Mandated DOE and DCF Reporting (and Related Legal Issues) in the Context of Cases of Suspected Child Abuse

Mark Oettinger, DOE General Counsel
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Recent events highlight the degree of vigilance that is necessary in the effort to protect children from sexual predators. Fortunately, the frequency of these incidents is low, but when they do occur, the results are devastating. Although no system will totally eliminate the problem, we need to have a clear understanding of what the education community must do in order to interdict these types of behavior at the earliest possible opportunity.

There are two separate but related reporting laws that bear on these types of situations. First, 33 V.S.A. § 4913(a) requires that "mandated reporters," a class of individuals which includes most school employees, must report to the Department for Children and Families (DCF) when they have "reasonable cause to believe that any child has been abused…" In addition, 16 V.S.A. § 1699

requires that "a superintendent who has reasonable cause to believe that a licensee has engaged unprofessional conduct…*shall* submit a written report to the commissioner (of education)." With respect to this latter reporting obligation, anyone *may* submit such a report, but for superintendents, the reporting is *obligatory*.

Interestingly, the standard of "reasonable cause" is common to both of these types of reports, although "abuse" and "unprofessional conduct" are different phenomena. Comparing the similarities and differences between these two reporting standards is not easy, but in my opinion, any time a superintendent reports a licensed educator to DCF for suspected student-related abuse, a simultaneous report should be filed with the Commissioner of Education. As with any report of unprofessional conduct, it is wise to err on the side of caution. By that, I mean err on the side of child safety. When in doubt, report. Let the Department of Education's trained investigators decide what degree of investigation is appropriate.

For purposes of triggering the reporting requirement, the statutory definition of unprofessional conduct is found in 16 V.S.A. § 1698. Sexual misconduct falls within subsection (1)(A), which prescribes, "Grossly negligent conduct or greater, on or off duty, that places a student or students in meaningful physical or emotional jeopardy, or conduct that evidences moral unfitness to practice as an educator," and within subsection (1)(E), which prescribes, "A pattern of willful misconduct or a single act of egregious willful misconduct…" Further guidance as to what might meet these definitions can be found in the Code of Professional Ethics and Rules of Professional Conduct for Vermont Educators, in Rules 5500-5530 of the Vermont Standards Board for Professional Educators. Rule 5522 in particular addresses sexual impropriety in significant detail.

No superintendent will be criticized for filing a report in good faith. There are two important statutory protections that reflect the law's preference for erring on the side of caution. The first is 16 V.S.A. § 1708, which provides that, subject to a few

narrowly tailored exceptions, "the commissioner shall not disclose to anyone but…the licensee charged any information regarding a complaint." That same section explains that "it is the purpose of this section both to protect the reputation of licensees from public disclosure of unwarranted complaints and to fulfill the public's right to know…" In addition, 16 V.S.A. § 1699 provides that "a person who acts in good faith [in reporting misconduct] shall not be liable for damages in any civil action."

It is also important to keep in mind that a superintendent's failure to report *under circumstances in which reporting is warranted* can constitute ground for licensing action against the superintendent who fails to report.

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A related question arises when an educator leaves employment with one district (whether voluntarily or involuntarily), and seeks employment in another district. What is the extent of the previously employing district's duty to disclose adverse information about its former employee when the

prospective new employing district calls for a reference? The answer to this question is complex, as it is not directly addressed in statute. It is the subject of case law, which varies from state to state, and there are essentially no definitive cases on point in Vermont. That said, there are generally-recognized principles that must be kept in mind.

Some large corporations have a policy of disclosing, when asked, only date of hire, date of separation, and job description. That may work in some contexts, but when the safety of children is involved, the equities favor *more* disclosure, not less. Imagine a trucking company which fires a driver for drinking on the job, and then gets a call from a school bus company which is considering hiring the same individual. If the trucking company says nothing, and the school district hires the driver, only to have the driver involve a school bus in an accident while intoxicated, should the trucking company have to pay damages to the families of injured children?

The principle involved is sometimes referred to as "negative deceit," a *failure* to speak, in the face of a *duty* to speak, with harm resulting. The same principle arises in the real estate context. Does a seller have a duty to inform a prospective buyer that the basement leaks periodically…or that the house has termites? Or is this a "buyer beware" situation? In the educational context, the proper course in cases of "abuse" and "professional misconduct" may be less difficult to discern (if only slightly) than in cases of more pedestrian performance problems. For example, does the former district have a duty to disclose that a teacher was dismissed for being chronically late to faculty meetings, or for proselytizing in the classroom? In answering this question, consider Rule 5524(c) of the previously mentioned Ethics Code, which includes within the definition of unprofessional conduct, "Deliberately falsifying, deliberately misrepresenting, or deliberately omitting when requested, information regarding the evaluation of…personnel."

Vermont does not have a state-wide teacher contract, and the idea that has appeared in some press reports that districts should report all educator performance-related issues to the Department of Education for creation of a database, is impractical for a number of reasons.

Previously employing districts are reluctant to pass along adverse information for fear of being sued by their former employees on any number of legal theories. Negligence, defamation, and contractual interference, are just a few of the possible legal theories that come to mind. It has been suggested that a prospective employer might require the prospective employee to execute a waiver releasing former employers (or anyone for that matter) from liability arising out of the disclosed information, but the enforceability of such waivers is open to question. It may also relieve some districts to know that the significant majority of national case law regarding liability for *civil damages* in this type of situation, favors the former employer. In *Kadlec v. Lakeview Anesthesia Associates*, a 5th Circuit case, an

anesthesiologist was given a positive recommendation after being dismissed for on-duty use of narcotics. In his next job, he almost killed a patient due to his drug use, and in the resulting suit against the former employer for civil damages, the court noted:

> "....we have not found a single case outside of Louisiana where a court imposed an affirmative duty on an employer to disclose negative information about a former employee. Some courts have held that employers have a legal duty to disclose negative information about former employees who later cause foreseeable physical harm in their new jobs, at least when there are misleading statements made by the former employer. But each of these cases based its conclusion on the fact that the former employer had made affirmative misrepresentations in its referral, and none imposed a duty based on the employer's mere nondisclosure." 527 F.3d 412, 423 (2008).

When contractual disputes are resolved, the departing employee is often successful in negotiating a letter of reference, and an agreement on the part of the former employer to otherwise remain silent, *to the extent the law permits.* Note, however, that a mandated reporter (for DCF reporting purposes) and a superintendent (for either DOE *or* DCF reporting purposes) may

not agree to refrain from making a statutorily-mandated DCF or DOE report, and again, a failure on the part of a superintendent to do so can result in sanctions being imposed upon his or her license. A tepid letter of reference, and an otherwise tight-lipped former employer, should be a red flag in any case, but my advice is to disclose fully and honestly, especially when there is "reasonable cause to believe" that harm could come to children. And under such circumstances, resist signing a confidentiality agreement in the first place.

Yes, it takes courage to be honest, and it takes judgment to separate rumor from fact, but it is the safety of our children that must guide our actions.