



What We Have Learned About K-12 Sex Abuse Claims Since the Letourneau Case

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What We Have Learned About K-12 Sex Abuse Claims Since the Letourneau Case

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Ever since 2002 with the Mary Kay Letourneau case and the Boston Archdiocese scandal, the media has been more interested in reporting about sex abuse of students in schools, changing societal awareness about what before had been “the unthinkable.” The way school people and the public look at sex abuse in schools has changed demonstrably since then, impacting schools in unexpected ways. Fortunately, there are trainings which are effective at preventing most sexual misconduct against students by school employees and which define the new standard of care by which future cases will be judged.

A Societal Problem Spilling Over into the Schools

Child sex abuse (CSA) is a larger societal problem though. According to the U.S. Department of Justice:

- Approximately 30% of sexual assault cases are reported to authorities.
- 62,939 cases of child sexual abuse were reported in 2012.
- Not all sexually abused children exhibit symptoms.
- In a 2012 maltreatment report, 26% of victims who were sexually abused were between 12-14 years of age and 34% were younger than 9 years of age.
- The Center for Disease Control estimates that approximately 1 in 6 boys and 1 in 4 girls are sexually abused before the age of 18.

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Mr. Austin and Mr. Patterson first brought attention through NSBA as to how sexual abuse by school employees could be prevented in “Protecting Children from Sexual Misconduct of School Employees,” NSBA *COSA Inquiry and Analysis* article for May 2008.

- 35.8% of sexual assaults occur when the victim is between the ages of 12 and 17.
- 82% of all juvenile victims are female.
- 69% of the teen sexual assaults reported to law enforcement occurred in the residence of the victim, the offender, or another individual.
- Teens 16 to 19 years of age were 3½ times more likely than the general population to be victims of rape, attempted rape, or sexual assault.
- Approximately 1 in 5 female high school students report being physically and/or sexually abused by a dating partner.³

A miniscule percentage of educators engage in sexual misconduct of one form or another with students. In Washington State, the percentage of certificated employees who are removed from the profession yearly was around the .0003% level in 2006, or 20 that year. After board policies and “professional boundary” trainings became routine in Washington, the number of teachers being reported to the state Office of Professional Practices dropped to .00004% in 2014-15.⁴ This small number of people do disproportionate harm to students, schools, and the teaching profession. A 2004 study by Dr. Charol Shakeshaft found that up to 9.6% of students experience some kind of sexually inappropriate talk or conduct from educators at some point between kindergarten and graduation from high school.⁵

Surprises and Lessons from Church Cases

Child sex abuse in churches has historically been something that resulted from a variety of problems within those institutions, including lack of knowledge about predatory behaviors, misguided trust in individuals who should not have been trusted with second chances, celibacy issues, a belief by psychologists and psychiatrists that serious sex offenders could be cured, covering up situations when they occurred, transferring offenders from one position to another, and not understanding the scope of the problem. In addition, initial responses when situations became known were too often ad hoc, flawed, and without any protocol for what to do and how to do it. Church sex abuse cases can be instructive for school districts in at least four ways:

³ See “Raising Awareness About Sexual Abuse—Facts and Statistics,” U.S. Department of Justice Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking.

⁴ Information from the Washington Office of the Superintendent of Public Instruction’s (OSPI) Office of Professional Practices. Interestingly, since Professional Boundary board policies and trainings became routine in Washington around 2011, that percentage dropped to .00005% in 2012-13, .00004% in 2013-14, and .00003% in 2014-15. No peer-reviewed study has made a causal connection between board policies, trainings, and the decrease in sexual misconduct allegations against certificated employees. But these numbers deserve looking into and hopefully can be compared to other states without such policies and trainings to see if there is any difference.

⁵ Charol Shakeshaft, Ph.D., *Educator Sexual Misconduct: A Synthesis of Existing Literature*, prepared for the U.S. Dept. of Education (2004).

(1) Jury verdicts can be staggering! The resulting thousands of claims have been very expensive for communities of faith, driving some Catholic archdioceses into bankruptcy. Church settlement figures, which are often confidential, are usually in the six figures with the Western U.S. having the highest average. Consider the following jury verdicts in relation to the typical amount of insurance that school districts in your area carry. The verdicts are against the entities based on negligent supervision theories: **\$41 million** (Catholic school case, Delaware, 2007); **\$28 million** (Jehovah's Witness case, Oakland, 2012), **\$13.5 million** (Jehovah's Witness case, San Diego, 2014); **\$12.5 million** (Florida, 2014); **\$8.7 million** (Vermont, 2008); **\$8.5 million** (Episcopal School of Dallas, 2011); **\$8 million** (Duluth, 2015); and **\$6.5 million** (Seattle for a claim based on 1964 abuse).⁶ In addition, there have been class action settlements in recent years of **\$110 million** in Fairbanks, Alaska, and **\$200 million** in Portland, Oregon.⁷

Today, best practices for communities of faith in dealing with sex abuse resulting in claims include having solid policies and procedures in place ahead of time for preventing CSA and dealing with situations when they occur; training employees in those protocols; supervising employees to avoid CSA; effectively and transparently dealing with situations when a claim arises; and having effective media relations. These best practices have led to a situation where most CSA claims brought against Catholic entities arise from abuse before 2002.

Lesson learned: In a 2006 National Review Online article, Dr. Shakeshaft was quoted as follows:

"[T]hink the Catholic Church has a problem?" she said. "The physical sexual abuse of students in schools is likely more than 100 times the abuse by priests."⁸

While there is no way to measure whether Dr. Shakeshaft is correct until claims are tallied and compared decades from now, it is absolutely paramount for school districts (a) to retain old certificates of insurance and insurance policies, and (b) retain sexual misconduct investigation reports and disciplinary documentation.

(2) The sex abuse problem was extensive and not isolated. Literally thousands of such claims have been brought in the U.S. since 2002. We see plaintiff law firms making public records requests to obtain information that might lead to claims against school districts. One case in the past five years involved claims of sexual abuse from 1982 by 7 students. We anticipate seeing more and more such claims.

⁶ In non-church cases, **\$19.9 million** (Boy Scouts case, Portland, Oregon); **\$11.8 million** (Boy Scouts, Connecticut, 2015); **\$15.4 million** (Empowering Families case, Virginia, 2012); and **\$11.5 million** (Masonic Homes, 2007).

⁷ News articles on all of these cases may be found by googling the award, the name of the city, and the terms "sex" and "verdict." For instance: "\$28 million Oakland sex verdict".

⁸ "Has the Media Ignored Sex Abuse in School?" by Tom Hoopes, National Review Online August 24, 2006.

Lesson learned: Have laws, board policies, and trainings in place to prevent future abuse. It is prudent to be ahead of the curve and make sure that someone is prepared to step in and handle media relations immediately should a claim be made or a lawsuit filed.

(3) Depending on the state where the abuse took place, there might be no statute of limitations. 26 states lack an effective statute of limitations from the institution's point of view. (E.g., RCW 4.16.340 and *CJC v. Corporation of the Catholic Bishop of Yakima*, 138 Wn. 699 (1999)).⁹

Lesson learned: Investigate all claims of sex abuse and retain those investigations as long as the victim is alive if your state has an open ended statute of limitations for CSA. Include information in investigation reports concerning board policies, staff trainings, supervision of staff involved, names of witnesses, and details concerning events alleged. What happens today may not be what is alleged thirty years from now. Investigation reports conducted now may be considered as potential evidence thirty years from now based on hearsay exceptions for business records. (Fed. R. Evid. 803(6) and 803(8) and Washington Evidence Rule 803; RCW 5.45 (Uniform Business Records As Evidence Act) and RCW 5.44.040.)

(4) Old insurance policies are frequently lost. Not everyone retains their insurance policies from the 1930s through the present time. In addition, a 1930s insurance policy providing \$2,000 of indemnity coverage, while providing a defense in the case, will not do much to cover a settlement or verdict.¹⁰

Lesson learned: Again, permanently retain insurance policies and certificates of insurance. When approving payment of insurance policies, board minutes should include the name of the insurance company and the policy number so they may be located or reconstructed if necessary.

⁹ In Washington State, a CSA claim may be brought within three years of the victim discovering that the abuse occurred and that a particular injury or condition was caused by the act. (E.g., RCW 4.16.340.) This "discovery" rule is generally interpreted liberally because childhood sexual abuse is a pervasive problem, causes long lasting damage, victims may repress memory of the abuse or not connect the abuse to any injury until years later, victims may be unable to understand or make the connection between the abuse and the emotional damages it causes, even though victims may be aware of injuries related to the abuse, and more serious injuries arising from the abuse may be discovered many years later. (E.g., *CJC v. Corporation of the Catholic Bishop of Yakima*, 138 Wn. 699 (1999).) Usually a claimant will be able to find a psychologist who will testify that the victim may never know the full extent of the harm which the abuse caused.

¹⁰ We will sometimes use insurance archeologists to either find or reconstruct policies if there is sufficient information about the policies to do that reconstruction.

Lessons from School Cases

(1) *Claims of sexual misconduct against students have become the most expensive claims for school insurers:* Jury verdicts in sex abuse cases against schools are now, according to insurers, the most expensive claims against school districts. While traumatic brain injury, quadriplegia, or wrongful death cases may result in large verdicts and settlements, sex abuse claims are collectively the most expensive kind of claims against school districts today. The following chart of Northwest CSA verdicts and settlements illustrates the problem for school districts¹¹:

Verdict of Settlement	Average
1. Published Verdict Average (15):	\$3.09 million
2. Published Settlement Range (17):	\$524,000 to \$656,000 ¹²
3. Unpublished Settlements (486):	\$348,333 to \$378,668

Verdicts and settlements have become even more expensive since the verdicts in the chart above, potentially exhausting the insurance available, especially when there are multiple plaintiffs. In 2012, a Los Angeles jury awarded \$23 million in damages against a school district in a single plaintiff sex abuse case. In the last ten years, archdioceses in Portland, Tucson, Spokane, Davenport, San Diego, Fairbanks, Wilmington, and Milwaukee have filed for bankruptcy due to sex abuse cases. The conclusions one could reach from the published CSA verdicts and settlements are:

- a) CSA cases are very volatile in front of juries with verdict averages being more than twice the settlement averages. Except with Special Education victim/plaintiffs, defense verdicts are infrequent.
- b) The cases resulting in verdicts or settlements of more than \$1 million usually involve some kind of gross negligence, dereliction of duty, ignoring reports of the perpetrator molesting children, or extreme impact on the victim. If there are facts in the case about how the school handled the abuse which jurors will find disturbing, skillful plaintiff's counsel will exploit those facts.
- c) In addition to any facts indicating the school district dropped the ball, factors which drive jury verdicts and settlements higher include the age of the victim at the time of the abuse, whether the perpetrator is a school employee, the severity of the abuse, the frequency of the abuse, the vulnerability of the victim at the time, impact on the victim, whether a special relationship of trust between the victim and perpetrator was breached, whether the aftermath was traumatic, whether there are multiple plaintiffs, and the skill of the plaintiff's attorney.

¹¹ These cases are based on Westlaw and Lexis jury verdict and settlement sheets.

¹² One figure is a straight average, one figure is average after eliminating the highest and lowest results.

- d) Special education victims in student-on-student molestation do not fare as well at trial ending up with a higher proportion of defense verdicts than with general education students. This may be that the students involved were not able to tell what happened, leaving jurors with questions.

(2) ***The standard of care is changing:*** The biggest lesson learned about CSA cases can be illustrated by having a group of school people read the facts of the Letourneau case during a training and then tell how the jury voted. The Letourneau abuse happened in 1996-1997, the jury verdict was in 2002, but people reading the facts in trainings judge the case with present day sensibilities and get the actual verdict wrong. After 9½ weeks of trial, the King County jury found in favor of the school district, and in so doing, determined that the standard of care was met. The facts of the case in brief are as follows:¹³

Ms. Letourneau was a 37 year-old sixth grade school teacher who had an affair with one of her 12 year-old male students, Villi. Ultimately, she would be arrested and convicted for various child abuse and molestation crimes. Prior to the public becoming aware of the molestation, Villi was the teacher's pet over several years of grade school. He once went on a family vacation to Alaska with the Letourneaus, had dinner at her house with her husband and family on numerous occasions, babysat for her children, and stayed overnight at her house. Letourneau also had dinners at Villi's house with his family and once stayed the night when the snow was too deep to drive home. Before her arrest occurred, the following situations were known by various school district individuals:

- A custodian caught Villi and Letourneau in a teacher's restroom alone one evening with the lights out in the restroom. The custodian did not tell anyone about this incident.
- A teacher saw Villi driving Letourneau's van. She told no one.
- A teacher heard that Letourneau and Villi took art classes together at the local community college. She told no one.
- A few teachers were aware that Villi stayed in Letourneau's classroom as late as 10 p.m., "working on art work." They assumed nothing was wrong and told no one.
- Other teachers thought Letourneau was unprofessional in her relationship with children, acting like a child at times, skipping and playing with them, and forming

¹³ These facts are in the public domain with the Court records and testimony at the trial.

personal relationships with kids which seemed to be of a social nature. They told no one.

- Other teachers and the principal noticed that Letourneau and Villi would usually spend their recess time together.
- Another teacher thought it was odd the way Letourneau looked at Villi, like a teenage girl looking at her boyfriend. He told no one.
- Another teacher saw Villi pat Letourneau on her bottom. He told no administrator.
- Letourneau and Villi slow danced at a school Valentine party, holding each other closely in a way that caused children to comment so that other teachers heard. They told no one.
- One morning at 2:00 a.m., police in a nearby town were at a local marina doing a routine check when they found Letourneau and Villi in Letourneau's van. It appeared that they had made up a bed in the back of the van which looked suspicious. The police called the boy's mother who said it was okay for him to be with his teacher. The police released the boy back to his teacher and went their way. The police did not tell the school principal.
- The school district Director of Security became aware of the marina incident when a school security officer, who was married to a police officer employed in the town where the marina was, told the director vague details about something happening with Letourneau and a student at 2:00 a.m. at the marina. No follow-up action was taken, though, because the police never informed the district and Villi's mother apparently approved of his being with his teacher.
- Four months later, a counselor at school became aware of threats by another parent to expose Letourneau's inappropriate relationship with a student. She told the principal.
- Ultimately, Letourneau's relationship was discovered when she became pregnant with her fifth child and it was learned that the child was Villi's, not her husband's. She was then arrested.

Lessons learned: King County is probably the most liberal jury venue in Washington, which in turn is a very liberal state. It is doubtful that a jury today would reach the same result as in 2002. Jurors are prone to decide standard of care issues based on what they as reasonable persons would do, using their hindsight, without regard to the common awareness and training of

educators 20 to 50 years ago. In trials of older CSA claims, this hindsight bias must be adjusted with expert testimony and a hindsight jury instruction.

While the standard of care has changed in some states and is changing in others, it is important in cases brought from the distant past to have a firm understanding of what standard of care was at the time of the abuse so that jurors are not using current day standards in their thinking. We believe that standard of care began to change in Washington State around 2008 with the NSBA COSA article cited in footnote 2 since that was the first writing in the educational field we are able to find that delineates how sexual abuse by educators against students can be prevented by preventing inappropriate boundary invasions. 2010 was when Washington's school board association propounded a model board policy for professional boundaries. Trainings became more and more common after that date.

“Professional boundaries” and preventing “inappropriate boundary invasions” are the key vocabulary by which educators name the behaviors that are instrumental in preventing sexual abuse of students by educators. When those or similar terms are common in the vocabulary of educators in a particular region, the standard of care will have likely changed. What the standard of care is in other states, and the date any change in that standard of care began, is likely different in different states and would be based on when the concepts of “professional boundaries” and preventing “inappropriate boundary invasions” by staff became connected in the vocabulary of educators in a particular state with preventing sexual misconduct by educators against students.

Standard of care experts: Actions of educators before 2008 should be judged by a different standard of care, based on expert testimony of people who were in school administration during that time period. If the abuse occurred in 1980, individuals with administrative experience from that time period could be considered as experts on administrative practices at that time. If the abuse is from much earlier, someone who has a solid historical understanding of how schools have slowly come to learn to protect children more effectively from sexual misconduct of employees would be a necessary expert witness. If plaintiffs' experts testify about “inappropriate boundary invasions” or enforcing “professional boundaries” with employees, they should be challenged to cite specifically to when such concepts became part of the vocabulary of educators in the state where the case is being tried. If they cannot cite to specific trainings, articles, board policies, or discussions about “inappropriate boundary invasions” or enforcing “professional boundaries” with employees to prevent sexual misconduct by employees, they are doing nothing more than inviting jurors to engage in hindsight analysis of a problem that was not seen in those terms until 2008 and later.

Also address hindsight bias with a “foresight jury instruction” and briefing: The standard of care has changed since 2002 when the Letourneau jury ruled in the school district's favor. Jurors may tend to judge school actions decades ago through hindsight based on the wisdom of present day sensibilities. Any attorney defending a sex abuse case where the abuse occurred more than a decade ago should present the court with a solid hindsight jury instruction

accompanied by briefing to support that instruction. In Washington State, that briefing would point out that at least two reported cases support hindsight instructions. Under Washington law, it is clear that jurors are to abstain from retrospective thinking when contemplating a verdict. (*Vasquez v. Markin*, 46 Wash. App. 480, 731 P.2d 510 (1986).) “[N]egligence is not a matter to be judged after the occurrence; thus, ‘foresight, not retrospect, is the standard of diligence.’” (*Vasquez*, 46 Wash. App. at 489, quoting *Winsor v. Smart’s Auto Freight Co.*, 25 Wash. 2d 383, 387 (1946) (emphasis added), and *Peterson v. Betts*, 24 Wash. 2d 376, 388 (1946) and *Qualls v. Golden Arrow Farms*, 47 Wash. 2d 599, 603 (1955).)

(3) *Most sex abuse by school employees against students can be prevented.* Certified Sex Offender Treatment Providers, psychologists, psychiatrists, neuropsychologists, and experts on the sexual grooming process provide us with the following conclusions:

- a) Sexual molesters victimize children either by “grabbing” or “grooming” children and can therefore be divided into two groups: grabbers or groomers. (Carla van Dam, Ph.D., *Identifying Child Molesters* (2001).)
- b) 95% of educators who sexually molest students are “groomers,” accomplishing their molestations through the sexual grooming process.¹⁴
- c) Sexual grooming of students is accomplished by a process of increasingly invasive ***inappropriate boundary invasions***.¹⁵ ***Therefore:***
- d) If we ***stop inappropriate boundary invasions***,¹⁶ we will prevent most sexual misconduct against students by educators.

(4) *School boards and administrations must lead the way with board policies and procedures, training, and enforcement.* School boards should establish sound professional boundaries policies and procedures, prohibiting inappropriate boundary invasions of students by staff. (Inappropriate boundary invasions is defined in the Professional Boundary Checklist below.) Part of the board policy should be to require any employee who observes another employee engaging in what may appear to be an inappropriate boundary invasion to report the matter to administration for follow-up. When inappropriate boundary invasions occur, staff

¹⁴ This is particularly true with older students.

¹⁵ Not all boundary invasions with students are inappropriate. When there is a bona fide health, safety, or educational reason, boundary invasions with students are necessary. Examples of such situations would be a 1st grade teacher assisting a child after a toileting accident; a wrestling coach teaching holds or sparring with wrestlers; or a teacher grabbing a student to prevent him from stepping in front of a truck.

¹⁶ A list of inappropriate boundary invasions, compiled by education and sex abuse experts is set forth below under the heading “Professional Boundary Checklist.”

should learn through the investigation process and written reprimand that their conduct is not acceptable. Key principles for staff training should include the following.¹⁷

Staff member duties under board policy: The staff member's role in preventing sexual abuse of students is two-fold: first, to avoid engaging in behaviors which could be mistaken for boundary invasion or grooming behaviors; and second, to report situations where such behaviors by other employees take place. Ideally, board policy would establish the following requirements of staff in relation to professional boundaries.

- A. *Maintain professional boundaries.* Do not engage in inappropriate boundary invasion behaviors described below or behaviors like them. Keep your interactions with students on a professional level. Refer students who need emotional or other support to appropriately trained staff such as counselors or school psychologists. Staff can be caring while maintaining an appropriate level of professional decorum.
- B. *Report the Boundary Invasion:* If a staff member observes any adult engaging in the behaviors described above with students, or other behaviors which raise concerns, the staff member should:
 - a. Inform your principal or the appropriate person at the District Office at your earliest opportunity.¹⁸ Do not wait or mull things over or attempt to determine for yourself whether the behavior you have observed has a plausible, innocent explanation. You may not be aware of or understand the entire situation, and allowing the conduct to continue could be bad for both the staff member and students.
 - b. DO NOT confront or discuss the matter with the adult engaging in the boundary invasions. Do not inform the person of your concern, unless it is a situation where immediate intervention is necessary to protect a child.
- C. *Maintain confidentiality.* Failure to do so may impede official investigations, foster untrue rumors, or violate privacy. You owe a legal duty of confidentiality to students on matters which a reasonable person would want to remain confidential. Therefore, you are directed not to tell your concerns to anyone other than the appropriate administrator, Child Protective Services, or the police.

¹⁷ Since 2010, the Washington State School Directors' Association (WSSDA) has propounded model board policy 5253 and 5253P concerning Professional Boundaries. That policy can be found by googling the name of most school districts in Washington State and searching under board policies for that school district. The policy could be improved by augmenting the inappropriate boundaries list.

¹⁸ Make your report to the appropriate administrator, but do not make the report to an administrator who may be the one involved in the boundary invasion behaviors.

- a. Document who you notified, where and when, and what you reported for your own records.

Professional boundaries: The bedrock principle of professional relationships with students in education is that educators should establish good relationships with students in order to educate students; but educators should not rely upon students to meet their own social needs. When educators rely on students to meet the educator’s social needs, the relationship is no longer a strictly professional relationship. Nor is it a true friendship since by the nature of the educator-student relationship, it is not an equal or even relationship.

The relationship between educator and student is an uneven one. It is also a relationship of trust where the educator has power over the student, making it inappropriate and unprofessional for the educator to try and meet his/her social needs through that relationship. While good relationships with students are very important for the educational process, that does not mean that the educator needs to become personal friends with his/her students. Failure to follow this basic principle of professionalism can result in an educator fitting the profile of someone attempting to engage in sexual misconduct with students, even if that is not the person’s intent.

At the same time, it is recognized that a sound and trusting relationship with students is often necessary to advance educational goals. The key in striking the balance is for the educator to consider whether s/he is attempting to have personal needs met through the relationship, or to have a peer-to-peer or “special relationship” with a student. If the relationship is becoming too close, the educator is the adult and should re-establish professional boundaries.

Kinds of sexual misconduct by employees against students: Based on cases we have seen, sexual misconduct by educators is of two kinds—predatory and opportunistic. The child predator deliberately grooms a student to engage in sexual behavior. The opportunist may not consciously begin with predatory motivation in mind, but allows himself/herself to develop a “special relationship” with a student which results in situations where the educator’s professionalism is compromised. At some point the relationship then becomes predatory, sometimes when there is a situation made possible by the close relationship where there is an opportunity to take advantage of the student. Both situations arise out of ignoring the basic principle of professional relationships with students and nurturing a “special relationship” with a particular student where the adult is getting his/her social needs met through the student. There is nothing wrong with a student feeling special; but there is something wrong with the adult using the student to meet the adult’s social needs.

How sexual grooming works: Sexual grooming is the process by which 95% of serious sexual misconduct against children occurs in education. The adult befriends the child, creating a connection with the child, a special relationship, lowering the child’s natural inhibitions in order to eventually take advantage of the child sexually. In education, sexual abusers often target students who are passive or needy and then engage in personal boundary invasion behaviors

which become increasingly invasive of the child's boundaries. The child gets used to the boundary invasions, and their increasing intrusiveness, accepting them as normal. Eventually, when the student's inhibitions are down, sexual misconduct may occur. Commonly, the child may even blame him/herself for what happened.

Student victim profile: Students who become victims are often in special need of adult attention, and at first find the special relationship with the educator something grounding and centering. They end up trusting the educator, feel that they are personal friends with the educator, allow the boundary invasions because they are friends, and when something inappropriate happens, may end up blaming themselves.

What should happen: When a school employee becomes aware of inappropriate boundary invasions by another educator, board policy should require that person to report the matter to administration.¹⁹ If the administrator is aware of all boundary invasion behaviors that other employees observe with a particular educator, the administrator has a more complete picture and can talk with that individual, find out what is happening, and if necessary, counsel the educator to more professional conduct. If nothing inappropriate is happening, it becomes a training experience in professional judgment for the educator. In some situations, discipline may be necessary.

What the administration should do depends completely on the situation. If the boundary invasions are not inappropriate, nothing would happen. In minor situations, a verbal or written reminder may be necessary. In repeat situations, progressive discipline may be warranted.²⁰ In extreme situations, such as those involving molestation of a student, arrest and prosecution, termination, and loss of credentialing would be warranted. Naturally, in any case involving child abuse, mandatory child abuse reporting duties must first be met.

What about small communities? Sometimes educators have relationships with students outside of school which have nothing to do with school, but begin at church, Boy Scouts, Little League, Young Life, or having a neighbor's kid mow the lawn or babysit. This can be especially true in small communities. Regardless of contacts outside of school, it is still inappropriate for the educator to engage in a peer-to-peer relationship with a student even if the personal relationship is outside of school.

(5) *Investigate inappropriate boundary invasions.* Since inappropriate boundary invasions can lead to sexual misconduct by school employees, situations involving such boundary invasions should be investigated and documented. We use the following Professional

¹⁹ Go back to the Letourneau case facts above. Had a school principal today been informed of any two of the bullet point facts, it is likely that things would have turned out very differently.

²⁰ We have seen a number of cases where individuals continue engaging in inappropriate boundary invasions with students after being counseled and reprimanded in writing. These individuals are engaging in "risk behaviors" with students and should find a different profession.

Boundaries Checklist in our investigations, asking individuals who work in proximity with the person accused of the boundary invasions to check off any of the items on the list that they have seen or heard about the accused. The rest of the interview is taken up with getting the details. The significance of this list is that according to mental health professionals and sex offender treatment providers, these are risk behaviors which, unless they are based on valid educational, health, or safety reasons, can be sexual grooming.

Professional Boundaries Checklist²¹

Taking an Undue Interest in a Particular Student:

1. Having a "special" friend or a "special relationship" with a particular student.
2. Favoring certain students by giving them special privileges.
3. Favoring certain students, inviting them to come to the classroom at non-class times.
4. Getting a particular student out of class to visit the teacher during the teacher's prep period.
5. Engaging in peer-like behavior with students.

Using Poor Judgment in Relation to a Particular Student:

6. Allowing him/her to get away with inappropriate behavior.
7. Being alone with the student behind closed doors at school.
8. Giving gifts or money to the student.
9. Being overly "touchy" with certain students.
10. Touching students for no educational or health reason.
11. Giving students rides in the educator's personal vehicle, especially alone.
12. Frequent electronic communication or phone contacts with a particular student.

Becoming Involved in the Student's Private Life:

13. Talking to the student about the educational practitioner's personal problems.
14. Talking to the student about the student's personal problems to the extent that the adult becomes a confidant of the student when it is not the adult's job to do so.
15. Initiating or extending contact with students beyond the school day.
16. Taking a particular student on outings, especially personal outings, away from protective adults.
17. Using e-mail, text-messaging, instant messaging, or social networking to discuss personal topics or interests with students.

²¹ Special thanks and kudos to Certified Sex Offender Treatment Provider Timothy Kahn, M.S.W., of Bellevue, Washington for providing the first draft of this list, based on his decades of work with sex offenders, and working with us to update the list over the years. The list has also been vetted by psychologists, psychiatrists, neuropsychologists, and educators. The list is instrumental in conducting investigations into violations of professional boundaries by educators.

Not Respecting Normal Boundaries:

18. Invading the student's physical privacy (e.g., walking in on the student in the bathroom).
19. Inviting students to the teacher's home.
20. Visiting the student's home.
21. Asking the student to keep certain things secret from his/her parents.

Sexually Related Conduct:

22. Engaging in sex talk with students (sexual innuendo, sexual banter, or sexual jokes).
23. Talking with a student about sexual topics that are not related to a specific curriculum.
24. Showing pornography to the student.
25. Hugging, kissing, or other affectionate physical contact with a student.

Since grooming behavior normally occurs out of sight of witnesses, when there are lapses in professional boundaries unexplained by bona fide educational, health, or safety reasons, you are dealing with a person who, at the very least, lacks adequate professional judgment and needs to be educated as to proper boundaries with students.

When Sex Abuse Happens

When a school district receives notice of possible sex abuse of a student, it is best to respond proactively and immediately. Typically a parent calls or somehow site administration finds out about suspected abuse and reports it to the Superintendent or HR Director, depending on the size of the school district. The following outlines a proactive response to such allegations.

A. Within the first hours after notice is received:

1. Tell site administration to **hold off doing anything** other than seeing to it that the student is protected. The employee may soon be placed on administrative leave, but law enforcement needs to be contacted since they may want to talk with the employee first.
2. **Mandatory reporting and discussion with law enforcement** has either occurred or occurs. (E.g., RCW 26.44.030.) Keep notes of these conversations.
 - Inform law enforcement that the employee will be placed on administrative leave by the end of the day. They may want to speak with the employee first.
 - Also let law enforcement know you need to report to the parent. They may ask you to hold off to allow them to make the contact.
3. **Contact insurance.** Many insurers will want to take part in any investigation and in some circumstances will pay for the investigation.

4. **Contact legal counsel.** This may be a person the insurer puts the school district in contact with. Discuss the following which will be implemented as soon as possible. **Plan the investigation.** (See below.)
5. Contact the parent of the victim child. Law enforcement may require that the school district allow them to do this.
6. Have a media response prepared. Only one person should be talking with the media, and only when the media calls. That person is usually the attorney in the cases we handle. The response must be honest, and express genuine concern, assuring the public that student safety is paramount.

B. Agenda---First day conference call or meeting with legal counsel:

In a conference call or meeting with the Superintendent, insurance representative, and attorney, the following should be considered:

1. The attorney should prepare an **attorney-client privileged email to the Superintendent** which can be **forwarded to the board** advising of the situation and the action plan. The board should be asked to forward media inquiries to the attorney. An executive session board meeting should be arranged to discuss a potential claim with the board so that the wisdom of having one spokesperson can be discussed with them.
2. Consider a **media response** and one spokesperson for the district.
 - Inform site administration of the same.
 - Inform the board of the same in the email from counsel discussed below.
 - Determine who will draft the media response.
3. Confirm that law enforcement and CPS have been contacted.
4. Review discipline and **just cause sections of the collective bargaining agreement** (CBA) to see if there are special requirements which must be met.
5. Likely if an employee is the alleged perpetrator, that person will be placed on **paid administrative leave** pending the outcome of the police and district investigations.
 - If law enforcement is called in, regardless of whether the perpetrator is a student or adult, do not inform the perpetrator of the allegations unless law enforcement allows. They may want to make the first contact.

- Prepare a paid administrative leave letter which includes specific directives requiring confidentiality, avoiding retaliation, and no contact or interacting with the alleged victim, parents, or other students regarding the matter.²²

C. Plan the investigation(s):²³

1. **Who** will investigate? We recommend an experienced investigator from outside the District. OCR’s April 4, 2011 Dear Colleague Letter (DCL) requires a person who is trained and/or experienced in such investigations.
2. **What kind** of investigation(s) will there be? Can they be coordinated or **piggy-backed**? A piggy back investigation is one done by administration sitting in on interviews of staff by an attorney conducting a work product investigation in anticipation of litigation.²⁴
3. Be aware from the outset as to what materials from the investigation will become **Public Records**. Also:
4. What people (**witnesses**) will likely have the most information?
 - i. Employees working around and near the situation.
 - ii. Other students (interviewed pursuant to Board Policy, with parent permission and the parent present if the parent desires).
5. What **documentation** is there that should be reviewed before interviewing witnesses?
 - i. Lock down computers.
 - ii. Consider how to obtain any text messages, Instagram, Snap Chat, etc.
6. **When** will the investigation begin?²⁵

²² This letter would not prohibit the employee from talking with union representatives, attorneys, a therapist or doctor, priest or minister, etc.

²³ Generally, plans will need to be adjusted, but it is important to discuss a plan completely as input from the people on the conference call will be valuable.

²⁴ Be careful of any “dual purpose investigation” if one of the purposes is work-product-anticipation-of-litigation. (*I.e.*, an investigation for safety and work product litigation purposes would be dual in purpose.) That is why a school administrator may be conducting the investigation required under Title IX alongside and at the same time as the work product investigation. In *D.I. Chadbourne, Inc. v. Superior Court*, 60 Cal. 3d 723 (Cal. 1964), the Court ruled that the predominate purpose of the investigation would control whether the investigation is privileged.

²⁵ **Begin your investigation immediately**, though consistent with any restrictions imposed by law enforcement such as not talking with the alleged victim or perpetrator until law enforcement has completed those interviews. There is a strong sense of urgency of finding out what people know before the rumor mill pollutes memory. Interviews can

7. **Who will be present** for interviews of witnesses, and in what roles?
8. **What kind of reporting** is legally required? Title IX will require reporting.²⁶ Board policy may also require an investigation and report to the parents.²⁷
9. **Are there Harassment, Intimidation, and Bullying board policy timelines to meet?**
10. Does the **CBA** have provisions which impact the investigation?
11. How will the report be documented?
 - Full report?
 - Executive summary?
 - Two reports?
 - Summary to the parent?

D. Victim's Parent Contact

Parents have a right to know promptly anything that affects the well-being of their children. Contact should be made with the victim's parent the first day, as soon as practicable, and consistent with any law enforcement request. Parents left in a vacuum of information will often seek to express their anger on Facebook or other social media. Even if the victim's parent was the one to bring the matter to the school district's attention, such contact should be made later in the same day to share with the parent what is being done. After that contact, confirm in writing what was discussed, including that the school district is taking measures to protect the student and asking that any retaliation or problems be reported immediately to the district. This letter often includes an offer to pay for counseling up to a specific dollar amount, should the parents wish.²⁸

usually begin with employees working in proximity with the accused, as well as student witnesses. We always ask for the parents' permission and give parents of student witnesses the option of sitting in on their child's interview. Sometimes those parents have unexpected and useful information too.

²⁶ OCR's April 4, 2011 DCL.

²⁷ *E.g.*, Washington State School Directors Association Model Board Policy 3207 and 3207P concerning Harassment, Intimidation and Bullying of students.

²⁸ There should be no requirement that the District receive counseling records. If suit is filed, it will receive such records through the normal medical provider subpoenaing process.

CSA Litigation

Three things are paramount in defending schools against CSA claims: retaining experienced counsel, experts, and mediation. Our best recommendation for defending sex abuse claims is that experienced counsel be engaged to handle the case as soon as notice of the situation or claim occurs. Counsel should be experienced in high stakes litigation. Counsel must also be knowledgeable in handling school sex abuse claims, as well as knowledgeable in how school districts and schools work. Having an understanding of how school districts work often leads to a solid defense based on the school district meeting its standard of care. If the victim or perpetrator are special education students, litigation counsel must understand the special education process, including IEPs, triennial reports, prior written notices, FBAs, and BIPs. Comparing Present Levels of Performance from before and after abuse can be important.

Experts are often the key to a successful defense, whether that defense ends in a jury verdict or settlement. School defendants should consider experts including a psychologist, psychiatrist, or neuropsychologist experienced in treating sex abuse and in testifying. Psychological experts should review all school, medical, and employment records of the plaintiff and be able to address to what extent the plaintiff has been impacted by the abuse. A school administration standard of care expert, discussed above, will also be important, especially in decades-old claims. With decades-old claims, a panel of three to five standard of care experts is sometimes useful with only one of the experts testifying, but being able to support their conclusions with the affidavits from the other experts.

Finally, the attorney representing the school district should also be adept at the mediation process since most sex abuse cases are resolved through mediation. Pre-litigation or even pre-claim mediation should be discussed with opposing counsel as soon as the identity of that person is known. Mediation is often the best means of resolving things for victims, parents, and school districts. Take great care in choosing a mediator who is experienced in sex abuse cases and has a solid track record of being able to settle such cases.

Conclusion

We now understand that schools are uniquely capable of protecting students from sexual abuse by employees in ways that no other institution can. Training staff in professional boundaries and enforcing those boundaries is the key. While we are not able to undo sex abuse which may have occurred in the past, we are able to prevent future abuse with board policies and procedures, staff trainings, and responding quickly to situations where an employee engages in inappropriate boundary invasions with a student. The school attorney can be instrumental in beginning the conversation about such matters with schools.²⁹

²⁹ Please feel free to email Don Austin if you want samples of training materials. [dfa@pattersonbuchanan.com]