UTAH SCHOOL LAW UPDATE

Utah State Office of Education

February 2008

Inside this issue:

Immigrant Education

The 2008 Utah Legislative session is replete with bills targeting illegal immigration. The 2008 presidential hopefuls are also targeting the issue. But for public education, the issue was decided by the U.S. Supreme Court many years ago.

Back in 1982, the Supreme Court ruled in Plyler v. Doe that the school-aged children of illegal immigrants must be educated in their public school of residence.

The case arose in response to a Texas statute passed in 1975. The law denied funding to school districts for undocumented students. As a corollary, the law also allowed districts to deny enrollment to the children of illegal aliens.

The U.S. Supreme Court determined that the law violated the Equal Protection Clause. The court noted that the 14th Amendment applies to "persons," whether "citizen or stranger." The law created a class of persons who were denied the benefit of education.

In order to deny education to the children of undocumented persons, the state would need to show that the legislation was narrowly tailored to achieve a compelling state interest. The state's purported interest was to protect its limited resources. The Supreme Court found this insufficient justification for discrimination.

The court went further in its commentary, explaining that the children do not voluntarily choose to enter the country illegally, thus the law was based on a trait over which the students had no control. In the words of the court, "legislation directing the onus of a parent's misconduct against his children does not comport with fundamental concepts of justice . . . ."

The court also considered the "significant social costs" of denying the children the means of "attaining the values and skills necessary for citizens," and questioned the value of the statute in achieving the stated goal of discouraging illegal immigration; "charging tuition to undocumented children constitutes an ineffectual attempt to stem the tide of illegal immigration, at least when compared with the alternative of prohibiting employment of illegal aliens."

Other cases followed, all of which reaffirmed the power of a district to use bona fide residency requirements (must live with a parent or legal guardian and have a present intent to remain) to determine who is eligible for education services and denying districts the power to discriminate based on citizenship status.

In 1996, the state of New York sought reimbursement from the federal government for the costs of educating and providing other services to illegal immigrants (a bill making the rounds in the legislature this year seeks to do the same).

When the federal government denied the request, New York sued. In Padavan v. U.S., the state noted that it had over 530,000 illegal residents within its borders. It estimated the costs of educating and providing other services to those immigrants for one year (1993) at $5.6 billion.

New York made 11 very interesting arguments to support its case that the feds owed it money because it had failed to stem the tide of immigrants. The court knocked down each of those arguments and essentially informed New York if it doesn't like the current state of immigration policy, elect new members of Congress.

UPPAC CASES

- *The Utah State Board of Education revoked the license of Alan R. Willey following his conviction for seven second degree felony counts of aggravated sexual abuse of a child .*
- *The State Board suspended Brandon Fessler's license for one year. The suspension results from his counseling a student in violation of the state FERPA law, engaging in inappropriate and unprofessional text and email messages with the student, traveling alone in his car with a student and kissing a student.*

Eye On Legislation

There's a touch of schizophrenia at the Legislature this year, as some legislators seem to be at cross purposes (this is, of course, bound to happen when you put 104 people together who represent different constituencies).

For example, Rep. Frank is sponsoring a bill to consider whether government should provide services in competition with the private sector, such as county recreation centers (H.B. 76 Government Competition and Privatization Act). At the same time, Rep. Greg Hughes would mandate that schools open their buildings as civic centers for private events, in competition with other social halls that may be privately owned and operated (H.B. 332 Use of Public Schools by Community Organizations).

In a more costly move, Rep. Ron Bigelow's H.B. 120 Education Materials Center would require the Utah State Office of Education to create textbooks, a business that is amply represented by private businesses, and which may require the addition of a new division at the State Office.

Meanwhile, legislators seem divided over the question of which subsets of the population should receive special privileges. Thus, some are absolutely opposed to legislation that would prohibit employment discrimination against gay, lesbian, and trans-gendered individuals (H.B. 89 Antidiscrimination Act Amendments).

Others are equally adamant that home schooled students should be able to play sports without providing evidence of academic eligibility similar to the evidence that public and private school students must have (S.B. 37 Home School and Extra Curricular Activities Amendments). Still others would exempt students who attend kindergarten in another state from Utah's long-standing Sept. 2 kindergarten deadline.

On another front, some legislators want to improve the financial literacy of students (S.B. 61 Financial Literacy Education). Their colleagues, on the other hand. seek to provide a high school diploma to students who have never taken any of the current legislatively mandated financial literacy courses (S.B. 142 High School Graduation Requirements).

How each of these potential conflicts plays out will be clearer when the session ends. In the meantime, legislators, lobbyists, and interested education groups will engage an incredible amount of time and energy to ensure the best policies are put into law and potentially bad laws are left far behind.

UPPAC Case of the Month

Legislators are debating a bill that mandates permanent revocation of an educator's license if UPPAC finds that the educator committed a sexual offense against a student or engaged in sexual activity with a student.

Currently, Utah law allows the Board to permanently revoke the license of any educator who has committed a sexual offense against a minor. The State Board has exercised this power once, following a hearing.

The sparse use of this power reflects the realities the Board and UPPAC address in each licensing revocation matter.

A permanent revocation is not a simple matter. It bars the person from teaching in any public school not only in Utah but across the U.S. and in parts of Canada—forever!

Further, most situations that warrant a permanent revocation involve criminal activities. Typically, an educator facing a long term prison sentence will be less concerned about his educator license and will not respond to the UPPAC investigation.

A person who fails to respond within the appropriate time periods can and will be revoked by default. However, UPPAC has not recommended a permanent revocation based on default because doing so may violate the educator's due process rights. The educator has not taken advantage of the opportunity to present her side of the story. With a permanent revocation, the educator will never get that chance.

As a practical matter, an educator who has engaged in sexual and criminal conduct with a student is extremely unlikely to ever get his educator license back. But with a lesser revocation, there is at least a slim chance he might have an opportunity to explain his side of the story and the measures he has taken to prevent the misconduct from ever occurring again.

The current bill would take away that opportunity for educators who not only commit sexual crimes, but for those who engage in lesser sexual conduct that is reprehensible, but not in the same category as those who deserve a permanent revocation.

In other words, an educator who systematically molests first graders in his classroom deserves prison and a permanent revocation. An educator who sends a sexually explicit email to a high school junior may have earned a revocation, but perhaps not for the rest of his life.

As with minimum mandatory sentences in the criminal context, permanent revocation will not fit every fact situation and may impose a greater punishment on the educator than the conduct merits.

Recent Education Cases

Mongelli v. Red Clay Consolidated School Dist. (Del. D. Ct. 2007). According to the federal district court in Delaware, a teacher might be able to bring a sexual harassment claim against a student, but the same "severe, pervasive and objectively offensive" standard will apply.

The teacher sued the district for sexual harassment, among other things. She claimed that the district failed to take action to prevent harassment by a student.

The teacher wrote six complaints to her principal about lewd comments and gestures she was repeatedly subjected to by a 14-year old special education student. The six complaints were all filed over a 12 day period.

After the 6th complaint, the student was permanently removed from the classroom. A special education team determined that the behavior was a manifestation of the student's disabilities and determined that services would be provided to him at home for the remainder of the school year.

The teacher also filed criminal charges against the student and he pled guilty to a charge of sexual harassment and offensive touching.

The court found that the teacher could pursue a claim against the district for sexual harassment by a student. However, the court also determined that the harassment in this case was not "severe or pervasive" because it occurred over a short time period and the student was removed from the teacher's classroom. The court also determined that, in this case, the conduct failed to meet the objectively offensive standard given that the student is a special needs student and the conduct was a manifestation of his disability.

Requa v. Kent School Dist. (W.D. Wash. 2007). A sophomoric video by a high school student was not protected speech and his suspension for creating the video did not violate the First Amendment.

The student and friends had secretly taped their teacher during class. The video included footage of another student making rabbit ears and pelvic thrusts behind her. The video also showed footage of the teacher's buttocks with the caption "Caution: Booty Ahead."

The teen and his cohorts posted the video to YouTube. The school became aware of the video when a local TV station showed it as part of a segment on high school students posting videos about teachers.

All students involved in creating the video were suspended for 20 days. Requa sued claiming his suspension punished protected speech. Requa claimed the video was a legitimate criticism of the teacher.

The court disagreed, noting that the bulk of the video "cannot be denominated as anything other than lewd and offensive and devoid of political or critical content."

Wisniewski v. Board of Educ. (N.Y. Ct. App. 2007). An eighth grade student's long-term suspension did not violate the First Amendment. The student created an instant messaging icon showing a pistol firing a bullet at a person's head with a caption calling for the recipient to kill the student's English teacher. The student sent the icon to 15 people, including some classmates.

The student was suspended for one semester and the court upheld the suspension noting that the student could have reasonably foreseen that the icon would come to the attention of the school and would materially and substantially disrupt school activities even if it was transmitted

Your Questions

What do you do when. . . ?

Q: A parent has requested that we allow her **child to be videotaped** at school for use in a non-school related lawsuit. Must we agree to this?

A: Not unless you want to or are subpoenaed to do so.

Even if the school is willing to allow the videotaping or is subpoenaed, **the parents of any other children** who may appear in the video must provide **written consent** to have their child's image included in the video. Without the consent, the school will either have to figure out some means to hide the identities of any other students on the video, or require ample evidence from the parent that the person taping the students can and will do so.

Q: We have received complaints regarding **inappropriate conduct by a coach** and, in a separate matter, **perceived bias by judges** in a drill team competition. Should we send these to UPPAC for action?

A: The coach, possibly. The judges, no.

UPPAC has the ability to make recommendations regarding **licensed educators only**. Often, high school coaches are hired solely to coach and do not have an educator license. If the coach is not licensed, misconduct allega-

Utah State Office of Education

250 East 500 South
P.O. Box 144200
Salt Lake City, Utah 84114-4200

Phone: 801-538-7830
Fax: 801-538-7768
Email:
jean.hill@schools.utah.gov

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)

tions should be handled by the school and district.

UPPAC has no authority over perceived bias by judges at athletic or activities competitions. These complaints should be handled by the Utah High School Activities Association or, if it is not a UHSAA activity, the sponsoring entity.

Q: If the parents of a student have never been married, what rights does the **biological father** have?

A: Parents have the right to view their child's education records under the federal Family Education Rights and Privacy Act. Under FERPA, the key question in determining who can access the records is not marriage, but parentage. If the father is the birth father, he has **the same rights as the mother** to view the student's records, regardless of his marital status.

An adoptive father has the same rights.

Things get trickier for parents by marriage alone. If a person marries the physical custodian of a student (the child lives with them most of the time), the step-parent has the same rights as the biological parent.

The same does not hold, however, for a step-parent with whom the child does NOT live. This step-parent would need the biological parent's (i.e., the person he or she is married to) permission to view the records.

Q: We are trying to prepare for the coming school year but noticed many bills that will significantly change our policies. Exactly **how many education bills** are legislators looking at this year?

A: The Utah State Office of Education is currently tracking the fates of **118 bills**. There were also 24 additional bill requests that were not filed by the legislative deadline for numbering bills.

Of the current crop, several do not have text yet and many of the others have or will be substituted multiple times as major amendments are made to the original.

Those without text can be the most troubling, since the bills are often given vague titles, such as "Education Revisions," or strange titles, such as "High School Activities Association Accountability."