# There Is No Constitutional Right to be a Cyberbully
## Analysis of J.C. v Beverly Hills Unified School District

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The United States District Court for the Central District of California has issued a disturbing decision in a cyberbullying case, *J.C. v. Beverly Hills Unified School District* (CV 08-03824 SVW).

Although the news coverage of the decision has indicated that the case determined that school officials do not have the right to impose discipline for student off-campus cyberbullying, this is an inaccurate interpretation of the decision. In all of the cases that have involved off-campus online student speech, including this decision, the courts have uniformly held that school officials have the authority to respond to student speech, regardless of geographic origin, under the standard enunciated in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969). Under Tinker, school officials can restrict or respond to student speech if that speech has caused, or foreseeably will cause a substantial disruption at school or interference with the rights of students to be secure.

What presents concern about this decision is that in applying the *Tinker* standard to a situation involving a student online attack against another student, the District Court ruled school officials can only impose discipline if the speech has or foreseeably could cause violence or other substantial disruption of school activities. Judge Wilson dismissed the concerns of emotional harm inflicted on the student who was denigrated and the impact of this verbal aggression on her right to receive an education and feel secure at school. Thus, the ruling calls into question all disciplinary responses to student verbal aggression, whether occurring on- or off-campus.

Fortunately, there is contrary guidance in several other leading Circuit Court student free speech cases that addressed discipline in the context of student bullying that were unfortunately not considered by the court.

> **The primary function of a public school is to educate its students; conduct that substantially interferes with the mission (including speech that substantially interferes with a student's educational performance) is, almost by definition, disruptive to the school environment**. *Saxe v. State College Area Sch. Dist*., 240 F.3d 200, 213 (3d. Cir. 2001).
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> **Intimidation of one student by another, including intimidation by name calling, is the kind of behavior school authorities are expected to prevent. There is no constitutional right to be a bully.** *Sypniewski v. Warren Hills Regional Board of Education*, 307 F.3d 243, 264 (3rd Cir. 2002).

The Court also determined that the school's disciplinary policy was unconstitutionally vague because they did provide the student with fair notice that off-campus conduct could be regulated and disciplined. This decision should provide significant incentive for districts to review their policies to ensure that students are on notice that off-campus acts that substantial disrupt the school can be subject to a disciplinary consequence.

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## Facts of the Case

The facts in this case bear similarity to cyberbullying incidents that school officials are struggling to address with an unfortunate frequency. Plaintiff J.C. and several other students gathered at a local restaurant. Plaintiff recorded a short video of her friends talking about a classmate, C.C. One of Plaintiff's friends called C.C. a "slut," said that C.C. is "spoiled," talked about "boners," and used other profanity. During the video, J.C. is heard encouraging this student to continue to talk about C.C. In the evening on the same day, Plaintiff posted the video on the website "YouTube" from her home computer. She also contacted 5 to 10 students from the school and told them to look at the video. She also contacted C.C. and informed her of the video.

C.C. came to the middle school with her mother and spoke with school counselor. She was crying and told he counselor that she did not want to go to class. The counselor spent some time counseling C.C. and convincing her to go to class. J.C. and the other students involved in the incident were called to the office. J.C. was suspended for 2 days. The father of the student who spoke on the video came to school and viewed the video and removed her from school for that day. It was estimated that approximately half of the 8th grade students had seen the video.

Research addressing cyberbullying has consistently revealed that these incidents can be exceptionally emotionally traumatic and frequently are related or contribute to school failure, school avoidance, violence at school - and sometimes youth suicide. To protect the well-being of youth, school officials must have the authority to respond to these incidents and, if justified, remove offending students from school for a period of time.

## School Authority to Respond to Off-Campus Student Speech

The Plaintiff had argued that "if the publication of a student's speech does not take place on school grounds, at a school function, or by means of school resources, a school cannot punish the student without violating her First Amendment rights." The Court noted that while the Supreme Court has not yet addressed a factual situation related to off-campus student speech, that "the majority of courts will apply *Tinker* where speech originating off campus is brought to school or to the attention of school authorities, whether by the author himself or some other means."

**The Court held that "any speech, regardless of its geographic origin, which causes or is foreseeably likely to cause a substantial disruption of school activities can be regulated by the school."**

The Court did note that the Second Circuit requires a demonstration of a school nexus. In this situation, which is similar to the vast majority of student-on-student cyberbullying cases, the Court found a clear school nexus. The video was reviewed at school. It was posted on a publicly available web site. The Plaintiff had contacted other students, including C.C., to tell them about the video. The comments made in the video increased the probability that a parent would call the video to the school's attention. Thus, while not required in the Ninth Circuit, school nexus was clearly established.

Thus, this decision is consistent with all of the cases involving student off-campus online speech in determining that school officials can regulate speech, regardless of its geographic origin, if that speech has or foreseeably will cause a substantial disruption at school.

**Substantial Disruption or Interference with the Rights of Students to be Secure**

The lack of case law related to a school response to student speech that harmfully targets another student was evident in how the case was analyzed by the Court. Judge Wilson stated: "*Tinker* establishes that a material and substantial disruption is one that affects 'the work of the school' or 'school activities' in general." This narrowing of the standard is clearly contrary to the language in *Tinker* which also references speech that "(collides) with the rights of other students to be secure and to be let alone." 393 U.S. at 508

After thus narrowing the analysis of *Tinker* to an assessment of the impact on the school environment, Judge Wilson assessed a variety of issues that were not relevant to the harmful impact on C.C.: The fact that C.C's parent was upset and that students were removed from their class. Whether or not there was a ripple effect in the classroom that disturbed instruction. Whether or not students were planning to physically assault C.C. or any evidence that C.C. intended to engage in physical violence. The demand on staff time to address the situation. The concern that student might worry that the same thing might happen to them. The potential that students could take sides and this could lead to violence. Whether or not there was any history of a prior video posted on YouTube that led to violence. None of these factors, in the Court's opinion, provided sufficient evidence of substantial disruption <u>of school activities</u>.

**Are these the factors that we would expect a school official to assess in determining how to respond to an exceptionally nasty video disparaging a student that has been posted by another student on a publicly accessible site and widely advertised to other students in the school by that offending student? Clearly not.**

Judge Wilson discussed the other important language in *Tinker*, regarding rights of students to be secure, as follows:

> In addition to the substantial disruption test, *Tinker* held that a school may regulate student speech that interferes with the "the school's work or [collides] with the rights of other students to be secure and be let alone." 393 U.S. at 508. Thus, it appears that speech that "impinge[s] upon the rights of other students" may be prohibited even if a substantial disruption to school activities is not reasonably foreseeable. Id. at 509. That said, the precise scope of *Tinke*r's "interference with the rights of others" language is unclear, as the Court's analysis in *Tinker* focused primarily on whether a substantial disruption was reasonably foreseeable. Moreover, lower courts have not often applied the "rights of others" prong from *Tinker.*
> ...
> Defendants argue that *Harper* [*Harper v. Poway Unified School District* 445 F.3d 1166 (9th Cir. 2006)[2]] demonstrates that "California schools have an obligation to protect students from psychological assaults that cause them to question their self worth." (Mot. at 11.) This is undoubtedly true; however, California schools cannot exercise this obligation in a manner that infringes upon other student's First Amendment rights. The task for this Court is not to assess whether the School's intentions were noble; no one could dispute that the School was attempting to protect C.C. from psychological harm. That said, the Court is not aware of any authority, including *Harper*, that extends the Tinker rights of others prong so far as to hold that a school may regulate any speech that may cause some emotional harm to a student. This Court declines to be the first.

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2 While the Harper decision related to anti-gay T-shirts was grounded in the interference with rights of students, this case did not involve student-on-student verbal aggression.

Judge Wilson failed to address two student free speech cases that specifically addressed student speech that caused emotional harm to another student, *Saxe v. State College Area Sch. Dist*. and Sypniewski v. Warren Hills Regional Board of Education.

*Saxe* assessed the constitutionality of a bullying prevention policy that was found to be overbroad. In writing for the Court, Judge (now Supreme Court Justice) Samuel Alito Jr. wrote:

> We agree that the Policy's first prong, which prohibits speech that would 'substantially interfer[e] with a student's educational performance,' may satisfy the Tinker standard. The primary function of a public school is to educate its students; conduct that substantially interferes with the mission is, almost by definition, disruptive to the school environment.

In addressing another policy provision, Judge Alito noted that the "precise scope of *Tinker's* 'interference with the rights of others' language is unclear ..." Judge Alito expressed concerns about district's policy language against speech that "creat[es] an intimidating, hostile or offensive environment" because this language "(did) not, on its face, require any threshold showing of severity or pervasiveness, ..." Thus, under *Saxe*, school officials can respond to student speech that is sufficiently severe or pervasive, but not simply "offensive," if that speech will substantially interfere with a student's educational performance.

In *Sypniewski,* which also addressed the constitutionality of a school's anti-harassment policy, the Third Circuit quoted with approval the new policy language of the State College Area School District (which was the subject of the prior *Saxe* decision):

> The term "harassment" as used in the Policy means verbal, written, graphic or physical conduct which does or is reasonably believed under the totality of the circumstances to 1. substantially or materially interfere with a student's or students' educational performance; and/or 2. deny any student or students the benefits or opportunities offered by the School District; and/or 3. substantially disrupt school operations or activities; and/or 4. contain lewd, vulgar or profane expression; and/or 5. create a hostile or abusive environment which is of such pervasiveness and severity that it materially and adversely alters the condition of a student's or students' educational environment, from both an objective viewpoint and the subjective viewpoint of the student at whom the harassment is directed. The term "harassment" for purposes of this Policy does not mean merely offensive expression, rudeness or discourtesy; nor does the term "harassment" mean the legitimate exercise of constitutional rights within the school setting. The School District recognizes there is a right to express opinion, ideas and beliefs so long as such expression is not lewd or profane or materially disruptive of school operations or the rights of others. *Id*. at 264.

The court in *Sypniewski* also affirmed the rights of students to attend school in an environment free from abuse stating: "Intimidation of one student by another, including intimidation by name calling, is the kind of behavior school authorities are expected to prevent. There is no constitutional right to be a bully. ... Schools are generally permitted to step in and protect students from abuse." *Id*. at 264.

In fact, schools throughout the country have enacted bullying prevention policies, frequently required by state law, that specifically address verbal assaults. School officials routinely discipline students who engage in verbal aggression of a fellow student that could interfere with that student's educational performance or emotional security at school.

**The Court's inquiry was misguided. The inquiry should have focused on one question: Was the speech of J.C. sufficiently severe or pervasive that it had or foreseeably would substantially interfere with C.C.'s educational performance and right to feel secure at school, and thus her right to receive an education?**

Based on the language in *Sypniewski* that noted approval of the State College policy, this determination should be made based both on the subjective perspective of C.C., as well as an objective third party perspective - informed by research insight on bullying. An analysis guided by this question would effectively distinguish between student speech that is merely "offensive" but should be considered protected speech and speech that is truly harmful and interfering with the right of another student to feel secure at school and receive an education.

**Emotional Harm Suffered by C.C.**

The Court dismissed the emotional harm suffered by C.C. Most notably and highly illogically, the Court downplayed the significance of harm caused by this cruel video by stating that "while C.C. was undoubtedly upset, it took the school counselor, at most, 20-25 minutes to calm C.C. down and convince her to go to class."

The Court failed to note the context of C.C.'s decision. Her willingness to go to class was predicated on the fact that she knew that the school officials were intending to call the aggressors to the office and deal with the situation. The fact that the school officials at Beverly Vista School responded promptly and effectively to this situation was held against the district. Due to the district's effective disciplinary actions, the foreseeable significant interference with C.C.'s ability to participate in school activities was prevented!

Let's replay this situation with Judge Wilson's resolution. C.C. comes to the counselor reporting that she is being targeted by students who are calling her a "slut" and spreading nasty rumors about her. The counselor's response is that she is being emotionally fragile and since no violence has yet occurred nor is predicted there is nothing the school can or will do and she should go back to class. At its essential core, this is what the ruling of Judge Wilson deems to be an appropriate school response.

Judge Wilson further displayed his abject lack of insight into the problems of bullying and the serious consequences of bullying on the emotional well-being and educational success of students. Examples include:

> The Court does not take issue with Defendants' argument that young students often say hurtful things to each other, and that students with limited maturity may have emotional conflicts over even minor comments. However, to allow the School to cast this wide a net and suspend a student simply because another student takes offense to their speech, without any evidence that such speech caused a substantial disruption of the school's activities, runs afoul of Tinker.
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> ...(T)he School's decision must be anchored in something greater than one individual student's difficult day (or hour) on campus.
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> ...(N)o one could seriously challenge that thirteen-year-olds often say mean-spirited things about one another, or that a teenager likely will weather a verbal attack less ably than an adult. The Court accepts that C.C. was upset, even hysterical, about the YouTube video, and that the School's only goal was to console C.C. and to resolve the situation as quickly as possible.

> The Court cannot uphold school discipline of student speech simply because young persons are unpredictable or immature, or because, in general, teenagers are emotionally fragile and may often fight over hurtful comments.

Judge Wilson's comments and interpretation of this situation flies in the face of all bullying prevention guidance, thus reinforcing the wisdom of the guidance provided in *Tinker* that the "Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." 393 U.S. at 507.

**Why Did the Decision Go Off-Track?**

One reason this decision went off-track is likely the limited legal guidance related to the constitutionality of a school response when a student is bullying, or being verbally aggressive, towards another student. One reason for the lack of case law is likely that there are very few attorneys such J.C.'s father, Evan Cohen, who filed the case, who are inclined to file a law suit against a school district arguing that students should have a First Amendment right to torment and harass other students.

The other reason is that the arguments in this case appeared to be framed in the context of the recent online, off-campus student speech cases - with the failure to note the critical difference between these other cases and the situation in Beverly Hills School. All of the other off-campus online cases involved student online speech that targeted school staff. Thus, the issue of whether such speech had caused a substantial disruption of school activities was relevant in those cases. There have not been any other cases involving speech targeting other students.

**What Should School Officials Do in Response to This Case?**

At first glance, this ruling may appear to suggest to school officials that they should refrain from intervening in any bullying or cyberbullying situations, on or off-campus, absent evidence of the potential for violence or a substantial disruption <u>of school activities</u>. This interpretation would essentially require a rewriting of most school district bullying prevention policies, many of which are dictated by state statute. Because the Court framed its decision in the context the ability of school officials to respond to speech regardless of geographic origin, but determined that the substantial disruption must be of school activities and if the Court's conclusion is correct, then this calls into question the constitutionality of all school bullying prevention statutes and policies.

Alternatively, districts could, under guidance from their legal council, continue to rely on the guidance set forth in *Saxe* and *Sypniewski* and respond to situations where the severe or pervasive behavior of one student has or could significantly interfere with the security of another student - regardless of the geographic origin of such speech.

The arena where some attorneys appear to be inclined to pursue legal action are those situations involving off-campus, online speech - cyberbullying. When a school official intends to impose a formal disciplinary response on a student for off-campus harmful speech that has targeted another student, the focus - and evidence retention - must be on the potential for that speech to significantly interfere with the targeted student's educational performance and emotional security at school. It is likely that school officials should be prepared to address this question based both on the subjective perspective of the target, as well as an objective analysis. This is also in accord with guidance from *Saxe* and *Sypniewski.* These are the kinds of situations where evidence retention related to the targeted student's subjective response, as well as retention of all harmful material, will be critical.

## Due Process, State Statutes, and District Policies

J.C. also challenged the discipline based on a violation of her due process rights. The Court noted the importance of notice. It then discussed concerns related to the district's policy and the California state statute. The district's policy stated:

> 12. To refrain from behavior which disrupts school activities. I understand that actions such as inappropriate classroom conduct, profanity, lack of respect for classmates and adults, are unacceptable behaviors that may result in suspension and/or expulsion.

The court noted that all of the activities mentioned in the policy involve on-campus acts. The court further addressed provisions of the California state statute:

> Specifically, California Education Code section 48900(s) provides, in relevant part: A pupil should not be suspended or expelled for any of the acts enumerated in this section, unless that act is *related to school activity or school attendance occurring within a school* under the jurisdiction of the superintendent of the school district or principal . . . . A pupil may be suspended or expelled for acts that are enumerated in this section *and related to school activity or attendance* that occur at any time, including, but not limited to, any of the following: (1) While on school grounds. (2) While going or coming from school. (3) During the lunch period whether on or off the campus. (4) During, or while going to or coming from, a school sponsored activity. Cal. Educ. Code § 48900(s) (emphasis added).

The Court highlighted and noted again the focus on acts occurring on-campus. The Court did not rule out the fact that, with appropriate notice, schools have the authority to respond to off-campus acts. The Court noted that the language of the statute was not exclusive and that the possibility of responding to off-campus acts was not ruled out by this statutory language - but that a person of ordinary intelligence cannot be left to guess what other activities might warrant discipline.

The Court concluded:

> In sum, the Court finds that the School's disciplinary policies are unconstitutionally vague because such policies appear, on their face, to limit the School's authority to discipline students for activities occurring at school, while the students are on the way to or from school, or at a school-sponsored event. Although the School can, within the bounds of the constitution, regulate off-campus speech that causes a material and substantial disruption to school activities under Tinker, it must put students on notice of such authority so that they can modify their conduct in conformity with the school rules. The School's current written policies do not put students on notice that off-campus speech or conduct which cause a disruption to school activities may subject them to discipline.

Many states have statutes related to bullying and harassment or student discipline that contain language similar to that in the California statute, with a focus on activities occurring at school, school activities, or transportation. As is the case in California, generally this language does not specifically exclude off-campus acts, but rarely do the statutes include language that specifically includes off-campus acts that have or could cause a substantial disruption at school. This is an authority that clearly school officials have under all of the cases cited by the Court in J.C., as well as the J.C. decision itself.

The concerns of lack of due process are significant. But fortunately relatively easily remedied with changes to school policies. An amendment of state statute to also make it clear that school officials have the authority to respond to off-campus student acts under the *Tinker* standard would also be advisable.

The following is recommended language:

> ... bullying that takes place on or immediately adjacent to school grounds, at any school-sponsored activity, on school-provided transportation or at any official school bus stop, through the use of the district Internet system while on or off-campus, through the use of a personal digital device on campus, or off-campus activities that cause or threaten to cause a substantial disruption at school or school activities.
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> "Substantial disruption" means:
> - Significant interference with instructional activities, school activities, or school operations.
> - Physical or verbal violent altercations between students.
> - A hostile environment for any student that impairs that student's ability to participate in educational programs or school activities.

**About the Author**

Nancy Willard, M.S., J.D. is the director of the Center for Safe and Responsible Internet Use. She has degrees in special education and law. She taught "at risk" children, practiced computer law, and was an educational technology consultant before focusing her professional attention on issues of youth risk online and effective management of student Internet use. Nancy is author of *Cyberbullying and Cyberthreats: Responding to the Challenge of Online Social Cruelty, Threats, and Distress* (Research Press).

The author is working on a 2-hour video presentation, with an extensive handout, addressing Cyberbullying, Cyberthreats, and Sexting that will be released in early 2010. More information will be available on the CSRIU site at <http://csriu.org>. The author is also available to provide professional consultation to school attorneys related to these types of cases.

Further comment on this case can be found at:

http://nasspblogs.org/principaldifference/

http://cyberbullying.us/blog/cyberbullying-and-the-right-to-feel-safe-at-school.html

http://miketully.net/blog/2009/12/28/what-about-the-kids-new-case-continues-troubling-trend-of-adult-bias/