

Sept. 3, 2015

Carol Lear, Heidi Alder, and Erin Preston, the Education Law Group of Lear & Lear,



Inside this issue:

Educator Evaluations	1, 2
Surveillance Cameras and FERPA	2
To Discipline or Not to Discipline	3
Back to School Q&A	3
Lear & Lear Ethics Training	4

# Education Law Newsletter Back to School

## Educator Evaluations



Educator evaluations are not new to Utah’s education system. Most districts have had evaluation programs in place for years. With the adoption of SB64 in 2012, certain requirements regarding evaluations of educators were codified, namely: (1) a local board shall require that the performance of each school employee be evaluated annually; (2) that a summative evaluation result in four differentiated levels of performance; and (3) that the State Board will establish a framework for the evaluation system that requires summative evaluations and includes student learning growth and stakeholder input. Also, the legislation implemented reporting requirements that had not been mandated previously.

Since 2012, the USBE has been working to establish a framework with specific guidelines, requirements and procedures for evaluation systems. State Board Rule 277-533, not yet effective, but expected to pass on third reading this month is the result of the Board’s efforts and the governing regulation for districts’ evaluation systems. While the rule breaks down the detailed requirements

for each of the 3 mandatory components (performance, student growth, and stakeholder input), it also provides requirements of what evaluation systems are expected to look like overall. The following is a summary of these requirements, with our suggestions for areas of policy implementation.

Pursuant to R277-533, overall, the evaluation systems should:

- Be *reliable* and *valid* (Each District’s program must be validated according to accepted validation standards.)
- Include 4 differentiated levels of performance (Not effective, Emerging/Minimally effective, Effective, and Highly effective)
- Include systematic evaluation procedures for both provisional and career educators (Districts should have these procedures spelled out in policy, and they should include 2 evaluations/yr for provisional teachers a 1/yr for career.)
- Base ratings on *at least* the following 3 components: professional performance, student growth, and stakeholder input. (This and the required

weight of each component should be laid out in policy.)

- Require regular conferences between the educator and the evaluator
- Provide a process for educators to contribute additional information to inform their rating at several intervals throughout the process (Districts should have policies in place that identify what type of information will be accepted and how that information will affect the educator’s rating.)
- Measure an educator’s professional performance when the educator is working in a professional capacity
- Provide a process for educators to analyze stakeholder input and data related to performance, develop appropriate responses to the information, and determine how to calculate the educator’s response to stakeholder data in the rating (Districts should have policies in place that specify when and how an educator can analyze this



*Surveillance videos are “student records” under FERPA according to the Utah Court of Appeals*



**"Your evaluation will be based on what you do in the next thirty seconds. Go!"**

## Surveillance Cameras and FERPA

The Utah Court of Appeals issued a ruling earlier this summer that surveillance cameras as used and maintained in Canyons School District, are student records under FERPA. Bryner v. Canyons School District, 2105 UT App 131. This means a request to view a video from a surveillance camera requires consent from the parents of all the students in the video, or the blurring out of all identifiable features of the other students in the video before releasing it to a parent.

The case began 3 years ago when Mr. Bryner's child was involved in an altercation with other students outside of a classroom in Butler Middle School. A surveillance camera recorded the incident and Mr. Bryner filed a GRAMA request for a copy of the video. The District denied the request on the grounds that the video was an "education record" under FERPA and unless all the parents of the other students in the video consented to a release of the video, it could not be produced to Mr. Bryner. Bryner filed a complaint in state court arguing that the video was not an education record and must be disclosed under GRAMA.

The trial court ruled that Bryner could have a redacted copy of the video if he paid the money to blur out all the identifiable features of other students. Bryner appealed. The Utah Court of Appeals held that the video is an education record as defined by FERPA, rejecting the argument that because the record is "nonacademic in nature" it is "therefore not the type of record FERPA was meant to protect." Instead the court found that a plain reading of FERPA suggests that Congress intended to define education records to be broad in scope. Because the video contained information directly related to students and because the video was maintained by persons acting for the district, it qualified as an education record. While the court did not discuss how the record was maintained exactly, it is clear that if a surveillance video is maintained by a school or district or by an entity who is maintaining it on behalf of the school or district, it likely meets the "maintained" prong of the definition of an education record. It is therefore protected under FERPA.

## Educator Evaluation, Cont.

information, when and how responses to this information are to be submitted by the educator, and what will be done with the responses.)

- Includes measurable, actionable, and written responses regarding needed improvement and a recommended course of action. (Districts should have a policy for providing plans of improvement.)
- Includes multiple observations
- Provides a description of the methods for gathering, using, and protecting data.
- Provides a process for educators to request a review of their rating. (Districts should have a policy for the review process if an educator is unsatisfied with the educator's rating.)

stakes of these evaluations for educators are not insignificant. Educators receiving low ratings will likely seek a review of the rating, at so at the very least, a good policy for reviewing the rating is essential to protect districts. A good policy will spell out the procedures and timelines for requesting a review (to whom is the request to be made; for what issues; who will cover the cost of an outside rater if necessary, etc.) These and other details will help districts address requests for review in an objective, consistent and systematic manner that will protect them from allegations from unsatisfied educators.

**For a sample Educator Evaluation Policy that can be adapted for your district, visit our website at <http://leareducationlaw.com/services-2/newsletter/>**

Because SB 64 also includes a provision for performance pay beginning in 2016-2017, the

## To Discipline or Not to Discipline for Off Campus Online Threats

An August 2015 en banc 5th Circuit Court of Appeals decision in Taylor and Dora Bell v. Itawamba County School District both furthered and complicated disciplining students and employees for online activity. In December 2010, Taylor Bell, an 18 year old aspiring rapper and a senior in Itawamba School District in Mississippi, composed and recorded a rap song about some female students' complaints that two of the male coaches at the high school were sexually harassing them. He said he believed if he wrote and sang about the incidents, someone might hear his song and do something about the teacher-on-student harassment. The resulting song was raunchy, included foul language, and freely used disgusting words

and phrases. It also defamed the coaches. Bell wrote the song during the Christmas holidays, using his own equipment and resources. After Christmas, Bell uploaded the song to his Facebook page where it was available to his Facebook "friends," and later uploaded the song to YouTube, he said targeting recording companies.

Following a disciplinary hearing, Bell was sent to the district alternative school for the balance of the 9-week grading period and excluded from school activities. The Committee concluded that Bell's song "... did threaten, harass and intimidate employees in violation of School Board policy and Mississippi State law." No one claimed there was an actual threat or

disruption. Bell sued the school district.

The question posed by the 5th Circuit was whether, consistent with the requirements of the 1st Amendment, student initiated off-campus speech directed intentionally at the school community and reasonably understood by school officials to be threatening, harassing, and intimidating to a teacher satisfies the almost 50-year old Tinker v. Des Moines standard for restricting student speech, based on a reasonable forecast of a substantial disruption. The 5th Circuit, unlike most previous lower and circuit decisions, determined it did, and upheld Taylor Bell's suspension to an alternative placement. This is one of the first decisions upholding student disciplinary action for online speech targeting adults.

## Back to School Q&A

**Q:** It seems that more and more neighbors are choosing not to enroll their 5-year old boys, especially those with summer birthdays, in kindergarten? Shouldn't these children be in school?

**A:** Utah's compulsory education age begins in the year a child turns 6. This means that 5 year olds (in Utah) are not required to enroll in school. HOWEVER, this does NOT mean that kindergarten is an optional grade. Public school districts must offer K under Section 53A-3-402.7 (and charter schools must offer the grade level consistent with

their charters), but students are not required to attend school in the traditional kindergarten year. Schools may require students to begin in kindergarten when they enroll in public school for the first time.

**Q.** If a student seeks to be enrolled part-time in kindergarten, and part-time in a private school, how does that work for purposes of funding? What if the student's parents want the student to attend kindergarten and the private school alternatively every other week?

**A.** Unless the student is in all-day kindergarten, a kindergarten student receives 1/2 a WPU. Where the student is enrolled part-time, the student would qualify for 1/4 of a WPU. While an every other week arrangement may not be in the best interest of the student, it is ultimately the parents' decision and as long as the student does not miss ten consecutive days of school, the student may be counted to the extent of enrollment for purposes of funding.

**Q.** If parents of a 9th grade student ask that the 9th grade student be held back, what are

the school's obligations to accommodate that request?

**A.** While the Parental Rights in Public Education bill sponsored by Senator Osmond in 2013 allows parents the right to request reasonable accommodations with regard to retention of students, the law only refers to students in K-8. Districts may certainly discuss with parents the best interests of the student, but the statutory rights of parents to request retention applies only to K-8 students.



The Downey Mansion  
808 E. South Temple St.  
Salt Lake City, Utah 84102

Phone: 801-883-8001  
Fax: 801-538-5001  
E-mail: heidi.alder@learlaw.com



Carol Lear, Heidi Alder, and Erin Preston are pleased to announce their affiliation as of counsel with Lear & Lear, LLP to provide Education Law services to school districts, charter schools and other public education-related entities. Our services include:

- Prompt and cost effect responses to everyday legal questions and issues
- LEA/school policy and contract review
- School facilities, construction and financing issues
- Hearing officer services
- Employee questions and issues
- Training for educators and for students



## Lear & Lear Teacher Ethics Training

Since January, 2013, there have been no less than 14 cases of educators accused of sexual misconduct with students. In the 2015 legislative session, H.B. 345 "Educator Abuse Policy" sponsored by Sen. McCay, received a great deal of attention from other legislators and the media. The public is fascinated—and disgusted—by the stories of teachers who become sexually involved with students. It is such a captivating tale that Brianne Altice is making headlines throughout the world.

Though these cases represent a very small percentage of Utah educators, the notoriety of these cases does not help build the

perception of professionalism in education.

While at the State Office of Education, Heidi and Carol saw many of these and other similar cases. The fact is, most of these cases do not involve child predators or pedophiles. Of the 14 cases in the last 2.5 years, only 2 involve children younger than 12. Most of these cases involve decent educators who have good rapport with these older students, but who first lack appropriate boundaries and then lack serious judgment.

Rather than more laws aimed at reducing inappropriate teacher-

student relationships, (Sen. McCay's bill does very little more than what is already being done to keep sexual predators out of the classrooms), professionalism and boundary training is a much more effective way to prevent not only the sex conviction cases that make headline news, but all boundary violations.

In consultation with psychologist Dr. Val Hale, Lear & Lear has developed a 90 minute training based on Carol's and Heidi's collective 30 year experience reviewing and investigating educator boundary cases. The training is designed to helping school employees understand appropri-

ate boundaries and professionalism in a meaningful and engaging presentation. The training includes real life examples of misguided teacher-student relationships and encourages all employees to be introspective about their own vulnerabilities when it comes to their relationships with students.

If you are interested in a training for your District or a school in your District, please contact us for more information and for references from those who have received this training.