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State Capitol North, 325 Don Gaspar, Suite 200  
Santa Fe, New Mexico 87501  
PH: (505) 986-4591 FAX: (505) 986-4338  
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October 17, 2006

**MEMORANDUM**

**TO:** Legislative Education Study Committee

**FR:** David Harrell

**RE: STAFF BRIEF: REPORTING SCHOOL EMPLOYEE MISCONDUCT**

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The 2006 interim workplan of the Legislative Education Study Committee (LESC) includes a presentation on the reporting of ethics-related misconduct by school employees.

**Issues:**

A recent issue of the journal *School Superintendent's Insider* provides this description of the situation addressed by this staff brief and this presentation:

If an employee in your school faces charges of inappropriate contact with a student, you may be tempted to get rid of the employee without a fight in return for giving him a good reference. This practice . . . unfortunately, is still common in districts around the country.

Although the instance seems infrequent, there have been occasions in New Mexico when school districts have forced the resignation of a licensed employee under pressure or allegations of improper conduct, particularly with students, with the understanding that the district will not reveal the circumstances and the employee will not file legal claims against the district.

- According to one legal analysis, “[a] typical agreement calls for a district to provide only the basic facts of an employee’s work history for prospective future employers, with no mention of any reason why the employee resigned” – what this source calls “neutral” or “no comment” references.

- While such arrangements may protect the first school district from the employee, they can put subsequent school districts in jeopardy. As the Public Education Department (PED) explains, such confidentiality agreements “keep PED and future potential employers in the dark about such allegations” and prevent PED from gathering pertinent evidence during investigations.

The dilemma, to use a phrase from PED’s Standards of Professional Conduct, is the “delicate balance between confidentiality and the right to know.” Furthermore, an examination of the issue requires an awareness of certain components.

- Perhaps the most fundamental component is the sort of misconduct that warrants resignation or discharge and then reporting.
  - As far as PED is concerned, the misconduct could be any of those actions enumerated in the department rule regarding standards of professional conduct, either under Standard I, duty to the student, or under Standard II, duty to the profession.
  - In the first case, the offenses range from exploiting or unduly influencing students into illegal or immoral acts to offering gifts to certain students but not others, which, according to PED, is a tactic often employed by sexual predators.
  - In the second case, the offenses encompass such actions as misrepresenting one’s professional qualifications, accepting a gift that would compromise the educator’s integrity, and breaching test security.
  - Recent incidents in New Mexico have included a high school coach alleged to have had sex with a student, an elementary teacher accused of sexually molesting several students, and a high school teacher fired for battery against a student. In each case, the misconduct at the previous district was said to have been unknown at the time the employee was hired at the subsequent district. The case of the elementary teacher in particular has resulted in multiple lawsuits and costly settlements – not to mention the harm done to the students involved and their families.
- Another component is the dimensions of liability.
  - Among these concerns are the liability that the first employer might feel over a negative employee reference, the liability that the first employer would incur if he allows a predator to remain in the system, and the liability of the second employer for hiring a troubled staff member, whether the background was known or not.
  - On this point, incidentally, a New Mexico law firm that often represents school districts notes that the firm “sees far fewer claims or threatened claims from former employees who have received an unfavorable reference or recommendation than [it does] from attorneys for employees or students claiming that the school district failed to adequately check references and screen out potential bad apples.”

- Also on this point, *School Superintendent's Insider* notes that, as long as reference letters are factual, a former employee “has little chance of winning a defamation lawsuit . . . even when the truth can be construed as disparaging.” This source also advises a four-step process for dealing with allegations: investigate, suspend the employee with pay during the investigation, terminate the employee if the allegations are true, and give truthful employment references thereafter.
- Yet another point of concern is the reporting requirements themselves. For example, at what point should a report be filed and to whom: PED only, school districts statewide, or some statewide or even national database? How long and by whom should the report be maintained?
- On a broader scale, such incidents, when they become known, tend to cast aspersions on the education profession as a whole. In the case of a sexual predator, for example, who leaves one district under undisclosed circumstances only to gain employment and molest students in another district, parents and the public at large may question the integrity of each district’s personnel policies and perhaps wonder about the suitability of other educators.
- Finally, while protecting children must be paramount, the civil and due process rights of the accused must also be respected. In this regard, there is the prospect of damage to the reputation of the employee and his or her chances of future employment if some personnel action is taken on the strength of allegations alone or, even worse, if the allegations are eventually found to be untrue.

As explained more fully under “Background,” below, current provisions in state law and PED rule already address circumstances similar to those presented in this staff brief, but they seem not to cover these particular circumstances.

The 2006 Legislature attempted to address this issue with Senate Bill 473, *Require School Employee Misconduct Reports*.

- As it was amended, this bill would have required a local superintendent or charter school administrator first to investigate allegations of unethical conduct by licensed school employees and then, if there were proof of wrongdoing, to report to PED the identity and circumstances of a licensed school employee who “resigns, is removed from or otherwise leaves school employment.”
- The bill also required PED to provide the reporting forms, and it required school districts and charter schools to transmit the originals to PED and not to keep copies.
- The original version of the bill contained a clause that this reporting requirement applied regardless of any settlement agreement containing a confidentiality provision, but one of the amendments deleted that clause.

## Background:

To some extent, PED rules already in place – and in the process of being revised – address the issue of reporting unethical conduct by school employees.

- In one section of the Code of Ethical Responsibility of the Education Profession, PED states its authority to revoke, suspend, or deny a license to any person “who after [a] hearing, is found to have failed to comply with one or more of the enumerated provisions of the standards of professional conduct.”
- In another section, PED requires each school superintendent to provide written notification to the director of the licensure bureau after taking final action to discharge or terminate an employee based in whole or in part on a violation of the standards of professional conduct.
- However, the first clause presumes PED’s awareness of an incident, which confidentiality agreements might prohibit; and the second would not apply to resignations under a cloud. Moreover, these rules lack the force of law, of course.
- Even closer to the point is a requirement in the PED rule for denying, suspending, or revoking a license:

Every local school superintendent or the person designated by the governing authorities of state agencies, private schools or charter schools shall provide written notification to the director of the ethics bureau upon acquiring knowledge of purported facts reasonably believed . . . to constitute grounds for suspension, revocation or other disciplinary action against an educator or administrator license. At a minimum, the written notification shall include the name and address of the licensed individual, the personnel action taken by a school district, if any, and a statement of reason for the action.

- Yet, as explicit as it is, this requirement does not necessarily negate the terms of a confidentiality agreement, and, like the other rules, it lacks the force of law.

The related provisions in law apply only in cases of actual convictions of felonies or misdemeanors involving moral turpitude of a licensed school employee that result in any type of action against the employee.

- Under penalty of having his or her own license suspended or revoked, a local superintendent must report such a conviction to PED.
- There is also in the *School Personnel Act* protection against liability of the superintendent who makes such a report in good faith; and employment law provides a similar immunity from liability for employers in general who, when a reference is requested, act in good faith in making comments about an employee’s job performance. Moreover, in each of these cases, there are exceptions for negligent, deliberately false, or malicious reporting.

Finally, this issue first came to the attention of the LESC during the 2003 interim, when the committee heard testimony from the School Safety Task Force in response to three memorials from 2003 to examine and enhance public school safety. One of the points raised in this testimony was PED's concern over the practice of some school districts of discharging an employee accused of certain offenses, like sexually molesting students, and then agreeing with the employee not to report the allegations either to PED or another employer. Although the presumption of innocence is an important legal premise, PED testified at the time, if an incident is serious enough for an employee to resign or be fired, notice should be given.

**Presenters:**

For this presentation:

- Mr. Willie Brown, General Counsel, PED, will offer the department's perspective on the issue, including a review of recent cases, proposed revisions to department rule, and PED's recommendations for amending statute;
- Mr. Sammy Quintana, Executive Director, New Mexico Public School Insurance Authority, and Ms. Julie Garcia, Director, Poms & Associates, Inc., will discuss liability issues and costs; and
- Ms. Christine Trujillo, President, AFT New Mexico, will offer the employee's perspective on the issue.

**Questions the committee may wish to consider:**

1. Given the likelihood that PED does not learn of every instance of unethical conduct, what is the department's estimate of the frequency of discharge-related confidentiality agreements?
2. Do the incidents of unethical conduct by school employees, whether reported or not, seem to be increasing or decreasing?
3. To what extent and in what ways do the policies of local school boards address the issue?
4. To what extent do teacher preparation programs and professional development activities address ethical conduct of school employees?
5. What legislation, if any, is needed to address the problem?
6. In what ways, if any, have the publicized incidents of previously undisclosed unethical conduct affected morale at public schools or public perceptions of public schools?
7. How often have school administrators acted on the basis of allegations of misconduct that ultimately were proved to be unfounded?