



UTAH SCHOOL LAW UPDATE

Utah State Office of Education

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Supreme Court Changes Direction

A recent U.S. Supreme Court ruling suggests a major shift in the way the court interprets the Individuals with Disabilities Education Act.

For many years, lower federal courts seem to have agreed that a parent could not unilaterally place a student with disabilities in a private school and expect public reimbursement without first making a good faith effort to obtain services through the public school district.

But the U.S. Supreme Court determined in Forest Grove School Dist. v. T.A. that a school can deny a Free Appropriate Public Education to a student without the student ever attending a public school.

In a divided opinion, the majority justices determined that, since the IDEA appeals processes are time consuming, if a school district determines that a student does not qualify for special education services, the parent can place the child in a private school and sue for reimbursement based on a denial of FAPE.

The decision is odd on several counts. First, the Court's explanation for this new interpretation of IDEA rests, in part, on the lengthy processes in place for appealing school deci-

sions under the statute. Typically, where the Court finds a statute does not work efficiently in practice, the Court will send a stern message to Congress in its opinion urging that body to amend the law. In this case, however, the Court instead decided to reinterpret long-standing precedent in lower courts to overcome the obstacles created by Congress.

Second, the Court reinterprets its own precedent and the facts of the case to come to its decision. The parties to the controversy cited two prior Supreme Court rulings in their arguments. In those rulings, the Court determined that reimbursement was warranted where the parents placed their children in private schools based on the public school's failure to provide required services. In both cases, the children received services in the public schools prior to their placement in private schools.

But the majority somehow found that the facts were irrelevant to the final decisions. The Court's reasons for doing so are baffling. Though the majority attempts to tie its decision to the language of the statute, by doing so it appears to ignore the

plain language in the statute. As the dissent points out, the majority's determination that a parent need not first collaborate with the public school to determine if services are necessary ignores the clear language of the 1997 amendments to IDEA. The relevant section of IDEA states that reimbursement of private school expenses is available to "a child with a disability, **who previously received special education and related services** under the authority of a public agency." As the dissenters state, "if Congress did not mean to restrict reimbursement authority by reference to previous receipt of services, why did it even raise the subject [in the amendments]?"

While the dissent's argument seems more in line with prior precedent and the reauthorized IDEA, the majority ruling stands, providing parents with an opportunity to receive reimbursement for the costs of unilaterally placing their child in a private school if the school finds no eligible disabilities, perhaps avoiding the due process provisions established by the IDEA.

Expect more litigation based on this decision.

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UPPAC CASES

- *The Utah State Board of Education suspended Tilton Christian Nelson's educator license for three years. Nelson fostered an inappropriate relationship with a student. Nelson's actions toward the student also resulted in a charge of criminal stalking.*
- *The State Board of Education suspended Mark Jay Harris' license for two years. Harris accessed inappropriate and pornographic materials in his school computer during the school day.*

Eye on the 10th Circuit

The 10th Circuit Court of Appeals, the federal appellate court circuit which includes Utah, recently ruled on a student speech issue.

In Corder v. Lewis Palmer School District (2009), the Court addressed the speech rights of valedictorians.

Erica Corder was one of 15 valedictorians for the Lewis Palmer High School. The school informed the 15 that they could choose whether each would speak or a subset of the group, but any speech would have to be reviewed by the principal. The 15 decided they would each have 30 seconds to speak.

District policy prohibits speech that would “disrupt the orderly operation of the educational process.” The policy does not provide for prior review of student speech by a principal. Corder challenged the principal’s unwritten policy of reviewing the content of valedictory

speeches.

Corder presented her speech to the principal, but she gave a very different speech at graduation, focusing on Jesus Christ and encouraging students to “find out more about the sacrifice He made for you. . . .”

Corder did not receive her diploma that day. Instead, an assistant principal told her she would need to meet with the principal.

At the meeting five days later, the principal told Corder and her parents that Corder would not receive her diploma unless she made a public apology for her speech, including a statement that she did not have the school’s approval for the speech and recognized that she would not have been allowed to say what she did without prior permission.

Corder issued the apology and then sued for violation of her free speech and religion rights, including being compelled to apologize.

The Court found no violations of the

Constitution in the principal’s actions. After reviewing U.S. Supreme Court and 10th Cir. Precedent, the Court held that the speech was school-sponsored, related to learning since a valedictory speech is an opportunity to learn about public speaking, and a school “is entitled to review the content of speeches in an effort to preserve neutrality on matters of controversy within a school environment.”

Further, the Court found that the school could tell Corder “what to say when she disregards the School District’s policy regarding school-sponsored speech, as long as the compulsion is related to a legitimate pedagogical purpose.” Prior precedent establishes that the use of compelled speech to ensure that “the views of the individual speaker are not erroneously attributed to the school” is a valid pedagogical purpose.

UPPAC Case of the Month

There are times when an educator will make a bad decision and end up with an arrest and conviction. After a period of time, the educator may have the record of the arrest and conviction expunged, but the educator may still be asked for information about the expunged record by the Utah Professional Practices Advisory Commission.

Per Utah law and cases around the country, a person with an expunged record may legitimately say “no” when asked if he has ever been arrested or convicted on an employment application. The person may answer no to the same question in a job interview. But when the person seeks an educator license, she may have to explain the facts behind the expunged arrest and conviction.

The Utah Legislature decided decades ago that certain state

agencies should have access to expunged records. The Utah State Board of Education is included on the short list of approved agencies. The Legislature determined that the Board should know if there is any cause for concern in the background of a potential educator, who will have regular, significant, unsupervised access to minors.

While helpful to the Board, access to expunged records can create a problem for the potential educator. While most expungements involve minor crimes or things that happened several years ago, the educator will still need to explain to UPPAC the facts leading to the arrest and conviction. This can be more difficult with expunged records.

The problem is a lack of consistent standards in courts. Some courts “seal” a record, but do not destroy it once it is expunged. Other courts destroy expunged re-

ords. If the record is destroyed, the educator may have a more difficult time providing evidence that his explanation of the conviction is accurate.

Which is why UPPAC recommends that educators keep the final documentation of expungement. Courts will usually issue an order of expungement. If the educator can produce the final order, she is more likely to convince UPPAC that the case was actually expunged, versus hoping the Commission will take her word for it.

While it is often in the best interests of a person who is eligible to have a criminal record expunged to do so, maintaining a personal record of the expungement can be equally as beneficial for those few entities that do have access to the records and will require an explanation.

Recent Education Cases

J.M. v. Avoyelles Parish School Bd. (La. Ct. App. 2009). The appellate court awarded the parents of three female kindergarten students \$3500 each plus costs for expert witness fees based on a school's failure to provide required annual sexual harassment training.

A male kindergarten student touched each of the girls in a sexual manner during recess. The parents complained and the principal of the school interviewed two of the girls. Each girl told the principal that the boy had touched them somewhere far more innocuous than where they told their mothers they had been touched. Consequently, the principal took no further action.

The parents then sued the school, citing a breach of the duty of care owed to students and parents evidenced by the school's failure to adequately train teachers and students about sexual harassment.

The court upheld the trial court's imposition of monetary damages against the school. The court noted that the school district had a clear policy regarding annual training on sexual harassment and the school admitted not providing the training. The court

found the nominal damage awards to be reasonable under the circumstances.

Cornerstone Christian Schools v. University Interscholastic League (5th Cir. 2009). Parents and a parochial school sued the University Interscholastic League (UIL) alleging that its failure to admit the parochial school into the league for interscholastic athletics violated parents' right to free exercise of religion and to direct their children's education.

The school had been involved in a different sports league. The school's membership had been suspended or revoked twice and the league members voted not to renew the school's admission in the league. The school then sought admission in the UIL (based at the University of Texas, it is, unsurprisingly and as cited by the court, "the largest interschool organization of its kind in the world").

The UIL denied the school's application based on its constitution and rules. The parents and school brought suit but the school was denied standing to sue since it was alleging violations of the rights of its patrons and did not raise any legal issues regarding any burdens on the school itself.

The court found the parents' claims to be without merit, finding the rules used by the UIL were neutral and reasonably related to a legitimate interest.

Further, the court noted that the UIL rules did not prevent the parents from enrolling their student in a parochial school. The court reminded the parents that the right to choose a nonpublic school for their child "does not come with a concomitant right to opt into those portions of a public education they deem advantageous." The court was unsympathetic to the argument that the parents should not have to accept a loss of some benefits in exchange for other benefits when choosing a high school for their son.

Barnett v. Tipton County Bd. of Ed. (W.D. Tenn. 2009). The court denied First Amendment protection to a student's fake Internet profiles of a teacher and an administrator. The court noted that the sexually suggestive comments about students were designed to look like real comments by the teacher and administrator and would be viewed by visitors not as parodies, but as authentic comments from the people profiled.

Your Questions

Q: Our school runs an internally produced student "morning show" for 5 minutes each day. The show is run on an internal tv network, May we edit the show for content?

A: Yes. Like a school newspaper, literary magazine, yearbook, or other internal publication, the "morning show" is a non-public forum, provided by the school for school purposes. As such, student producers or on-air staff are subject to the legitimate rules and pedagogical requirements of the school. The show can be edited to

What do you do when. . . ?

ensure content is appropriate, to fit any time constraints, and to avoid disruption to the learning environment.

Q: We plan to remove a non-fiction book from the library based on numerous factual inaccuracies. A parent has complained about the

decision, claiming we are violating the First Amendment and trying to stock the library with books that are "politically correct." May we remove a book based on factual issues?

A: Yes. While a school should use caution when removing books from its library or classrooms based on content, a school has a legitimate pedagogical interest in providing materials that are factually accurate.

The 11th Circuit Court of Ap-

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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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peals ruled on a similar case earlier this year, finding that a school could remove a book about Cuba from the library based on several inaccuracies in the text. The school was not trying to indoctrinate students to a particular political orthodoxy, but merely sought to ensure that misleading books which misstated several objective facts were not on the library shelves.

Q: My son was adjudicated for marijuana possession over one year ago. The school district says he can never return to his high school of residence. The district says it will place him in the alternative high school. Can the district do this?

A: Yes. While districts are encouraged to consult with parents on placement decisions, the ulti-

mate decision still resides firmly in the district's court. This is particularly so where a student has committed a safe schools violation. The district is well within its rights to place the student in an alternative setting, even if the student shows signs of remorse and sobriety following his conviction.

Q: Our family is moving temporarily to Utah from Arizona. My daughter would be able to start kindergarten in Arizona, which has a later kindergarten deadline. Is there a Utah school district that will accept my daughter into kindergarten, though she won't be five until September 15?

A: No. The kindergarten deadline is firm, however temporary a family's stay in Utah. If the family is still in Utah next August, the child could be tested and if, based on the district's evaluation, the child

is ready for first (or second) grade, the child could begin school in first grade.

Q: I am a fifth grade teacher and was convicted in July for a DUI. I am on a plea in abeyance for one year. Will this affect my job, even though the arrest was in the summer?

A: Probably. Per State Board rule, you must notify your employing school district of the conviction. The school district will notify UPPAC which will likely recommend suspension of your license for at least the length of the plea in abeyance.

Reinstatement of your license will depend on successful termination of the plea in abeyance, and any other conditions the Commission may determine are appropriate under the circumstances.