

UTAH SCHOOL LAW UPDATE

Utah State Office of Education

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UPPAC CASES

• The Utah State Board of Education reinstated Eric Jensen Zobell's educator license.
Zobell's license was revoked in 2000 as a result of his two misdemeanor drug offenses, storing pornographic images on his school computer, and throwing firecrackers out of his school windows.

But It's My Space

The world of Myspace litigation is heating up across the nation and employees in many fields are feeling the burn.

News stories abound regarding employers checking the Myspace, Facebook, or other social networking sites for posts by potential employees. For some candidates, postings they believed to be private can cost them an interview.

For current employees, including teachers, a Myspace or Facebook page may cost them their current employment.

As employers increasingly site social networking posts as grounds for termination, some of the fired employees have questioned the legality of their terminations. Most of the cases question whether an employer can take adverse employment action based on postings created by an employee outside of there employment.

In the education arena, at least, courts seem to be taking the employers side. Consider, for example, the case of <u>Spanierman v. Hughes</u>, decided by a U.S. District court in Connecti-

Spanierman was a probationary teacher, in Utah parlance. The school dis-

cut in Sept. 2008.

trict decided not to renew his contract after looking into complaints about his Myspace site.

Spanierman was a high school English teacher. He used his Myspace site to communicate with students about school and non-school related topics. A school counselor reviewed the site and was concerned that Spanierman had many "peer-like" conversations with students—including discussions of students' personal issues. The counselor talked to

Spanierman about his site and he deactivated it, only to activate another profile on Myspace.

A teacher found the new profile and reported it to the principal. Spanierman was placed on leave pending an investigation of his activities. At the conclusion of the investigation, his principal issued a letter informing Spanierman that he had exercised poor judgment as a teacher. At the same time, the district informed Spanierman that his contract would not be renewed for the following vear.

Spoanierman sued claiming his rights of due process, equal protection, free speech, and free association were violated.

The court rejected all of Spanierman's claims. His due process and equal protection claims failed because he was not a tenured teacher and could be non-renewed for any reason. His speech claims failed because, although he faced adverse employment action for his Myspace discussions, he did not use the discussions to address matters of public concern and, his speech was likely to disrupt the educational process, and therefore was not protected.

Finally the court found no right to "associate" with Myspace since Myspace does not speak out on matters of public concern.

For employees in most sectors, a Myspace or Facebook post that causes disruption in the workplace will be grounds for termination. Educators must also adhere to laws and rules unique to the profession. This includes prohibitions on discussing students in any personally identifiable manner on social networking site, by text message, or in any other format, and crossing professional boundaries in conversations with students whether in class or outside of school.

Tribute to Martha Ball, 3R's Project Founder

We wanted to take an opportunity to praise a positive, inspiring Utah educator.

Martha Ball has, in her twentyplus years of teaching, become the personification of Rights, Responsibility and Respect—the 3 R's Program that was her teaching passion.

Martha has BS degrees in History and Educational Studies from the University of Utah. She taught History for 26 years in the secondary public schools of Utah and California, and in 2000 was chosen Outstanding Teacher of United States History in the U.S. by the Daughters of the American Revolution. She was an exchange student to Poland and a Fulbright Scholar to India.

In 1997, the Utah State Office of Education joined a new initiative to teach civic virtue and mutual understanding in the public schools of Utah. Known as the Utah Three R's Project, the initiative provides a civic framework within which the citizens of Utah are able to debate differences and reach common ground to protect the religious freedoms of students in public education.

Martha maintained a similar interest in civil discussions about these important issues and approached 3Rs to become involved. She soon became a national role model and poster child for the program, turning Utah's 3Rs Project into one of two nationally recognized programs.

Mrs. Ball has done it all. She is a phenomenal middle-school teacher. She is a personal example of the program she directs; individuals of all political, religious, and cultural persuasions are welcome in her home. Her classrooms have been examples of inclusion and discussion. As a Program Director, Mrs. Ball's 3R's Board meetings have included law-

makers and educators and civic leaders of many political and philosophical perspectives. She encourages an honest exchange of ideas and discussion.

Mrs. Ball has also been an enthusiastic fundraiser for the 3R's Program. She has been so successful that there have been other successful civic education spinoffs—first cousins of the 3R's Program. Many encourage all citizens with diverse, perhaps divisive beliefs, to respect each other and communicate with civility in our government meetings and schools.

Mrs. Ball stands as an example to teachers, students and all parents—we have common concerns for civility in public discourse, the actions of both educators and public figures speak volumes about professionalism and civic propriety. We can be both passionate and professional in our behavior. Martha, we're PROUD of you!

UPPAC Case of the Month

Determining when to report an educator to the Utah Professional Practices Commission can lead to sleepless nights for school and district administrators. Some resolve the dilemma by reporting everything; others report nothing, but many manage to find an acceptable balance between these extremes.

For those seeking the balance, a few guidelines may be in order:

1. Does the action appear to violate one of the State Board's Educator Standards rule?

Licensed educators regardless of assignment should be familiar with the rule and should know where to find it (big hint: http://www.rules.utah.gov/publicat/code/r277/r277-515.htm). The rule provides notice of the standards educators are expected to uphold. It also suggests the potential disciplinary action for mis-

conduct.

An administrator considering a referral to UPPAC need not make a final determination whether the standards have been breached, but if the educator's actions do not appear to involve any of the standards in the rule, the administrator may decide not to report the behavior or incident.

- 2. Is the educator licensed? The State Board has jurisdiction over licensed educators, regardless of assignment. If the employee is not licensed, however, the State Board will not be able to take any disciplinary action against that person. This is often the case with substitute teachers. Any appropriate discipline would be taken by the employer--the school district or charter school.
- 3. Was the misconduct the result of a critical lack of judgment or was it

due to a legitimate misunderstanding? While "accidentally" bringing pornography to school may still result in licensing action, a testing protocol violation resulting from a lack of training in testing protocols may not.

4. WWUESD: What would the UP-PAC Executive Secretary do? When in doubt, administrators can always call ahead and ask the UPPAC Executive Secretary or investigator if either thinks the case merits further investigation by UPPAC. Such discussions do not obligate the administrator to report, but may help clarify the issues and severity of the misconduct.

UPPAC cases are usually very factspecific and a prior phone call is often a great time-saver for both the administrator and UPPAC.

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Recent Education Cases

Woods v. Newburgh Enlarged City School Dist. (Ct. App. N.Y. 2008). A probationary assistant principal claimed her termination for violating the federal Family Educational Rights and Privacy Act was a pretext for racial discrimination. The court upheld the termination noting that the act of directing school staff to copy large amounts of student records and then taking the records home with her was sufficient cause for termination.

The court also found insufficient evidence of racial discrimination. The educator asserted that, among other comments, the principal's comment that some unidentified educators in the building would not be willing to accept her "based on the color of your skin" was evidence that she was actually terminated for her race not the FERPA violation. The court found this and other nonspecific comments were not enough to prove that the termination was based on race and not the FERPA violation.

Bar-Navon v. Brevard County Sch. Dist. (11th Cir. 2008). A student asserted a free expression right to wear pierced jewelry in her tongue, nasal septum, lip, navel, and chest. School policy prohib-

ited students from wearing pierced jewelry anywhere but in the ears. The student admitted that the jewelry did not make a religious or political statement but was simply a means for expressing her individuality.

The court found that the student could express her individuality in other ways and the school policy did not violate her rights. The court also found that school grooming policies narrowly tailored to achieve valid school objectives are per se constitutionally valid.

Parker v. Hurley (U.S. S.Ct. 2008). The U.S. Supreme Court has refused to grant certiorari to Massachusetts parents who asserted a violation of their religious beliefs by a public school district.

The parents sued the district claiming a right to have prior notice of and a chance to opt out of any part of the elementary school curriculum that included materials depicting families with same-sex parents and otherwise designed to encourage respect for gay couples and parents. The parents found some books used in the diversity curriculum for kindergarten through second grades offensive to their sincerely held religious beliefs.

The First Circuit Court of Appeals explained that "the heart of the plaintiffs' free exercise claim is a claim of "indoctrination": that the state has put pressure on their children to endorse an affirmative view of gay marriage and has thus undercut the parents' efforts to inculcate their children with their own opposing religious views.

The First Circuit ruled that there is no right "to be free from any reference in public elementary schools to the existence of families in which the parents are of different gender combinations."

Futher, the court noted that "public schools are not obliged to shield individuals from ideas which are potentially religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas, or even participate in discussions about them."

The Supreme Court's denial of certiorari means the First Circuit ruling stands.

Your Questions

Q: It's that time of year again. Please remind me what is allowed in "Christmas" activities and "Christmas" music.

A: Christmas activities and music are allowed provided each is used as part of the curriculum and provided the lesson does not focus solely on the traditions of one religion during the holidays.

The teacher may not use her captive class as a sounding board for her views on a particular holiday tradition, whether it is What do you do when. . . ?

for or against.

Nor should the teacher assign students to reenact the Nativity or explain the significance of the Menorah, unless the study of holiday traditions is tied specifically to the curriculum for the class and includes an unbiased review of the traditions. In short, as long as there is a legitimate educational purpose

in the activities related to the holidays, educators can decorate, discuss and enjoy the season to their hearts content, without excluding any student on the basis of religious belief.

Similarly with music. If the teacher has a legitimate, educational purpose for choosing a particular song, its religious nature is irrelevant—unless the entire singing program is based in one religious tradition.

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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)

Q: An administrator and teacher in our rural middle school are romantically involved. Students and teachers know about the relationship. One participant is divorced, the other is still married. Shouldn't the superintendent do something?

A: Yes and no. If the teacher is supervised by the administrator, the superintendent should assign another educator to supervise the teacher. If the teacher and administrator are conducting their affair using school resources—sending personal emails to each other using the school email system or computers, for example—then the superintendent should consider disciplinary action. If the couple are engaged in any acts

of affection on school time, the superintendent may also want to explain to the couple that such actions may lead to employment action

However, if the couple are limiting their personal interaction, beyond the mundane personal exchanges between co-workers in any workplace, the superintendent should not do anything. Adults are allowed to engage in mutually acceptable personal relationships. So long as the relationship does not create a substantial disruption at the school and any appearance of or actual favoritism or harassment is avoided, the superintendent cannot tell his employees how to relate to one another off school time.

Q: My sixth grade students ask me personal questions: Are you a Mormon? Who did you vote for in

the presidential race? What is a good professional response to these types of questions?

A: State law prohibits discussion of personal viewpoints on particular topics—sex, religion, politics, to name a few—without prior parental permission. A teacher may, however, answer a spontaneous question asked by a student, but may not delve into an in-depth discussion of the issue.

The best response to a question about an educator's personal views may be "that's personal. Now let's get back to our lesson."

A teacher may give a quick, truthful response, but should always consider the effect the response will have on students. For example, if a teacher decides to reveal a religious preference will some students feel excluded?