



UTAH SCHOOL LAW UPDATE

Utah State Office of Education

March 2010

Inside this issue:

It's a Wrap

Another legislative session has come to an end, this time with very few surprises and no omnibus bills—making it a fairly successful session.

School districts and charter schools may need to adopt or revise a few policies based on legislation:

First substitute HB 42 extends the period of time that an employee remains on provisional status. Districts with set time periods for provisional employees may need to revise their policies to reflect the added flexibility of the new law.

First substitute HB 81 allows districts and charter schools to require periodic background checks for employees. Districts or schools which have not already adopted background check policies in accordance with State Board Rule 277-515 should consider doing so. It should also be noted that first substitute HB 178 raised the fee for the BCI regional background checks to \$20 (currently, the fee is \$15). Name checks also went up from \$10 to \$15.

HB 88 requires districts and charters to adopt policies prohibiting the use,

possession, or distribution of electronic cigarettes, in addition to other tobacco products. Check your current tobacco policies to add electronic cigarettes to the mix.

HB 386 enacts the Interstate Compact on Educational Opportunity for Military Children. Districts and charters should read the bill, now enacted into law, to ensure their policies on military children comply with the new language. Charters and districts that lack a policy on children of active duty military members should adopt a policy which complies with the terms of this new law.

HB 433 re-enacts language regarding foreign exchange students which was removed several years ago. Schools should include in their foreign exchange policies a provision that, even if the cap on foreign exchange students has been reached, the school will accept one for one exchange students who use the same exchange agency and are attending each other's school for less than one year.

SB 56 requires that the State Board adopt rules to

calculate average class size. The calculation adopted by the board should be used by districts and charter schools to calculate and report average class sizes to the State Board.

SB 59 requires the adoption of gang prevention and intervention policies, which districts and charters should already have in place. Boards may want to review the suggested components of gang policies in the bill to ensure their existing policies include the suggested elements, if appropriate.

In other news, districts and charters can look forward to a short recess from some standardized testing requirements. First substitute HB 166 eliminates 10th grade Basic Skills Competency Test for the next two years and all second grade criterion-referenced tests permanently.

For the next two years, school districts can also forego the independent textbook evaluation normally required before purchasing instructional materials, can dispose of textbooks without providing notice to other districts of the disposal,

UPPAC Case of the Month	2
Eye on Legislation	2
Recent Education Cases	3
Your Questions	3



UPPAC CASES

The Utah State Board of Education did not take action against any teacher licenses at its March Board meeting.

Eye on Legislation

and can eliminate the annual presentation on adoption.

The new law uses the money saved by the State Board from the two year moratorium on UBSCT to create a pilot program to replace UBSCT with a computer adaptive test and to administer the ACT to all secondary students.

SB 55 adds a new chartering entity to the education code. Under this new law, higher education institutions would be able to charter k-12 schools.

SB 66 changes the procedures for home school students seeking to participate in extracurricular activities at a public school. Currently, home school students must provide some evidence, in a form acceptable to the school, of satisfactory progress in the core curriculum. This has typically meant showing a portfolio of stu-

dent work or perhaps passing an exam.

Now, a home school student need only provide an affidavit from his or her parent, teacher, or a home school organization indicating that the student meets academic eligibility requirements.

SB 150 requires district and charter schools to notify parents before mid-year if their first, second, or third grader is reading below grade level. The school must provide parents or guardians with information about remediation interventions available through the school district or charter school and must provide focused reading interventions for the students. These interventions may include tutoring, before and after school programs, and summer programs.

SB 188 made several changes to the charter school laws. First, a State

Charter School Board member will become a non-voting member of the State Board. Second, the bill removes the caps on enrollment for charter schools and gives the State Board the authority to increase charter enrollments based on funding. Third, the bill modifies provisions for students seeking to transfer between a charter and district school, clarifying that a student may not bounce from school to school during the school year.

Finally, the bill requires that a charter school officer declare a conflict of interest, abstain from voting, and absent him or herself from board meetings where contracts or transactions contemplated by the board would financially benefit the officer or a relative.

UPPAC Case of the Month

Miscommunication about the State Office of Education's recent review of educator background checks is rampant. Some teachers have expressed panic after being told USOE has found thousands of educators with criminal histories and is going after those educators' licenses.

Reality is far less stark. As noted in a prior newsletter, USOE and the Division of Public Safety ran all educators with valid licenses in CACTUS through a name and date of birth background check. Of the active educators, a grand total of 250 had criminal arrests of concern to the Utah Professional Practices Advisory Commission.

Commission concerns center on recent arrests, particularly where the educator is currently on a Plea in Abeyance or subject to court jurisdiction in some other

manner, and convictions for serious crimes, such as child sexual abuse.

The 250 educators with recent arrests or arrests for heinous crimes were sent letters asking them to complete a fingerprint check. This requirement helps USOE verify if the educator is the actual person arrested. In a few instances, we discovered that the arrested individual used a false name and birth date that corresponded with someone in CACTUS.

Several educators failed to complete the required fingerprint check and have received additional notice that failure to do so may result in their license being marked as "pending" until the fingerprint check results are received.

Most educators completed the check and were found to be the arrested individual. Those educators have received another letter

requesting information about the circumstances leading to the arrest. For many, if there was no further court action or the court action has been completed, the educator retains the license and no further action is required.

For a few, the educator will be required to present his or her story to a three-member panel of the Commission for further consideration. If the educator can prove by a preponderance of the evidence his or her fitness for duty in the face of the arrest or ongoing court action, the educator will retain the license. If not, appropriate licensing action will be recommended to the State Board of Education.

Of the 250 educators sent letters, so far only six have required hearings before a UPPAC panel.

Recent Education Cases

Mardis v. Hannibal Public School District (E.D. Mo. 2010). Mardis, a sophomore in the district, sent instant messages to a classmate about his depression over a breakup and desire to shoot five people at the school, then kill himself. The classmate forwarded the messages to a school administrator within hours of the conversation. The school suspended the student who made the threats for the remainder of the school year.

The parents of the student sued the school district, claiming violation of the student's First Amendment Rights. The parents asserted that the speech was not "student speech" since Mardis was talking to a friend from home, after school and via instant messaging. Therefore, the parents reasoned, the speech was not made by a student and should not be subjected to the more restrictive standards applied to student speech (student speech may be curtailed where it is reasonably likely to create a substantial disruption at the school).

The appellate court found that the speech was student speech since it was reasonably foreseeable that an Internet conversation between classmates and about school would be forwarded to other students and administrators.

The court also determined that the threats caused an actual disruption at the school as parents called in to determine if their students were on Mardis' list and whether their children were safe at school.

The court also determined that Mardis' threats were "true threats" over which a school could take reasonable action. Per the court, Mardis' statements could be viewed by the reasonable recipient as a threat where the classmate knew Mardis' state of mind (depressed), knew he had access to weapons, and Mardis named his victims and his method of killing them.

Reinhardt v. Albuquerque Public Schools (10th Cir. 2010). The 10th Circuit adds more detail to the ongoing questions about the scope of the U.S. Supreme Court's ruling in Garcetti v. Ceballos. In summary, Garcetti held that a public employee can be retaliated against for speech made within the scope of the employee's professional duties.

Since that decision, several courts have decided speech cases in favor of the employer. The 10th Circuit is one of the first to side with the employee.

In Reinhardt, the court found that a speech language pathologist

moved beyond employee speech when she took her concerns about potential violations of the Individuals with Disabilities Education Act to an outside attorney and fielded a complaint with the New Mexico Department of Public Education.

The court found that a speech language pathologist's job duties do NOT include filing complaints with agencies "outside her direct chain of command." Thus, Reinhardt acted as a public employee while she was expressing her concerns over the denial of SLP services for students within the district's internal grievance procedures, but as a private citizen when she went outside the district to the private attorney and Department of Education.

The district also argued that it had not retaliated against Reinhardt by reducing her caseload and refusing to extend her contract when her caseload grew.

The district lost its argument when it was unable to explain how it figured caseloads and provided three different versions as to how it makes caseload determinations.

Your Questions

Q: A student is living with friends while his dad travels for work. When dad is home, both student and dad continue to reside in the home of the friends. Is this student a resident?

A: He might be, though he may also qualify for services as a homeless student.

The McKinney-Vento Act defines a homeless student as someone who lacks fixed, standard, and adequate housing. The examples of

What do you do when. . . ?

homelessness include youth living in someone else's home due to economic hardship or other reasons.

If the father does not have a home of his own due to cost, and the father and son can be kicked out of the friend's home at any time, the home may not qualify as fixed, standard, and adequate.

Q: We are revamping our registration form to meet the ethnicity requirements. May we inform parents that, if they do not self-identify their student's ethnicity, we will make the determination?

A: Yes. In fact, the National Forum on Education Statics guide for implementing the new race and ethnicity standards indicates that you MUST provide notice to parents that the school is required to select an ethnicity if the parent or student does not self-

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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)

select.

A simple statement on the form such as, "If you do not select one of the above, the school is required by law to make a selection for you" should suffice.

Q: Our district has adopted a new dress code for teachers that prohibits visible tattoos. Can they really do this? What about my First Amendment rights?

A: The district may enact reasonable appearance standards for employees. If a First Amendment right is implicated—i.e., the tattoo conveys a political or religious message—the district can still enforce the policy as long as the policy addresses a compelling interest reasonably related to its educational mission.

Courts have repeatedly found school prohibitions against tattoos acceptable. The courts have stopped at forcing students or teachers to remove tattoos, but if the tattoos can easily be covered up by regular styles of clothing, the policy meets current court standards.

An employee's interest in his or her tattoos is not overly harmed by a simple requirement that those tattoos be covered at work. If any are on hands or neck and can't be covered, the district can make an exception.

Districts can also make an exception for unobtrusive tattoos, like eyebrows or other permanent makeup, unless the eyebrows were tattooed on in bright red or something similarly unusual.

As long as the district can articulate valid reasons for adopting

the policy, and it is not forcing tattoo removal surgery on teachers, the policy meets legal standards.

Valid reasons may include establishing or maintaining a professional atmosphere in the classroom or school, avoiding unnecessary distractions in the classroom, modeling respect for school standards by holding teachers and students to the same requirements, etc.

It bears repeating that a desire to show off body art is not a protected First Amendment right. To be protected, the body art must convey a political or religious message that can be understood by a reasonable person—think "bong hits 4 Jesus" as a message that the court found could not be understood by the reasonable person and, therefore, was not protected student speech.