



HB 128: PROTECTING STUDENTS THROUGH A THOROUGH HIRING PROCESS

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CONCERNS

- Where a school employee who has been accused of or disciplined for abuse of a student or child leaves their current place of employment to move to a new area and new employer that are unaware of the offense they have committed or are alleged to have committed

LEGISLATORS' REACTIONS

- “It’s absolutely devastating to know one in 10 children in the United States is sexually abused by school employees by the time they graduate from high school.” Rep. Susan Herrera
- “Someone with a record of abuse should never be allowed to simply leave one school and begin teaching at another.” Reg. Joy Garratt
- “The reality that perpetrators have moved from victim to victim and school to school is unacceptable.” Rep. Debra M. Sariñana
- “The safety of New Mexico’s children depends on the proper vetting of school employees.” Rep. Marian Matthews

WHAT IS HB 128?

- House Bill 128 or HB 128 is legislation that was signed into law on April 7, 2021, by Gov. Lujan-Grisham, to address ethical and sexual misconduct in New Mexico's public schools.
- HB 128 implemented a series of changes to the New Mexico School Personnel Act to protect students in New Mexico public school from sexual or ethical misconduct on the part of school district personnel, school employees, school volunteers, contractors and contractors' employees.

WHAT IS ETHICAL MISCONDUCT?

- The following behavior or conduct by school personnel, employees, volunteers, contractors or contractors' employees:
- Discriminatory practice based on race, age, color, national origin, ethnicity, sex, pregnancy, sexual orientation, gender identity, mental or physical disability, marital status, religion, citizenship, domestic abuse reporting status or serious medical condition. Section 22-10A-2(F)(1).
- Sexual misconduct or any sexual offense prohibited by Chapter 30, Article 6A or 9 NMSA 1978 involving an adult or child, regardless of a child's enrollment status. Section 22-10A-2(F)(2).
- [F]ondling a child or student, including touching private body parts, such as breasts, buttocks, genitals, inner thighs, groin or anus. Section 22-10A-2(F)(3).
- Any other behavior, including licentious, enticing or solicitous behavior, that is reasonably apparent to result in inappropriate sexual contact with a child or student or to induce a child or student into engaging in illegal, immoral or other prohibited behavior. Section 22-10A-2(F)(4).

PROHIBITED SEXUAL OFFENSES

- Criminal sexual contact of a minor: “[U]nlawful or intentional touching of or applying force to the intimate parts of a minor or the unlawful and intentional causing of a minor to touch ones intimate parts.” Section 30-9-13(A).
 - Second Degree (contact with “unclothed intimate parts”): Child under 13 years of age or 13-18 years of age when “perpetrator in position of authority over child and uses that authority to coerce child to submit.”
 - Third Degree (contact): Child under 13 years of age or 13-18 years of age when “perpetrator in position of authority over child and uses that authority to coerce child to submit.”
 - Fourth Degree: Child 13-18 years of age “when the perpetrator who is a licensed school employee, an unlicensed school employee, a school contract employee, a school health service provider or a school volunteer, **and who is at least eighteen years of age and is at least four years older than the child and not the spouse of that child, learns while performing services in or for a school that the child is student in the school.**”

APPLICATIONS
EMPLOYEES, CONTRACTORS, AND/OR
VOLUNTEER POSITIONS

DEFINITIONS: AS USED IN THE SCHOOL PERSONNEL ACT

- “applicant” means an applicant for employment, an individual who is being considered as a contractor, a contractor's employee or an individual who wants to be a school volunteer.
NMSA 1978 § 22-10A-5.2
- “contractor” means an individual who is under contract with a public school and is hired to provide services to the public school, but does not include a general contractor or a building or maintenance contractor who is supervised and has no access to students at the public school.
NMSA 1978 § 22-10A-2
- “school volunteer” means a person, including a relative of a student, who commits to serve on a regular basis at a school district, charter school or other educational entity without compensation
NMSA 1978 § 22-10A-2

DEFINITIONS: AS USED IN THE SCHOOL PERSONNEL ACT, CONT'D.

- “unsupervised contact with children or students” means access to or contact with, or the opportunity to have access to or contact with, a child or student for any length of time in the absence of:
 - (1) a licensed staff person from the same school or institution;
 - (2) a school volunteer who has undergone a background check pursuant to Section 22-10A-5 NMSA 1978; or
 - (3) any adult relative or guardian of the child or student.
NMSA 1978 § 22-10A-2.

DEFINITIONS: AS USED IN THE SCHOOL PERSONNEL ACT, CONT'D.

- “child abuse” means a child:
- (1) who has suffered or who is at risk of suffering serious harm because of the action or inaction of the child's parent, guardian, custodian or other adult;
- (2) who has suffered physical abuse, emotional abuse or psychological abuse inflicted or caused by the child's parent, guardian, custodian or other adult;
- (3) who has suffered sexual abuse or sexual exploitation inflicted by the child's parent, guardian, custodian or other adult;
- (4) whose parent, guardian, custodian or other adult has knowingly, intentionally or negligently placed the child in a situation that may endanger the child's life or health; or
- (5) whose parent, guardian, custodian or other adult has knowingly or intentionally tortured, cruelly confined or cruelly punished the child.

NMSA 1978 § 22-10A-2

APPS: REQUIREMENTS FOR APPLICANTS; NMSA 22-10A-5.2

A public school shall require an applicant to provide:

- a list of the applicant's current and former employers that were schools or that employed the applicant in a position involving unsupervised contact with children or students.
(with contact information).
 - This includes: boy/girl scouts, youth groups, sports leagues, daycare, etc.

APPS: REQUIREMENTS FOR APPLICANTS(CONT.); NMSA 1978, 22-10A-5.2

- A public school shall require an applicant to provide:
- A written statement describing whether applicant:
 - Has ever been under investigation for, or has been found to have violated a state or federal statute relating to child abuse or neglect, sexual misconduct or any sexual offense, unless the allegations were false or unsubstantiated.
 - Has ever been under investigation or found to have violated any ethical rule of policy of the former employer that previously employed that applicant and the outcome of the investigation including a finding that the allegation was false or unsubstantiated.
 - Has ever had a professional license or certificate denied, suspended, surrendered or revoked due to a finding of child abuse or ethical misconduct or while allegations of child abuse or ethical misconduct were pending or under investigation.

APPS: CRIMINAL OFFENDER EMPLOYMENT ACT (COEA); LIMITATIONS TO QUESTIONS ABOUT CRIMINAL CONVICTIONS

- The COEA has always barred school district and other public entity employers from inquiring about criminal convictions in an initial application.
 - “A board, department or agency of the state of any of its political subdivisions shall not make an inquiry regarding a conviction on an initial application for employment and shall only take into consideration a conviction after the applicant has been selected as a **finalist** for the position.” NMSA 1978 § 28-2-3
- COEA still applies to public schools but now schools are required to make applicants disclose the NMSA 22-10(A)-5.1 list of items that could include convictions.

*Takeaway: Do not request information regarding criminal convictions on **initial** application. Only exceptions are those listed in prior slide which include: sexual/abuse convictions related to children. Can't ask questions until applicant is a Finalist.*

EXAMPLES OF PERMISSIBLE QUESTIONS/INQUIRIES ON INITIAL APPLICATION:

- “Have you ever been the subject of an investigation for child abuse or misconduct?”
- “Have you ever been reprimanded, disciplined, resigned, been asked to resign or discharged for child abuse or misconduct?”
- Have you ever resigned from a prior position without being asked, but under circumstances involving your employer’s investigation of inappropriate sexual contact or sexual abuse with/of another person?

APPS: REQUIREMENTS FOR APPLICANTS; NMSA 22-10A-5.2; WRITTEN AUTHORIZATION/LIABILITY WAIVER

- **A public school shall require an applicant to provide:**
 - **A separate written authorization that authorizes disclosure of information requested and the release of related records by the applicant's previous employers, releasing the applicant's previous employers from any liability related to the disclosure or release of records**

APPS: LIABILITY WAIVERS

- Examples for Waiver:
 - “I hereby authorize [NAME OF EMPLOYER] to investigate my background and qualifications for purposes of evaluating whether I am qualified for the position for which I am applying.”
 - “I authorize all former employers, persons, schools, companies and law enforcement authorities to release any information concerning my background and hereby release any said persons or entities from any liability for any damage whatsoever for issuing this information.”

REQUIRED PRE-HIRING INVESTIGATION

- The District is required to conduct a review of the applicant's employment history and contact ALL the applicant's current and former employers that are schools or other employers in which there was unsupervised contact with children.
- The District is required to make and document efforts to verify the information provided by the employee and to ask former employers specific questions.
- The former employer is required to provide the information within 30 days.
- When a reference on a former or current employee, contractor or volunteer is requested, the employer is required to respond and to provide answers to the questions in Subsection B of 1978 § 22-10A-5.2

REQUIRED PRE-HIRING INVESTIGATION: REQUESTS TO FORMER EMPLOYERS

District must request from the former employers the applicant's dates of employment and a written statement addressing the following questions:

- Has the applicant ever been under investigation for, or has been found to have violated, any state or federal statute relating to child abuse or neglect, sexual misconduct or any sexual offense, including those offenses prohibited in Chapter 30, Articles 3,3A,4,6,6A, 9, 37A or 52 NMSA 1978, unless the allegations were false or unsubstantiated?
- Has the applicant ever been under investigation, or found to have violated any ethical rule or policy approved by a former employer that previously employed the applicant, unless the allegations were false or unsubstantiated?
- Has the applicant ever had a professional license or certificate denied, suspended, or surrendered or revoked due to a finding of child abuse or ethical misconduct or while allegations of child abuse or ethical misconduct were pending or under investigation?

APPS: WAIVERS – QUESTIONS FOR FORMER EMPLOYERS (*TYPES OF SUGGESTED QUESTIONS*)

- Has the applicant's conduct been investigated or under a procedure to consider discharge for misconduct including child abuse or neglect, sexual misconduct or any sexual offense by you the employer?
- Has the applicant ever been disciplined or reprimanded for misconduct including child abuse or neglect, sexual misconduct or any sexual offense?
- Did the applicant resign or were they asked to resign for misconduct including child abuse or neglect, sexual misconduct, or any sexual offense?
- Did the applicant resign from a prior position without being asked, but under circumstances involving your investigation of misconduct including child abuse or neglect, sexual misconduct or any sexual offense?

APPS: WAIVERS – QUESTIONS FOR FORMER EMPLOYERS

- For these questions to former employers:
 - Attach Waiver;
 - Ask Employer to provide all relevant documentation;
 - Ask Employer to include any allegation that was found to be false or unsubstantiated.

Response from Employer due back within 30 days

APPS: TERMINATION

- A public school may terminate an individual's employment or contract or rescind an applicant's offer of employment or offer of contract if the applicant is offered or commences employment with a public school and information regarding the applicant's history of child abuse or ethical misconduct that is determined to disqualify the applicant from employment or a contract is subsequently obtained by a public school.

TRAINING

**EMPLOYERS, REGULAR VOLUNTEERS,
CONTRACTORS, CONTRACTOR'S EMPLOYERS**

TRAINING: REQUIREMENTS

- All school district personnel, employees, volunteers, contractors and contractors' employees are required to complete training in:
 - The detection and reporting of child abuse and neglect
 - Ethical misconduct
 - Professional responsibilities
 - Sexual abuse and assault
 - Substance abuse
- Training must be completed within the first year of employment
- PED is required to:
 - Develop or adopt training programs, including training materials and training staff, and make them available to every public school
 - Promulgate rules for administration of the training programs
 - Coordinate development of the programs with appropriate school district staff, the HSD, the DOH, the ECECD, and CYFD
 - Consult with the CDC

TRAINING: REQUIREMENTS

- Minimum training required
 - Reporting Requirements, including minimal standards triggering requirements
 - Trauma-informed instruction
 - Identification of circumstances/facts that indicate likely abuse or inappropriate behaviors
 - Ethical misconduct
 - Professional responsibilities
 - Investigations and procedures
 - Relevant legal and regulatory definitions

MANDATORY REPORTING

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- School district personnel, a school employee, a contractor or a contractor's employee who knows or has a reasonable suspicion that a child or student has been subject to ethical misconduct by school district personnel, a school employee, a school volunteer, a contractor or contractor's employee shall report the matter immediately to:
 - **The Superintendent; or**
 - **The Public Education Department (PED)**

MANDATORY REPORTING (CONT.)

- The Superintendent and PED shall immediately transmit to each other by telephone the facts of the report and the name, address, and telephone number of the reporter (the individual making the report concerning Ethical Misconduct).
- The Superintendent and PED shall transmit the same information in writing within forty-eight hours.

****The written report must be made on standardized form developed by PED.***

MANDATORY REPORTING (CONT.)

- The Written Report shall contain:
 - The name, address and age of the child or student; the child's or student's parents, guardians or custodians; the school district personnel, school employee, school volunteer, contractor or contractor's employee who is alleged to have committed ethical misconduct; and any evidence of ethical misconduct, including the nature and extent of any injuries and other information that the maker of the report believes might be helpful to investigate the report of ethical misconduct.

MANDATORY REPORTING (CONT.)

- **Coordination:**
 - PED shall immediately notify law enforcement if the allegation of ethical misconduct is criminal in nature
 - PED shall notify a tribal law enforcement or social services agency for any Indian child residing in Indian county.
 - A law enforcement agency, PED or Superintendent shall have access to any of the records pertaining to ethical misconduct.

MANDATORY REPORTING (CONT.)

- Notifications to Reporter:
 - The office receiving the report shall notify the person making the report within five days after the report was made that the office receiving the report is investigating the matter.
 - Mailing a notice within five days shall constitute compliance with this subsection.

MANDATORY REPORTING: TRACKING

- Required:
 - Local school board shall adopt policies providing for the coordination and internal tracking of reports made.
 - Such policies shall include measures to protect the identity of any alleged victims.
 - No policy shall relieve any person having a duty to report pursuant to this section from that duty.

PRE-HB128 MANDATORY REPORTING REQUIREMENTS STILL APPLY

- Every person...who knows or has a reasonable suspicion that a child is an abused or a neglected child shall report the matter immediately to:
 - (1) a local law enforcement agency;
 - (2) the [CYFD]; or
 - (3) a tribal law enforcement or social services agency for any Indian child residing in Indian country. NMSA 1978 § 32A-4-3
- Criminal penalties for failure to report.
- If a school employee reasonably suspects that a child is an “abused or neglected child,” as defined in the Abuse and Neglect Act, that employee is personally required to report to law enforcement, CYFD or applicable tribal agencies.

RESPONSE TO REPORT OF ETHICAL MISCONDUCT

INVESTIGATION

- The recipient of a report shall ensure that immediate steps are taken to protect the health or welfare of a student or child who is the subject of a report.
- A school shall take immediate steps to ensure the safety of enrolled students.
- The recipient of the report shall take immediate steps to ensure prompt investigation of the report.

INVESTIGATION (CONT.)

- A superintendent may appoint a designated representative to act on the superintendent's behalf.
- The superintendent or the designated representative shall investigate all allegations of ethical misconduct about any school district personnel, school employee, school volunteer, contractor or contractor's employee who resigns, is being discharged or terminated or otherwise leaves employment after an allegation has been made.

INVESTIGATION (CONT.)

- If the investigation results in a finding of ethical misconduct by a licensed school employee, the superintendent or the superintendent's designated representative shall report the identity of the licensed school employee and the attendant circumstances of the ethical misconduct on a standardized form to PED and the licensed school employee within thirty days following the separation from employment, or immediately if the finding of ethical misconduct is sexual misconduct with an adult or child.

INVESTIGATION (CONT.)

- The superintendent or superintendent's designated representative shall also report allegations of sexual assault or sexual abuse involving any school district personnel, school employee, school volunteer, contractor or contractor's employee to the appropriate law enforcement agency.

BEST PRACTICES

- NMSA 1978, § 50-12-1 Employer immunity from liability for references on former employee.

When requested to provide a reference on a former or current employee, an employer acting in good faith is immune from liability for comments about the former employee's job performance. The immunity shall not apply when the reference information supplied was knowingly false or deliberately misleading, was rendered with malicious purpose or violated any civil rights of the former employee.

BEST PRACTICES

- **NMSA 1978, § 41-4A-3(B) (2021) A person who claims to have suffered a deprivation of any right, privileges or immunities in the bill of rights of the constitution of New Mexico due to acts of a public body or person acting on behalf of, under color of or within the course and scope of the authority of a public body may maintain an action to establish liability and recover actual damages and equitable or injunctive relief in any New Mexico district court.**

BEST PRACTICES

- **For Human Resources:**
 - Be fair
 - Be honest
 - Disclose only the facts
 - No personal opinions
- **For Staff:**
 - Boundaries
 - Overcome fear of reporting
 - Conversations with community (*Keep Dialogue)
 - Conversations with reluctant parents

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