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

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Welcome

This month, *Law Wise* continues this year’s theme of the Bill of Rights relevant to schools and students by focusing on the Fourteenth Amendment – specifically, whether physical altercations with or discipline of students may violate the student’s substantive due process rights. Did you know that Kansas has no law prohibiting corporal punishment in public schools? (See KAR 28-4-427, regarding preschools.) Corporal punishment is prohibited by policy, however, in many school districts. Nonetheless, physical encounters do occur between school employees and students. In April, *Law Wise* will examine procedural due process, which generally requires notice of the charges against a person, and an opportunity to be heard in one’s defense. Substantive due process is another matter and is the focus of this issue.

SUBSTANTIVE DUE PROCESS IN KANSAS SCHOOLS

By Kathryn Gardner, J.D.

CALENDAR OF EVENTS

March 24, 2012	Regional Mock Trial Competition
March 30-31, 2012	State Mock Trial
May 3-6, 2012	National Mock Trial Competition (Albuquerque, N.M.)
June 14, 2012	Flag Day



THE FOURTEENTH AMENDMENT, GENERALLY.

The Fourteenth Amendment prohibits any state deprivation of life, liberty, or property without due process of law. Due process is required only when a decision of the state implicates an interest within the protection of the Fourteenth Amendment. When public school employees impose disciplinary corporal punishment or have other physical encounters with students, the Eighth Amendment (which prohibits cruel and unusual punishment of *incarcerated* persons) does not apply, but the Fourteenth Amendment may. The pertinent constitutional question is whether the discipline meets the requirements of due process. Corporal punishment in public schools may implicate a constitutionally protected liberty interest. In order to establish a Fourteenth Amendment substantive due process constitutional violation in a school corporal punishment case, the conduct alleged must properly be characterized as arbitrary, or conscience shocking.

The Tenth Circuit, which reviews Kansas federal cases, usually analyzes claims of excessive force in the discipline of public school students under the Fourteenth Amendment. In such cases, to determine whether there is a violation of substantive due process, the court asks “whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.”

Garcia v. Miera, 817 F.2d 650, 655 (10th Cir. 1987). To satisfy this standard, the plaintiff must demonstrate “a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking.” *Uhrig v. Harder*, 64 F.3d 567, 574 (10th Cir. 1995).

Conscience-shocking conduct was found in one case where a 9-year-old girl was held up by her ankles and paddled on her thighs several times until they bled, causing a permanent scar and, on a separate occasion, was paddled five times and pushed against a desk, which caused back and buttocks pain, and bruising for several weeks. *Garcia v. Miera*, 817 F.2d 650, 653, 658 (10th Cir. 1987). Similarly, a student’s substantive due process rights were violated when a teacher left a mentally-handicapped child, who had a documented and known fear of being alone in a bathroom, to clean the bathroom alone for two hours. *Gerks v. Deathe*, 832 F.Supp. 1450 (W.D.Okla. 1993).

Law Wise highlights for you three Kansas school cases applying this substantive due process “shock the conscience” standard.

1. Teacher Slaps Belligerent Student

In our first case, a seventh-grade student with a history of behavior problems walked into the classroom eating a sucker. When the bell rang, the teacher asked her to get rid of it. The student refused, so the teacher gave her a demerit slip. While the teacher was taking attendance, the student began arguing with two other students, so the teacher told her to move to a different chair. The teacher went to help the student move her book and folder nearer to the teacher’s desk and farther from the other students, but the student grabbed the book away. The teacher carried the folder to the desired desk, and the student slowly followed her while talking, cussing, and arguing. The teacher stood by the newly-designated chair. The student then sat in it, cussed and argued, and turned the chair completely around to face the class. The teacher reacted by slapping the student on her cheek. See *Holloman v. Unified School Dist.* 259, 2006 WL 1675932 (D. Kan. 2006).

The court found that a single slap from a teacher that left no scars and required no medical attention did not amount to a substantive due process claim, since it was not conduct that shocked the conscience. No evidence showed that the conduct was inspired by malice or sadism. Rather, this appeared to be an incident “where a teacher exerted an unwise level of force that was inappropriate and regrettable.” *Id.* p. 6. Accordingly, the court granted summary judgment to the defendant school district, and the case never got to a jury. (The teacher was disciplined and her contract was non-renewed, however.)

2. School Security Officer Seizes Student

Our second case arises out of an altercation between a student and a school security officer. The facts, according to the student’s version of events, follow. The school officer followed the student, who had just been suspended, as she walked through the school halls, and pushed her into a file cabinet. The officer then shoved her into another student and through a classroom door, pursued her, then caught her and held her in a head lock with his arms around her neck. He then dragged her across the hallway and pinned her up against the wall near a water fountain. She grabbed the water fountain as she struggled to get away from him, but the water fountain fell off the wall when defendant the officer pulled her away from it. Dur-

ing the encounter, she “couldn’t breathe” and she remembered “everything was going black.”

This case went to trial, and the jury found in favor of the defendant school district. How? The jury believed other evidence which conflicted with the student’s version of events. That other evidence revealed the student’s combative nature on the day of the altercation and conflicted with her testimony regarding the characterization of the physical struggle, the severity of the struggle, and the appropriateness of the officer’s reaction to her acts. The jury found that the conduct underlying plaintiff’s substantive due process claim did not meet the “shock the conscience” test. No appeal was taken. *Nicol v. Auburn-Washburn USD 437*, 231 F.Supp.2d 1107, 1116 (D.Kan. 2002).

3. Administrators Suspend Student for School Year

In our last case, school administrators suspended a high school senior for the remainder of the school year for her inappropriate conduct on her senior class trip. Here, the facts were undisputed – the student defecated in a can then gave the can to a fellow student, who dumped its contents into another student’s shoe. The suspended student then sued the school, acting as her own attorney, claiming the discipline was arbitrary and capricious. (Do you think she realized that her case, and thus her acts, would become public knowledge?)

In dismissing the student’s potential substantive due process claim, the court reviewed the broad discretion of school administrators to deal with student behavior:

A school district and its administrators have vast powers in determining what constitutes appropriate conduct. Courts do not have the time or the ability to second guess every disciplinary decision made by a school administrator. See *Wood v. Strickland*, 420 U.S. 308, 326 (1975) (“It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion.”); *Haverkamp v. Unified School Dist. No. 380*, 689 F.Supp. 1055, 1058 (D. Kan.1986) (“Federal courts should not ordinarily intervene in the resolution of conflicts which arise in the daily operation of school systems. Local school boards have a legitimate and substantial community interest in promoting respect for authority and traditional values.”).

Herrmann v. Board of Educ. of Unified School Dist. No. 256, 2002 WL 31498983, 6 (D. Kan. 2002).

The court found it clear that the student knew her actions were inappropriate, even though no written rule specifically told her so, and found that the discipline imposed fell far short of “shocking the conscience.” Accordingly, the court granted judgment to defendant school district, and the case never got to a jury.

4. Other Cases

Cases arising in states other than Kansas, but within the jurisdiction Tenth Circuit, consistently find substantive due process violations only when a school employee’s disciplinary acts are egregious and ill-willed, and cause severe injury. Lesser acts usually do not shock the conscience, as is required for a substantive due process violation. See, e.g., *Butler v. Rio Rancho Public Schools Bd. of Educ.*, 341 F.3d 1197 (10th Cir. 2003) (no substantive due process violation where school board suspended a student for one year for having driven to school in a car containing a gun and knife); *Harris v. Robinson*, 273

F.3d 927 (10th Cir. 2001) (no substantive due process violation where home room teacher made a 10-year-old mild-to-moderately retarded boy clean out a toilet with his bare hands, due to her mistaken belief that he had intentionally clogged the toilet); *Abeyta By and Through Martinez v. Chama Valley*

Independent School Dist., No. 19, 77 F.3d 1253 (10th Cir. 1996) (no substantive due process violation when teacher called a 12-year-old student a prostitute in front of class over a period of several weeks).

LESSON PLAN

Lesson plan address: http://1.usa.gov/lw_lesson3-12

This month *Law Wise* is not reproducing a lesson plan, due to length of the featured lesson plans. Instead, we refer you to a set of four lesson plans found at <http://www.in.gov/judiciary/citc/2586.htm>. These plans, made available by the Indiana Judicial Branch, teach the constitutional requirement for due process of law by examining the case of *Rene v. Reed*, 751 N.E.2d 736 (Ind.App. 2001). In that case, Meghan Rene and other disabled students argued that their due process rights were violated by the state's requirement that they had to pass a graduation qualifying examination in order to graduate.

The four lesson plans are titled:

- (1) "What Is 'Due Process' Anyway?";
- (2) "What Is the Difference between Procedural and Substantive Due Process?";
- (3) "The Changing Meaning of 'Due Process'"; and
- (4) "Oral Arguments On-Line."

Each lesson presents background information, states learning objectives, lists online resources, provides learning activities, and suggests materials for further study. The site contains a glossary, a case summary, the Appellant's Petition to Transfer, the Appellee's Opposition to Petition to Transfer, the "Order Denying Transfer," and the Court of Appeals' Opinion. Check out those great resources online!

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. Windows Media Player 9.0 or above is required. <http://bit.ly/kbaWMP>

Talking Points:

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

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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.

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, 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 ...

This site explains the differences between substantive and procedural due process, includes definitions, explains international due process versus U.S.

due process, explores its development and use as a legal doctrine, and includes criticisms of due process.

<http://anse.rs/zVOu9r>

This site includes an article (The Right to Due Process of Law) which shows how U.S. Supreme Court decisions have interpreted due process.

<http://bit.ly/yM1mM9>

ERIC Digest does a good job explaining the difference between procedural and substantive due process.

<http://bit.ly/xKc0Eh>

The U.S. Constitution Online is a comprehensive web site about all aspects of the U.S. Constitution. It contains detailed information about the history and interpretation of the due process clauses of the Fifth and Fourteenth Amendments.

<http://bit.ly/wo1rdE>

FindLaw is designed for use by legal professionals, but may be used by others. This site contains a detailed article about the development of substantive due process.

<http://bit.ly/ykkyHQ>

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.

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