Dexter A. Johnson
LEGISLATIVE COUNSEL

900 COURT ST NE S101
SALEM, OREGON 97301-4065
(503) 986-1243
FAX: (503) 373-1043
www.oregonlegislature.gov/lc

# STATE OF OREGON
## LEGISLATIVE COUNSEL COMMITTEE

August 21, 2018

Senator Arnie Roblan, Chair
Senate Interim Committee on Education
900 Court St NE S417
Salem OR 97301

Re: Sexual Abuse in Schools

Dear Senator Roblan:

The Senate Interim Committee on Education requested an opinion related to sexual abuse in schools. Specifically, the committee asked: (1) whether any adjustments to statutory law are required to bring state law into compliance with 20 U.S.C. 7926; (2) what possible statutory changes could be enacted based on the Whitehurst Report[1]; and (3) how mandatory reporting requirements interact with education law. These three issues have been addressed in a single opinion to give legislators a single reference source for the purpose of revising state law related to sexual abuse in schools.

## I. ANALYSIS OF 20 U.S.C. 7926

### A. Overview of 20 U.S.C. 7926 and ORS 339.370 to 339.400

The U.S. Constitution does not give Congress any authority related to education, which makes education the responsibility of the states. The lack of specific constitutional authority means that Congress must rely on other constitutional authority to enact legislation related to education. One of the methods by which Congress enacts legislation related to education is through the Spending Clause.[2] Under that clause, Congress makes distributions of federal funding to states contingent on the states' compliance with legislation enacted by Congress. Congress has exercised this authority with the Every Student Succeeds Act (ESSA).[3] Passed in 2015, ESSA replaced the federal standards for education that had been prescribed by the No Child Left Behind Act of 2001.[4]

One of the federal standards enacted under ESSA is the prohibition on aiding and abetting sexual abuse in public kindergarten through grade 12 schools. The standards are codified as 20 U.S.C. 7926, which provides, in part:

[1] *See infra* note 30.
[2] Article 1, section 8, United States Constitution.
[3] P.L. 114-95.
[4] P.L. 107-110.

> (a) IN GENERAL—A State, State educational agency, or local educational agency in the case of a local educational agency that receives Federal funds under this chapter shall have laws, regulations, or policies that prohibit any individual who is a school employee, contractor, or agent, or any State educational agency or local educational agency, from assisting a school employee, contractor, or agent in obtaining a new job, apart from the routine transmission of administrative and personnel files, if the individual or agency knows, or has probable cause to believe, that such school employee, contractor, or agent engaged in sexual misconduct regarding a minor or student in violation of the law.

The elements of the section may be summarized as: (1) a prohibition imposed on a school employee, contractor or agent or a state or local educational agency (2) against assisting (3) a school employee, contractor or agent (4) in obtaining a new job (5) when the individual or agency knows, or has probable cause to believe, that (6) the employee, contractor or agent engaged in sexual misconduct regarding a minor or student.

The federal standard addresses a practice that has occurred across the country in which school districts allow, or even encourage, employees with certain problematic behavior to seek employment in other school districts and do not report the problematic behavior to law enforcement. The practice often allows the employee to continue with the problematic behavior in the new school district and has been termed "passing the trash."

Oregon has its own approach to addressing the practice of "passing the trash." Oregon was one of the first states to address the practice[5] when the Legislative Assembly enacted chapter 93, Oregon Laws 2009. Primarily codified as ORS 339.370 to 339.400, the Oregon law establishes investigatory, reporting, hiring and termination standards related to school employees. Oregon's law is considered one of the most comprehensive laws of its kind in the country.[6]

Both 20 U.S.C. 7926 and ORS 339.370 to 339.400 address the practice of "passing the trash," but the federal and state laws take different approaches. As explained in greater detail below, the federal law is more encompassing in addressing the actors covered by the law and the actions taken by a person seeking new employment, while the state law is more encompassing in addressing other aspects of the employment relationship. The federal law does not preempt the state law, which means that the state law must be amended to comply with the federal law. Failure to comply with the federal law could jeopardize federal funding for education in this state.

---

[5] "Legislation to Address Educator Sexual Misconduct and Abuse," *The Enough Abuse Campaign* http://www.enoughabuse.org/legislation/mapping-state-legislative-efforts/educator-misconduct-abuse.html (visited August 10, 2018).

[6] A recent survey of states gave Oregon an "A" for checking an applicant's background before issuing a teaching license, sharing licensing and disciplinary information about sanctioned teachers and requiring mandatory reporting. John Kelly, "How USA TODAY Graded the States on Teacher Background Checks," *USA Today*, February 14, 2016, https://www.usatoday.com/story/news/2016/02/14/how-we-graded-states-teacher-background-checks/80214540/ (visited August 10, 2018).

## B. The Need for State Statutory Amendments

Although 20 U.S.C. 7926 was enacted in December 2015, states have been slow to respond to the changes in federal law. Recognition of states' slow responses may be the reason the U.S. Department of Education issued a Dear Colleague Letter on June 27, 2018.[7] The letter was addressed to the Chief State School Officers and sent to the Governors of each state to remind them of the provisions of 20 U.S.C. 7926. The letter reinforces the department's commitment to compliance with the section, and includes statements that the department will take "appropriate enforcement action" and that the department intends to "[i]n the near future . . . reach out to State officials to discuss how [they] are meeting their responsibilities under this important provision." The U.S. Department of Education's increased scrutiny and interest in this issue makes the need for states to act soon even more imperative.

Based on previous actions of the executive and legislative branches of this state, we assume that the state does not wish to jeopardize federal funding and that the state would act in a manner to comply with federal law. We proceed with our analysis in this opinion under that assumption. We also proceed with our analysis under the assumption that the Legislative Assembly prefers to retain the substance of the current state law, because we are unaware of any legislative interest in repealing or significantly amending the law.

Under 20 U.S.C. 7926, states have leeway in how to achieve compliance with the federal law, as states may have laws, regulations or policies related to sexual abuse in schools. Some states rely on their state education agencies to compel compliance with the federal law. For example, the Iowa State Board of Education acted under its general rulemaking authority relating to accreditation to incorporate the federal law almost verbatim into administrative rules.[8] Other states' education agencies take similar action, but under legislative direction. For example, the Virginia General Assembly enacted legislation that directed the Virginia Department of Education and local school boards to "adopt policies to implement the provisions of 20 U.S.C. [ ] 7926."[9] Other states rely more on legislative authority. For example, the West Virginia Legislature enacted a statute that copies the federal law almost verbatim.[10]

The solution in Oregon is not as simple as in other states, though, because Oregon already has a law related to sexual conduct in schools and that law has significant differences from the federal law. Retaining the substance of current state law while incorporating the provisions of the federal law requires direction from the Legislative Assembly. The Legislative Assembly could adopt legislation to clarify how the two laws should interact for the purposes of avoiding confusion and potentially jeopardizing federal funding for education.

## C. Elements of Federal Law in Comparison to State Law

### 1. Element 1—Actor to whom prohibition applied

[7] Jason Botel, Principal Deputy Assistant Secretary, Office of Elementary and Secondary Education, U.S. Department of Education, Dear Colleague Letter on ESEA Section 8546 Requirements, June 27, 2018, *available at* https://www2.ed.gov/policy/elsec/leg/essa/section8546dearcolleagueletter.pdf (visited August 10, 2018).
[8] *See* Proposed Amendments to 281 Iowa Administrative Code 12, as under consideration by the Iowa State Board of Education on August 2, 2018, *available at* https://educateiowa.gov/sites/files/ed/documents/2018-08-02%20Chapter%2012%20Rules.pdf visited August 10, 2018).
[9] 2018 Va. Acts, chapter 513, (Enrolled House Bill 438).
[10] W. Va. Code section 18A-4-22.

The first element of the federal law addresses the actor to whom the prohibition is applied. Under federal law, the prohibition is applied to school employees, contractors and agents and to state and local educational agencies. In comparison, state law applies only to education providers, which is defined to include school districts, the Oregon School for the Deaf, an educational program under the Youth Corrections Education Program, a public charter school, an education service district, a state-operated program that provides educational services to any student in kindergarten through grade 12 and a private school.[11]

The state law is broader than the federal law because it applies to private schools while the federal law does not. The effectiveness of extending the federal law provisions to private schools may be limited because private schools are not regulated by this state and the state lacks the authority to impose sanctions on a noncompliant private school.[12] While private schools also cannot be forced to comply with current state law,[13] the inclusion of private schools in current state law is not entirely ineffective, because public education providers are required to contact any former employers that are private education providers prior to hiring an educator. The Legislative Assembly may wish to review the inclusion of private schools in current state law and evaluate the extent to which private schools should be included in relation to any provisions enacted to comply with the federal law.

The state law is narrower than the federal law because the state law does not specify that the provisions apply to school employees, contractors or agents or to state or local educational agencies. To comply with the federal law, the Legislative Assembly could adopt provisions that align state law with federal law and could evaluate the extent to which the provisions of ORS 339.370 to 339.400 may be expanded to include the same list of actors specified in 20 U.S.C. 7926.

**2. Element 2—Action that is prohibited**

The second element of the federal law is a prohibition on an actor against assisting in the obtainment of a new job. The meaning of the term "assisting" is most likely quite broad, as the federal law specifies that the routine transmission of administrative and personnel files is allowed. Presumably, then, any action that is beyond the transmission of those files is a prohibited action.

The state law is broader than the federal law because the state law is not limited to the actions of a current or former employer when a person is trying to be hired for a new job. Instead, the state law requires education providers to adopt relevant policies,[14] to conduct background checks,[15] to comply with requests related to background checks,[16] to not hire

[11] ORS 339.370 (3).
[12] Other states have attempted to expand sexual abuse provisions to private schools that participate in public programs, such as scholarship programs (*see, e.g.,* Florida Senate Bill 1614 (2018) and Florida Senate Bill 1756 (2018)). Oregon, however, does not have any such programs.
[13] When ORS 339.370 to 339.400 was enacted in 2009, private schools had the option of registering with the Department of Education under ORS 345.505 to 345.575. The department could prescribe specified standards as a condition of registration. The option for private schools to register with the Department of Education was removed with the repeal of ORS 345.505 to 345.575 by chapter 301, Oregon Laws 2011.
[14] ORS 339.372.
[15] ORS 339.374.
[16] ORS 339.378.

applicants who have not undergone a background check,[17] to follow specified procedures relating to reports and investigations,[18] to not enter into certain agreements upon the termination of employment[19] and to provide training.[20] State law is more comprehensive than federal law by covering a person before, during and after employment and by imposing requirements on both the former and the potential employer. These requirements exceed the requirements of federal law but are acceptable additions to the federal law.[21]

The state law is narrower than the federal law because the state law requires former education employers to provide specified information to potential employers[22] but does not prohibit the provision of anything more than administrative and personnel files. To comply with federal law, the Legislative Assembly could expand the requirements of ORS 339.370 to 339.400 to prohibit a former employer from assisting a person in obtaining a new job as prescribed by 20 U.S.C. 7926.

**3. Element 3—Actor who is subject of prohibited action**

The third element of the federal law addresses the person who is the subject of the prohibited action. Under federal law, the prohibition applies to a school employee, contractor or agent. State law applies only to employees of an education provider.[23]

To comply with federal law, the Legislative Assembly could expand the list of persons who are the subject of the prohibited action to include contractors and agents of education providers. The Legislative Assembly may decide, however, to expand state law only in relation to the specific requirements of the federal law (i.e., finding a new job) or to all aspects of state law (i.e., reports, investigations, hiring and termination).

**4. Element 4—Employment sought by actor who is subject of prohibited action**

The fourth element of the federal law relates to when a person is trying to obtain a new job. The federal law applies to any new job, while state law applies only to jobs with education providers. Also notable is that the federal law applies to jobs within the same school district. ORS 339.370 to 339.400 is targeted toward new employers that are education providers, which means that most instances when the provisions of the state law are applicable occur when a person is changing employment from one school district to another school district.

To comply with federal law, the Legislative Assembly could expand state law to match federal law by ensuring that education providers and educational agencies do not assist employees, agents or contractors in obtaining any new job, not just a job with another education provider.

**5. Element 5—When an individual or agency knows or has probable cause to believe**

[17] ORS 339.384.
[18] ORS 339.388.
[19] ORS 339.392.
[20] ORS 339.400.
[21] *See* 20 U.S.C. 7926(d).
[22] ORS 339.378.
[23] ORS 339.370 (8).

The fifth element of the federal law requires action when an individual or agency knows or has probable cause to believe certain behavior occurred. This standard is both a lower and a higher threshold than the standard in state law.

In state law, duties to future employers are activated if a substantiated report has been made in relation to a person. A substantiated report has two requirements. The first requirement is that, based on an investigation, an education provider has a reasonable cause to believe that a report alleging sexual conduct or abuse is founded.[24] The second requirement is that the conduct that is the basis of the report is sufficiently serious to be documented in a personnel file or education record.[25]

The first requirement of the state law, related to a reasonable cause to believe, is a lower standard than the probable cause standard of the federal law and, therefore, is more protective toward children. Although the term "reasonable cause to believe" is not defined for purposes of ORS 339.370 to 339.400, Oregon courts have concluded that a "reasonable suspicion" standard should be used in determining if a mandatory reporter under ORS 419B.005 to 419B.050 has a "'reasonable cause' to believe" that a child has suffered abuse.[26] Considering the similar subject matter of ORS 339.370 to 339.400 and the mandatory reporting requirements of ORS 419B.005 to 419B.050, we believe the courts of this state similarly would find that the "reasonable suspicion" standard applies to ORS 339.370 to 339.400. The probable cause standard of the federal law also has not been defined for purposes of the federal law, but Oregon courts generally find that the "reasonable suspicion" standard is a lower standard than the "probable cause" standard.[27] For purposes of the first requirement for a substantiated report triggering a duty to act under ORS 339.370 to 339.400, the state law standard is lower than the federal law standard and is more protective of children, which would make the standard an acceptable standard for compliance under the federal law.

Complicating the analysis is that the state law has a second requirement for a substantiated report activating duties to a future employer are activated. That second requirement is that the conduct must be sufficiently serious to require documentation in a personnel file or an education record. This requirement adds another factor that must be met, and makes the state law overall less protective for children than the federal law. To comply with federal law, the Legislative Assembly could revise or remove the second requirement but may retain the first requirement.

### 6. Element 6—Sexual misconduct regarding a minor or student

The sixth element of the federal law requires action when a person has engaged in sexual misconduct regarding a minor or student.

The state law is broader than the federal law because the law requires action not only in relation to sexual conduct, but also to abuse.

The state law is narrower than the federal law because the state law applies only to a student, and not to any minor.

[24] ORS 339.370 (10)(a).
[25] ORS 339.370 (10)(b).
[26] *Meier v. Salem-Keizer School District*, 284 Or. App. 497, 501-506 (2017).
[27] *See, e.g., State ex rel. Juvenile Department v. M.A.D.,* 348 Or. 381 (2010).

To comply with federal law, the Legislative Assembly could add minors to the statutes of ORS 339.370 to 339.400.

**D. Federal Law Exception**

Enacted at the same time as 20 U.S.C. 7926 was section 9201 of ESSA. In that section, Congress expressed a "sense" that schools and school districts should "report any and all information regarding allegations of sexual misconduct to law enforcement and other appropriate authorities."[28] Similar to a findings section in Oregon law, the "sense" section expresses an opinion but does not create law.

Instead of enacting a requirement that schools and school districts must report allegations of misconduct to law enforcement and other authorities, Congress enacted an exception to 20 U.S.C. 7926(a) that strongly encourages schools and school districts to act in such a manner. The exception provides:

> (b) EXCEPTION—The requirements of subsection (a) shall not apply if the information giving rise to probable cause—
>
> (1)(A) has been properly reported to a law enforcement agency with jurisdiction over the alleged misconduct; and
>
> (B) has been properly reported to any other authorities as required by Federal, State, or local law, including title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) and the regulations implementing such title under part 106 of title 34, Code of Federal Regulations, or any succeeding regulations; and
>
> (2)(A) the matter has been officially closed or the prosecutor or police with jurisdiction over the alleged misconduct has investigated the allegations and notified school officials that there is insufficient information to establish probable cause that the school employee, contractor, or agent engaged in sexual misconduct regarding a minor or student in violation of the law;
>
> (B) the school employee, contractor, or agent has been charged with, and acquitted or otherwise exonerated of the alleged misconduct; or
>
> (C) the case or investigation remains open and there have been no charges filed against, or indictment of, the school employee, contractor, or agent within 4 years of the date on which the information was reported to a law enforcement agency.

In other words, a school or school district is not prohibited from assisting a person in obtaining a new job if the question of a person's conduct has been reported to law enforcement and other authorities and the case has been closed or is still pending after four years. Reporting the conduct to law enforcement and other authorities significantly enables a school or school district to comply with the federal law.

A similar provision is not provided under state law. School employees currently are required to report suspected abuse or sexual conduct to a law enforcement agency, the

[28] Section 9201(b)(3) of the Every Student Succeeds Act (P.L. 114-95).

Department of Human Services or specified school personnel,[29] but such a report does not relieve the school or school district of any other requirements under ORS 339.370 to 339.400.

### E. Actions of the Teacher Standards and Practices Commission

As discussed above, states have taken a variety of approaches to incorporating the provisions of 20 U.S.C. 7926 into state law. Since most persons to whom the law applies are licensed educators, some states have made licensure status contingent on compliance with 20 U.S.C. 7926. For example, rules proposed by the Texas State Board for Educator Certification allow the board to discipline an educator for assisting a person in obtaining a new job in violation of 20 U.S.C. 7926.[30] Similarly, Wisconsin has enacted a statute that considers a licensee who assisted a person in obtaining a new job in violation of 20 U.S.C. 7926 to have engaged in immoral conduct.[31] In both of these states, the person whose license is at stake is the licensee who assisted another person and not the person who engaged in the sexual conduct. We do not believe that similar provisions are required under state law to comply with the federal law, but that enacting such provisions would strengthen the state law. The Legislative Assembly may wish to consider whether to enact such provisions.

## II. ANALYSIS OF WHITEHURST REPORT

The Whitehurst Report[32] was an independent report commissioned by the school district board for Portland Public Schools. The investigators focused on Mitchell Whitehurst, who was an educator for the school district for over 30 years and who engaged in sexual conduct with students over the course of his career with little discipline or documentation related to his conduct. The 200-page report documented breakdowns in the system of disciplining and documenting sexual conduct, especially sexual conduct involving an educator who remained with the same school district over the course of a career. The investigators included a number of recommendations for the school district, including recommendations that the school district lobby for changes to state law.[33] The recommended changes to state law are explored below. Please note that all changes relate to sexual conduct, while current statutory law addresses both sexual conduct and abuse.

### A. First Legislative Recommendation—Definition of "Sexual Conduct"

The first recommendation for changes to state law proposed by the investigators is to amend the definition of the term "sexual conduct" under ORS 339.370 to 339.400.[34] The definition of "sexual conduct" for ORS 339.370 to 339.400 has four requirements. The

---

[29] ORS 339.372 (3)(a) and 339.388 (1)(a)(B).
[30] *See* Proposed Amendments to 19 Texas Administrative Code Section 249.15(b)(13), as considered by the State Board for Educator Certification on August 3, 2018, https://tea.texas.gov/About_TEA/Leadership/State_Board_for_Educator_Certification/SBEC_Meetings/2018/August/August_3,_2018_SBEC_Meeting_Agenda/ (visited August 10, 2018).
[31] Wis. State. 115.31.
[32] Weaver at 190-193.
[33] Portland Public Schools began this lobbying effort during the Legislative Days of May 2018 by meeting with legislators and distributing a letter from district leadership (letter from Portland Public Schools Superintendent Guadalupe Guerrero et al (May 21, 2018) http://media.oregonlive.com/education_impact/other/Whitehurst%20letter%205-21.pdf (visited August 10, 2018).
[34] Robert C. Weaver, Jr., Joy Ellis and Norm Frink, *Report to the Portland Public Schools Board of Education: Findings and Recommendations of the Whitehurst Investigation Team*, May 8, 2018.

requirements are that the verbal or physical conduct: (1) is sexual in nature; (2) is directed toward a kindergarten through grade 12 student; (3) has the effect of unreasonably interfering with a student's educational performance; and (4) creates an intimidating, hostile or offensive education environment.[35] The investigators criticized the definition as setting too high of a standard, as the definition "does not focus on *preventing* sexual conduct . . . . [but] only catches sexual conduct [that] has already occurred."[36] The investigators recommended that the school district "should lobby to align the statutory definition of sexual conduct with the [Teacher Standards and Practices Commission's (TSPC's)] definition of sexual conduct" for purposes of suspending or revoking an educator's license.[37] The investigators reasoned that if satisfying the lower standard established by TSPC could end an educator's career, then the same standard should apply to disclosures of conduct under ORS 339.370 to 339.400.[38]

Legally, we do not believe a change to the definition would cause any problems with complying with federal law or other state law. Logistically, consistency in definitions could be beneficial for school districts. The Legislative Assembly could amend ORS 339.370 (9)(a) to incorporate the definition from TSPC's rule.[39] Alternatively, the Legislative Assembly could direct the State Board of Education to define the term in collaboration with TSPC to ensure that the two definitions remain in sync.

## B. Second Legislative Recommendation—TSPC Investigation Timelines

The second recommendation for changes to state law proposed by the investigators is to shorten TSPC's timelines for investigating educators.[40] Currently, TSPC does not have any statutorily mandated timelines for investigations. According to TSPC's website, complaints are prioritized based on the severity of the allegation, and cases involving sexual abuse take priority.[41] While the average length of an investigation for the period from November 2016 until May 2018, was 8.7 months[42] that duration is an improvement over previous years, as TSPC has improved its processes and has received additional funding from the Legislative Assembly to hire additional investigators. Even with additional resources, TSPC now has four investigators to investigate the 254 complaints received by TSPC in 2017.[43] Investigations by TSPC can be delayed by other factors outside of the control of TSPC, including the response times of the involved parties, actions taken by other agencies or the courts, and the investigator's continuing high case load.[44]

Our understanding is that lack of funding for investigations has been the primary obstacle in past years for TSPC in conducting investigations in a timely manner. Therefore, mandating an investigatory timeline may not be productive. Alternatively, the Legislative

[35] ORS 339.370 (9)(a).
[36] Weaver at 191.
[37] *Id*. at 192.
[38] *Id*.
[39] *See* OAR 584-020-0005 (5).
[40] Weaver at 193.
[41] "Professional Practices/Discipline," Teacher Standards and Practices Commission https://www.oregon.gov/tspc/Pages/Professional-practices-Main-Page.aspx (visited August 10, 2018).
[42] Dr. Anthony Rosilez, Executive Director, Teacher Standards and Practices Commission, "Report on the Complaint and Investigations Process for Complaints Against TSPC Licensed Educators," presented before the House Interim Committee on Education, May 21, 2018, *(available at* http://olis.leg.state.or.us/liz/2017I1/Downloads/CommitteeMeetingDocument/148782 (visited August 10, 2018).
[43] *Id*.
[44] *Id*.

Assembly could consult with TSPC to determine how TSPC could reduce the duration of an investigation.

## C. Other Recommendations

While the Whitehurst Report included two specific recommendations for legislative changes, the report also included recommendations for the school district that may be appropriate for consideration by the Legislative Assembly.

### 1. Recommendations about resignation and termination agreements

A key area of concern for the investigators who prepared the Whitehurst Report involved resignation agreements.[45] Resignation agreements also were a concern for Congress, which expressed a "sense" that "confidentiality agreements between [school districts] or schools and child predators should be prohibited."[46] State law does address resignation and termination agreements, but the investigators identified a number of problems that are not addressed under current statute.

First, the investigators found that the statutory language provided a loophole. Under ORS 339.392, an education provider is prohibited from entering into an agreement that has "the effect of suppressing information relating to an ongoing investigation related to a report of suspected abuse or sexual conduct or relating to a substantiated report of abuse or sexual conduct."[47] The investigators, however, found that the school district was meeting the letter, but not the spirit, of the law by entering into agreements before a report was substantiated as long as information was not suppressed.[48] Such actions could be prevented if the Legislative Assembly enacted legislation that prohibits a school district from entering into any resignation or termination agreements with an educator if the school or school district has an ongoing investigation related to the educator.

Second, the investigators found that the school district entered into agreements that limited employment inquiry responses to only basic employment information.[49] This neutral approach aligns with federal law, which prohibits any assistance beyond the provision of basic employment information. The investigators, however, advocated against giving a neutral reference if there are credible complaints.[50] The Legislative Assembly may wish to explore various options related to this concern, such as requiring disclosure of an ongoing investigation or credible complaints.

Third, the investigators criticized agreements that affected an educator's personnel file. One agreement provided that the district would "remove from the personnel file and maintain in a separate location all investigatory information relating to allegations of inappropriate behavior of a sexual nature."[51] Another agreement provided that the district would "place all discipline issued to the educator . . . in a sealed file within the educator's personnel file, to be opened only

[45] Weaver at 182-188.
[46] Section 9201(b)(1) of the Every Student Succeeds Act (P.L. 114-95).
[47] ORS 339.392 (1).
[48] Weaver at 184.
[49] *Id*. at 185.
[50] *Id*. at 186-187.
[51] *Id*. at 185.

by specified individuals or as required by law."[52] The Legislative Assembly could prohibit the inclusion of such provisions in a resignation or termination agreement. Alternatively, the Legislative Assembly could legislatively prohibit those actions, regardless of any agreements.

Fourth, the report criticized an agreement to "respond, if asked whether the educator's employment included any sexual misconduct, that there was an investigation into allegations of sexual misconduct that the educator denied, no findings were made, and the educator resigned before the conclusion of the investigation."[53] The investigators did not specify the concern they had with such agreements, but did state that any agreement should "allow the District the discretion to disclose information freely."[54] Additionally, the investigators believed that the district "should not enter into any more resignation agreements that prevent the disclosure of sexual conduct that potentially could have been substantiated if only a complete and thorough investigation had taken place."[55] These statements indicate that the investigators object to any agreements that limit the disclosure of information. The Legislative Assembly could legislatively prohibit any agreements that prohibit the disclosure of information when there have been allegations of abuse or sexual conduct.

### 2. Recommendations for other school policies

The investigators also made recommendations about changes to policies for the school district that the Legislative Assembly could consider applying to all school districts. One recommendation is that the school district adopt a policy related to appropriate electronic communications between employees and students.[56] Another recommendation is that the school district implement a centralized tracking system for disciplinary concerns and investigations.[57] Finally, the investigators recommended a policy that restricts school district employees from giving recommendations and serving as a reference for other employees or that requires school district employees to first consult with the human resources department before giving a reference for another school employee.[58] Such policies could be adopted at the local level, or the Legislative Assembly could require that all school districts in this state adopt such policies.

## III. ANALYSIS OF MANDATORY REPORTING REQUIREMENTS

In light of the Whitehurst Report and other recent disclosures of sexual conduct between educators and students, concerns have been raised about whether mandatory reporting laws are effective.[59] Under the mandatory reporting laws,[60] a duty to report is imposed on specified public and private officials who have "reasonable cause to believe that any child with whom the official comes in contact has suffered abuse or that any person with whom the official comes in

---

[52] *Id*.
[53] *Id*.
[54] *Id*. at 186.
[55] *Id*.
[56] *Id*. at 188.
[57] *Id*. at 197.
[58] *Id*. at 195.
[59] *See, e.g.*, Steven and Deborah Waksman, "PPS Failed Mandatory Reporting Laws: Letter to the Editor," *The Oregonian*, May 21, 2018, *available at* https://www.oregonlive.com/opinion/index.ssf/2018/05/pps_failed_mandatory_reporting.html (visited August 10, 2018).
[60] ORS 419B.005 to 419B.050.

contact has abused a child."[61] Included in the list of officials who are required to make a report are school employees.[62] Failure to make a report is a Class A violation,[63] which could result in a $2,000 fine.[64] Additionally, failure to make a report may be considered a gross neglect of duty[65] that may result in disciplinary action against a licensee.[66]

The question then arises: If educators are mandatory reporters and failure to report has serious consequences, why are cases of sexual conduct between educators and students occurring and not being reported? Possible reasons are explored below.

## A. Definition of the Term "Abuse"

One reason the mandatory reporting requirements have not played a larger role in sexual conduct cases may be that not all instances of sexual conduct between an educator and a student must be reported under the mandatory reporting requirements. Under the mandatory reporting requirements, a person is required to make a report if the person has reasonable cause to believe that a child has suffered abuse. The term abuse is defined to include rape,[67] sexual abuse under ORS chapter 163[68] and sexual exploitation.[69] Instances of sexual conduct that may include grooming behavior and other behavior described as "creepy" do not meet the definition of abuse for purposes of the mandatory reporting requirements. The differentiation between abuse and sexual conduct is noted in ORS 339.370 to 339.400, as reports of abuse are to be directed to a law enforcement agency or the Department of Human Services[70] but reports of sexual conduct are to be directed to a school official.[71] As noted above, Congress expressed a "sense" that even reports of sexual conduct should be reported to law enforcement or other authorities.

## B. Weaknesses in the Reporting System in Relation to Educators

Another reason the mandatory reporting requirements have not played a larger role in sexual conduct cases may be weaknesses in the reporting system in relation to educators. Weaknesses in the reporting system are caused by the system's assumption that the person committing the abuse is a caregiver of the child or that the abuse is serious enough to constitute a crime. These assumptions are evident in the fact that reports are to be made to the Department of Human Services or to a law enforcement agency.[72]

The difficulty with a report to the Department of Human Services is that the department best addresses abuse committed by a family member instead of a teacher. This specialization is justified, as family members account for more than 94 percent of all abusers.[73] When the

[61] ORS 419B.010 (1).
[62] ORS 419B.005 (5)(c).
[63] ORS 419B.010 (5).
[64] ORS 153.018 (2)(a).
[65] OAR 584-020-0040 (4)(s).
[66] OAR 584-020-0040 (3)(c).
[67] ORS 419B.005 (1)(a)(C).
[68] ORS 419B.005 (1)(a)(D).
[69] ORS 419B.005 (1)(a)(E).
[70] ORS 339.372 (3)(a).
[71] ORS 339.372 (3)(b).
[72] ORS 419B.015.
[73] "What You Can Do About Child Abuse," Department of Human Services, DHS 9061 (Revised May 2017) at 26, *available at* https://apps.state.or.us/Forms/Served/de9061.pdf (visited August 10, 2018).

department receives a report alleging abuse, the Child Welfare Division of the department conducts a screening. The division will close the case at screening if the abuse was committed by a third party (such as school personnel),[74] the person who committed the abuse does not have access to the child and the parent is willing and able to protect the child.[75] The division will continue with a child protective services assessment only if the person who committed the abuse continues to have access to the child and the parent or caregiver is unable or unwilling to protect the child.[76] Most often, cases of abuse by school personnel will be closed at screening. Even if a case proceeds through the assessment stage, the division can act to protect the child but lacks sufficient remedies to take against the school personnel. Perhaps for this reason, a spokesperson for the Child Welfare Division of the Department of Human Services recently stated that the division does not investigate allegations of child abuse of students by teachers.[77] Instead, the spokesperson stated, law enforcement conducts those investigations.[78]

The difficulty with a report to a law enforcement agency is that the agency best addresses abuse that rises to the level of a crime. If a crime was not committed, the agency does not have authority over the case.

If neither the Department of Human Services nor law enforcement has authority over an allegation of abuse, the case has the potential of remaining unresolved. This appears to be what happened with a recent case alleging abuse of students by a teacher when the department did not proceed with an investigation and the local law enforcement did not have a record of the report.[79] Even if the report of abuse had been resolved, neither the department nor law enforcement had access to a sufficient remedy if the conduct was not a crime. The agency that may best be able to provide a remedy is TSPC. The department has procedures to notify TSPC of a report involving an educator both at the conclusion of screening[80] and at the conclusion of child protective services assessment.[81] Law enforcement does not necessarily have the same procedures, as there is not a state-mandated requirement for such a procedure and law enforcement could be a city police department or a county sheriff's office.[82]

Ultimately, the most effective action most likely will be taken by TSPC, and channels of communication and standards of cross reporting with TSPC could be clarified. The Legislative Assembly could examine how to enable TSPC to conduct investigations more efficiently or how to clarify how the department and law enforcement can aid TSPC in investigations.

## C. Incomplete List of Mandatory Reporters

The mandatory reporting provisions apply to school employees,[83] but not necessarily other persons involved in schools who may become aware of abuse allegations. For example, members of a school district board or a public charter school governing board are not

[74] OAR 413-015-0115 (68).
[75] OAR 413-015-0210 (4)(a)(B).
[76] OAR 413-015-0210.
[77] Shasta Kearns Moore, "PPS Teacher: Rewarding Misbehavior?", *Portland Tribune*, May 17, 2018, https://portlandtribune.com/pt/9-news/395725-287415-pps-teacher-rewarding-misbehavior (visited August 10, 2018).
[78] *Id*.
[79] *Id*.
[80] OAR 413-015-0215 (5).
[81] OAR 413-015-0470 (1)(d).
[82] ORS 419B.005 (4).
[83] ORS 419B.005 (5)(c).

mandatory reporters. Expanding mandatory reporting requirements to those groups might have changed the outcome of a situation in Springfield, in which a public charter school's governing board members were aware of the conduct of a principal in the public charter school but did not report the conduct.[84] The Legislative Assembly may wish to examine whether the list of mandatory reporters applies to all persons in an educational setting who may become aware of abuse or sexual conduct involving students.

## IV. SUMMARY

In summary, the Legislative Assembly could enact legislation to broaden components of current state law to comply with federal law requirements. Amendments would be required to expand the list of actors on whom prohibitions are imposed and to restrict actions that may be taken when a person is looking for any new job.

In addition to changes that are required to ensure compliance with federal law, issues for the Legislative Assembly to consider include:

- Determine the extent to which the sexual conduct and abuse statutes should apply to private schools (section (I)(C)(1)).
- Determine the extent to which state sexual conduct and abuse statutes should apply to the list of actors listed in federal law (section (I)(C)(1)).
- Determine the standard to apply when deciding when the duty to future employers is activated (section (I)(C)(5)).
- Determine whether sexual conduct should be reported to law enforcement or other agencies in the manner that abuse is reported (section (I)(D)).
- Determine whether to authorize TSPC to discipline a licensee who assisted a person in obtaining a new job in violation of the federal law (section (I)(E)).
- Determine whether to amend the definition of the term "sexual conduct" to align with the definition in TSPC's rules (section (II)(A)).
- Determine whether any statutory changes or legislative action is required to assist TSPC in conducting investigations in a more timely manner (section (II)(B)).
- Determine whether any statutory changes are necessary in relation to resignation or termination agreements (section (II)(C)(1)).
- Determine if any of the recommendations made for the school district under the Whitehurst Report should be mandated for all school districts (section (II)(C)(2)).
- Determine if the mandatory reporting requirements should be revised (section (III)).

We hope this has been helpful. Please let us know if you have any additional questions.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek

[84] "Student Remarks About Principal's Misconduct at Springfield School Were Deleted," *The Oregonian*, May 6, 2018, https://www.oregonlive.com/today/index.ssf/2018/05/student_remarks_about_springfi.html (visited August 10, 2018).

and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel

Hannah Lai

By
Hannah Lai
Senior Deputy Legislative Counsel

c: Lisa Gezelter, LPRO Analyst
Senate Interim Committee on Education