

# CLIENT NEWS BRIEF

## School's Discipline of Student for Off-Campus Sexual Harassment Proper under First Amendment

In *C.R. v. Eugene School District 4J* (9th Cir., Sept. 1, 2016) \_\_ F.3d\_\_ [2016 U.S.App. LEXIS 16202], the Ninth Circuit Court of Appeals considered an issue of first impression: Whether a school may discipline a student for off-campus sexual harassment without violating the student's First Amendment free speech rights. Based on the facts, the Ninth Circuit held that disciplining a student for off-campus sexual harassment of fellow students did not violate the student's free speech rights.

To date, judicial opinions considering issues at the intersection of off-campus conduct and student free speech rights have centered on electronic communications and student expression on the Internet and social media outlets. In *C.R.*, the student's speech occurred in person, as school was letting out, and only a few hundred feet from the school's property line. Following an investigation, the student was issued a two day out-of-school suspension for his sexually suggestive joking directed at two younger students walking home from school. The student subsequently challenged the suspension on First Amendment and due process grounds.

The Ninth Circuit has previously held that not all off-campus speech is beyond the reach of school officials. In *Wynar v. Douglas County Sch. Dist.* (9th Cir. 2013) 728 F.3d 1062, 1068, the Ninth Circuit identified two tests used by other circuit courts to determine when a school may regulate off-campus speech. The first is a nexus test, which requires asking whether a student's off-campus speech was tied closely enough to the school to permit school officials to regulate it. The second test requires determining whether it was reasonably foreseeable that the off-campus speech would reach the school.

If the off-campus speech meets the nexus and foreseeability requirements, the standards offered by the United States Supreme Court in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* (1969) 393 U.S. 503 are applied to evaluate the constitutionality of the school's imposition of the discipline and/or regulation of student expression. Under *Tinker*, schools are permitted to restrict student speech if the speech might reasonably lead school authorities to forecast substantial disruption of or material interference with school activities, or alternatively, if the speech collides with the rights of other students to be secure and to be let alone. (*Id.*, at pp. 508, 514.)

In the current case, the school's actions met the nexus requirement because although the sexual harassment took place off school property, it had a close relationship to the school. In reaching this conclusion, the court noted that all individuals involved were students at the school, had been let out minutes before the incident occurred and the incident took place only a few hundred feet from the school door in a park that shared a boundary with school property. The school also met the foreseeability test because the incident occurred within close proximity of the school, and administrators could reasonably expect that the harassed students may be distracted during school hours by the prospect of impending harassment.

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Applying *Tinker*, sexual harassment implicates the rights of students to be secure, because it threatens the students' sense of physical, emotional and psychological security. Even if sexual harassment is only verbal, the threat of unwanted physical intrusion is implicit. Here, the offending student's speech interfered with the younger students' rights to be secure and let alone, and thus the discipline applied was permissible under *Tinker*.

The Ninth Circuit court also rejected the plaintiff student's procedural and substantive due process claims. When a student is suspended for 10 days or fewer, the Constitution only requires informal procedural due process. In *C.R.*, the student received informal notice of the charges and was provided a chance to tell his side of his story, as required. While the student argued that the school did not provide him with sufficient notice as to the specific nature of the allegations, the Constitution did not require the school to inform the student of the specific rules violated.

The student in *C.R.* also claimed that his school violated his substantive due process rights by recording the reason for his suspension as "harassment – sexual." The student argued that the stigma from such a label was so strong that it deprived him of his right to a good reputation. The appeals court held, however, that there are no due process rights to maintaining non-stigmatizing school disciplinary records.

While the *C.R.* opinion originates from Oregon, the court's First Amendment analysis would be the same in California, and under California's Education Code provisions regarding student discipline and student free speech rights there is no apparent reason that the same outcome would not result under state law.

For further information regarding the discipline of students for off-campus speech, or student free speech rights in general, please contact the authors of this Client News Brief or an attorney at one of our [10 offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#) or download our [Client News Brief App](#).

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