UTAH SCHOOL LAW UPDATE

Utah State Office of Education

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Watch Those Emails

The 5th Circuit Court of Appeals recently issued a decision in a case involving the Establishment Clause.

Comer v. Scott involves an employee's violation of a neutrality policy employed by the Texas Education Agency. The policy is used primarily as a means of avoiding conflicts with the elected Texas State Board of Education.

Comer was the agency's Director of Science for the Curriculum Division until November of 2007. The agency gave her notice of its intent to terminate her after she sent an email from her agency account to various science teachers and leaders of science teacher organizations, advising them of an upcoming presentation entitled "Inside Creationism's Trojan Horse." The event would feature a speaker criticizing the teaching of creationism in the public schools.

The Texas State Board of Education has the statutory authority to establish curricular requirements as well as to determine the textbooks to be purchased for use in the schools. The agency, which serves as the Board's staff, has a "neutrality policy" requiring staff to remain neutral and refrain from expressing any opinions on any curricular matter that would be subject to the State Board's jurisdiction. *Slip Opinion* at 2. The "neutrality policy" also prohibits staff from expressing opinions on the wisdom of any particular State Board policy option.

Comer had been disciplined once before for violating the policy by talking with persons outside the agency about the State Board's deliberations concerning the science curriculum.

The agency moved to terminate Comer after her second violation. Comer resigned in lieu of termination. She then filed suit, raising claims under the First Amendment's Establishment Clause and the Fourteenth Amendment's Due Process Clause. She claimed her termination violated her due process rights and argued that the neutrality policy had the "effect of endorsing religion," specifically, "creationism." *Id.* at 4. Comer lost in district court and appealed to the U.S. 5th Circuit Court of Appeals.

On appeal, Comer argued that the neutrality policy, as applied to her for sending a critical email on her agency account, served to support creationism as "a legitimate subject matter for the Board to consider in the curriculum" and thereby constituted an establishment of religion in violation of the First Amendment. *Id.* However, Comer was aware of the neutrality policy and admitted that her sending the email through her agency account violated that policy.

The court found that the neutrality policy does not have the "primary effect" of advancing religion, even if there should be some indirect, remote, or incidental benefit to religion.

> "The fact that Comer and other TEA employees cannot speak out for or against possible subjects to be included in the curriculum—whether the considered subjects relate to the study of mathematics, Islamic art, creationism, chemistry, or the history of the Christian Crusades—their silence does not primarily advance religion, but rather, serves to preserve TEA's administrative role in facilitating the curriculum review process for the Board."

"*Id.* at 11. The Court found "it hard to imagine circumstances in which a TEA employee's inability to publicly speak out for or against a potential subject for the Texas curriculum would be construed or perceived as the State's endorsement of a particular religion." *Id.* at 12. The 5th Circuit panel found that the TEA policy did not violate the Establishment Clause.

UPPAC CASES

The Utah State Board of Education reinstated the educator licenses of Eric Erastus Snow and Thomas Sterling Tholen.

The Board suspended Derek Matthew Ritter's educator license for encouraging a student to corroborate a sexual relationship between himself and the student and engaging in an inappropriate relationship with the student.

The Board suspended Joseph K. Everton's license for inappropriate disciplinary tactics, pursuing romantic relationships with a minor and recent alumnae, and providing preferential treatment to students of one religious organization.

The Board suspended Darrin J. Workman's license for accessing pornographic images on his school computer.

The Board revoked by default Jeremiah Manti Hawks' license for accessing pornography on his school computer.

The Board revoked by default Kent Oviatt's license for discouraging students from reporting child abuse.

Eye on Legislation

✔ State and federal education laws require schools and districts to provide certain information each school year. Below is a condensed Back to School Checklist for schools and districts:

✔ Fee schedules approved by local board and notice of fees and fee waiver policies provided to parents.

✔ FERPA "directory information" definition established and disclosed to parents. Opt out option for parents provided.

✔ Separate opt out option for sending FERPA directory information to military recruiters provided.

✔ "In God We Trust" signs posted in all classrooms.

✔ Notice posted in a conspicuous place that students have a right not to participate in the recitation of the Pledge of Allegiance.

Student/parent handbooks updated and provided to all students/parents (updates might include updated definitions of gang attire, electronic devices policies, updates to school discipline policies as needed).

✔ Class disclosure forms properly disclose per Utah Code any and all sensitive topics which will be discussed. Disclosures require parent consent to discussions of personal views on sex, religion, politics, mental health, criminal or demeaning behaviors, and family relationships.

✔ Negotiated agreement accessible online.

✔ School district policies accessible online.

✔ Proposed school community council meeting schedule distributed to parents.

✔ Only children who are 5 by Sept. 1 are enrolled, unless student's parent is on active duty within a branch of the U.S. armed forces.

✔ Birth certificates (or affidavits of lost certificates) and immunization records (or certificate showing parental objection to immunizations) noted in each student record.

This is not an exhaustive list, but a simple reminder of some of the required information schools must provide each year.

UPPAC Case of the Month

The use of violence against students, whether the intent is malicious or otherwise, is unacceptable for educators. While educators can physically restrain students when needed and to the extent reasonable, smacks to the head, jabs in the back, and headlocks should be removed from all educators' classroom management toolboxes.

Recent cases are illustrative. The Utah Professional Practices Advisory Commission has investigated educators for, among other things, grabbing a student and pushing him, hitting a student with a roll book, hitting a student's head with the back of the hand, slapping a student, and putting a student in a headlock.

In all but one of the cases, the teacher reacted in anger. The remaining case involved a teacher acting in jest. In all of the cases, the students were upset by the teacher's actions, sometimes hours later or to their parents, rather than immediately. Police investigations were initiated in all of the cases involving angry teachers.

Educators are expected to control their emotions, especially when acting on the emotions may result in criminal charges. In the past 10 years, no teacher accused of striking a student in anger has been able to offer a justification which would argue against licensing discipline. Whether the argument was protection of school property (the student was kicking a heavy metal door which would not have been injured by the student's actions) or protection of other students (the student was talking out in class, impeding the teacher's ability to teach her class), the facts did not support the teacher acting as he or she did, primarily because the teacher went beyond what would have been required to solve the issue.

Further, when witnesses verify that the educator acted not out of concern for student safety but in anger, the educator's response is unlikely to be considered a reasonable use of force. It is difficult to use reasonable amounts of force when the educator is in an unreasonable state of anger.

Those educators who use force in jest rather than in anger may also find their professionalism called into question. While a smack to the head may seem amusing, it is not an appropriate means of disciplining students. Neither is a "playful" kick in the pants, shove into a desk, or "nudge" with a foot.

Students should be given a pat on the back for good behavior and perhaps a firm hand on the shoulder for bad. But if the hand leaves a bruise, disciplinary action is likely.

Recent Education Cases

Bear v. Fleming (S.D. Dist. Ct. 2010). The federal district court ruled that school officials did not violate a student's rights by insisting he wear a graduation cap and gown.

Aloysius Dreaming Bear was one of 10 graduating seniors and the senior class president. He is also a Lakota Indian. Bear sought a permanent injunction against the Oelrichs School District to prevent it from requiring him, and any other current or future Lakota students, to wear a cap and gown over his traditional Lakota clothing.

Bear informed the school of his intention to wear traditional regalia to graduation at the beginning of the school year. At that time, he was told by one school official that he would be allowed to do so. Bear later learned that the school board would require a cap and gown for at least part of the ceremony.

Bear requested time on the Board's April agenda. He was granted the time and orally presented part of a letter he had written to the Board. He was not able to finish reading the letter because he was told his three minutes were up. He also had signatures from all but one of his fellow seniors who supported his decision to wear his Lakota clothing.

The school board informed Bear that evening that he would be required to wear the cap and gown to walk across the stage to receive his diploma. After that, he could remove the cap and gown and the board would provide a place for him to hang it as he exited the stage. The principal also testified that the graduation would include a traditional Lakota ceremony (9 of the 10 seniors were Lakota) during which the students were encouraged to wear native clothing. Following the ceremony, the students would exit and re-enter as a unified class in caps and gowns. Once the diplomas were awarded, another Lakota ceremony would be conducted, during which students would not need to be in cap and gown.

The court found that Bear's desire to wear native dress was speech under First Amendment standards. Bear intended to send a particularized message through his clothing that the audience would understand as a message of pride and cultural affinity.

However, the court also found that the school had a legitimate interest in demonstrating unity in the class and celebrating the students' and institution's academic achievements. The court noted that the cap and gown are universal symbols of academic accomplishment.

Further, the court explained that a graduation ceremony is a school sponsored event. Bear sought a permanent injunction which would hamper the school's interest in establishing cap and gown standards for all future school sponsored graduation ceremonies. The court determined that the school's interest in regulating its events now and in the future outweighed Bear's interest in his speech. This is particularly true where Bear was given ample opportunity to wear his traditional dress, sending his message for all but 30 minutes of what promised to be at least a two hour long event.

Your Questions

Q: Do we need to retain the certified copy of a student's birth certificate?

A: It is wise practice to keep a copy of the student's birth certificate in the file. However, if a parent objects to the school keeping the certified copy, the school can keep an unofficial copy or can ask the parent for an affidavit explaining that a certified copy was "provided," as state law requires, but the parent was not willing to have a copy retained in the file.

What do you do when. . . ?

Q: May a school require a doctor's note in order to excuse an absence for illness?

A: The school can request a doctor's note where the excuse is a doctor's appointment or an illness. However, schools must also recognize that parents may not take their children to the doctor every time the child has a runny nose and a fever. If the school asks parents to keep students home when the students have fevers, it should not insist that parents visit the doctor to confirm the fever.

Schools must also take into account the potential economic resources of their patrons who may not be able to make regular doctor's visits. Unless the student misses an excessive amount of school for colds and fevers, a

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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.

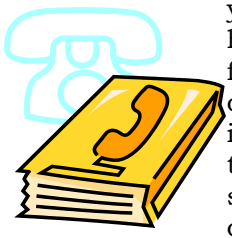
(Continued from page 3)
doctor's note is probably not needed whenever a parent says a child is ill.

Q: May we provide student names, addresses, and phone numbers to the Parent-Teacher Association?

A: Under the federal Family Education Rights and Privacy Act, if a school has provided parents with its annual FERPA disclosure, notifying parents of the school's definition of directory information, and that definition includes contact information and student names, the school can provide the information to school-related organizations. The school is not REQUIRED to provide the information to any group or individual, but it can choose to do so.

If the school does provide the information to the PTA, it must also provide the information to similar organizations that are affiliated with the school.

A school may also provide the information to outside interests, such as class ring providers, but must, again, provide equal access to the information to all providers who seek it.



Q: We have several parent volunteers signed up to help register students at the school. Are there any limits on their access to student information?

A: Yes. School volunteers should not have access to any student information that does not fit within the school's definition of "directory information."

In other words, parent volunteers should not be asking or receiving information about an individual family's or student's eligibility for fee waivers, medical conditions, income, or special needs.

Q: A parent tells us she has not yet decided between our neighborhood school and a charter school further away. May we register her child knowing that she is also registering at the charter school with the intention of choosing one school before the first day of classes?

A: No. Parents may not register their children at two different public schools at the same time. The parent will need to make a decision and register her child at one school or the other.