

FILED
SUPREME COURT
STATE OF WASHINGTON
1/27/2020 8:52 AM
BY SUSAN L. CARLSON
CLERK

FILED
SUPREME COURT
STATE OF WASHINGTON
2/4/2020
BY SUSAN L. CARLSON
CLERK

NO. 97630-9

THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM U.S. DISTRICT COURT, WESTERN
DISTRICT OF WASHINGTON AT TACOMA

IN

W.H., *et. al.*,

Plaintiffs,

v.

OLYMPIA SCHOOL DISTRICT, *et. al.*,

Defendants.

BRIEF OF AMICUS CURIAE WASHINGTON SCHOOLS
RISK MANAGEMENT POOL

TYNA EK, WSBA No. 14332
Attorney for Washington Schools Risk Management Pool
3704 S.W. Lander Street
Seattle, WA 98126
(206) 419-0967

TABLE OF CONTENTS

I. IDENTITY AND INTEREST OF AMICUS CURIAE.....1

II. ISSUES ADDRESSED BY AMICUS.....1

III. STATEMENT OF THE CASE.....2

IV. ARGUMENT.....3

 A. Schools May Not Be Held Strictly Liable for Injury to Students
 3

 1. State Law Mandates A Public School District Can Only Be
 Sued For Its Own Acts Or Omissions.....3

 2. Washington Courts Have Consistently Maintained That
 Public Schools Are Not Guarantors of Students’ Safety....5

 (a) Extending the meaning of “educational institution”
 in the WLAD’s public accommodation definition to
 include off-campus bus service would have unintended
 consequences.....6

 (b) Plaintiffs’ effort to extend WLAD liability to
 student-to-student personal injury has no support in the
 WLAD.....9

 B. Child Abuse Is Not Sex/Gender Discrimination Under the
 WLAD.....9

 1. The WLAD is Not a Child Abuse Statute, and Sexual Abuse
 of a Child Is Not “Discrimination” In Public
 Accommodation.....9

 (a) An adult’s sexual abuse of a child is not gender
 discrimination under the WLAD.....9

(b) Plaintiffs’ analysis relies on employment law this Court expressly rejected in <i>Floeting</i>	11
(c) None of the foreign cases Plaintiffs cite support holding a school district strictly liable for an employee’s intentional sexual abuse.....	12
2. Washington Has Clear Law Addressing School District Liability For An Employee’s Sexual Abuse of A Student.....	13
C. <u>Burdening Schools with Unprecedented No-Fault Liability Would Have a Disastrous Impact on Public Schools and Would Not Lower the Incident Rate of Student Sexual Abuse</u>	15
1. Adopting No-Fault Strict Liability For Student Sexual Abuse Claims Would Leave Schools With Unpredictable, Unavoidable and Uninsurable Catastrophic Liability Exposure.....	15
2. Adopting No-Fault Strict Liability Would Hinder Schools’ Ability To Self-Insure Through Risk Pooling.....	18
V. CONCLUSION.....	20

TABLE OF AUTHORITIES

CASES

<i>Bratton v. Calkins</i> , 73 Wn.App. 492, 870 P.2d 981, (Div. 3 (1994)).....	5
<i>Christensen v. Royal Sch. Dist. No. 160</i> , 156 Wn.2d 62, 124 P.3d 283 (2005).....	10, 14
<i>Davis Next Friend LaShonda D. v. Monroe County Bd. Of Educ.</i> , 526 U.S. 629, 650, 119 S. Ct. 1661, 143 L. Ed. 2d 83 (1999).	12, 13
<i>Doe ex rel. Subia v. Kansas City, Missouri Sch. Dist.</i> , 372 S.W.3d 43 (W.D. Mo. 2012).....	13
<i>Evans v. Tacoma School District No. 10</i> , 195 Wn.App. 25, 38, 380 P.3d 553, (2016).....	5
<i>Floeting v. Group Health Coop</i> , 192 Wn.2d 848, 434 P.3d 39 (2019).....	passim
<i>Franklin v. Gwinnett County Public Schools</i> , 503 U.S. 60, 63, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1991).....	12
<i>Grange Ins. Co. v. Brosseau</i> , 113 Wn. 2d 91, 98, 776 P.2d 123 (1989).....	17
<i>Hendrickson v. Moses Lake School District</i> , 192 Wn.2d 269, 278-79, 428 P.3d 1197 (2018).....	6, 10
<i>McLeod v. Grant County School District No. 128</i> , 42 Wn.2d 316, 320-22, 255 P.2d 360 (1953).....	14
<i>N.L. v. Bethel School District</i> , 186 Wn. 2d 422, 431, 378 P.3d 162 (2016).....	5, 6, 14
<i>Parrilla v. King County</i> , 138 Wn.App. 427, 157 P.3d 879 (2007).....	8

Quynn v. Bellevue School District,
 195 Wn. App. 627,631,643,383 P.3d 1053 (2016)..... 7, 14

CONSTITUTION

Washington State Constitution, Article II §26.....3
 Washington State Constitution, Article IX.....3

STATUTES

RCW 4.08.110.....3
 RCW 4.08.120.....3, 4, 5
 RCW 28A.160.160.....7
 RCW 39.34 *et. seq.*.....1, 18
 RCW 48.62 *et. seq.*.....1, 18
 RCW 49.60.030.....10
 RCW 49.60.0405, 6, 7, 9
 Title IX of the Educ. Amendments of 1972.....12

RULES AND REGULATIONS

Washington Admin. Code 392-145-001.....7

I. IDENTITY AND INTEREST OF AMICUS CURIAE

This *amicus curiae* brief is submitted by Washington Schools Risk Management Pool (“WSRMP”), a non-profit interlocal governmental self-insurance pool formed in 1986¹ under the authority of Chapter 39.34 RCW and Chapter 48.62 RCW to administer a self-insurance program for its member school districts and Educational Service Districts. Olympia School District is not a member of WSRMP, so WSRMP has no direct interest in this case. A list of WSRMP’s members is attached as Appendix A.

WSRMP provides contract-based joint self-insurance for its members, purchases reinsurance and excess insurance, administers a risk management program focused on increasing school safety and reducing school district liability, and provides claim handling services for members.

II. ISSUES ADDRESSED BY AMICUS

1. May a school district be subject to strict liability by its employees in violation of the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW?
2. If a school district may be strictly liable for its employees’ discrimination under the WLAD, does “discrimination” for the

¹ When originally formed in 1986, WSRMP was called Puget Sound Schools Risk Management Pool. The name was subsequently changed to Washington Schools Risk Management Pool as the membership grew in number and geographic spread.

purposes of this cause of action encompass intentional sexual misconduct including physical abuse and assault?

3. The impact on Washington public schools if this Court were to recognize a strict liability claim under the WLAD for a school district employee's criminal sexual abuse of a minor student.

III. STATEMENT OF THE CASE

Plaintiffs allege a bus driver employed by Olympia School District sexually molested elementary school children while they were riding the bus to or from school. Plaintiff minors and their parents/guardians sued the District and two administrators in federal district court. ER 1-34.

After this Court's decision in *Floeting v. Group Health Coop*, 192 Wn.2d 848, 434 P.3d 39 (2019) (hereafter "*Floeting*"), the trial court allowed Plaintiffs to amend their complaint, adding a cause of action for discrimination in a place of public accommodation under Washington's Law Against Discrimination; RCW 49.60 *et. seq.* (hereafter "WLAD"). ER 89-99. Plaintiffs urge the adoption of an unprecedented, strict liability standard of liability against Olympia School District for the bus driver's alleged criminal sexual abuse of minor students.

IV. ARGUMENT

A. Schools May Not Be Held Strictly Liable for Injury to Students

Both the Washington State Legislature and this Court have clearly stated public schools *are not and cannot be* guarantors of students' safety.

1. **State Law Mandates A Public School District Can Only Be Sued For Its Own Acts Or Omissions**

The Washington State Constitution requires the State Legislature to set up a public school system, to fund it, and to direct when, how and where lawsuits may be brought against such state-created governmental entities.²

As Washington moved from broad governmental immunities to greater government accountability, the legislature redefined the permissible scope of civil suits against the State. Since 1953, RCW 4.08.120 has controlled what legal action may be brought against a school district, and RCW 4.08.120 does not permit suit against a school district absent district fault.³

RCW 4.08.120 Action against public corporations.

An action may be maintained against a county or other of the public corporations mentioned or described in RCW 4.08.110, either upon a contract made by such county, or other public corporation in its corporate character and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation.

² Washington State Constitution, Art. II, §26, Art. IX.

³ RCW 4.08.120 controls what actions can be made against "public corporations mentioned or described in RCW 4.08.110," and RCW 4.08.110 specifically lists "school district," as well as counties and incorporated towns.

RCW 4.08.120 permits an action against a school district in only two circumstances: (1) based on a contract entered into by the School District; or (2) “for an injury to the rights of the plaintiff *arising from some act or omission of such . . . public corporation.*” RCW 4.08.120 (emphasis added). Consequently, any school district liability for injury to a student must arise from an act or omission *of the district.*

Even though the legislature, in setting out when legal action “may be maintained” against a school district clearly states “either” upon a contract “or” for the district’s own acts or omissions, Plaintiffs argue this does not prohibit no-fault liability lawsuits because the legislature did not include the word “only” in RCW 4.08.120. *See* Plaintiffs’ Reply Brief at 16. Plaintiffs’ urged interpretation would make RCW 4.08.120 meaningless, and ignores the clear and accepted definition of “either-or” language:

Merriam-Webster Definition of *either-or*⁴

: an unavoidable choice or exclusive division between only two alternatives

Plaintiffs further argue that a school district may only act through its employees, so if a school district is not held strictly liable for the acts of its employees, then districts will be “immune to suit under WLAD for public

⁴ The Merriam-Webster.com Dictionary, Merriam-Webster Inc., <https://www.merriam-webster.com/dictionary/either-or>

accommodation discrimination by removing their *only* basis for liability.” Plaintiffs’ Opening Brief at 14. This is flawed logic that ignores the language of the WLAD and the entire body of corporate liability case law.⁵

2. Washington Courts Have Consistently Maintained That Public Schools Are Not Guarantors of Students’ Safety

Interpreting the WLAD as creating a new strict-liability standard whereby public schools would become guarantors of students’ safety—even from criminal acts of its employees—would conflict with more than 100 years of Washington precedent and has no legal precedent in this country.

Washington courts have developed a rich body of school law, carefully refining a school’s duty to protect a student from harm. *See* Defendants’ Brief, Argument, Part B at 10-21. This Court has never wavered in its position that public schools are not guarantors of student safety, and recently reiterated this firm Washington precedent. *See N.L. v. Bethel*

⁵ The WLAD defines “employer” to include “any person acting in the interest of an employer. . .” RCW 49.60.040(11). There are many examples of how a school district may be liable for its employees’ acts without creating unprecedented no-fault liability prohibited by RCW 4.08.120. For example, school discipline has been challenged as discriminatory based on race, or dress codes have been challenged as discriminatory based on gender. In these and other examples of alleged discrimination, employees were acting on behalf of the school when enforcing school policies. In contrast, Washington courts have uniformly held a school employee who sexually abuses or molests a minor student is not acting on behalf of the school district, but purely for his/her personal interest. *See, e.g., Evans v. Tacoma School District No. 10*, 195 Wn.App. 25, 38, 380 P.3d 553, (2016) (“Washington courts uniformly have held as a matter of law that an employee's intentional sexual misconduct is not within the scope of employment”); *Bratton v. Calkins*, 73 Wn.App. 492, 870 P.2d 981, (Div. 3 1994) (“A sexual relationship between a teacher and a student does not benefit the employer and is not within a teacher's scope of employment”).

School District, 186 Wn.2d 422, 436, 378 P.3d 162 (2016) (“It is true that districts have no duty to prevent unforeseeable harms to their students.”); *Hendrickson v. Moses Lake School Dist.*, 192 Wn.2d 269, 278-79, 428 P.3d 1197 (2018) (“We have never held that a school district is subject to a heightened duty of care. Instead, school districts are held to a standard of ordinary care to protect their students from foreseeable harm.”).

This Court’s opinion in *Floeting* does not compel this Court to overturn an entire body of school law and become the only state in the country to adopt strict liability for public school districts. The *Floeting* decision explicitly refrained from speculating how or if its analysis in *Floeting* would apply to a public entity⁶, much less a school that the State legislature has expressly stated may only be sued in contract or for its own fault.

(a) Extending the meaning of “educational institution” in the WLAD’s public accommodation definition to include off-campus bus service would have unintended consequences

The WLAD’s definition of a “place of public . . . accommodation” includes an “educational institution.” RCW 49.60.040(19). But plaintiffs’ effort to bootstrap that “place” to transportation services to and from that “place,” further erodes existing limits on school liability and would have unintended negative consequences.

⁶ *Floeting*, 192 Wn.2d at 870, ftne. 3.

It does not follow from plaintiffs' argument that because a school must provide transportation services⁷, this means the school bus is an "educational institution." Washington case law is well developed concerning when a school district will or will not be liable for off-campus injury to a student. Contorting the WLAD to create strict liability for bus drivers' behavior would undo that carefully crafted law.

Adopting strict liability for bus drivers would not make students safer. A bus driver's job necessarily places the driver in an unsupervised, off-campus location with students and, by definition, no-fault strict liability means the district had no reason to know the driver posed a danger. While *amicus* strongly urges this Court not to extend "public accommodation" liability to off-campus locations, at a minimum this Court should not impose a strict liability standard when the employee was not in any manner "acting in the interest" of the employer as referenced in RCW 49.60.040(11). This is not comparable to a technician making "unwelcome" comments to an adult patient while taking an x-ray. A bus driver axiomatically is not driving the bus when he is physically molesting a child. *See Quynn v. Bellevue Sch. Dist.*, 195 Wn. App. 627, 635, 383 P.3d 1053 (2016) (higher common

⁷ The statute Plaintiffs rely upon does not say districts must own buses or employ bus drivers. See Plaintiffs' Reply at 6. RCW 28A.160.160(1) references an option of compensating for "individual transportation arrangements." State regulations contemplate three options: providing transportation services, contracting with private companies or compensating students for using public transportation. *See* WAC 392-145-001.

carrier standard of care did not apply to student’s claim she was bullied and assaulted on bus because “wholly unrelated to the practical operation of the bus.”); *Parrilla v. King County*, 138 Wn.App. 427, 157 P.3d 879 (2007).

Making school districts strictly liable for the crimes of employed bus drivers would have an inequitable impact on school districts. Currently, some districts employ bus drivers. Others that can afford it and are located where such services are offered, contract transportation services to a third-party provider.⁸ While some school districts in urban and historically wealthier areas pay for students to ride city buses to school.⁹ Adopting strict liability for an inherently uncontrollable risk would cause districts with options to stop employing bus drivers, while smaller, more rural districts would bear the financial brunt of this unprecedented liability.

⁸ There are three main school transportation contractors in Washington state, at last report serving 15 districts (including the largest; *e.g.*, Seattle, Tacoma, Spokane, Everett). OSPI REPORT TO THE LEGISLATURE Transportation Contracting In Wash. State (2018) at 4, 10 <https://www.k12.wa.us/sites/default/files/public/legisgov/2019documents/2019-transportationcontractorsreport.pdf>. Appendix B.

⁹ For example, Bellevue School District handles all high school student transportation services by paying for student-use of Metro bus services. Mercer Island School District also relies heavily on Metro bus services. *See* Bellevue School District Metro Transit Program, <https://bsd405.org/departments/transportation/metro-transit/> Appendix C; Mercer Island Sch. Dist. Mercer Island High School Transportation Information 1-2. <https://www.mercerislandschools.org/Page/107> Appendix D.

(b) Plaintiffs’ effort to extend WLAD liability to student-to-student personal injury has no support in the WLAD

Plaintiffs suggest the new strict-liability claim they urge would extend to student-to-student assaults and injuries on a school bus. Plaintiffs’ Opening Brief at 22-24. While this argument has no support in the WLAD public accommodation statute or the *Floeting* decision that both address misconduct by “agents and employees,” it certainly spotlights the extent to which Plaintiffs seek to make schools liable as guarantors of student safety.

B. Child Abuse Is Not Sex/Gender Discrimination Under the WLAD

1. The WLAD is Not a Child Abuse Statute, and Sexual Abuse of a Child Is Not “Discrimination” In Public Accommodation

The public accommodation provision in the WLAD is not a child abuse statute, and none of the cases Plaintiffs cite support holding a school district strictly liable for an employee’s sexual abuse of a student.

(a) An adult’s sexual abuse of a child is not gender discrimination under the WLAD¹⁰

Washington has always treated an adult’s sexual abuse of a child as a unique offense, unlike sexual harassment of an adult, and worthy of unique

¹⁰ The WLAD defines “sex” as “gender,” so to avoid confusion, *amicus* will refer to the discrimination at issue in the second certified question as “gender discrimination.” RCW 49.60.040(25).

treatment by the legislature and courts.¹¹ The WLAD is not a child abuse statute, and an adult's sexual assault of a child is not gender discrimination.

There is nothing in the WLAD's prohibition against gender discrimination in public accommodations that should persuade this Court that RCW 49.60.030(1)(b) is a child abuse statute the legislature intended to completely upend more than a century of school law, including decades of case law specifically defining the nature and scope of a public school's duty to protect a child from sexual abuse by a school employee. The judicial creation of a new legal theory for suing public schools for the criminal conduct of an employee—a theory under which plaintiffs need not prove fault and will be awarded reasonable attorneys' fees if they prevail—would eclipse and practically preempt Washington law designed specifically to address school liability for the sexual assault of a minor student.

Plaintiffs argue that creating this new cause of action under the WLAD for child abuse would not eclipse traditional theories of school liability for abuse because Plaintiffs would still need to prove gender was a factor. But this is disingenuous when paired with Plaintiffs' argument that whether gender is a substantial factor in a perpetrator's mind is always a fact

¹¹ Just last year, the State Legislature eliminated the statute of limitations for child sexual assault, and this Court recognized the unique public policy concerns surrounding child sexual abuse that warrant unique treatment in criminal and civil law. See RCW 9A.04.080 and *Hendrickson v. Moses Lake School District*, 192 Wn. 2d at 285; see also, *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 124 P.3d 283 (2005).

question. Unlike school policies or practices that may discriminate based on gender—*e.g.*, dress codes, discipline policies or sports team privileges—an adult’s criminal, sexual abuse of a child is not a gender discrimination issue appropriately litigated under the WLAD. No court in the nation has held a public school strictly liable for the sexual assault of a minor student under a public accommodation or any other legal theory, and Washington courts have never interpreted the WLAD’s prohibition against gender discrimination in public accommodations in this manner since “sex” was added to the WLAD’s list of discrimination prohibitions 35 years ago.

(b) Plaintiffs’ analysis relies on employment law this Court expressly rejected in *Floeting*

When arguing that an adult’s intentional sexual abuse of a minor student should be considered “discrimination” in a place of public accommodation, Plaintiffs offer an analysis based on employment law—an approach this Court expressly rejected in *Floeting*. See Plaintiffs’ Opening Brief part IV.C.2 at 18-20. *Floeting*, 192 Wn.2d at 852 (“We decline to import doctrines developed for the employment context into the public accommodations context.”). Concepts of welcome/unwelcome sexual advances between adults in a workplace setting do not apply to children. The sexual assault of a child is not gender discrimination; it is child abuse.

(c) None of the foreign cases Plaintiffs cite support holding a school district strictly liable for an employee’s intentional sexual abuse

The second certified question asks whether an employee’s intentional sexual assault or physical abuse of a student should be construed as “discrimination” under the WLAD’s prohibition against gender discrimination in public accommodations. Plaintiffs offer two Title IX¹² cases and one Missouri decision as persuasive authority. Plaintiffs’ Opening Brief at 21-24. These cases do not support the creation of a strict-liability gender discrimination claim for child sexual abuse as Plaintiffs urge here.

Title IX is not a public accommodation statute, and the Title IX cases Plaintiffs rely upon are not on point. The issue in *Franklin v. Gwinnett County Public Schools*¹³ was whether Title IX affords a private cause of action. In *Davis Next Friend LaShonda D. v. Monroe County Bd. Of Educ.*¹⁴, the Supreme Court reiterated that a school board is “liable only for its own misconduct,” then held the rule that “a school district may be liable for damages under Title IX where it is deliberately indifferent to known acts of teacher-student sexual harassment also applies in cases of student-on-student harassment.” *Id.*, 526 U.S. at 629-30 (emphasis added).

¹² Title IX of the Education Amendments of 1972 (hereafter “Title IX.”).

¹³ *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 63, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1991).

¹⁴ *Davis Next Friend LaShonda D. v. Monroe County Bd. Of Educ.*, 526 U.S. 629, 650, 119 S. Ct. 1661, 143 L. Ed. 2d 83 (1999).

Plaintiffs do cite one Missouri case involving a public accommodation statute in a school setting. Plaintiff's Opening Brief at 22, citing *Doe ex rel. Subia v. Kansas City, Missouri Sch. Dist.*, 372 S.W.3d 43 (W.D. Mo. 2012). But this case did not involve an employee's abuse of a child. In *Subia*, a male student was alleged to have repeatedly harassed another male student in the boys' bathroom. Plaintiff alleged school administrators and teachers "had knowledge of the perpetrator's inappropriate and sexualized behavior" yet failed to protect him. *Id.* at 46. The court emphasized, plaintiff "is not trying to hold the School District liable for the perpetrator's conduct but is instead trying to hold the School District liable for its own conduct— that is, its 'decision to remain idle in the face of known student-on-student harassment in its schools.'" *Id.* at 51, quoting *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. at 641. This Missouri court then applied the legal standard Washington courts have used for decades, holding "the school district can be held liable if it knew or should have known of the harassment and failed to take prompt and effective remedial action." *Id.* at 54.

2. Washington Has Clear Law Addressing School District Liability For An Employee's Sexual Abuse of A Student

In *Floeting*, defendants urged this Court to determine Group Health's liability for its employee's sexual harassment of a patient by adopting a legal framework developed to address workplace harassment between

employees. This Court rejected the employment law construct, explaining that the patient’s claim was “more of a consumer claim than a claim between an employee and employer.” *Floeting*, 192 Wn.2d at 855. The situation presented in this case is quite different. Washington already has a long and rich line of authority directly addressing the nature and scope of a public school district’s enhanced duty to protect minor students from sexual abuse.¹⁵ This Court recognized the “special relationship” a school has with minor students that gives rise to an enhanced duty to protect its students from harm in 1953. *McLeod v. Grant Cnty. Sch. Dist. No. 128*, 42 Wn.2d 316, 320-22, 255 P.2d 360 (1953). Since *McLeod*, Washington courts have defined the duty a school district has to protect minor students from injury on campus, off-campus, and expressly on a school bus.¹⁶ Courts have defined when a school district will be liable for injuries caused by other students and when districts will be liable for an employee’s sexual harassment or assault of a minor student.¹⁷ In every case, Washington

¹⁵ *Amicus* adopts part B of Defendants’ Response Brief at 9-16 setting forth the historical development of Washington school law related to a school district’s duties and attendant liabilities for an employee’s sexual abuse of a minor student.

¹⁶ *McLeod v. Grant County Sch. Dist.*, 42 Wn.2d 316, 255 P.2d 360 (1953) (on-campus); *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 436, 378 P.3d 162 (2016) (off-campus); *Quynn v. Bellevue Sch. Dist.*, 195 Wn.App. 627, 383 P.3d 1053 (2016) (school bus).

¹⁷ *McLeod v. Grant County Sch. Dist.*, supra (student-to-student); *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 124 P.3d 283 (2005) (employee).

courts have maintained there must be some showing of fault on the part of the district, rejecting efforts to make schools guarantors of student safety.

C. Burdening Schools with Unprecedented No-Fault Liability Would Have a Disastrous Impact on Public Schools and Would Not Lower the Incident Rate of Student Sexual Abuse

1. Adopting No-Fault Strict Liability For Student Sexual Abuse Claims Would Leave Schools With Unpredictable, Unavoidable and Uninsurable Catastrophic Liability Exposure

While not the most frequent,¹⁸ sexual abuse claims are the most costly and unpredictable type of claim facing school districts today. “According to insurers nation-wide, jury verdicts in sex abuse cases against schools are now the most expensive variety of claim against school districts,” with verdicts sometimes in the tens of millions of dollars.¹⁹

For example, while “less than two percent of overall frequency” in a recent California study, sexual abuse and molestation (SAM) claims

¹⁸ “The number of sex offenders in education is statistically miniscule, yet they do disproportionate harm to their victims and the school systems they work within. ...In Washington, . . . the number of teachers being reported to the OSPI’s Office of Professional Practices dropped to .00004% by 2014-15.” See “The Problems of Sex Abuse and Schools,” by Michael Patterson *et. al.*, Member Matters (March 2017) and sources cited therein at 5-6, Appendix E.
<https://www.agrip.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e8aac91e-01bc-0cc4-f360-f1ec9774339d&forceDialog=0>

¹⁹ *Id.*, “Sex abuse claims against schools, churches, and youth organizations are volatile in front of juries.” *Id.* at 6-7, citing recent examples of verdicts ranging from \$1.5M-\$200M..

“accounted for almost 40 percent of claim costs in excess of \$1 million” as reflected in this published graph²⁰:

**California Schools Large Liability Analysis 2007-2017
Breakdown of incurred loss costs in excess of \$1M**



This high risk and unpredictable claim category has been noticed by insurers, dramatically impacting the cost and availability of insurance for sexual abuse claims against schools, particularly in Washington and California, which more expansively define the zone of school responsibility and do not cap tort claim recoveries.²¹

²⁰ See “Sexual abuse and molestation claims in the public sector” by C. Bowlus, D. Callahan and A. Gergen, *Intelligence* (Sept. 2018) at 1-2. Appendix F.
<https://agrip.connectedcommunity.org/HigherLogic/System/DownloadDocumentFile.aspx?DocumentFileKey=8aeb2204-fda2-2a58-25b7-3d8915a9e1b6&forceDialog=0>

²¹ See “5 Areas of School Liability to Watch,” *Insurance Journal* (June 3, 2019)
<https://www.insurancejournal.com/magazines/mag-features/2019/06/03/528085.htm>
Appendix G; C. Wilkinson, “Sexual misconduct claims hike insurance costs for school districts,” *Business Insurance* (June 12, 2019)
<https://www.businessinsurance.com/article/20190612/NEWS06/912328994/Sexual-misconduct-claims-hike-insurance-costs-for-school-districts> Appendix. H.

Already faced with rising costs for more narrowly drawn coverage for sexual abuse claims, school districts would be placed in financial peril if this Court imposes strict liability on schools for the unforeseeable criminal behavior of every school employee. Liability insurance is not designed to cover intentional criminal behavior.²² The sexual abuse insurance coverage currently available to Washington schools typically includes an explicit exclusion for the actual behavior of the perpetrator.²³ *Amicus* is unaware of **any** liability insurance on the market that would cover an employee’s intentional criminal sexual abuse of a child.

This Court is well aware of the challenges the State of Washington has faced in funding public schools. *See McCleary v. State of Washington*, Supreme Court No. 84362-7 (June 7, 2018 Order ending 11-year litigation re inadequacy of state funding of K-12 schools). More than one-half of this State’s Near General Fund goes to public schools.²⁴ Creating new strict liability for the type of claim that is already the most costly claim category

²² *See Grange Ins. Co. v. Brosseau*, 113 Wn. 2d 91, 98, 776 P.2d 123 (1989) (“generally an individual may not purchase liability insurance coverage against a claim arising from the intentional infliction of injury on the person or property of another.”) and cases cited therein.

²³ *See e.g.*, Sexual Abuse exclusion in United Educator excess policy issued to WSRMP at 6. Appendix I. United Educators is one of the largest providers of school excess insurance in Washington State.

²⁴ *See* 2019-21 Washington State Omnibus Operating Budget <http://fiscal.wa.gov/BudgetOCurrSW.aspx>.

for schools and the most difficult to insure, would financially jeopardize public schools. Creating this new liability under the WLAD, which provides an attorneys' fees award, would be worse. Creating no-fault liability, and extending it to unforeseeable off-campus criminal activity, would not lessen the incidence of sexual abuse. Rather, this would divert into litigation, money currently used to pay for teachers, supervision and training that help increase safety. Meanwhile, districts would be forced to operate with uninsured high-risk exposure knowing one bad hire—despite all available background checks and precautions—could bankrupt the district.

2. Adopting No-Fault Strict Liability Would Hinder Schools' Ability To Self-Insure Through Risk Pooling

The Washington State legislature allows local governmental entities to pool their resources, and jointly self-insure through risk pooling. *See* RCW 39.34 *et. seq.* and RCW 48.62 *et. seq.* All but one school district in Washington State manage their liability exposure through some form of risk pool. But school districts' ability to manage sexual abuse claims through risk pooling would be jeopardized by making school districts absorb no-fault liability for the criminal behavior of every employee.

Joint risk pooling depends on the ability of the group to collectively purchase excess insurance above certain exposure levels. Excess insurance available to schools does not cover an employee's intentional criminal

behavior. There would be no incentive for commercial insurers to write such coverage just for Washington State, especially with a strict liability claim standard that does not exist anywhere else in the country. *Amicus* anticipates that if Washington places direct liability on schools for school employee's criminal behavior, excess insurers will simply stop writing *any* sexual abuse coverage in Washington State.

Sadly, there is no action school districts can take that will eliminate all sexual abuse in schools. Child sexual abuse is a societal problem found in families, churches, schools, Scouts—everywhere youth gather. But there are actions that can be taken to minimize sexual abuse in schools, and risk pools play a positive role. Unlike commercial insurers that typically have no contractual obligation until a claim is made, risk pools can and do direct resources into loss prevention programs. Shared development of loss prevention resources is one of the most effective ways to meaningfully address sexual abuse in schools. For example, WSRMP was part of the collaborative development of Washington State School Directors' Assoc. policies addressing how to maintain staff/student boundaries.²⁵ ²⁶ But the

²⁵ See Washington State School Directors' Association Policy WSSDA 5253 and Procedure WSSDA 5253P. Appendix J.

[https://wssda.app.box.com/s/d0jta4iv5n5119mt5byizy6mghkf5jo8;](https://wssda.app.box.com/s/d0jta4iv5n5119mt5byizy6mghkf5jo8)
<https://wssda.app.box.com/s/v16ya4h8p1miphwzx7duyruhf5p0myrb>

²⁶ In Washington, the percentage of certificated employees OSPI disciplined in 2006 for sexual misconduct was around .0003%, or 20 that year. After board policies and

adoption of strict liability would jeopardize schools' ability to jointly self-insure their sexual abuse claim exposure through risk pooling because there would be no excess insurance available, and one claim at any one district could exhaust any limited joint funds.

An adult's sexual abuse of a child is a heinous crime. Burdening school districts with no-fault liability for employee crimes even when all reasonable precautions have been taken, will not prevent these crimes. On the contrary, diverting all available resources to litigation and discouraging risk pooling will only make the problem worse, while seriously jeopardizing the financial sustainability of this State's public school system.

V. CONCLUSION

The answer to the two certified questions is NO. A public school district may not be held strictly liable under the WLAD, and an adult's sexual abuse of a child is not gender discrimination, it is child abuse.

Respectfully submitted this 26th day of January, 2020.

/s/ Tyna Ek, WSBA# 14332
Attorney for Washington Schools Risk Management Pool
3704 SW Lander Street, Seattle, WA 98126
Telephone: (206) 419-0967
Email: TynaEkLaw@comcast.net

“professional boundary” trainings became common in Washington State (*i.e.*, BP 5253), the number of teachers being reported to the OSPI's Office of Professional Practices dropped to .00004% by 2014-15.” See “The Problems of Sex Abuse and Schools,” by Michael Patterson *et. al.*, Member Matters (March 2017) and sources cited therein at 5-6, <https://www.agrip.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e8aae91e-01bc-0cc4-f360-f1ec9774339d&forceDialog=0> Appendix E.

APPENDIX A

Washington Schools Risk Management Pool Membership List

Members

Current WSRMP Members

- Aberdeen School District
- Anacortes School District
- Arlington Public Schools
- Auburn School District
- Bainbridge Island School District
- Blaine School District
- Brinnon School District
- Burlington-Edison School District
- Cape Flattery School District
- Carbonado Historical School District
- La Conner School District
- Lake Stevens School District
- Lake Washington School District
- Lopez Island School District
- Lynden School District
- Marysville School District
- Mercer Island School District
- Meridian School District
- Mount Baker School District
- Puyallup School District
- Puget Sound ESD 121
- Puget Sound WCT
- Queets-Clearwater School District
- Quilcene School District
- Quillayute Valley School District
- Riverview School District
- San Juan Island School District
- Seattle Public Schools
- Sedro Woolley School District

- Chimacum School District
- Cle Elum-Roslyn School District
- Concrete School District
- Conway School District
- Clover Park School District
- Coupeville School District
- Crescent School District
- Darrington School District
- Dieringer School District
- Eastmont School District
- Eatonville School District
- Mount Vernon Schools
- Mukilteo School District
- Nooksack Valley School District
- North Kitsap School District
- North Mason School District
- NorthEast Washington ESD 101
- NorthEast WA Workers Compensation Cooperative
- Northshore School District
- Northwest ESD 189
- Northwest WCT
- Oak Harbor Public Schools
- Sequim School District
- Shaw Island School District
- Shoreline Public Schools
- Spokane Public Schools
- Skykomish School District
- South Kitsap School District
- South Whidbey School District
- Stanwood-Camano School District
- Steilacoom Historical School District
- Sultan School District
- Sumner-Bonney Lake School District

- Edmonds School District
- Enumclaw School District
- ESD 123 – Pasco
- ESD 123 WCT
- Everett Public Schools
- Federal Way Public Schools
- Franklin Pierce Schools
- Fife Public Schools
- Granite Falls School District
- Index School District
- Issaquah School District
- Olympic ESD 114
- Olympic ESD 114 WCT
- Orcas Island School District
- Orting School District
- Pasco School District
- Peninsula School District
- Port Angeles School District
- Port Townsend School District
- SW WA Risk Management Insurance Cooperative (SWRMIC)
- Tacoma Public Schools
- Tahoma Public Schools
- Thorp School District
- Tukwila School District
- University Place School District
- Vashon Island School District
- White River School District

APPENDIX B

OSPI REPORT TO THE LEGISLATURE

Transportation Contracting In Washington State (2018)

(Excerpts)

<https://www.k12.wa.us/sites/default/files/public/legisgov/2019documents/2019-transportationcontractorsreport.pdf>.



Office of Superintendent of Public Instruction
Chris Reykdal, State Superintendent

*All students prepared
for post-secondary pathways,
careers, & civic engagement.*

REPORT TO THE LEGISLATURE

Transportation Contracting In Washington State

2018

Authorizing legislation: [ESSB 6032 Section 501\(65\)](#)

T.J. Kelly
Interim Chief Financial Officer at OSPI

Prepared by:

- **Patti Enbody, Program Supervisor, Student Transportation**

patti.enbody@k12.wa.us | 360-725-6122

Introduction

There are three main contractors in Washington state serving 15 districts. Those contractors are First Student, Durham School Services, and Cascade Student Transportation. A list of districts and their contracted transportation provider is included in Appendix B.

The following sections outline the specific data elements required under Senate Bill 6032 (2018). A description of the data provided, if any, is included in each section.

Number of transportation contract employees by job category

First Student and Durham School Services supplied information detailing the job categories of contracting employees. A breakdown of the job categories reported is included in Table 1.

Table 1: Number of Transportation Contract Employees by Job Category

Category	First Student	Durham School Services	Total	Percent of Total
Admin Staff	34	30	64	4.8%
Drivers	716	412	1,128	84.6%
Monitors	11	73	84	6.3%
Mechanics	23	18	41	3.1%
Dispatcher	17	0	17	1.3%
Total	801	533	1,334	100.0%

Note: First Student provided their job category information at a more granular level. OSPI condensed their information for the purposes of formatting this table. Complete information is available in Appendix C.

The total cost of the transportation contract, including the amount held by the school district or educational service district for administration of the contract

The Office of Superintendent of Public Instruction (OSPI) obtained the total cost of the transportation contract through the financial statements (F-195) submitted by school districts in November 2018. Total costs related to contracting for transportation services for the 2017–18 school year were \$97,964,754. This number is total expenditures related to supplying transportation to and from school. Table 2 shows the breakdown of this total dollar amount by school district. The allocation methodology OSPI uses includes an allowance for the federal restricted indirect rate, which was a statewide average of 3.9 percent for the 2018–19 school year. Each district has a uniquely calculated [federal restricted rate](#).

Appendix B: Contracting Districts

STUDENT TRANSPORTATION Contracting Districts

2018-19

<u>SCHOOL DISTRICT NAME</u>	<u>CITY</u>	<u>CONTRACTOR</u>
ADNA	ADNA	FIRST STUDENT, INC.
BATTLE GROUND	BATTLE GROUND	CASCADE STUDENT TRANSPORTATION
COLVILLE	COLVILLE	FIRST STUDENT, INC.
EVERETT	EVERETT	DURHAM SCHOOL SVS.
HOCKINSON	BRUSH PRAIRIE	CASCADE STUDENT TRANSPORTATION
NEWPORT	NEWPORT	DURHAM SCHOOL SVS.
NINE MILE FALLS	NINE MILE FALLS	DURHAM SCHOOL SVS.
RIVERSIDE	CHATTAROY	FIRST STUDENT, INC.
ROCHESTER	ROCHESTER	FIRST STUDENT, INC.
SEATTLE	SEATTLE	FIRST STUDENT, INC.
SPOKANE	SPOKANE	DURHAM SCHOOL SVS.
STEILACOOM	STEILACOOM	DURHAM SCHOOL SVS.
TACOMA	TACOMA	FIRST STUDENT, INC.
TENINO	TENINO	FIRST STUDENT, INC.
VASHON ISLAND	VASHON ISLAND	FIRST STUDENT, INC.

APPENDIX C

Bellevue School District Metro Transit Program

(Excerpts)

<https://bsd405.org/departments/transportation/metro-transit/>



⚠ There is no school for Monday, Jan. 27 for grades Kindergarten through 12. District facilities are open normal hours from 8 a.m. to 4:30 p.m. Extended-day preschool, before-care programs, and after-care programs will be open from 6:30 a.m. to 6 p.m.

[Home](#) → [Departments](#) → [Transportation](#) →

METRO Transit Program: High Schools, International School & Big Picture School

Bellevue School District uses Metro Transit services for student transportation to and from all High Schools as well as International School and Big Picture School.

ORCA Cards

Students living outside the school's 1 mile eligibility boundary will be eligible to receive an ORCA Card. (No longer a Radial Mile. Changed to walking or driving mile.) Bellevue School District ORCA Cards will only work on King County METRO and local Sound Transit buses. Students must scan/tap their ORCA Card on the fare card reader each time they enter the bus.

BSD Student ORCA Cards are activated the first day of school and expire the last day of school each year. Students are issued a new ORCA Card each year at the school's August Back-to-School Day or at BSD Transportation any day after the second week of August or at school starting the first day of school each year.



Select Language

↓ **Download Orca Card Application**

Important

- **DO NOT LOAD PERSONAL FUNDS ON A BSD STUDENT ORCA CARD. Personal Funds are unusable and will be lost.**
- Replacements for LOST or DAMAGED ORCA Cards will be issued at a cost of \$25.
- There is NO Cost to replace a defective ORCA Card, but it must be turned in to the school office to receive a new card, for verification that it wasn't damaged and that it is a current year card.
- METRO Lost and Found is (206) 553-3000.
- Timetables and METRO Bus Route Maps are available online at <http://metro.kingcounty.gov> or at <http://www.soundtransit.org> or by calling METRO at (206) 553-3000.

Metro Contracted Supplemental 800 Series Routes

- [823 – Cougar Mountain – Newport – International](#)
- [824 – Newcastle – Newport – International](#)
- [886 – Newport – Bellevue – International](#)
- [887 – Newport Hills – Newport – International](#)
- [888 – Eastgate P&R – West Lake Sammamish – Interlake – International](#)
- [889 – Cherry Crest – Sammamish – International](#)

International – Big Picture in AM on BSD Yellow School Bus Route 53



Select Language ▾

APPENDIX D

MERCER ISLAND SCHOOL DISTRICT

Mercer Island High School

Transportation Information

(Excerpts)

<https://www.mercerislandschools.org/Page/107>



Mercer Island School District

206-236-3330

MENU 

MIHS Transportation Information

All buses (Metro and MISD Yellow buses) that serve MIHS in the morning and the afternoon use the bus load zone on the east side of the school, along 92nd Ave SE.

Note: Metro bus 204 which is a regular, non-school specific bus that runs throughout the day, will continue to have its normal bus stop on 86th Ave SE @SE 42nd St, in front of the District Administration Building.

Late start Wednesday Transportation Information:

Classes begin at 8:45 a.m. on Wednesdays. Transportation will be provided on school district yellow buses in the am and students will use their normal Metro bus stop. Buses covering Metro stops will start their routes at 8:15 am and will be at MIHS by 8:35 am. The regular yellow school bus covering East Mercer Way will start its route at 8 am. For more detailed information, contact the Transportation department at 206-236-3335. No change for the pm.

[MIHS Late Start Wednesday AM Yellow Bus Route](#)

Metro bus/ORCA card information

Mercer Island High School students who are eligible for Metro transportation will be issued a **new** ORCA Youth Card each school year. ORCA Cards from last year are no longer valid and will no longer work.

[Required ORCA Card Application Form](#)

[ORCA Card FAQ's](#)

Metro bus schedules:

Routes 891, 892, 894 only operate on school days with morning drop-off for 8:00 AM arrival and PM pick-up at 3:00 PM. Late-start Wednesdays will be served only by yellow MISD buses on the same Metro routes, 45 minutes later.

Route 204 operates every day all year with hourly north and southbound service along the island.

[Route 204](#) | [Route 891](#) | [Route 892](#) | [Route 894 Schedule](#)

[Metro Route 891 Map](#) | [Metro Route 892 Map](#) | [Metro Route 894 map](#)

Note: Metro bus schedules only list "way points". Other bus stops and routes nearest your location can be found on Google Maps by zooming in until the bus icon appears. Click on icon for route info.

Students can also access Metro bus schedules online by typing the route number [here](#).

You may also search for useful free public transportation apps for your mobile devices, such as Transit or OneBusAway.

MISD Yellow Bus schedules:

The MISD Yellow School Buses serve MIHS students along East Mercer Way north of SE 70th St.

[Route 412 MIHS AM](#)

[Route 403 MIHS PM](#)

[MIHS Late Start Weds. AM](#)

APPENDIX E

“THE PROBLEMS OF SEX ABUSE AND SCHOOLS”

by Michael Patterson *et. al.*, Member Matters (March 2017)

<https://www.agrip.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e8aae91e-01bc-0cc4-f360-f1ec9774339d&forceDialog=0>

Legal Matters

The Problems of Sex Abuse and Schools

by Michael A. Patterson, J.D., LL.M. and Donald F. Austin, M.A.T., J.D.

Patterson Buchanan Fobes & Leitch, Inc., P.S.

Though sexual abuse of students does not happen often in the schools, when it does occur it causes serious problems for everyone involved, including school districts. This is the first of three articles addressing the problems of sexual abuse, preventing sexual abuse in schools, and school administrative response to sexual abuse if it happens.

A Societal Problem Spilling Over into the Schools

Department of Justice "Facts and Statistics" illustrate that child sex abuse is a serious societal problem:

- Though only about 30% of sexual assault cases nationwide 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 and 34% were younger than 9 years.
- 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.
- 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.¹

Frequency of Sexual Abuse in Schools

The number of sex offenders in education is statistically miniscule, yet they do disproportionate harm to their victims and the school systems they work within. There are no definitive studies as to how often educators sexually abuse students. The closest any study comes to answering that question is a 2004 study by Dr. Charole Shakeshaft finding that up to 9.6% of students experience some kind of sexually inappropriate talk, conduct, or molestation from educators at some point between kindergarten and graduation from high school.²

¹ See, "Raising Awareness About Sexual Abuse—Facts and Statistics," U.S. Department of Justice Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking; <https://www.nsopw.gov/en/Education/FactsStatistics?AspxAutoDetectCookieSupport=1#sexualabuse>.

² Charole Shakeshaft, Ph.D., *Educator Sexual Misconduct: A Synthesis of Existing Literature*, prepared for the U.S. Dept. of Education (2004).

The Problems of Sex Abuse and Schools (cont.)

In Washington, the percentage of certificated employees OSPI disciplined in 2006 for sexual misconduct was around .0003%, or 20 that year. After board policies and "professional boundary" trainings became common in Washington State (i.e., BP 5253), the number of teachers being reported to the OSPI's Office of Professional Practices dropped to .00004% by 2014-15, or 4 that year.³ While no peer reviewed study has made a causal connection between Professional Boundary board policies, trainings, and the decrease in sexual misconduct allegations against certificated employees, we are hopeful that an enterprising doctoral candidate will compare states with and without Professional Boundary policies and trainings to help determine what is most effective in protecting children.

Impact on the People

It is common knowledge that sex abuse harms its victims which is partly why jury verdicts in sexual abuse cases are high. How sexual abuse impacts a victim depends on a number of variables, including the age of the victim at the time of the abuse; whether there had been prior abuse or trauma; the severity, extent and nature of the abuse; the duration of the abuse (one-time, over weeks, over months); whether physical violence was involved; whether the abuser asserted control over the victim; how adults reacted to the victim when the abuse became known; family support; school support; as well as whether early therapeutic intervention was available.

As far as the abuser is concerned, s/he faces loss of job, loss of family, loss of reputation, loss of freedom through being imprisoned, and loss of liberty after release with the difficulties in registered sex offenders have in finding employment and housing.

As discussed in next issue's article, these are things that schools are able to prevent through sound Board Policy and Procedure, and training of staff and students.

Jury Verdicts Can Be Staggering

According to insurers nation-wide, jury verdicts in sex abuse cases against schools are now the most expensive variety of claim 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 claim against school districts today. Sex abuse claims against schools, churches, and youth organizations are volatile in front of juries. Recent examples include:

- **\$41 million** (Catholic school case, Delaware 2007)
- **\$28 million** (Jehovah's Witnesses case; 9 plaintiffs, Alameda Co. 2012)
- **\$23 million** (1 plaintiff, Los Angeles Unified School District (LAUSD) 2012)
- **\$19.9 million** (1 plaintiff, Boy Scouts case, Portland 2010)
- **\$15.4 million** (Therapist case, Virginia 2012)
- **\$13.5 million** (Jehovah's Witness case, San Diego 2014)

³ Information from the Washington Office of Superintendent of Public Instruction's (OSPI) Office of Professional Practices.

The Problems of Sex Abuse and Schools (cont.)

- **\$12.5 million** (Baptist church case, Florida 2014)
- **\$11.8 million** (Boy Scout case, Connecticut 2014)
- **\$8.7 million** (Catholic priest case, Vermont 2008)
- **\$8.5 million** (Episcopal school, Dallas 2011)
- **\$8 million** (Catholic priest case, Duluth 2015)
- **\$6.9 million** (School case, LAUSD 2012)
- **\$6.5 million** (Catholic school case, Seattle 2010)
- **\$4.5 million** (School bus case, Olympia 2010)
- **\$4.2 million** (LDS case, King County 2009)
- **\$1.5 million** (DHS case, Seattle 2009).

In addition, there have been class action settlements in recent years of **\$110 million** in Fairbanks, Alaska, and **\$200 million** in Portland, Oregon. In 2016, LAUSD settled a case involving 30 students and two abusers for **\$88 million**. In 2013, LAUSD settled 58 claims for **\$30 million**.

Statute of Limitations Problems

Many verdicts and settlements in sex abuse cases involve claims that are decades old. In the last decade, Patterson Buchanan has defended multiple claims arising from sexual abuse occurring in the 1930s, 1940s, and 1950s. Washington's child sex abuse statute of limitations allows sex abuse victims to bring their claims "[w]ithin three years of the time the victim discovered that the act caused the injury for which the claim is brought" (RCW 4.16.340, underlining added.) The Washington Supreme Court has interpreted this "discovery" rule liberally stating, "[t]he Legislature adopted 'findings and intent,' [when enacting RCW 4.16.340] which make clear that its primary concern was to provide a broad avenue of redress for victims of childhood sexual abuse who too often were left without a remedy under previous statutes of limitation." (*CJC v. Corporation of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 712 (1999).) As a result, school districts could end up defending claims from fifty and sixty years ago.

Retain Old Insurance Policies

Do you know where your school district's insurance policies are from fifty and sixty years ago? It is important to retain certificates of insurance and insurance policies indefinitely. You do not want to be in a situation where your school district is defending claims from decades ago but is unable to locate its insurance from that time period or even identify who the insurer was. That would result in having to use general fund money to pay for verdicts, settlements, and the attorneys to defend the old claims. While it is sometimes possible to reconstruct insurance policies based on information that might be available from long-term employees and board minutes, it is best to have the old insurance policies.

The Problems of Sex Abuse and Schools (cont.)

Conclusion

Washington State leads the nation in protecting students from sexual misconduct by school employees. The secret is having Professional Boundaries board policies and procedures, such as WSSDA's BP 5253 and 5253P, and enforcing Professional Boundaries. Next issue we will go into more detail on why Professional Boundaries matter.



Mr. Patterson is the Sr. Principal and President at Patterson Buchanan. He has significant civil trial and appellate experience, having tried more than 100 cases to verdict in both federal and state courts, and having argued over two dozen cases in federal and state appellate courts. Mr. Patterson is a nationally recognized trial attorney, with expertise in sexual misconduct litigation and best practices issues. Very few civil litigators match his trial experience. Mr. Patterson concentrates his practice on high stakes, high profile litigation and has represented scores of school districts. He won the Mary Kay Letourneau case for the Highline School District. Mr. Patterson is also a nationally recognized speaker for a wide variety of litigation. He has published extensively and frequently gives presentations to national, statewide, and local audiences on a wide variety of sex abuse, litigation, employment, and public entity topics.



Don Austin is a school law attorney with 25 years' experience working inside of school districts, 16 as an English teacher and 9 as in-house counsel for Ventura Unified School District in California (17,500 students). He is admitted to practice law in Washington, Idaho, and California and has represented school districts in federal and state court trials and appeals, as well as in special education and personnel administrative hearings. He has investigated and litigated more than 100 child sex abuse and professional boundaries cases. He has taught School Law at California Lutheran University, California State University at Northridge, and Seattle Pacific University. Don is currently a Principal with Patterson Buchanan Fobes & Leitch, Inc. P.S.

APPENDIX F

“Sexual abuse and molestation claims in the public sector”

by C. Bowlus, D. Callahan and A. Gergen, Intelligence (Sept. 2018)

(Excerpts)

<https://agrip.connectedcommunity.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=8aeb2204-fda2-2a58-25b7-3d8915a9e1b6&forceDialog=0>



Intelligence

An AGRIP Publication

ASSOCIATION OF GOVERNMENTAL RISK POOLS

Sexual abuse and molestation claims in the public sector

By Craig Bowlus, Aon National Practice Leader for Risk Pooling; Deborah Callahan, Washington Schools Risk Management Pool Executive Director, and Ann Gergen, AGRIP Executive Director

Public entity pools that have managed sexual abuse and molestation claims say it's a matter of when, not if, other pools will experience similar claims.

All pools deal with tough claim scenarios on occasion, but a claim of sexual abuse and molestation (SAM) in the public sector can be particularly challenging. These claims present a multitude of important considerations and may be personally difficult for even seasoned pooling professionals.

In addition to specialized claim needs, SAM claims present unique questions about coverage, risk management, and advocacy efforts. The time is right for pools to help address this important issue.

Overview of public sector SAM claims

Common understanding and legal definitions overlap for sexual abuse, sexual assault, rape, and sexual harassment. All of these acts involve power being asserted through inappropriate means.

Although some commonalities may exist between sexual harassment and sexual abuse and molestation, the nature of SAM claims are distinctive. Sexual abuse and molestation is generally used to describe acts against children and highly vulnerable adults. In other words,

SAM victims are entirely unable or unequipped to protect themselves.

Sexual abuse and molestation claims in the public sector do not happen often. A recent study of K-12 school pools in California, representing more than 60 percent of California's average daily student attendance over the last ten years, found less than two percent of 14,000 claim occurrences were for sexual abuse or molestation.¹

However, one west coast school pool cites a 53 percent increase in reported SAM claims from 2014 to 2018, when compared to the prior four year period. Almost half of the increase is attributable to student-on-student touching, previously rarely reported.

Local governments, public transit and special districts probably have even lower incidence rates than schools. In an era of increased social awareness, though, it's reasonable for all public entities to expect changes in report rates of SAM claims.

Though less than two percent of overall frequency in the California study, SAM occurrences accounted for almost 40 percent of claim costs in excess of \$1 million.

Thirty-seven SAM occurrences included 96 individual claimants, with approximately \$1.5 million in total incurred value per claimant.

¹ California Schools Large Liability Analysis including data from 2007-2017, published 2018; shared by Mujtaba Dattoo, ACAS, MAAA, FCA, Actuarial Practice Leader and Craig Bowlus, ARM, National Practice Leader for Risk Pooling, Aon Risk Solutions.

California Schools Large Liability Analysis 2007-2017

	Occurrences	Frequency	Incurred Costs	Severity
Total in Study	14,000		\$778M	
In Excess of \$1M	114	.8 percent	\$389M	50 percent
SAM in Excess of \$1M	37	.3 percent	\$148M	19 percent

Breakdown of incurred loss costs in excess of \$1M



Severity as measured solely by incurred costs is of course insufficient to capture the totality of impact SAM claims have. A claim of sexual abuse or molestation perpetrated by a public or school official, or a claim the public entity failed to adequately identify and address a sexual abuse situation, is devastating and creates immediate disruption within every aspect of public sector work.

A SAM claim is a complicated web of protecting individual rights, weaving through organizational constraints, understanding difficult facts, and dealing with strong emotions. The circumstances of these claims in the public sector are troubling, to say the least:

- The victims may be children, vulnerable adults, or the elderly.
- K-12 victims are often involved in some kind of special education program.

- There may be several victims, abused over multiple years.
- Victims may have suppressed memories, so can be processing emotions concurrent with the investigation process.
- The offender, whether a public employee, official or volunteer, is often a trusted member of the community and admired by others.
- Victims, their families, and friends may attend the same school and community functions as the abuser.
- Broadened statutes of limitations for SAM victims may mean claims are being brought many years after the abuse took place.

Given the nature of SAM claims, frequency and severity considerations, it's appropriate that public entity pools evaluate SAM risks and response, coverage, and risk management opportunities for their members.

Providing SAM coverage

Coverage provided by a pool likely has exclusions for intentional acts by an alleged abuser. But exclusions may not apply for negligent hiring or supervision of an employee who commits sexual assault, or for claims made by an employee of the insured public entity. And, defense and indemnification may be required until the intentional act is proven.

In most cases, SAM coverage will exist as part of the pool's general liability policy, subject to the same limits as all other coverage. Some sexual abuse claims may fall under directors and officers, or elected officials coverage. This may be the case if the claim is for failure to adequately address known circumstances of abuse or molestation.



Because the nature of pooling is to find ways to provide needed coverage for public entities performing essential functions, some new coverage ideas are beginning to emerge.

APPENDIX G

“5 Areas of School Liability to Watch”

Insurance Journal (June 3, 2019)

<https://www.insurancejournal.com/magazines/mag-features/2019/06/03/528085.htm>



View this article online: <https://www.insurancejournal.com/magazines/mag-features/2019/06/03/528085.htm>

5 Areas of School Liability to Watch

Lilian A. Vanvieldt, senior vice president, educational entities practice leader for Alliant, has spent more than three decades insuring schools across the country. Her book spans from the small school district in Maine that only has two students to Oakland Unified School District and Long Beach Unified School District, which together have nearly 120,000 students. Below are five areas of risk and coverage Vanvieldt says are important to watch.

Sexual Abuse and Molestation

One of the most significant areas of coverage under pressure is sexual abuse and molestation, according to Vanvieldt.

In most states where tort caps or immunities for public agencies or school districts are limited the market is tough. "Particularly in the western states such as California, Washington, and to some degree even Oregon, you're seeing significant restrictions on coverages for certain types of exposures, the biggest one being sexual molestation," she said. "The cost of sexual molestation is becoming quite restrictive for insurance companies so they're starting to pull back on that line of coverage."

Recent jury verdicts have skyrocketed, Vanvieldt said. "One recent case, there was an allegation of molestation by a wrestling coach. He molested one child and was found to have been viewing others while they were showering," she said. That jury verdict was \$28 million.

She said the school district had only purchased \$25 million in coverage, which at the time, "was deemed to be acceptable and a good coverage limit for districts."

Now, in California, Vanvieldt recommends that schools carry a minimum of \$50 million in coverage.

The cost is significant and even with high limits carriers are pushing up deductibles. "So, in addition to insurance coverage being more costly to buy, districts are also having to take on million-dollar retentions to even have the coverage. That can be pretty difficult," she said.

Vanvieldt says California is down to three or four insurance markets willing to write sexual abuse and molestation coverage. "Philadelphia doesn't like stuff in California anymore. Travelers is out of California," she said. Others are limiting the coverage. "So they're only able to give you three or four sexual molestation claims or they're changing the type of coverage, and it's almost all claims made for sexual molestation."

Philadelphia Insurance has disputed the agent's comment referenced above. Philadelphia Insurance is one of the largest insurers of education risks in California, and they continue to offer sexual abuse and molestation coverage, Bryan Luci, senior vice president, Philadelphia Insurance Companies, told Insurance Journal in an emailed statement.

In other states with tort protections, the market isn't as bad. "So, states like Georgia and Maine, where they have tort protections, they're not seeing the same type of increases or market restrictions. You can still buy coverage in those states," according to the Alliant executive.

Special Education



Special education is another coverage area that's becoming more challenging, according to Vanvieldt.

"Special education is really expensive because unlike other areas where there may be state tort caps and tort liability, special education claims are generally federal claims," Vanvieldt said. State tort caps don't apply.

When special education students are denied certain educational benefits, such as a specific one-on-one teacher-student ratio, or funds to pay for a specific school that may or may not include housing costs, the school district can face a lawsuit, Vanvieldt said.

"From a school district standpoint, it's costly just because special education is costly. But, then from an insurance standpoint, when the parent is denied the one-on-one tutor or the parent is denied the special school program, such as 'I want my kid to go to a school for the blind in Minnesota' They are going to pay for them to go to Minnesota, pay for their housing and everything as a part of their education plan," or possibly get hit with a lawsuit.

Coverage sometimes falls under school board legal liability policies, which covers allegations of discrimination, harassment and wrongful termination. Vanvieldt says that some carriers have now carved out special education claims from those policies. "So, they don't even cover the claims anymore and when you do find the coverage it may have been reduced," she says. In one state where she just wrote coverage, the district went from having \$1 million in coverage down to \$100,000 per claim and \$300,000 total. Last year, it had \$1 million per claim.

Bullying



Between 1 in 4 and 1 in 3 U.S. students say they have been bullied at school, according to the Centers for Disease Control and Department of Education. Bullying is a huge exposure for schools, Vanvieldt said.

Parents are saying: "You allowed my child to be bullied and my child committed suicide. You allowed my child to be bullied and as a result they didn't graduate. You allowed my child to be bullied and my child's life is ruined," then it's up to the school district to not only protect the students but also prevent bullying.

"We've seen and we've had some claims come out of students being bullied and students committing suicide as a result," she said.

The good news for school districts is that so far insurers haven't pulled back on coverage for bullying but rather have become proactive in helping schools address the exposure, Vanvieldt said.

"Right now what we're finding carriers do is that they're actually offering programs and they're giving grants to help you address bullying," she said. Some carriers are offering grants for training or access to organizations such as Community Matters, an organization that supports improving the social-emotional climate of schools and communities. Community Matters provides schools with free courses identifying bullying behavior.

"We do a lot with Community Matters," she said. "When we tell underwriters that we're using them, that tends to help with pricing as well."

Law Enforcement



School shootings continue to worry parents, as well as administrators and insurers, Vanvieldt said.

Some schools now provide on campus police, or school resource officers, as a protective measure. But that's not always a safe tactic either. Vanvieldt said a recent shooting incident involved a student who brought a BB gun onto campus. "The resource officer didn't know it was a BB gun ... and shot the student," she said. Now the school district is in a lawsuit.

"Resource officers are really in a tough spot because they have to be able to figure out when an incident is appropriate to respond and when it's not," she said. "In this instance, it wasn't appropriate and it's going to cost the district and the carrier a lot of money." As a result some schools are now starting to see insurers carve out coverage for law enforcement, she says.

Active Shooters

Active shooter coverage is gaining in acceptance, and Alliant has developed its own active shooter program. "We are now going into our third renewal for it and this year a large majority of my clients are buying the coverage," she said. "The beauty of the active shooter coverage is that it steps in right away. It has the PR piece, which is vitally important. But they also help the insured navigate through the claim," she said. "What the active shooter coverage does, is it has specific things built in to address the actual exposure." That can mean tearing down and rebuilding a classroom where the incident occurred. A typical property policy wouldn't cover that, but an active shooter policy would. "I think that coverage is really important now and it's inexpensive; a few thousand dollars for most part."

Editor's Note: This article has been changed from the original version to include a comment from Philadelphia Insurance Companies.

More from Insurance Journal

[Today's Insurance Headlines](#) | [Most Popular](#) | [Features](#)

APPENDIX H

**“Sexual misconduct claims hike insurance costs
for school districts,”**

Business Insurance (June 12, 2019)

<https://www.businessinsurance.com/article/20190612/NEWS06/912328994/Sexual-misconduct-claims-hike-insurance-costs-for-school-districts>

BUSINESS INSURANCE.

Sexual misconduct claims hike insurance costs for school districts

Posted On: Jun. 12, 2019 7:19 AM CST

Claire Wilkinson

ORLANDO, Fla. — California K-12 schools and districts are seeing significant increases in liability insurance rates and shrinking coverage availability due to the escalating values associated with sexual abuse and molestation settlements and awards, experts say.

A more proactive risk prevention and mitigation strategy is needed to reverse this alarming trend, experts said Tuesday at the Public Risk Management Association's annual conference in Orlando.

Martin Brady, Sacramento, California-based executive director, of Schools Insurance Authority, a Joint Powers Authority that provides property/liability insurance to 70 school districts in Southern California, said that the risk insurance pools are experiencing an "unhappy triad."

"Self-insured retention levels are going up, deductibles are going up, and capacity is going down. There are cost increases and you are paying more and getting less," Mr. Brady said during the session The Costs of Sexual Assault and Molestation.

"Some of these escalating costs and jury verdicts that are coming out are horrific ... Financially we're on a trajectory that is not unsustainable," he said.

"Now that we're in a hard market for property and general liability [insurance] it really puts the squeeze on us financially ... It's imperative that we be successful and try to counteract some of these trends," Mr. Brady said.

"This is a time for us not to function as individual joint underwriting pools, we need to link arms because we need some solutions," he said.

A 2018 California auto liability and general liability study including a dozen K-12 school pools generated a data base including 14,000 occurrences with \$780 million of total incurred value, experts said during the session.

This data represented over 60% of the state's average daily attendance over the last 10 years.

"We collected 10 years of data and one of the initial findings was shocking," said Craig Bowlus, Washington-based managing director of risk pooling, at Aon PLC.

Some 0.8% of claims in excess of \$1 million, or 113 out of the 14,000 occurrences, generated 50%, or \$389 million of total incurred values, said Mr. Bowlus.



“We came to the conclusion that the cost driver was sexual abuse and molestation,” he said.

In the study, some 37 sexual abuse and molestation occurrences included some 96 individual claims, averaging \$1.5 million per claim, said Mr. Bowlus.

Most of the large occurrences were associated with teachers, while aides, student-on-student activity and coaching-related occurrences accounted for the remainder, he said.

A couple of plaintiff law firms also seemed to be “more active” on the occurrences and generated substantial awards, he said.

“The sexual abuse and molestation exposure in 10 years in California in this sample appears to be in the \$70 million to \$200 million range, or \$350,000 per claim. That’s significant,” Mr. Bowlus said.

Given the rising severity, a school facing a sexual abuse and molestation claim in California needs to be thinking in terms of six figures, he said.

All schools and districts should have procedures in place where they do not allow situations where a teacher can be one-on-one with a student, experts said.

“It’s not just teachers but contractors, the after-school programs. It’s very important to look through the contractual language with third parties ... We want to ensure there’s never an opportunity for an adult to be left alone with a child,” said Mr. Brady.

“We’re creating healthy boundaries, for the protection of our staff as well as our students,” he said.

APPENDIX I

United Educator's Sexual Abuse Exclusion



Liability Reinsurance Agreement

Washington Schools Risk Management Pool (WSRMP)

United Educators Insurance, a Reciprocal Risk Retention Group
7700 Wisconsin Avenue, Suite 500
Bethesda, MD 20814

Reporting Threshold means the amount listed in Item 13. of the Declarations.

Sexual Molestation means any actual or alleged illegal or otherwise wrongful sexual conduct with a minor.

TRIA means the Terrorism Risk Insurance Act of 2002, the Terrorism Risk Insurance Extension Act of 2005, the Terrorism Risk Insurance Program Reauthorization Act of 2007, and the Terrorism Risk Insurance Program Reauthorization Act of 2015 and/or some other form of federal terrorism reinsurance and/or any other subsequent TRIA extension.

Ultimate Net Loss means, subject always to Article 2. Business Covered, the actual loss paid by the **Reinsured** or which the **Reinsured** becomes liable to pay, such loss to include **Loss Adjustment Expense**.

ARTICLE 7

TERRORISM RISK INSURANCE ACT RECOVERY CLAUSE

- A. Certain portions of this **Agreement** may fall within the scope of **TRIA**. The obligations of the **Reinsurer** to make payments under the **Agreement** to the **Reinsured**, however, shall not be contingent on any recovery under **TRIA**.
- B. The applicable share of any and all recoveries from **TRIA** for the business covered hereunder shall inure to the benefit of the **Reinsurer**.
- C. Any net recoveries under **TRIA** shall inure to the benefit of the **Reinsurer** as salvage and subrogation. The **Reinsured's** right to invoke the **Agreement's** cash call provision, including any loss which may fall within the scope of **TRIA**, remains unchanged. Irrespective of the net recoveries under **TRIA**, the **Reinsurer** shall advance the **Reinsured** for the total amount of all recoveries under **TRIA**. Following any such payment by the **Reinsurer**, the **Reinsured** shall immediately, upon receipt of any **TRIA** proceeds, forward net recoveries to the **Reinsurer**.

ARTICLE 8

EXCLUSIONS

This **Agreement** incorporates all Exclusions in the **Reinsured's Policies** and, in addition, this **Agreement** does not apply to, and the **Reinsurer** will not be liable for **Ultimate Net Loss** related to or arising out of:

1. the hazardous properties of radioactive or nuclear material (including *source material, special nuclear material and by-product material* as those terms are defined in the Atomic Energy Act of 1954 and amendments thereto), nuclear reaction or nuclear radiation or radioactive contamination all whether controlled or uncontrolled and whether such loss be direct or indirect, proximate or remote;
2. liability accruing to the **Reinsured** directly or indirectly, from any insurance written by or through any pool or association in which membership by the **Reinsured** is required under any statutes or regulations;
3. contract, operation of law, or any other manner, from its participation or membership, whether voluntary or involuntary, in any **Insolvency Fund**;

4. State or Federal No-Fault laws, uninsured or under-insured motorist coverage or optional coverage extensions thereof;
5. war, invasion, politically backed hostilities, act of foreign enemies, civil war, rebellion, insurrection, military or usurped power or martial law or confiscation by order of any government or public authority;
Exception: This Exclusion does not apply to any events or conditions occurring in the United States of America, its territories or possessions, or Canada;
6. the manufacture, construction, maintenance, service, use or operation of any aircraft (including any "lighter than air" craft or manned balloon), or any component part or equipment thereof, or any other airplane navigational or aviation-related equipment;
Exception: This Exclusion does not apply to the assembly, maintenance, service, ownership, use or operation of owned aircraft not used in flight, but instead solely for maintenance or service as part of non-flight curriculum-related instruction; however non-flight curriculum-related instruction does not include:
 - (i) the flying of any aircraft,
 - (ii) the time commencing with the take-off run or landing run of any aircraft or
 - (iii) the assembly, maintenance, service, ownership, use or operation of any aircraft actually used in flight.
7. asbestos or lead in any form;
8. medical and allied health services;
Exception: This Exclusion does not apply to:
 - (i) doctors, nurses, or other licensed medical professionals for the rendering or failure to render medical services at a dispensary, infirmary, clinic, athletic facility, or similar facility maintained by an insured for use principally by its employees or students; or
 - (ii) allied health students and/or faculty and/or non-affiliated medical facilities for the rendering or failure to render medical services by allied health students and/or faculty participating in internship programs at such non-affiliated medical facilities;
9. **Sexual Molestation** when known to an administrator, officer, trustee, director or board member of a **Member Institution** who did not engage in **Sexual Molestation** but failed to report it to proper authorities when under a legal duty to do so;
10. the indemnification or defense for any natural person who engaged in **Sexual Molestation**, sexual or physical assault, abuse or corporal punishment or who knew about any of these acts and failed to report it to proper authorities when under a legal duty to do so;
11. the indemnification or defense for any natural person who knowingly committed any illegal act; or who intentionally caused damage, harm or injury;
12. any criminal proceeding;
13. the formation, performance or breach of any written, oral or implied contract;
Exception: This Exclusion does not apply to **Loss Adjustment Expense** and those consequential damages for the actual or alleged formation, performance or breach of an individual employment contract or a contract with a student for educational services;
14. any amount for which a **Member Institution** was already obligated at the time of a wrongful act or occurrence, including any amount that a **Member Institution** is obligated to pay under the terms of a contract or agreement, or would have been obligated to pay had that contract remained in effect;

APPENDIX J

**Washington State School Directors' Association
Policy WSSDA 5253 and Procedure WSSDA 5253P**

[https://wssda.app.box.com/s/d0jta4iv5n5119mt5byizy6mghkf5jo8:](https://wssda.app.box.com/s/d0jta4iv5n5119mt5byizy6mghkf5jo8)
<https://wssda.app.box.com/s/v16ya4h8p1miphwzx7duyruhf5p0myrb>

Maintaining Professional Staff/Student Boundaries

Purpose

This policy provides all staff, students, volunteers, and community members with information about their role in protecting children from inappropriate conduct by adults. This policy applies to all district staff and volunteers. For purposes of this policy and its procedure, the terms "district staff," "staff member(s)," and "staff" also include volunteers.

General Standards

The board expects all district staff to maintain the highest professional standards when they interact with students. District staff are required to maintain an atmosphere conducive to learning by consistently maintaining professional boundaries.

Professional staff/student boundaries are consistent with the legal and ethical duty of care that district employees have for students.

The interactions and relationships between district staff and students should be based upon mutual respect, trust, and commitment to the professional boundaries between staff and students in and outside of the educational setting, and consistent with the educational mission of the district.

District staff will not intrude on a student's physical and emotional boundaries unless the intrusion is necessary to serve a demonstrated educational purpose. An educational purpose is one that relates to the staff member's duties in the district. Inappropriate boundary invasions can take various forms. Any type of sexual conduct with a student is an inappropriate boundary invasion.

Additionally, staff members are expected to be aware of the appearance of impropriety in their own conduct and the conduct of other staff when interacting with students. Staff members will notify and discuss issues with their building administrator or supervisor whenever they suspect or question whether their own or another staff member's conduct is inappropriate or constitutes a violation of this policy.

The board recognizes that staff may have familial and pre-existing social relationships with parents or guardians and students. Staff members should use appropriate professional judgment when they have a dual relationship to students to avoid violating this policy, the appearance of impropriety, and the appearance of favoritism. Staff members shall pro-actively discuss these circumstances with their building administrator or supervisor.

Use of Technology

The board supports the use of technology to communicate for educational purposes. However, when the communication is unrelated to school work or other legitimate school business district staff are prohibited from communicating with students by phone, e-mail, text, instant messenger, or other forms of electronic or written communication. District staff members are prohibited from engaging in any conduct on social networking websites that violates the law, district policies or procedures, or other generally recognized professional standards. This prohibition includes prohibiting staff from "friending" and/or "following" students on social media.

Staff whose conduct violates this policy may face discipline and/or termination consistent with the district's policies and procedures, acceptable use agreement, and collective bargaining agreements, as applicable.

The superintendent/designee will develop protocols for reporting and investigating allegations and develop procedures and training to accompany this policy.

Cross References: 3205 - Sexual Harassment of Students Prohibited

3207 - Prohibition of Harassment, Intimidation and Bullying
3210 - Nondiscrimination
3421 - Child Abuse, Neglect, and Exploitation Prevention

Legal References:

Title IX of the Education Amendments of 1972
Chapter 9A.44, RCW – Sex offenses
Chapter 9A.88, RCW – Indecent exposure – Prostitution
RCW 28A.400.320 Crimes against children – Mandatory termination of classified employees – Appeal – Recovery of salary or compensation by district
RCW 28A.405.470 Crimes against children – Mandatory termination of certificated employees – Appeal – Recovery of salary or compensation by district
RCW 28A.405.475 Termination of certificated employee based on guilty plea or conviction of certain felonies – Notice to superintendent of public instruction - Record of notices
RCW 28A.410.090 Revocation or suspension of certificate or permit to teach – Criminal basis – Complaints – Investigation - Process
RCW 28A.410.095 Violation or noncompliance – Investigatory powers of superintendent of public instruction – Requirements for investigation of alleged sexual misconduct towards a child – Court orders – Contempt – Written findings required
RCW 28A.410.100 Revocation of authority to teach – Hearings
Chapter 28A.640, RCW Sexual Equality
Chapter 28A.642, RCW Discrimination Prohibition
Chapter 49.60, RCW – Washington State Law Against Discrimination
Chapter 181-87 WAC Professional certification – Acts of unprofessional conduct
Chapter 181-88 WAC Definitions of sexual misconduct, verbal and physical abuse - Mandatory disclosure – Prohibited agreements

Management Resources:

2019 - March 2019 - March Policy Issue
2015 - October Issue

Adoption Date:
Classification: **Encouraged**
Revised Dates: **02.10; 12.11; 10.15; 03.19**

© 2014-2019 Washington State School Directors' Association. All rights reserved.

Procedure - Maintaining Professional Staff/Student Boundaries

Many educators or volunteers who cross the line of professional boundaries may not consciously begin with predatory motivation in mind. Instead, they allow themselves to develop a special relationship with a student that results in situations where their professionalism is compromised. Sometimes, this leads to sexual misconduct. All of this can be prevented by maintaining professional boundaries with students.

Educators, volunteers, students, parents, and other concerned adults are the key to stopping unprofessional conduct against students. Hence, the following information will help you to help protect students, your school, and the profession.

Reporting Violations

All school staff members or volunteers must promptly notify the supervisor of a staff member or volunteer suspected of engaging in a boundary invasion toward a student.

Staff members should:

- Not wait before reporting suspicious behavior or try to determine whether there is an innocent explanation;
- Not confront or discuss the matter with the staff member at issue or with anyone else, but maintain confidentiality to protect privacy and avoid rumors; and
- Document for their own records, that they notified an administrator, including to whom and what they reported

Students and their parents/guardians are strongly encouraged to notify the principal (or other administrator) if they believe a staff member or volunteer may be engaging in inappropriate boundary invasion conduct with a student.

Boundary Invasion

A boundary invasion is an act or pattern of behavior by a staff member or volunteer that does not have a bone fide health, safety, or educational purpose for the student. Such situations are the opposite of maintaining professional boundaries with students. Staff members and volunteers shall not engage in boundary invasions of students, which include, but are not limited to, the following:

- A. Any type of inappropriate physical or sexual conduct with a student or any other conduct that violates the board's policies regarding student welfare, the educational environment, or conduct toward current or former students. Inappropriate physical conduct includes hugging, kissing, or being "overly touchy" with students without any legitimate educational or professional purpose;
- B. Showing intimate or unduly revealing photos to a student or asking a student to provide intimate or unduly revealing photos; taking inappropriate photographs of a student, or taking an inordinate number of photographs of a student.
- C. Any kind of flirtatious or sexual communications with a student;
- D. Singling out a particular student or students for personal attention and friendship beyond the professional staff/student relationship. This includes, but is not limited to, favoring one or more students with special privileges, allowing them to remain in the classroom during non-class times, unilaterally removing a student from another class or activity, or engaging in "peer like" behavior with one or more students;
- E. Providing alcohol, drugs, or tobacco to students or failing to report their use of these substances;
- F. For non-guidance/counseling staff, allowing or encouraging students to confide their personal or family problems and/or relationships. If a student initiates such discussions, staff members shall refer the student to appropriate guidance/counseling staff. In either case, staff involvement should be limited to a direct connection to the student's school performance;
- G. Sending students on personal errands unrelated to any educational purpose;
- H. Banter, allusions, jokes, or innuendos of a sexual nature with students;

- I. Favorably commenting on a student's appearance if it is unduly revealing or if the comments have no educational value;
- J. Disclosing personal, sexual, family, employment concerns or other private matters to one or more students;
- K. Addressing students or permitting students to address staff members or volunteers with personalized terms of endearment, pet names, or otherwise in an overly familiar manner;
- L. Maintaining personal contact (including "friending" or "following") a student on any social networking application or device;
- M. Sending phone, e-mail, text, instant messenger, or other forms of written or electronic communication to students when the communication is unrelated to school work or other legitimate school business. If staff members have educational or legitimate school business to conduct, they shall include a parent/guardian and a school administrator on the communication. If staff members receive a student's communication, the staff member shall reply by including the student's parent/guardian and an administrator. Staff members should use school e-mail addresses and phone numbers and the parents' phone numbers for communications with students, except in an emergency situation;
- N. Exchanging or providing personal gifts, cards, or personal letters with an individual student;
- O. Socializing or spending time with students (including but not limited to activities such as going out for beverages, meals or movies, shopping, traveling and recreational activities) outside of school-sponsored events, except as participants in organized community activities;
- P. Giving a student a ride alone in a vehicle in a non-emergency situation or failing to timely report that occurrence;
- Q. Providing a student with information or views about other students or staff members without a legitimate professional purpose;
- R. Asking a student to keep a secret or not to disclose any inappropriate communications or conduct;
- S. Unnecessarily invading a student's privacy, (e.g. walking in on the student in the bathroom or a hotel room on a field trip);
- T. Being alone with an individual student out of the view of others; and/or
- U. Any home visits unless other adults are present, the student(s) are invited for an activity related to school, and the student's parent/guardian and an administrator are informed and have consented.

Investigation and Documentation

When an administrator receives information that a boundary invasion has occurred or might have occurred, the administrator must document, in writing, the concern and provide a copy of the documentation to the *District note: insert appropriate person/department (e.g. assistant superintendent or director in charge of the district's human resources)*. The *[insert appropriate person/department (e.g. assistant superintendent or director of human resources)]* will see that the matter is investigated and documented, and if a boundary invasions have occurred without a legitimate educational or safety purpose, that appropriate action is taken and documented. The *[insert appropriate person/department (e.g. assistant superintendent or director of human resources)]* will maintain a file documenting reports, letters of direction, and discipline relating to professional boundary investigations.

Reminder About Reporting Sexual Abuse

In some situations, the person engaging in boundary invasions with a student may also have engaged in child abuse or sexual abuse, which is defined in Board Policy 3421 - Child Abuse, Neglect, and Exploitation Prevention. Remember that according to law (RCW 26.44.020) and Board Policy 3421, all school personnel who have reasonable cause to believe that a student has experienced sexual abuse by an adult or student are required to make a report to Child Protective Services and/or law enforcement. (See Board Policy 3421.) Reporting suspected abuse to the building principal or supervisor does not relieve professional school personnel from their reporting responsibilities and timelines.

Disciplinary Action

Staff member or volunteer violations of this policy may result in disciplinary action up to and including dismissal. Violations of this policy may occur by ignoring professional boundaries as well as failing to report another staff member or volunteer who is ignoring professional boundaries. In any disciplinary situation, the Superintendent should consider whether the conduct violates the Code of Professional Conduct in Chpt. WAC 181-87 and whether a report to the Office of Professional Practices is warranted.

Training

All new staff members and volunteers will receive training on appropriate staff/student boundaries within three months of employment or beginning of service. Such initial training may be on-line training. Site

administration and classified employee supervisors shall see to it that more detailed, live training covering this entire procedure shall occur every two years for all schools and work sites. Site administration and classified employee supervisors will also address professional boundaries at staff meetings early in the year.

Dissemination of Policy and Reporting Protocols

This policy and procedure will be included on the district website and in all employee, student, and volunteer handbooks. Annually, all administrators and staff will receive copies of the district's reporting protocol. The district shall also provide a copy of this policy and procedure to students and their parents during each school year.

Adoption Date:

Classification:

Revised Dates: **02.10; 06.11; 10.15; 03.19**

CERTIFICATE OF SERVICE

I certify that on this date I caused to be served **Brief of Amicus**

Curiae Washington Schools Risk Management Pool as follows:

Counsel for Plaintiffs

PFAU, COCHRAN, VERTETIS & AMALA, P.L.L.C.

Darrell L. Cochran

Kevin M. Hastings

Christopher E. Love

911 Pacific Avenue, Suite 200

Tacoma, WA 98402

darrell@pcvalaw.com

kevin@pcvalaw.com

chris@pcvalaw.com

U.S. Mail

E-Service

Facsimile

Counsel for Defendants

EVANS, CRAVEN & LACKIE, P.S.

Michael E. McFarland, Jr.

818 W. Riverside Avenue, Suite 250

Spokane, WA 99201

mmcfarland@ecl-law.com

U.S. Mail

E-Service

Facsimile

JERRY MOBERG & ASSOCIATES, P.S.

Gerald J. Moberg

124 3rd Avenue SW

P.O. Box 130

Ephrata, WA 98823

jmoberg@mrklawgroup.com

U.S. Mail

E-Service

Facsimile

MASTERS LAW GROUP.

Kenneth W. Masters

Shelby R. Frost Lemmel

241 Madison Avenue North

Bainbridge Island, WA 98110

ken@appeal-law.com

shelby@appeal-law.com

U.S. Mail

E-Service

Facsimile

Dated this 27th day of January, 2020

/s/ Tyna Ek _____

Tyna Ek, WSBA# 14332

Attorney for Washington Schools Risk Management Pool

January 27, 2020 - 8:52 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 97630-9
Appellate Court Case Title: W.H., et al. v. Olympia School District, et al.

The following documents have been uploaded:

- 976309_Briefs_Plus_20200127084559SC410735_7915.pdf
This File Contains:
Briefs - Amicus Curiae
Certificate of Service
The Original File Name was Amicus Brief with COS.pdf
- 976309_Motion_20200127084559SC410735_2857.pdf
This File Contains:
Motion 1 - Amicus Curiae Brief
The Original File Name was Motion to File Amicus Brief with COS.pdf

A copy of the uploaded files will be sent to:

- TynaEkLaw@comcast.net
- chris@pcvalaw.com
- darrell@pcvalaw.com
- jmoberg@mrklawgroup.com
- ken@appeal-law.com
- kevin@pcvalaw.com
- mmcfarland@ecl-law.com
- paralegal@appeal-law.com
- sawes@pcvalaw.com
- shelby@appeal-law.com

Comments:

Sender Name: Tyna Ek - Email: TynaEkLaw@comcast.net
Address:
3704 SW LANDER ST
SEATTLE, WA, 98126-2142
Phone: 206-419-0967

Note: The Filing Id is 20200127084559SC410735