UTAH SCHOOL LAW UPDATE

Utah State Office of Education

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U. S. Supreme Court Rules

The United States Supreme Court will be tackling a number of public school cases this term, including issues surrounding the provision of services to English Language Learners (our guess—you have to provide adequate services regardless of available resources) and whether it is reasonable to strip search a student for prescription Ibuprofen (our guess— "no").

In its first school decision of the new year, Fitzgerald v. Barnstable School Committee, the court has ruled that students are not limited to Title IX actions for peer-to-peer harassment but can also seek to redress unconstitutional gender discrimination under § 1983 of the Civil Rights Act.

The case involved a kindergarten student who was repeatedly bullied for six months by a third grade boy when she rode the bus to school.

The district and police investigated but could not find sufficient corroborating evidence. The principal suggested transferring the kindergartener to another bus or leaving rows of empty seats between the kindergarten students and older students.

The parents felt these measures punished their daughter and asked instead for the boy to be transferred to another bus or for an adult monitor to ride the bus. Instead, nothing was done, so the parents began driving the daughter to school. The boy then began bullying the girl at the school.

The parents reported each incident to the school. They then filed suit seeking $3.7 million for the school's alleged violations of Title IX and § 1983.

The First Circuit Court of Appeals determined that the school had actual knowledge of the harassment and the harassment was severe, pervasive, and objectively offensive (the standard established in the earlier case Supreme Court case of Davis v. Monroe). The court denied the parents' Title IX claim, however, because it found the school's response was objectively reasonable.

The court then ruled that Title IX is the "sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions."

The U.S. Supreme Court disagreed. In a unanimous decision, the Court determined that Congress did not intend Title IX to be an exclusive remedy.

The court noted that Title IX does not contain an express private remedy. The Court has implied a private remedy in other cases, but an implied right does not preclude a plaintiff from suing under § 1983 as well.

Further, Title IX does not permit suit against an individual school official or educator. To say that Title IX is the only solution would preclude injured parties from suing individual bad actors.

The Court determined that legislative history and the disparate evidentiary and remedial provisions of Title IX and § 1983 argued against the First Circuit's determination that Title IX is the sole remedy for gender discrimination against students.

The case will now wend its way back to the trial stage. Whether the school was reasonable in its response to the allegations and handled the parents' complaints and its investigation in a non-discriminatory manner will be determined in this second round of court action.

What the case means for schools and districts in Utah and across the nation is that the courts will not leave parents without legal recourse when a school acts with such indifference to bullying.

UPPAC CASES

- *The Utah State Board of Education accepted a Stipulated Agreement suspending Carvel Lee Jonas' educator license for 18 months. Jonas used school equipment or information systems to access and view pornographic and other inappropriate images during contract time.*
- *The State Board of Education accepted a Stipulated Agreement suspending the license of Thomas Sterling Tholen for two years based on his conviction for failing to report the existence of Ricin on his property.*

Eye on Legislation

The 2009 Legislature is off and running, but without the usual spate of pet projects or omnibus bills that have plagued prior sessions.

Even more exciting for those who track education bills, there are far fewer this year than we have seen in the last decade. Currently, the Utah State Office of Education is only tracking 62 bills, compared to the 166 bills last session!

Not that there aren't some problematic ideas within the bills that exist. For example, Rep. Ken Sumsion, R-American Fork, seeks, in H.B. 315, to give school community councils the ability to remove a teacher or principal from the school and make teacher and principal hiring decisions.

Sumsion's bill, "Local School Governance Amendments," enables parents to change the makeup of the school community council from a council composed of eight parent members and one teacher by submitting a petition to the school with the signatures of parents or guardians of 50% of the students in the school.

This modified council would then have the power to select the principal and teachers employed at the school. It would also be able to "request" that the district transfer a teacher or principal. While the term used in the bill is "request," the bill goes on the provide that a district which receives such a "request" cannot allow the teacher or principal to continue working at the school beyond the current school year, turning the "request" into a de facto, unilateral power to involuntarily transfer a teacher or principal.

Nothing in the bill as written provides for due process for the educator or contractual rights granted to educators in district negotiated agreements. The bill also delegates a local elected school board's power to make hiring and transfer decisions to a school community council without the board's consent—a possible violation of the non-delegation of essential functions doctrine.

On the other hand, Rep. Sumsion also offers H.B. 296 to help clarify governance and service issues at the Schools for the Deaf and Blind.

And Rep. Lynn Hemingway, D-Salt Lake, offers the extremely helpful H.B. 189 which provides for the teaching of medically accurate information in the sexual education curriculum. The bill would stress abstinence, but permit teachers to provide accurate information about contraceptives.

The bill goes on to provide for lessons in healthy life styles and good decision-making skills regarding health issues.

UPPAC Case of the Month

In the last month, the Utah Professional Practices Advisory Commission has considered two cases in which educators lied to school authorities or law enforcement officers. What both of these educators have in common is a video security system that caught the lies on tape.

Following the Columbine school shootings, districts across the nation began installing a variety of security measures within schools. Utah is no exception and many of our elementary, middle, and secondary schools are now equipped with security cameras covering both interior and exterior portions of the school buildings.

Districts are also increasingly installing security cameras on school buses.

Which all leads to a diminished expectation of privacy for students, educators, staff, and anyone else in a school building or on school grounds. For UPPAC purposes, the cameras may also mean far stronger evidence of educator misconduct.

Though pictures don't always tell the full story, security camera videos can prove that an educator was not where she said she was or did do something she claimed not to have done.

For example, a video camera may show that an educator was in a hall with a student when the educator claimed she was nowhere near the area or the student.

Or it may show that an educator did not arrive at a location when he claimed he did.

With the increased use of security cameras, educators should be aware that their actions may be caught on tape and used against them in a termination or licensing hearing, not to mention a criminal trial. While a video is not infallible, a picture is worth a thousand words, particularly when the words of the accused are clearly contradicted by her actions, as shown on a video security system.

On a side note, we want to take this opportunity to further remind educators that they have a similar lessened expectation of privacy on their school computers. Educators must remember that neither their email nor their web browsing while on a school computer or using school Internet services is private. Districts log every Internet search and have every right to review emails sent or received by a school email address.

Recent Education Cases

Lehto v. Board of Ed. (Del. 2008). The Supreme Court of Delaware ruled there was a sufficient nexus between a teacher's actions and his duty as a role model to justify his termination.

Lehto was an elementary school teacher. He was terminated after he engaged in a sexual relationship with a 17-year old former student. The student attended school in another district but had a younger sibling in Lehto's school.

The 34-year old Lehto claimed his misconduct had no adverse effect on his teaching, as evidenced by his teaching evaluations. The Board of Education disagreed, stating that Lehto's conduct "certainly interferes with Mr. Lehto's important function serving as a role model to students in his school, and threatens the moral and social orientation of such students."

The Delaware Supreme Court agreed, noting that "despite the lack of a direct connection with the classroom, . . .[other] jurisdictions have found a nexus [between a teacher's sexual relationship outside of the school with a non-student] based on the effect of the conduct on the teacher's position as a role model and the parents' ability to trust the safety of their children to the school."

Speaking of safety: Dollar v. Grammens (GA Ct. App. 2008). The Court of Appeals found a teacher was not entitled to governmental immunity and could be held **personally liable for her failure to follow school policy**, resulting in harm to a student.

The teacher conducted a science experiment in her 8th grade class. As part of the experiment, the student pulled a string attached to a metal pin to launch a soda bottle. The pin struck the student in the eye. School policy required that student's were eye protection while participating in or observing any instructional activity involving explosive materials. The teacher did not provide eye protection, despite a clear warning that the bottle could explode in the instructions for the experiment.

The father of the student initially sued the teacher, school principal and district superintendent. The court agreed that suit against the principal and superintendent would not survive, since neither was responsible for the teacher's decision not to provide eye protection to any of the students involved in the experiment.

B.W.A. v. Farmington R-7 School Dist. (8th Cir. 2008). The 8th Circuit ruled that a high school could ban students from wearing clothing depicting the Confederate flag based on demonstrated racial conflicts in the school and community.

The students claimed that the ban on flag-related clothing was an unconstitutional violation of their free speech rights. They noted that minorities accounted for only 15% of the high school population so the likelihood of a substantial disruption based on the clothing was minimal.

The court found, however, that though the population might be small, there had already been substantial racial conflicts in the school and community. These included incidents of white students using racial slurs, a white student urinating on a black student, a fight between a black student and several white students, and students drawing swastikas and other offensive symbols on their notebooks and chalkboards.

Thus, the school demonstrated a substantial likelihood of disruption to the school justifying a ban on the clothing.

Your Questions

What do you do when. . . ?

Q: Must we provide the transcript of a closed termination hearing to UPPAC if we receive a subpoena from UPPAC?

A. Yes, please. The Government Records Access and Management Act permits a state agency to access otherwise protected records if that agency enforces or investigates licenses or other listed civil, criminal, or administrative matters. As the investigative body for the State Board, UPPAC may subpoena the records and the district should comply with the subpoena, unless it can articulate a compelling reason not to. A subpoena is not a regular GRAMA request and could be enforced by a court order, if necessary. Thus, the reason for denying a subpoena should by something that will hold up in a court of law.

Q: May a principal unilaterally impose an unwritten disciplinary policy on students without prior notice to parents or prior approvals required by the district?

A: No. A principal cannot impose disciplinary measures on a student without providing prior notice of the policy and meeting any additional requirements of the district.

Typically, school discipline policies are printed in the student handbook. The reason for doing

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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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so is to notify students beforehand of their rights and responsibilities. While this notice seems to be a matter of common sense, it is also in response to reams of case law requiring such notice. Should a principal, or district, want to change the policy after it has been published in the student handbook, a written notice of the changes must be sent to parents/students.

Districts may also require that the principal obtain prior approval from the superintendent or school board before implementing or changing a policy. A new policy or amendment cannot be imposed on students until these requirements have been met and the policy is officially approved.

Should a principal decide to implement a policy without providing proper notice and complying with district procedures, he could find himself defending his actions in court. While principals are immune from suit for actions taken within the scope of their employment, they are not immune for actions taken against district policy or commonly recognized legal obligations—such as notice provisions.

Q: We recently moved to Utah from California. My child was in kindergarten in California, but I was told she could not be enrolled in kindergarten here until the start of the 2009-2010 school year because she isn't five yet. Is this true? What can I do to get her in kindergarten now?

A: It is true. Utah law requires that a student be five before Sept. 2 of the year the child seeks to enroll in kindergarten.

The law does not provide for any exceptions. Thus, a parent with a very talented four-year old or moving in from another state with a different age requirement must abide by the same law as other residents of the state.

While this requirement frustrates some parents, it is designed to ensure a baseline of both academic and social readiness before a child enters school, and protect limited school resources from being further stretched by the addition of more students.