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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 sixth edition of the 2011-2012 school year.

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CALENDAR OF EVENTS

May 3-6, 2012	National Mock Trial Competition (Albuquerque, N.M.)
June 14, 2012	Flag Day



Welcome

Welcome to our last issue of *Law Wise* for this school year. This issue focuses on procedural due process. Procedural due process is a guarantee of the 14th Amendment of the U.S. Constitution that protects individuals “against governmental deprivations of life, liberty, or property without due process of law.” *Farthing v. City of Shawnee, Kansas*, 39 F.3d 1131, 1135 (10th Cir. 1994). Read on to see how students and their parents have asserted this constitutional right against schools. Have they succeeded or failed?

PROCEDURAL DUE PROCESS IN KANSAS SCHOOLS

By Kathryn Gardner, J.D.

PROCEDURAL DUE PROCESS, GENERALLY

What constitutes procedural “due process” within the ambit of the 14th Amendment is difficult to define precisely. Instead, it must be determined in the light of that which is just and reasonable, considering all the relevant factors. As Chief Justice Warren said:

‘Due process’ is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. * * * Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.

Hannah v. Larche, 363 U.S. 420, at 442 (1960).

Public school students retain substantive and procedural due process rights while at school. Students do not “shed their constitutional rights ... at the schoolhouse gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Federal courts protect students’ constitutional interests, including students’ due process rights.

Procedural due process claims often arise when a student is being disciplined. A student “faced with the possibility of suspension from public school is entitled to due process.” *West v. Derby Unified Sch. Dist. No. 260*, 206 F. 3d 1358, 1364 (10th Cir. 2000). The Supreme Court established the baseline of a student’s basic procedural due process rights

in *Goss v. Lopez*, 419 U.S. 565, 579 (1975): “At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing.” More specifically, a student facing a temporary suspension of ten days or less must “be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.” *Id.* at 581–82. Longer suspensions or permanent expulsions “may require more formal procedures.” *Id.* at 584.

What Constitutes a Protected Property or Liberty Interest?

The due process provisions of the state and federal constitutions apply only if the aggrieved party shows that it has been deprived of a protected life, liberty, or property interest. A student’s interest in receiving public education is a well-established property interest entitled to protection by the due process clause. *Goss*, 419 U.S. at 574. But what about a student’s participation in athletics or other extracurricular activities? Are those activities property interests protected by the due process clause?

Courts have consistently answered this question “no,” finding that a student’s property interest in the right to public education does not imply a property interest in a student’s participation in extracurricular activities. A student’s participation in extracurricular activities is generally found to be a privilege rather than a protected right. Accordingly, student athletes do not have protected property or liberty interests in participating in high school or intercollegiate athletics. See *Richard v. Perkins*, 373 F. Supp. 2d 1211 (D. Kan. 2005). Similarly, students have no constitutional right to other incidents of education, such as the right belong to school clubs, to take advanced placement classes, or to attend a particular school. *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996). Because *Goss* speaks only in general terms regarding the “educational process,” the many separate components of the educational process do not create property interests subject to constitutional protection. *Albach v. Odle*, 531 F.2d 983, 985 (10th Cir. 1976).

Liberty Interests

Liberty interests are not alleged by students as often as property interests are, but students sometimes claim harm to a liberty interest, contending that their reputations have been damaged by actions taken by schools. For example, a liberty interest claim was brought by a middle school student because the school placed her in an alternative education setting for having brought unauthorized medication on school property, which violated the school’s anti-drug policy. *Storie v. Independent School Dist., No. 13*, — F. Supp. 2d —, 2011 WL 3704216 (E.D. Okla. Aug. 23, 2011). She was also prohibited from participating in her eighth grade graduation ceremony. The Court found that she was not deprived of a liberty interest in violation of due process under those circumstances.

Liberty interest claims of this kind are usually unsuccessful. The U.S. Supreme Court has held that damage to an individual’s reputation alone, apart from some more tangible interest, is not enough to establish a due process violation. *Paul v. Davis*, 424 U.S. 693, 701 (1976). Thus even if a student is deprived of his reputation in the community as a result of a school or principal’s conduct, he still fails to state a procedural due pro-

cess claim. *Seamons*, 84 F.3d 1226 (finding no due process claim where the football team hazed a student by stripping him naked, taping him to a towel bar, and bringing a female student to see him).

What Procedural Safeguards are Due

The Tenth Circuit has examined whether a student’s due process rights require procedural safeguards in addition to the notice and hearing requirements established in *Goss*. In *Watson ex rel. Watson v. Beckel*, 242 F.3d 1237, 1242–43 (10th Cir. 2001), the plaintiff argued that due process required that the student “be afforded written notice specifying the charges, legal counsel, the presentation of evidence, the right to cross-examine witnesses, an impartial board, a transcript of the hearing, and independent review of the decision.” The Tenth Circuit disagreed, holding that due process does not require all of these rights – just notice and an opportunity to be heard.

That rule was applied when five students were suspended and jailed as a result of their conversation about attacking the high school, which resulted in substantial disruption of the school. *Smith v. Barber*, 316 F. Supp. 2d 992, 1032–34 (D.Kan. 2004). The students claimed that they were deprived of their procedural due process rights when the school failed to continue their educations while they were in jail, and failed to permit them to cross-examine a witness. Those claims were unsuccessful.

Sufficiency of Notice

Due process requires that students be made aware of the charges facing them so that they may prepare a proper defense. Notice is generally considered to be adequate if it is sufficient to inform the students of the charges against them. But even if the written notice is inadequate, when a student has been made aware of the subject of a suspension hearing through other means, the inadequate written notice does not deprive the student of due process rights. *Watson*, 242 F. 3d at 1241; *Smith*, 316 F. Supp. 2d at 1032–34.

Deliberateness is necessary

Negligent violations of procedural due process are not actionable. There must be an “element of deliberateness in directing the misconduct toward the plaintiff before the Due Process Clause is implicated.” *Archuleta v. McShan*, 897 F. 2d 495, 497 (10th Cir. 1990).

“[T]he Supreme Court has stressed that ‘[h]istorically, th[e] guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property.’” (Citations omitted.) The word “deprive” in the Due Process Clause indicates that something more than mere negligence is required to trigger the protections of the Clause. (Citations omitted.)

Seamons, 84 F. 3d at 1234. For example, no deliberate deprivation can be shown where a student claims that the school violated his due process rights by transferring him to another school, but admits that the decision to transfer was made by the student and his parents. *Id.*

A recent case illustrates application of the deliberateness requirement. There, a student stage hand accidentally shot and killed himself by firing a blank from a gun used as a prop in a school play. *Thayer v. Washington County School Dist.*, 781 F. Supp. 2d 1264, 1267 (D. Utah 2011). His parents sued, alleging, among other things, that the defendants violated their proce-

dural due process rights because their son was deprived of his life, and defendants had not notified them that their son would fire a gun in the play. This claim failed because the plaintiffs did not show that the one defendant who knew the student had access to the gun had acted with the requisite deliberateness to deprive the student or his parents of any constitutionally protected right. Similarly, the parents did not show that the other defendants knew that the student had been given access to the gun – without such knowledge their acts could not have been deliberate. *Id.*

Substantial Prejudice is Necessary

In order to establish a denial of due process, a student must also show substantial prejudice from the allegedly inadequate procedure. *Watson*, 242 F.3d at 1242. Where a student admits having engaged in the conduct that is the subject of the suspension, the student cannot show prejudice even if due process was somehow lacking. In those circumstances, additional procedural protections would not have enabled the student to better defend the allegations, thus no procedural due process violation can be shown. *Herrmann v. Board of Educ. of Unified School Dist. No. 256*, 2002 WL 31498983, 5 (D. Kan. 2002).

Another case illustrates how procedural due process violations may be harmless. In *Tennessee Secondary School Athletic Ass'n v. Brentwood Academy*, 551 U.S. 291 (2007), a private high school brought an action against the state's interscholastic athletic association, asserting free speech and due process challenges against the rule which prohibited undue influence in recruiting middle school students for athletic programs. The U.S. Supreme Court held that any procedural due process violation in connection with the association proceedings was harmless beyond a reasonable doubt.

There, the sanctioned school claimed that the interscholastic athletic association violated private its procedural due process rights by hearing and considering evidence against the school without the school being present or having any opportunity to respond. The Court held that even if a due process violation occurred, the violation was harmless beyond a reasonable doubt because: 1) the evidence likely did not increase the severity of the penalties against the school; and 2) the school failed to identify how its strategy in proceedings before the association's board would have been any different or more

effective if it had had additional procedural protection.

Substantial Interference with Protected Interests is Necessary

Due process is not invoked where a school's interference with a student's property interest is only minimal. For example, "[w]hile the child is temporarily removed from the classroom, any loss of a property right is de minimis and not subject to procedural protections." *Couture v. Board of Educ. of Albuquerque Public Schools*, 535 F.3d 1243, 1257 (10th Cir. 2008). In *Couture*, the Tenth Circuit held that use of a timeout room did not violate due process, reasoning that because of the student's disposition, "teaching him self control was among the most important components of his educational program." *Id.* Thus placing the student in a timeout room without notice or a hearing did not infringe on his property or liberty interest.

Similarly, placing a student with significantly limited intellectual capacity in secure wrap-around table that includes a restraint bar does not violate due process. *Ebonie S. ex rel. Mary S. v. Pueblo School Dist. 60*, 2011 WL 1656455, 8 (D. Colo. 2011). In *Ebonie*, the court reasoned that the School District's policy of using a wrap-around desk did not remove the student from the classroom or take her away from the learning process. Therefore, any loss of a property right was *de minimis* and the school district was entitled to judgment as a matter of law on the plaintiff's procedural due process claim.

Violations of State Law are Insufficient

What about lawsuits which allege a violation of state law? Are violations of state laws regarding suspensions or expulsions also due process violations? Not necessarily, as the Kansas case below illustrates.

In *Herrmann*, a student who had been suspended from her school before her graduation alleged various deficiencies in the handling of her suspension. Most of them alleged lack of compliance with Kansas state law on suspensions, K.S.A. 72-8902. But violations of state laws relating to school suspensions do not necessarily violate constitutional due process rights. The court held that the school's failure to conform to the procedural requirements guaranteed by state law does not by itself constitute a violation of federal due process. ■

LESSON PLAN

Lesson plan address: <http://goo.gl/QSuS0>

Law Wise provides this word scramble puzzle for you to incorporate in your lesson plans about the United States Constitution. The answer key is also available online. Enjoy!

Word Scramble is on page 5.

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 attractive and engaging on-line game asks students to help restore the Bill of Rights. The official national computer has crashed, and your mission is to rebuild the document by

finding the missing rights and freedoms in Freeville.

<http://goo.gl/5Vcxp>

This lesson plan provided by the Washington State Courts has students analyze the concept of procedural justice by identifying the unfair decisions by the ruler in a play. Is it designed for 4th – 7th graders.

<http://goo.gl/BvKmx>

This site examines the rights of public school students to due process, summarizing three United States Supreme Court cases on point.

<http://goo.gl/uQhnr>

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>

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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Name _____

Date _____

U.S. Constitution

Find each of the following words:

PREAMBLE	COURT	WELFARE	ELECTIONS
SUPREME	TRANQUILITY	POWER	LEGISLATIVE
BLESSINGS	RIGHTS	CONGRESS	UNION
FATHERS	BALANCE	EXECUTIVE	VOTING
LIBERTY	LAW	AMENDMENTS	
UNITED	BILL	PERFECT	
WASHINGTON	STATES	COMMON	
SENATE	CITIZENSHIP	PRESIDENTS	

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