



# LAW WISE

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Greetings from the Kansas Bar Association (KBA).

Welcome to this edition of *Law Wise* and the third edition of the 2013-2014 school year.

## IN THIS ISSUE

Welcome.....	1
Calendar of Events.....	1
Coach has Creative Response to Cyberbullying.....	1
Legal Ramifications to Cyberbullying in Kansas.....	2
2014 Kansas High School Mock Trial Information.....	4
Why is Cyberbullying so Popular?.....	4
Kansas Expands the Law Prohibiting Bullying in Schools.....	5
Anti-Bullying Activities.....	5
Lesson Plan: Screen Out the Mean.....	6
Terrific Technology for Teachers.....	6

## WELCOME

This month, *Law Wise* revisits the topic of bullying in schools. Perhaps you are aware that the Kansas legislature recently revised the law prohibiting bullying in schools. As of July 1, 2013, our law prohibits bullying by a staff member, parent, or students towards a staff member or student. The new law also requires each board of education to adopt a policy prohibiting bullying on or while using school property, as well as in a school vehicle or at a school-sponsored activity or event. The school board must also implement a plan to address bullying and train and educate staff members and students about it. Check out the article about Legal Ramifications of Cyberbullying in Kansas to see some practical suggestions for handling reports of bullying in schools.

Would you like to work as a bus monitor? We all remember the incident where the New York bus monitor (who would fall within the definition of a “staff member” under current Kansas law) was repeatedly bullied by four middle school boys. Because the students’ taunts were captured on a cell phone and shown on YouTube, Karen Klein garnered the sympathies of many in our nation. Could this be because so many of us have also been the victims of bullies? Sympathizers set a goal of raising \$5,000 to send her on vacation, but that goal was far exceeded by donations which poured in from people in over 80 countries, including a gift of \$700,000 from one person in Canada. Ms. Klein decided not to press criminal charges against the students, and has since retired and started an anti-bullying foundation to teach kindness. ■

## CALENDAR OF EVENTS

<b>March 1, 2014</b>	Regional Mock Trial Competition
<b>March 28-29, 2014</b>	State Mock Trial Competition



## COACH HAS CREATIVE RESPONSE TO CYBERBULLYING

Did you hear about the Utah high school football coach’s creative response last month to cyberbullying? When he learned that some of his players allegedly were anonymously cyberbullying other students on the social media site Ask.fm, he suspended all 80 players from the team. Players earned the right to play again by participating in community service activities, taking character-education classes, and participating in extra study hall sessions. School administrators and parents supported his decision. Coach Matt Labrun also met with a student who had been harassed and asked for his forgiveness on behalf of the team. ■

Read more about it at [http://www.huffingtonpost.com/2013/09/26/utah-school-football-suspends\\_n\\_3991469.html](http://www.huffingtonpost.com/2013/09/26/utah-school-football-suspends_n_3991469.html)

# LEGAL RAMIFICATIONS OF CYBERBULLYING IN KANSAS

By Kathryn Gardner, J.D.

No federal law currently criminalizes cyberbullying. Since 2011, the state of Kansas has revised its stalking law to permit criminal charges in cyberbullying cases. See K.S.A. 21-5427 (defining stalking to include “recklessly engaging in a course of conduct targeted at a specific person which would cause a reasonable person in the circumstances of the targeted person to fear for such person’s safety, or the safety of a member of such person’s immediate family and the targeted person is actually placed in such fear.”). But to date, most penalties against cyberbullying are enforced by school administrators. Kansas law now requires schools to have an anti-bullying policy. See K.S.A. 2012 Supp. 72-8256 (included later in this edition of *Law Wise*).

## Student Disciplined for Cyberbullying Sues School Officials

A recent reported case of cyberbullying presents some insightful facts. In *Roasio v. Clark County School Dist.*, 2013 WL 3679375 (July 3, 2013 D.Nev.), a student was found to have cyberbullied not another student, but multiple school officials and employees. After the student was disciplined for his tweets, he sued the school, who moved to dismiss the case. This case is summarized in part below. Although neither Kansas nor the Tenth Circuit has addressed these issues yet, our courts may find the rationale of this case to be well-reasoned and persuasive, although not binding.

### Facts

Juliano tried out for the school basketball team during his senior year but was cut from the team. After his father protested, Juliano was placed on the basketball team subject to certain conditions. After the team’s final game of the season, the Rosario family went to dinner at an off-campus restaurant. While there, the student used Twitter to post eight vulgar and offensive “tweets” about various school officials, including the basketball coach.

After school officials learned of the tweets they filed a discipline complaint against the student, charging him with cyberbullying. The student was either suspended or expelled, but an appeal panel subsequently modified that disciplinary punishment and reassigned the student to a different high school in the school district.

The student and his father (the Plaintiffs) originally sought an injunction to force the school district to place Juliano back at his original high school. The court denied the injunction. Plaintiffs then sued the school principal, the assistant principal, two athletic directors, and three coaches, alleging the following causes of action: (1) 42 U.S.C. § 1983 violation of the First Amendment; (2) 42 U.S.C. § 1983 violation of the Fourth Amendment; (3) 42 U.S.C. 1983 violation of equal protection; (4) 42 U.S.C. § 1983 violation of 42 U.S.C. § 2000d et seq; (5) abuse of process/malicious prosecution; (6) intentional infliction of emotional distress; (7) defamation; (8) civil conspiracy and section 1983 conspiracy to violate civil rights; (9) denial of procedural due process as guaranteed by the Fifth and Fourteenth Amendments; and, (10) assault and battery.

### First Amendment Claims Remain In

The federal court dismissed many of the claims, but permitted a few to proceed to discovery, including First Amendment violations against all defendants. The student argued that his speech was protected under the First Amendment and that the school exceeded its authority to regulate off-campus speech.

The court found one of the tweets to be obscene, so it was not entitled to protection under the First Amendment. The court did not decide whether the other tweets forfeited their First Amendment protection due to their racist, violent, or hateful nature, since those arguments were not properly made to the court at that time.

In examining the school’s authority to regulate off-campus speech, the court found:

It is well-established that schools may discipline students for off-campus speech in certain situations. See, e.g., *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565 (4th Cir. 2011) (holding that a school did not violate a student’s free speech rights by suspending her for creating and posting to a webpage). However, the Ninth Circuit has never issued an opinion regarding off-campus and after-hours student speech on social media. The Ninth Circuit has hinted that it would be deferential to school administrators’ decisions. See *Lavine v. Blaine Sch. Dist.*, 257 F.3d 981, 988 (9th Cir. 2001) (“In the school context, we have granted educators substantial deference as to what speech is appropriate.”)

Although the Ninth Circuit has not ruled on a factually similar situation, other circuits have addressed a school’s ability to punish students for off-campus speech on social media websites. The test that has emerged from the circuit courts when considering off-campus student speech, including online social networking speech, is that school officials have the authority to discipline students for off-campus speech that will foreseeably reach the campus and cause a substantial disruption. *S.J.W. ex rel. Wilson v. Lee’s Summit R7 Sch. Dist.*, 696 F.3d 771, 777 (8th Cir. 2012); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011); *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565 (4th Cir. 2011); *Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008); *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 38–39 (2d Cir. 2007). Some courts also require that a sufficient nexus exist between the off-campus student speech and the disruption at school. See *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011).

*Roasio v. Clark County School Dist.*, 2013 WL 3679375, 4 (D.Nev. 2013).

The Court then examined the relevant state statute, which prohibited a pupil from engaging in cyber-bullying “on the premises of any public school, at an activity sponsored by a public school or on any school bus.” NRS 388.135. It found that the reach of school administrators when disciplining students for off-campus speech depends on the facts of the case, so found this issue was better left for resolution on the merits.

### Fourth Amendment Claims are Tossed Out

Plaintiffs argued that the school and its administrators violated Juliano's Fourth Amendment rights by searching his Twitter account. The court disagreed, finding that the student had no reasonable expectation of privacy in his tweets even if he maintained a private rather than a public Twitter setting. The court found that even with a private Twitter setting, the user is still disseminating his postings and information to the public so his tweets are not protected by the Fourth Amendment.

Nor did the manner in which administrators accessed his tweets violate the Fourth Amendment. His tweets were discovered when one of Juliano's followers voluntarily gave the tweets to administrators.

When a person tweets on Twitter to his or her friends, that person takes the risk that the friend will turn the information over to the government. *Meregildo*, 883 F.Supp.2d at 526 ("Where Facebook privacy settings allow viewership of postings by 'friends,' the Government may access them through a cooperating witness who is a 'friend' without violating the Fourth Amendment.").

*Roasio*, 2013 WL 3679375 at 6. The Fourth Amendment claims were thus dismissed.

### Practical Approach

Based on the case law from other jurisdictions, some basic principles emerge. Here are some practical questions that should help teachers and school administrators handle cyber-bullying.

1. Do your students know how to report bullying?
  - Publish your anti-bullying policies and distribute them to staff, students and parents.
  - Make sure your students know who to report bullying to, and that they will not be retaliated against for making well-founded reports.
2. Do you know what to do if you receive a report of bullying?
  - Know what is and is not "bullying" within your school's definition of that term.
  - Meet separately with the bully and parents, and the victim and parents.
  - Get the facts of who did what to whom, when, how, and why, if possible. Ask what response was taken by the victim.
3. Did the bullying occur off-campus or on-campus?
  - Bullying may be deemed to occur where its effects are felt by the victim,
 and
  - Bullying may also be deemed to occur wherever the bully engages in the acts.
4. If the bullying occurred off-campus only, did it cause substantial disruption to the operation of the school?
  - If not, the school cannot penalize the bully.
  - But the school may always offer other methods of conflict resolution.
5. Did bullying occur on school property, in a school vehicle, at a school-sponsored activity or event, or by use of the school's computer or other property?

or

Did off-campus bullying cause substantial disruption in the operation of the school?

If you answer "yes" to either of the above, then:

- a. Preserve evidence of the bullying.
  - take a screen shot of the website
  - keep copies of photos, recordings, or other evidence provided by the victim
  - have the parties write down relevant facts
  - interview all other witnesses to the events
  - document each step you take, and date and preserve your notes.
- b. Determine whether the acts may be criminal in nature. For example:
  - assault (knowingly placing another person in reasonable apprehension of immediate bodily harm)
  - battery (knowingly causing physical contact with another person when done in a rude, insulting or angry manner)
  - criminal threat (threatening to commit violence communicated with intent to place another in fear)
  - kidnapping (taking or confining a person by force, threat or deception with intent to hold that person: for ransom, or as a shield, or to inflict bodily injury or to terrorize the victim or another, or for other reasons stated in the statute)
  - criminal restraint (knowingly and without legal authority restraining another person so as to interfere substantially with such person's liberty)
  - blackmail (intentionally attempting to gain anything of value or compelling or attempting to compel another to act against such person's will, by threatening to communicate accusations or statements about any person that would subject such person or any other person to public ridicule, contempt or degradation)
  - breach of privacy (knowingly and without lawful authority: intercepting, without the consent of either the sender or receiver, a message by any means of private communication; or divulging, without the consent of the sender or receiver, the existence or contents of such message if such person knows that the message was illegally intercepted)
 If so, contact your local law enforcement agency.
- c. Determine whether the acts were based on the victim's protected class under federal or state civil rights laws.
  - Age, race, sex, religion, disability, color, national origin and ancestry are protected classes under federal law.
  - Those same classes are protected under Kansas law.
 If so, follow your school's stated policy for harassment based on a protected class, and remedy any peer or staff-created hostile learning environment.

(continued on next page)

d. Determine whether the acts may constitute an intentional tort (civil wrong) under Kansas law. These include, among others, the following:

- defamation (spreading false and negative facts that damage one's reputation in the community)
- invasion of privacy (publicly disclosing private facts, or intrusion on seclusion, for example)
- intentional infliction of mental distress (engaging in extreme and outrageous conduct which produces severe emotional distress)

If so, advise the parents of the victim they may wish to consult an attorney.

e. Determine whether the acts violate your school's stated rules or policy or your state laws regarding bullying.

If so, apply the consequences as provided in the governing policy manual, rule, or statute.

f. Determine the degree of egregiousness of the acts.

- Were they done intentionally instead of negligently?
- Were the acts done repeatedly or just once?
- Were the effects on the victim severe or inconsequential?
- Were both parties partly at fault for the events?

Understanding these facts will assist you in applying your policy and in determining what practical consequences should result from the actions.

g. Get some closure to the incident.

- Connect the parties to any outside sources for counseling, conflict resolution, or other avenues to build social and emotional skills.
- If parents or students remain dissatisfied, inform them of their options for further dispute resolution under your governing policies. ■

## WHY IS CYBERBULLYING SO POPULAR?

- Cyberspace allows everyone to be a bully. Even the smallest, otherwise defenseless individual can harass a larger bully-type kid. In contrast, traditional bullying is usually done only by larger students.
- Cyberbullying can occur at any time or place. With traditional bullying, the children are face-to-face and must find some secluded location in which to bully.
- Because physical fighting cannot occur online, verbal abuse often takes its place, and its emotional results may be deeper and longer-lasting than the pain from a bloody nose.
- Cyberspace allows the bully to remain anonymous, making it much harder for them to get in trouble.
- Anonymity may lead to repetition. When a bully can remain anonymous in cyberspace, he may engage in abuse more often, believing he won't get caught.
- Becoming a victim of cyberbullying is less avoidable. Almost all students have some online presence now which creates the possibility of abuse. With traditional bullying, students may be able to avoid the bully, and have a safe retreat in their home.
- Cyberbullying can easily be greater in scope than traditional bullying. A bully can spread negative information/comments/photos quickly to multiple individuals and locations, while traditional bullying is limited to one time and place. For example, the bully could take a picture of the victim's face and paste it onto the picture of a naked body and email that picture to every classmate they know.
- Students and others may be more likely to say something negative to a person by using an impersonal medium, such as a computer, than they would dare say to a person face-to-face.
- Parents and others may remain unaware for longer periods of time that cyberbullying is occurring. The victim doesn't display any physical evidence, such as bruises or disheveled clothing, which might tip the parents off to traditional abuse.
- Cyberbullying may be harder to prove or monitor, with bullies using multiple screen names or different computers, and with parents or others lacking the technical know-how to monitor these actions. Traditional bullying is, of course, subject to the usual forms of proof because it can be seen and heard by others.
- Bullies may believe that their cyberbullying outside of school hours cannot be addressed by school authorities, so they may be undeterred by the academic repercussions such as suspension that may result from traditional bullying.
- The coarsening of society/human behavior in general, as shown by crude and hateful statements made by national media personalities, acceptance of the use of expletives in public and in media, and a lack of common courtesy and civility, may lead to an increase in cyberbullying, as well as in traditional bullying. Students raised in our coarse, litigious, individualistic society may believe they have a right to say whatever they want, whenever they want.

## 2014 Kansas High School Mock Trial Information

Mock Trial is exactly what it sounds like—a fake court trial. Students work as either attorneys or witnesses for a complete trial from a fabricated set of facts and information. The program teaches students critical thinking, on your feet thinking, and oral communication skills unmatched by other high school extracurricular programs. Each team will receive a copy of the prepared case materials during the winter semester break. Students will have until the regional competition to prepare their case presentations. Students will prepare and present both sides of the case for competition. Three students act as attorneys and three as witnesses. Judges hear and score the trials. For additional information visit <http://www.ksbar.org/?mocktrial>.

# KANSAS EXPANDS THE LAW PROHIBITING BULLYING IN SCHOOLS

Here's a copy of the current Kansas anti-bullying law, with the new language added this year italicized.

Sec. 15. K.S.A. 2012 Supp. 72-8256 is hereby amended to read as follows: 72-8256. (a) As used in this section:

(1) "Bullying" means:

(A) Any intentional gesture or any intentional written, verbal, electronic or physical act or threat *either by any student, staff member or parent towards a student or by any student, staff member or parent towards a staff member* that is sufficiently severe, persistent or pervasive that *such gesture, act or threat* creates an intimidating, threatening or abusive educational environment that a reasonable person, under the circumstances, knows or should know will have the effect of:

- (i) Harming a student or staff member, whether physically or mentally;
- (ii) damaging a student's or staff member's property;
- (iii) placing a student or staff member in reasonable fear of harm to the student or staff member; or
- (iv) placing a student or staff member in reasonable fear of damage to the student's or staff member's property;

(B) cyberbullying; or

(C) any other form of intimidation or harassment prohibited by the board of education of the school district in policies concerning bullying adopted pursuant to this section or subsection (e) of K.S.A. 72-8205, and amendments thereto.

(2) "Cyberbullying" means bullying by use of any electronic communication device through means including, but not limited to, e-mail, instant messaging, text messages, blogs, mobile phones, pagers, online games and websites.

(3) "Parent" includes a guardian, custodian or other person with authority to act on behalf of the child.

(4) "School district" or "district" means any unified school district organized and operating under the laws of this state.

(3)(5) "School vehicle" means any school bus, school van, other school vehicle and private vehicle used to transport students or staff members to and from school or any school-sponsored activity or event.

(6) "Staff member" means any person employed by a school district.

(b) The board of education of each school district shall adopt a policy to prohibit bullying *either by any student, staff member or parent towards a student or by a student, staff member or parent towards a staff member* on or while utilizing school property, in a school vehicle or at a school-sponsored activity or event.

(c) The board of education of each school district shall adopt and implement a plan to address bullying *either by any student, staff member or parent towards a student or by a student, staff member or parent towards a staff member* on school property, in a school vehicle or at a school-sponsored activity or event. Such plan shall include provisions for the training and education for staff members and students.

(d) The board of education of each school district may adopt additional policies relating to bullying pursuant to subsection (e) of K.S.A. 72-8205, and amendments thereto.

(e) *Nothing in this section shall be construed to limit or supersede or in any manner affect or diminish the requirements of compliance by a staff member with the provisions of K.S.A. 2012 Supp. 38-2223 or 38-2226, and amendments thereto.*

H.B. No. 2261, eff. July 1, 2013. ■

## ANTI-BULLYING ACTIVITIES

### 1. Wrinkled Wanda

On chart paper, have the participants trace an outline of a person. Once the outline has been traced, the participants will write unkind, rude, and disrespectful statements all over the outline. These are statements that could be made to another person like, "You're a loser, Nobody likes you, You are dumb." Identify the drawing as a girl named Wanda. After Wanda is completely filled with a variety of negative comments, have the participants crumple the drawing, and then un-crumple it. Post the wrinkled drawings around the room. Explain to the class that these drawings are examples of what negative comments can do to a person who is bullied. Bullying comments can destroy a person's self-image and often leads to a defeated body language in the victim.

Next have the participants do the drawing again. This time write as many positive comments on the drawing as possible.

Statements like, "You did such a nice job," or "I enjoy your friendship." Fill it with really nice statements. Cut this drawing out, but don't wrinkle it. Post these drawings around the room. Have students discuss the difference between the two.

### 2. The Toothpaste Activity

Ask for a volunteer to come to the front of the room. Place a strip of masking tape on the length of the table. With a tube of toothpaste, have the volunteer run a bead of toothpaste on the length of the masking tape. Now ask the student to put the toothpaste back in the tube. Obviously, it can't be done. This is an example of how hurtful words once spoken cannot be taken back. Bullies say hurtful words frequently and need to know the impact that their words have on their victims. ■

<http://bullyproofclassroom.com/great-anti-bullying-activities>

The Kansas Bar Foundation, with Interest on Lawyers' Trust Accounts funding, provides support for this publication. *Law Wise* provides general information about law-related matters of interest to teachers, students, and the public in Kansas, but does not provide any legal advice, so readers should consult their own lawyers for legal advice. For further information about any projects or articles, contact Kathryn Gardner, Topeka, (785) 338-5366; or Anne Woods, public services manager, (785) 234-5696. *Law Wise* is published by the Kansas Bar Association, 1200 SW Harrison, Topeka, KS 66612-1806, during the school year.

## LESSON PLAN

### ELEMENTARY – SCREEN OUT THE MEAN (K-2)

#### What can you do when someone is mean to you online?

Students learn that children sometimes can act like bullies when they are online. They explore what cyberbullying means and what they can do when they encounter it.

#### Learning Overview and Objectives

Students first read a scenario about mean online behavior. They then discuss what cyberbullying is, how it can make people feel, and how to respond. Then they use their knowledge to create a simple tip sheet on cyberbullying. Students recognize that it is essential to tell a trusted adult if something online makes them feel angry, sad, or scared.

*Students will be able to ...*

- analyze online behaviors that could be considered cyberbullying.
- explain how to deal with a cyberbullying situation.
- recognize the importance of engaging a trusted adult when they experience cyberbullying.

#### Materials and Preparation

- Copy the **STOP Cyberbullying Student Handout**, one for each student.
- Preview the scenario in Teach 2 and be prepared to present it to the class.

Teaching Plans (available for downloading at <http://www.common sense media.org/educators/lesson/screen-out-mean-2-3>)

- Introduction
- Teach 1
- Teach 2
- Closing

### INTRODUCTION

#### Warm-up (5 minutes)

**ENCOURAGE** students to share what they know about bullying.

**ASK:** *What kinds of things count as bullying?*

Students should understand that bullying is behavior that is purposely mean or scary to someone else – for example, making fun of how someone looks, telling lies about them behind their back, or threatening to do something bad to them.

**ASK:** *How does bullying make other people feel?*

Sample responses:

- Hurt
- Angry
- Upset
- Scared

**ASK:** *What is the best thing to do when you feel bullied, or when you see someone else being bullied?*

Students should know to always tell a trusted adult when they experience or witness bullying.

**EXPLAIN** to students that they will be learning about a kind of bullying that can take place when they use the Internet.

The rest of this lesson plan may be accessed at: <http://www.common sense media.org/educators/lesson/screen-out-mean-2-3> ■

## TERRIFIC TECHNOLOGY FOR TEACHERS

Among the many resources available at the Clearinghouse at Emporia State University is one about bullying from the Health Resources and Services Administration. This contains a DVD with a dozen Webisodes for middle schoolers and two for younger students; an activities guide; a flash drive with posters, and top sheets in English and Spanish. Contact [jromeise@emporia.edu](mailto:jromeise@emporia.edu) for this free Kansas resource.

Kansas information on bullying and its prevention is located at [www.stopbullyingkansas.org](http://www.stopbullyingkansas.org). Also available are the Kansas School Safety Hotline, (877) 626-8203; the 24-hour Parent and Youth Resource Hotline, (800) 244-5373; and the Bullying Prevention Hotline, (800) 332-6378 or text [1800children@kcs.org](mailto:1800children@kcs.org).

Are you a bully? Take this test and see. Twelve short scenarios and multiple choice responses should tell you. This site also has other power point presentations as well.

[sociology.mrdonn.org/powerpoints/bullying.html](http://sociology.mrdonn.org/powerpoints/bullying.html)

Practical tips for protecting yourself from cyberbullying, standing up for others, and getting involved are detailed on this site, as well as facts about bullying, kid videos and games.

<http://www.stopbullying.gov/kids/what-you-can-do/index.html#cyberbullying>

Teach about the different types of bullying by using this power-point presentation and transcript.

[www.slideshare.net/thesnapecape/bully-powerpoint](http://www.slideshare.net/thesnapecape/bully-powerpoint)

Here's a great collection of aids including free games, crosswords, online coloring (printable) and cartoon video clips all based around a gang of friends that are determined to help put a stop to bullying.

<http://www.stopbullying.gov/>

Want a simple but fun online game where kids feel empowered by taking charge and freeing their friends from the school bully? Choose the "I Want to Play" tab and design yourself a hero and an opponent, then set off on a mission through the school to 'right all the wrongs.' (This requires Adobe Shockwave.)

<http://www.bullying.org/index.cfm>