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# Chalkboard

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2008 ISSUE 3

## STUDENT EXPRESSION: PROTECTED SPEECH AND TRUE THREATS

by Bo Rainey

It's 4:45 on Friday afternoon. This has been one of those weeks that cause you to ask yourself why you left the safety and security of the classroom to become an administrator. Not only have the School District's auditors recently discovered that chess club activity account funds were used to purchase 200 Powerball tickets, but at the last board meeting you gleaned that at least one member thinks you should go back into teaching (preferably in another district). To make matters worse, Prudence Payne, the outspoken leader of the local

chapter of Housewives for Moral Clarity, has somehow obtained your private cell phone number. She has just informed you that her organization's web trolling software has uncovered a blog posted by student Clarence E. Nigma, the only son and namesake of the publisher of the local paper. In his blog, Clarence lists a number of students and teachers he would like to see harmed.

After personally reading Clarence's blog, you, too, have become concerned. Cognizant that school district

policy calls for a student to be suspended for threatening students or teachers and knowing in the back of your mind that you may be treading into the First Amendment Zone, you immediately call the District's attorney, I.M. Wright. Ever insightful, Lawyer Wright agrees that you have a potential First Amendment problem and promises to get back to you on Monday. When you and Lawyer Wright next speak, this is what you learn.

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## FAILURE TO SPECIFY SUBJECT MATTER OF AGENDA ITEM HELD TO BE WILLFUL VIOLATION OF OPEN MEETING ACT

A recent decision of the Oklahoma Court of Civil Appeals illustrates the importance of providing sufficient information on agendas posted pursuant to the Oklahoma Open Meeting Act. In *Wilson v. City of Tecumseh*, 2008 OK CIV APP 84, 194 P.3d 140, Oklahoma's intermediate appellate court ruled

that agenda items that did not make clear that a resigning city employee was seeking a bonus constituted willful violations of the Open Meeting Act and rendered the payment of the bonus invalid.

The City of Tecumseh is governed by a city council consist-

ing of the mayor and four other council members. The same five persons also serve as the board of trustees for the Tecumseh Utility Authority. In a municipal election held in November of 2006, three seats changed hands. The new members of the city council

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## OKLAHOMA'S PIONEER IN LEGAL EXCELLENCE



## STUDENT EXPRESSION: PROTECTED SPEECH AND TRUE THREATS (CONTINUED FROM PAGE 1)

Constitutional implications arise when a school district attempts to restrict or punish student expression. As the United States Supreme Court

noted in *Tinker v. Des Moines Community Sch. Dist.*, 393 U.S. 503 (1969),

“It can hardly

be argued that either students or teachers shed their constitutional rights at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.

\* \* \*

The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is particularly the ‘market place of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongue, [rather] than through any kind of authoritative selection.’”

*Id.* at 506, 512.

While the First Amendment protects an individual’s right

to freedom of expression and speech, not all speech is protected. Specifically falling outside of the protections of the First Amendment is speech that amounts to a *true threat*.

A threat has been defined as “a declaration or intention, purpose, design, goal, or determination to inflict punishment, loss, or pain on another, or to injure another or his property by the commission of some unlawful act.” *United States v. Viefhaus*, 168 F.3d 392, 395 (10th Cir. 1999). “A *true threat* means a serious threat as distinguished from words of mere political argument, idle talk or jest.” *United States v. Leaverton*, 835 F.2d 254, 257 (10th Cir. 1987).

Courts considering threatening student expression have not agreed upon a single bright line test to use in determining when expression rises to the level of a *true threat*. However, there are commonalities to the different approaches used by the courts. Generally, the courts have applied an objective test – that is, would a reasonable person, after considering the context and the circumstances under which the expression was made, find that the speech in question threatening.

Although the courts are split on whether the proverbial reasonable person should consider the expression from the

viewpoint of the speaker or the recipient of the expression, important factors include:

Did the student make a direct threat?

Did the student communicate the threat to the person threatened?

How did the threatened person perceive the speech?

Did the threatened person have a reasonable belief that the threat would be carried out?

How timely was the school district’s investigation of the expression once it learned of it?

How serious did the school district perceive the expression?

Other factors courts have considered, regarding the context and circumstances of the expression, include:

Did the speaker have access to the means necessary to carry out the threat?

Does the academic and social background of the speaker reveal them to have a known history regarding violence?

Is the speaker suicidal?

Has the speaker suffered significant losses?

What is the speaker’s background, both in regard to relationships and stability?

Is there a history of drug abuse, violence, domestic violence, bullying or

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“Generally, the courts have applied an objective test – that is, would a reasonable person, after considering the context and the circumstances under which the expression was made, find that the speech in question threatening.”

**STUDENT EXPRESSION: PROTECTED SPEECH AND TRUE THREATS (CONTINUED FROM PAGE 2)**

victimization?  
**I**f after considering all of these factors it is determined that a reasonable person would not view the expression as constituting a *true threat*, this does not mean that a school district is without recourse. A school district can still impose limitations on a student's protected speech and punish a student for violating these limitations if the speech would *substantially* disrupt

or materially interfere with school activities or intruded upon the rights of others.  
**A**fter providing this legal background, Lawyer Wright congratulated you on your keen insight as to how disciplining Clarence E. Nigma for his blog writings might launch the school district into the First Amendment Zone. With this new found knowledge, you now have the legal framework to carry out your fact investigation into

whether Clarence E. Nigma's blog writings might reasonably be interpreted as constituting a *true threat*. And, in the event you recommend disciplinary action against Clarence E. Nigma, you can rest assured that the School District will be in a far better position to defend itself against any possible claim that it ignores the constitutional rights of its students.

**OPEN MEETING ACT UPDATE (CONTINUED FROM PAGE 2)**

were to take office in January of 2007.

**B**efore the new members were sworn in, the city manager, who also served as manager of the Utility Authority, submitted his notice of resignation and advised various members of the city council that he was going to ask the council for a bonus of \$30,000 pursuant to a provision in his employment contract. At the December meetings of the city council and the board of trustees, the lame duck council members approved the \$30,000 bonus.

**T**his action was taken pursuant to the following items on the agenda for the city council meeting:

Consideration of an executive session to discuss the employment, hiring, resignation of David Johnson, City Manager (25 O.S. 2001 § 307(B)(1).

Consideration of action related to executive session.

Consideration of resignation from City Manager, David Johnson, effective December 8, 2006.

**T**he agenda for the meeting of the board of trustees of the Tecumseh Utility Authority, which immediately followed the meeting of the city council, contained the following items:

Consideration of an executive session to discuss the employment, hiring, resignation of David Johnson, Manager of Tecumseh Utility Authority (25 O.S. 2001 § 307(B)(1).

Consideration of action related to executive session.

**B**ecause half of the city manager's salary was paid by the City and half by the Authority, the \$30,000 bonus payment was apportioned in the same way.

**I**n March of 2007, taxpayers made a written demand on the City that it take action to recover the \$30,000 bonus paid to the former city manager, asserting that the payments were approved in violation of the Open Meeting Act. The three former members of the city council then filed suit against the City seeking a declaratory judgment that the payment was lawful. The City and the Authority brought third party claims against the former city manager. The trial court granted summary judgment to the City and the Authority on their claims against the former city manager, and he appealed.



*“This case illustrates the importance of using language in your agendas that plainly and clearly disclose the subject matter under consideration and the action proposed to be taken.”*

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**OPEN MEETING ACT UPDATE (CONTINUED FROM PAGE 3)**

The Oklahoma Court of Civil Appeals observed that the Open Meeting Act is designed to “encourage and facilitate an informed citizenry’s understanding of the governmental processes and governmental problems.” The court noted that for that reason, the Act is to be construed liberally in favor of the public. Notice to the public, via agendas, must “be worded in plain language, directly stating the purpose of the meeting ... [and] the language used should be simple, direct and comprehensible to a person of ordinary education and intelligence.”

The court specifically rejected the former city manager’s argument that the use of the word “employment” in the agendas was sufficient to provide no-

tice that the city council and board of trustees were considering approving payment of a \$30,000 bonus.

Because the Open Meeting Act provides that any action taken in willful violation of the Act shall be invalid, the court next considered whether the inadequate agendas constituted a “willful” violation. The court pointed out that willfulness does not require a showing of bad faith or malice. Instead, willfulness encompasses not only conscious, purposeful violations of the law but also blatant or deliberate disregard of the law by those who know, or should know, the requirements of the Act. The court ruled that language which is “deceptively vague and likely to mislead” constitutes a willful violation of the Act and affirmed the trial court’s judgment.

This case illustrates the importance of using language in your agendas that plainly and clearly disclose the subject matter under consideration and the action proposed to be taken. The careless use of language that is vague and likely to mislead, even when there is no intent to mislead, can nonetheless result in a court’s finding of a willful violation and invalidation of the action in question.

If you need help in wording your agenda or have questions about an agenda item, consult your school attorney.

**RF&R SPEAKERS/EVENTS SHOWCASE**

**John G. Moyer, Jr., Bryan K. Drummond, Bo Rainey, Eric D. Wade and Matt J. Ballard** will present a **School Law Workshop** at the High Plains Technology Center in Woodward on January 7, 2009 and at the Bob Lee Kidd Civic Center on the Poteau High School campus January 14, 2009. Topics to be covered will include employee due process, special education and Section 504 plans, the ADA/FMLA and Workers’ Compensation, Student Suspension and Due Process, and Reductions in Force. Registration fee is \$50 per attendee and includes a complimentary copy of *Instructions for Oklahoma Public Bodies in Compliance with the Open Records Act*, a \$25 value.

**Bryan K. Drummond** will also be speaking at the OSSBA school law workshop on February 17, 2009. Mr. Drummond will give a presentation about annexation and consolidation.

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We welcome your comments, criticisms and suggestions. Correspondence should be directed to Rosenstein, Fist & Ringold, 525 South Main, Seventh Floor, Tulsa, Oklahoma 74103-4508, or call us at (918) 585-9211 or 1-800-767-5291. Our FAX number is (918) 583-5617. Help us make *Chalkboard* an asset to you.