

CLIENT NEWS BRIEF

Ninth Circuit Finally Weighs in on Student Discipline for Off-Campus, Electronic Communications

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In a case with particular interest for school administrators addressing issues such as bullying and threats, a federal court has ruled that school officials can discipline students at school for off-campus electronic communications. In *Wynar v. Douglas County Sch. Dist.* (9th Cir. 2013) __ F.3d __, 2013 WL 4566354, the United States Ninth Circuit Court of Appeals has held that a student's violent and threatening off-campus, electronic speech was not protected by the First Amendment of the United States Constitution and could be a basis for school discipline. This opinion is the first Ninth Circuit appellate case to address the question of whether a school district may discipline students for off-campus, electronic communications and, if so, what student speech standard applies. Prior to *Wynar*, although federal district courts around the nation and other sister appellate circuit courts had addressed this issue, there was no authority from the Ninth Circuit providing guidance to California school districts on this issue.

Based on *Wynar*, school districts faced with a student's off-campus, electronic communications of a sufficiently violent or threatening nature, which are directed at the school, school employees and/or other students, may pursue disciplinary action against the student so long as the student speech standard under *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* (1969) 393 U.S. 503 is met. For all other off-campus speech, communicated electronically or otherwise, school districts should carefully analyze such speech on a case-by-case basis to determine whether or not the speech did, or was foreseeably likely to, cause a substantial disruption to the educational environment under *Tinker*.

The seminal student free speech case is *Tinker*, in which the United States Supreme Court held that students maintain their right to freedom of speech at school, and school officials are prohibited from disciplining them for otherwise protected speech so long as such expression does not cause a substantial disruption to the educational environment, or is reasonably forecast to cause such a disruption. This substantial disruption standard is often referred to as the *Tinker* standard. Subsequent Supreme Court precedent established that school districts may discipline students for speech that is "vulgar, lewd, obscene and plainly offensive speech" (*Bethel Sch. Dist. No. 403 v. Fraser* (1986) 478 U.S. 675), speech which undermines the legitimate pedagogical interests of the school in school-sponsored forums (*Hazelwood Sch. Dist. v. Kuhlmeier* (1988) 484 U.S. 260), and speech which promotes illegal drug use or other illegal activities (*Morse v. Frederick* (2007) 551 U.S. 393). These later cases, however, involved and apply only to student speech taking place *on campus or at school-sponsored activities*.

Before *Wynar*, the only published federal court case within California to address student discipline for off-campus expression was *J.C. v. Beverly Hills* (C.D. Cal. 2010) 711 F.Supp.2d 1094, in which the United States District Court for the Central District of California outlined the state of the law as generally allowing school districts to discipline students for off-campus, electronic speech only if: (1) the speech is subsequently brought onto school campus, brought to the attention of the school officials, or could foreseeably make its way onto campus; and (2) the speech caused substantial disruption to the educational environment or it was



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reasonably foreseeable that such a disruption would occur. Such disruption or foreseeable disruption, however, had to be based on specific facts and not undifferentiated fears of the administration.

Until *Wynar*, the two leading federal appellate court opinions regarding discipline for off-campus, electronic speech were issued by the Third Circuit Court of Appeals, in *Layshock v. Hermitage Sch. Dist.* (3d Cir. 2011) 650 F.3d 205 (en banc) and *J.S. v. Blue Mountain Sch. Dist.* (3d Cir. 2011) 650 F.3d 915 (en banc). The Third Circuit held in these cases, both of which are non-binding in California, that the involved school districts could not discipline the plaintiff students for creating fake MySpace profiles of school administrators, created off-campus, because neither school district could clearly demonstrate a substantial disruption to the educational environment resulting from such activities.

The *Wynar* case concerned a high school student who sent multiple violent and threatening instant messages through MySpace to his friends, who were also students at his high school. These messages included specific details of a potential school shooting, including a date of the planned event, which individuals the student planned on killing and the weapons and ammunition he had to execute his stated plan. His classmates notified the school, who correspondingly notified the police. The student was detained by law enforcement and suspended for ten days.

The student claimed that the online statements were a joke, and that the school district had violated his First Amendment rights by disciplining him for speech made off-campus. Both the district court and then the Ninth Circuit disagreed with the student and found that the school district lawfully disciplined the student for his off-campus speech under the *Tinker* standard. Specifically, the student's speech was not protected because his statements, "which threatened the safety of the school and its students, both interfered with the rights of other students and made it reasonable for school districts to forecast a substantial disruption of school activities." Additionally, the school district did not have to wait for actual disruption to occur before taking action—an extremely important point given the recent and tragic history of school shootings throughout the country.

For the first time, this court expressly held that the *Tinker* standard applies to off-campus, electronic communications that amount to an "identifiable threat of school violence." This said, the court also emphasized that it was not ruling that *Tinker* applies to *all* off-campus speech. Nor did the court decide to expressly adopt any of the standards previously applied by other federal district courts or federal circuit courts. While the Court also found that the student's due process rights, as guaranteed under Nevada state law, had not been violated, the case did not address the perhaps unique issues under California's Education Code relative to due process, student speech rights, or California's cyberbullying discipline provisions.

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