GARRETT HEMANN ROBERTSON P.C.

Off-Campus Student Behavior: Conduct and Speech

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What can be done about student's bad conduct off campus?

- 4 Majors Areas
  - Student Speech
    - Bullying other students
    - Attacks on school staff
  - Off-campus fighting
  - Off-campus Drug/alcohol possession

How Far Does A District's Discipline Policy Reach?

- Review ORS 339.250 as amended in 2013 and effective July 1, 2014.
- Basic Concepts in Oregon.
  - School District policies
  - Oregon case law
- Review Student Free Speech under 1st Amendment.
- Review Recent Case law around the nation.

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.

Germantown S.D. Mississippi (9-29-14)

- Student received a nude photo of female student.
- Student then reposted photo on instagram entitled “Germantown Whores.”
- Student files lawsuit for his expulsion.

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.

Potential Individual Liability

- Due Process Violation
- 1st Amendment Free Speech Violation
- Equal Protection of the 14th Amendment
- Search and Seizure violation– 4th Amendment

ORS 339.250 (effective July 1, 2014)

- 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;

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.

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.

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.

District Must Consider:

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

Limitations on Expulsion

- Duration must not exceed 1 calendar year.
- Duration of suspension may not be more than 10 school days.

Portland Public Schools

- ***Neighborhood Residents' Rights***
- Community residents have a right to privacy, private property and freedom from abusive behavior. Students must not loiter, litter, trespass or create nuisance conditions for residents of the community. While schools cannot be held responsible for the acts of students to and from school, they may take disciplinary action if the circumstances warrant.

Portland Public Schools Student Handbook

- ***To and from School***
- "Students are subject to school discipline for conduct on the way to and from school, within a reasonable period of time. School personnel are not responsible for supervision of students traveling to and from school."

Salem-Keizer School District Student Handbook

- "These apply to student conduct which occurs while a student is:
- 1. On school premises before, during, or after normal school hours.
- 2. At a school-sponsored event before, during, or after normal school hours, including field trips and school sponsored tours and activities in another city, state or country.

SKSD Student Handbook:

- "3. Traveling to and from school or a school-sponsored event.
- 4. On school premises at any other time when the school is being used for a school-sponsored event.
- 5. Enrolled in summer school and/or intersessions.
- 6. Off school premises when such conduct involves threats or harm to students, staff and/or district property."

Eugene School District 4J Student Handbook:

- **12. Misconduct that Occurs Off-Campus**
- Students may face disciplinary consequences for (1) any off-campus behavior that would otherwise tend to disrupt the educational process or the operation of the school or district;

Eugene S.D. 4J: Student Handbook

- (2) conduct that occurs off the school premises at school-related or supervised functions or at a school bus stop;
- (3) or behavior that occurs while traveling to and from school if the behavior has a threatening effect on student safety or physical or mental health.

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.

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?

C.R. v. Eugene S.D., 2013 *US* Dist. Lexis 130463 (2013)

- Off Campus verbal harassment of two disabled students on the way home from school by fellow student.
- Student claims free speech rights violated.
- Court: Summary Judgment granted. Subject to discipline

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."

C.R. v. Eugene S.D.

- "While the location of speech can make a difference, off-campus speech is within the reach of school officials."

Discipline for off-campus drug use.

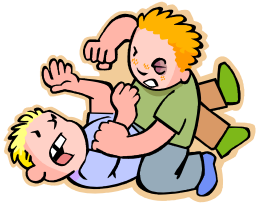
- Scenarios:
  - Students leave campus during school to smoke marijuana in a neighborhood park adjacent to school.
  - Student makes drug deals with students on campus, delivers drugs off campus.
- Look at District's policy. Does policy allow discipline for off-campus conduct?
- What is connection of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

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.

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.



Review of Free Speech Cases

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.

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.

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.:
  - 4th Amendment
  - Equal protection
  - 42 USC 2000d
  - Abuse of process
  - Due process
- Other Claims remain.
  - 1st Amendment
  - Defamation
  - Civil conspiracy
  - Assault

Layshock v. Hermitage S.D. (Penn. 2007)

- 17 year old Student creates fictitious MySpace profile of high school principal on grandmother's computer.
- Profile reached most students at the high school.
- Student accessed profile at school.
- Theme of "Big"
  - Big keg behind desk.
  - Big Fag
  - Big steroid freak.

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."

J.S. v. Blue Mountain S.D. (3rd Cir. 2011)

- 8th grade student creates MySpace profile for school principal on the weekend at home.
- Principal's photo used.
- Principal very upset.
- MySpace blocked by school.
- No student saw profile.
- Student suspended from school.
- Self-protrayal of a bi-sexual middle school principal named "M-Hoe."

Holding– For student

- No substantial disruption to school and no forecast of disruption.
- A future fear of disruption did not equal a current disruption.

Court's View:

- "An opposite holding would significantly broaden school district's authority over student speech and would vest school officials with dangerously overbroad censorship."

Kowalski v. Berkeley County Schools (Cal. 2011)

- Female 12th 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.

Holding:

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

Court's View

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

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.

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.

Wynar v. Douglas Co. S.D. (9th 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.

Wynar Continued:

- Student argued he could not be expelled because he did no 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.

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.

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."

Lessons Learned:

- Being a principal is not for the faint of heart.
- Slow down before acting to discipline student on speech cases.
- What is the substantial disruption to school environment?
- School employee's negative reaction to being target of student's internet speech is not automatically a substantial disruption.
- On off-campus fights or drug possession, what is nexus to school?

Contact Us

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