

Disciplining Students for E-Communications

Social networking sites like MySpace.com, Facebook.com, and YouTube.com are a part of the communication and socialization for students in California's schools. These "e-communications" also pose substantial challenges to school districts concerning student discipline.

Problematic student e-communications take the form of adolescent ridiculing, taunts, impersonations, harassment and threats of physical violence. The e-communications often originate off campus and outside of the school day, but are often accessible to anyone on the Internet.

School administrators receive complaints from students, parents and teachers that students' e-communications are negatively impacting the individual targets of the speech and disrupting the school environment. The targets demand that schools take disciplinary action against the student speakers.

School officials then face two precarious alternatives. They can do nothing and face public outcry for not taking the necessary steps to protect students and staff, or they can proceed to impose discipline against the student speaker at the risk of legal challenges for acting outside of their jurisdiction or violating the student's free speech rights.

While no published judicial decisions have resulted from a school's decision not to take disciplinary action against students under these circumstances, the past 10 years have produced a steady stream of case law regarding decisions to impose discipline. These decisions hinge on

upon whether disciplining students for speech originating off campus violates the student speaker's free speech rights.

With no U.S. Supreme Court decision on point, courts generally analyze the student speech question under the Supreme Court's *Tinker v. Des Moines Independent Community School District*, 369 U.S. 503 (1969), substantial disruption of school activities standard; the *Bethel School District v. Fraser*, 478 U.S. 675 (1986), lewd, vulgar, or plainly offensive standard or the true threats standard.

The speech question is often closely entangled with the separate issue of whether student discipline for off-campus speech is within the jurisdiction of schools in the first place.

With the growing prevalence of e-communications resulting in calls for student discipline, the California Legislature joined the mix in 2008, passing Assembly Bill 86, which made "cyberbullying" by "electronic act" a basis for student discipline under the Education Code effective Jan. 1, 2009. Notably, legislative commentators and opponents to AB 86 indicated it would be hard for school officials to implement the bill to the extent they cannot determine whether the electronic act (e-communication) occurred on school grounds, and that discipline under the bill may violate a student's free speech rights.

Recently, in *J.C. v. Beverly Hills Unified School District*, 08-03824 SVW (CW) (C.D. Cal. Nov. 16 & Dec. 9, 2009), the U.S. District Court for the Central District of California issued two separate orders significant to schools' discipline of students for e-communications and cyberbullying originating off of school grounds. Reviewing the constantly developing legal landscape on the issue of student discipline for e-communications, the court conducted one of the most comprehensive judicial analyses on this topic to date in California.

Plaintiff J.C., a middle school student in the Beverly Hills Unified School District, met with friends at a restaurant after school. At the restaurant, J.C. videotaped her friends making demeaning remarks about another student, C.C.'s friends commented in the video that C.C. was a "slut" and "spoiled," discussed sexual topics and used profane language.



SLOAN R. SIMMONS is an associate and Student Practice Group co-chair of the public agency law firm Lozano Smith. He has presented on the intersection of student free speech rights, electronic communications, and discipline to school districts throughout the state and before major education organizations.

That evening, on her home computer, J.C. posted the video on YouTube.com, where it was accessible to the public. J.C. told C.C. and various friends about the video. The video received 90 hits that night on YouTube.com.

The following day, C.C. and her mother came to school and complained to administrators. C.C. missed a portion of her first period class because she was humiliated and hurt but then returned to class. There was no evidence that any student viewed the video on school grounds. Based on the video, J.C. received a two-day suspension for violation of Education Code Section 48900(k) and related school discipline policies. Subdivision (k) of Section 48900 allows for discipline if a student "[d]isrupted school activities or otherwise willfully defied the valid authority of supervisors, teachers, administrators, school officials, or other school personnel engaged in the performance of their duties."

J.C. filed suit against the school district in federal court, alleging that the discipline imposed violated her free speech rights under the First

Amendment and her constitutional rights to due process, as well as related state's law claims. The parties ultimately each filed motions for summary judgment.

In the first of two orders, the J.C. court addressed the parties' summary judgment motions in the context of J.C.'s free speech rights. The court concluded first that, under proper circumstances, school districts can properly discipline students for speech originating off school grounds that is subsequently brought onto campus or to the attention of school officials. This is also the case where off-campus speech would foreseeably make its way onto campus.

Second, under *Tinker*, in such circumstances, discipline does not violate the student's speech rights if the speech caused substantial disruption to the educational environment or if it is reasonably foreseeable that it would do so.

The court identified examples of speech for which it is foreseeable that substantial disruption will result, including speech that is violent in nature or threatens harm to a specific individual. For foreseeable disruption, however, must be premised upon specific evidence and facts, not undifferentiated fear. The court also held that the *Fraser* standard that allows schools to discipline students for lewd, vulgar and plainly offensive speech generally does not apply to off-campus speech.

Under these principles, the court held that the school district violated J.C.'s free speech rights when it disciplined her, because substantial disruption did not result from the video on YouTube.com. One student's hurt feelings and embarrassment over another's off campus speech, without more, did not warrant school discipline. Nor did J.C.'s video result in any form of verbal or physical altercation, or have any effect on classroom activities.

The school administrators' investigation of the video and deliberation over whether to implement discipline is in itself insufficient to constitute disruption of the educational environment. And there were insufficient facts to reasonably foresee that substantial disruption would occur based on the video.

In a separate order, the court addressed the alleged violation of J.C.'s federal due process rights under the U.S. Constitution. J.C. alleged that her due process rights were violated because, as applied to her, neither Education Code Section 48900, subdivisions (k) or (s), nor the school district's student discipline policies, put her on notice that she could be disciplined for off-campus speech.

Education Code Section 48900(s), establishes the scope of a school's jurisdiction to institute student discipline, and generally provides that a student may only be disciplined for prohibited conduct where it relates to a school activity or attendance. Examples listed under the statute considered to be related to school activity or attendance include the more obvious, such as while on school grounds and while going to or coming from a school-sponsored activity.

J.C. premised her due process claims on the "void-for-vagueness" doctrine, under which a rule or regulation is unconstitutional if it does not give fair notice of its reach or the scope of its prohibitions. The court agreed with J.C. and found that the relevant Education Code provisions and the school district's student discipline policies did not put her on notice that she could be subject to discipline for off-campus speech and that, thus, were unconstitutionally vague.

The J.C. court's reasoning and analysis provides comprehensive guidance on the limit of school jurisdiction to discipline students for e-communications originating off campus without violating the students' free speech rights. Whether the legislature's recent amendment of the Education Code to add cyberbullying by electronic act as a basis for discipline puts students on notice that they could be subject to discipline for off campus speech is an issue left unresolved because the discipline in J.C. was imposed prior to the effective date of this amendment.

In the meantime, schools must consider whether their existing school policies and regulations sufficiently put students on notice of such potential disciplinary consequences for off-campus speech.

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