Chapter 5
Legal Issues Involving Educator Sexual Misconduct: Understanding the Risks and Assessing the Consequences

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ABSTRACT
In addition to the trauma for victims of an educator’s sexual misconduct, such conduct can have lasting consequences for the educator, their employer, and the community the educator serves. The educator who crosses professional boundaries and engages in sexual misconduct with students faces the possibility of both professional and personal consequences. In addition to discussing these consequences, this chapter will identify and examine the liability risks for school employers when an educator engages in sexual misconduct. This chapter will also provide insight into how a school employer can adopt and implement measures to prevent and manage risks posed by sexual misconduct through background checks, training, supervision, reporting procedures, and conducting investigations when appropriate.

INTRODUCTION
When considering what makes a child grow into a successful adult, parents may focus on various factors including academic achievement, career success, and emotional well-being. The education of a child plays a major role in the development of the child along with other factors such as family stability, community support, and socioeconomic factors. In addition to parents or close family members, many adults who have attained some measure of academic or professional success can name one or more educators who played a role in that success by making an imprint on their lives. An effective educator can challenge, inspire, and unlock a child’s individual potential. Parents and caregivers send children to school in the hopes that the educational experience will make their lives better in the long run. This hope is built to some extent on the trust that professional educators will look out for the best interests of their child when they are at school and those children will be positively influenced by their educational experiences.

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LIABILITY

One way to consider the issue of the liability is to think in terms of legal responsibility. People who are not familiar with the legal system often think of civil liability in the same context as criminal liability. While criminal liability requires both a criminal mental state and a criminal act, civil liability is a far less exacting standard. Civil liability is fundamentally about legal responsibility. In many cases, it does not require a specific mental state, the intent to do harm, or even an affirmative act that causes direct harm. In a civil lawsuit, liability frequently turns on a defendant’s failure to meet a standard of care or the failure to take certain measures when the defendant either knew or should have known that a course of action would result in the injury of another. One of the more basic forms of civil liability comes in the form of negligence.

In most states, liability under the theory of negligence may be found when:

- The employer had a duty which is also referred to as a standard of care;
- The employer breached that duty by failing to act in a reasonable manner;
- The breach of duty was the cause (direct and proximate) of the plaintiff’s injuries; and
- The plaintiff suffered damages (Bublick, 2009).

When considering the first element relating to duty, it is helpful to consider how a reasonable employer would have handled a particular situation. For example, does a school employer have a duty to take reasonable steps to keep students safe? Would a reasonable school employer ignore the report of a middle school student that a male teacher was making inappropriate remarks to her regarding the status of the student’s virginity? Most reasonable minds would not have trouble deciding that a reasonable school employer would not ignore such a report or that the employer should have taken steps to investigate and ensure the safety of the student. In terms of the third element focused on the cause or causation of the plaintiff’s injury, there are two distinctive prongs to causation for liability to attach. A plaintiff suing a defendant for negligence would have to prove both direct cause and proximate cause. Direct cause focuses on something referred to in the law as the “but for” test. This test analyzes whether the injury would have happened “but for” the defendant’s breach of duty. Proximate cause focuses on whether it was foreseeable the defendant’s breach of duty would cause the plaintiff’s injury. Finally, a plaintiff must prove damages. Examples of monetary damages include medical bills including psychiatric counseling, pain and suffering, and in extreme cases, punitive damages. Plaintiffs are required to present evidence that establishes the damages they are requesting in a legal complaint filed to commence a lawsuit.

Some of the areas where an employer might be vulnerable as a defendant in cases involving educator sexual misconduct would be negligent hiring practices or the failure to investigate alleged misconduct. For example, a school employer that does not perform adequate background checks or properly screen employees may run the risk that an employee who would have been otherwise detected and eliminated as a job candidate in the hiring process manages to slip through the cracks and is hired by the employer. Such a check would only eliminate a candidate from the applicant pool if something troubling appears during the course of the background check. However, one could make a compelling argument that even for those school positions that may not require background checks under a particular state law, that it is unreasonable for a school employer to neglect to conduct such checks because of the health, safety and welfare of students. Another potential area of vulnerability occurs when a school employer has received reports of inappropriate educator conduct involving interactions with students and the employer fails to