

UTAH SCHOOL LAW UPDATE

Utah State Office of Education

May 2009

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UPPAC CASES

of Education took no action regarding individual educator licenses during its May meeting. The Board did take initial steps to implement a new requirement that teachers self-report arrests for certain crimes. Please see page 2 for more details on the proposed rule.

UPPAC NEEDS YOU

The Utah Professional Practices Advisory Commission is looking for a few good educators to fill slots on the Commission.

If you enjoy reading police reports, feel drug use should be limited to properly followed prescriptions or the use of over-the-counter meds according to package directions, and would never think of intentionally sabotaging CRT or other state testing results, you are just what the Commission is looking for!

As regular newsletter readers know, the Commission is responsible for recommending licensing action to the State Board, as well as setting ethical standards for the public education profession. As part of its duties, the Commission reviews background check information submitted by those seeking educator licenses, and determines or recommends appropriate discipline for educators who violate the rules of professional conduct.

Currently, three positions (defined under UCA 53A-6-302 (1)) are open for three-year terms beginning on July 1, 2009. All three of the positions must be filled by licensed classroom teachers.

Public, charter, private, and parochial school edu-

cators who are interested may nominate themselves by submitting a vita and an application to Carol B. Lear, J. D., Executive Secretary, Utah Professional Practices Advisory Commission, 250 East 500 South, P. O. Box 144200, Salt Lake City, Utah 84114-4200. Applications are available at www.schools.utah.gov/uppac and are due on or before May 22, 2009.

The selection process may also include a personal interview conducted by the executive secretary and/or members of the Commission.

Not sure you are qualified but know someone who has never been and would never be arrested for lewdness? An individual may also nominate a qualified colleague.

Commission members are appointed by the State Superintendent. The Superintendent will ensure a balanced representation from throughout the state when making appointments. Members who will continue to serve on the Commission are from Logan, Murray, Salt Lake City, Duchesne, Alpine, and Park City School Districts. This does not rule out applicants from these districts; however, candidates from other areas of the state may be given

preference.

If you apply but are not selected, don't despair. Once an educator applies for the Commission, his or her application is retained to be considered for vacancies or new appointments, if the educator is not initially selected.

If selected, an educator must commit to attending monthly meetings to discuss the latest background check issues, review investigative reports concerning educators accused of misconduct, and evaluate ethical issues for licensed educators. Members are also asked to serve as panel members for misconduct hearings.

The Professional Practices Commission plays a vital role in ensuring the professionalism of our licensed ranks. The members make crucial decisions for individuals accused of educator misconduct and set the ethical tone for the profession across the state. As past members can attest. serving on the Commission is enlightening, harrowing, and worth every volunteer hour (note: UP-PAC pays for subs while teachers meet, reimburses travel costs, and provides donuts at most meetings).

Eye on Legislation

Utah: Though not "legislation," State Board Rules have the effect of law. The State Board proposed one new rule for educators and a substantial amendment to the educator licensing rule at its May 1, 2009 meeting.

The Board considered R277-516 Education Employee Required Reports for Arrest for the first time at the meeting. This rule requires educators to report arrests for certain offenses to their principal or supervisor. An educator is required to report within 48 hours any arrest for a sex offense, a felony or class A misdemeanor drug offense, or a "crime against the person" as defined in the criminal code.

"Crimes against the person" include assault, kidnapping, murder, manslaughter, reckless endangerment, abuse of a child or vulnerable adult, stalking, hazing, and making a terroristic threat. The rule also requires districts to enact reporting policies for nonlicensed personnel. Non-licensed employees must also report arrests for sex offenses, all drug or alcohol offenses, and "crimes against the person."

The Board also seeks to amend R277-501 Educator Licensing Renewal and Timelines. The amendment requires that all educators undergo a background check when requesting license renewal.

Both the amendment and the new rule are in response to an audit conducted by the Office of the Legislative Auditor. As reported by several news sources, the audit found some licensed and nonlicensed public school employees with questionable arrests in their backgrounds. These individuals were either never checked or had been arrested after their back-

ground check was submitted to USOE.

Vermont: After several states filed child pornography cases against minors engaged in "sexting" (sending sexually explicit photos or videos of themselves to other minors), Vermont legislators are considering a bill that would

decriminalize the activity. The bill would allow persons under the age of 18 to continue "sexting" without facing felony charges. Students would still be subject to school and parental discipline. Several state law-

makers across the nation have expressed alarm at the trend of saddling kids with felony charges for behavior that is unwise, but for which the minors show no criminal intent. Source: WCBSTV in New York.

UPPAC Case of the Month

The Commission has received an unusual number of cases in recent months involving the treatment of special education students. The majority combine allegations that an Individualized Education Plan is not being followed with claims of unreasonable disciplinary measures by school employees.

Because special education has so many rules all its own, violations of IEP provisions are not normally reviewed by the Commission. But allegations of undue force or otherwise unreasonable punishments being meted out to students are within the Commission's purview.

In a couple of the cases, the punishment involved the extensive use of isolation or "time-out" areas. In two others, the students were bruised by educators trying to physically restrain them.

In all of the cases, the students had known behavioral problems, clear Behavioral Intervention Plans, and watchful parents.

In the cases where educators isolated the students or put them in time-out areas, the UPPAC outcome depends, in part, on the policies of the school and the teacher's interpretation of the policy. In the current instances, the schools recommended that time-out be limited to one minute per the student's year of age. While this standard is straightforward, problems arose from another provision permitting the educator to begin timing the time-out from the point the student is under control.

In both instances, the student continued to act out while in timeout, so the official time didn't begin to toll for several minutes. This resulted in the students being left in the time-out area for far longer than the recommended one minute per year of age.

In the cases where physical restraint was used, much depended on the students' known behaviors. Since student and educators had vastly different stories, the cases turned on whether others had also struggled to restrain the student in different settings. In one of the cases, for example, the parents had found restraint so difficult, they called in the police to help. This history made the educator's actions in the case seem more reasonable.

In the other, however, the student was severely injured but posed no risk to himself or others at the time force was used on him. These facts argued persuasively against the amount of force used by the educator to restrain the student.

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Recent Education Cases

Miller v. George Skumanick (D. Ct. Pa. 2009). The court granted a temporary restraining order preventing the prosecutor from filing child pornography charges against a student based on "sexting."

The school district had seized and reviewed several students' cell phones and discovered photos of scantily-clad, semi-nude, or nude female students on some of the phones. The district found that male students had been trading the photos on their cell phones.

The district turned the phones over to Skumanick, the county attorney. He sent a letter to twenty potential defendants, including the owners of the phones and the girls shown in the photos, informing them that they could face felony child pornography charges. The letter also informed the students that charges would be dropped if the students completed a six-to-nine month education and counseling program. Part of the program included writing an essay describing why the individual's actions were wrong.

The prosecutor then held a meeting with the 20 accused and their parents and informed them that he would charge all of them with child pornography unless they agreed to pay the \$100 fee and

successfully complete the program. Later, after all parents refused to sign, the program was revamped into a 5-week program but the prosecutor also added six months of probation with drug testing to the plea deal.

At the meeting, one father asked how his daughter could be charged with pornography when the picture of her did not contain any nudity or sexual activity. The girl was shown wearing a bathing suit. The prosecutor stated the girl was in a "provocative pose."



The father found nothing provocative in the photo of his daughter which showed her and a friend from the waist up wearing white bikini tops. His daugh-

ter was talking on a cell phone while the other girl was making a peace sign. The father refused to sign the agreement and brought suit challenging the prosecutor's actions. He was joined by two other parents.

The suit alleged that the prosecutor violated the girls' and their parents constitutional rights. First,

the prosecutor violated the girls' rights to free expression by threatening to charge them without a legal basis in an effort to force the girls to abandon their rights and submit to a "reeducation" program. The suit also alleged retaliation in violation of the girls' rights to be free from compelled speech by forcing the girls to write an essay about how their actions were wrong, even though the girls and parents did not accept that they did something wrong. Finally, the parents asserted a violation of their 14th Amendment rights to direct their children's upbringing. The parents alleged that the prosecutor's attempts to force their children into "re-education" infringes on the parents' rights to educate and establish values for their children.

The court agreed with the parents, finding that the parents were likely to succeed on the merits of their claims and granting the temporary restraining order.

The court will hear additional arguments in June to determine if the temporary order should be expanded into a permanent order.

Your Questions

Q: I know the rules for interviewing students become more stringent when the police are involved, but when does an investigation become a police investigation requiring the tougher standards?

A: There is no bright line, but court rulings provide some guidance.

When a school administrator questions a student about possible violations of school rules and criminal laws, the administrator is NOT required to have "probable cause" to talk to the student or to

What do you do when. . . ?

provide Miranda warnings.

But when the school resource officer gets involved, the rules change.

Courts have found that the resource officer assigned to a school remains a police officer, not a school employee, even if his salary is partially paid by the school. As such, the SRO must always abide

by the rules applicable to police investigations.

Courts have found that having the SRO present during an interview may be enough to require proper police procedures.

One court, for example, excluded a student's admission that he stole money from another student because the SRO did not give the student a Miranda warning. The court noted that, though the officer did not question the student during the vice principal's interview, he was present, with gun

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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)

and police belt in plain view, during the interview and responded to questions from the vice principal about whether the student's acts constituted a crime.

While the school can still discipline the student for the conduct, criminal prosecution may be jeopardized where an SRO tries to avoid the more stringent requirements for a police interview by using school administrators to conduct investigations.

Q: What "freedom of expression" or free speech rights do students have for various student publications such as yearbooks, schoolsponsored student newspapers, student publications, electronic or otherwise, created off-campus using personal rather than school resources?

A: Schools have considerable

control and discretion (and responsibility) for publications sponsored and funded by the school. If a journalism or vearbook advisor decides that a topic (California Prop 8, local immigration issues, even civil disobedience issues that have been in the news) is off limits because the issue is currently very volatile in the community, discussion of the issue is inappropriate and perhaps illegal in student publications paid for by the school. Of course profanity, harassment, discriminatory statements, violence are always off limits in school publications.

Students do retain **some** limited 1st Amendment rights in school-sponsored publications, but advisors, teachers and administrator discretion usually trumps student opinions.

Students have considerably more rights if they seek to provide factual information as opposed to

opinion on controversial issues. A 1988 U.S. Supreme Court case, Hazelwood v. Kuhlmeier is both interesting and informative in explaining student/administrator rights regarding student newspapers. One interesting exception to the general rule of administrative control, a 2007 California appellate court required a showing of "clear and present danger of the commission of unlawful acts on school premises" or substantial disruption, based on statute, prior to censorship of student publications) Smith v. Novato Unified Sch. Dist.)

Where publications are *not* school sponsored (underground newspapers, student emails from home computers), regulations do not defer so readily to administrative concerns. If a school can reasonably forecast substantial disruption or where the publication is obscene, defamatory or invades a person's privacy, reasonable, contentneutral rules are still upheld.