

Preventing Sexual Abuse in Our Nation's Schools: The Case for a Federal Qualified Privilege  
Statute to Protect Schools that Report Sexual Misconduct

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## I. INTRODUCTION

Sexual abuse and harassment of children have always been serious problems in the United States, and unfortunately these problems have permeated into our nation's schools.<sup>1</sup> Although our country has made progress in recent decades by increasing awareness of this issue, studies continue to show shocking figures of rampant sexual abuse and harassment in schools. One study indicated that 17.7% of males and 82.2% of females graduating from high school reported they had been sexually harassed by a school employee or faculty member at some point during their education.<sup>2</sup> In a separate survey, 9.6% of students in grades eight to eleven reported that they had been victim to unwanted sexual misconduct from an educator, some of which reported physical contact.<sup>3</sup> Even if the statistics are inaccurate or skewed, they are supported by far too many stories of substantiated sexual abuse or sexual assault between teachers and students.<sup>4</sup> The most frightening thing about these stories is the number of teachers who had already been arrested or accused for improper sexual misconduct in the past but were somehow able to keep their jobs or get hired to work for other schools.<sup>5</sup>

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<sup>1</sup> Jason P. Nance and Philip T.K. Daniel, *Protecting Students from Abuse: Public School District Liability for Student Sexual Abuse Under State Child Abuse Reporting Laws*,

<sup>2</sup> Daniel Wishnietsky, *Reported and Unreported Teacher-Student Sexual Harassment*, 3 J. EDUC. RES. 164, 164-69 (1991).

<sup>3</sup> CHAROL SHAKESHAFT, *EDUCATOR SEXUAL MISCONDUCT: A SYNTHESIS OF EXISTING LITERATURE* 17 (U.S. Dept. of Educ. 2004).

<sup>4</sup> E.g., Martha Irvine and Robert Tanner, *AP: Sexual Misconduct Plagues US Schools*, WASH. POST, Oct. 21, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/21/AR2007102100144.html> (describing the story of Gary C. Lindsey, a public school teacher who surrendered his teaching license after forty years of teaching with at least a half-dozen accusations of sexual abuse toward students); Tony Gordon, *Track Coach Accused*, CHI. DAILY HERALD, Feb. 2, 2011, at 4 (reporting that a teacher, Tony Hsieh, was arrested and accused of molesting a student at school). On May 14, 2011, a quick search in Google News of the words "teacher," "charged," and "sexual" turned up 505 results, most of which described teachers across the country who had recently been charged with sexual assault, sexual abuse, or other improper sexual misconduct.

<sup>5</sup> E.g., Irvine & Tanner, *supra* note 4; *Teacher Arrested Again for Continuing Affair with 8<sup>th</sup> Grader*, NEWS 4 WOAI (Apr. 30, 2011, 4:48 PM), <http://www.woai.com/news/local/story/Teacher-arrested-again-for-continuing-affair-with/KT6hZEZ0qkq GMtEaGOSfAQ.csp>; Jessika Lewis, *Lake Shore Middle School Teacher Arrested for Molestation Charges*, FIRST COAST NEWS (Apr. 27, 2011, 1:22 PM), <http://www.firstcoastnews.com/news/article/202139/3/Lake-Shore-Middle-School-Teacher-Arrested-on-Molestation-Charges>.

Many legal scholars have recently pushed for broadening the legal duty of schools in protecting students from sexual abuse, thereby expanding the potential liability of those schools that fail to prevent sexual misconduct by a teacher.<sup>6</sup> Although these arguments are made with good intentions, they propose too significant a burden on schools and do not address the root of the problem: schools are afraid to act on suspicious teacher behavior because they fear defamation or wrongful termination law suits from employees.<sup>7</sup> This paper focuses on those teachers who are hired by new schools after having been released by their previous employer due to suspicious behavior with students. It argues that the federal government should adopt a qualified privilege to protect all U.S. schools that give negative employment references for a teacher regarding suspicious sexual misconduct such that any plaintiff would be required to show actual malice in order to prevail in a defamation law suit against the school.

## II. SCHOOLS NEED SPECIAL LEGAL PROTECTION TO GUARD STUDENTS FROM SEXUAL ABUSE

For obvious reasons, schools are in a unique position in the employment context. They have a special relationship with their students and are responsible for protecting them from foreseeable dangers such as sexual abuse.<sup>8</sup> Yet, teachers unavoidably spend countless hours alone with their classes and are even given opportunities at times to be alone with individual students who might need special attention.<sup>9</sup> These situations have the potential to foster inappropriate behavior or sexual misconduct between teachers and students, making sexual

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<sup>6</sup> See, e.g., Joshua D. Sayko, *When Employers Get "Something for Nothing": The Need to Impose a Limited Obligation to Disclose in Employment Reference Situations*, 38 SUFFOLK U. L. REV. 123 (2004).

<sup>7</sup> See, e.g., *id.* at 124.

<sup>8</sup> See *Christensen v. Royal Sch. Dist. No. 160*, 124 P.3d 283, 287 (Wash. 2005) (“[A] school has a ‘special relationship’ with the students in its custody and a duty to protect them ‘from reasonably anticipated dangers.’”); *Eberwein v. Newburgh Enlarged City Sch.*, 818 N.Y.S.2d 255, 256 (A.D. 2 Dept. 2006) (“Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision.”).

<sup>9</sup> See Jane Wangmann, *Liability for Institutional Child Sexual Assault: Where Does Lepore Leave Australia?*, 28 MELB. U. L. REV. 169, 179 (2004) (arguing that teachers should not be left alone with individual children).

misconduct by teachers not only foreseeable but disturbingly frequent.<sup>10</sup> An Associated Press investigation revealed over 2,500 instances of teacher sexual misconduct toward students in a span of just five years.<sup>11</sup> Further, a report mandated by Congress estimated that up to 4.5 million students have been victim to sexual misconduct by a teacher or other school employee sometime between kindergarten and 12<sup>th</sup> grade.<sup>12</sup> Although the studies are not consistent, they demonstrate that sexual abuse by teachers is a serious problem.

Despite this problem, however, the law treats employment references for teachers the same as other employment references.<sup>13</sup> Schools, fearful of being sued for defamation, generally opt to say nothing about their former employees except to confirm their employment or to give other basic facts.<sup>14</sup> For instance, in *Randi W. v. Muroc Joint Unified School District*,<sup>15</sup> a school gave a former administrator a *positive* recommendation even though it knew of charges and complaints against the administrator for sexual misconduct with students.<sup>16</sup> In part because of the school's recommendation, the administrator was hired to work in another middle school where he sexually molested a female student.<sup>17</sup> Clearly, the unique circumstances in schools require special treatment under the law to encourage the free flow of information about sexual misconduct by former school employees.

### III. AN ANALYSIS OF LEGAL PROPOSALS

Legal scholars commonly propose methods of expanding the legal duty of schools to their students and students at other schools who might be victims of sexual abuse. For instance,

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<sup>10</sup> See *supra* notes 1–4 and accompanying text.

<sup>11</sup> Irvine & Tanner, *supra* note 4.

<sup>12</sup> *Id.*

<sup>13</sup> See *infra* notes 15–18. These two cases address employment references in the school context but address the issues as to employment law generally.

<sup>14</sup> Markita D. Cooper, *Beyond Name, Rank, and Serial Number: "No Comment" Job Reference Policies, Violent Employees and the Need for Disclosure-Shield Legislation*, 5 VA. J. SOC. POL'Y & L. 287, 294 (1998).

<sup>15</sup> 929 P.2d 582 (Cal. 1997).

<sup>16</sup> *Id.* at 584–87.

<sup>17</sup> *Id.* at 595.

the Ohio Supreme Court in *Yates v. Mansfield Board of Education*<sup>18</sup> extended a statutory duty of school districts such that the board of education was liable after its failure to report the sexual abuse of one student by a teacher resulted in the abuse of another student by the same teacher several years later.<sup>19</sup> Scholars argue that the court's approach in *Yates* is a welcome change to tort law because it creates another means of recourse for the victims of sexual abuse.<sup>20</sup> They argue that school districts under this model will more frequently report instances of sexual abuse to child services agencies or the police.<sup>21</sup> Under most theories of liability, a school's good faith investigation that leads to the conclusion there was no sexual misconduct is sufficient to avoid liability. However, the court's holding in *Yates* essentially requires the school to report allegations of sexual misconduct to the proper authorities if it wishes to avoid liability for subsequent misconduct by the same teacher.<sup>22</sup>

Even more relevant to this paper is the Supreme Court of California's holding in *Randi W. v. Muroc Joint Unified School District*, mentioned *supra*. The court in *Randi* held an administrator's former school district liable in damages to a student after the administrator's former district provided him with a positive recommendation to obtain his new job.<sup>23</sup> Some scholars support this holding and even go further, arguing that school districts should be legally required to report a teacher's history of sexual misconduct or allegations thereof in employment references.<sup>24</sup> They contend that such a duty is the only means of overcoming school districts'

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<sup>18</sup> 808 N.E.2d 861 (Ohio 2004).

<sup>19</sup> *Id.*

<sup>20</sup> Nance & Daniel, *supra* note 1, at 62; see also Jeremy Beck, *Entity Liability for Teacher-on-Student Sexual Harassment: Could State Law Offer Greater Protection than Federal Statutes?*, 35 J.L. & EDUC. 141, 149 (2006) (discussing *Yates* in the context of identifying the legal means most likely to prevail in a law suit against school districts for sexual harassment by teachers).

<sup>21</sup> Nance & Daniel, *supra* note 1, at 62.

<sup>22</sup> *Id.* at 59–61.

<sup>23</sup> *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 584–87. (Cal. 1997).

<sup>24</sup> Deborah A. Ballam, *Employment References—Speak No Evil, Hear No Evil: A Proposal for Meaningful Reform*, 29 AM. BUS. L.J. 445, 464–66 (2002). See also Janet Swerdlow, *Note, Negligent Referral: A Potential Theory for*

fear of incurring litigation expenses, and is therefore the only way to accomplish the free flow of information necessary to prevent sexual abuse by teachers or other school employees.<sup>25</sup>

Extending the duties of schools such that they are more susceptible to liability would certainly incentivize precautions to prevent sexual abuse. Naturally, if schools were more vulnerable to lawsuits from sexually abused students or if they were mandated to report sexual misconduct, they would comply or try to mitigate costs by more readily reporting and releasing teachers who were accused of abuse. However, these proposals have several negative side effects. First, mandatory disclosure would lead to more teachers being unnecessarily defamed when they did not actually engage in inappropriate behavior.<sup>26</sup> Requiring schools to report all allegations of sexual abuse might even increase the occurrence of students making false accusations out of a desire to harm the teacher.<sup>27</sup> Further, mandatory disclosure would burden schools with additional lawsuits.<sup>28</sup> Inevitably, there will be incidents of alleged sexual misconduct that are not completely substantiated by evidence.<sup>29</sup> Under a duty to disclose, schools will report the misconduct and be forced to face a defamation lawsuit. Alternatively, they will elect not to disclose sexual misconduct and potentially face a lawsuit for breaching their duty to third party students who are subsequently abused. Thus, the proposals discussed above force school districts to walk a tightrope with lawsuits lingering on both sides of their

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*Employer Liability*, 64 S. CAL. L. REV. 1645 (1991) (arguing for an affirmative duty on employers to warn potential employers in employment references); Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform*, 13 YALE L. & POL'Y REV. 45 (1995) (arguing for a less expansive affirmative duty on employers to warn subsequent potential employers about issues that could cause physical harm).

<sup>25</sup> Ballam, *supra* note 24, at 464–66.

<sup>26</sup> Swerdlow, *supra* note 24, at 1671.

<sup>27</sup> In 1995, it was estimated that 7.5% of sexual abuse allegations made by students against teachers were false. Ann Hassenpflug, Ph.D. and Robert O. Riggs, Ed.D., *Guilty Until Proven Innocent? Protecting the School District Employees*, 104 ED. LAW REP. 981, 981–82 (1996).

<sup>28</sup> See Robert S. Adler and Ellen R. Peirce, *Encouraging Employers to Abandon their "No Comment" Policies Regarding Job References: A Reform Proposal*, 53 WASH. & LEE L. REV. 1381, 1446–47 (1996) (stating that imposing a duty to disclose on employers would lead to tort damages of "hundreds of thousands (or even millions) of dollars" for failing to act).

<sup>29</sup> *Id.* at 1450.

decision.<sup>30</sup> The additional lawsuits will only raise costs for school districts, either raising taxes or diverting valuable funds away from important resources that make quality education available in our communities.

In addition to added costs on schools, imposing an obligation on school districts in this context would set a problematic precedent that an individual can breach an affirmative duty merely by his or her silence even when that silence is more likely an indication that prospective employers should be wary of the employment candidate.<sup>31</sup> This precedent goes against well established principles of tort law and would be an inefficient burden on unrelated third parties who could be held liable for failing to prevent injury to another person with whom they have no special relationship.<sup>32</sup>

Most importantly, even though these proposals adjust incentives to encourage disclosure, they do nothing to address the root of the problem: schools' fear of defamation litigation.<sup>33</sup> Schools are driven to "no comment" reference strategies and even to offering positive references for teachers accused of sexual misconduct because they fear law suits from those teachers and are prone to avoid monetary risk at all costs.<sup>34</sup> Thus, the first step to encouraging disclosure is the federal government's enactment of a reference immunity privilege for all U.S. schools. Such a privilege would allow schools to disclose a teacher's history of sexual misconduct or abuse to

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<sup>30</sup> John Ashby, *Employment References: Should Employers Have an Affirmative Duty to Report Employee Misconduct Inquiring Prospective Employers?*, 46 ARIZ. L. REV. 117, 149 (2004).

<sup>31</sup> Adler & Peirce, *supra* note 28, at 1445.

<sup>32</sup> RESTATEMENT (SECOND) OF TORTS § 314 (1977); *Doe v. Prudential Ins. Co. of Am.*, 860 F. Supp. 243, 251 (D. Md. 1993).

<sup>33</sup> Markita D. Cooper, *Job Reference Immunity Statutes: Prevalent but Irrelevant*, 11 CORNELL J.L. & PUB. POL'Y 1, 61–62 (2001)

<sup>34</sup> *Id.*

subsequent employers without being liable for defamation unless the information is false *and* reported with actual malice in an effort to harm the teacher.<sup>35</sup>

Opponents of this approach argue that it will do nothing to change a school's fear of being sued—only its ability to prevail in litigation—and will therefore not change the practice of “no comment” employment references.<sup>36</sup> However, a reference immunity statute lowers the risk that a former teacher will prevail in a defamation law suit and therefore lowers the risk of a teacher bringing the suit in the first place.<sup>37</sup> Potential plaintiffs will be less inclined to incur the significant costs of litigation when the chance of success is lower.

Critics of this approach further argue that employers have chosen to remain silent about employee misconduct despite the growing prevalence of qualified privilege statutes.<sup>38</sup> Indeed, most states have adopted reference immunity statutes without seeing significant change, but there are still ten states that have not enacted immunity laws.<sup>39</sup> Further, even though many employers continue to elect non-disclosure, it is likely a result of the confusing and poorly defined body of reference immunity state statutes.<sup>40</sup> First, state statutes involve inconsistencies and are often too narrow to provide adequate protection for employers.<sup>41</sup> Second, many states do not clearly define key terms such as “good faith” and “malice,” making it difficult to understand the proper application of the statute.<sup>42</sup> Finally, the differing state laws make it difficult for employers to predict the application of reference immunity statutes for employees that move out

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<sup>35</sup> See 740 Ill Comp. Stat. 145/3 (1991). This Illinois statute is one example of how immunity statutes require actual malice to prevail in libel or slander claims. *Id.* See also *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964), for a description of the federal immunity standard that requires “actual malice” before public officials can recover in a defamation case.

<sup>36</sup> Ballam, *supra* note 24, at 464–66.

<sup>37</sup> Bruce Elder and Sara Gerdes, *Is A Job Reference Really a Reference? Addressing Employer Name, Rank, and Serial Number Policies through Job Reference Immunity Legislation*, 2007 J. BUS. INQUIRY 19, 26.

<sup>38</sup> Swerdlow, *supra* note 24, at 1670.

<sup>39</sup> Elder & Gerdes, *supra* note 37, at 24.

<sup>40</sup> Adler & Peirce, *supra* note 28, at 1451.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1452–53.



of state. As a result, most employers adopt reference policies that are tailored to the laws of the least protective state.<sup>43</sup> These three factors have all hindered the effectiveness of reference immunity state statutes, and schools have maintained uninformative reference policies rather than taking their chances on being protected by the confusing immunity laws.<sup>44</sup>

Adopting a federal reference immunity statute to protect all U.S. schools that report sexual misconduct by teachers in good faith would provide clarity and uniformity for employment references.<sup>45</sup> So long as Congress adopts a clear and predictable standard,<sup>46</sup> schools would more readily report instances of sexual misconduct or alleged misconduct in order to prevent future sexual abuse.<sup>47</sup> Although schools seek to avoid the risks of liability, administrators are not purely driven by the bottom line but are also driven by their desire for good schools.<sup>48</sup> It is safe to presume that administrators want to protect their students and students at other schools from sexual abuse. This is one of their most important duties, and they have only strayed from focusing on this duty out of fear of costly litigation that is no longer as threatening because of immunity laws. The prevalence of “no comment” employee references surfaced during the onslaught of defamation lawsuits against employers that began in the 1980s.<sup>49</sup> To remove the fear of those lawsuits and to create a predictable standard by which schools can report instances of sexual misconduct without a significant fear of defamation liability would have a significant impact on preventing sexual misconduct in schools.

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<sup>43</sup> *Id.* at 1451.

<sup>44</sup> Cooper, *supra* note 33, at 44–45.

<sup>45</sup> Adler & Peirce, *supra* note 28, at 1451.

<sup>46</sup> Although it is not the focus of this paper, the “actual malice” definition from *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964), would provide a good federal standard for education references because it is widely understood, having been interpreted and applied frequently in courts across the country.

<sup>47</sup> Adler & Peirce, *supra* note 28, at 1459.

<sup>48</sup> RON RENCHLER, STUDENT MOTIVATION, SCHOOL CULTURE, AND ACADEMIC ACHIEVEMENT: WHAT SCHOOL LEADERS CAN DO 2 (Eric Clearinghouse on Education Management, Univ. of Oregon, February 1992). Administrators are motivated by, among other things, an altruistic desire to improve students’ lives. *Id.*

<sup>49</sup> Shannon M. Blankinship, *Comment: The Employment Record Disclosure Act in Illinois: Applying the Knowledge Standard Liberally*, 22 S. ILL. U. L. J. 743, 743 (1998).

A federal reference immunity statute for schools that report sexual misconduct would change the perception that lawsuits lurk behind every employment reference because it would establish a clear and predictable standard,<sup>50</sup> and it would publicize that schools can report a teacher's history of sexual misconduct without invariably facing a lawsuit. As a result, lawyers would be able to advise schools on how to craft their employment references truthfully without risking liability for defamation. This is consistent with recent scholarship arguing that state immunity statutes will not be effective until employers' perception of risk is changed.<sup>51</sup> Even in states that already have enacted privilege statutes, many employers and employees are still not aware of the protection they are afforded.<sup>52</sup> Those providing employment references must first understand that statutory protections make the risk of defamation litigation very small before such protections will be effective.<sup>53</sup> A clear federal statute would significantly increase this understanding and would therefore lessen the occurrence of sexual misconduct in schools.

Scholars also argue that employers must learn to accept the small risk of defamation litigation as the cost for promoting society's collective well-being.<sup>54</sup> This is especially relevant in education where the public interest of protecting students from sexual abuse is particularly great. By enacting a federal statute to this end, this need will be more apparent to schools, reinforcing the need to put the interest of students above the very small risk of defamation litigation. Moreover, a federal statute will increase public awareness of sexual misconduct in schools and demonstrate a commitment on the federal level to stop such misconduct. If the public sentiment is more clearly behind efforts to report alleged sexual misconduct in employment references, even administrators who are not motivated by a sense of collective well-

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<sup>50</sup> Adler & Peirce, *supra* note 28, at 1457–58.

<sup>51</sup> Cooper, *supra* note 33, at 62.

<sup>52</sup> Cathy A. Schainblatt, 44 ST. LOUIS U. L.J. 693, 744–45 (2000).

<sup>53</sup> See Elder & Gerdes, *supra* note 37, at 26.

<sup>54</sup> *Id.*; Cooper, *supra* note 33, at 62–63.

being will be encouraged to report sexual misconduct in order to avoid negative publicity that results from a former teacher engaging in sexual misconduct.<sup>55</sup>

#### IV. CONCLUSION

Students should be free to attend school without the risk of being sexually abused or sexually assaulted by a teacher or other school employee. However, the occurrence of teacher sexual abuse and harassment in schools is quite common, affecting hundreds if not thousands of students each year. Although the figures are not certain, the prevalence of the problem is, and far too many teachers are able to find new teaching positions even after being released from their old job due to sexual misconduct. This problem is in large part the result of administrators' fear of defamation law suits. When they are contacted to provide employment references for these teachers, administrators simply confirm employment and offer "no comment" in order to avoid the exorbitant costs of a defamation lawsuit.

Although mandating disclosure of sexual abuse in employment references would effectively encourage such disclosure, it would add costs and burden schools with more litigation. Further, it would overturn well established legal precedent that, absent a special relationship, unrelated third parties have no duty to rescue. Moreover, these inefficient results are not necessary to achieving the desired policy results. Although forty states have enacted reference immunity statutes, the body of immunity law is confusing, inconsistent, and sporadic in its application. Thus, the potential of immunity laws have not been reached. A federal immunity law for schools that report sexual misconduct of former teachers in employment references would provide clarity and predictability. It would allow administrators to report a teacher's sexual misconduct or allegations thereof without fearing a resulting defamation law suit. So long

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<sup>55</sup> RENCHLER, *supra* note 48, at 2. Some administrators are motivated by their desire for a good reputation in the community as a good administrator and others are driven by their desire to be successful professionally. *Id.*

as schools are aware of the statute's existence and how to report misconduct under the protection of the immunity law, their desires to protect students from sexual abuse and to avoid negative publicity would motivate them to report sexual misconduct in employment references.

Therefore, Congress should enact a federal immunity law protecting schools that report sexual misconduct in good faith on a teacher employment reference.