



UTAH SCHOOL LAW UPDATE

Utah State Office of Education

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Did Someone Say Sex?

For several years now, Utah health educators have struggled to provide comprehensive sex education without crossing the hazy line into “advocacy” or “encouragement” of prohibited topics, including contraceptives.

Rep. Lynn Hemingway, D-Salt Lake City, is proposing a new strategy to alleviate some of the fears of health educators.

Current Utah law prohibits educators from “the advocacy or encouragement of the use of contraceptive methods or devices.” Many educators are uncertain what constitutes “advocacy or encouragement,” so shy away from providing students with medically-accurate information.

Meanwhile, according to the Utah Department of Health 62% of unwed mothers who gave birth in 2007 were under the age of 24. Of those, 72% of the 15-17 year old mothers said their pregnancies were unintended.

The Department of Health also found that 57% of new chlamydia infections happened to 15-24 year olds.

For parents who find these numbers appalling, and who want their children to have medically-accurate information about methods to prevent

both pregnancy and sexually transmitted diseases, Rep. Hemingway offers a possible solution.

Rep. Hemingway will sponsor a bill in the 2010 Utah legislative session that gives parents a choice in the health education curriculum. Parents would be able to choose between an abstinence-only curriculum, unchanged from what is currently offered in schools, or an abstinence-based comprehensive reproductive health program. Both programs would emphasize abstinence until marriage, but the comprehensive curriculum would also provide medically accurate, age appropriate information about sexually transmitted diseases, contraceptive methods, instruction in healthy relationships, and skills to help students avoid risky behaviors.

The program anticipates one teacher prepared to teach both the basic abstinence-only curriculum and the enhanced abstinence-based comprehensive curriculum.

A similar dual-track program is already used in North Carolina, with positive results.

Critics of the idea have

primarily expressed concern that schools are teaching sex education at all. This may be a legitimate criticism, but no legislator has yet proposed legislation to repeal the health education curriculum from the Utah Code.

Until the law is repealed, the dual track offers parents a unique opportunity to select their child’s curriculum. While students may be placed in advanced classes, those determinations are based in large part on the student’s academic records. The health education curriculum choice would be left purely to parents.

Rep. Hemingway offered amendments to the health education curriculum during the 2009 session, but the bill died in the Health and Human Services Committee. The 2009 bill did not provide for parent choice in the curriculum.

We hope the 2010 bill will at least earn some rational debate on the merits of providing medically accurate, age appropriate instruction to students as a tool in the battle against teen pregnancy and the spread of sexually transmitted diseases.

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UPPAC CASES

- *The Utah State Board of Education permanently revoked the license of Linda Richins Nef. The revocation results from Nef’s conviction for Attempted Aggravated Sexual Abuse of a Child.*



Eye on Legislation

Federal: The Obama administration is offering “Race to the Top” grants for states to spend on education. To compete for a share of the \$4.35 billion in grants (plus another \$6 billion included in the 2009 budget agreement), states must show efforts to 1) reverse the trend of dumbing down education standards and testing requirements, 2) establish better data on student achievement, including provision for performance pay, 3) provide high quality teachers in high-poverty schools and hard-to-staff subjects, and 4) turn around failing schools, including replacing school staff as needed.

U.S. Secretary of Education Arne Duncan has the discretion to choose winners and losers in the quest for the grants. Currently, the U.S. Department of Education is also considering several factors that would immediately disqualify a state from participating in the grants. These factors include state

laws that prohibit or inhibit “increasing the numbers of charter schools or otherwise restrict student enrollment in charter schools” and any law that acts as a barrier to performance pay. *Source: Christian Science Monitor.*

Ohio: Ohio became the latest of several states trying to cut costs by cutting standardized tests. The Ohio legislature decided to drop 5th grade social studies and 4th grade writing tests for at least the next two years—an estimated savings of \$4.4 million. The legislature is also looking at cutting 7th grade writing and 8th grade social studies tests for an additional \$4.4 million in savings. *Source: Columbus Dispatch.*

Vermont: Vermont recently passed legislation requiring school district superintendents to report educator misconduct to the state Education

Commissioner, or risk losing their educator licenses. *Source: Rutland Herald.*

Texas: Texas, the first state to adopt the “65% Solution” in August 2005, repealed the measure in June of this year.

The 65% Solution, created by Republican strategist Tim Mooney and Utahn and Overstock.com CEO Patrick Byrne, requires school districts to spend 65% of their budgets on expenses “directly” related to the classroom. The definition of directly related, however, does not include special education services, counselors, and school libraries, among other items that have a direct impact on classroom performance. The Texas legislature eliminated the “solution” as part of a larger accountability measure passed and signed into law in June.

UPPAC Case of the Month

For the past several years, the Utah Professional Practices Advisory Commission has made a concerted effort to raise educator awareness of the rules that govern the education profession, and the consequences for violations.

One of the ramifications of this endeavor has been heightened awareness that the Commission exists and accepts complaints against educators. While this has meant better reporting of educator misconduct, it has also led to more retributive reports against educators.

To put it another way, some use the Commission complaint process to assuage their hurt feelings and get a bit of revenge against an educator. This isn’t necessarily a new phenomenon, but it seems to be increasingly popular.

In the past, the Commission would see complaints by parents

against a coach whose winning record was either declining or had been missing in action for too long. Most of the complaints would focus on the educator’s use of foul language on the field or in the gym—language the parent was more tolerant of when his student had ample playing time and the team was winning.

Currently, UPPAC is receiving more complaints against educators about matters that should be resolved on the school or district level. Management style, for example, is not typically a UPPAC matter, unless the manager uses corporal punishment to control students or subordinates.

The Commission attempts to weed these “hurt feelings” complaints out, to the extent that it can. At times, however, the allegations may raise very real UPPAC issues. If the claims are investigated and it becomes clear the

complaint was overblown or the real problem is a personality conflict or experience issue, the matter will be referred back to the school district.

For those wondering if their concerns belong at the UPPAC or district level, the first question to ask before filing a UPPAC complaint should be, “what evidence do I have of a violation of the Utah Educator Standards?” Rumors, hurt feelings, or hunches are not sufficient. Further, if the person filing the complaint has not talked to the educator, educator’s superior, or district office, the complaint process should begin at those lower levels.

Also, read the rules carefully. There is guidance in the rules explaining which violations warrant licensing action and which do not, unless there is a long term history of prior district level discipline.

Recent Education Cases

Garcia v. Puccio (N.Y. 2009). The appellate court dismissed a teacher's defamation claim against his principal on several grounds.

The teacher claimed the principal had called a parent to come and meet with him about allegations the teacher had used corporal punishment, claiming the teacher had used corporal punishment before.

The principal claimed she did not make the statement but did tell the parent there were "problems" with the teacher.

The court dismissed the defamation claim because the only evidence that the principal made the comment was hearsay (the parent told the teacher). The court also found that the principal's admitted statement, that there were problems with the teacher, was not defamatory since it was true. Finally, the court found that the principal's comment was immune from suit because it was the statement of a principal made to a parent "who had a common interest in the subject matter of the conversation."

Doninger v. Niehoff (2nd Cir. 2008). In a case decided by now U.S. Supreme Court Justice Sotomayor, the Second Circuit Court of Appeals upheld a school principal's decision to prohibit a student from

running for class office based on out-of-school conduct.

Doninger sued the principal and district superintendent after she was disqualified from running for Senior Class Secretary as punishment for posting a vulgar and misleading message about a school event on a publicly accessible, non-school blog.

Doninger was one of four student council members responsible for a music festival at the school. The festival was rescheduled several times and appeared to be in jeopardy again. The student council members used a school computer to send a mass email soliciting emails and phone calls to the principal and superintendent in support of the festival.

After receiving "an influx" of messages, the principal advised Doninger that a mass email was not an appropriate way to resolve the issues. She explained that class officers are expected to work cooperatively with administration and she was disappointed that the email contained false information. Doninger agreed to send out a corrective email and did so.

At home that night, however, Doninger posted a blog message calling the administration vulgar names, providing misleading information

and encouraging readers to write more emails to the principal "to piss her off more."

Once the principal learned about the blog post, she decided Doninger could not run for student government again. The Court upheld the principal's decision, noting that Doninger's action not only risked disrupting the efforts to settle the music fest questions, but also interfered with the operation of the school's student government and undermined the values that student government "is designed to promote."

In short, the school could disqualify Doninger from an extracurricular activity where the principal determined that her behavior "was inconsistent with school policy providing that student government should teach good citizenship. . . ."

The court found a **clear** school policy of "civility and cooperative conflict resolution" which Doninger violated. It also found that Doninger was aware of the policy since the principal discussed her expectations of civility and cooperative resolution with Doninger after she and the other students sent the mass email.

Your Questions

Q: We received a call from another school district seeking a referral on a teacher we terminated for cause in May. What can we tell the district?

A: Per state statute, you can provide "any recommendation or information possessed by the school or school district which has significance in evaluating the employment or licensure of a current or prospective school employee, license holder, or applicant for licensing."

What do you do when. . . ?

In other words, you can share factual information and recommendations based on that information. The statute goes on to provide an exemption from civil or criminal liability to anyone who makes such a recommendation about an employee, including, for

purposes of this section of the state law, volunteers.

Q: Why don't you ever talk about special education law in the newsletter?

A: Special education law is an extremely complex area of education law. Because of the numerous, and daily, issues involved in special education, the State Office has an attorney devoted solely to that specialty. Lisa Arbogast is our special education law expert and provides counsel

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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 Law and Legislation 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.

(Continued from page 3)

through multiple formats, including an excellent special education law conference held every August in Ogden (for more information, see the Utah State Office of Education website under Special Education). The conference is co-sponsored by The Center for Technical Assistance for Excellence in Special Education and The Center for Persons with Disabilities at Utah State University.

Specific special education law questions can be directed to Lisa at lisa.arbogast@schools.utah.gov.

Q: How does Utah law, which prohibits homosexual couples from adopting, effect a homosexual couple who legally adopted their children in another state and now plan to move to Utah? The parents both want to have

equal authority to address any issues that may arise at school.

A: Though Utah law prohibits gay couples from adopting, it can't prevent or ignore a legally accepted adoption from another state. In short, you can treat the parents the way you would any custodial parents. As long as they reside in the same house and are both listed as parents on the adoption papers, there is no reason for you to deny one parent access to the student over the other. And just as with other couples, if they can't agree on an issue, you can ask them to work it out, rather than getting yourself into the middle of the match.

Q: We had some parents upset at the prospect that we might show students President Obama's speech regarding education. The parents cited to state FERPA to

say we couldn't show the speech without two weeks prior notice and written parental consent. Is this an accurate reading of the law?

A: No. State FERPA requires prior notice and written parental consent before a teacher discusses the personal political viewpoints of students and/or their families. No prior consent is required for a teacher to show a speech by a current or, for that matter, past President of the United States. Nor is consent required to discuss the speech afterwards, unless the teacher plans to solicit students personal political views.