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## “Do I have to report this?”

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The General Assembly and the State Board of Education each spent significant time on the topics of educator and employee misconduct during the first half of 2008. Attorneys and administrators will be spending considerably more time deciphering the changes that were made. The following article is an overview of the reporting requirements adopted this year.

### Background

House Bill (HB) 79 of the 126<sup>th</sup> General Assembly, which became law in March of 2007, required boards of education to report misconduct in four situations.<sup>1</sup> The duty to report misconduct was on the *board of education* and no penalty for failure to report was provided in the law. HB 428, effective September 12, 2008, shifts the duty to the superintendent to report misconduct involving school employees other than the superintendent or treasurer. The board president must report misconduct of either the superintendent or treasurer. The bill established new criminal penalties for failure to report and for false reporting, detailed below.

On the administrative side, the State Board of Education adopted the Licensure Code of Professional Conduct of Educators (LCPCOE) in March.<sup>2</sup> The relationship between the code and the law has been a point of some confusion as discussed below.

### Statutory reporting requirements

HB 428 did not change the four situations established by HB 79 in which reporting is required. R.C. § 3319.313 requires superintendents (and board presidents if the act is committed by the superintendent or treasurer) to report misconduct in the following circumstances:

- (1) If he or she knows an employee pleaded guilty to, has been found guilty of, was convicted of, was found eligible for intervention in lieu of conviction, or opted for a pre-trial diversion program for certain offenses (offenses that are bars to licensure (R.C. § 3319.31(B)(2)), offenses that result in automatic licensure revocation (R.C. § 3319.31(C)) and offenses that are bars to employment (R.C. § 3319.39(B)(1))).
- (2) If the board or superintendent reasonably determines that the person either committed one of the R.C. § 3319.31(B)(2) or (C) or R.C. § 3319.39(B)(1) offenses *or* committed an act unbecoming to the teaching profession *and* the board or superintendent has taken an adverse employment action against that person (includes termination or nonrenewal, or the initiation of either proceeding).

- (3) If an employee resigned under threat of termination or nonrenewal because the board or superintendent reasonably determined the person committed one of the R.C. § 3319.31(B)(2) or (C) or R.C. § 3319.39(B)(1) offenses or an act unbecoming the teaching profession.
- (4) If an employee resigned because of or in the course of an investigation into whether the employee committed a R.C. § 3319.31(B)(2) or (C) or R.C. § 3319.39(B)(1) offense or an act unbecoming to the teaching profession.

The superintendent or board president must report the name and social security number of the employee in question and a factual statement describing why the board is reporting to the Ohio Department of Education (ODE). Presumably, this should include a citation to the listed offense or the facts and circumstances surrounding the conduct unbecoming to the teaching profession. ODE has developed a reporting form that can be found on their website.

Under R.C. § 3319.313, convictions of listed offenses must be reported. Arrests must also be reported under HB 428 (see below). However, absent a conviction, both misconduct (a reasonable determination the individual committed a listed offense or conduct unbecoming the teaching profession) *and* an adverse employment action (nonrenewal, termination, resignation under threat of nonrenewal or termination, or resignation because of an investigation) are required. If the board continues to employ someone who committed misconduct, no report is required. There may be an obligation to report under the LCPCOE for educators who have knowledge of the misconduct, but there is not a statutory obligation and no criminal penalties apply.

Statutory reporting is relatively straightforward, but for the term “conduct unbecoming the teaching profession.” The State Board of Education was charged with defining the term in November of 2006 as part of HB 79. To date, the State Board has not adopted administrative rules pursuant to that authority. An existing administrative code section states: “the following may be deemed conduct unbecoming under division (B)(1) of R.C. § 3319.31” and includes crimes or misconduct that involves minors, school children, academic fraud, or the school commu-

nity, making false statements on licensing documents, certain crimes and violating a consent agreement.<sup>3</sup> Even if we accept this definition as the correct definition for purposes of R.C. § 3319.313, it requires some subjective interpretation. Until such time as rules are enacted to clarify the term’s meaning or existing rules are amended, superintendents will be forced to err on the side of caution when reporting to avoid potential criminal sanctions.

## Arrests

HB 428 adds an additional reporting requirement with regard to alleged criminal activity of licensed individuals.<sup>4</sup> Beginning September 12, 2008, superintendents and treasurers are required to suspend employees from duties involving the care, custody or control of children if they are arrested, summoned or indicted for certain crimes. For licensed employees, the offenses are the same as those that result in automatic revocation of a license if convicted, found in R.C. § 3319.31 (C). For non-licensed individuals, the offenses are the bars to employment offenses listed in R.C. § 3319.39 (B)(1). When the board, superintendent or treasurer suspends a licensed employee after an arrest, summons or indictment, the district must notify ODE of the suspension. This notice must refer to the charged offense.

## Penalties for failure to report

HB 428 created penalties for superintendents or board presidents who fail to report any of the four R.C. § 3319.313 scenarios. It is a fourth degree misdemeanor to knowingly fail to make a required report.<sup>5</sup> The crime is heightened to a first degree misdemeanor if the required report involved a “physical or mental wound, injury, disability, or condition of a nature that constitutes abuse or neglect of a child” and that, between the date of the failure to report and the subsequent conviction for failure to report, the employee again inflicts on any child “any physical or mental wound, injury, disability, or condition of a nature that constitutes abuse or neglect of a child.”

## The Code

HB 190 charged the Educator Standards Board (ESB) with recommending a code of conduct for educators to the State Board of Education. The ESB is a group of educators, administrators and board members originally

charged with developing educator standards. HB 190 required the ESB to adopt a code of conduct for educators, and to recommend that code to the board. The board was given only three months to come up with the code.

Adopted by the State Board as a policy statement, the LCPCOE applies to all persons licensed by ODE, including pupil activity permit holders, substitute teachers, administrators and teachers. It sets out behaviors and acts that could subject an educator to discipline by ODE, and the corresponding disciplinary actions, ranging from a letter of admonishment to a permanent revocation of an educator's license.

Defining "conduct unbecoming" becomes more confusing when viewed in relation to the new LCPCOE. The term "conduct unbecoming to the profession" is used in the LCPCOE to define the types of acts that may lead to discipline by ODE of a licensed individual. It is unclear if this phrasing was intended to be the definition of misconduct for purposes of R.C. § 3319.313. An argument exists that it cannot be the definition for purposes of the statute, since it was adopted as a policy statement, and not a rule through the Ohio Administrative Procedures Act (R.C. Chapter 119). This unsettled issue is likely to complicate enforcement and lead to litigation.

## Administrative reporting

The LCPCOE has an additional reporting requirement. It requires reporting of: "conduct that substantially impairs an educator's ability to function professionally in his or her position or any conduct that is detrimental to the health, safety, and welfare of students." Educators will have to use their best judgment to determine whether the misconduct they witness meets this standard.

Note that the reporting requirements in statute and the LCPCOE are different. The reporting requirement in RC 3319.313 applies *only* when an adverse employment action (nonrenewal, termination, resignation) occurs because of misconduct or an employee is convicted of certain crimes. The LCPCOE "substantially impairs" reporting standard is broader than the four statutory reporting situations. The code standard could apply in many situations where no employment consequence occurs.

It is a violation of the LCPCOE to intentionally fail to report conduct that "substantially impairs" or to fail to make a report mandated by state or federal law, including reporting misconduct under RC 3319.313. Therefore, failure to report any of the four statutory situations not only can result in criminal penalties and but also a violation of the LCPCOE. The penalty for failure to report under the LCPCOE is possible discipline by ODE of the educator who failed to report. The presumptive penalty range for failure to report is suspension of the educator's license for a period of one day to one year.

## Existing reporting requirements

The reporting requirements established by HB 79 and modified by HB 428 are in addition to other notable and long-standing reporting requirements. It is a crime to knowingly fail to report that a felony is occurring or has occurred. R.C. § 2921.22 requires *any person* to report such felony to the law enforcement authorities. Failure to do so is a misdemeanor of the fourth degree.

It also is a crime to fail to report suspected child abuse to a public children services agency or a municipal or county peace officer for certain mandatory reporters.<sup>6</sup> Mandatory reporters include, among others: health care professionals, licensed school psychologists, speech pathologists and audiologists, school teachers, school employees and school authorities. A conviction for failure to report may be either a fourth or first-degree misdemeanor, depending on the circumstances.

This year's legislative changes make clear that districts must report certain convictions, arrests, and misconduct that results in termination, nonrenewal or resignation. When misconduct falls into the "conduct unbecoming" category, determining whether there is a duty to report becomes more subjective and uncertain. Faced with possible criminal sanctions or discipline from their licensing entity, superintendents likely will err on the side of caution and report. Confusion will remain until the legislature, State Board or courts clarify the interplay between the statutes, administrative code provisions and policy statements.

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## ENDNOTES

1. R.C. § 3319.313.
2. A copy of the code is available at <http://esb.ode.state.oh.us/>.
3. O.A.C. § 3301-73-21.
4. R.C. § 3319.40.
5. R.C. §§ 3319.313 (F) and 3319.99 (C).
6. R.C. § 2151.421.

Author's Note:

After the publication of this article, the Office of Professional Development (OPC) informed the author of a different interpretation of the words “superintendent or his designee” in the LCPCOE. OPC currently takes the position that rather than the superintendent *of public instruction* or his designee (meaning ODE), these words refer to the superintendent *of the school district* where the misconduct is alleged to have occurred. This is a very favorable interpretation for superintendents, leaving them with responsibility only to report to OPC those things listed in RC 3319.313. Violations of the LCPCOE must only be reported to the superintendent of the district under this interpretation.

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