UTAH SCHOOL LAW UPDATE

Utah State Office of Education

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RESPONDING TO SUBPOENAS

In rare instances, a school or educator will receive a subpoena duces tecum for a student's education records. Educators need to proceed with some caution when responding to such requests.

The Federal Family Education Rights and Privacy Act governs student education records. The act requires parental consent to release of a student's records, with some limited exceptions.

One exception is in response to a "lawfully issued subpoena."

Whether a subpoena is lawfully issued must be determined by the educator, or better still, his or her principal or district, before giving out the information.

A lawfully issued subpoena has two components: it is issued by an attorney or a judge involved in the case at issue and it gives the educator at least 14 days to respond.

If the subpoena is lawful, there is still another provision of FERPA to comply with before the documents can be provided to the attorney or judge.

FERPA allows the educator to provide subpoenaed information without parental consent, but first, the educator must make a "reasonable effort to notify the parent of the order or subpoena in advance of compliance…." This allows the parent time to seek protective action in court to keep the records private.

In limited circumstances, FERPA enables a judge or an agency to direct the educator not to reveal the existence of the subpoena to parents. The subpoena must be for information needed for law enforcement purposes and must be issued by a judge or an agency involved in the matter. A private attorney could not forbid the educator from disclosing the subpoena to parents.

Thus, if the records are requested by an attorney in a divorce case, the educator would have to provide notice to the parents. If the records are requested by a judge through a court order in a criminal child abuse case and the order forbids notice to the parents, the educator can and must turn the records over without notifying the parents.

Also, the person who subpoenas the records is responsible for the costs of producing or copying the rested records.

An educator should never ignore a subpoena. Neither, however, should the educator respond without talking to school or district administrators about the appropriate response.

UPPAC Case of the Month

Reading through the list of State Board actions each month (at right) can cause some confusion.

Why, a reader might ask, is one teacher suspended for two years for inappropriate computer use while another is revoked? Or one is revoked for mishandling school funds and another agrees to a suspension?

Many of the discrepancies are explained by the full facts, which are not a matter of public record.

Others are explained, in part, by the educators actions, which may be a matter of public record.

For instance, the discipline imposed on educators for viewing Internet pornography on a school computer can vary depending on whether students are involved, or if the pornography involves children, a federal offense, vs. adults.

Discipline also differs depending on an educator's willingness to discuss the events with the Commission.

A number of the revocations issued by the Board in January have little to do with the egregiousness of the allegations. Several of the educators just did-

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UPPAC CASES

- *The Utah State Board of Education revoked the license of Scott G. Revill for Internet solicitation of a minor.*
- *The Board revoked the license of Eileen M. Allen for failure to follow district accounting procedures resulting in significant amounts of missing money from the school.*
- *The Board revoked the license of Gail Bartholomew for accessing Internet pornography through his school computer.*
- *The Board accepted an agreement for a 2 year suspension of Myron Casper's license for failure to properly account for school funds.*
- *The Board accepted an agreement for revocation of Christopher Mikesell's license for using a school computer to request objectionable materials.*
- *The Board reinstated the licenses of Clayton Kirkham and Allan Jones.*

Eye On Legislation

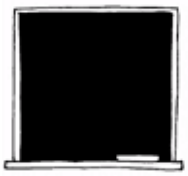
Legislators have requested a number of education-related bills, though funding is still up in the air.

The big bills, Tuition Tax Credits and the Carson Smith voucher program, will get plenty of press time. But there are several other bills of interest to educators.

Rep. Carol Spackman Moss, D-Holladay, for instance, will open Pandora's box with her bill to specifically require instruction in HIV/AIDS prevention. The law currently requires instruction in the prevention of communicable diseases, without listing specific diseases.

HIV/AIDS education is part of the existing core curriculum for health education. But educators must tread lightly through all sex-related instruction because of Utah's rather vague prohibition against "promoting or encouraging" sexual behavior.

Educators have also heard the loud and clear messages of Legislators who refused federal grant money for AIDS education, effectively eliminating a health education specialist position at the State Office of Education.



At the same time, Legislators granted parents and districts the right to adopt even more conservative sex education texts and materials than the state has approved.

All this occurred four years ago. The Health Education Specialist position has recently been revived, but, in the interim, teachers were left to fend through the minefield of sex education on their own.

The lack of a specialist to coordinate training in health education across districts took a toll. Health officials worry that students have been cheated of information they need about HIV and AIDS and many applaud Rep. Moss' bill.

But adding HIV and AIDS to the law doesn't alter the minefield. Local communities can still limit the amount of information students receive on these topics through the selection of textbooks and other teaching materials, and through personal pressure on teachers who cross the line in the view of the community. And many have sympathetic Legislators willing to assume the worst about health education classes.

Students need factual information about HIV/AIDS. Unfortunately, given the rest of the state law on health education, Rep. Moss' bill can't guarantee that the students will receive that information.

Rep. Dougall, R-American Fork, proposes changes to the composition and duties of school community councils. His changes would give community

Recent Education Cases

Whitfield v. Board of Educ. of City of Mount Vernon, (N.Y. A.D. 2 Dept. 2005). As an example of why parents need to be notified of subpoenas, the court in this case denied the plaintiffs motion to compel the school to provide a five-year old kindergartener's education records, calling it a "fishing expedition."

The plaintiffs were attempting to assert that the school knew or should have known that the kindergartener was capable of sexually assaulting a classmate.

Before requesting the subpoena, the plaintiffs deposed four knowledgeable people and all testified that no one was aware of any prior violent or sexually aggressive acts by the student.

The court found, therefore, that the plaintiffs had no "basis to believe" that the records might contain information useful in their case against the Board of Education.

Smith v. Half Hollow Hills Central School District, (E.D. N.Y. 2004). A school district was not liable to a student for injuries he suffered in a lunchroom altercation. Another student tried to grab coins lying on the student's tray, causing injury.

The parent's argued the district had a duty to protect their student from the other student because the school knew or should have known the altercation was possible based on the aggressor's six prior disciplinary inci-

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UPPAC cases cont.

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n't bother to respond to the UPPAC investigation.

Educators under investigation first receive letters from UPPAC informing the individual that allegations have been received which merit investigation.

If enough evidence of unprofessional conduct is discovered in the investigation, the educator may then receive a Complaint from UPPAC.

The Complaint sets out the rules the educator has allegedly violated and the facts which support the finding of a violation.

The educator has 30 days to respond to the Complaint. In the simplest terms, the educator can either deny all charges and request a hearing, or admit to the charges and request a Stipulated Agreement for resolution.

If the educator doesn't respond at all to the Complaint, a Notice of Default is sent. This notice gives the educator an additional 20 days to Respond.

If the educator still doesn't respond, the matter is sent to the Board for a Default Revocation.

An educator who defaults is assumed to accept the facts stated in the Complaint as true. Thus, in the eyes of the Board, a default is tantamount to an admission of guilt.

Suspensions and revocations, agreed upon or not, are reported to a national clearinghouse for school districts in all 50 states, the District of Columbia, Dept. of Defense sites, U.S. territories and parts of Canada to review in hiring decisions.

Eye on Legislation (Cont.)

councils some say in curriculum and assessment of students.

Dougall's bill would also allow any person who lives within the school's boundaries or owns a business in the boundaries to run for election to the council. It would open up voting to all residents within the school's boundaries, regardless of whether they have any knowledge or interest in the school.

In committee debate on the bill, several individuals, both on the committee and from the public, noted that it makes little sense to let someone with no interest in the day-to-day operations of the school have a vote on how money from school trust lands and other programs is spent for day-to-day operations.

That message resonated with the audience, but a proposed amendment by Rep. Merlynn Newbold, R-South Jordan, failed in a 6-4 vote.

The bill did not pass out of the committee, however. A motion to adjourn passed before the committee could vote on passing the bill out to the House floor for debate.

It will surely be back again, and soon.

Rep. Eric Hutchings, R-Kearns, proposes some important changes to the state's truancy law. His bill redefines the criteria for a parent to be charged with a class B misdemeanor based on a child's excessive absences. The proposed language makes a parent liable to be charged if the parent "fails to resolve" the child's absenteeism. The current language reads "fails to respond to a written request."

Under the existing language, a parent who has little interest in seeing their elementary student gets to school can avoid prosecution by simply calling the school after receiving the school's letter, even if its just to say "I got the letter."

The bill also requires that the school consider a parent's suggestions for resolving the student's absenteeism.

Your Questions

What do you do when. . . ?

Q: Can my district impose a dress code on teachers?

A: Yes. Case law has established that any employer may expect its employees to dress appropriately for the job. The employer can also create standards, policies or rules establishing what is appropriate.

However, if the dress code is so restrictive that the majority of educators must buy a new, more expensive wardrobe, the district may have to negotiate its code as part of its collective bargaining for teacher contracts.

Even if the code is not so restrictive and causes no real hardship, the district may have to negotiate how the dress code is enforced. What is the penalty for an educator who refuses to comply? If the sanction is something other than the district has currently in its progressive discipline policy, it may have to negotiate with the union over the new sanctions.

Q: May a charter school contract with a local school to allow the charter students to participate in sports or activities?

A: A school, or more appropriately,

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Recent Cases Cont.

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dents.

The court found no reason for the school to suspect the student of grabbing money from a tray since he had never done so before and he had no disciplinary actions in the current school year.

The court also rejected the parent's argument that the school failed to provide adequate supervision noting that the incident happened too quickly for anyone to prevent it and lunchroom problems were rare at the school.

Saxonis v. City of Lynn, (Mass. App. Ct. 2004). A substitute teacher's claim that she had a verbal contract for a full-time teaching position was denied, in part.

The substitute had been hired to replace a cosmetology teacher. The teacher was on indefinite leave and intended to retire at the end of the year. The substitute stated that the principal promised her he would hire her to replace the current teacher when she retired.

Following the teacher's retirement, the principal hired another person to take the position.

The court noted that a verbal promise of employment would violate the express legislative policy that substitutes are at will employees and could not be enforced by the court.

However, the court also stated that the substitute could proceed with her case against the principal for damages she suffered by relying on his promises. The teacher had sold her 23-year old beauty salon business in reliance on the promise of employment.

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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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the district, may enter into an agreement with a charter school to allow charter students to participate in its programs. But schools and districts need to carefully consider the ramifications.

For instance, if a school agrees to allow charter students to play on the school's sports teams, the school will have to count all of the charter students as potential athletes, possibly changing its division classification with the Utah High School Activities Association.

Q: Can the school district require that all students whose parents are Utah residents but who are attending school outside their boundaries have a court ordered legal guardian?

A: Only in limited circumstances. To require legal guardianship when a parent enrolls a student in a school that has been declared "open" for enrollment would defeat the purposes and intent of the school choice legislation.

In the other hand, if the parent is seeking to enroll a child in another school district at a school that is not open for enrollment, the district can require a legal guardian.

This may be a bit punitive, however, if the parent lives a short distance away and is readily available to make the kinds of decisions a school district usually requires a legal guardian to make. It makes far more sense if the parent is several hours and a long distance phone call away.

Q: As a teacher, what are my rights to academic freedom?
A: A public school educator's right to academic freedom is limited by the nature of public education.

The state board, for instance, sets the core curriculum. While educators may choose supplemental materials and the methods of teaching the core, those choices are limited by their professional responsibilities and state board rules and local policies.

Administrators are also expected to prevent disruption in their schools, including disruption caused by an educator's methods or materials. Administration can tell a teacher not to use a particular work or method, to edit something provided to kids, or to refrain from certain activities with kids.

Academic freedom exists for public school educators, but it primarily protects outside activities, like membership in professional associations or participation in a protest against public policy, not what happens in the classroom.