



UTAH SCHOOL LAW UPDATE

Utah State Office of Education

June 2009

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New Registration Requirements

New and old federal requirements mean that school districts and charter schools will need to spend the summer updating their registration materials for the 2009-2010 school year.

First, just as a reminder, schools must provide annual notice of “directory information” to parents. The federal Family Educational Rights and Privacy Act allows schools to provide student information without parental consent in limited circumstances. One of those circumstances is information that the school has defined as “directory information.”

As the title implies, this is information that may be included in a student directory or yearbook. Information such as the student’s name, address, photograph, honors received, awards earned, GPA, sports, extracurricular activities, or school club participation, and date of graduation is usually included in the definition. All charter schools and districts should review their definitions annually and provide notice to parents of the definition in registration packets (a sample form is available on the USOE website).

New federal requirements also mean changes to the

registration forms. The Department of Education seeks more in-depth information about student ethnicity. In its search for this information, it now requires public schools to report a broader variety of ethnic categories, eliminates the “other” option from registration forms, and, the most troubling change, requires schools to identify the ethnicity of students who do not self-identify on the form. Some federal funds will be allocated based on the race and ethnicity data reported.

Registration forms beginning with the 2009 school year must include two separate ethnicity-related questions:

- A. Is the student Hispanic/Latino?
- B. What is the student’s race?
 - American Indian or Alaska Native
 - Asian
 - Black or African American
 - Native Hawaiian or Other Pacific Islander
 - White

Students/parents must answer both parts of the question. If the student/parent does not answer, “observer-identification” is reported. This is the

trickiest part for schools because a school person saying “hmmm...you LOOK Mexican” could lead the school to a civil rights lawsuit.

Thus, the DOE recommends that schools first try to identify the student’s ethnicity and race through past records or siblings’ records that may include race and ethnicity. If a records review fails, the Department recommends that the school designate someone with authority and legal accountability—such as the principal—to make the observer identification.

The expectation is that the principal will have some tact in making the identification and will recognize the legal pitfalls of inappropriate comments or methods for determining race and ethnicity. The school is required to inform the parent that, if she fails to self-identify, observer identification will be used.

The Utah State Office of Education has already begun changing its reporting system to eliminate the “other” category and expand the category list. Schools should have updated registration forms developed or at least in process.

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REMINDER: Utah School Law Update will not be published in July.

- ### UPPAC CASES
- *The Utah State Board of Education reinstated Richard Brenkmann’s educator license.*
 - *The State Board suspended Shambry Mecham Emero’s license for two years based on her inappropriate written communications with a student.*
 - *The Board suspended Diane Marie Pay’s educator license for two years based on her failure to provide proper care for a student.*
 - *The Board suspended Kirk Parker’s educator license for 18 months for storing and accessing a sexually-explicit story on his school computer.*

Eye on Legislation

Other state legislatures are looking at education issues similar to those Utah has or will consider:

Ohio: Utah considered dating violence legislation two years ago and Ohio is moving forward on the issue. The Ohio House of Representatives passed a bill that requires all school district to adopt policies designed to prevent teen dating violence. The bill would require schools to include teen dating violence prevention education in the health curriculum for 7-12 graders. The Ohio Board of Education would also be required to develop a model policy on dating violence prevention, including reporting requirements for school employees, and set standards for studies on dating violence.

The bill is named Tina's Law after an 18-year old woman who was murdered by her ex-boyfriend in 1992. *Dayton Daily News*.

Oregon: The Oregon Legislature passed a comprehensive sex education bill, following the failure of a similar bill in the Utah Legislature.

The Oregon bill requires that schools provide age-appropriate and medically accurate information in the sex education curriculum. Schools would also be required to provide more specific information about the risks of sexually transmitted diseases and legal "rights and responsibilities related to childbearing and parenting." *Oregonian and NSBA Headline Review*.



Pennsylvania: Pennsylvania enacted a law in January that all states should consider putting on the books. The new law requires private companies that do government work to provide public access to records created in relation to the work.

The law is being challenged after a

newspaper asked a for-profit company running a public charter school to turn over information related to its management of the school.

The paper asked for information on the names, title, salaries, and payments, expenses or benefits paid to employees of the management company. The paper also asked for information about the company's profits.

The company refused and the paper took its case to a new state agency created for the sole purpose of hearing appeals related to the new

"Right-to-Know" law.

That tribunal ruled that the documentation related to the company's performance of "what is otherwise a government function"—i.e. running a public charter school—must be turned over to the paper. *Philadelphia Enquirer and NSBE Legal Clips*.

UPPAC Case of the Month

There are times when it is painful to watch an educator facing a Utah Professional Practices Commission proceeding. The pain stems not from the educator's actions, but from the ineptitude of the attorney representing the educator in the proceedings.

Educators need to choose their attorney wisely. Though it is tempting to go with the person who feeds the educator's ego, talks a good game, or sets a minimal fee, before hiring an attorney, look for a few key characteristics:

1. Does the attorney have ANY experience with the public school system, beyond being a parent of a student?

Law is a specialized profession. A tax lawyer is not prepared to face UPPAC, regardless of her expertise in tax law. Similarly,

an employment lawyer may have better experience than the tax lawyer, but she should either have represented educators at the district or state level previously, or at least recognize that she will need to do some research in order to represent an educator effectively before UPPAC—and then actually do the research.

2. Does the attorney provide a realistic sense of the possible outcomes?

An attorney who does nothing but tell the educator he can get anyone out of anything, or that the educator can rest assured, he will dis-mantle the entire public education system to win, may be a zealous representative, but will probably not be able to deliver on his many trumped-up promises.

The more effective attorney will be level-headed and will research and

inform the client of the possible outcomes of the case, then present a strategy.

3. Is the attorney prepared for meetings, hearings, etc?

If the educator is facing a hearing before UPPAC, he should make sure the attorney has talked to the witnesses he intends to call to the hearing. This may seem like common sense, but attorneys do come to a UPPAC hearing with no sense of what the witnesses will say.

While an attorney cannot TELL a witness what to say, he should at least have some idea if the witness' testimony will be more beneficial to the state's case than his client's.

An educator facing UPPAC may not always need an attorney, depending on the severity of the allegations. But those who do should make sure they are hiring not only zealous, but also competent counsel.

Recent Education Cases

Acosta v. New York City Dept. of Educ. (N.Y. App. 2009). As the Utah Board of Education considers new rules regarding background checks, other states address issues in their current laws. In New York, Acosta worked as an administrative assistant at a non-profit which provided special education pre-school services under a contract with the New York City Department of Education. The department required background checks of all employees. Acosta's fingerprint check revealed a prior conviction for four counts of armed robbery committed when she was 17.

Based on the convictions, the Department denied Acosta's employment. The court found the Department's act to be "arbitrary and capricious." The court noted that Acosta had served her time, gone to college, started a family and is now 31 years old. Further, Acosta's job duties did not involve any access to the students.

Doe v. Merrill Community School Dist. (Mich. D. Ct. 2009). A middle school student brought a claim against the school district alleging deliberate indifference to sexual harassment. The federal district court found enough ques-

tions of material fact to warrant proceeding to trial.

The female student alleged that while she was an 8th grader at the junior high, which was located in the same building as the high school, a ninth-grader began to harass her. The girl's father witnessed the boy making sexually-suggestive gestures toward his daughter during a basketball game in October.

The girl then revealed that the boy regularly made sexual comments to her and had thrown her against a locker.

The father sent a letter to the administration, explaining what was going on. The school allowed the boy to attend school and school events "under supervision." In December, the boy raped the girl.

The father alleged in the lawsuit that school administrators were aware that the boy had a prior criminal conviction for sexual assault against an 11-year old relative and was facing charges in 2006 for either sexual assault of another female student.

It also turned out that the boy had a track record of six "documented infractions specifically dealing with sexual harassment" beginning in 2004.

The court found enough issues of

material fact regarding who knew what about the student and when to permit the case to proceed to trial. The victim will still need to prove that the school knew about the boy's sexual assault tendencies and acted unreasonably and with deliberate indifference in its responses to the several incidents involving the victim.

Musgrove v. School Board (Fla. D. Ct. 2009). In a classic example of a balancing test, a Florida court determined that, while the parents were entitled to a preliminary injunction, the public interest outweighed the parents' constitutional rights.

The school board scheduled the high school graduation ceremonies in a religious institution. The ceremonies would have taken place in the shadow of a giant cross. While the school board's actions did cause irreparable harm to the parents, the parents didn't bring their action in time. The court found the harm to the community from requiring the school board to rearrange four graduation ceremonies with only 24 hours to the ceremonies greater than the harm to the parents.

Your Questions

Q: What appeal rights must be provided to parent denied a fee waiver?

A: Whatever rights the school district offers. State law does not specifically provide for an appeal of a fee waiver decision. However, since a student may not be denied access to school activities based on an inability to pay fees, districts should provide some due process for parents who are denied waivers.

The level of process due in this situation requires notice to the

What do you do when. . . ?

parent of the reason for the denial and an opportunity for the parent to present to a person with authority to grant a fee waiver with information regarding the parents' qualifications for fee waiver.

The district need not provide a full scale hearing process for fee waivers. However, districts should

ensure that "cases of extreme hardship" are considered along with the standard financial verifications.

Q: May we expel a student who repeatedly violates school rules?

A: State law provides that a student may be suspended or expelled for "frequent or flagrant willful disobedience, defiance of proper authority, or disruptive behavior, including the use of foul, profane, vulgar, or abusive

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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.

(Continued from page 3)

language . . .” among other reasons. However, expulsion means the student has greater due process rights, so the school should have ample evidence to support the decision to permanently remove a student from the school.

In other words, “frequent or flagrant willful disobedience” means the student has a written record of multiple violations or a violation that is so severe, it affected the school’s ability to provide educational services to the individual or other students.

A one-time act of yelling a swear word in the hall, for example, would probably not warrant expulsion. A regular habit of skipping classes to smoke on school grounds, to the point the student’s grades are suffering or other students start to join in,

might.

Q: Do we need parental permission to ask a student to remove his shoes and socks for a search?

A: Whether you should conduct an invasive search, which any removal of clothing is, depends on what you are looking for and how reasonable your suspicion is that the student being searched has the contraband.

While a shoe search seems minimally invasive, it should not be conducted on a whim. State law does not require prior parental permission to search a student in this manner, but the student may have a claim of unreasonable search and seizure if the school is looking for something of limited threat to the school or without a legitimate reason to suspect the student has it.

Searches involving the removal of any clothing other than a jacket should only be conducted if the school is searching for drugs or weapons and has a present suspicion that the student may have the drugs or weapon. If a student tells an administrator that four named students smell like marijuana, or he heard three students talking about a knife fight planned for after school behind the school gym, the administrator would have reason to search the students for drugs, in the first case, or a weapon, in the second instance. If the allegation is that a student took \$5 from another, the removal of clothing is not warranted.

Also, the more intrusive the search, the more senior the school employee should be. A teacher may look in a student’s desk; a principal should be the one to ask student’s to remove clothing or to search pockets.