UTAH SCHOOL LAW UPDATE

Utah State Office of Education

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NURSING AND HEALTH SERVICES

Jenifer Lloyd, a legal intern at the Disability Law Center, offers this guide on providing health and nursing services under IDEA.

1. A student must qualify for special education services to receive health and nursing services at school. Students meeting the eligibility criteria are entitled to those health and nursing services necessary for them to access a free and appropriate public education (FAPE). Students who do not qualify for special education but need health or nursing services may need Section 504 accommodation plans.)

2. Schools are obligated to provide ONLY those health and nursing services necessary for eligible students to access FAPE. For example, a school does not have to administer medication to a student if that student can receive the medication outside of school without impacting his ability to access FAPE.

3. Schools are obligated to provide ALL health and nursing services necessary for eligible students to access FAPE. These can include care and suctioning of a tracheotomy tube, or administration of medication. There are some limits to these obligations:

- If the service can **only** be performed by a licensed **physician,** the school is **not** obligated to provide it. If the service can be provided by **any other individual** besides a physician, the school **is** obligated to provide it.
  - o There is **one** exception: Schools may be obligated to pay for physician's services to diagnose or evaluate a student's medically-related disability.
  - o Schools do **not** have to purchase or replace surgically implanted medical devices (e.g., cochlear implants).
  - o Schools do **not** have to purchase medications or personal medical equipment (e.g., suctioning devices).

  Schools **do** have to purchase assistive technology (AT) devices necessary for the student to access FAPE (e.g., communication devices, adaptive equipment, etc.).

4. Schools can usually discontinue giving medication to students after notifying the students' parents; HOWEVER**, this does not apply to students who qualify for special education AND need access to medication to access FAPE.** (This also does not apply to students whose Section 504 plans include access to medication.)

- If a student needs access to a medication that can only be administered by a nurse to access FAPE, the school is **obligated** to provide the student with access to that medication.
- Schools have an **affirmative responsibility** to administer medications to students who need medications to access FAPE.
- Schools are **not** obligated to purchase medications. Parents must provide medications in properly labeled containers with appropriate instructions.
- Schools **cannot** require a student to take medication as a condition of attending school, or in order to receive an evaluation or special education services. Some students can **self-carry** medications for asthma, diabetes, and anaphylactic allergies – ask USOE if you have questions about these issues.

5. Remember: While IDEA does not prohibit schools from clustering students with health care needs, IDEA requires that every student who qualifies for special education have an IEP that offers them FAPE in their least restrictive environment which may be their neighborhood school.

UPPAC CASES

- *The Utah State Board of Education accepted a Stipulated Agreement revoking Ronald S. Sherman's educator license. The revocation results from Sherman's sexual misconduct with students.*
- *The Board permanently revoked Marco R. Herrera's license following his conviction on three counts of forcible sexual abuse.*
- *The Board permanently revoked Chris L. Morris' license following her conviction for three counts of unlawful sexual activity.*
- *The Board revoked Susan Merz' license by default. Ms. Merz failed to response to allegations of prescription drug abuse.*

Eye On Legislation

A group of education leaders, parents, and legislators met recently to begin discussing the issue of class-size reduction in Utah. One legislator at the meeting noted that several powerful legislators are opposed to giving any money to class-size reduction (CSR) because it is fiscally impossible to provide enough funds to do so.

As noted in a legislative audit on the use of CSR designated funds, the legislature has not appropriated enough money to CSR to accomplish anything more than maintaining the status quo.

Instead, the legislator at the meeting explained, certain legislators are bent on finding new methods for delivering education services rather than reducing class sizes through a line-item appropriation.

While the idea of finding innovative solutions to class-size has merit, the methods that have been tried so far all seem designed to push students into other schools, rather than working within the public schools.

Ideas such as vouchers or online learning do not necessarily solve class-sixe issues within the public school building. Encouraging a few students to attend school elsewhere does not reduce by an significant amount the number of students entering any one particular school or classroom.

And online learning, while a great benefit for many students, is not a panacea. Nor do all online programs provide adequate access for students with special needs.

There may be other methods for reducing class-size in addition to strengthening the teacher ranks. There may also be innovative measures for funding CSR, such as lowering the tax deductions available for multiple children, repealing state laws against impact fees on new developments, or limiting CSR funds to those schools that have a demonstrated need.

Solving Utah's class size issues will require a number of different measures, which is a prime reason why CSR funding should not be taken off the table.

Public education stakeholders should be on the watch for effective ideas and for truly bad ideas couched as something else—such as proposals to remove schools from the funding if they can't show significant decreases in class size have been made despite the lack of sufficient CSR funds.

UPPAC Case of the Month

At times, the State Board of Education will revoke an educator's license "by default." This means that, for a variety of reasons, an educator failed to respond to the allegations against him or her or to an offer of a Stipulated Agreement.

When there appears to be ample evidence of an educator's misconduct, the Commission issues a written Complaint to the educator. The educator then has 30 days to respond to the Complaint.

The educator may also enter into discussions for a Stipulated Agreement. This is an agreement between the educator and the Board or Commission regarding the discipline that is imposed on the educator. It resembles a plea agreement in the criminal system.

The educator has 30 days to respond to the proffered agreement as well. That response can be "no," but silence is not considered a response.

If the educator fails to respond to either a Complaint or Stipulated Agreement, a Notice of Default is issued. This document notifies, as the name suggests, that the educator has failed to respond within the required time frame and has 20 days to issue a response or lose his or her license.

If no response is received in the 20 day time frame, the case is forwarded to the State Board for a revocation by default.

In some instances, the revocation is more than the educator would have received had she responded to the Complaint or Stipulated Agreement.

So why would an educator put herself at risk of revocation? The reasons vary.

Where the educator is facing criminal charges, she may want to avoid making any admission, either in a hearing or Stipulated Agreement. Though the U.S. Supreme Court ruled several years ago that a statement made in a civil or administrative process can't be used in a criminal process, some attorneys are still reluctant to take that chance.

In other cases, an educator may simply be in denial about the seriousness of either her conduct or the results of a State Board licensing action. (Some attorneys suffer from the same denial problem when facing State Bar sanctions).

In these cases, we will often not hear from the educator for years. Then, when she attempts to get a teaching job in another state and finds that the Utah licensing action bars her from doing so, the educator will call and ask what happened.

It is at this point that the educator realizes that letters from the Utah Professional Practices Commission require immediate attention.

Recent Education Cases

Page v. Lexingotn County School Dist., (4th Cir. 2008): The Fourth Circuit Court of Appeals ruled that a school district did not need to open its website to opposing viewpoints on tuition tax credits.

The district passed a resolution expressing opposition to tuition tax credit legislation for private and home schooling. The district then used its website, email, and other resources to communicate its opposition. The district also included links on its website to other websites with similar messages.

Page, an individual with an opposing point of view, requested equal access to the district's website, email, and other resources to spread his message in support of the legislation. The district denied Page access to its information systems and he sued claiming violation of his First Amendment rights.

Page claimed that the district's dissemination of information from non-district employees through links on its website and via its email, fax machines, and newsletters, created a public forum requiring equal access.

The court held that Page was not entitled to access the school district's systems. First, as a government agency, the district can engage in "government speech" without opening the door to others. Governmental entities may develop messages directly related to their missions, include information from private sources as part of the message, and control and disseminate that message.

Page argued that, if the governmental agency does not maintain sufficient control over the message or dissemination of the message, it creates a limited public forum. Since the district included links to other sites opposed to the tax credits on its website, it had opened the door to opposing points of view.

The court disagreed. It noted that, had the district allowed chat rooms or bulletin boards for discussion of the issue, or otherwise opened its site to outside control, then it would have required equal access.

However, providing information about other websites with messages consistent with the district message, with a disclaimer that the other sites did not represent the district did not create a public forum.

Cain v. Horne (Ariz. App. 2008): The Arizona Court of Appeals found that two Arizona voucher programs violated the state's constitution.

The programs provided vouchers for disabled students and children in foster care to attend the private school of their choice. Disabled students may also receive a scholarship to transfer to another public school. Cain filed suit, arguing that the programs violated the Religion Clause and the Aid Clause of the Arizona Consitution.

The court agreed, in part. It found that the programs did NOT violate the religion clause because students could make a "true private choice" between public or private schools. However, the court determined that the programs did violate the Aid Clause of the Arizona Constitution.

The Aid Clause prohibits any "appropriation of public money made in aid of . . . private or sectarian schools." The court found that, even though tuition payments are made to the students who then pay the tuition, "a payment made by the State of the tuition and fees of the pupils of a private school begun on the strength of a contract by the State to do so would be an appropriation to that school."

Your Questions

Q: May a home school student who does not live in our district try out for the high school golf team?

A: The student can try out if he enrolls at least part time in the school under open enrollment.

A home school student may try out for any team at his resident school, provided he is willing to abide by all of the rules and requirements for regularly-enrolled students. The student has no right to try out for a team at a school he does not attend and is not entitled to attend as a resident within the school's boundaries.

If there is space available at the school, and the student enrolls for even one class under open enrollment (even a P.E. class specifically designated for golfers), then he may try out for the team at the non-resident school.

What do you do when. . . ?

Q: Do I have any rights of academic freedom as a teacher to offer an elective course that will include controversial subjects?

A: Academic freedom is a higher education concept that does not apply in the public education sector. Where the State establishes the curriculum and many of the requirements for teaching that curriculum, including the standards students must meet

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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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and the textbooks and other materials that may be used, the teacher has no expectation of academic freedom.

Curriculum decisions that are not made by the State are left to the district, not individual teachers.

Thus, a teacher can propose an elective course, but the district has the authority to grant or deny the request.

If the district does grant the request, and the course will address controversial topics that fall within the categories of the Utah Family Educational Rights and Privacy Act, the teacher must have written parental consent for each student to engage in the class.

Utah's FERPA law prohibits discussions about personal beliefs or practices related to sex, religion, psychological issues, personal relationships with family, political views, criminal or demeaning behavior, and personal economic status.

Further, textbooks that are not approved by the state or district in accordance with state law requirements may not be purchased with state funds.

Q: As a member of the school community council, what right do I have to access individual student disciplinary records?

A: None. Federal law protects student records from disclosure to "non-school officials." The Family Policy Compliance Office, which enforces the federal Family Education Rights and Privacy Act has determined that volunteers are NOT school officials.

Further, only those school official with a "legitimate educational interest" in the records may access the records.

If, however, a parent consents to having her student's records reviewed by the council, then it could review the records.

But nothing in the community council's list of statutory duties would provide any reason for reviewing **individual** student data. Community councils may be involved in planning measures for the school, but the school can provide de-identified student data for those purposes.

As a side note, office and other school volunteers are also prohibited from accessing individual student information unless the information is properly classified as "directory information."