

## UTAH SCHOOL LAW UPDATE

Utah State Office of Education

May 2010

Inside this issue:

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



#### **UPPAC CASES**

The Utah State Board of Education permanently revoked Melissa Andreini's educator license following her conviction for one count of unlawful sexual activity with a minor.

The State Board suspended Shanel Marie Gray's educator license based on her inappropriate flirtatious activity with a student, including text messaging. Ms. Gray may not apply for a reinstatement hearing until all conditions of the stipulated agreement are satisfied and for at least one year from formal State Board of Education action

### Taking on the Bully

Tragic accounts of students taking their own lives due to harassment and bullying by their peers continue to plague the news. Distraught parents turn to the school for answers.

If the school's answer is inadequate, parents may then sue the school for its failure to protect their child.

Courts have dealt with many cases of bullying, hazing, and harassment. Courts have provided some guidelines for addressing the cases, but who prevails in a particular case is fact specific.

In general, courts agree that a school may be liable for its actions if it "knew or should have known" about harassment and failed to take any action "reasonably calculated" to end the harassment.

Whether the schools actions are "reasonably calculated" to end harassment also requires looking at the cumulative effect of the harassing behavior, not at each incident on its own.

For example, in <u>Patterson</u> v. <u>Hudson Area Schools</u> (6th Cir. 2009), the court found that, while the school's act of verbally reprimanding one of the harassing students was effective as to that student, it did nothing to stop the overall harassment of

Patterson.

Schools are also expected to have solid policies in place to prevent bullying, hazing, and harassment, and to address instances where the conduct occurs. However, a great policy will not shield a school from liability if the policy is regularly ignored or inconsistently administered (if students are disciplined under the policy only if they happen to be from a specific ethnic or racial group, for example).

Schools are also expected to exercise some degree of supervision over students after school hours. If students are in the school building or on school grounds waiting for rides home, the school is responsible for supervising the students. Students who sneak on to campus late at night or on weekends are probably not the school's responsibility, but if the students stay after a school dance, those in charge that evening must ensure that the students leave the campus before the chaperones also head home for the evening.

Instances of cyberbullying outside of the school day are more difficult for schools to control or sanction. However, if the mean emails sent from home on the weekend spill into the school in the form of harassing or bullying comments during gym class, the school can discipline the students for not only the conduct at school, but also the emails from home.

To be actionable, however, the emails from home must also be more than just standard fare nastiness. Emails calling a student fat are probably something a student has to address on their own or with their parents. Emails threatening a student with imminent physical harm are more likely to be emails the school should take action to prevent.

And if the emails and subsequent comments at school are known to teachers, administrators, or counselors, the school must take some action to protect the student from the foreseeable harms that arise from the content/context of the comments.

Bullying and cyberbullying are prohibited in Utah. But ending the conduct requires more persistent and consistent effort than a state law or well-written district policy. It requires changing school culture and climate and parent support.

#### Eye on Legislation

The State Board of Education adopted a new rule regarding district and charter school compliance with Board requirements.

Board rule R277-114 <u>Corrective</u> <u>Action and Withdrawal or Reduction of Program Funds</u> provides procedures for the Board to monitor and take corrective action if districts and charter schools fail to comply with specific requirements or accountability standards in education programs.

Under the rule, which is expected to take effect on May 10, 2010, the Board directs the superintendent, associate superintendents, and directors at the State Office of Education to establish standards for program funding, monitor compliance with the standards and provide regular notice and training to districts on the standards for specific programs.

Districts or charter schools that do not comply with program re-

quirements or financial protocols are to be placed on corrective action plans. The plan will set a time frame for the district or school to correct the identified issues. The office will provide continuing assistance to the district or school under the corrective action plan.

If the school or district is unable to meet the requirements of the plan, the USOE staff person monitoring the school or district's compliance will inform the USOE Internal Auditor. The Auditor will notify the State Superintendent and they will determine whether further investigation is warranted. The superintendent may also recommend to the Board that funding for the program to the school or district be withheld or terminated.

The State Board may then determine whether and to what level funding for the programs should be withheld from the noncompliant school or district.

The rule is currently open for public comment.

The Board has also amended R277-501 Educator Licensing Renewal and Timelines. The amendment clarifies an educator's license status if the educator's criminal background check is incomplete or under review by the Utah Professional Practices Commission. The educator's license is in a pending status until it is completed or the UPPAC review process is concluded. The pending status will be noted in a dialog box on CACTUS, directing the person looking at the CACTUS information to contact the USOE for further information. The license cannot be renewed until the pending status is cleared.

This amendment has been approved by the Board and should be published in the May 1 Utah State Bulletin and become effective 30 days later.

#### **UPPAC** Case of the Month

DUIs, criminal mischief charges and other misdemeanors may appear, at first glance, to be unrelated to an educator's day job, but misdemeanors that end in court probation terms or pleas in abeyance have a significant impact on educator licenses.

The Utah Professional Practices Advisory Committee has consistently held that an educator is incapable of fulfilling his or her role model duty of civic responsibility if the educator is under court supervision for the commission of a crime, regardless of the type or severity of the crime.

The standard also applies even if parents are blissfully unaware that their child's teacher is on a plea in abeyance to criminal conduct.

The State Board rule of Educator Standards is clear:

"The professional educator . . . shall not be subject to a diversion agreement specific to sex-related or drug-related offenses, plea in abeyance, court-imposed probation or court supervision related to criminal charges which could adversely impact the educator's ability to perform the duties and responsibilities of the profession."

A diversion agreement is treated differently from pleas in abeyance and other court probation because a diversion agreement does not involve an admission of guilt. However, a diversion agreement for sexor drug-related offenses will subject the educator to licensing sanctions.

Pleas in abeyance are admissions of guilt. As long as an educator has pled guilty to a crime, even if the plea is not officially entered into the court record, the educator may not continue to hold an educator

license and work in a public school.

If the plea in abeyance involves a lesser criminal offense, such as a driving while impaired charge, a district may choose to put the educator on leave without pay until the license is reinstated, or may find a temporary position for the educator in the district office. The district is not required, however, to find alternate employment for the educator or hold a position for the educator.

Committing a crime and pleading guilty to the crime is a serious breach of educator standards. Educators are role models to their students of proper behavior. Being a law-abiding citizen is an important component of that role model responsibility. Educators who face charges such as DUI should keep in mind that pleading guilty to the crime, or a lesser included offense, will likely result in licensing action.

Utah State Office of Education Page 2

#### **Recent Education Cases**

In Re D.H. (Tex Ct. App. 2010). D.H. was a 16-year old student charged with possession of marijuana in a drug-free zone after a drug-sniffing dog uncovered the drug in her backpack. D.H. moved to suppress the evidence of the marijuana, claiming that requiring her to leave her backpack in a classroom to be searched by the canine was an illegal seizure of her property.

The Court found that the school's use of a drug-sniffing dog, requiring students to leave their backpacks in a classroom while the dog searched the room, and subsequent search of D.H.'s backpack based on the dog's actions was reasonable and did not involve an illegal seizure of D.H.'s property.

The assistant principal accompanied the police officer and canine through several classrooms. The assistant principal informed the teachers of the sweep and asked students in each classroom to leave their belongings and wait in the hall while the officer and canine conducted the search. The dog sniffed the personal items the students left behind.

The dog reacted to D.H.'s backpack. The officer called D.H. into the classroom, read her Miranda

rights, and searched her bag, where they found marijuana.

The court found that the low level of the invasion of D.H.'s privacy from the canine search—having the dog sniff air space around the backpack—was minimal compared to the school's interest in combating a known drug abuse problem at the school.

Chattooga County Bd. of Ed. v. Searels (Ga Ct. App. 2010). The Court of Appeals upheld the termination of a teacher for insubordination. Searels was an 18-year veteran who left a note on the desk of another teacher stating that her special education students could be put in "ANY elective class—no matter how advanced-except PEbecause they cannot do ANY of it anyway. This is just to please the parents." The teacher, who had an autistic child in the school, was highly offended and took the note to the principal. The principal met with Searles and told her to be more careful in all of her comments about students.

Twelve days later, Searles commented to another teacher that a student's "grandmother thinks [the student] is going to be an attorney or doctor or pharmacist, but he will

probably be dead before he is 21.' The student was two feet away from Searles when she made the comment.

Six days after that incident, the principal talked to Searles about violating the school dress code by wearing a too short skirt. When the principal called Searles in, he noticed that she was wearing a shirt which exposed her bra and breasts. The principal advised Searles to cover up and to read the teacher handbook and code of ethics.

Finally, the principal discovered that Searles had taken a student's medication home with her. The principal recommended termination and the district superintendent agreed, sending Searles a notice of termination. The local board upheld the termination at an appeal hearing.

Searles sued, claiming the Board did not have sufficient grounds to terminate her. While a lower court agreed with Searles, the appellate court found more than enough evidence to support Searles' termination for insubordination, willful neglect of duty, and "other good and sufficient cause."

#### **Your Questions**

**Q:** We have received an application for admission from a student who was expelled from his prior school for habitual truancy. May we deny the student enrollment in our school based on that expulsion?

**A:** State law permits any school to deny enrollment for UP TO one year if the student has been **expelled** from another school for safe schools violations.

A "safe schools" violation would include bringing drugs or a

What do you do when. . . ?

weapon to school, "frequent or flagrant willful disobedience, willful destruction of school property, possession of pornography, or other actions that create a disruption to the school or pose an "immediate and significant threat" to the student, personnel, or operation of the school.

Truancy does not fit within these categories. Though it could be

argued that truancy is an example of "frequent and flagrant willful disobedience," truancy must be dealt with under the procedures also designated in state law

Courts have recognized that the best method for dealing with truancy is not to give the student what he wants—a pass out of school—but to use local resources, including the juvenile courts, to coerce the student back to school. Expelling a student for missing school and then

Utah State Office of Education Page 3

Utah State Office of Education

250 East 500 South P.O. Box 144200 Salt Lake City, Utah 84114-4200

Phone: 801-538-7830 Fax: 801-538-7768 Email: jean.hill@schools.utah.gov





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)

denying the student access in other schools would hardly serve the purpose of convincing students to attend school.

Further, truancy is not typically disruptive to the school environment, though it is extremely inconvenient for the classroom teachers. The itemized list of offenses for which a student may be expelled focuses on the overall negative, and perhaps dangerous, impact on the learning environment. Truancy does not have these same effects.

**Q:** If our school drug policy prohibits only "controlled substances," may we take disciplinary action against a student who uses "spice" to get high, causing a disruption in his classroom?

**A:** Yes, though it will not be the same level of action that you could take if the policy were broader.

"Spice" is a new problem for schools. It is an herbal incense students have learned gives a high similar to marijuana if smoked. The incense is sold in stores under many names, including "K2," "Spice Gold," "Spice Diamond," "Yucatan Fire," "Black Mamba," and "Genie." It may come packed in a small foil packet and is a leafy substance, not an incense stick or cone.

While it is not a controlled substance, and will not show up on drug tests, spice does pose similar dangers to students as marijuana and can and should be banned from school campuses.

In the meantime, you can discipline the student for his disruptive behavior. While you couldn't suspend or expel the student, as you might consider doing with a controlled substance, you can put the student on notice that any further use of any mind-altering substance will result in suspension or expulsion and place the student on probation with strict requirements that he not use, possess, or offer spice, or other mind-altering substances, to his fellow students.

All schools and districts need to

consider changes in their policies that will cover spice and any other common household items that have similar mind-altering properties and which students may use to

get a high, such as "huffing" aerosol cans, sniffing glues, etc.