

**ON GUARD—PROTECTING AGAINST  
SEXUAL MISCONDUCT BY  
EMPLOYEES AGAINST STUDENTS**

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**VIRGINIA SCHOOL BOARDS  
ASSOCIATION  
SCHOOL LAW CONFERENCE**

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# BACKGROUND

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- Growing peril
- Implicates federal and state law
- Heightened hazard because of social media explosion
- Leadership challenges and opportunities exist

# SESSION

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- Appreciate the phenomenon
- Realize the risks
- Review of legal framework
- Illustrate some leadership challenges and smart opportunities

# THE PHENOMENON

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- **Yesterday**—10-20 Years Ago—lots less tech
- **Yesterday**—less mobile society
- **Yesterday**—smaller staff, less staff turnover
- **Today**—vast technology and social media
- **Today**—cultural shifts—boundary shifts
- **Today**—legal shifts

# OBSERVATIONS— SHAKESHAFT

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- SM affects 10% or 125,000 Virginia students
- Most predators have no criminal record
- Majority of abusers—employees lack judgment and/or emotionally delayed
- Prevention saves money—average settlement against school districts \$6 million

# THE RISKS

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- Opportunistic
- Relationship of trust—implicit and explicit
- Relationship of power
- Challenge to detect—secretive/tech
- Challenge to prove
- Challenge to prosecute
- Potentially large civil liability—the jury
- Damage to falsely accused

# LEGAL FRAMEWORK

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- Federal and State Law
- Federal: Title IX and “§ 1983” claim
- State Law: Tort Law—Negligence, Gross Negligence, etc.
- Limits of Sovereign Immunity
- Insurance Coverage Limits

# FEDERAL LAW—Overview

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- Title IX—Forbids sex discrimination
- U.S. Supreme Court held student can sue under Title IX and get damage\$ award (*Cannon, Franklin*)
- Until 1998, issue remained about when a school district would be liable for teacher's sexual wrongs—*Gebser* decided

# THE FRANKLIN CASE—SUPREME COURT

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- 1992 Decision
- Title IX —“No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a)
- High school student alleged teacher sexual abuse and other educators knew but took no action
- S.Ct.—Title IX permits private suit for \$\$\$\$\$\$\$

*Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992)

# THE *GEBSER* CASE— SUPREME COURT

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- 1998 Decision
- Events began in 1991
- Title IX—what has to be proven to establish liability for educator sexual misconduct?
- Focus: when school district liable for employee sexual misconduct?

# *GEBSER CASE*

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- 8<sup>th</sup> grader—sex with teacher
- Sexually suggestive comments to students
- Teacher groomed student—intercourse
- Parent complaints but teacher denied
- Principal cautioned & didn't report

# *GEBSER* CASE, cont'd.

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- Police discovered intercourse
- Teacher arrested
- Employment terminated & license revoked
- School district sued for \$\$\$\$
- Q: When is district liable under Title IX for sexual misconduct of employee?

# *GEBSER* TEST

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- Just being district's employee is not enough
- Actual knowledge of situation/discrimination—“**deliberate indifference**” must be shown by evidence
- BUT, the U.S. Supreme Court reminded that state law may provide most effective recourse and offered the following comment:

# *GEBSER—S.Ct.’s VIEW*

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“NO ONE QUESTIONS THAT A STUDENT SUFFERS EXTRAORDINARY HARM WHEN SUBJECTED TO SEXUAL HARASSMENT AND ABUSE . . . AND THAT TEACHER’S CONDUCT IS REPREHENSIBLE AND UNDERMINES THE BASIC PURPOSE OF THE EDUCATIONAL SYSTEM.”

# VIRGINIA LAW

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- Virginia law recognizes claim for negligence, gross negligence, etc.
- Potential liability under Virginia law begins with hiring process and may continue POST-HIRING

# VIRGINIA LAW

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- School board itself absolutely immune because of **sovereign immunity**
- School officials have **LIMITED sovereign immunity**—shielded only from negligence
- If school officials are **GROSSLY negligent or worse**, no immunity
- Liability can occur with **bad hiring process and failure to intervene and act and beyond**

# NEGLIGENT HIRING

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- Virginia—negligent hiring risk
- Thorough background checks—not just HR duty
- Thorough check? More than criminal and abuse-neglect checks
- Documentation
- Hints of prior misconduct?

# Va. Code § 22.1-296.1

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EVERY school board must require employment app certification:

- applicant not been convicted of a felony or any offense involving the **sexual molestation, physical or sexual abuse or rape of a child**; and
- applicant not been convicted of a **crime of “moral turpitude”**
- applicant not been subject of **founded case of child abuse and neglect**

# APPLICATIONS

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- Board policy—comprehensive form required
- Sweep Virginia disclosures into application
- Broad authorization—grant access to personnel files and other files accessible via internet—including Facebook?
- Broad affirmation of disclosure and continuing duty

# BACKGROUND HINTS

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- Charges reduced or dismissed?
- Frequent moving?
- Break in licensure record?
- Mid-year or early departure?
- Reference sources “code” talk?

# BACKGROUND HINTS

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- Employment gaps
- Refusal to grant prior file review
- Facebook indicators—ask to see Facebook?
- Name change(s)
- Web info—  
Google/teachertrash.blogspot.com/  
other search, etc.

# ‘BAD’ TEACHERS WEBSITES

“ [R]eaders are urged to always keep in mind that **accusations are not proof of misconduct** . . . . unless and until the accusations are proven in a court of law.”

# NEGLIGENT SUPERVISION

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- Claim recognized by Virginia law
- **DUTY** to train—new and existing
- **DUTY** to pay attention to warning signs
- **DUTY** to review, investigate/check leads—even anonymous ones
- **DUTY** to report—and protect—and intervene—**TIMELY**

# INTERVENE WITH SUSPENSION

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- Virginia statute: 22.1-315
- “[G]ood and just cause”
- “[W]hen the safety or welfare of the school division or the students is threatened” or
- “[W]hen the teacher or employee has been charged by summons, warrant, indictment or information with commission of a felony [or other listed crimes]”
- Careful about using charge as basis for suspension—limits flexibility

# POLICIES AND GUIDES

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- Non-discrimination and sex harassment prohibition central
- Compliance with SOQ 7—22.1-253.13:7—required policy on sexual abuse complaints of student by employee
- Safe harbor of VBOE Guidelines

# VBOE GUIDELINES

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- Finally approved March 2011—very general—avoids specific model and restrictions on electronic commun.
- **School board duties**—compliance with screening and reporting laws, adoption of effective and clear policies, established reporting channels, notice to law enforcement, and disclosure in references
- **Prevention policy elements**—purpose, clear rules, clear procedures, training, and applicability to virtual programs/staff/vendors
- Electronic commun. transparent and professional

# BOARD POLICY—BOUNDARIES

- NSBA offers boundary policy—good resource and starting point
- Treat policy as part of curriculum—takes out of First Amendment Free Speech context
- Boundary descriptions illustrative not exhaustive
- Use of electronic communications addressed—only school division e-mail absent specific course need, approval by principal, and parent approval
- Electronic communications only in course context

# BOARD POLICY, cont'd.

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- Grievance or complaint procedure
- Separate social media policy useful
- New teacher and staff training
- Faculty and staff handbook reminders
- Job description references to role and boundaries
- Emphasize to coaches, too

# ROLE AND BOUNDARIES

- Position descriptions—every employee is role model for students
- Role model reference should be descriptive—what to be modeled—such as the “Pillars of Character”
- Why? Gives you wider latitude in taking action, citing *Bethel* and *Anderson* cases, even for off-campus conduct

# VIRGINIA LAW—REPORTING

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- Employee sexual misconduct = child abuse
- Child abuse report must be **made—72 hours of first suspected**
- Title IX report and investigation within school division, too
- Documentation of report essential years later because of delayed statute of limitations for suit
- If get hint of claim, expect **“litigation freeze” memo + give notice to insurer**

# INVESTIGATIONS & ACTIONS

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- Prompt but not precipitous
- Consistent with board policy
- Inside or outside person/lawyer?
- Full exploration—email, computer
- Corroboration
- Conclusions not conjecture
- Watch email, disclosure and FOIA

# TERMINATION AND REVOCATION

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- Accept resignation? Maybe not!
- Termination of employment not enough ?
- Prompt license revocation petition—know process
- School board must conduct hearing and vote to recommend to VBOE
- Monitor VBOE process—never assume

# BEWARE OF REFERENCES

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- Liability exposure may continue
- Don't sanction use as reference—"pass the trash"
- All calls on person centralized
- Don't give reference/ recommendation
- Don't be a "buddy" victim
- Nothing "off the record"

# LITIGATION—THE REALITY

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- Long statute of limitations for filing suit
- May be preceded by VDOE/USDOE-OCR investig.
- Expect lawyer FOIA request—and retention warning
- Expect lawyer contact with Commonwealth Attorney
- Give notice to insurer promptly
- “Hold/Freeze all documents, paper and electronic
- Centralize all contacts and communications

# PUBLICITY—THE REALITY

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- Be prepared for publicity—news media contacts and stories
- Understand downside of “no comment” approach
- Only one person speaks—not lawyer
- Find other ways to tell story that generally corroborates care: solid policies, expectations for staff, training, prompt intervention, status of employee, cooperation with authorities, and follow-through—without too much disclosure

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# Douglas L. Guynn—Presenter

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DOUGLAS L. GUYNN serves as general and special counsel to school boards and institutions of higher education in Virginia for several decades. A former member of the State Council of Higher Education, by appointment of the Governor, he is a charter member and former Chairman of the Virginia Council of School Attorneys and a frequent presenter for statewide sessions for school board members and superintendents and for school division staff training on a full-range of education law issues. He also has represented the Virginia School Boards Association before the Virginia Supreme Court to give voice to the collective view of Virginia's school boards on legal issues with broad implications, including the authority of courts to interfere with school division policy and decision-making. Mr. Guinn's experience has taken him into state and federal courts throughout Virginia on a wide-spectrum of education law matters, including employee grievances and dismissals, constitutional issues involving staff and students, FOIA, FERPA, ADA, ADEA, and contracts. He has been listed in Best Lawyers®, Super Lawyers®, and Legal Elite® and is regarded as preeminent by peers, including lawyers and judges, in published Martindale-Hubbell® ratings.