UTAH SCHOOL LAW UPDATE

Utah State Office of Education

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Three Simple Steps to Avoid Lawsuits

Want to stay out of legal trouble this school year? Whether you are an administrator, teacher, or other professional, there are some easy steps you can take to fend off litigation:

1. <u>Listen and Respond</u>. Far too many education cases are filed by legitimately disgruntled parents.

Most of the cases could have been resolved long before the parents filed suit if the teacher/administrator had used some people skills and made the parent feel that the school was listening and was doing whatever it could to respond to the parent's concerns.

This is not to say that the parent was always right, but in many of the cases, the parent was simply ignored in the hope he or she would just go away.

A school may not be able to solve a parent's dilemma, but it may avoid litigation if the parent feels the concerns are taken seriously and the school has tried to do something in response.

2. <u>Document</u>. After you have listened to the parent, or student, or teacher or administrator, document the conversation in purely factual terms.

This is not just a cathartic exercise, it will make it easier for you to prove your case.

If a parent, for example, threatens legal action, you will have ample proof of all of the conversations you had with the parent, and the outcomes, to share with your and the parent's attorneys. A well-documented attempt at resolution can stave off litigation far better than your undocumented assertions that you did everything you could.

3. <u>Apply policies consistently</u>. Don't let some kids/faculty get away with things while others are disciplined.

Don't treat some parents/students/teachers/administrators with respect while others are shown the door.

Do use your best professional judgment, and a little common sense, to ensure the spirit of the policies is followed, as well as the letter of the policies.

UPPAC Case of the Month

The U.S. Supreme Court issued two important decisions recently. The first, <u>Ceballos v. Garcetti</u>, may have profound effects on professional practices.

In this case, the court took another look at the rights of public employees to speak out while on the job—and further restricted those rights.

In a rather odd, split decision, Justices Kennedy, Roberts, Scalia, Thomas, Alito and Stevens determined that public employees may be disciplined for speech made pursuant to their official duties.

Ceballos is a deputy district attorney in California. As part of his job, he reviewed a defense attorney's complaint that a police affidavit used to obtain a search warrant contained "serious misrepresentations."

Through his investigation, Ceballos discovered that their were substantial inaccuracies in the affidavit and wrote a memo to that effect, recommending dismissal of the case.

Ceballos also shared his memo with the de-

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UPPAC CASES

- *The Utah State Board of Education suspended Kathleen Ann Nielsen's license for 3 years based on he repeated inappropriate disciplinary behavior with students.*
- *The State Board suspended Kent Shawn Rushton's license for 4 years based on his inappropriate physical relationship with a female student.*
- *The State Board suspended Robert James Bedont's license for 4 years resulting from his sexual relationship with a student.*
- *The Board revoked the license of Tommy Thorpe for conduct related to three sexual battery charges files against him*
- *The Board suspended the license of Scott Fred Orme for 3 years for pursuing an inappropriate relationship with a minor.*

U.S. Supreme Court: Burlington N & S. F. R. Co. v. White

In contrast to the Garcetti case, which gave employers the opportunity to retaliate, this case restricts an employer's ability to retaliate.

White was a railroad employee who complained about sexist harassing comments made by her foreman. Following her complaints, she was removed from her duties and reassigned to a less desirable position and placed under heightened surveillance. She was also suspended for alleged insubordination.

A later investigation revealed she had not been insubordinate and she received back pay for the time of her suspension. She then sued the railroad for retaliating against her based on her complaints.

The court announced a new standard for dealing with retaliation claims, broadening the category of conduct that can be viewed as retaliation.

The court stated that any employer conduct that is "materially adverse" to an employee can be viewed as retaliatory.

Prior to this decision, the conduct had to involve employment action, such as termination or failing to promote the employee. Under the new standard, an employee need only show that "a reasonable person" would have been convinced by the employer's actions not to pursue his/her legal right to object to discrimination or harassment.

For example, the court noted that, while a schedule change might seem trivial, it could be highly detrimental to a mother with young children.

The Court also broadened the categories of employer conduct that can be viewed as retaliation to include non-employment related actions. The Court cited the examples of an employer filing criminal charges against a former employee or an employer not investigating threats against an employee who had complained about bias.

Employers are well-advised, then, to make sure they have policies against retaliation and that they fully document their reasons for taking any kind of adverse action against an employee.

UPPAC Case Cont.

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fense attorney, as he felt he was required to do by state law.

Despite Ceballos' findings, his supervisor decided to proceed with the prosecution. Ceballos claimed that he was also demoted and transferred based on his memo.

Ceballos brought suit against the district attorney's office alleging he was retaliated against for, what he claimed was, constitutionally protected speech.

The Supreme Court (or at least five members) felt differently. The justices ruled that a public employee who speaks as a part of his job duties does not have First Amendment protection and can be disciplined by his employer.

The justices note that an employer has "heightened interest in controlling speech made by an employee in his or her professional capacity."

The justices further cite the need for consistency and clarity in official statements from a public entity.

The majority also determined that state and federal whistleblower statutes would protect an employee who speaks out about corruption within his public employment.

The problem with the decision, however, is best explained in a dissent by Justice Souter. Souter compares the outcome in this case to the outcome in a case involving a teacher who was disciplined for complaining to her principal about discrimination in employment practices at the school.

In that case, Givhan v. Western Line Consol. School Dist., the Supreme Court ruled that the teacher had been retaliated against in violation of her First Amendment rights. Souter states in his Ceballos dissent,

"the difference between a case like Givhan and this one is that the subject of Ceballos's speech fell within the scope of his job responsibilities, whereas choosing personnel was not what the teacher was hired to do.

The effect of the majority's constitutional line between these two cases, then, is that a Givhan school teacher is protected when complaining to the principal about hiring policy, but a school personnel officer would not be if he protested that the principal disapproved of hiring minority applicants."

Souter argues that the Pickering test, used in a long stream of First Amendment cases involving public employees, is the appropriate test. A Pickering analysis balances the employee's important interest in being able to speak on matters of public concern against the employers interest in the efficient operation of government.

In Souter's view, the court has thrown out the Pickering test, giving the employer an unquestioned right to retaliate in those cases where an employee says something in his or her official duties that the employer objects to.

Arguably, then, a teacher who includes statements in a lesson that the principal objects to could be transferred or fired without recourse under the Garcetti v. Ceballos standard.

Recent Education Cases

Doe v. Lafayette School Corp. (App. Ind. 2006).

The court ruled that a school could not be held liable for a teacher's inappropriate use of school computers.

The teacher used his school computer during school hours to pursue a sexual relationship with a student.

The student sued the school arguing that it was liable for the teacher's conduct. The student theorized that the emails were within the scope of the educator's employment because the school authorized the teacher to send emails to students.

The school argued, successfully, that it did not authorize the teacher to send personal emails to students and nothing in his conduct was required by his job.

Behymer v. Coral Academy of Science (D.Nev. 2006).

A student was granted a temporary restraining order against his school.

The school disciplined the student for reading a poem containing the words "hell" and "damn." The school also sought to prohibit the student from reading the poem at a poetry contest.

The student sued the school for violation of his First Amendment rights.

The court held that the school had failed to show any likelihood of disruption at the school from the student's reading and granted the student's request for the restraining order.

Taylor v. Enumclaw School Dist. (App. Wash. 2006).

A student had no right to participate in sports activities at the school and could, therefore, be suspended from a team for alcohol use.

The school suspended the student without a hearing. The student sued for violation of his due process rights, claiming he should have been granted a hearing before the suspension was imposed.

The court found, however, that where the student has no property or liberty interest in his participation, no process is due.

Flickinger v. Lebanon Sch. Distr. (Pa. Cmwlth. 2006).

A principal's failure to respond to a report of a gun in the school warranted his dismissal.

The middle school principal was dealing with two students and their mothers in one volatile situation when an assistant principal reported to him that another student might have a gun in the school. The principal made the assistant wait for 15 minutes. The assistant finally gave up on the principal and found another assistant principal to address the situation with her (the student did have a gun).

The principal had been trained to respond to any report of a gun in school immediately. The court found his dismissal for neglect of duty was warranted, particularly given the potential harm a middle school student with a gun poses.

Your Questions

What do you do when. . . ?

Q: I have been picking my grandkids up from school and volunteering in their classrooms for over a year. Their parents are now refusing to let me pick the kids up and the school has refused to let me volunteer in the classroom, what can I do?

A: Very little at the school level. Grandparents, or anyone else, have no right to volunteer in a school and the principal can deny a student's relative, including a parent, access to the school, within reason.

Principals have the discretion to decide if a visitor, whether a parent, grandparent, or best friend of a student, is a disruptive influence.

Disruption in this context runs the gamut from a visitor who wants to take a child out to lunch during class time to one who is to talkative in the teacher's class.

Despite the public name in "public school," a school building is not like other public buildings. Patrons do not have unfettered access rights.

Q: I was told that, once the district took disciplinary action, any investigation of my teaching license at the State Office would be dismissed. Is this accurate?

A: No. Investigations by the Utah Professional Practices Advisory

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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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Committee for violations of the Rules of Professional Practices are separate and distinct from district investigations.

Though the investigations may involve the same set of facts, the purposes and standards for each are very different.

Districts investigate to determine if employment action is warranted, UPPAC investigates to determine if action against the educator's license is warranted.

The difference is in the result. A teacher who loses his job may be able to find another job at another school. A person who loses his license is prevented from working at another public school in Utah or any other state.

Thus, the investigations may uncover the same facts, but reach different conclusions based on the possible penalties.

In some cases, a district may decide to impose a short term suspension. UPPAC may decide that the district action is the appropriate level of punishment for the misconduct and dismiss the licensing case.

Or it may decide that the district action is fine for employment purposes, but the educator has shown definite tendencies that do not bode well for his level of professionalism, and it will take additional action against the educator's license.

A district decision is considered in UPPAC investigations, but it is not determinative.

Q: Why can't my child, who has attended kindergarten in another state, start school in Utah? Her birthday is one day past the Sept. 2 deadline.

A: The state law on the issue (U.C. § 53A-3-402(6)) is unconditional. It says simply that a school board may enroll a child who is at least 5 by Sept. 2.

There is no provision in the law granting exceptions for the brilliant, the already schooled or the "just missed the deadline" child.

While the merits of the law may be questioned, the language is unambiguous—a student may be enrolled if he or she turns five before Sept. 2. All others must learn to wait their turn.