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Letters of Recommendation: Honesty Remains the Best Policy

By Charles J. Russo, J.D., Ed.D.

The Supreme Court’s unanimous decision in Franklin v. Gwinnett County Public Schools (1992) stands out as the first case in which the Court recognized a student’s right to sue a teacher and the school board under Title IX after being sexually abused. Franklin has led to a significant amount of litigation in which boards were liable for teacher sexual abuse of students. Subsequently, in Gebser v. Lago Vista Independent School District (1998), the Court clarified that if school officials were unaware of teacher sexual abuse of students, they could not be liable.

Amid concerns over teacher sexual abuse and other misconduct involving students—although involving a very small percentage of educators—boards should strengthen their policies for evaluating the qualifications of potential teachers, including those with experience, by requesting letters of recommendation after they complete initial state-mandated criminal background checks. As crucial as letters of recommendation are in the hiring process, litigation demonstrates that some education leaders fail in their duty to safeguard children from sexual predators. Cases arose when officials provided undeserved positive reference letters for teachers who engaged in sexual misconduct with students—teachers who moved on to other school systems where they again misbehaved. In those cases, students and their parents sued education officials in the sending districts for providing essentially false references, thereby highlighting the need to have policies in place that require letter writers to be truthful and forthright.

In light of the need to ensure that school boards protect children from teachers who may threaten their safety, the remainder of this column reviews cases wherein parents sued school boards alleging that officials failed to complete adequate background checks of teachers. Then, it offers recommendations for school business officials (SBOs), their boards, and other education leaders as they work to devise policies on letters of recommendation.

Disputes have been litigated over undeserved positive reference letters that officials wrote for educators who misbehaved with students before moving to new jobs where they continued their misdeeds. In controversies from California and Illinois, respectively, the courts allowed cases to proceed when students and their parents sued educators and their boards. In other words, although the appellate courts were not asking to resolve the underlying factual disputes about liability because they were reviewing dismissals of the claims, they permitted the cases to go forward.

The upshot is that those courts support the proposition that boards can be liable for the harm caused by their former employees if officials fail to disclose the truth in letters of recommendation.

Randi W. v. Muroc Joint Unified School District

In a case of first impression, Randi W. v. Muroc Joint Unified School District (1997), the California Supreme Court reasoned that school boards may be liable for knowingly providing undeserved positive recommendations for employees who moved on to harm children in different districts.

When officials learned that an assistant principal engaged in sexual misconduct, they willingly wrote him a favorable letter of recommendation in exchange for his resignation. The administrator then relied on the letter that contained “undeserved and unconditional praise” (p. 584) to obtain a similar position in another district. In the assistant principal’s new job, he touched a 13-year-old inappropriately while she was in
his office, leading her and her mother
to sue him and both school boards.

The California Supreme Court
affirmed an earlier order reinstating
the mother’s claim, explaining
that officials who provide letters of
recommendation have a duty not to
misrepresent key facts by offering
“half-truths” when describing the
qualifications and characteristics of
individuals lest harm befall the chil-
dren in their care.

In a related issue, an appellate
court in Ohio affirmed an order
voiding a settlement agreement
between a school board and a
teacher who resigned in exchange
for its promise not to disclose infor-
amation about his pedophilia (Bow-
man v. Parma Board of Education
1988). The court rejected the argu-
ment by the teacher’s estate (the
teacher committed suicide when
his actions were disclosed) that the
board breached its covenant of non-
disclosure. The court determined
that insofar as the separation agree-
ment purportedly prohibiting the
board from disclosing the teacher’s
pedophilia to officials in the district
where he was later employed was
void as violating public policy, it
could not serve as the basis for a
breach of contract action.

**Shrum ex rel. Kelly v. Kluck**

In the only case in which a teacher
and officials escaped liability, the
Eighth Circuit affirmed that a mother
in Texas could not sue a school board
in Nebraska for entering into a con-
fidential settlement agreement with
the educator who molested her son.
After the teacher allegedly molested
the child, officials in Nebraska pro-
vided him with a positive letter of
recommendation, entered into a
confidential agreement not to disclose
what had occurred, and allowed him
to resign rather than terminate his
contract via costly hearings (Shrum

The Eighth Circuit affirmed that
the actions of Nebraska board offici-
cials failed to rise to the level of
deliberate indifference that “shocked
the conscience” so as to warrant lia-
bility under Title IX or Section 1983
for depriving the student of a rec-
ognized federal constitutional right.
The court opined that although the
teacher sexually molested the child in
Texas, the officials in Nebraska could
not be liable since they lacked control
over him, the student, and the con-
text in which the abuse occurred.

**Doe-3 v. McLean County
Unit District No. 5**

Most recently, the parents of two
female students in Illinois who were
sexually abused by a male teacher
sued the teacher and officials in the
district in which the teacher had for-
merly worked after district officials
wrote him an undeserved positive
reference letter and failed to fill out
a verification of employment form
honestly. The officials in the McLean
County district did not document or
investigate parental complaints about
the teacher’s abuse even after they
removed him from classroom duties.
Further, officials entered into a sev-
ance agreement with the teacher
and wrote a falsely positive letter of
recommendation that concealed his
known acts of sexual abuse.

In response to an employment
verification form from the district in
which the teacher sought employ-
ment, officials also failed to disclose
that he was removed from his class
for disciplinary reasons before the end
of a school year, making it appear as
though he worked for the entire year.

The students filed suit claiming
that officials in the sending district
engaged in wanton and reckless con-
duct by providing false information
about the teacher’s qualifications. A
state trial court dismissed the claims
against the sending school board and
officials on the ground that they did
not owe the students a duty of care.
An intermediate appellate court then
reversed in their favor.

On further review, the Supreme
Court of Illinois affirmed in favor of
the students. In Doe-3 v. McLean
In seeking to avoid controversies over reference letters, some school boards have eliminated the practice of providing recommendations. Instead, these boards offer departing and former staff members employment verification letters that typically are limited to information about their dates of employment, duties, and salaries.

Yet as demonstrated in Randi W. and Doe-3, such letters are unlikely to survive judicial scrutiny if employees resigned in exchange for good references and officials failed to disclose relevant information to prospective employers.

School boards that are considering the adoption or revision of policies about letters of recommendation may wish to keep the following points in mind.

1. Policies should stipulate whether boards are willing to provide letters of recommendation for departing and former staff members. Given the trend disfavoring employment verification letters, coupled with cases holding boards liable for references that failed to disclose relevant information about applicants, board officials seems to have little option other than to write honest letters of recommendation.

2. Board policies should consider restricting who can write reference letters to, for example, building-level principals, department heads, or personnel directors. Adopting such a provision can allow boards to safeguard the flow of information while helping to insulate themselves from liability if departing employees misbehave in their new jobs.

3. Even if references are less than positive, policies should require letter writers to answer all questions honestly and fully. In fact, by relying on documented information in employee records, most of which is typically subject to public disclosure under state laws, boards and letter writers should be immunized from fears of liability for defamation insofar as the truth, in the form of specific, verifiable factual comments, is a defense to such claims.

If employees are the subject of unsubstantiated or uninvestigated complaints or rumors, letter writers should avoid addressing these scenarios unless or until such time that determinations are made about their truthfulness so as to avoid the risk of defamation claims.

4. Policies should specify that confidentiality is not applicable to information regarding employee misconduct covered by state public record laws. However, if misconduct involves students, confidentiality may apply to the statements and personally identifiable information in order to protect children.

5. Board policies should make it clear that the board refuses to enter into confidential settlement agreements with teachers who engage in misconduct with students, since doing so ordinarily violates public policy and may subject the board to liability if individuals later harm students in their new jobs.

6. Policies should establish time frames within which letters of recommendation are to be completed and returned.

Finally, as with all other policies, boards should review their guidelines annually, typically between school years—not during or immediately after controversies—to ensure that they are up-to-date with legal developments in their states.

References
Doe-3 v. McLean County Unit Dist. No. 5, 2012 WL 322632 (Ill. 2012).
Randi W. v. Muroc Joint Unified Sch. Dist., 60 Cal.Rptr.2d 263 (Cal. 1997).
Shrum ex rel. Kelly v. Kluck, 249 F.3d 773 (8th Cir. 2001).

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