



Editor: Kathryn Gardner, J.D., and Assistant Editor: Sarah Muehler
Coordinators: Neely Fedde, J.D., and Kelsey Schrempf, Kansas Bar Association

Greetings from the Kansas Supreme Court and the Kansas Bar Association (KBA). Welcome to this edition of *Law Wise* and the second edition of the 2011-2012 school year.

IN THIS ISSUE

Welcome.....	1
Calendar of Events.....	1
Discipline of Teachers and Students for Internet Speech.....	1
Field Trip	2
Lesson Plan – My Space and First Amendment Rights Online	3
Kansas Courts Video Available.....	4
Resources for Law-Related Education	5
The KBA Law-Related Education Clearinghouse.....	5
Technology for Teachers	5

Discipline of Teachers and Students for Internet Speech

By Kathryn Gardner, J.D.

Did you know that Missouri just passed a law making it illegal for teachers to use social media with students? Do you wonder whether students may be disciplined for posting items on Facebook or the internet which verbally attack a teacher? Read on!

I. THE FIRST AMENDMENT, GENERALLY

The First Amendment provides that “Congress shall make no law ... abridging the freedom of speech.” “[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002) (internal quotation marks omitted).

Although students in public schools do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” the First Amendment rights of students are not the same as the rights of adults in other settings. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988). Instead, the rights of students “must be ‘applied in light of the special characteristics of the school environment.’” *Id.*, 484 U.S. at 266.

II. FREE SPEECH EXCEPTIONS

Did you know that some kinds of speech deserve no “free speech” right? Some categories of speech are simply not protected by the First Amendment.

A. Unprotected speech, generally

The following categories of speech are unprotected for students and adults, regardless of whether the speech occurs on school property or elsewhere: fighting words; speech that incites others to “imminent lawless action,” obscenity, true threats, fraud and defamation. This kind of speech is of so little value that any benefit that may be derived from it is clearly outweighed by the social interest in order and morality.

B. Additional restrictions on student speech

Public schools have the authority to prohibit certain speech by students even though the speech is otherwise protected. Thus, public school authorities may legally discipline a student for the following additional categories of unprotected speech: inappropriate school-sponsored speech; lewd, vulgar, or profane speech on school property; speech at school-sponsored events promoting illegal drug use; and speech that school au-

CALENDAR OF EVENTS

January 29, 2012	Kansas Day
March 24, 2012	Regional Mock Trial Competition
March 31, 2012	State Mock Trial
May 3-6, 2012	National Mock Trial Competition (Albuquerque, N.M.)
June 14, 2012	Flag Day



thorities have reason to believe will create a risk of substantial disruption within the school environment. These categories, developed in the context of traditional speech, extend to speech on social media, as well.

III. MISSOURI LAW BANS TEACHER FROM USING SOCIAL MEDIA SITES OR TEXT MESSAGING TO COMMUNICATE WITH STUDENTS.

Missouri recently passed a law (VAMS 162.069) which has received lots of attention for being the first of its kind in the United States. The law, which was to take effect on August 28, 2011, required every school district to promulgate a written policy by January 1, 2012, concerning teacher-student communication and employee-student communication. That policy was required to contain, in its sexual harassment policy or elsewhere, the following restriction: "No teacher shall establish, maintain, or use a non work-related internet site which allows exclusive access with a current or former student." Teachers became aware of this proposed law and filed two separate lawsuits, one in state court and one in federal court, alleging that the law chilled their right to free speech, was overbroad, and was unconstitutionally vague. Two days before the law was to take effect, a Missouri state judge agreed with the teachers, so entered a preliminary injunction which prevents the law from taking effect for 180 days. His order stated that teachers would not be subject to discipline for using social media during that time. This case will be interesting to follow.

IV. RECENT CASES — DISCIPLINE OF STUDENTS FOR OFF-CAMPUS INTERNET SPEECH

May a principal discipline a student for speech posted on the internet which verbally attacks a teacher? The contours of First Amendment protections for student internet speech are not well defined in Kansas because the courts which establish the controlling law for Kansas (namely, the United States Supreme Court, the Kansas Supreme Court, and the Tenth Circuit Court of Appeals) have not yet decided such a case. Legal developments from other jurisdictions (which are not binding in Kansas) are summarized below to illustrate the varying approaches and results in this developing area of the law.

A. Expulsion of student is legal

In *J.S. v. Bethlehem Area School District*, 569 Pa. 638 (2002),

a student created a website at home, which made "derogatory, profane, offensive and threatening comments, primarily about the student's algebra teacher" and principal. The student told other students about the website and showed it to another student at school. The court held: "[W]here speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech." *Id.* at 865. Because the student's speech was "on-campus" speech that implicated unique First Amendment concerns regarding the school environment, and because the website had disrupted the entire school community, expelling the student was legal.

B. Discipline of student is not legal

In *Evans v. Bayer*, 684 F.Supp.2d 1365 (S.D.Fla. 2010), a senior created a group on Facebook for students to "express [their] feelings of hatred" for a specific teacher. The page was made after school hours from the student's home computer. The teacher never saw the posting and it did not disrupt school activities. The school principal learned of the posting only after the student had removed it from Facebook. The principal suspended the student from school for three days and moved her from her advanced placement classes into lesser weighted honors courses. The court found that the student's speech was protected as free speech because it was an opinion, was published off-campus, did not cause any disruption on-campus, was not lewd, vulgar or threatening, and did not advocate illegal or dangerous behavior. The student thus had a constitutional right to the speech.

III. CONCLUSION

Given the undeveloped state of the law in Kansas, only one parting remark is appropriate: students - don't be too sure that your principal cannot discipline or expel you for derogatory remarks you make about school officials on the Internet; and school officials - don't be too sure that you can discipline or expel students for derogatory remarks they make about school officials on the Internet. Teachers, you can be sure that Kansas has not passed any law like the Missouri law which restricts teachers' communications with students on the internet. Although the totality of the factual circumstances must be examined in each case, the legal test to be applied to these emerging free speech cases is not yet well established in Kansas. ■

Take a Field Trip!

Looking for a field trip idea? Interested in an interactive learning experience? Want to give your students a chance to meet with a federal judge? Need materials to help you teach about the courts?

Contact the U.S. District Court for the District of Kansas for help! We offer tours of our three courthouses and fun, timely, and interactive EDUCATIONAL programs designed for students of all ages.

Check out the program offerings at www.uscourts.gov/outreach/index.html and contact Neely Fedde, the Court's Public Outreach Specialist, at neely_fedde@ksd.uscourts.gov or (913) 551-6692 for more information or to schedule a session in our Kansas City, Wichita, or Topeka courthouses or at your school.

Lesson Plan: My Space and First Amendment Rights Online

adapted from www.channelone.com/teachers/first-amendment-lesson-plans

CASE STUDY I: ONLINE STUDENT SPEECH

The Facts:

Once again, Main Street High School has found itself in the local – and national– newspapers after it suspended a student for comments he made about the school on MySpace.com. “I just wrote the stuff to make people laugh,” said Jake Edelstein, a sophomore and an honors student. “They were stereotypes about the school, what people say about the school. But it was just my opinion, not facts.” About a dozen students held a rally the day after the suspension was announced as a public show of support for Edelstein, who was suspended for 15 days. Although no names were used, it was possible to identify people from their descriptions.

Asked to comment on the case, the student’s attorney said: “It’s definitely a First Amendment issue. Young people have the right to express themselves. When students speak out on campus, the school has some ability to regulate what students write, but this is off campus.”

A concerned parent brought a printout of the postings to school a week ago, and Edelstein was suspended the same day. The Public School spokeswoman confirmed that the suspension was for Internet postings. “A writing that disrupted the educational process at school occurred in this venue,” she said. “Just like with any other student behavior that disrupts the educational process, it is the school’s responsibility to respond accordingly.”

A friend of Edelstein’s said the school took the comments too seriously. “When you’re at home and you’re on your computer, you know, people say things every day,” the 18 year-old said. “I don’t know why they’re taking it out on Jake. It’s just so blown out of proportion.”

THE LEGAL QUESTIONS:

1. What are the primary considerations to make when determining issues of student speech that occur in cyberspace?
2. What limits, if any, can be placed on the private Web sites of students?

OTHER KEY ISSUES TO CONSIDER:

Who will win the case?

ANSWERS TO LEGAL QUESTIONS*:

1. Student speech and the Internet raise some important and complex issues for educators, students, and parents. Until recently, there was little law governing what was and wasn’t acceptable speech on the Internet. In 1997, the case of *Reno v. ACLU* clarified that Internet speech is generally entitled to the same degree of protection that the speech would receive, if in traditional print.

In light of this ruling, schools should consider the following factors before regulating student speech on the Internet:

- ✎ Was the content created as part of the school curriculum, such as a class project or the official school newspaper? If so, then the speech in question is considered

school sponsored, and the Hazelwood standard of expression would apply. In that case, schools are granted greater leeway in regulating speech that “students, parents, and members of the public might reasonably perceive to bear the imprimatur [endorsement] of the school.”

- ✎ Was the content created on school computers during the student’s free time? If it was, the student will likely contend the Tinker standard governs. Under that standard, the speech in question is entitled to protection under the First Amendment as long as it does not (a) cause a material or substantial disruption to the school community, or (b) infringe on the rights of others. An attorney for the school, however, would likely argue that the speech should be held to the Hazelwood standard of expression because school computers were being used.
- ✎ Was the content created during a structured class or lab time? If so, the Hazelwood standard should apply, because the content could be linked to the curriculum.

These factors, of course, relate to student speech on the Internet that occurs on the school grounds. If the speech in question occurs on a private Web site, a different set of issues is at stake.

2. Case law in this area is still developing, so a clear legal standard has yet to be defined. School officials, however, should exercise caution before attempting to limit student expression on a private Web site maintained off school grounds.

On one hand, schools have a vital interest in keeping all members of their community safe; if a student produces speech that constitutes a “true threat,” schools have a responsibility to act. However, in the majority of lawsuits between students and administrators so far, judges have been more likely to defend the free expression rights of the students, whose speech they usually determined did not constitute a “true threat.”

As one judge put it, in a case where students had been punished for publishing an underground newspaper that was produced and sold off campus, “our willingness to defer to the schoolmaster’s expertise in administering school discipline rests ... upon the supposition that the arm of authority does not reach beyond the schoolhouse gate.”¹¹

To help understand the distinctions that educators should make when considering off-campus Internet speech, Edwin Darden, senior staff attorney for the National School Boards Association (NSBA), suggests that student websites be divided into three categories:

- ✎ Sites that are offensive, obnoxious, and insulting.
- ✎ Sites that are offensive, obnoxious, and insulting, and also contain some sort of veiled threat of violence or of destruction of property.
- ✎ Sites that contain an outright blatant threat.

Darden suggests that for the first category, under which most student sites fall, “my advice to schools is, you just need to develop a thick skin.” For the second

category, because the nature of the threat is unclear, educators should be sure to get further information on the subject before passing judgment too quickly.

2. For the third category, however, if the speech in question represents an actual threat, the student could be punished, as long as schools can demonstrate that the speech could disrupt the school or that it seriously threatens harm to a member of the school community.

For example, in the case of *J.S. v. Bethlehem Area School District*, an 8th grader asked visitors of his Web site for \$20 to “help pay for the hit man” to kill his math teacher. The student was expelled as a result, prompting the parents to sue the school district. Then the teacher followed by filing a defamation suit against the family. The family countersued. When the Pennsylvania Commonwealth Court issued their ruling in July 2000, they ruled that the child’s threat materially disrupted the educational process.³ Then, a jury awarded the teacher \$500,000 in damages.

Several other state and federal courts have determined that school officials exceeded their authority in regulating students’ online speech created wholly off campus. For example, one federal judge rejected school officials’ actions in suspending a student for lampooning school officials on his private Web site. The judge wrote: “Disliking or being upset by the content of

a student’s speech is not an accepted justification for limiting student speech under *Tinker*.”⁴

So what does this all mean?

Because the Supreme Court has granted cyberspeech the highest degree of protection under the First Amendment, school officials need to be aware that student speech that occurs off school grounds is private and not subject to the

authority of school officials unless it causes a substantial disruption. If, however, a student’s speech crosses the line and suggests actual physical harm — such as Eric Harris’s Internet “hit list” prior to the Columbine massacre — then schools should immediately consult an attorney. ■

Endnotes

1. See *Thomas v. Bd. of Education Granville Central Sch. Dist.*, 607 F.2d 1043 (2nd Cir. 1979), cert. denied, 444 U.S. 1081 (1980).

2. Welch, Matt, “Off-Campus Speech v. School Safety,” available online at USC Annenberg Online Journalism Review.

3. *J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412 (Pa. Cmwlth. 2000).

4. *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998).

*The answers to the legal questions are taken from *The First Amendment in Schools* (ASCD, 2003). For more information, visit <http://shop.ascd.org/productdisplay.cfm?productid=103054>

COURT EDUCATION VIDEO AVAILABLE

The Kansas Supreme Court has released a new educational video along with talking points on four court-related topics. The video, called *Justice in Kansas*, and the talking points may be accessed below.

Justice in Kansas Video: Published by the Kansas Supreme Court, produced in January 2009 and hosted by then-Chief Justice Robert E. Davis, the video provides information regarding the structure and function of the Kansas Judicial Branch. Copies of the video are available upon request to teachers or anyone interested in law-related education. Contact Ron Keefover, Education and Information Officer of the Office of Judicial Administration, Topeka, (785) 296-4872 to order. Video is approximately seven (7) minutes in length. Window Media Player 9.0 or above is required. [Free Download for WMP.](#)

Talking Points:

- Interesting facts regarding the Kansas Judicial System
- Types of courts
- Case statistics
- Jury service in Kansas
- About Kansas courts

- Ron Keefover
Education-Information Officer
Kansas Judicial Center
301 W. 10th
Topeka, KS 66612
Phone: (785) 296-4872
Fax: (785) 296-7076
keefover@kscourts.org

The Kansas Bar Association Law-Related Education Clearinghouse Inventory catalog is available. To request a new copy, please call Kelsey Schrempp, KBA Public Services Manager, at (785) 234-5696 or email her at kschrempp@ksbar.org.

LAW-RELATED EDUCATION CLEARING HOUSE ... WHERE?

This is no longer a mystery! The Kansas Bar Association's Law-Related Clearinghouse is located in the Teachers College Resource Center, room #224 of Visser Hall, here on the campus of Emporia State University. Packed on the shelves are a wide variety of civics resources for Kansas educators. A brief scan of the collection shows that there are booklets, books, games and kits, mock trial simulations, videos, DVDs, and more.

So why is this collection so unknown? For me *that* is a huge mystery! Any time that I can find valuable materials in my content area, ready to use with students, I consider that a resource that I will call upon again and again. I think that this collection may have been overlooked in the search for effective materials for students because of the variety of other resources offered here at the Teachers College Resource Center. I have excellent reason to believe that this non-use will change! The Kansas Bar Association, steered by their Public Services Manager, Kelsey Schrempp, has put their valuable dollars to work for educators! New, timely audio-visual materials have been ordered and will soon invigorate this collection. Now, all you will need to do is be first in line to check out these brilliant new additions to the collection. The new additions will be available in mid December and some are listed in the above Clearinghouse Resources.

The hours at the Center are 9 a.m. to 6 p.m. Monday through Thursday, and 9 a.m. through 5 p.m. on Friday. For more information, call (620) 341-5292 or email me at jromeise@emporia.edu.

Janice Romeiser
Director Teachers College Resource Center/Instructional Materials Center
Emporia State University

TERRIFIC TECHNOLOGY FOR TEACHERS



Check out these great websites ...

Interactive Constitution - The U.S. Constitution, including detailed explanations of the text is just a click away.

www.constitutioncenter.org/ncc_edu_Online_Activities.aspx

"Improv Anywhere?" - Does the First Amendment protect the rights of groups like Improv Everywhere to burst into song or perform synchronized swimming in public fountains?

www.channelone.com/teachers/first-amendment-lesson-plans/

Young People and the Internet: Issues of Censorship and Free Expression - Students debate restricting online access by filtering the Internet.

www.firstamendmentschools.org/resources/lesson.aspx?id=14360

When May Speech Be Limited? - Students look at case studies to justify circumstances when speech may be limited.

www.firstamendmentschools.org/resources/lessonplans_speech.aspx

Regulating Freedom of Speech - Students explore the nature and purpose of dissent within the context of Supreme Court rulings.

www.firstamendmentschools.org/resources/lesson.aspx?id=13932