

## CLIENT NEWS BRIEF

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### **SUSPENSION FOR YOUTUBE VIDEO VIOLATES STUDENT'S FREE SPEECH AND DUE PROCESS RIGHTS**

In J.C. v. Beverly Hills Unified School District (C.D. Cal. Nov. 16 & Dec. 9, 2009) Case No. 08-03824 SVW (CWx) (“J.C.”), the United States Central District Court of California issued two separate orders extremely significant to schools’ discipline of students for cyberbullying and other electronic speech originating off of school grounds. The court’s reasoning in J.C. addresses a number of hot issues regarding a school district’s jurisdiction to discipline students for off-campus speech on the internet, and the students’ competing free speech rights that may be infringed through such discipline.

In this case, Plaintiff J.C., a middle school student in Beverly Hills Unified School District (“District”), met with friends at a restaurant after school. At the restaurant, J.C. videotaped her friends making demeaning remarks about another District student, C.C. J.C.’s friends commented in the video that C.C. was a “slut” and “spoiled,” discussed sexual topics and used profane language. 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 five to ten 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 about the video to administrators. C.C. missed a portion of her first period because she was humiliated and hurt, but then returned to class. There was no evidence that any student viewed the video on school computers or a personal cell phone while on school grounds. Based on the video, J.C. received a two-day suspension for violation of Education Code section 48900, subdivision (k) and related school discipline policies.

J.C. filed suit against the District in federal court, alleging that the discipline violated her free speech rights under the First Amendment of the United States Constitution, her constitutional rights to due process, and related state law claims. After initial procedural challenges, the parties 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. Reviewing the constantly developing legal landscape on the issue of student discipline for speech on the internet, the court conducted a comprehensive judicial analysis on this topic. The court concluded first that, under proper circumstances, school

districts can 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 will foreseeably make its way onto campus, which often depends on the subject matter and content of the speech. Second, in such circumstances, discipline of a student does not violate the student's speech rights if the student's speech caused substantial disruption to the educational environment or it is reasonably foreseeable that the speech will cause such disruption. This is based on the student speech standard established in Tinker v. Des Moines Independent Community School District (1969) 369 U.S. 503. Examples of speech for which it is foreseeable substantial that disruption will result include speech that is violent in nature or threatens harm to a specific individual. Finally, foreseeability of disruption must be premised upon specific evidence and facts, not undifferentiated fear.

Under these principles, the court held that the District violated J.C.'s free speech rights when it disciplined her, because substantial disruption did not result from J.C.'s YouTube.com video. One student's hurt feelings and embarrassment over another's off campus speech, without more, cannot warrant school discipline. Nor did J.C.'s video result in any form of verbal or physical altercation. There was no evidence of any effect on classroom activities by J.C.'s video. And the school administrators' investigation of the video and deliberation over whether to implement discipline is insufficient to constitute disruption of the educational environment.

Further, there were insufficient facts to reasonably foresee that substantial disruption would occur based on the video. Rather, school officials' concerns of disruption resulting because of gossip, possibly leading to confrontations among students, were speculative; as there did not exist any evidence that similar videos had led to such confrontations or student violence previously at the middle school. In sum, the District failed to satisfy the substantial disruption standard under Tinker.

In a separate order the court addressed J.C.'s motion for summary adjudication of her two remaining claims, including, as is relevant here, the alleged violation of her federal due process rights under the United States Constitution. J.C. alleged that her due process rights were violated because, as applied to her, neither Education Code sections 48900, subdivisions (k) or (s), nor the District's student discipline policies put her on notice that she could be disciplined for off-campus speech. J.C. premised this argument on the "void-for-vagueness" doctrine, under which a rule or regulation is unconstitutional if it does not give fair notice of its reach and leaves parties guessing as to the limits of its prohibitions. Education Code section 48900, subdivision (k), allows for student discipline where a student's conduct: "Disrupted 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." Education Code section 48900, subdivision (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 under the Education Code where the conduct is related to a school activity or attendance. Examples listed under the statute considered to be related to activity or attendance include, while on school grounds; while going to or coming from school; during the lunch period whether on or off the campus; or during, or while going to or coming from, a school sponsored activity. Analyzing J.C.'s argument, the court found that the relevant Education Code provisions and the

District's student discipline policies did not put J.C. on notice that she could be subject to discipline for off-campus speech and, thus, were unconstitutionally vague.

Of note, the individual district employees named as defendants in the case were granted qualified immunity, and therefore were not liable for any damages to J.C. based on the violation of her free speech rights. Regardless, the court's rulings suggest wide ranging implications for discipline of students for cyberbullying and other off-campus speech, and provide a sound roadmap for how courts may address these issues in the future. This said, neither of the two orders have yet to be officially published and currently have little or no *binding* effect. It is also unclear whether the District will appeal the court's rulings to the Ninth Circuit Court of Appeals. Finally, the court's analysis above does not address student speech rights generally under Education Code sections 48907, high school student speech rights under section 48950, or whether the Education Code's new provision allowing for student discipline for cyberbullying would have impacted the outcome of the case, and the student's void-for-vagueness arguments in particular.

If you have any questions regarding student free speech rights, discipline for cyberbullying, or other cutting-edge issues faced by schools in today's constantly developing arena of technology, please do not hesitate to contact one of our seven offices located statewide.

*As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.*



Written by Tom Manniello ([tmanniello@lozanosmith.com](mailto:tmanniello@lozanosmith.com)) and Sloan Simmons ([ssimmons@lozanosmith.com](mailto:ssimmons@lozanosmith.com)). Tom is a shareholder in our Monterey office and Sloan is an associate in our Sacramento office. Tom is chair of our Litigation Practice Group. Sloan is co-chair of our Student Practice Group.

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