirm the district court's grant of summary judgment.

Respectfully submitted  
**Team No. 24**

## APPENDIX A

### Horton Hopkins School District DRUG AND ALCOHOL USE POLICY

Horton Hopkins School District recognizes that the illegal use of alcohol and drugs is unacceptable and that the problems associated with it pose a significant threat to our school community and to society in general. The District further understands that the use of chemical substances can have a profound impact on the student's own education, as well as other students' educational opportunities. The District therefore takes the following steps to maintain a drug-free school system.

#### Suspicion of Drug Use or Drug Possession

When drug use or possession is suspected on school property, the District reserves the right to conduct personal searches of students, as well as searches of lockers, desks, other school property, and book bags and other personal containers. The District will request consent before beginning a search, however, the school may continue with a search even if the student refuses to give consent. The District may also conduct drug testing by urinalysis on an as-needed basis. The District will balance the likelihood the student possesses drugs against the risk of infringing the student's individual rights.

##### a) Personal Search

The District may contact a student's parent or legal guardian before commencing a personal search, but this is not mandatory. The District may judge if parental involvement is necessary on a case-by-case basis. A faculty member of the same gender as the student will conduct the personal search.

##### b) Consequences

###### 1. Illegal drugs

In cases where students are found in possession or under the influence of illegal drugs, the school may contact police, and must contact the student's parent or legal guardian. Discipline will be decided on a case-by-case basis,

but the offending student will receive a suspension of no less than three days.

###### 2. Alcohol or tobacco

A parent or guardian will be notified in cases where a student is found in possession or under the influence of alcohol or tobacco. The District will dispose of all alcohol or tobacco, and notify the parent or guardian of the disposal.

###### 3. Extra-curricular activities

Students in violation of this policy will be banned from all athletic and other extra-curricular activities for the remainder of the school year.