VIRGINIA COMMONWEALTH UNIVERSITY
VCU L. Douglas Wilder School of Government and Public Affairs

THE COMMONWEALTH EDUCATIONAL POLICY INSTITUTE
AN INSTITUTE IN THE CENTER FOR PUBLIC POLICY

CEPI Education Law Newsletter

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April 2017: Vol. 15-5

SCHOOL DISCIPLINARY AUTHORITY AND STUDENT OFF-SCHOOL GROUNDS BEHAVIOR: POLICY IMPLICATIONS

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Overview

Of all the possible locations where questions exist concerning the reach of school system disciplinary authority, off-school grounds (community based) situations are most problematic. When, where, and under what circumstances does school system responsibility for off-school grounds student safety and security become paramount?

As a growing number of parents and local school officials are working to prevent acts of face-to-face (in person, non-technology assisted) bullying (verbal, physical), taunting (more than teasing), hate speech, and threats, the following questions must be asked: What about kids walking to and from home to school? What about kids waiting at the school bus stop? What about kids who ride the school bus to and from school? What about students on field trips? Are they not protected from harassment by other students? What about the responsibility of school officials for their safety and security? When do the "special relationship" and "custodial care" standards apply in such situations? Does the *deliberate indifference* standard (a standard higher than failure to exercise *due care*) also apply in "face-to-face" situations?

School System Authority
As a general rule, because school systems may be held responsible for students on their way to and from school (door-to-door), school boards often establish policies and set down reasonable rules and regulations (*i.e*., articulate reasonable *expectations* for behavior) to which students are expected to conform. And, as a general rule, students may be held accountable for misconduct occurring while on their way to and from school. At the same time, however, it would be unfair to assume that school authorities can ensure a safe and secure environment in all situations where students are away from school grounds, not on school property, and outside the official time schedule of the school day. (Vacca and Bosher, 2012) What about the responsibility of parents for off-school grounds (community-based) misbehavior of their children—especially where allegations of parental neglect may be possible in situations where children of any age are out in community free of "proper parental supervision or guardianship" including travel to-and-from school. (Vota, 2017)

Student Speech and Expression

Beginning in the mid-to-late 1960s the body of public education law involving the First Amendment and student rights grew as a fertile source of litigation. Over the past decade, while the court's continued to rely on the case hardened standards established by the United States Supreme Court in Tinker v. Des Moines (1969), Bethel School District v. Fraser (1986), Hazelwood v. Kuhlmeier (1988), Morse v. Frederick (2007) and others, student speech and expression have undergone rapid change (beyond traditional boundaries of protected speech and expression) mainly due to the impact of rapidly developing technology (*i.e.,* social media) on student-to-student communication. More often than not, in situations where student-to-student-peer harassment is found, the mode of communication relied on by the perpetrator was some form of non-school owned electronically (cyber) assisted device, communicated off-school grounds, not during the school day, and not through face-to-face personal contact. Do the existing standards of judicial review apply to emerging First Amendment issues? Has a new standard of judicial analysis taken root in student First Amendment jurisprudence? If so, will the new standard eventually replace a reliance on the traditional standards?

Assaultive Speech
In my opinion, while still rare to find in First Amendment court decisions, an alternative standard does exist and is available for application where face-to-face (in person) student-on-student harassment is alleged. Referred to as *assaultive speech*, the alternative standard can be defined as: "those expressive acts (spoken, written, or gestures) of one or more persons that either cause actual harm to another person or persons, or, at a minimum, place a person or persons in imminent fear of harm." (Vacca and Hudgins, 1994)

Applying the *assaultive speech* standard, a judicial determination is made in each case depending on:

(1) the special characteristics of the situation (*e.g*., custodial relationship; on school property during the school day; at a school sponsored or sanctioned function; out in the community);
(2) the students involved (e.g., elementary, middle, or secondary school, students with disabilities), and;
(3) the circumstances (e.g., on the school bus, at the school bus stop, in attendance at an athletic event at another school, on a field trip, on a public street, in proximity to the student's home residence) under which the speech or other expressive act had occurred.

C.R. v. Eugene School District 4J (9th Cir. 2016)

Recently I reviewed a decision handed down by the United States Court of Appeals for the Ninth Circuit involving a twelve year-old public middle school student suspended from school for two days for his off-school grounds, face-to-face (in person) sexual harassment of two other students. The suspension was challenged on First Amendment grounds claiming that school authorities lacked authority to suspend that student. The court's decision is most informative.

Facts
C.R. was a seventh grade male student when the incident occurred. The victims of the harassing behavior were two (one male and one female) sixth grade students with disabilities. The harassing incident was the last in an escalating series of encounters between C.R. and the two students at school. Over the course of several days a group of seventh grade boys had engaged in inappropriate behavior toward the two students. On the day of the incident the boys had circled the two students and engaged in vulgar name calling, jokes of a sexual nature, and made other sexually inappropriate comments. The situation escalated.

The harassing incident, which occurred about five minutes after school let out and a few hundred feet from school property, began when C.R. and a few other seventh grade boys followed the two sixth graders home from school. The students involved took the same route home from school, across a public park to a neighboring street. The public park borders on the school's athletic fields, but there is no visible boundary to indicate where school property ends and the park property begins. On the far side of the park, across from the school, is a track belonging to the school district. School administrators refer to the park, fields, and track as "'the back field."

An instructional aide in the school district was biking home when she rode past the group of students. The aide happened to be a friend of C.R.'s mother and knew him since kindergarten. Concerned by their posture, the aide asked the two younger students if they felt comfortable. The female student said she

was not comfortable. The aide then asked the older boys to leave. She then walked home the two younger students. On the way home one of the students recounted what happened. The female student repeated that she was not comfortable.

On Monday, the instructional aide reported to and spoke with the school's vice principal. Although she did not know the other students involved, she did identify C.R. as a participant. The vice principal reported the matter to the school principal and an informal investigation was launched.

The vice principal first met with the two victim students. They recounted the series of events, the name calling, puns, and sexual comments. While the female student repeated that she felt unsafe and uncomfortable during the last encounter in the park, the male student said that he did not. The vice principal later overheard the two victim students at lunch discussing the incident with their friends. Their friends were upset to hear about what had taken place.

The vice principal next interviewed the boys suspected of being involved in the incident, beginning with C.R. He denied any involvement and insisted that "nothing inappropriate had happened." He was asked not to tell the other boys about the interview. That same day C.R. ignored the request and discussed his interview at lunch.

In a subsequent interview with the other boys involved they admitted their intent in making the inappropriate sexual comments. They also confirmed that C.R. had participated in the incident in the park, and that he was the "ringleader." C.R. was called in to a second interview during which he admitted to making at least one of the sexual comments and that his behavior was "inappropriate."

Ultimately all the boys, including C.R., involved in the park incident were disciplined. In an email to C.R.'s parents school administrators informed them of the following reasons for C.R.s two days out-of-school suspension. In addition to his participation in the park incident, he also lied to administrators in his first interview, and he disobeyed their request not to discuss the interview with friends. Determining that the incident fell within the school system's definition of "sexual harassment," and under the school district's "door-to-door policy," the school administration determined that they had the power to discipline C.R. for his "off-campus speech."

District Court Action

One year later, C.R.s parents, on behalf of their son, filed suit in federal district court. In their law suit they alleged violations of C.R.s First Amendment and due process rights. The district court granted summary judgment to the school district. C.R. v. Eugene School District 4J (D. Ore. 2013). An appeal was taken to the United States Court of Appeals for the Ninth Circuit.

Ninth Circuit Court Rationale and Decision

Because the parties did not dispute the underlying facts of the case, the appeals court had the following question before it: Did the district court correctly apply the law? As such, the appellate court reviewed the district court's grant of summary judgment *de novo*.

Rationale
The Court begins its opinion by summarizing the framework for analyzing student speech under the First Amendment. To determine whether school officials properly discipline a student for off-campus speech requires the answers to two questions:

(1) Whether school officials could permissibly regulate the student's off-campus speech at all?
(2) If the answer to question is yes, did the school system's regulation of the student's speech comply with the First Amendment's requirements?

Relying on its own past decisions (*e.g.,* Chandler v. McMinnville School District (9th Cir. 1992)), the Ninth Circuit begins by stressing the United States Supreme Court's foundation statement in Tinker v. Des Moines (1969), that "[s]tudents in public schools do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." However, the Ninth Circuit then quotes from the Supreme Court's decision in Bethel School District v. Fraser (1986) to clarify that "[t]he First Amendment rights of public school students are not automatically coextensive with the rights of adults in other settings," and that "the basic educational mission of the school may at times conflict with the speech rights of students." As such, said the Ninth Circuit court, "our precedent recognizes that "schools must achieve a balance between protecting the safety and wellbeing of their students and respecting those same students' constitutional rights." La Vine v. Blaine (9th Cir. 2001), citing from Karp v. Becken (9th Cir. 1973)

The Ninth Circuit Court next cites the following leading decisions from the United States Supreme Court establishing four types of student speech subject to restriction by school officials:

(1) "vulgar, lewd, obscene, and plainly offensive speech," Bethel School v. Fraser (1986);
(2) "school-sponsored speech," Hazelwood v. Kuhlmeier (1988);
(3) "speech promoting illegal drug use," Morse v. Frederick (2007); and
(4) "speech that falls into none of these categories," Tinker v. Des Moines (1969).

However, states the Ninth Circuit, each of these cases "concerns only a school's ability to regulate student's on-campus speech. Whether and how these precedents apply to off-campus speech are questions that the Supreme Court has yet to answer." C.R. (9th Cir. 2016)

The Ninth Circuit then relies on its own past precedents in which it upheld the authority of public school officials to regulate students' off-campus speech. In La Vine v. Blaine School District (9th Cir. 2001), a case involving the expulsion of a high school student who had written a poem (violent content) from the prospective of a shooter—a poem written at home but brought to school to gain a teacher's feedback; and Wynar v. Douglas County (9th Cir. 2013), a case in which a student was expelled for a series of messages threatening to commit a school shooting—messages written (on a home computer) and sent to friends (social media) after school hours. In the Court's view, while location is important, these decisions establish that not all off-campus speech is "beyond the reach of school officials," and "when faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech." C.R. (2016)

Acknowledging that the Ninth Circuit Court itself, as well as the other circuit courts, has not rendered a definitive decision regarding school discipline and off-campus (in person) student harassment (most

decisions involve internet speech), the Court does propose a *nexus* standard—*i.e*., establishing a *nexus* between a student's off-campus speech and *reasonable foreseeability* that the student's speech would reach the school. Bell v. Itawamba County School Board (5th Cir. 2015) The Ninth Circuit reiterates the United States Supreme Court's statement that schools may restrict student speech that "might reasonably lead school authorities to forecast substantial disruption of or material interference with school activities or that collides with the rights of other students to be secure and to be let alone." Quoting Tinker (1969), from Wynar (9th Cir. 2013)

Relying on the *reasonable foreseeability (nexus) test* to the unique facts of this case, the Ninth Circuit Court saw the harassment incident as being "closely tied to the school." The individuals involved were students at the school. The harassment (exclusively between students) began a few hundred feet from the school house door and a few minutes after students had been released from school. The path the students took home begins at the schoolhouse door. The park shares a boundary with the school before meeting the public street. There is no visible marker to indicate where school property ends and park property begins. The harassed students had not yet reached the street when the older boys caught up with them. While the park technically is city property, school administrators refer to it as part of the "back field." And, the park incident had become a matter of discussion among students in school. School administrators could reasonably expect the harassment's effects to spill over into the school's environment. Citing Bethel School District v. Fraser (1986), and Vernonia School District v. Acton (1995), the Ninth Circuit Court concluded that "it is a reasonable exercise of the School District's *in loco parentis* authority to be concerned with its students' wellbeing as they begin their homeward journey at the end of the school day." C.R. (2016)

C.R. contended that a finding for the School District would dangerously expand its reach, permitting schools to regulate student speech in public places. The Ninth Circuit Court did not agree with him and held that the School District could take disciplinary action against C.R. because of his off-campus, "sexually harassing" speech. Likewise, the court held that the authority to discipline C.R, falls "squarely within Tinker (1969)" because the speech involved "collides with the rights of other students." However, the Court emphasized that its decision is necessarily restricted to the unique facts presented in this case.

Finally, the Court considered C.R.'s procedural and substantive due process claims. Citing the United States Supreme Court's decision in Goss v. Lopez (1975) and Wynar v. Douglas County (9th Cir. 2013), the Ninth Circuit Court held that school officials did provide C.R. with *sufficient notice* of the allegations against him, and an *opportunity to tell his side of the story* (explain *his version* of the story during the interview). And, even if school administrators did not follow their own policies and procedures that "does not, itself, constitute a violation of constitutional due process." Regarding C.R.s substantive due process claim (maintaining a clean, non-stigmatizing school disciplinary record) the Court held that it failed to raise "any viable substantive due process claim." C.R. (2016)

Decision

Under the set of facts in this case the Ninth Circuit Court concluded that C.R.s speech was tied closely enough to the school to subject him to the school's disciplinary authority, and the discipline imposed (two-days out-of-school suspension for sexual harassment of other students) complied with Tinker (1969). Moreover, said the Court, the interpretation of school system rules and policies given by school administrators was reasonable and evidence existed to support the charge against C.R.

The district court's order granting the School District's motion for summary judgment, and the order dismissing the action are affirmed.

Policy Implications

Because most recently decided First Amendment off-school-grounds expression and speech court decisions involving some form of student-on-student harassment (*e.g*., sexual, bullying, taunting, threats) are usually limited to actions involving some form of electronically assisted (cyber) social media, and not student-on-student face-to-face (in person) interaction, C.R. v. Eugene School District 4J is very informative. However, because of its narrow facts, this decision cannot be overly generalized. The most valuable item of advice made by the Ninth Circuit to school system policy makers is the need to base off-school grounds student behavior policies on:

(1) protecting student safety and security,
(2) protecting the school's educational environment, and
(3) establishing a nexus between student off-school behavior and maintaining in-school discipline.

In C.R (2016) a *causal connection* (nexus) was forged and demonstrated between the earlier in-school sexually harassing behavior toward the victim students by older boys and their continued harassment of the same victim students later off school grounds that same day. Plus, the older students continued harassing the younger students (both of whom were children with disabilities) in proximity to school property, shortly after the school day had ended, and before the students had reached home. And, after being told by school administrators not to discuss the incident with other students, the outside school incident was discussed with other students inside school, during the school day. Friends of the victim students were upset when hearing about the harassment. In essence "the off-school grounds incident was brought into the schoolhouse," and school administrators took action to prevent "material and substantial disruption." In my view, the ruling is an interesting interpretation and application of Tinker (1969).

Finally, the C.R. decision also emphasizes the continued importance of school system policy requiring and providing students with Goss v. Lopez (1975), *basic procedural due process* (*basic fairness*), as a part of the disciplinary process. In this case, prior to taking disciplinary action:

(1) the accused students were given sufficient notice,
(2) an informal administrative investigation was undertaken to establish the facts,
(3) an informal hearing process (interviews) was implemented, and
(4) the accused students were given a chance to tell their side of the story.

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Note: The views expressed in this commentary are those of the author.