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Educator Sexual Misconduct and Nondisclosure Agreements: Policy Guidance from Missouri's *Amy Hestir Student Protection Act*

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Abstract

When faced with allegations of sexual misconduct, districts may be tempted to enter into a settlement or non-disclosure agreement with alleged perpetrators in exchange for a resignation (Mawdsley and Permuth, 2003: Walker 2012). The non-disclosure settlement agreement usually limits how much information the district can share with other school districts. This process, called "*passing the trash",* can be particularly troublesome (Gibbs and Vergon, 2010). Missouri's *Amy Hestir Student Protection Act* provides policy guidance regarding non-disclosure agreements when allegations of educator sexual misconduct arise.

Keywords: "sexual misconduct", "Amy Hestir Student Protection Act", Title IX, "sexual grooming", non-disclosure agreements, district liability, certification revocation

The topic of educator sexual misconduct has recently received increased scrutiny by news media as well as a variety of publics, most notably state legislative bodies. However, current national studies of educator sexual misconduct are sparse. Most reports come from newspapers (Knoll, 2010). For example, in 2007, an Associated Press investigation found 2,570 educators nationwide had their teaching credentials revoked, denied, surrendered or sanctioned for sexual misconduct with a student during a five-year period spanning 2001-2005 (Tanner, 2007 November 5). More recently, officials in the Los Angeles Unified School District have referred 604 teachers from the past four years to state authorities for possible licensure revocation

(Martinez and Hurtado, 2012). Of these 604 cases, 60 educators were accused of sexual misconduct with students.

For this article, we use the term "educator sexual misconduct" to include a wide range of behaviors including, but not limited to, sexual innuendo, inappropriate touching, inappropriate text messaging, email, or social media contact with a student, soliciting sex from a student, or sex with a student. The term "educator" not only includes classroom teachers but also administrators, coaches, counselors, and tutors (West, Hatters-Friedman, and Knoll, 2010).

Shakeshaft (2013) identifies two types of abusers: those who focus on children under 13 and those who target middle or high school students. Each of these types of abusers uses different approaches and "grooming" techniques, which will be discussed later. For this article we will focus only on the middle and high school abuser.

Secondary school abusers may be average or excellent teachers with boundary and judgment problems (Shakeshaft, 2013). Most secondary school abusers are what Shakeshaft (2013) terms as *opportunistic*. The opportunistic abuser tends to spend significant amounts of time around groups of students, flirting with selected students, inappropriately commenting on their attractiveness, and ultimately taking sexual advantage of the situation. Most secondary abusers are male and target female students. Females target older boys or girls and make themselves sexually available for consensual sexual activity (Knoll, 2006: Shakeshaft, 2013; West, Hatters-Friedman, and Knoll, 2010).

The story of Amy Hestir is illustrative of the problem of educator sexual misconduct in middle and high schools. According to her testimony before a Missouri House education subcommittee, Amy Hestir was sexually abused by a popular high school coach starting at age

12. He groomed her by giving her cards, gifts, and hiring her to babysit his daughter. She did not consider the relationship to be abusive until she tried to end it and he sexually assaulted her. Like many sexual abuse victims, she did not reveal the abuse while it was happening. Ten years later she did tell, but prosecution was not an option, as the statute of limitations had passed. Hestir alleged that the offending teacher was investigated for child sexual misconduct in another Missouri school district. According to her testimony, he remains employed as a teacher, presumably in Missouri (MissouriNet, 2008).

Amy Hestir is not the only victim of educator sexual misconduct in Missouri. From April 2011 to March 2012, the Missouri State Board of Education voted to revoke the teaching certificates of 10 middle school and high school teachers for sexual misconduct (Missouri Department of Elementary and Secondary Education, 2012). Charges ranged from sexual intercourse with a student to inappropriate emails, text messaging, and, in one case, the solicitation of sex from a student. It should be noted that these are only those educators referred to the State Board for licensure revocation. It is logical to assume that these 10 Missouri educators probably only represent the "tip of the iceberg" and are a symptom of a much deeper problem.

Some evidence indicates educators who engage in sexual misconduct are serial stalkers or predators who, if given the chance, will continue to engage in sexual misconduct with unsuspecting students (Gibbs and Vergon, 2010; Walker, 2012). The predator-educator often seeks out and grooms needy students. The act of grooming is a carefully planned and deliberate approach designed to initiate and maintain a sexual relationship with a student (Knoll, 2010). Predator-educators typically uses teaching, advising and coaching to lure their victims into a sexual relationship. In order to keep from being discovered, they will use the threat of blaming

the victim. At times, school faculty will be supportive of the accused educator. For example, Shakeshaft (2013) reports that, in one school, faculty rallied around an accused teacher, wore armbands in support of their colleague, collected money for his defense, and blamed the victim for engaging in inappropriate sexual behavior. These actions continued even after the teacher admitted to the sexual abuse. This kind of faculty behavior has a devastating impact on the victim and should never be tolerated.

To make matters worse, predator -teachers have been allowed to transfer from school-to-school (Shoop, 2003). This process, called '*passing the trash*,' can be particularly troublesome (Gibbs and Vergon, 2010). When faced with allegations of sexual misconduct, districts may be tempted to enter into a settlement or non-disclosure agreement with the alleged perpetrator in exchange for a resignation (Mawdsley and Permuth, 2003: Walker, 2012). The non-disclosure settlement agreement usually limits how much information the district can share with other school districts. These agreements effectively allow the person to be employed in other districts where she or he is free to sexually abuse other students.

School District Liability

From a legal standpoint, educator sexual misconduct presents significant potential liability issues for school districts. The U. S. Supreme Court has established that students who are victims of educator sexual misconduct may recover monetary damages under Title IX from the district when 1) a school district official who at a minimum has authority to institute corrective measures has actual knowledge of allegations of sexual misconduct and 2) the school official is *deliberately indifferent* to the allegations of sexual misconduct (*Gebster v. Lago Vista Independent School*, 1998). Deliberate indifference may be defined as 'turning a blind eye' to allegations of educator sexual misconduct. For example, Shakeshaft (2013) reports that awards

or settlements for school district indifference to allegations of educator sexual misconduct may range from hundreds of thousands of dollars to millions of dollars. Therefore, Title IX requires districts to reasonably and promptly respond to allegations of sexual misconduct (Walker, 2012).

In addition to Title IX, all fifty states and the District of Columbia have laws that require school officials to report suspected or alleged sexual misconduct to state child protection agencies (Nance and Daniel, 2007). According to Nance and Daniel (2007) most courts hold school officials civilly liable when allegations of educator misconduct are known and school officials fail to report the allegations to the proper child protection agency within the time frame specified by state law. For example, the Ohio state Supreme Court has held that school officials can be held civilly liable when they fail to report alleged sexual abuse to the proper child protection authorities and that educator subsequently abuses another student (Nance and Daniel, 2007). It would also seem that school officials who fail to report may be held criminally liable for breaking state law. It is important to note that most school district insurance policies protect school officials from civil liability only. Therefore, any criminal charges would not be covered by school district insurance, and all attorney fees would be the responsibility of the district employee.

Settlement or non-disclosure agreements

When we allow employees to resign in exchange for an agreement not to disclose alleged sexual misconduct we are presented with a different legal problem. This is especially true when an employee accused of sexual misconduct enters into a settlement agreement, is hired by another district, and sexually abuses another student. In these cases, sexually abused students may bring a cause of action under section 1983 of the Civil Rights Act of 1871 as well as Title IX (Nance and Daniel, 2007). However, there is a lack of consistency among courts with respect

to how much duty school officials owe to other school districts seeking references on potential employees with respect to disclosing substantiated allegations of sexual misconduct. (see *Shrum v. Kluck*, 1991; *Randi W. v. Muroc Unified School District*, 1997; *Davis v. Bd of County Commissioners*, 1999; and *Doe 2 v. McLean County School District*, 2010 as examples).

Missouri's *Amy Hestir Student Protection Act*

Several states have recently addressed some of the problems associated with educator sexual misconduct. For example, a Texas law signed in 2011 requires superintendents to complete an investigation of alleged sexual misconduct even if the educator in question resigns before completion of the investigation. A New York law signed in 2008 provides for the automatic revocation of a teaching certificate after conviction of a sex offense. A Mississippi law signed in 2011 adds to the grounds for revocation of licensure for fondling a student or engaging in any type of sexual involvement with a student (Education Commission of the States, 2011). However, Missouri's *Amy Hestir Student Protection Act* (SB 54, 2011) is the first statute in the nation to effectively address the problems associated with investigating alleged sexual misconduct, non-disclosure agreements, and civil liability protections for school officials by enacting the following statues:

- School districts are mandated to adopt a policy to address allegations of sexual misconduct by a teacher or any school employee. Reports will be investigated by the Division of Social Services to determine whether or not the allegations should be substantiated. Districts may investigate the allegations but the findings are to be used for employment purposes only (RSMo 160.261).
- By July 1, 2012, all school districts in Missouri must adopt a written policy relating to information that the district will provide about former employees (certified and non-

certified) to other public schools. School district representatives, acting in good faith and pursuant to district policy, responding to requests for information regarding former employees are granted civil immunity (RSMo 162.068).

- School districts may be civilly liable for failure to disclose information about an employee who was dismissed or resigned due to substantiated allegations of sexual misconduct to a subsequent employing district. The district shall reveal findings of substantiated allegations on any former employee to any public school district that inquires. Any employee, who, in good faith, reports another teacher, shall not be terminated or discriminated against as a result (RSMo 167.068). This section effectively eliminates non-disclosure agreements.
- By March 1, 2012 school districts must have a policy regarding the use of electronic media and other mechanisms to prevent improper communications between staff members and students (RSMo 162.069).

Implications for Policy and Practice

Educator sexual misconduct may be far more common and pervasive than many may realize (Gibbs & Vergon, 2010; Kent 2006). For example, in one of the few national studies of educator misconduct, Shakeshaft (2004) reported that nearly 10% of students nationwide are the victim of educator sexual misconduct sometime in their K-12 school career. However, many school administrators and school board members do not believe it will happen in their school, to their students (Kent, 2006). Unfortunately, they are wrong. Even if district administrators are vigilant and do all the right things, educator sexual misconduct can happen in any school. *Missouri's*

Amy Hester Act provides the following guidance for school district policy and practice to address educator sexual misconduct.

- School districts should have clearly articulated policies that define sexual misconduct and outlines unacceptable behaviors.
- Policy should clearly state that any allegations of misconduct automatically trigger an investigation.
- Policy should outline what information will be provided to other potential public school employers requesting a reference regarding a former or current employee. It should be clear in policy that the district will notify the potential school employer if the past or current employee was terminated, non-renewed, or allowed to resign in lieu of termination as a result of substantiated allegations of sexual misconduct that will be provided to other districts.
- Policy should clearly outline the district person or person authorized to provide references to potential school employers requesting information on a current or past employee of the district.
- Policy should specify examples of physical and emotional boundary-crossing behaviors. Examples may include being alone with a student in a locked or dark room, associating with students outside the school day in social situations, and communicating with students about sexual topics verbally, text messaging, and/or social media.
- Policy and practice should prevent the use of settlement agreements. Boards of education are held to a 'preponderance of the evidence' standard (defined as it is

more than likely an accused educator did cross professional boundaries with a student), rather than the stricter beyond a reasonable doubt standard of criminal trials.

- Annual training for all employees should be mandatory. The training should include at a minimum examples of symptoms of sexual abuse in students, indications of boundary crossing by educators, and reporting requirements.
- Policy and training should provide clear guidelines on how students, parents and others may report alleged educator misconduct

Finally, the most important message from statutory and case law to school districts, superintendents, and principals regarding sexual misconduct is very clear. When faced with any kind of notice of abuse by an employee, the district *must* act. School authorities must take prompt, careful action to follow district policy, investigate the circumstances, confront all parties, preserve confidentiality, and document the incident carefully in the employee's file. Districts should involve local police and state agencies in the investigation according to district policy and state law. Lastly, districts need to take particular precautions to protect the student/ victim and any others who reported the alleged abuse.

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