UTAH SCHOOL LAW UPDATE

Utah State Office of Education

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THE BIG BANG THEORY

As any one who pays even remote attention to the news knows by now, Sen. Chris Buttars, R-West Jordan, is proposing a bill singling out evolution for special treatment in public school classrooms.

Sen. Buttars originally intended to advocate for the teaching of "intelligent design" in the biology curriculum, but changed his legislation in the face of a recent ruling by the U.S. District Court for the Middle District of Pennsylvania.

In the Pennsylvania case, Kitzmiller v. Dover Area School District, the court found, in an excruciatingly detailed opinion, that Intelligent Design is not science and the reasonable student or adult observer could surmise that a forced disclaimer regarding evolution and alternative theories of the Origins of Life suggest an unconstitutional endorsement of religion.

But Buttars did not read far enough into the case.

The Dover Area School District adopted a disclaimer for all biology teachers to read. The disclaimer stated, in essence, that evolution is a theory only and subject to gaps in evidence. It also stated that the theory is required to be taught and tested in standards-based assessments.

The disclaimer went on to note that "Intelligent design is an explanation of the origin of life that differs from Darwin's view," and offered a named reference book for students interested in learning more.

Buttars, or his legal advisors, seem to have read the case to rule out only the use of the words "intelligent design." His bill requires that the state curriculum include requirements that teachers stress to students that scientists do not agree on any one theory related to the origins of life and that teachers "do not endorse a particular theory."

The logical reasoning in Kitzmiller reaches Buttars' bill as well.

The bill does several of the same things the Pennsylvania court found contributed to the message of religious endorsement.

First, Buttars would require a disclaimer for one particular scientific theory—that related to the origins of life. No other theory in the state science curriculum, or any other part of the state curriculum, requires such a disclaimer.

This special treatment for evolution serves as a red flag to students and par-

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UPPAC Case of the Month

Across the nation, sexual misconduct, including everything from looking at pornography at school, to sexual harassment and sex with students, is the number one reason educators lose their licenses.

While these types of cases are always common, the Utah Professional Practices Advisory Commission is seeing an increasing number of educators involved in the worst kind of sexual misconduct, sex with students.

Sadly, we are not alone. A December 11, 2005 *New York Times* article noted that the last few months have "produced a spate of cases where women are prosecuted for having sex with boys." In two of the cited cases, the women were teachers and the boys were their students.

The article quotes Carol Shakeshaft, a professor at Hofstra University who conducted a study on behalf of the U.S. Department of Education on educator sexual misconduct. Shakeshaft points out what UPPAC has always known, "teachers

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UPPAC CASES

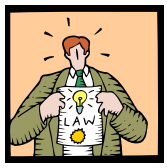
- *The Utah State Board of Education accepted a Stipulated Agreement for an 18 month suspension of David Lynn Felton's educator license. Mr. Felton engaged in a pattern of inappropriate and unwanted touching of female students.*
- *The State Board accepted a Stipulated Agreement for an 18 month suspension of the educator license of Gilles Pierre Marie Goheir. Mr. Gohier used school computers to access sexually explicit Internet dating sites during school hours.*

Eye On Legislation

"Let the games begin," as they are saying in Turin, Italy. Here, the games are legislative, and no less vital to those involved.

The 2006 Legislature has begun numbering bills, though little text is available at this point.

There are some emerging themes, however, including medical issues in schools, curriculum changes and fun with funding.



On the medical front, the shortage of school nurses will receive some attention. Sen. Ed Mayne, for example, is proposing a legislative task force to study the issue and there is talk of additional funding for nurses.

Also in the medical arena, Rep. Morley will try, try again to enact his Medical Recommendations bill. The bill passed the 2005 Legislature but was vetoed by Gov. Huntsman.

Sen. Patrice Arent is also stuck on the medical theme. Following the success of her bill allowing students to carry asthma medication, she will push this year to allow student with diabetes to carry their medication as well. Arent is also proposing a resolution encouraging schools to teach children about the dangers of sun exposure.

Curriculum changes include the Origins of Life bill, discussed elsewhere in these pages, and bills entitled High School Curriculum, Full Day Kindergarten for At-Risk Students, Kindergarten Readiness, and Karen Morgan's reading bill, discussed in the Dec. edition.

On the funding front, bills include Adjustments in Funding for Concurrent Enrollment, Adjustments to the Minimum School Program Budget, Special Education Funding, Beginning Teacher Enhancements, Instructional Expenses Requirements, and a Teacher Bonus Program.

Also on the list: three bills related to school community councils, more charter school amendments, a school uniform bill, Sen. Buttars' no gay student support clubs bill, a classroom discipline bill, another attempt to tighten the truancy law and a school discipline pilot program.

Please watch for further updates as text is made available.

Recent Education Cases—Teacher Speech

Mella v. Mapleton Public Schools (10th Cir. 2005). Mella was a district computer specialist who sued when she was not selected as one of the final candidates for a new Manager of Technology position.

Mella claimed she was not chosen in retaliation for her speech on the district's prior decision to disable a security software program.

Mella's speech consisted of telling the district that disabling the software might lead to teachers downloading software in violation of licensing agreements and copyright laws.

The court found that Mella's speech was not protected under the First Amendment since it did not involve a matter of public concern. There was no evidence that the disabling was intended to allow teachers to break copyright laws and disabling the software was not illegal.

Further, Mella was not voicing concerns to protect the public, but to ensure she would not be blamed for any problems that arose from the decision.

Further, the district had a valid, non-discriminatory reason for selecting other candidates for the final interviews—the candidates had better communication skills.

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UPPAC cases cont.

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are always wrong" when they engage in sexual relationships with students.

Building on the article, syndicated columnist Kathleen Parker explains another UPPAC truism, "An adult, especially one in a position of authority such as a teacher . . ., is always in a superior position with a minor player. . . .Thus, the sexual act, even if consensual, is still coercive to some degree."

Courts agree. In one of the more instructive cases to date, the 6th Cir cuit ruled that a school board could terminate a teacher who engaged in a sexual relationship with a student nine months after the student graduated.

The court recognized that sexual relationships between teachers and students do not "spring into existence" after graduation. In fact, it determined that the board could adopt a policy prohibiting teachers from developing romantic relationships with student within as much as **a year or two** of graduation. Such a policy, the court reasoned, "would **prevent high school seniors from being perceived as prospects eligible for dating immediately after graduation** . . . ." Flaskamp v. Dearborn Public Schools.

Having witnessed, many times over, the devastation caused to students, families and schools by inappropriate sexual relationships between students and teachers, UPPAC encourages districts to consider such a policy.

Intelligent Design and Sen. Buttars

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ents that there is something controversial about evolution. As the Pennsylvania court explained, what any reasonable adult knows is that the controversy involves a religious view that evolution is wrong.

In the words of the U.S. Supreme Court, cited in Kitzmiller, "out of many possible science subjects taught in the public schools, the Legislature chose to affect the teaching of the one scientific theory that historically has been opposed by certain religious sects."

Buttars bill would note that scientists do not agree on evolutionary theory. What the disclaimer fails to note, however, is that scientists disagree on many hypotheses, which is why scientists continue to research, experiment and practice the scientific method.

Buttars bill is also harmed by its sponsor's public comments and public reaction. The court in Kitzmiller, looked to letters to the editor and editorials in the local area for guidance on community perceptions. It found that the community viewed the controversy over the disclaimer as implicating, and endorsing, religion.

The U.S. Supreme Court has also looked to a legislative sponsor's intent and community perceptions. In Wallace v. Jaffree (1985), the Court ruled that a statute providing a moment of silence in Alabama's public schools was unconstitutional. In making its decision, the Court looked to the comments of the legislative sponsor which clearly revealed his intent to bring prayer into the schools through the legislation.

Buttars' has made no attempt to disguise his religious motivation behind the bill. Local letters to the editor make it clear that the community is well aware of these motivations.

If Buttars' bill passes, it is bound to be litigated, and found unconstitutional. While Sen. Buttars may feel fine about using taxpayer dollars to fight preventable legal battles, voters might feel differently.

Your Questions

What do you do when. . . ?

Q: Can citizens hold a recall election for local school board members?

A: No, Utah law does not provide for recall elections. Citizens who are unhappy with a board member's performance, can ask the board member to resign or wait for the next election cycle.

Taxpayers who believe the board member has committed a "high crime or misdemeanor" or an act of "malfeasance in office" can petition the court for removal of the board member.

Note that an act of malfeasance involves an illegal act as well, done in the course of the board members duties. For example, a board member who accepts a bribe commits both a crime and an "act of malfeasance."

Q: Does a student who moves to Utah to live with extended family need a legal guardian to enroll in school if he is 18?

A: No. Once a student reaches 18, his residence is wherever he himself resides and he no longer needs to live with a parent or legal guardian.

However, that does not mean the student can flout school rules and

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Recent Cases Cont.

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Gilder-Lucas v. Elmore County Bd. of Ed., (M.D. Ala. 2005). The teacher sued the Board of Education claiming she was non-renewed in retaliation for her public criticism of the procedures and criterion used in cheerleading tryouts.

The court found that Gilder-Lucas' speech was not a matter of public concern because it did not address that quality of education in the school system. Instead, the court held Gilder-Lucas' speech was a matter of personal grievance that affected only a small group of people interested in this particular extracurricular activity.

Williams v. U.S. Dept. of Labor, (4th Cir. 2005). The teacher, convinced that several schools had unsafe levels of lead and asbestos, contacted the media, posted flyers and filed occupational safety complaints.

The schools were investigated and found to be safe.

Despite the ruling of safety, the teacher continued to foment, using school contact information to send letters to parents.

The court upheld her termination for misconduct. While the teacher's comments would have been protected before the investigation, once the schools were found to be safe, the teacher's continued comments were not longer a matter of public concern.

Further, the teacher had no right to use the school's parent contact information even when she was addressing a matter of public concern.

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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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check himself in and out of school as he pleases. The student still must comply with all school requirements.

Further, unless the student is completely independent—living on his own and paying his own way—the school can treat him as it would any student when it comes to absences, providing grades to parents, and other school rules.

Thus, for example, if the student lives with family, the school can require that a responsible adult (other than the student) sign the student out for appointments or sick days.

Q: A parent objects to the school dress code prohibiting coats in class. He has threatened to call in the ACLU if the school continues to forbid his student to wear a coat in class. The parent has not offered any explanation for his objection to the dress code and we allow students to wear sweatshirts, sweaters and other similar items if they are cold in class. Do we have to let his student wear a coat in class based on the parent's nonspecific objection?

A: No. There is ample case law upholding school dress codes, particularly when the student, or parent, has no rational objection to the code.

In fact, a 2005 case from the 6th Circuit held that a student must comply with a reasonable dress code policy where her only objection was that she didn't lie the clothes required by the policy. The student claimed she should be able to wear whatever she feels she looks good in. The court found no need to uphold her fashion sense. Blau v. Fort Thomas School District.

The dress code at issue here, allowing multiple means for students to stay warm and not requiring any specific type of wear, such as blue blazers with gold buttons, is reasonable.

Students do not have a First Amendment right to wear whatever they like simply because they like it. Wearing a winter coat that makes no other statement than "I'm cold and I want to wear this" is not protected speech and the father's call to the ACLU is futile.