UTAH SCHOOL LAW UPDATE

Utah State Office of Education

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Those Pesky Phones

It wasn't so long ago that people survived without constant access to a telephone. Students had to plead an emergency to use the main office telephone and parents had to call a school secretary for permission to talk to a student.

Now, students can spend their entire class time text messaging their neighbor and parents can call in the middle of class time to remind junior of his piano lesson after school.

Students can also call immediately if they are having trouble or need emergency care and parents can contact students quickly in the case of a crisis.

All of this convenience and safety makes life a bit more interesting for school personnel. And "interesting" always seems to translate to "possible legal action" in the education world.

Fortunately, or not, there is little case law to date about school cell phone policies, though several suits have been threatened by parents and others across the nation.

Many of the threatened lawsuits resulted from district policies that banned all cell phones on campus. Few districts have kept such policies, and the parental threats have stopped.

But a more likely scenario for a lawsuit arises from school personnel seizing a phone for one reason and finding evidence of unrelated illegal conduct on the phone.

Educators can take the phone of a student who is using it during class, assuming such a school policy exists. But a teacher or administrator can't randomly search the phone. Like backpacks and coat pockets, the school must have a reason to suspect a school infraction or potential criminal conduct in order to search a phone for text messages, photos, or other information.

For example, if a student tells a teacher that Mikey has nude photos on his phone, the teacher has a reason to search the phone for photos—but not text messages. If the teacher sees Mikey texting from his phone during a test, the teacher can search the text messages for evidence of cheating, but can't run through the list of contacts to see if he is calling a known drug dealer.

If the teacher grabs the phone and sees a questionable photo, the teacher can also take what is clearly visible to the administration for possible disciplinary action.

If the teacher takes the phone and starts pressing buttons for lack of anything better to do and finds something questionable, there is little she can do. The teacher has no right to look through the "files" on a student's cell phone based solely on the fact that the student violated a school policy on use of the phone.

To prevent this, and ensure phones are properly searched, schools' need a clear policy on phone and searches of phones.

Some schools have adopted policies against camera phones. Most have adopted policies against using phones in class and many have policies against using the phones in the school at all—the "as long as I don't see it or hear it" rule.

Some of these policies include cell phone use on school buses and others forbid students from having phones in locker rooms and restrooms.

Whatever the policy, consistent enforcement is also key.

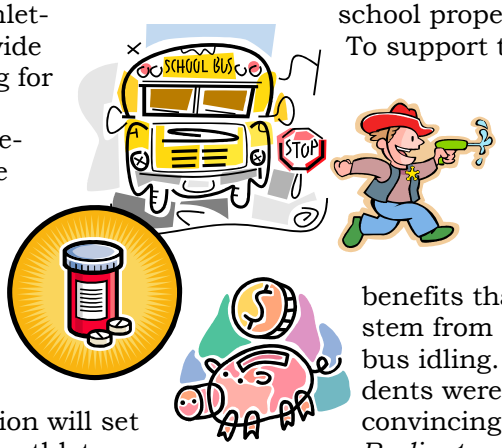
UPPAC CASES

- *The Utah State Board of Education permanently revoked by default Ben Clare Newby's educator license. Mr. Newby's revocation results from his guilty plea to two second degree felony counts of forcible sexual abuse involving students.*
- *The Board accepted a Stipulated Agreement suspending Jennifer N. Weeks' license for three years. The suspension results from Ms. Weeks' guilty plea to third degree felony DUI.*

Eye On Legislation

Steroids and Students: Texas has passed a law requiring the state's high school athletics association to provide random steroid testing for all student athletes.

An earlier proposal required schools to raise ticket prices to cover the costs of the program. The final bill allocated $3 million per year to the association to fund the testing.



The athletic association will set rules and penalties for athletes who test positive or refuse to be tested. *Houston Chronicle.*

Diesel Fumes: A 7th grade social studies class successfully lobbied the Vermont legislature to ban school bus idling. Governor Jim Douglas signed the bill which prohibits bus drivers from running bus engines while parked on school property.

To support their proposal, the students cited fuel savings and environmental and health benefits that would stem from a ban on bus idling. The students were clearly convincing lobbyists. *Burlington Free Press.*

Guns in School: South Carolina may soon join Utah and Idaho as the only states in the nation that allow individuals to carry firearms on school grounds.

About 20 lawmakers in South Carolina are co-sponsoring the legislation which would allow people to have concealed weapons on campus. The bill as written does not say who may carry a weapon, but the bill sponsor has indicated that he would be willing to limit guns to school personnel.

On the other end of the spectrum, 38 states specifically ban weapons at schools. *Charlotte Observer.*

Minimum Wage: President Bush has signed legislation increasing the federal minimum wage. As of July 24, 2007, the federal minimum wage will be $5.85 per hour. On July 24, 2008, the rate increases to $6.55 an hour and on July 24, 2009, the rate reaches its high of $7.25 per hour.

The current state rate in Utah is $5.15 an hour but state law authorizes the Division of Labor to change the rate to meet federal minimums by rule.

UPPAC Case of the Month

On occasion, the Utah Professional Practices Advisory Commission will receive a complaint involving old allegations of misconduct.

Often, these complaints involve what would be criminal conduct, but the statute of limitations has passed for filing criminal charges.

In those instances, lawyers unfamiliar with UPPAC may attempt to use criminal law standards to prevent a UPPAC case from being heard. A lawyer may claim, for instance, that the criminal statute of limitations applies to the UPPAC action.

But there is no statute of limitations for a UPPAC matter. An educator who engages in criminal sexual misconduct with a minor remains unfit to serve as an educator, even if the educator got away with the crime because the victim failed to report it in time.

Utah is not unique in this position. Cases from across the nation support the ability of educator licensing boards or agencies to take action based on allegations of wrongdoing from 10, 20, or more years ago.

For example, an appellate court in Texas upheld the revocation of a teacher's license based on evidence that the educator had repeatedly sexually molested his minor stepdaughter more than 20 years earlier.

As the court noted, "the fact that the sexual abuse occurred some time ago did not diminish the relevance of the behavior to an evaluation of the teacher's unfitness." Marsh v. State Bd. For Educator Certification (2006).

This is just one of several cases along these lines. Courts recognize the incongruence of allowing a person who has shown a complete and depraved lack of concern over the well-being of a child and that person's ability to serve as a role model and educator for children.

Courts are even more inclined to support licensing action where the educator has shown no remorse or attempt to address the problem. In the Marsh case, the court was particularly concerned that Marsh never apologized for his actions or attended any counseling beyond what was required by the court back in 1980.

UPPAC has had its share of old allegations. The Commission follows case law such as Marsh and has recommended suspension or revocation of educator licenses for activities that occurred more than a decade ago.

The Board is particularly inclined to suspend or revoke licenses where the allegations, though old, involve potentially criminal activity against children.

Recent Education Cases

Wilder v. Board of Trustees of Hazelhurst City School Dist., (Miss. App. 2007). Wilder challenged his dismissal as superintendent, claiming the school board acted in an arbitrary and capricious manner.

Wilder claimed that the Board terminated him hours after he signed his contract, with a note that he was signing "under protest." The only change to the contract from the prior year was an 8% increase in pay.

Hours later, the Board voted to dismiss Wilder. Despite the time frame, the Court found that the Board had sufficient reasons to terminate Wilder and had not acted in haste.

The evidence showed that Wilder was excessively absent from his office, provided no contact numbers for staff to reach him (in his defense he stated that he inherited his cell phone from the prior superintendent and didn't know the phone number), pulling students out of class to give them pep talks of up to one hour, threatening coaches for calling plays Wilder found questionable, withholding test scores from the Board and other acts. The court noted that any one of these allegations alone would have been grounds for dismissal.

Macy v. Hopkins County School Board, (6th Cir. 2007). Macy challenged her termination on the grounds the Board had discriminated against her based on her disability.

Macy was physical education teacher. In 1987, she sustained a severe head injury in a non-school related accident but returned to teaching. A 1995 automobile accident inflamed her injuries and the school provided accommodations in compliance with the Americans with Disabilities Act.

In 2000, Macy told nine middle school students that she would kill them if she heard them making fun of girls. She repeated the threat, stating that she "meant it." She was terminated from her employment based on this and other inappropriate comments to students.

Macy was subsequently charged with nine counts of making a terroristic threat—class A misdemeanors. She was found guilty of all nine charges and appealed.

Given this set of facts, the 6th Circuit found that the Board's actions were not discriminatory.

Macy appealed to the U.S. Supreme Court, which declined to hear her case.

Gay-Straight Alliance of Okeechobee H.S. v. School Board (S.D. Fla. 2007). The school board denied recognition to the GSA on the grounds that the club was sex-based and must be denied to maintain order and discipline and protect the well-being of students and faculty.

The Court disagreed, issuing an injunction requiring the school to grant the club official status and provide it with all of the privileges granted to other clubs.

The court found that the stated purpose of the club—to provide a safe, supportive environment for students and promote tolerance and acceptance of one another, regardless of sexual orientation— in no way promoted sexual activity or conflicted with the school's abstinence-based curriculum.

The school's only evidence that the club was sex-based "appears to be an assumption or conclusion derived from the name of the club." This was insufficient evidence for the court.

Your Questions

Q: Must a local school board member who is related to a newly appointed school administrator resign from the board?

A: Not necessarily, though the board member should not be involved in any decisions related to the relative's employment.

Utah's nepotism law prohibits a relative from appointing, employing, supervising, or voting on the potential employment of a relative. There are several caveats to this law, however.

What do you do when. . . ?

First, a relative can do all of the above if the appointee is "the only person available, qualified, or eligible for the position. . . ."

That broad standard makes it possible for a board member to serve despite her family relationship with a school employee.

Incidentally, another exception in the statute makes it possible for a board member and superintendent who are related to continue serving in their respective roles, even though the board member directly supervises the superintendent.

The nepotism law recognizes that rural areas in particular may have a limited number of qualified individuals and those individuals may have close family relationships with their supervisors. The law defines "relative" as a mother, father, husband, wife, son, daughter, sibling, aunt, uncle, nephew, niece,

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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 Education 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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first cousin, or in-law.

While a board member and principal who are related can work together, both should be very cognizant of any appearance of impropriety and avoid situations where their judgment could be questioned because of their personal relationship.

Q: Can the school community council use school trust lands monies to fund non-academic student clubs?

A: No. Trust lands funds must be spent for the purposes identified in the school's Trust Land Program plan.

By law, the plan must identify the school's top academic priorities, what the school needs to achieve the goals set in the plan AND how the school will use trust land money to enhance academic achievement in accordance with the plan.

If a school provides funds to a school club, it needs to be able to show how that expenditure fits within the school's trust lands program plan for academic achievement. While school clubs may enhance student learning overall, if the school's critical academic need is to improve math scores, it will be difficult to show how funding for swimming directly relates to that critical need.

Q: If a teacher takes a personal item from a student and loses it, who is responsible for replacement?

A: The answer depends on why the teacher took the item.

If, for example, the student was using a cell phone in class, and against a clear school policy, and the teacher was obligated by the policy to take the cell phone, the school may be liable for the teacher's actions, assuming the phone was lost in the course of the teacher performing her duties.

If, on the other hand, the teacher took a phone that was lying on the ground, put it in her car and then lost it, the teacher may be responsible since her actions are outside the scope of her employment. Similarly, if the teacher took the phone in compliance with school policy but then placed it in a desk drawer despite a school rule that phones be taken to the office, the teacher may again be on the hook for the replacement costs of the phone.