



Missouri Association of School Administrators

**Spring Conference
Staff Members Speaking Out?**

March 30, 2017

www.edcounsel.law

**Areas of Emphasis:**

Board Operations, Policy and Procedure, Compliance, Discrimination Claims, Teacher Tenure Act, Student Rights

As a member of the EdCounsel team, Emily defends public schools in a variety of legal matters ranging from discrimination claims to complex contract disputes.

Emily is an experienced advocate who uses her background in general defense litigation to represent her school clients in state and federal court, as well as before state administrative bodies.

Every morning, Emily wakes up with a solid game plan for the anticipated work projects ahead of her (just don't ask her to start the operation of this plan before six a.m.). Due to the nature of schools and the education business, it's difficult to actually know what lies ahead each day. This, as well as her clients drive to do what is best for kids, fuels Emily's love for what she does. She enjoys collaborating with her clients, problem-solving and consulting with colleagues to help do what is most valuable in this important field. At the end of the day, a lot of good work is done, but not necessarily what she thought when her feet hit the floor in the morning.

Growing up, many amazing teachers touched Emily's life. Whether at Fulton High School, Missouri State University, or University of Missouri School of Law, the teachers who made the biggest

impression and inspired her the most were the teachers who injected passion and humor into the subject matter. Those experiences are part of the reason why Emily is a committed supporter of public schools.

Education

**University of Missouri
School of Law,**
Columbia, Missouri
Juris Doctorate

Missouri State University,
Springfield, Missouri
Bachelor of Arts

Employment

EdCounsel, LLC
Columbia, Missouri

Taylor, Stafford, Clithero, Fitzgerald & Harris, LLP
Springfield, Missouri

Office of Prosecuting Attorney,
Boone County, Columbia, Missouri

**Areas of Emphasis:**

Compliance, Discrimination Claims, Bullying, Policy and Procedure, Open Records and Board Meetings

After beginning her legal career in civil litigation, Rachel has exclusively represented public schools since 2011. Rachel provides legal guidance to school administrators and Board members on a broad variety of topics, including employment matters involving both certified and non-certified staff, student discipline matters, discrimination complaints, constitutional matters, and contract and real estate matters. Rachel also has extensive experience advising and representing school districts on complaints before the Office for Civil Rights, Equal Employment Opportunity Commission, and the Missouri and Kansas Human Rights Commissions. Rachel's experience includes representation of school districts at trial and on appeal to the Missouri Supreme Court.

The aspect of her career that Rachel enjoys most is the people she gets to work with, and she highly values her relationships with EdCounsel's clients. Helping school leaders in achieving their goals for their district, and working through issues they face to reach effective solutions, is incredibly rewarding.

Throughout each school year, Rachel conducts training sessions with school personnel to ensure they are equipped with up-to-date information about legal requirements impacting schools. From meeting and speaking with educators throughout Missouri and Kansas, Rachel has seen how the vision and determination of school leaders can make a huge impact on the lives of children and feels fortunate to represent public schools.

Rachel grew up in St. Peters, Missouri and decided to stay in the Kansas City area after attending law school at UMKC. One of the reasons Rachel is driven to contribute to the strength and success of the public school system is her two children, Abel and Ainsely, who will be entering school in a couple years. Rachel and her husband, Adam, enjoy taking their kids on mini-adventures to the park, zoo, and museums and look forward to traveling to more exciting destinations with the kids when they are older.

Education

**University of Missouri-
Kansas City, School of Law,**
Kansas City, Missouri
Juris Doctorate

Truman State University,
Kirksville, Missouri
Bachelor of Arts

Employment

EdCounsel, LLC,
Independence, Missouri

Walters, Bender, Strohbehn & Vaughan, P.C.,
Kansas City, Missouri

**U.S. District Court for the Western District of
Missouri,**
Kansas City, Missouri

Missouri Association of School Administrators Staff Members Speaking Out?

March 30, 2017

Emily Omohundro & Rachel England



Staff Free Speech



Key Concepts

Like students, staff members do not shed their first amendment rights at the door.

With that said, public employees are government employees and teachers are in a position to influence or indoctrinate students.

Cases have determined that teachers, along with administrators and other staff in public schools, possess some diminished protection under the First Amendment.

Despite these more limited protections, school officials should engage in an analysis about staff speech before taking action, with the understanding that there are increased concerns about a staff member's ability to force their opinions on students.

What You Need to Know

With spikes in staff political speech issues, districts need to carefully evaluate whether the speech is disruptive. As public employees, First Amendment rights are still afforded to staff members at school.

Pickering v. Board of Education 1968

A letter to the editor...



- "That's the kind of totalitarianism teachers live in at the high school, and your children go to school in."
- "But \$20,000 in receipts doesn't pay for the \$200,000 a year they have been spending on varsity sports while neglecting the wants of teachers."
- "To sod football fields on borrowed money and then not be able to pay teachers' salaries is getting the cart before the horse."
- "As I see it, the bond issue is a fight between the Board of Education that is trying to push tax-supported athletics down our throats with education, and a public that has mixed emotions about both of these items because they feel they are already paying enough taxes, and simply don't know whom to trust with any more tax money."

Pickering v. Board of Education 1968

Board determined that the letter was "detrimental to the efficient operation and administration of the schools of the district"



U.S. Supreme Court: "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."

Mount Healy v. Doyle

Statement of reasons for Teacher Doyle's nonrenewal:
You have shown a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships.

A. You assumed the responsibility to notify W.S.A.I. Radio Station in regards to the suggestion of the Board of Education that teachers establish an appropriate dress code for professional people. This raised much concern not only within this community, but also in neighboring communities.

B. You used obscene gestures to correct students in a situation in the cafeteria causing considerable concern among those students present.

*Sincerely yours,
Rex Ralph
Superintendent*



Question: Would Doyle have been non-renewed had he not contacted the radio station?

Matters of Public Concern

- Can be *communicated* privately or publicly
- The test involves the subject matter

Connick: Content, form, and context of a given statement, as revealed by the whole record

Rankin: "if they go for him again, I hope they get him" about the assassination attempt on President Reagan



Court's Analysis:
Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest.

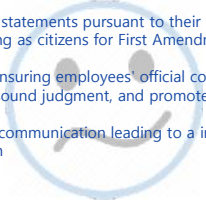


Held: Not sufficient to outweigh her First Amendment rights

Matters of Public Concern

Garcetti: Public employee statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes

- There is an interest in ensuring employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission.
- An employee's internal communication leading to a inter-office conflict could lead to corrective action



Reality

- Right to free speech is not absolute
- If speaking as a citizen
- On matters of public concern
- Must show compelling interest to overcome that right



Scenario

Your assistant football coach's newfound love for Twitter has come to you attention as a result of a parent phone call:

"How can we teach our kids good sportsmanship when we have a coach writing rude things about other teams in the conference? My son just showed me this tweet!"



Scenario

A parent leaves an IEP meeting and immediately takes to Facebook to post his dissatisfaction with the team's decisions regarding specific interventions for his student. The building secretary brings to your attention that one of the special education teachers in the District posted a response:

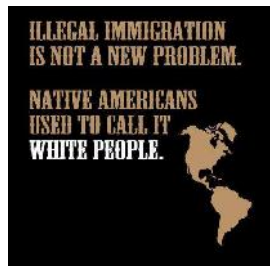
"I completely agree that the team's decision was not appropriate if things went down that way. YOU'RE the parent and know your kiddo the best. This District is going to get sued by someone someday for this crap."



Scenario



Scenario



Scenario

Teacher 'reassigned' after praising Trump action on immigration

6/10/2018 11:38 AM

NASC: The school board in the state of Ohio has reassigned a teacher who praised Donald Trump's executive order on immigration.

The teacher, who is a member of the National Education Association (NEA), was praised for his support of the president's executive order on immigration.

The teacher, who is a member of the National Education Association (NEA), was praised for his support of the president's executive order on immigration.

The teacher, who is a member of the National Education Association (NEA), was praised for his support of the president's executive order on immigration.

The teacher, who is a member of the National Education Association (NEA), was praised for his support of the president's executive order on immigration.

The teacher, who is a member of the National Education Association (NEA), was praised for his support of the president's executive order on immigration.

The teacher, who is a member of the National Education Association (NEA), was praised for his support of the president's executive order on immigration.

Scenario



What is Speech?

- Written
- Spoken
- Clothing
- Symbolic Expression



How Did We Hear About It?

It should reach the school somehow



Unprotected Speech

- Personal attacks on board members, administrators, employees, students, parents, etc.
- Grievances and complaints about personnel actions
 - BUT do not forget anti-retaliation law and policy re protected activities like complaints of discrimination



Unprotected Speech

- *Speech that is spoken as part of employee's job duties is not protected regardless of whether the speech is public concern or private interest.
- Speech that is spoken as a private citizen that is a matter of private interest is not protected, but carefully examine the "public concern" aspect during analysis:
 - Is speech that is spoken as a private citizen disruptive?
 - Speech that violates Staff Conduct or Staff Student Relations Policy is likely disruptive
 - Document the disruption



Take-Aways

- Must respect employee's right to free speech.
- Discipline depends on the content of the speech and its effect.
- Right to speak out about a matter of public concern.
- This right is balanced against district's interests in operating efficiently.
- If speech is so disruptive that it prevents the district from operating efficiently, the speech can be regulated.
- If the issue is purely a matter of private concern, the district may regulate.
- If employee makes speech as part of their official duties, not speaking as a citizen for 1st Amendment purposes.

Employee Speech

Identify the Speech
(oral, clothing, safety pin, etc.)

Is the Speech advocating, supporting, or opposing a ballot issue or candidate?

If yes, does the Speech involve the use of District resources?

Tip: District resources include stationary, devices, technology, facilities, and any other resource provided by the District, including employees' time.

If yes, the District may prohibit and/or implement appropriate discipline.

If no, is the Speech being made as part of the employee's job duties/in her capacity as an employee?

If no, is the Speech an issue of private concern?

If yes, the District may prohibit and/or implement appropriate discipline.

Tip: private concern v. public concern

If no, is the Speech so disruptive that it prevents the District from operating efficiently?

If yes, the District may prohibit and/or implement appropriate discipline.

If yes, the District may prohibit and/or implement appropriate discipline.

If no, the Speech is protected and the District cannot prohibit/discipline.

Key Concept
The District can only discipline according to these principles, even if the Speech violates a Board Policy/Regulation

Remember certain categories of Speech have less protection under the first amendment regardless of setting:

1. Obscenity
2. Inciting Illegal Activity
3. Fighting Words
4. Integral to Criminal Conduct
5. Fraud/Perjury
5. Commercial Speech
7. Defamation (Libel/Slander)

If no, is the Speech being made as part of the employee's job duties/in her capacity as an employee?

If no, is the Speech an issue of private concern?

If yes, the District may prohibit and/or implement appropriate discipline.

Tip: private concern v. public concern

If no, is the Speech so disruptive that it prevents the District from operating efficiently?

If yes, the District may prohibit and/or implement appropriate discipline.

If yes, the District may prohibit and/or implement appropriate discipline.

If no, the Speech is protected and the District cannot prohibit/discipline.



EdCounsel LLC

SCHOOL ATTORNEYS

What You Should Know

EdCounsel SCHOOL ATTORNEYS

2016

LEGAL GUIDE FOR MISSOURI SCHOOL LEADERS

Missouri's New Criminal Code and the Impact on Schools

On January 1, 2017, Missouri's new criminal code went into effect. This new code contains significant changes to the state's criminal law, including the creation of a new Department of Corrections and the reorganization of the state's courts. This article discusses the impact of these changes on schools and provides guidance on how to prepare for the new code.

New FLSA Overtime Exemption Ruling

On November 23, 2016, a federal judge issued a nationwide injunction against the Department of Labor's new overtime rule. This ruling means that the new rule will not be enforced, and schools will continue to follow the previous rule. This article discusses the details of the ruling and provides guidance on how to prepare for the future.

EdCounsel SCHOOL ATTORNEYS

2016 Annual School Law Seminar

2016-2017 BOARD POLICY TRAINING REQUIREMENTS

Requirement	MINIS	SECS
1. Develop and Adopt Board Policies	90	200
2. Review and Update Board Policies	90	200
3. Communicate Board Policies	90	200
4. Monitor and Evaluate Board Policies	90	200
5. Amend Board Policies	90	200
6. Report on Board Policy Training	90	200
7. Provide Annual Training	90	200
8. Provide Additional Training	90	200
9. Provide Training for New Board Members	90	200
10. Provide Training for Board Members	90	200
11. Provide Training for Board Members	90	200
12. Provide Training for Board Members	90	200
13. Provide Training for Board Members	90	200
14. Provide Training for Board Members	90	200
15. Provide Training for Board Members	90	200
16. Provide Training for Board Members	90	200
17. Provide Training for Board Members	90	200
18. Provide Training for Board Members	90	200
19. Provide Training for Board Members	90	200
20. Provide Training for Board Members	90	200

Legislative Update

SAFETY AND SECURITY ISSUES PAGE 1

CONSTRUCTION PAGE 4

STUDENT ISSUES PAGE 6

BOARD AND ADMINISTRATION PAGE 9

Transgender Students

EdCounsel SCHOOL ATTORNEYS

Transgender students are a diverse group of individuals who identify as neither exclusively male nor female. This article discusses the legal and ethical issues surrounding transgender students in schools and provides guidance on how to create a safe and inclusive environment for all students.

THE NEW PAID LEAVE REQUIREMENTS UNDER §105.264, RSMo.

Effective January 1, 2017, Missouri's new paid leave law went into effect. This law requires employers to provide paid leave to their employees. This article discusses the details of the law and provides guidance on how to comply with the new requirements.

Visit our website at:
www.edcounsel.law

For informative and up to date information
about school law.



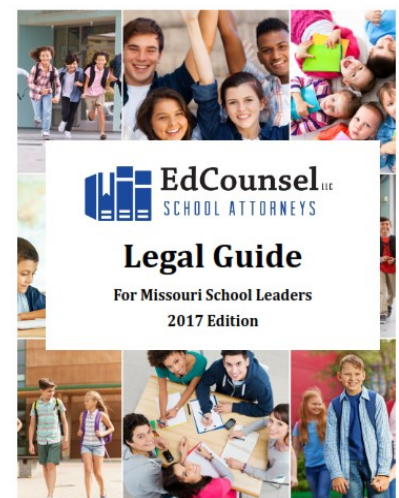
EdCounsel LLC
SCHOOL ATTORNEYS

Save the Date!

2017 School Law Seminar

Legal trends in public education move quickly and change often. Join us to learn about and discuss recent developments in school law and receive your exclusive copy of the 2017 EdCounsel Legal Guide

- 07/26 Springfield, Missouri
- 07/28 Independence, Missouri
- 08/03 Columbia, Missouri



www.edcounsel.law