

STUDENT ALLEGATIONS OF TEACHER SEXUAL MISCONDUCT AND A TEACHER'S RIGHT TO PRIVACY: THE US CONTEXT

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Every state in the United States (US) has a compulsory attendance statutory scheme that requires persons between certain ages to attend school. While at school, students are protected from employee abuse by a comprehensive network of state statutes and regulations that can result in criminal sanctions, civil damages, and professional discipline where an investigation has produced evidence of sexual abuse.

*Complaints of teacher sexual abuse can result in multiple investigations by school officials, law enforcement, or social services, but the ultimate issue discussed in this article is the extent to which members of the public, including media and parents, are entitled to know the names of teachers against whom allegations of sexual misconduct have been made. The issue is complicated by the fact that, while some investigations can result in a finding of teacher sexual misconduct, most either find the charges as false or unsubstantiated for lack of evidence. The Supreme Court of Washington's recent decision in *Bellevue John Does v Bellevue School District No.* addresses whether these investigations are adequate for finding and punishing abusive teachers, and if not, whether that inadequacy will result in school children continuing to suffer at the hands of predatory teachers. Whether the names of all teachers against whom charges of sexual misconduct have been made, regardless of the outcome of investigations, should be revealed presents a difficult balancing question between a teacher's privacy interest in his or her identity and the public's interest in schools that are free from sexual misconduct of publicly paid teachers. The discussion in this article is limited to the United States but the question of teachers' privacy where they are charged with sexual misconduct could well be an issue in any nation.*

I INTRODUCTION

Every state in the United States has a compulsory attendance statutory scheme that requires persons between certain ages to attend school.¹ While at school, students are protected from employee abuse by a comprehensive network of state statutes and regulations that can result in criminal sanctions, civil damages,² and professional discipline³ where an investigation has produced evidence of sexual abuse. These sanctions, though, have not always been successful in preventing student sexual abuse and, among a comprehensive compilation by the US Department of Education of student sexual misconduct studies,⁴ one such study reported that 9.6 percent of all children in Grades 8–11 have been subjected to educator sexual misconduct.⁵ From a broader perspective, '[m]ore than 4.5 million students are subject to sexual misconduct by an employee of a school sometime between kindergarten and 12th grade'.⁶

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Whether investigations of alleged teacher sexual misconduct are conducted by school officials, law enforcement, or social services,⁷ the issue discussed in this article is the extent to which members of the public, including media and parents, are entitled to know the names of teachers against whom allegations of sexual misconduct have been made. The issue is complicated by the fact that, while some investigations can result in a finding of teacher sexual misconduct, most either find the charges as false or unsubstantiated for lack of evidence. The Supreme Court of Washington's recent decision in *Bellevue John Does v Bellevue School District No. 405 (Bellevue)*⁸ addresses whether these investigations are adequate for finding and punishing abusive teachers, and if not, whether that inadequacy will result in '[school] children ... continu[ing] to suffer at [the] hands [of predatory teachers]'.⁹ Whether the names of all teachers against whom charges of sexual misconduct have been made, regardless of the outcome of investigations, should be revealed presents a difficult balancing question between a teacher's privacy interest in his or her identity and the public's interest in schools that are free from sexual misconduct of publicly paid teachers.

II *BELLEVUE*: FACTS AND COURT DECISIONS

A Facts and Trial Court Decision

The Seattle Times newspaper in Seattle, Washington, requested under the state's Public Disclosure Act (PDA)¹⁰ (recodified as the Public Records Act (PRA)¹¹ and for purposes of this article will be referred to as PRA),¹² 'seeking copies of all records [for three school districts] relating to allegations of teacher sexual misconduct in the last 10 years'.¹³ Washington's PRA defines a public record broadly as 'any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics'.¹⁴ PRA protects an employee's privacy to the extent that disclosure of employee information '(1) [w]ould be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public'.¹⁵ To the extent that release of information would represent 'an unreasonable invasion of personal privacy ... an agency *shall delete identifying details* in a manner consistent with this chapter when it makes available or publishes any public record'.¹⁶ However, the Washington Code accords a 'good faith' exemption to any public agency or employee that releases in good faith in attempting to comply with the provisions of this chapter'.¹⁷ The Washington Code goes so far as to require that, except for pending civil or criminal investigations or charges or a contrary request from the employee, '[a]ll information determined to be false and all such information in situations where the employee has been fully exonerated of wrongdoing, shall be promptly destroyed'.¹⁸

Pursuant to the Seattle Times' request, the three school districts identified 55 current and former teachers who satisfied the Times' request and, pursuant to the PRA, notified the teachers of that request. Thirty-seven responded with a lawsuit alleging that 'the release of records identifying them with accusations of sexual misconduct would be an invasion of privacy'.¹⁹ The school districts released to the newspaper the unredacted records of the 18 teachers who did not join the lawsuit,²⁰ in addition to having earlier released 'numerous records [regarding the 37 teachers] documenting the nature of the allegation in each case [against the teachers], the grade level[s] [they taught], the type of investigation conducted [by the school district], and any disciplinary action taken [by the district] ... [but without] disclosure of [the 37 teachers'] real names'.²¹

Against a backdrop of PRA statutory policy ‘that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials’,²² and after considering documentary evidence introduced by the plaintiff teachers, the trial court ordered the disclosure of 22 of the 37 teachers’ records where ‘alleged misconduct was substantiated, [where the misconduct had] resulted in some form of discipline, or [where] the school district’s investigation [had been] inadequate’.²³ Twelve of the 22 teachers sought review of the order for disclosure of their names and the Times was permitted to intervene ‘seeking release of identifying information for the 15 [of the 37] prevailing John Does’.²⁴

B Appeals Court Decision

The Washington appeals court held that the names of all but three teachers had to be disclosed to the Times, including those in the group of 15 who had been excluded from disclosure by the trial court, holding that nondisclosure did not apply to ‘unsubstantiated [allegations] or [those] determined not to warrant discipline’²⁵ and to teachers who had received ‘letters of direction’.²⁶ In effect, the appeals court limited nondisclosure only to those fact situations where an investigation had occurred and ‘an allegation against a teacher [was] plainly false’.²⁷ For the three cases where nondisclosure was not required under the PRA, the appeals court found those cases to involve reports that were ‘blatant fabrication’²⁸ or ‘patently false’.²⁹

C Supreme Court Majority Decision

The Supreme Court of Washington, in a complicated and divided 5-3 opinion, reversed in part the appeals court decision. In effect, the Supreme Court was called upon in *Bellevue* to determine whether ‘the identities of teachers who are the subjects of allegations’ and information in letters of direction are ‘personal information’ under the PRA ‘to the extent that disclosure would violate [the teachers’] right to privacy’.³⁰ In its interpretation of the PRA, the supreme court majority observed that: (1) ‘the public lacks a legitimate interest in the identities of teachers who are the subjects of unsubstantiated allegations of sexual misconduct because the teachers’ identities do not aid in effective government oversight by the public and the teachers’ right to privacy does not depend on the quality of the school districts’ investigations’;³¹ and, (2) ‘the [PRA] mandates disclosure of letters of direction ... [but] where a letter simply seeks to guide future conduct, does not mention substantiated misconduct, and a teacher is not disciplined or subject to any restriction, the name and identifying information of the teacher should be redacted’.³²

The Court held that ‘teachers’ identities’ and letters of direction ‘contain[ing] information regarding the school districts’ criticisms and observations of the Doe employees that relate to their competence as education professionals’ constituted ‘personal information’³³ under the statute, and thus were subject to the statutory limitation on invasion of privacy. The *Bellevue* supreme court was constrained by two of its earlier opinions reaching opposite results regarding disclosure, the first (*Brouillet v Cowles Publishing Co*)³⁴ deciding that the public had a legitimate interest in information about the revocation of a teacher’s certification involving ‘the extent of *known* sexual misconduct in schools’,³⁵ and the second (*Dawson v Daly*)³⁶ that disclosure of a deputy prosecutor’s performance evaluation was not required under the PRA because it would have violated the prosecutor’s right to privacy.³⁷ In both of these decisions, the Washington Supreme Court had relied on the definition of ‘invasion of privacy’ in the Restatement of Torts: “[o]ne who gives publicity to a matter concerning the private life of another is subject to liability to the other

for invasion of privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public”³⁸ However, in *Brouillet*, the supreme court had never reached the question as to ‘whether teachers have a right of privacy in *unsubstantiated* allegations of sexual misconduct’,³⁹ and in *Dawson*, whether disclosure of a performance evaluation ‘would violate the prosecutor’s right of privacy [where] it would be highly offensive and the public [did] not have a legitimate concern in such information’.⁴⁰

In *Bellevue*, the supreme court addressed the unanswered question from *Brouillet*, holding that ‘unsubstantiated or false accusation[s] of sexual misconduct [do not involve] action taken by an employee in the course of performing public duties [and thus] ... are matters concerning the teachers’ private lives’.⁴¹ In essence, the supreme court determined that where ‘the fact of the allegation, not the underlying conduct ... lacks any evidence that misconduct ever occurred’, the court refused to permit ‘the teacher’s performance or activities as a public servant ... [to be] held up to hatred and ridicule in the community’.⁴² The supreme court found the appeals court’s distinction between reportable ‘unsubstantiated’ claims and unreportable ‘patently false’ claims to be a ‘vague and impractical’ one that placed ‘unworkable [and] time consuming’ ... burden[s] on agencies and courts ... likely to lead to radically different methods and conclusions’.⁴³ In holding that ‘[w]hen an allegation is unsubstantiated, the teacher’s identity is not a matter of legitimate public concern’, the Supreme Court of Washington rejected the Times argument that ‘the public has a legitimate concern in monitoring the school districts’ investigations of sexual misconduct and the identity of the accused is imperative to the effectiveness of such monitoring’.⁴⁴ The court refused to make ‘the quality of a school district’s investigation’ a relevant factor in determining teacher privacy because ‘the accused [teacher] has no control over the adequacy of the investigation’.⁴⁵ The *Bellevue* majority opined that even if,

school districts [can] get away with less than acceptable investigations and permit teachers (whose reputations have not been cleared by thorough investigations) to avoid public scrutiny of their alleged misconduct, ... the public can [still] access documents related to the allegations and investigations (*subject to redactions*), thus maintaining the citizens’ ability to inform themselves about school district operations.⁴⁶

Similarly, the public is entitled only to redacted letters of direction in teacher personnel files where the letter ‘does not identify unsubstantiated misconduct and the teacher is not disciplined or subjected to any restriction’.⁴⁷ Even with redactions of teacher identities, the public’s interest is still protected ‘in overseeing school districts’ responses to allegations ... [by] giv[ing] citizens a complete picture of a school district’s investigations and accompanying procedures’.⁴⁸

D *Supreme Court Dissenting Opinion*

The three dissenting supreme court justices in *Bellevue* found the majority’s decision far too limiting because ‘the public in Washington will not have access to information necessary for determining whether the State’s school districts satisfactorily address allegations of teacher sexual misconduct’.⁴⁹ Unlike the majority, the members of the dissent saw no right of privacy regarding ‘specific instances of misconduct occurring in the course of the teacher’s performance of his her public duties’.⁵⁰ The dissent rejected the majority’s claim that ‘an *accusation* of sexual misconduct is not an action taken by an employee in the course of performing public duties’⁵¹ with the pointed observation that ‘public school teachers who prey on school children do so in the course of performing their public duties’.⁵² Far less sanguine than the majority about the integrity of school district investigations of sexual misconduct complaints, the dissent noted that

not disclosing teacher identities where misconduct is unsubstantiated ‘leaves school districts free to control whether an accused teacher’s identity must be released by controlling the scope and depth of its investigation’.⁵³ Because school districts that vigorously pursue allegations of sexual misconduct face ‘the threat of lawsuits from students and their parents’ as well as ‘from teachers [where] allegations of sexual misconduct can threaten a teacher’s career or lead to discharge’, the dissent speculated that school districts find it much easier to control ‘an accused teacher’s identity ... by reaching an agreement with the teacher exchanging resignation for silence’.⁵⁴ In sum, the dissent concluded that the public was entitled to ‘information about an allegation where the sexual misconduct is unsubstantiated ... [in order] to protect students ..., to hold school districts accountable for their investigations and teachers accountable for their conduct ..., [and] to enable the public to oversee the agencies charged with the education and care of public school children for fully half of their days, spanning a period of 12 years’.⁵⁵

III ANALYSIS AND IMPLICATIONS

Bellevue presents a difficult policy question as to how much information about sexual misconduct complaints involving teachers should be disclosed. The policy reasons against disclosure are arguably more persuasive where allegations of sexual misconduct have been found to be false but one has to assume that even in such cases the investigation of those allegations was adequate. Thus, for purposes of this article, all allegations — those found to be false, those found to be substantiated, and those found to be unsubstantiated — will be included together since, whatever differing privacy interests may be asserted by teachers, those privacy interests depend arguably on the adequacy of investigations.

Although issues concerning teacher privacy and disclosure of information are state specific,⁵⁶ the overarching issue, regardless of current state law, is whether teachers *should have a protectable privacy interest at all* in complaints about their performance as a public employee. The Supreme Court of Washington’s interpretation of its state’s public records act in *Bellevue* follows the pattern in most states that ‘disclosure provisions are liberally construed and its exemptions are narrowly construed’.⁵⁷ Whether information requested for disclosure should be denied as an invasion of privacy is the threshold issue in all jurisdictions although courts do not reach the same conclusions.⁵⁸ Generally, courts have held that information regarding teacher sexual misconduct can be revealed as long as the teacher’s name is redacted.⁵⁹ However, as suggested by the dissent in *Bellevue*, redacting information about teacher identities whenever a student claim cannot be substantiated may only serve to send the message to the public that when ‘predatory teachers ... go undetected, ... children will continue to suffer at their hands’.⁶⁰

Bellevue highlights three policy questions related to allegations of teacher sexual misconduct: (1) whether school officials or board members are the appropriate persons to investigate allegations of teacher sexual misconduct and to make decisions regarding the substantiated or unsubstantiated results of such investigations; (2) whether sexual misconduct charges related to teacher performance of their public educational duties is (or, should be) protected by privacy; and, (3) whether the quality of K-12 education is best served by teacher responsiveness to public resolution of student or parent charges of teacher sexual misconduct.

A Investigatory Role of School Boards or School Officials

An appellate brief filed on behalf of thirty of the teachers in this case began with a plea that ‘it is imperative that [the Supreme Court of Washington] protect the identity of those against whom

false allegations are made’ but then the brief subtly expanded its claim to read that ‘there is no legitimate public concern in the identity of the teacher where there is no finding of misconduct and allegations remain unsubstantiated or false after an adequate investigation of those allegations’.⁶¹ Indeed, one of the core issues in this discussion is how categorisation following an investigation should affect disclosure of teacher identities. In the three school districts involved in this case, a person in each was designated as personally responsible for ‘investigat[ing] charges of teacher misconduct and imposing appropriate discipline where allegations of misconduct are substantiated and issuing a letter of direction when allegations are not substantiated’.⁶² The advantage of a ‘letter of direction [for both the school district and the employee was that it did] not constitute a finding of misconduct or that the employee [had] violated a District policy ... [and thus its] value as [an] evaluative tool [was] ... [that] the employee ... avoid[ed] a time-consuming grievance process associated with employee discipline’.⁶³ The school districts’ position in *Bellevue* was that

[r]eleasing letters of direction would harm the public interest in efficient government administration by interfering with the employer’s ability to give candid advice and direction to its employees and would ... chill employer-employee communications ... if all written communications between the employer and employee were subject to disclosure.⁶⁴

In sum, the teachers’ position in *Bellevue* was that the public has no interest in knowing the identity of teachers where ‘an adequate or extensive investigation ... revealed no finding of misconduct [or] imposed [no] discipline’.⁶⁵ However, the adequacy of an investigation and the recommendations of the investigator are two quite different matters and, to follow the reasoning of the teachers in *Bellevue*, the latter can be emphasised at the expense of the former. Thus, if school officials conducting an investigation choose to frame their evaluative comments as ‘concerns about [an employee’s] handling of specific incidents at the schools ... [or] shortcomings and performance criticisms [without] ... discussion of specific instances of misconduct’,⁶⁶ the public, even though no consideration has been given to the adequacy of the investigation, should have no right to disclosure.⁶⁷ The trial court in *Bellevue* had refused to defer to the school district’s investigation and after ‘an *in camera* review of the records ... the trial court [had] order[ed] disclosure o[f] the identity of [those] teacher[s] ... [where] there [had] not [been] an adequate investigation’,⁶⁸ a position affirmed by the appeals court.⁶⁹ On appeal, the Supreme Court of Washington in *Bellevue* reversed and refused to make inadequate investigations the basis for unredacted disclosure of teacher identities,⁷⁰ reasoning that school districts could be sued under separate lawsuits for negligent retention or supervision⁷¹ or breach of its supervisory duty to investigate allegations of sexual abuse,⁷² or school districts could be subject to ‘significant penalties and attorney fees ... if the [school district] fail[ed] to comply with the [PRA]’.⁷³

One can query, though, whether the threat of litigation for negligent hiring, supervision, or retention substitutes for an effective investigation of complaints of teacher sexual misconduct. The Supreme Court of California, in *Randi W. v Muroc Joint Unified School District (Randi W.)*,⁷⁴ broke new ground by broadening the scope of liability to include a claim by the subsequent employer of an administrator who had engaged in sexual misconduct in a prior school district but whose misconduct was not revealed in the prior district’s positive letter of recommendation. However, *Randi W.*, arguably, is limited to its facts where a former school district has provided a positive evaluation and, thus, the case does not necessarily extend to disclosure of information in a neutral letter of recommendation, with no reference to prior sexual misconduct, that has been negotiated as part of a settlement agreement,⁷⁵ nondisclosure where no duty to report was created when the subsequent school district did not inquire about sexual misconduct,⁷⁶ or to nondisclosure based on a prior school district administrator’s internal investigation that concluded that the

complaining student was lying.⁷⁷ Thus, while *Randi W.* has suggested a broadening of liability for negligent hiring, supervision or retention, it does not appear to have diminished the amount of litigation or the length of time necessary to resolve legal disputes involving employee sexual misconduct.

The dissent in *Bellevue* had little confidence in allowing school officials to ‘control the scope and depth of its investigation’,⁷⁸ adopting what in essence was a ‘foxes guarding the henhouse’ position that such self-investigation would serve to erode public trust and leave the public with the perception that ‘the school board is not responsive to the taxpayers, and the school board is hiding something’.⁷⁹ In its appellate brief, the *Seattle Times* cited an unreferenced six-week nationwide study that found ‘at a minimum, hundreds of cases involving sexual abuse of students are unfolding publicly at any given time’; the study concluded that school officials ‘have fallen short in their duty to keep students safe’, resulting in multimillion-dollar jury verdicts for victims or in costly out-of-court settlements.⁸⁰ Indeed, the *Seattle Times* Appellate Brief chronicled specific examples of school districts in Washington ‘cut[ting] a deal that require[d] the districts to withhold any information about [teacher] misconduct ... [in order to] avoid court battles with fired employees[,] [thus] let[ting] accused teachers “slip away” when allegations are made, landing in new districts where the officials “remain in the dark until too late”’.⁸¹ In addition, the school districts at issue in *Bellevue* had a practice of issuing ‘oral reprimands [or] warnings’ reflective of ‘the tremendous pressures upon the districts not to document events’, even though ‘no certain safety measure was in place to assure that successive administrators would become aware of the oral discipline’.⁸² Where ‘evidence of discipline stemming from an investigation is not in accessible files’, the *Seattle Times* reasoned that ‘[e]ven when personnel are advised to consider [past] allegations’, they are unable to do so ‘due to poor reporting and record keeping practices’.⁸³ Where the purported motives for school district nondisclosure of complaints of sexual misconduct are ‘keep[ing] the matter secret to avoid alarming the public, ... avoid[ing] embarrassing the alleged victims of abuse, [or not] publiciz[ing] charges against [the teacher because] his career may be irreparably harmed’,⁸⁴ one can question whether such breadth of discretion qualifies school district officials to conduct investigations at all.

Some courts have called into question the adequacy of internal investigations of teacher sexual misconduct, particularly where those investigations substitute for reporting the alleged misconduct to social services.⁸⁵ However, even if school districts forgo investigation of sexual misconduct complaints by referring all complaints to social welfare agencies as required under state child abuse statutes,⁸⁶ such referrals do not necessarily require disclosure of the teacher’s identity (including teacher name, certificate/license number, and schools taught at)⁸⁷ if the investigation does not substantiate that sexual misconduct occurred, or if the result generates a ‘letter of direction’ that allegedly is not based on a finding of sexual misconduct. In other words, if a social service agency investigation does not produce a substantiated finding of child abuse,⁸⁸ the public is likely to discover the names of teachers against whom complaints of sexual misconduct have been made only if a student is willing to pursue a lengthy, costly, and cumbersome lawsuit for negligent hiring, supervision or retention. More troublesome, though, is that even if parents can pursue these negligent claims, actions against state officials for inadequate investigations may be blocked by state immunity statutes.⁸⁹

B *Privacy Rights of Teachers in the US*

At this point, the discussion moves from the issues of investigation and labeling of the results to the privacy interests of teachers in the US. At the core of this discussion, from the teachers’

perspective, is the extent to which a teacher charged with sexual misconduct is a government actor subject to public scrutiny or a citizen entitled to have his/her identity shielded from such scrutiny as long as those allegations are not substantiated.⁹⁰ The teachers in *Bellevue* argued that the purpose of the State of Washington's PRA was 'to monitor government, ... not to scrutinize individuals ..., [and the effort to gain access to teacher records] relating to [other than] actual misconduct ... constitute[d] scrutiny of individuals, not of government'.⁹¹ For the plaintiff teachers in *Bellevue* the conflict focused on the extent to which teachers in public schools retain the privacy rights of a citizen while they perform their contracted responsibilities in classrooms and other school venues. While the answer to this question is framed to a large extent in a localised context by a state's statutory and common law, it also invokes in the larger context a public policy consideration of the function of education.

The Supreme Court of Washington majority rested its *Bellevue* decision on the privacy rights of teachers' 'personal information' under the state's public records act.⁹² Appellate briefs on behalf of the teachers claimed broadly that public disclosure of an accusation of sexual misconduct, especially if unsubstantiated or false, would be highly offensive under state law because such release would taint a professional teacher's career and shed doubts on the character of the accused teacher.⁹³ The argument contrary to the *Bellevue* majority is that complaints of teacher sexual misconduct have to be disclosed because 'a teacher's conduct with his or her students ... on the job is not a private matter ... [nor does it] relate to "the intimate details of one's personal and private life"'.⁹⁴

Courts have taken three approaches to disclosing education-related information regarding sexual misconduct: (1) some courts have rationalised disclosure of personal identities where such disclosure would not only 'encourage ... the public [to] evaluate the expenditure of public funds and the efficient and proper functioning of its institutions, but also to foster confidence in government through openness to the public';⁹⁵ (2) however, even when ordering disclosure, other courts have taken the *Bellevue* majority approach that complaint or grievance records are discoverable only after individual identity material has been redacted;⁹⁶ and, (3) yet other courts have adopted the *Bellevue* trial court approach that information can be disclosed after an *in camera* hearing to determine if disclosure would constitute an invasion of privacy.⁹⁷

Privacy in its broadest meaning is the protection of an individual's interest in making decisions free of government interference.⁹⁸ The United States Supreme Court has recognised that the Liberty Clause of the Fourteenth Amendment⁹⁹ protects 'a right of personal privacy'¹⁰⁰ that includes 'the interest in independence in making certain kinds of important decisions'.¹⁰¹ However, the right to make decisions without government interference is not without limits. For public school teachers, their expectation of privacy, one can argue, is diminished by the reality that they have been employed to instruct students, most of whom are minors required under state compulsory attendance laws to attend school.

C *Quality of Public Education*

School boards entrust teachers with the responsibility to provide students with the knowledge and skills that comport with board policy. When teachers instruct students, board members expect that teachers will adhere to approved guidelines and conduct themselves in school settings in an appropriate and professional manner. Teachers who deviate from these guidelines, or act in a manner that board members and school officials consider not to be in the best interests of the school district, may face disciplinary action. Under a broad penumbra of statutory language, including unprofessional conduct, unfitness, willful neglect of duty, and immorality, courts

consistently have upheld dismissals of employees for misconduct involving students, regardless of whether the conduct involved sexual contact¹⁰² or non-sexual conduct reflecting an improper relationship.¹⁰³ Courts tend to be very generous with school boards in discharging employees who have engaged in impermissible sexual contact with students, even when that contact occurred in the past¹⁰⁴ or the teacher has been cleared of criminal charges.¹⁰⁵

The obvious result of such litigation is that teachers who choose to challenge in court a school district's disciplinary action against them for sexual misconduct have no reasonable expectation of privacy either in the facts underlying the school district's claim against the teacher or the school district's ultimate disciplinary decision. However, as reflected in *Bellevue*, disclosure of information related to administrative investigations by school officials or social service agencies becomes mired in judicial interpretations of statutory privacy exemptions. Just how broadly a state chooses to draw the circle of privacy protection can have an impact both on individual teachers as well as the school district as a whole. If, as the *Bellevue* majority suggests, a school district is the sum total of its parts, then the quality of education will be defined in significant part by an emphasis on whatever protection state law provides to those parts, in this case, the best interest of teachers. On the other hand, if, as the *Bellevue* dissent suggests, education is more than the sum of its parts, then a school district's education can extend to less readily definable components such as public confidence in its school officials acting appropriately to protect the safety of their children.

The *Bellevue* majority serves to preserve the administrative structure of school districts whereby elected school boards are responsible for selecting administrators who evaluate and provide direction for their staff. While the majority is correct that the electorate can non-reelect board members, one wonders how well-informed the electorate can be if, as the *Bellevue* dissent suggests, administrators can make teacher evaluations inaccessible merely by not including references to teacher misconduct or the board can make teacher misconduct inaccessible through negotiated settlement agreements with confidentiality provisions.¹⁰⁶ Even without the formal settlement agreement, the *Bellevue* dissent's observation that the same non-informed result can be reached by permitting teachers to quietly resign without having to face dismissal proceedings would seem to have merit.¹⁰⁷ One can at least query whether education is best served by an administrator or school board paternalism that treats student safety and wellbeing simply as removal of the cause of sexual misconduct.¹⁰⁸ Indeed, a medical patient would most probably have a malpractice claim if a physician considered his or her responsibility fulfilled by removing a cancer without on-going attention being given to its effect on the rest of the body.¹⁰⁹ Without schools furnishing specific, identifiable information about teachers who have been charged with sexual misconduct, one wonders how the wellbeing of victims of sexual misconduct who have reported abuse but have seen no results, or the wellbeing of victims of abuse who are afraid to report it, or the wellbeing of parents who are completely unaware of abuse, has been served.

By declaring that teachers have a personal identity privacy right in not having sexual misconduct charges revealed, parents are left only with redacted reports about the number of sexual misconduct reports that provide no information as to school officials' or the school board's resolution of those complaints. While *in loco parentis* can often be considered to be a legal fiction,¹¹⁰ it nonetheless still has served to mirror the reality that schools' work with students requires a collaborative effort among teachers, school officials, and parents.¹¹¹ Arguably, the *Bellevue* majority decision significantly marginalises this collaboration by permitting school officials and school boards to conceal information from parents affecting the safety and physical wellbeing of their children.

Admittedly, balancing professional harm to teachers where their identities are disclosed for unsubstantiated or false complaints and harm to students where complaints of sexual misconduct are either discouraged or ineffectively investigated present difficult public policy choices. Unquestionably, teacher reputations will be harmed, perhaps irreparably, where their names are associated with even false claims of sexual misconduct.¹¹² However, teachers would have a post-hoc due process entitlement to a name-clearing hearing,¹¹³ a due process right to defend themselves against discharge,¹¹⁴ or the opportunity to pursue state law tort or statutory claims against the student complainant or his or her parents.¹¹⁵ No legal process, though, can be invoked to compel students to make complaints about teacher sexual misconduct where, as suggested by the *Bellevue* dissent, students refuse to report sexual misconduct protection either because they are afraid to do so or because past complaints by their friends have effected no changes.¹¹⁶

The *Bellevue* majority chose to follow the prevailing view that teacher privacy interest in their identities takes precedence over the public's (including, parents') entitlement to unredacted knowledge of the identity of teachers against whom sexual misconduct complaints have been made, reasoning that school boards and school officials, not parents, are responsible for protecting the safety of students. While this approach has appeal from a school management perspective, one can query the extent to which concealing information from parents about some teachers against whom sexual misconduct complaints have been made will in the long run only serve to erode trust and confidence in all teachers.

IV CONCLUSION

Bellevue highlights the difficult policy issues related to disclosure of teacher identities when a complaint of sexual misconduct has been made by students. Unquestionably, teachers have a great deal at stake when they are alleged to have been involved in sexual misconduct, especially considering that such charges can be filed anonymously and maliciously. However, one can question whether public school teachers should be permitted to hide behind state privacy statutes to prevent disclosure of their names. To suggest, as the *Bellevue* majority does, that parents should be satisfied with redacted information revealing the existence of sexual misconduct charges but not the names of those charged nor the resolution of those charges, takes a diminutive, if not demeaning, view of the role of parents in protecting their children. Perhaps, if the record of responsible investigation by school officials were more convincing, the *Bellevue* majority's deference to such investigations would be more compelling. One wonders, though, how the best interests of those teachers against whom allegations of sexual misconduct have been made is served when school officials are permitted to negotiate resolution of sexual misconduct complaints without having to account to the public for those resolutions. One can certainly argue that, while using state privacy statutes to limit disclosure to redacted information may protect the identities of those teachers against whom sexual misconduct allegations have been made, it does nothing to protect other teachers not the victims of allegations from insinuation in such misconduct.

One possible resolution of this dilemma concerning the adequacy of school officials' investigation of sexual misconduct allegations might be to remove this function totally from the local level and transfer it to the state department of education. All investigations would then become matters of professional responsibility with licensure sanctions being imposed for findings of misconduct. While parents would not necessarily have access to the names of all teachers charged with sexual misconduct, the identities of sanctioned teachers, including those who receive 'letters of admonishment' or who enter into consent agreements, would be public knowledge.¹¹⁷

Arguably, this is a better mid-point in balancing the professional interests of teachers and the interests of parents in their children's safety since it not only removes the decision-making authority from local school boards but places the authority with a body that can impose licensure sanctions.

Keywords: teachers; sexual misconduct; privacy; public records; investigation; confidentiality.

ENDNOTES

- 1 For a list of all compulsory attendance statutes, see Charles Russo and Ralph Mawdsley, *Education Law, Appendix B, Compulsory Attendance Statutes* (2008).
- 2 The issue of civil damages presents two separate aspects. One aspect is whether a teacher can sue school officials or the school board where personally identifiable information has been released about the teacher without consent. See William L. Prosser, 'Privacy' (196) 48 *California Law Review* 383, 398 (describing a private facts tort as an extension of defamation, except that the private facts tort punishes the publication of truthful non-newsworthy matter that is damaging to a person's reputation). See also, John A. Jurata Jr, 'The Tort That Refuses To Go Away: The Subtle Reemergence of Public Disclosure of Private Facts' (1999) 36 *San Diego Law Review* 489. However, many authors have speculated that the private disclosure tort has been rendered obsolete by concerns about censorship under the First Amendment. See Diane L. Zimmerman, 'Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort' (1983) 68 *Cornell Law Review* 291, 362-64 (concluding that the private facts tort should be abolished due to its ineffectiveness); Phillip E. DeLaTorre, 'Resurrecting a Sunken Ship: An Analysis of Current Judicial Attitudes Toward Public Disclosure Claims' (1985) 38 *South Western Law Journal* 1151, 1184 (calling the private facts tort a 'phantom tort'); Joseph Elford, 'Trafficking in Stolen Information: A 'Hierarchy of Rights' Approach to the Private Facts Tort' (1995) 105 *Yale Law Journal* 727, 729 (proposing that the private facts tort is 'on the verge of collapsing under the weight of the First Amendment'); Lorelei Van Wey, 'Private Facts Tort: The End Is Here' (1991) 52 *Ohio State Law Journal* 299, 300 (claiming that the Supreme Court's decision in *Florida Star v B.J.F.*, 491 US 524 (1989), rendered the private facts tort extinct); Geoff Dendy, 'The Newsworthiness Defense to the Public Disclosure Tort' (1996-97) 85 *Kentucky Law Journal* 147, 148 (stating that much criticism accompanies the private facts tort due to censorship concerns). A second aspect of civil damages is whether the school district is liable in damages for teacher sexual misconduct with students. See 16B McQuillin Mun. Corp., Chapter 46, *Public Education III. Officers, Teachers And Employees*, §46.13.25 (2008) (indicating that where there is no conspicuous, plain, and clear reason to exclude liability coverage for teacher's criminal acts of sexual misconduct with students, the teacher is covered by the district's policy to the extent that the teacher is considered to have committed a 'wrongful act' under the school board's liability policy); see also, *Bender v Glendinning*, 632 S E 2d 330 [210 *Education Law Reporter* 1272] (W Va, 2006) (endorsement amending school board's liability policy to provide only coverage permitted by state statute was insufficiently conspicuous, plain, and clear to exclude liability coverage for teacher's criminal acts of sexual misconduct with students.).
- 3 See, eg, Joseph Beckham, *Meeting Legal Challenges* (1996) 70-73; Nelda H. Cambron-McCabe, Martha M. McCarthy and Stephen B. Thomas, *Public School Law: Teachers' and Students' Rights* (5th ed, 2004) 413-16; Richard D. Strahan and L. Charles Turner, *The Courts and the Schools: The School Administrator and Legal Risk Management Today* (1987) 153-54 (indicating that inasmuch as teachers are viewed as student role models, the threshold for determining when a teacher acts immorally is fairly low and acts of moral turpitude, criminal convictions, and sexual misconduct with students constitute the typical grounds for disciplinary action on the grounds of immorality). But see *Matter of Renewal of Teaching Certificate of Thompson*, 893 P 2d 301 [99 *Education Law Reporter* 1108] (Mont, 1995) (board of education's order denying renewal of teaching certificate on grounds of moral unfitness to teacher accused of and acquitted on criminal charges of sexual misconduct with students was clearly in violation of teacher's due process rights, and trial court properly reversed board's order,

- where decision of board was clearly erroneous and unsupported by substantial evidence); *Garcia v State Board of Education*, 694 P 2d 1371 [23 *Education Law Reporter* 280] (N M, 1984) (overturning denial of recertification of teacher who had been found guilty of criminal conduct with a child and where, after the case had been dismissed against the teacher following teacher’s rehabilitation, the teacher met burden of showing that he was rehabilitated and fit to be in classroom).
- 4 US Department of Education, Office of the Under Secretary, Policy and Program Studies Service, *Educator Sexual Misconduct: A Synthesis of Existing Literature*, [Doc # 2004-09] (2004) (hereafter referred to as, *Educator Sexual Misconduct*). Report is available at: www.ed.gov/rschstat/research/pubs/misconduct.
- 5 See Charol Shakeshaft, ‘Educator Sexual Abuse’ (Spring, 2003) *Hofstra Horizons*, 10-13 (published semiannually by Hofstra University, Hempstead, N.Y.), and an analysis of the Shakeshaft data by the American Association of University Women reported in *Educator Sexual Misconduct*, above n 4, 18, where students were asked to respond to the following kinds of teacher sexual abuse:
Made sexual comments, jokes, gestures, or looks; Showed, gave or left you sexual pictures, photographs, illustrations, messages, or notes; Wrote sexual messages/graffiti about you on bathroom walls, in locker rooms, etc.; Spread sexual rumors about you; Said you were gay or a lesbian; Spied on you as you dressed or showered at school; Flashed or ‘mooned’ you; Touched, grabbed, or pinched you in a sexual way; Intentionally brushed up against you in a sexual way; Pulled at your clothing in a sexual way; Pulled off or down your clothing; Blocked your way or cornered you in a sexual way; Forced you to kiss him/her; Forced you to do something sexual, other than kissing.
The result of this survey was that ‘9.6 percent of all students in grades 8 to 11 report[ed] contact and/or noncontact educator sexual misconduct that was *unwanted*’, *Educator Sexual Misconduct*, above n 4, 17 (emphasis in original). Of this number, ‘6.7 percent reported physical sexual abuse’, above n 4, 18.
- 6 *Educator Sexual Misconduct*, above n 4, 18.
- 7 See *Bellevue John Does 1-11 v Bellevue Sch. Dist.#405*, 120 P 3d 616, 622-23 (investigation by school officials), 625 (investigation by attorney hired by school district), 626 (police) [202 *Education Law Reporter* 346] (Wash Ct App, 2005).
- 8 189 P 3d 139, 155 [234 *Education Law Reporter* 1007] (Wash, 2008).
- 9 *Bellevue John Does v Bellevue Sch. Dist. #405*, 189 P 3d 139, 155 [234 *Education Law Reporter* 1007] (Wash, 2008) (Madsen J, dissenting).
- 10 Revised Code of Washington, Ch. 42.17.
- 11 Rev Code of Wash., Ch. 42.56.
- 12 The change in names from PDA to PRA did not change the statutory content as affecting this case.
- 13 *Bellevue*, 189 P.3d 139, 143.
- 14 Rev Code of Wash., Ch. 42.56.010(2).
- 15 Rev Code of Wash., Ch. 42.56.050.
- 16 Rev Code of Wash., Ch 42.56.070 (1) (emphasis added).
- 17 Rev Code of Wash., Ch. 42.56.060.
- 18 Rev Code of Wash., Ch. 41.06.450(1)(b), (2)(a) and (b).
- 19 *Bellevue John Does 1-11 v Bellevue Sch. Dist.#405*, 120 P 3d 616, 620 [202 *Education Law Reporter* 346] (Wash Ct App, 2005).
- 20 *Bellevue John Does v Bellevue Sch. Dist. #405*, 189 P 3d 139, 143.
- 21 *Bellevue John Does 1-11 v Bellevue Sch. Dist.#405*, 120 P 3d 616, 621. The names of the 37 teachers had been changed to ‘John Does’ which explains the plaintiffs in this case. *Ibid*.
- 22 PDA, ch, 42.56.550 (3).
- 23 *Bellevue*, 189 P 3d 139, 143.
- 24 *Ibid*.
- 25 *Bellevue John Does 1-11 v Bellevue Sch. Dist.#405*, 120 P 3d 616, 620.
- 26 *Ibid* 623-24. In Washington, ‘[a] counseling letter, or “letter of direction”, is a practice a district may use to respond when it views a teacher’s conduct as inappropriate but not serious enough to warrant a reprimand or other discipline’: at 621.
- 27 *Ibid* 627.

- 28 A complaint involving a teacher ‘sitting out in the hallway with a middle school girl on his lap turned out to be a blatant fabrication by an unruly student whose credibility was completely undermined by an immediate investigation’: *ibid* at 628.
- 29 Two complaints involved rape, one an ‘accusation that the teacher was guilty of violent rape, kidnapping, and satanic torture[,] was completely implausible [because it lacked any] corroborat[ion] by physical evidence, [and] no one reading the file would reasonably believe that the allegations against [the teacher] were anything but fabrications’: *ibid* at 627; and second complaint concerning ‘an individual with a well documented history of psychiatric problems [that] was purportedly based on a memory suppressed for 15 years ... [and during the investigation produced no] corroborative evidence ... [but did reveal that] ... [t]he accuser and her mother both admitted to the investigator that the police report had been filed with the thought of getting money from the teacher.’: *ibid* at 627-28.
- 30 Rev Code of Wash. ch. 42.56.230(2): ‘Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy’.
- 31 *Bellevue*, 189 P 3d 139, 152.
- 32 *Ibid* 153.
- 33 *Bellevue*, 189 P 3d 139, 145. The court found this definition similar to other states within the Ninth Circuit. See, eg, Alaska Stat. 40.25.350(2) (2006) (‘information that can be used to identify a person and from which judgments can be made about a person’s character, habits, avocations, finances, occupation, general reputation, credit, health, or other personal characteristics’); Cal. Civ.Code 1798.3(a) (West 2005) (‘any information that is maintained by an agency that identifies or describes an individual, including, but not limited to, his or her name, social security number, physical description, home address, home telephone number, education, financial matters, and medical or employment history.’).
- 34 791 P2d 526 [60 *Education Law Reporter* 638] (Wash, 1990).
- 35 *Ibid* 147 (emphasis added), citing to, *Brouillet v Cowles Publishing Co*, 791 P 2d 526, 532, 530 [60 *Education Law Reporter* 638] (Wash, 1990) (holding that disclosure of teacher records was permissible as ‘effective law enforcement’ under state statute because revocation of a teacher’s license involves the ‘imposition of sanctions for illegal conduct.’).
- 36 845 P 2d 995 (Wash, 1993).
- 37 *Dawson v Daly*, 845 P 2d 995, 1005 (Wash, 1993) (‘if public employees were aware that their performance evaluations were freely available to their co-workers, their neighbors, the press, and anyone else who cares to make a request under the act, employee morale would be seriously undermined.’).
- 38 Restatement (Second) of Torts § 652D (1977).
- 39 *Bellevue*, 189 P.3d 139, 147 (emphasis added).
- 40 *Ibid*.
- 41 *Ibid* 147-148.
- 42 *Ibid*.
- 43 *Ibid* 149.
- 44 *Ibid* 150
- 45 *Ibid* 150-151.
- 46 *Ibid* 151 (emphasis added).
- 47 *Ibid* 152.
- 48 *Ibid* 153.
- 49 *Ibid* 154 (Madsen J, dissenting).
- 50 *Ibid* 156.
- 51 *Ibid* 157 (emphasis in original).
- 52 *Ibid*.
- 53 *Ibid* 158.

- 54 Ibid, citing to, Ralph Mawdsley and Steven Permuth, ‘Nondisclosure Provisions in School District Settlement Agreements’ (2002) 163 *Education Law Reporter*. 2; W. Richard Fossey, ‘Confidential Settlement Agreements Between Schools Districts and Teachers accused of Child Abuse: Issues of Law and Ethics’ (1990) 63 *Education Law Reporter* 1. See examples at *Bellevue*, 189 P.3d 139, 158-59 of underreported and under investigated cases of teacher sexual misconduct.
- 55 *Bellevue*, 189 P 3d 139, 160 (Madsen J dissenting).
- 56 *Cf Stern v Wheaton-Warrenville Community Unit School District 200*, 894 N E 2d 818 [237 *Education Law Reporter* 509](Ill App Ct, 2008) (in holding that the details of a superintendent’s employment contract were not exempt public records under state law, the court observed that ‘(the disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy’) (emphasis in original); *Herald Co., Inc. v Ann Arbor Public Schools*, 568 N W 2d 411 [120 *Education Law Reporter* 1153] (Mich Ct App, 1997) (finding no privacy or attorney-client violations under the state’s *Freedom of Information Act* and holding that school district was required to reveal the following records regarding a teacher who had pleaded guilty to a charge of carrying a concealed weapon: memorandum discussing teacher’s professional performance; teacher’s attendance records; and, a tape recording of interview between school district, teacher, and school district’s attorney); *Anonymous v Board of Education for Mexico Central School District*, 616 N Y S 2d 867 [94 *Education Law Reporter* 883] (NY Sup Ct, 1994) (holding that settlement agreement disposing of charges of misconduct against teacher was subject to disclosure under Freedom of Information Law) with *LaRocca v Board of Educ. of Jericho Union Free School District*, 602 NYS 2d 1009 [86 *Education Law Reporter* 342] (NY Sup Ct, 1993) (holding that negotiated settlement agreement disposing of disciplinary charges against principal was ‘employment record’ within state’s Freedom of Information Law permitting committee on public access to records to withhold employment records to prevent unwarranted invasion of personal privacy).
- 57 Ibid 144. See *Ellis v Cleveland Municipal School District*, 309 F Supp 2d 1019, 1024 (ND Ohio, 2004) (holding that disclosure of teacher records relating to complaints about use of corporal punishment not prohibited by FERPA because ‘FERPA should not operate to protect allegations of abuse by substitute teachers from discovery in private actions designed to combat such abuse’). See generally, David A. Elder, ‘Ch. 3 Public Disclosure of Private Facts’ (2008) *Privacy Torts* § 3:17.
- 58 For a comprehensive discussion of cases discussing the balance between disclosure and invasion of privacy, see Andrea G. Nadel, ‘What Constitutes Personal Matters Exempt From Disclosure By Invasion Of Privacy Exemption Under State Freedom of Information Act[s]’ (2008) 26 *American Law Reports* 4th 666.
- 59 See, eg, *Booth Newspapers, Inc. v Kalamazoo School District*, 450 NW 2d 286 [58 *Education Law Reporter* 295] (Mich Ct App, 1989) (awarding partial attorney fees to newspaper that prevailed in securing disclosure of information about allegations of sexual misconduct even though the teacher’s name could be redacted). See generally, Jill M. Marks, ‘Construction and Application of State Freedom of Information Act Provisions Concerning Award of Attorney’s Fees and Other Litigation Costs’ 118 *American Law Reports* 5th 1 (2008).
- 60 *Bellevue*, 189 P 3d 139, 154 (Madsen J, dissenting).
- 61 Appellate Brief of Amicus Curiae Washington Education Association (Feb. 4, 2005), 2005 WL 5288867 at *1 (hereafter referred to as, *WEA Appellate Brief*).
- 62 Ibid *3.
- 63 Ibid.
- 64 Ibid *4.
- 65 Ibid *5 (emphasis added).
- 66 *Brown v Seattle Public Schools*, 860 P 2d 1059, 1063 [86 *Education Law Reporter* 475] (Wash Ct App, 1993) (emphasis in original) (a request for evaluation records of a school principal under the prior PDA and not involving sexual misconduct but still involving the same public interest issue).
- 67 *Bellevue*, 189 P 3d 139, 158 (Madsen J dissenting) (‘the majority leaves school districts free to control whether an accused teacher’s identity must be released by controlling the scope and depth of its investigation’).

- 68 *WEA Appellate Brief* at *15, 16 (emphasis in original). (The trial court in *Bellevue* conducted an *in camera* review of all records sought by the Times and on the basis of that review decided to disclose teachers' records where either there had been substantiated evidence of misconduct or an inadequate investigation). *Bellevue*, 189 P 3d 139, 143, n. 5.
- 69 *Bellevue*, 189 P 3d 139, 143.
- 70 *Ibid* 151 ('the identities of teachers who are subjects of unsubstantiated complaints should not be disclosed, regardless of the quality of the investigation.').
- 71 See, eg, *Peck v Siau*, 827 P 2d 1108 [73 *Education Law Reporter* 859] (Wash Ct App, 1992) (holding that School district could not be held liable to high school student with whom school librarian had sexual contact, on theory of negligent supervision of librarian, absent showing that district knew, or in exercise of reasonable care should have known, that librarian constituted risk of danger to students). See generally, Robin Cheryl Miller, 'Liability, Under State Law Claims, of Public and Private Schools and Institutions of Higher Learning for Teacher's, Other Employee's, or Student's Sexual Relationship with, or Sexual Harassment or Abuse of, Student' (2001) 86 *American Law Reports* 5th 1.
- 72 See, eg, *Christensen v Royal School District No. 160*, 124 P 3d 283, 287 [204 *Education Law Reporter* 385] (Wash, 2005) (rejecting school's claim that contributory defense should be permitted as to an eighth grade student who had sexual contact with a teacher, reasoning that 'that children do not have a duty to protect themselves from sexual abuse by their teachers' and if the student's lies frustrated the school's investigation, that would relate to the breach of a school's duty to supervise its students). See generally, Todd DeMitchell, 'Essay: Safety Sensitive Positions and The Duty Owed To Students: From Drugs To Torts' (2007) 217 *Education Law Reporter* 789.
- 73 *Bellevue*, 189 P 3d 139, 151.
- 74 929 P 2d 582 [115 *Education Law Reporter* 502] (Cal, 1997) (holding that a prior school district could be liable where it had failed to mention to a second district that hired the administrator that disciplinary action had been taken against him for sexual harassment with the first district having provided the second district with a letter of recommendation making positive statements about the administrator's character and rapport with students).
- 75 See *Shrum v Kluck*, 249 F 3d 773 [153 *Education Law Reporter* 600] (8th Cir, 2001) (finding no liability for a school district under section 1983 and title IX claims where it had entered into a settlement agreement with a teacher who had been issued a reprimand for 14 instances of impermissible touching of students, with the school district agreeing pursuant to the settlement agreement to provide a neutral letter of recommendation that did not refer to the reprimand); *Larocca v Board of Education*, 602 NY S 2d 1009 (NY Sup Ct, 1993) (denying access to charge against principal where charge had been withdrawn as result of settlement agreement).
- 76 See *Richland School District v Mabton School District*, 45 P 3d 580 [164 *Education Law Reporter* 476] (Wash Ct App, 2002), rev denied, *Richland School District v Mabton School District*, 60 P 3d 1211 (Wash, 2003) (school custodian's current employer, which hired custodian and afterward discovered that custodian had resigned from his former employer in exchange for county's dismissal of three counts of child molestation, brought action for negligence based on misrepresentation and nondisclosure against custodian's former employer, but with appeals court upholding summary judgment for former employer reasoning that, as matter of apparent first impression, former employer did not owe school custodian's new employer a duty under common law negligence principles to include the dismissed charges of child molestation and the reprimands in custodian's letters of recommendation).
- 77 See *Yates v Mansfield Board of Education*, 808 NE 2d 861 [187 *Education Law Reporter* 1005] (Ohio, 2004) (holding that a school district's principal who had conducted an investigation of a student's complaint of sexual harassment by her coach and concluded that the student had been lying might be liable for negligent retention claim by a student at a subsequent school who had been sexually abused by the same coach, if the principal at the first school had a duty under the state's child abuse reporting statute to report the coach's abuse to social services instead of conducting the search himself).
- 78 *Ibid* 158 (Madsen J dissenting).

- 79 See Susan P. Stuart, ‘Citizen Teacher: Damned If You Do, Damned If You Don’t’ (2008) 76 *University of Cincinnati Law Review* 1281, 1331 (applying the foxes and henhouse argument to school boards after *Garcetti v Ceballos*, 547 US 410 (2006) which allows boards to retaliate and, thus, control teacher speech where that speech is part of a teacher’s job). See also, Penelope Bryan and Thomas Reynolds, ‘Agency E-Mail and The Public Records Laws--Is The Fox Now Guarding The Henhouse?’ (2004) 33 *Stetson Law Review* 649 (making the same argument where, even if private use of public employer email is considered a public use, emails can be excluded from disclosure under the state’s public disclosure act if the employer classifies them as ‘personal’).
- 80 Appellate Brief of Seattle Times, 2004 WL 5252059 at *3-4 (Wash.) (*Seattle Times Appellate Brief*).
- 81 Ibid *4. See W. Richard Fossey, ‘Confidential Settlement Agreements Between School Districts and Teachers Accused of Child Abuse: Issues of Law and Ethics’ (1990) 63 *Education Law Reporter* 1, 2 (‘[a] covenant of non-disclosure is often included in the settlement agreement between a school district and a teacher accused of sexual molestation or other child abuse.’).
- 82 *Seattle Times Appellate Brief* at *8.
- 83 Ibid *8-9.
- 84 Fossey, above n 81, 2.
- 85 See *Yates v Mansfield Board of Education*, 808 NE 2d 861 (Ohio, 2004) (school principal conducted internal investigation of a student’s investigation of coach sexual harassment, determining that the student was lying, but case was remanded in subsequent damages lawsuit for negligent supervision and retention as to whether principal had duty under state’s child abuse reporting statute to report the alleged harassment to social services under a ‘knew or reasonably suspected’ standard); *Tammy C. v County of Riverside*, 2001 WL 1452214 at *6 (Cal Ct App, 2001) (holding that a school counselor as a ‘health practitioner’ under the state’s mandatory reporting statute could consider or look into the report of sexual misconduct only as necessary to determine whether a reasonable suspicion existed to support the child abuse allegation, also observing that ‘[n]ot only is it not incumbent upon the mandated reporter to conduct an active investigation, [but] the mandated reporter also should not determine the allegation’s truth or falsity,’ and concluding that where the counselor determined the student was lying, the molested student had a claim for negligent misrepresentation against the school district).
- 86 See [http:// childwelfare.gov/systemwide/laws_policies/search/](http://childwelfare.gov/systemwide/laws_policies/search/) (United States Department of Health and Human Services National Clearinghouse on Child Abuse and Neglect Information listings of each state’s mandatory reporting statutes, what professions are required to report, and which states recognize an exception to mandatory reporting due to privileged communications); Danny R. Veilleux, ‘Validity, Construction, and Application of State Statute Requiring Doctor or Other Person To Report Child Abuse’ (2005) 73 *American Law Reports* 4th 782.
- 87 See *Seattle Times Appellate Brief* at *14.
- 88 See, eg, West’s Ann. Cal. Penal Code § 11165.12 defining the following results of a social services investigation:
- (a) ‘Unfounded report’ means a report that is determined by the investigator who conducted the investigation to be false, to be inherently improbable, to involve an accidental injury, or not to constitute child abuse or neglect... .
 - (b) ‘Substantiated report’ means a report that is determined by the investigator who conducted the investigation to constitute child abuse or neglect, ... based upon evidence that makes it more likely than not that child abuse or neglect, as defined, occurred.
 - (c) ‘Inconclusive report’ means a report that is determined by the investigator who conducted the investigation not to be unfounded, but the findings are inconclusive and there is insufficient evidence to determine whether child abuse or neglect ... has occurred.
- 89 See, eg, *B.T. v Santa Fe Public Schools*, 506 F Supp 2d 718 [225 *Education Law Reporter* 300] (DNM, 2007).
- 90 See Reply Brief of Appellant Bellevue John Doe #11 (May 28, 2004) at * 3 (hereafter referred to as, *Reply Brief of John Doe #11*).
- 91 Ibid * 11.
- 92 *Bellevue*, 189 P 3d 139, 145.

- 93 See *WEA Appellate Brief* at *9; *Reply Brief of John Doe #11* at * 4.
- 94 Supplemental Brief of Respondent Seattle Times Company (Feb. 2, 2007) at * 2 (hereafter referred to as *Supp. Seattle Times Brief*). See *Spokane Police Guild v Washington State Liquor Control Board*, 769 P 2d 283 (Wash, 1989) (holding that investigative report regarding investigation of liquor law violations on policy guild property had to be disclosed because under state law it would not be highly offensive to a reasonable person and was not of legitimate concern to the public).
- 95 See *Athens Observer, Inc. v Anderson*, 263 SE 2d 128, 130 (Ga, 1980) (upholding disclosure of consultant’s evaluative report of mathematics department with comments on faculty because the public policy was not only to encourage public access to such information in order that the public could evaluate the expenditure of public funds in the efficient and proper functioning of its institutions, but also to foster confidence in government through openness to the public); *Brogan v School Committee of Westport*, (1987) 401 Mass 306, 516 NE 2d 159 (Mass, 1987) (disclosure of teacher absences and reasons for absence were public records that could be disclosed). See also, *Kentucky Board of Examiners of Psychologists v Courier-Journal & Louisville Times Co*, 826 SW 2d 324, 328 (Ky, 1992) (upholding disclosure of name of psychologist against whom charges of sexual misconduct had been made along with the names of complainants, but denying media access to the complaint files, reasoning that the information revealed indicated that ‘the Board of Examiners of Psychologists had performed its fundamental mission to ensure that citizens who consult a licensed psychologist [would] receive competent, ethical, professional services’ and to reveal the complete complaint files would ‘would constitute a serious invasion of the personal privacy of those who complained against [the psychologist]’).
- 96 See *United Federation of Teachers v New York City Health & Hospitals Corporation*, 428 NYS 2d 823 (NY Sup Ct, 1980) (upholding, under state Freedom of Information Act, disclosure of grievances and decisions rendered on grievances filed by registered nurses represented by competing union but only after all personal identifying details were redacted and deleted from the records).
- 97 See *News & Observer Publishing Company v State ex rel Starling*, 309 SE 2d 731, 732 (NC Ct App, 1983) (upholding trial courts disclosure of investigative report of school superintendent after balancing the interests of disclosure and confidentiality, reasoning that the public’s interest prevailed ‘as to how the official is functioning who is entrusted with responsibility for the day-to-day operations of the Wake County Public Schools’); *Connecticut Alcohol & Drug Abuse Comm’n v Freedom of Info. Comm’n*, 657 A 2d 630 (Conn, 1995) (applying the trial hearing principle to investigative file of sexual harassment complaint by two police officers working for hospital against former coworker where the file was considered to be part of personnel records).
- 98 See, eg, *Littlejohn v Rose*, 768 F 2d 765 [26 *Education Law Reporter* 955] (6th Cir, 1985), cert. denied, 475 US 1045 (1985) (non-tenured teacher’s privacy right might have been violated if school board’s non-renewal decision was based on her divorce). For a more comprehensive discussion of teacher Liberty Clause rights, see Robert Michael Ey, ‘Cause of Action to Challenge Discharge of Public School Teacher on Grounds of Immoral or Criminal Conduct’ (2008) 17 *Causes of Action* 335.
- 99 US Constitution Amendment XIV, § 1 (‘[No] State shall... deprive any person of life, liberty, or property, without due process of law.’).
- 100 *Roe v Wade*, 410 US 113, 152 (1973).
- 101 *Whalen v Roe*, 429 US 589, 599-600 (1977).
- 102 See, eg, *Morris v Clarksville-Montgomery County Consol. Board of Education*, 867 SW 2d 324, 330 [88 *Education Law Reporter* 461] (Tenn Ct App, 1993) (even though sexual contact with students did not meet insubordination grounds for dismissal because there had been no order to cease conduct, the dismissal could be supported on the ground of unprofessional conduct).
- 103 See, eg, *Kerin v Board of Education, Lamar School District No. RE-2, Prowers County*, 860 P 2d 574, 582-83 [86 *Education Law Reporter* 458] (Colo Ct App, 1993) (school board could dismiss teacher for fostering parent-child type relationship with fourth-grade student and engaging in custody dispute with parent).

- 104 See, eg, *Parker v Byron Center Public Schools*, 582 NW 2d 859 [128 *Education Law Reporter* 878] (Mich Ct App, 1998) (sexual relations with a student sixteen years earlier could support dismissal over teacher's evidentiary and probative claims); *Toney v Fairbanks North Star Borough School District, Board of Education*, 881 P 2d 1112 [95 *Education Law Reporter* 380] (Alaska, 1994) (teacher could be dismissed for immorality for impregnating fifteen-year-old student ten years earlier in another school district); *Wright v Mead School District*, 944 P 2d 1 [121 *Education Law Reporter* 312] (Wash Ct App, 1997) (sexual contact with students seven to ten years earlier supported dismissal of teacher).
- 105 See *Padilla v South Harrison R-H School District*, 181 F 3d 992 [136 *Education Law Reporter* 728] (8th Cir, 1999) (probationary teacher who was acquitted of misdemeanor and felony charges involving alleged sexual assault on a student could still be dismissed by the school board for a statement he made at his trial, saying that he saw nothing wrong with consensual sex between a teacher and a student).
- 106 *Bellevue*, 189 P.3d 139, 158 (Madsen J, dissenting).
- 107 *Ibid* (In one study, 39 % of teachers who had admitted to sexual abuse chose to leave the school district, 'most with positive recommendations or even retirement packages.')
- 108 *Ibid* 157. (The majority claims that 'an *accusation* of sexual misconduct is not an action taken by an employer in the course of performing public duties' while the dissent emphasizes that 'it is the employee's alleged *conduct*, not the student's *accusation* that is the focus of the right of privacy inquiry.')
- 109 See Natasha C. Meruelo, 'The Need to Understand Why Patients Sue and a Proposal for a Specific Model of Mediation' (2008) 29 *Journal of Legal Medicine* 285, 289 ('The overwhelming consensus is that patients sue when there is a communication breakdown between themselves and their physician, when they feel ignored and that their questions and complaints go unanswered, or when physicians fail to express any genuine concern for their welfare.').
- 110 *Morse v Fredrick*, 127 S Ct 2618, 2638 (2007) (Alito, J, concurring).(in the context of a case where a school assistant principal removed a sign from a student and then suspended the student for two weeks, Justice Alito observed that, '[w]hen public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students' parents'.).
- 111 See generally, Todd A. DeMitchell, 'The Duty to Protect: Blackstone's Doctrine of In Loco Parentis: A Lens for Viewing the Sexual Abuse of Students' (2002) *Brigham Young Journal Of Education And Law* 17.
- 112 See *WEA Appellate Brief* (Feb. 4, 2005), 2005 WL 5288867, *14.
- 113 See *Board of Regents v Roth*, 408 US 564, 573 (1972).
- 114 For a discussion of these state law rights, see Charles Russo and Ralph Mawdsley, *Education Law* § 2.05[2] and [3].
- 115 See, eg, *Dennis v Coventry Local School Board of Education*, 2006 WL 1540840 (Ohio Ct App, 2006).
- 116 *Bellevue*, 189 P3d 139, 160 (Madsen J, dissenting) (citing to a study where the majority of student complaints about sexual misconduct 'are ignored or disbelieved' with a poignant observation by the dissent that '[i]f the school will not act, what can a mere student do?').
- 117 See <www.ode.state.oh.us> for the State of Ohio disciplinary process.