# UTAH SCHOOL LAW UPDATE

Utah State Office of Education

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## UNFINISHED BUSINESS

A controversy is brewing between districts and charter schools.

The problem stems from the natural tendency of districts and charter schools to abandon disciplinary procedures against a student when the student leaves the district or school.

It seems logical to avoid the time and resources necessary to suspend or expel a student when the student is no longer a problem for a district or charter school.

But the student has not gone away, he or she has simply become a costly problem for another district or charter school.

Chances are, a student who faces expulsion in one district or charter school has committed a serious safe schools violation. State law allows another school to deny enrollment to a student expelled within the last 12 months for a safe schools violation.

But the school the student seeks to enroll in can do little to protect its students based on prior allegations alone. The school needs an expulsion or notice that a student was suspended so the student can be placed or served appropriately.

This issue has come up several times in the past months with pretty severe cases. Each time, the enrolling school knows there are major concerns about the student, but is barred from denying enrollment based on the student's past conduct.

The enrolling school can't conduct its own expulsion proceedings based on those past allegations. The best it can do is enroll the student and keep an eye on him or her until something else happens.

This is an untenable position for any school—and one that could expose the school to a lawsuit if the student commits the same violation at his or her new school.

Districts and charter schools have a legitimate interest in saving their resources. But doing so at the expense of another district or charter school is a short term solution. Eventually, someone will have to pay for the costs (both financial and reputational) associated with the expulsion of the student, and all districts and charter schools get the majority of their funding from the same pot.

In the interest of all schools, districts and charter schools need to finish what they start when expelling or suspending a student, even if the student is no longer in the area and does not intend to appear at the hearing.

## UPPAC CASES

- *The Utah State Board of Education revoked the license of Dan J. Kaighn. The revocation results from Mr. Kaighn's arrest on 10 felony charges including aggravated sexual abuse, object rape and sodomy of his own children.*
- *The Board agreed with the recommendation of the Commission, following a Commission hearing, to suspend the license of Heidi Kreyling Arias. Ms. Arias' suspension results from her appearance at work under the influence of illegal controlled substances.*

## UPPAC Case of the Month

Educators investigated by UPPAC may hire an attorney to help them through the process. This is particularly true when the educator is also charged with a crime.

The majority of cases are handled by the UEA-provided attorney, a cost-effective alternative for educators.

Some, however, will hire outside counsel, or use their criminal defense attorney as their representative in the UPPAC matter as well.

Many of these attorneys are very skilled at trial work. But they may lack the required knowledge to be effect in a UPPAC administrative hearing.

Unfortunately, an attorney who is unfamiliar with UPPAC may use common trial techniques that do little more than increase the number of hours the attorney bills the educator.

Criminal attorneys, in particular, are often inclined to put the UPPAC process off until after the criminal matter is resolved. The attorney may believe that an acquittal in the criminal case will eliminate the need for the

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## Eye On Legislation

In a wise move, Governor John Huntsman, Jr. vetoed H.B. 42 Medical Recommendations for Children.

The bill would have codified a current State Board of Education rule prohibiting teachers from requiring that students take a specific medication in order to attend school.

The bill went further, however, prohibiting school personnel from conducting any kind of behavioral assessment without parental consent and requiring that the school give the parent a copy of any assessment.

While the first section of the bill was unnecessary, the second could have caused significant problems for schools trying to assess the level of risk a student presents to him or herself or others.

The Governor apparently heard the cry of the many reputable groups opposed to the bill. In his letter to House Speaker Greg Curtis, R-Sandy, and Senate President John Valentine, R-Orem, Gov. Huntsman made specific note of the chilling effect the bill would have on teacher-parent communications.

As Huntsman stated, "the restrictions contained in this bill may needlessly hinder open and honest communication between a parent and a teacher concerning a child's behavior and discussion about the right solution for the family, the child and the school."

Huntsman also noted that requiring that parent's receive a copy of the assessment "would compromise the validity and security of those tests."

The veto is a victory for educators who were accused, particularly in the Senate committee hearing, of forcing parents to medicate their children. Supports of the bill offered no concrete examples of this occurring, and the State Office has investigated only one such case since the Board rule was enacted two years ago, but the unsubstantiated anecdotes certainly held sway in the Legislature.

Fortunately, Huntsman heard the more logical arguments of opponents who pointed out the very real, and verifiable, problems with the bill as written.

Supporters have promised to bring the bill back again. Hopefully, next time they will also listen to educators and draft legislation that will preserve "open and honest communication" between the people who care most about the student's health and safety, the parents and the teacher.

## Recent Education Cases

Jennings v. Wentzville R-IV School District, (8th Cir. 2005). Two cheerleaders were suspended from school for attending a school-sponsored event under the influence.

The girls were discovered by their fellow cheerleaders who told the coach. Later that evening, five of the girls threatened to leave the team because of the incident. The coach offered to meet with the girls and drove to the home they were at.

The girls insisted that the two girls who had been drinking also had to be at the meeting. The coach went out, picked up the two girls and brought them back to the home to be confronted by the other cheerleaders. This little gathering lasted from 11:00 p.m. until **2:30 a.m.**

The coach told the principal what had happened. The principal decided to conduct a separate investigation and did not rely on any of the information the coach learned at the midnight meeting.

The girls were not given a formal hearing prior to their 10 day suspensions, but the principal spoke with the girls, witnesses, and the girls' parents. The girls admitted drinking before the event to their parents.

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## UPPAC cases cont.

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UPPAC hearing.

But UPPAC is not bound by the results in a criminal trial and does not have the same heavy burden of proof that criminal prosecutors face.

A criminal trial requires a showing by the prosecutor that the defendant committed the crime "beyond a reasonable doubt."

The UPPAC prosecutor needs to prove only that it is more likely than not that the educator did what he or she is accused of doing. If 50.1% of the evidence suggests it happened, the Commission can take the action requested.

On the other hand, because the burden of proof in a criminal trial is so high, the Commission, by law, can assume the educator did what the victims claim if the educator is convicted in the criminal process. The burden then switches to the educator to prove the allegations are not true, or relevant, despite the conviction.

UPPAC hearings are also less formal that trials, with fewer motions and far less opportunity to delay the proceedings. A trial attorney may waste loads of time, and the educator's money, filing motion after motion or making formal requests for things that are permitted in the courts but unnecessary in an administrative hearing.

An educator who is looking for an attorney to represent him or her in a UPPAC case is well-advised to look for someone with experience in administrative licensing matters. Or at least someone who is willing to learn, on his or her own dime.

## Utah Decision: L.C. v. Utah State Board of Education

The federal 10th Circuit Court of Appeals has ruled in favor of the State Board and Ogden School District in a case several years in the making.

The lawsuit was filed in 1997 by L.C. and K.C., parents of N.C., a special needs child. N.C. attended sixth grade in Ogden District under an IEP.

The IEP was reviewed in October of N.C.'s sixth grade year to address additional issues N.C. had with anxiety. It was revamped again for his seventh grade year with new accommodations.

N.C.'s parent withdrew him from the district in April of his seventh grade year. In September of his eighth grade year, the parents filed for a due process hearing claiming that Ogden failed to provide FAPE as evidenced, in part, by N.C.'s successes at a private school. The parents sought reimbursement for their private school expenses.

The parties agreed on a hearing officer who later recused himself. The parties could not agree on a subsequent hearing officer, causing significant delays, so a new hearing officer was selected by the state superintendent, per the special education rules. The new officer ruled in Ogden's favor.

The parents then sued the state and the district for failing to provide FAPE, selecting a biased hearing officer and not providing a timely hearing for N.C.

A trial court affirmed the hearing officer's decision and the legality of the process.

The 10th Circuit upheld the trial court's findings, ruling that "the appropriate education required by the act is not one which is guaranteed to maximize the child's potential." The court found no deficiencies in the accommodations provided by Ogden, noting that "success at a private institution is not probative of whether the public school provided FAPE."

Perhaps most importantly, the court also refused to find the hearing officer biased based solely on the parents' "innuendos" and found the delays in holding the hearing were not prohibited by IDEA nor unreasonable given the complexity of the situation.

## Your Questions

Q: What action can local school board members take when another member discloses items presented in closed meetings?

A: Very little. Constitutionally, board members have a right to speak on matters of public concern. Items considered in a closed meeting generally fit within this category. The board cannot sanction another member for disclosing what should be considered by all as confidential information.

**What do you do when. . . ?**

The person spoken about, on the other hand, may have a cause of action against the board members, depending on the nature of the disclosure.

The board member may have a legitimate reason for speaking about the closed session, including the vital purpose of acknowledging that the meeting was not conducted according to law.

But members who gossip about employee discipline cases or impair the ability of a business to compete for district contracts because the member revealed proprietary information may find themselves facing a lawsuit against their personal assets.

Q: What liability does the school

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## Recent Cases Cont.

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After the school imposed the suspension, it offered the girls a right to appeal. Rather than continue through school channels, the parents took the case to court arguing, first, deprivation of their liberty rights at the late night meeting and, second, that the girls had the right to counsel and to present witnesses at a trial-type hearing prior to suspension.

The 8th Circuit Court of Appeals ruled that the meeting was a deprivation of the girls' liberty but the school was not liable for the coaches actions against school policy.

The court also found that the girls were only entitled to notice of the grounds for suspension and an opportunity to be heard. The school met these requirements.

Rossi v. West Haven Bd. Of Education (D.Conn. March 2005). A student argued that his 180 day suspension following his arrest on 10 counts of illegal sale of controlled substances on school grounds denied him equal protection. According to the student, he was the only student punished so severely by the school.

The court pointed out to the student that none of the other students he cited as examples had sold large quantities of drugs on school grounds. The court was not convinced all students should be disciplined the same, regardless of the severity of their conduct.

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The Utah Professional Practices Advisory Commission, as an advisory commission to the Utah State Board of Education, sets standards of professional performance, competence and ethical conduct for persons holding licenses issued by the Board.

The Government and Legislative Relations Section at the Utah State Office of provides information, direction and support to school districts, other state agencies, teachers and the general public on current legal issues, public education law, educator discipline, professional standards, and legislation.

Our website also provides information such as Board and UPPAC rules, model forms, reporting forms for alleged educator misconduct, curriculum guides, licensing information, NCLB information, statistical information about Utah schools and districts and links to each department at the state office.

## Your Questions Cont.

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have for an injury to a student caused by the actions of another student?

A: Unless the school administration knew, or had reason to know, that the aggressor was prone to violent acts against other students, the school is not liable for the injuries.

Courts are reluctant to hold schools responsible for the fisticuffs of adolescents. However, courts are less reluctant to punish schools that regularly turn a blind eye to known bullies or animosities between identified students.

Students who are known to fight each other, therefore, require some extra vigilance on the part of the school. This does not mean the school must assign a staff person to keep the students separated at all times, but it certainly must take whatever measures are reasonable under the circumstances to protect the students from harm.

Q: Is it okay for a teacher to ask my daughter questions about her religious beliefs?

A: No. Teachers should not be asking students for their personal religious beliefs without prior written parental consent.

In this case, the teacher had no pedagogical reason for the question but simply overheard a conversation between students. The teacher then asked the student what religion she was.

Even in casual conversation with students, teachers may not ask a student what his or her personal religious beliefs are, nor should the teacher reveal his or her own beliefs in any school or school-related setting.

Q: Where divorced parents have joint custody, must the school provide all notices, fliers, phone calls home to both parents?

A. No. State law allows the school to pick one parent to provide day to day information to. That parent is the one with custody "the majority of the time." U.C. 30-3-10.3 (4).

Therefore, the school can look at the divorce decree, do the math and decide that parent A has the child one day, or even one hour, more than the other so parent A is the one who will receive the daily updates.

This doesn't mean the school can't provide the information to both parents, but it certainly doesn't have to, especially if the parents are volatile.