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# Letters of Recommendation: Honesty Remains the Best Policy

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# Letters of Recommendation: Honesty Remains the Best Policy

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

School boards can be liable for the harm caused by their former employees if officials fail to disclose the truth in letters of recommendation.

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 children 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 information about his pedophilia (*Bowman v. Parma Board of Education* 1988). The court rejected the argument 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 agreement 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 confidential settlement agreement with the educator who molested her son. After the teacher allegedly molested the child, officials in Nebraska provided 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 ex rel. Kelly v. Kluck* 2001).

The Eighth Circuit affirmed that the actions of Nebraska board officials failed to rise to the level of

deliberate indifference that "shocked the conscience" so as to warrant liability under Title IX or Section 1983 for depriving the student of a recognized 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 context 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 formerly 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 severance 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 employment, 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 conduct 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*

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*County Unit District No. 5* (2012), the Illinois Supreme Court agreed that the students had a valid claim against officials of the sending district in light of their duty of care to provide administrators in the hiring system with a factually accurate employment verification form about the teacher-abuser.

Citing *Randi W.*, the court ruled that when officials in the hiring district requested a completed form from the first board, their doing so gave rise to a duty by the sending district to provide factually accurate and honest information. The court concluded that the suit could proceed because the failure of officials in the sending district to perform their duty when they misstated the teacher's record created the risk of harm that led to the students' being sexually abused.

## Reflections

Some may believe that the best way to be rid of poorly performing employees without resorting to potentially lengthy and costly hearings or litigation is to write the employees positive reference letters so they can find other jobs. As reflected in *Randi W.* and *Doe-3*, though, such an approach is no longer legally tenable and can result in even costlier litigation. Of course, writing positive recommendations for undeserving employees also violates professional ethics.

In addition to the cost of litigation, SBOs, their boards, and other education leaders must be mindful that providing positive recommendations to undeserving employees could result in nonfiscal harm to the reputations of their school systems and their many excellent employees. Thus, as with other areas of school operations, honesty remains the best policy when dealing with letters of recommendation.

## Policy Recommendations

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.

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