



GARRETT HEMANN ROBERTSON PC

## Student Behavior Off Campus

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## Topics

- Constitutional rights of students:
  - Recent Cases
  - Due Process
  - Speech
  - Search and seizure
- How far does a school district's discipline policy reach off-campus student conduct.
- New Legislation



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## Kings Park Sexting Scandal: 11/12/15

- 2 students shoot video of sex with female student and send video on smart phone to other students.
- 2 students arrested.
- 20 students who received video suspended



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## Cincinnati Ohio: 11/6/2015

- 1<sup>st</sup> Grader pretends to shoot fellow student with imaginary arrow.
- 3-day suspension.
- Mother: "I can't stop him from pretending to be a super hero."



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## Recent National News (ABC News 10-28-14)

- Oklahoma City– Student Brandi Blackbear suspended for casting a spell that caused a teacher to become sick and be hospitalized.
- Principal Charlie Bushyhead found student was an immediate threat.



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## Oregon Live / Oct. 16, 2015

- Lake Oswego officials shed light on mass football suspensions
- 30 football players suspended for violating the school's athletic code of conduct.



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## ABC News - October 21, 2015

- Students were suspended for allegedly giving their rivals a racially charged fruit basket.
- Several students faced possible suspension after being accused of racial insensitivity when they gave a watermelon as part of a pre-game gift exchange between two High School's Good Sportsmanship Leagues.



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## Constitutional Rights of Students

### Federal Sources

- U.S. Constitutional 14<sup>th</sup> Amendment “right to public education”
- U.S. Constitutional Due Process: “Notice and opportunity to be heard”
  - *Goss v. Lopez* 419 US 565 (1975)
- Search/Seizure – 4<sup>th</sup> Amendment
- Free Speech– 1<sup>st</sup> Amendment



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## School District employees: The Government

- For purposes of student discipline, school employees are the Government.
- Students are entitled to constitutional protection against deprivation of property and liberty interests without due process.



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## Potential Individual Liability

- Section 1983 Claims for constitutional violations.
- School Staff are not automatically immune from personal liability for a knowing denial of a student's constitutional rights.



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## Due Process

- "Notice and opportunity to be heard"
  - *Goss v. Lopez* 419 US 565 (1975)
- Notice of "charges" can be oral or written
- Opportunity to present their version (informal hearing)
- Within "reasonable time" of discipline
- If hearing proceeds: opportunity to ask questions of witnesses (school officials)
- Must follow school policies
  - *Juran v. Central School District 13J*, 898 F.Supp. 728 (1995)
  - "within minutes"
  - "some kind of notice"
  - "some kind of hearing"



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## Due Process requires notice to student of prohibited conduct

- "You never told me I would get in trouble for that!"
- How far does a school district's discipline policy reach?



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**Typical Board Policy re:  
Discipline:**

- “Students are subject to discipline for conduct while traveling to and from school, at the bus stop, at school sponsored events, while at other schools in the district, **and while off-campus whenever such conduct has a direct effect on the discipline or general welfare of the school.**”



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***Neuhaus v. Federico*, 12 Or App  
314 (1972)**

- Discipline for long hair at school.
- Off-campus behavior is protected.
- School cannot regulate off-campus hair length.



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***Pinard v. Clatskanie S.D.*, 446  
F3d 964 (2006)**

- BB players sign petition about verbally abusive coach.
  - Protected Speech
- Boycott of game was subject to discipline. (off-campus behavior)
- Question: Did school set up students for boycott in retaliation?



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## Discipline for off-campus drug use.

- Scenarios:
  - Students leave campus during school to smoke marijuana in a neighborhood park adjacent to school.
  - Student makes drug deals with students on campus, delivers drugs off campus.
- Look at District's policy. Does policy allow discipline for off-campus conduct?
- What is connection of facts of the case to the school?
- Connect conduct with its effect on school environment.



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## *Howard v. Colonial S.D.* (Delaware 1992)

- Student expelled for three cocaine sales off campus to undercover police officer.
- District determined that student as posed a threat to safety and welfare of other students.



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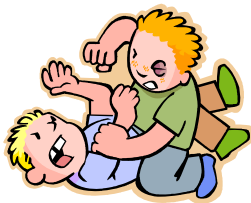
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## Off-Campus Fight: When can District apply discipline?

- Dispute between students starts during school day.
- Fight after school at location adjacent to school.
- Negative effects of fight on school after the fight.
- Must articulate school connection.



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## Review of Free Speech Cases



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## Starting Point—*Tinker v. Des Moines Ind. S.D. (U.S. 1969)*

- On Campus speech
- Black armband protesting Vietnam War.
- School can regulate speech that results in substantial and material disruption or invasion of rights of others.



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## *Morse v. Frederick (U.S. 2007)*

- Student disciplined for displaying banner “**Bong Hits for Jesus**”
- Across the street from school after students were released to view Olympic Torch relay.



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### C.R. v. Eugene SD (2013)

- Off Campus verbal harassment of two disabled students on way from school by fellow student.
- Student is disciplined.
- Student claims free speech violated.
- Court: Summary judgment granted in favor of district.



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### C.R. v. Eugene S.D.

- “Conduct by the student, in class or out of it, which for any reason– whether it stems from time, place, or type of behavior– materially disrupts classwork or involves substantial disorder or invasion of the rights of others, is, of course, not immunized by the constitutional guarantee of freedom of speech.”



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### Case on Appeal to 9<sup>th</sup> Circuit

- Oral Argument held on October 16, 2015.
- Court video on You Tube.



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*Rosaria v. Clark Co. S.D. (Nev. 2013)*

- Basketball player disciplined for sending obscene tweets about school officials at restaurant celebration after final game.
- Tweets sent to friend. Friend provides to District.
- Some claims dismissed on S.J.:
  - 4<sup>th</sup> Amendment
  - Equal protection
  - 42 USC 2000d
  - Abuse of process
  - Due process
- Other Claims remain.
  - 1<sup>st</sup> Amendment
  - Defamation
  - Civil conspiracy
  - Assault



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**School Response**

- 10-day suspension.
- Then alternative education.
- Denied right to graduate with class.
- "It is clear that the test for school authority is not geographical. The reach of school administrators is not strictly limited to the school's physical property."



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*Wynar v. Douglas Co. S.D. (9<sup>th</sup> Cir. Nev. 2013)*

- Wynar posted messages on MySpace on anniv. date of Columbine shootings:
  - "its pretty simple/I have a sweet gun/my neighbor is giving me 500 rounds/dhs is gay . . ."
  - "I haven't decided which 4/20 I will be doing it on."
- Students became alarmed. Alerted school administrators.
- Police interviewed Wynar who claimed postings were a joke.
- Wynar is expelled for 90 days.
- Wynar sues district.



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### Wynar Continued:

- Student argued he could not be expelled because he did not actually intend to harm or intimidate fellow students.
- Holding:
  - For School District.
  - Threat of school shooting impinges on the rights of other students to be secure and to be let alone.



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### J.S. v. Blue Mountain S.D. (3<sup>rd</sup> Cir. 2011)

- 8<sup>th</sup> grade student creates MySpace profile for school principal on the weekend at home.
- Principal's photo used, but not name or school or location.
- Principal very upset.
- MySpace blocked by school.
- No student saw profile.
- Student suspended from school.
- Self-portrayal of a bisexual middle school principal named "M-Hoe."



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### Results of MySpace profile

- "general rumblings" in school.
- Disruption of one teacher's class.
- School counselor (principal's wife) had to reschedule some meetings.



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### Holding– For student

- No substantial disruption to school and no forecast of disruption.
- “An opposite holding would significantly broaden school district’s authority over student speech and would vest school officials with dangerously overbroad censorship.”



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### Burge v. Colton School District (D. OR. April 17, 2015)

- Student when out of school wrote disparaging remarks about teacher and said that “she needed to be shot” on a Facebook post. Within 24 hours the post was deleted. The school suspended the student.
- Federal District Court of Oregon found that student’s first amendment rights were violated by disciplining the student for off-campus online speech.
- Comments did not cause a substantial interference with school operations.



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### Teacher’s Reaction to Facebook Post:

- Teacher was scared, nervous and upset about student’s post.
- Asked school administration to keep student out of her class.
- Accepted administration’s decision to return student to her classroom.
- Did not discuss the issue with the student.
- Student went on fieldtrip with teacher.



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**Court compares cases:**

- Wynar (9<sup>th</sup> Circuit 2013)
- J.S. (3<sup>rd</sup> Circuit 2011)
- “Teacher’s response—on its own— would not support a rational juror finding that [student’s] comments caused a material and substantial interference with appropriate school discipline.”
- Teacher’s reaction more similar to principal’s reaction in J.S.



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**What the administration did not do according to Court:**

- Did not ask parents or student if student had access to guns;
- Did not contact police;
- Did not have mental health evaluation for student;
- Did not discuss comments with other teachers to investigate whether he made similar comments.



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**Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379 (5th Cir. Miss. 2015)**

- High-school Student suspended for posting a song the student recorded off-campus, without the use of school resources, and posted on social networking sites.
- Bell accused the coaches of sexually harassing female students in a rap song replete with violent imagery, including a line predicting that a coach would "get a pistol down your mouth."



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*Bell v. Itawamba Cnty. Sch. Bd.*

- 5<sup>th</sup> Circuit held that Disciplinary action taken against Bell did not violate the student's First Amendment rights.
  - the recording described violent acts to be carried out against two named coaches,
  - the student intended the recording to reach the school community,
  - under Tinker, the school board reasonably could have forecasted a substantial disruption at school, based on the threatening, intimidating, and harassing language in the recording.



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*Kowalski v. Berkeley County Schools (Cal. 2011)*

- Female 12<sup>th</sup> grade student creates MySpace ridiculing a fellow student.
- S.A.S.H, (Students Against Sluts Herpes)
- Targeted a particular student.
- Encouraged other students to target.



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**Holding in Kowalski:**

- Student subject to expulsion.
- Admitted postings.
- Claimed 1<sup>st</sup> Amendment protection.
- A targeted attack on a classmate was sufficient connection to school environment.
- Substantial interference with victim's educational environment.



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## Court's View

- Kowalski pushed the keys at home but she knew that the electronic response would reach the school.



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## *Evans v. Bayer (USDC Fl. 2010)*

- Claim by student directly against principal.
- Facebook posting:
  - Ms. Sarah Phelps is the worst teacher I have ever met."
- Student created page then received negative comments from friends. Deleted page.
- Principal learned about the posting after it had already been taken down.
- Principal suspended student for 3 days.



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## Court: No substantial disruption.

- Bayer's actions did not comport with the requirements for the regulation of on-campus speech as required by *Tinker*.
- Bayer does not have qualified immunity. Subject to paying student's attorney fees.



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*Requa v. Kent S.D. (USDC Wa. 2007)*

- Student posts YouTube video of teacher taken in classroom, then adds audio and graphics.
- “Caution Booty Ahead.”
- “The Court takes judicial notice that ‘booty’ is a common slang term for buttocks.”
- District disciplines student for on-campus conduct making a video of teacher.



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**Holding:**

- “Court has no difficulty in concluding that that one student filming another student standing behind a teacher making ‘rabbit ears’ and pelvic thrusts in her direction, or a student filming the buttocks of a teacher as she bends over in the classroom constitutes a material and substantial disruption to the work and discipline of the school.”



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**Search and Seizure**

- Students have a right to be secure in their person and property against unreasonable searches and seizures.



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## Search and Seizure

- Some basic concepts:
  - “Search measures must be reasonably related to the objectives of the search and not excessively intrusive **in light of the age and sex of the student** and the nature of the infraction”. *Safford v. Redding*, 129 S.Ct. 2633 (2009)



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## Search requires:

- Voluntary student consent; or
- Reasonable suspicion; or
- Plain view; or
- A court authorized search warrant.



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## School search based upon reasonable suspicion

- “Specific and articulable facts that reasonably create a risk of immediate and serious harm to the officials or others” *In re M.A.D.* 348 Ore. 381 (2010)
  - Reasonable suspicion
  - Search related to the infraction and the objective of the search
  - Not excessively intrusive under the circumstances
  - Reasonable risk of harm associated



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*M.A.D. v. State ex rel. Juv. Dept. of Clackamas Co. (2010)*

- Administrator had a reasonable suspicion high school student had illegal drugs at school.
- Administrator called mother.
- Asked student to empty pockets.
- Noticed bulge in jacket pocket.
- Student allowed school counselor to reach in pocket, where she found marijuana.
- Police were then called.



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**Court Holding:**

- Reasonable suspicion standard is applicable when there is “credible information, based upon specific and articulable facts, about immediate threats of serious harm to students and staff, such as the presence of illegal drugs on school grounds.”



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**Containers within containers have privacy rights**



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*State v. A.J.C., 355 Or. 522 (2014)*

- Student makes threat to another student and told her he was going to bring a gun to school to shoot her and other students.
- Student who received threat told school counselor.
- Principal went to student's class and seized backpack and brought student to office.
- Search of backpack revealed gun.



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**Court's Holding:**

- "It was therefore reasonable for Smith to make reasonable efforts to find the gun and eliminate the threat of harm. A limited search of the parts of youth's backpack that could contain the gun was therefore reasonable."



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**Oregon Law regarding student discipline**

- The legislature continues to restrict use of expulsion.



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### ORS 339.250

- May allow discipline, suspension or expulsion for conduct that includes, but is not limited to:
  - Willful disobedience;
  - Open defiance of the authority of a school employee;
  - Possession or distribution of tobacco, alcohol, drugs or other controlled substances;



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### ORS 339.250 (Continued)

- Use or display of profane or obscene language;
- Willful damage or injury to school property;
- Use of threats, intimidation, harassment or coercion against a student or a school employee.



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### ORS 339.250 (Continued)

- Assault of a school employee or another student; or
- Intentional attempts, by word or conduct, to place a school employee or another student in fear of imminent serious physical injury.



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### Limit Use of Expulsion:

- Conduct that poses a threat to the health and safety of students or school employees;
- When other strategies to change student conduct have been ineffective; or
- When the expulsion is required by law.
  - Firearm offense.



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### District Must Consider:

- Age of Student
- Past Pattern of behavior of the student



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### SB 553 (effective as of 7/1/15)

- Must consider age of student and past pattern of behavior prior to imposing suspension/expulsion.
- For 5<sup>th</sup> grade student or younger, must limit suspension or expulsion to conduct causing serious physical injury to student or staff; or
- When student's conduct poses a direct threat to health and safety.



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## Contact Us

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