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## STUDENT DISCIPLINE: A TWO-DAY SUSPENSION BECOMES A FEDERAL CASE

The federal courts continue to become involved in public school student disciplinary proceedings. An important student discipline case from the United States Court of Appeals for the Ninth Circuit was decided on September 1, 2016. *C.R. v. Eugene Sch. Dis. 4J*, No. 13-35856 (9<sup>th</sup> Cir. 2016) regards a vice principal's decision to award a two-day suspension to a seventh grader for sexually degrading comments made off campus and after school to a female classmate.

The “take away” from this case is that vice principals need to be cognizant of: (i) the due process requirements associated with student discipline, even minor discipline; (ii) the limits of their authority to discipline misconduct committed off of school grounds and after the school day; and (iii) the scope of a student's free expression rights regarding caustic statements made to or about other students.

The *Eugene Sch. Dist. 4J* case is a study in how such issues are presently viewed in the Ninth Circuit. California is included within the Ninth Circuit. The case is instructive as to the reach of the school's authority to discipline or otherwise regulate student misconduct consisting of statements made off of school grounds and after the school day. Those rules are discussed below.

### A. Underlying Facts of the Case

About five minutes after school, on a bike path in a public park, a few hundred feet from the school, but during their walk home after school, C.R., a 12-year-old seventh grade male student, along with a few other seventh grade males, teased a hearing impaired sixth grade female student and a sixth grade male student with Autism. They used vulgar names and immature sexual puns referring to oral sex.

Their behavior on this day was the culmination of a couple days of teasing before their misconduct was brought to the attention of the school's vice principal. When questioned about the incident, C.R. initially lied and then violated a directive to not discuss the interview with his friends. C.R. and the other offending students received formal school discipline. C.R. was

suspended from school for two days. One year later, C.R. and his parents sued the school district in federal court.

The plaintiffs' contentions were that: (i) the school district lacked the legal authority to discipline C.R. because the alleged misconduct occurred outside of regular school hours and not on school property; (ii) disciplining C.R. for the statements he made violated his right of free expression under the First Amendment of the United States Constitution; and (iii) the school district failed to provide C.R. the procedural due process required by the Fifth and Fourteenth Amendments to the United States Constitution because during the interview prior to imposing the suspensions, C.R. was not informed of the exact charge or rule, with specificity, which he stood accused of violating.

**B. Guidance Provided by the Ninth Circuit in *C.R. v. Eugene Sch. Dist. 4J* as to When Student Expression Engaged in Off Campus/After School May be Reached by School Authorities for Purposes of Regulation, Prohibition and Student Discipline**

The school must have the authority to reach the off-campus speech. Either one of three alternative tests may be used to resolve this issue. The first is the nexus test - off-campus/after school speech is within the reach of school officials when tied closely enough to the school.

The second is the reasonably foreseeable test - off-campus/after school speech is within the reach of school officials if it is reasonably foreseeable that the off-campus speech would reach the school. (*Wynar v. Douglas County School Dist.*, 728 F.3d 1062 (9<sup>th</sup> Cir. 2013).)

The third test provides that a student's off-campus speech may be reached when it is intentionally directed at the school community and reasonably understood by school officials to threaten, harass, and intimidate. (*Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379 (5<sup>th</sup> Cir. 2015).)

In *C.R. v. Eugene Sch. Dist. 4J*, the pertinent facts which lead the court to conclude that an adequate nexus existed between the off-campus/after school expression and the school were: (i) all the individuals involved were students; (ii) the path on which the incident took place started at the school and ran along just outside the school's physical boundary; (iii) the students were only a few hundred feet from the school; (iv) the public park in which the incident took place is immediately adjacent to and readily appears to be physically part of the school; (v) the school day had just ended shortly before the incident; and (vi) the targeted student would likely see her harasser at school and be distracted by the prospect of impending harassment. The court ruled that in this matter both the nexus test and the reasonably foreseeable test were satisfied.

**C. Guidance Provided by the Ninth Circuit in *C.R. v. Eugene Sch. Dist. 4J* as to How the Free Expression Clause of the United States Constitution Impacts the Regulation, Prohibition and Punishment of Off-Campus/After School Student Expression in California**

Once it has been determined that off-campus speech may be reached by school administrators, schools may restrict such student expression in two broad sets of circumstances: (i)

if the expression might reasonably lead school authorities to forecast a substantial disruption of or a material interference with school activities; or, alternatively, (ii) if the expression collides with the rights of other students to be secure and to be left alone. (*Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 at 513 (1969); *Wynar, v. Douglas County School Dist.*, 728 F.3d 1062 (9<sup>th</sup> Cir. 2013).) This analysis is known as the *Tinker* test.

The precise scope of *Tinker's* interference with the rights of others language is unclear. Speech that is merely offensive to some listeners is not sufficient and such expression may not be disciplined under the *Tinker* test. (*Wynar, supra*, at 1072.)

Under the *Tinker* test, the material disruption or invasion of rights standard does not require that school authorities wait until an actual disruption occurs. When school authorities can “reasonably portend disruption” in light of the facts presented to them in the particular situation, the regulation of student expression is permissible. (*LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9<sup>th</sup> Cir. 2001).)

School officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place. (*Lowery v. Euwerard*, 497 F.3d 584, 596 (6<sup>th</sup> Cir. 2007).)

Sexual harassment implicates the rights of students to be secure. Such harassment is harmful because it positions the target as a sexual object rather than a person, threatening the individual's sense of physical, as well as emotional and psychological, security. Often, the threat of an unwanted physical intrusion is implicit even within the context of purely verbal sexual harassment. Sexually harassing speech, by definition, interferes with the victim's ability to feel safe and secure at school. Schools, therefore, have the authority to discipline students for engaging in sexually inappropriate and harassing speech. (*C.R. v. Eugene Sch. Dist. 4J*, No. 13-35856 (9<sup>th</sup> Cir. 2016).)

**D. Guidance Provided by the Ninth Circuit in *C.R. v. Eugene Sch. Dist. 4J* as to How the Due Process Clause of the U.S. Constitution Impacts Student Discipline Matters in California**

The United States Constitution only requires informal procedures when schools suspend students for ten days or fewer. The student must be told what he/she is accused of doing. If the student denies the violation, then the school must explain the evidence and given the opportunity to present his/her side of the story. (*Goss v. Lopez*, 419 U.S. 565, 581 & 582.)

The school does not need to outline the specific charges against the student, nor the consequences. The due process requisite of the United States Constitution does not require the school to inform the student exactly how his conduct violated the specific rules at issue. (*Goss v. Lopez*, 419 U.S. 565, 581 & 582; *Wynar, supra*, at 1073.)

In a matter involving a suspension from school, there is no requisite imposed by the due process clause of the United States Constitution for a delay between the time “notice” is given and the time of the hearing. The parents do not have to be notified in advance of the suspension hearing. (*Goss v. Lopez*, 419 U.S. 565, 581 & 582 (1975); *Wynar*, *supra*, at 1073.)

This case addresses the requirements imposed by the Free Speech clause of the First Amendment to the United States Constitution and the requirements imposed by the Due Process clause of the Fifth and Fourteenth Amendments to the United States Constitution. It is important to realize that in California, the state legislature, through the Education Code, may impose more stringent requirements in some circumstances.

If you have any questions concerning this or related issues, do not hesitate to contact our office.

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