UTAH SCHOOL LAW UPDATE

Utah State Office of Education

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Legal Threats

Some attorneys are adept at using the threat of litigation, regardless of the merits of the case, as a means of getting what their clients want. A recent letter sent from the law firm of Wood & Crapo to principals across the state regarding voucher-related activities at schools is a perfect example.

The letter threatens civil action against schools that allow certain political activities. The letter, not surprisingly, interprets state law in a manner that best serves the client's interests, but is not exactly accurate.

Given the heightened scrutiny of and sensitivity to political activities this year, **educators, particularly school administrators, need to be very aware of what political activities are, and are not, allowed by school employees and/or on school property** in order to respond to threats from attorneys**. We can only defend administrators who promote activities that are appropriate under these guidelines.**

1. Outside groups may use school property, consistent with whatever rules the school has about public use of school facilities, to advocate for or against the referendum or other political issues.

2. If a group advocating for one side of the referendum is permitted to use the building, the administration must allow an opposing group equal access UPON REQUEST. **There is NO requirement in state or federal law that a school provide any kind of notice of a political meeting to an opposition group or representative**.

3. Per state law, educators may NOT fund-raise or campaign during PAID association leave time or contract time.

4. If asked, an educator can explain a personal opinion about the referendum, vouchers, political candidates, or any other political issue to parents or patrons. An extended discussion, however, should be postponed until non-contract time.

5. Educators can use school newsletters, websites, announcements, etc. to provide factual information about political issues (but not to advocate for one side or another). For example, state law permits a school to host and advertise "meet the candidate" nights or provide pro and con information on ballot issues in the main office.

6. Educators may provide factual information and answer questions at school community council meetings, PTA meetings and other voluntary meetings.

7. Educators may NOT use school directories, email, mail, or other resources to contact people and advocate for or against the referendum.

8. Educators may meet and discuss, outside of contract time, their opinions and activities related to any political issue.

9. Educators may not wear political buttons, t-shirts, or other items during contract time that advocate for a particular political position; "VOTE!" is acceptable, "Vote Ralph/Jenny/Dave/Keith . . . for Mayor" is not.

10. Schools that allow organizations to meet or present in the building may remove any participants who are disruptive or violate state law or district policies.

In short, schools are meant to be places of learning—which includes providing information about matters of public concern to the general public. **Per state law, as long as school personnel remain neutral on the issue during contract time**, the school should have no fear of empty threats to run to the courthouse or demands for notice bandied about by hired guns.

Eye On The Utah Supreme Court

In the case of O'Connor v. Burningham, the Utah Supreme `Court attempted to clarify the boundaries of acceptable complaints by parents against teachers.

The case involved parents at Lehi High School who made various complaints against girls basketball coach Michael O'Connor.

The parents questioned O'Connor's coaching style, alleged improper use of team money, unfair preferential treatment for one player, and inappropriate recruiting of another player.

The parents first complained to the school principal and administrators. When they did not receive the answer they hoped for, the parents took their issues to the local school board.

The school board did not take employment action against O'Connor, but the school did remove him from his coaching position. O'Connor then sued the parents for defamation.

The lower court ruled in favor of the parents, finding that O'Connor was a "public official" and, therefore, could not succeed on a defamation claim without first proving that the parents acted with actual malice.

The Supreme Court took up the question of whether a high school coach is a "public official." It ruled that the coach is not a public official and limited the definition of "public official" to those government officials "in whom the authority to make policy affecting life, liberty, or property has been vested." Since a high school coach's decisions do not "affect in any material way the civic affairs of the community . . . ," the coach is not a public official and would not have to show actual malice in order to win a defamation suit.

However, the court also noted that the parents statements may still survive a defamation claim because the parents have a conditional privilege. This privilege allows a family member (which the court defined very broadly) to present information when he has a reasonable belief that the information affects a family member, he provides the information to a proper recipient, and the information as presented may aid in protecting the family member's well-being.

Thus, parents cannot spread rumors about teachers, but teachers are not absolutely protected from having their perceived misdeeds criticized through proper channels.

The Court referred the matter back to the lower court to determine if the parents' comments were defamatory in light of the Supreme Court's holding.

UPPAC Case of the Month

Much like religion in schools, some parents, educators, legislators and others see touching in schools as an all or nothing proposition.

Some educators become so frustrated trying to establish where the line is between o.k. touch and inappropriate touch, they argue for no touching, ever, period.

Others are inclined in the opposite direction, hugging everyone in sight at every opportunity.

As with religion, the most workable option may lie somewhere in between the extremes.

Most educators understand that massages of any kind (unless you are the athletic trainer, and the student needs the massage for sports-related medical reasons) are inappropriate in the school setting. This includes neck rubs, back rubs, belly rubs, etc., from student to teacher, teacher to student or teacher to teacher.

But a consoling arm around a distraught student is not an evil act, unless the educator's motive is less than pure.

Nor is a congratulatory pat on the back for a first grader who finally reads his first sentence without stumbling.

Educators can touch their students so long as they are always aware of the boundary between appropriate, comforting or congratulatory touch, and inappropriate groping or sexually gratifying touch.

The educator who is known for hugging everyone or allowing kids to jump on his back as he walks down the hall or tickles kids in the classroom is not acting in a professional manner. The educator who responds to a child in need with a comforting touch on the arm or a high five is within acceptable bounds of propriety.

Similarly, the educator who grabs a student by the arm to stop the student from hitting another is acting responsibly. The educator who grabs the student by the arm and yanks him out of his chair for talking in class has probably stepped over the line of reasonable touch given the circumstances.

An educator needs to tailor her actions based on the age, gender, and maturity of the students. Kindergarteners are huggy creatures who may be hurt by an outright rebuke of their hugs. A high school sophomore may also be huggy, but she may need a stern lesson in proper boundaries.

Similarly, it is hardly a professional act to ask a subordinate to provide a massage, even if the subordinate isn't quite mature enough to mind being asked for such an inappropriate favor.

Recent Education Cases

Good news and bad news for educators in recent cases. First, the good news: Hurd v. Hansen (9th Cir. 2007): A teacher's decision to give a student a C" in P.E. did not violate the student's constitutional rights.

The father of the seventh grade student claimed the grade was based on racial bias or personal animus toward his daughter. The court disagreed finding that the grade reflected the student's lack of effort in the class and failure to cooperate.

Now the bad news (sort of): Suddith v. Univ. of Southern Mississippi (Miss. App. 2007): a professor who was "not forthcoming" about his prior affair with a student (which led to his dismissal from another college) could be denied tenure.

The professor argued that he was discriminated against (no matter how many times we say it, some educators refuse to believe that "educators who have sexual relationships with students" is NOT a protected class!) and that he had not been given a valid reason for his termination.

The court found that the college had a rational reason for denying tenure to a faculty member who had sex with a student. The college's interest in "providing the best possible instructors for students" is a legitimate government interest and the college's actions did not violate the Equal Protection clause.

And D'Angelo v. School Board of Polk County Florida (11th Cir. 2007): a principal's First Amendment rights were NOT violated by a school board decision to terminate his employment.

The principal decided to explore the possibility of converting his high school into a charter school following notice from the school board that he would not receive additional funding for staff. He held faculty meetings and assigned faculty members to research and give reports on charter schools.

The principal held a vote of faculty members. When faculty voted 50-33 against the conversion, he proposed a partial conversion.

The superintendent learned of this decision and called the principal. The superintendent was "not happy" that the principal was continuing to pursue a charter conversion.

Despite his high performance ratings, the board terminated the principal. He sued, arguing, among other things, that the termination was retaliation for his comments on a matter of public concern—the possible conversion to a charter school.

The court ruled that the board **could** terminate the principal based on his comments. The court determined that the principal's comments would only be protected if (i) he was speaking on a matter of public concern AND (ii) he was speaking as a private citizen. The court found that, while the success of the high school was a matter of public concern, the principal was not speaking as a citizen on this matter. The principal admitted he was seeking conversion in an attempt to fulfill his professional duties. As such, he could be disciplined by for actions taken as past of his official duties and against the directives of his superintendent.

Your Questions

Q: Is it permissible to answer a student's questions about my personal religious, or anti-religious, beliefs or activities?

A: Under Utah's Family Educational Rights and Privacy Act, educators may **not** discuss their, or their students', personal religious beliefs without prior written parental permission.

FERPA does make an exception for spontaneous student questions, but that exception does not provide the teacher with carte blanche to discuss every aspect of his/her personal beliefs.

What do you do when. . . ?

The best response to such questions is usually "that's personal and not what we are discussing in class today." The worst response is a 30-minute monologue about your personal epiphany leading to a religious or anti-religious conversion.

Any answer to the question should consider the relevance of the question to the classroom discussion and the possible outcomes of revealing such information—such as alienating students who might disagree with your point of view (a point of view they have no right or need to know in the first place).

Q: The vote on the voucher issue is important to our school. Educators have asked to present information and opinions on the issue

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The Government and Legislative Relations Section at the Utah State Office of Education 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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to their fellow employees. What can employees do to promote their views on the issue?

A: School employees are citizens and can discuss their political views with their colleagues. However, they are also public employees and may not use public resources to promote their views.

Thus, employees can discuss voucher issues with one another on their free time. They can send emails to their colleagues from their personal email addresses to their colleagues' personal email addresses. Employees can provide voter registration or mail-in voting information at faculty meetings. If there is a common bulletin board where any member of the public can post information, the employees may post messages regarding meetings about the issue that will occur on non-contract time.

Employees may NOT send out school-wide emails encouraging others to vote a particular way on the school email system. Educators may not use association leave time to engage in political activities, including fundraising. Employees may not hold meetings advocating for a particular political point of view on school time. They may use the school facilities for such meetings, provided they meet the building use requirements that the school has for similar groups.

School employees should also be sure to keep the debate civil. Employees who engage in shouting matches with parents or other employees may be subject to employment action, regardless of the content of the discussion.

Q: I am a fifth-grade teacher and observed a fellow fifth-grade teacher with a student sitting on his lap. The room was full of students, but it still made me nervous. Is this appropriate and, if not, what should I do about it?

A: Students should not be sitting on an educator's lap, regardless of how many other students are in the room. The older the student, the more inappropriate this conduct becomes, but any educator who allows this to happen should be warned about the impropriety of doing so and reported to the administration.