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**S**raga  
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**Priority Briefing**

## **COURT DECISION ON DUTY TO REPORT ABUSIVE FORMER EMPLOYEE**

A recent Illinois Appellate Court decision appears to greatly expand the possibility for school districts' and district officials' liability to students when failing to report an employee with a history of abusive conduct. The decision, *Doe-3 v. White*, rendered on April 29, 2011, involved a teacher's sexual abuse of students which spawned numerous lawsuits.

Jon White was a teacher in McLean School District and, while employed by that district, he sexually abused young girls in his class. The lawsuits alleged that McLean administration knew about the abuse, but did not report it to the Illinois Department of Children and Family Services ("DCFS"). Instead, when White resigned, a McLean administrator gave him a positive letter of recommendation and a severance package that concealed the abuse. When White applied for employment at Urbana School District, McLean administrators not only allegedly failed to inform Urbana of White's misconduct, but also provided false information to Urbana about White's teaching experience.

The "public-duty rule" protects a governmental entity from tort liability to an injured member of society on the premise that the governmental entity owes a duty of care to the public at large, but not to individual members of the public. In the 1990's, the Illinois Appellate Court ruled that a school district has no duty to individual students in a district, separate from the district as a whole. However, an exception applies to the public duty rule if four elements are satisfied: (1) the governmental entity is uniquely aware of the particular danger or risk to which

the plaintiff is exposed; (2) there are allegations of specific acts or omissions by the governmental entity; (3) the specific acts must be affirmative or willful in nature; and (4) the injury must occur while the plaintiff is under the direct and immediate control of the entity's employees or agents.

Doe-10 and Doe-11, McLean students abused by White, brought suit against the McLean School District. In March 2009, a federal court ruled that the students' willful and wanton supervision claim was not defeated by the public duty rule. That court held that district administrators owed duties of care to these students in their district, even though immunities might relieve them for breaching those duties. Apparently applying the public duty rule exception, the court explained that McLean administrators controlled White, allegedly had actual knowledge of his misconduct and of the identity of his victim, and that therefore the public duty rule protection did not apply.

In April 2011, two years later, the Illinois Appellate Court reviewed the state case involving two different students, identified as Doe-3 and Doe-7. In this case, Urbana students sued McLean School District and alleged that McLean School District's willful and wanton conduct in "passing" White on to Urbana School District without warning, caused injury to the Urbana District plaintiffs. McLean argued that the public duty rule exception was not met because White was not under the control of McLean administrators when the Urbana students were abused and because McLean School District owed no duty to students in another school district. The Appellate Court confirmed that the public duty rule governs to school districts, but refused to apply the rule under these circumstances. The Court held that the McLean case was not one in which administrators negligently performed an ordinary, governmental, policing or enforcement function. The Court described the alleged behavior of McLean administrators to be intentional, egregious conduct, which if true, may "shock the conscious." The Court refused to apply the public duty rule protection where the administrators had specifically created the danger complained of.

The *Doe-3* decision is noteworthy as it greatly expands the duty school districts owe to students under common law. School personnel and school board members are mandated reporters to DCFS under the Abused and Neglected Child Reporting Act, 325 ILCS 5/1 *et seq.* Pursuant to Section 10-21.9(e-5) of the Illinois School Code, a local superintendent must notify the State Superintendent of Schools and the Regional Superintendent, of any certificate holder whom he or she has reasonable cause to believe has intentionally abused a student. But the *Doe-3* case may require a district to notify an inquiring district of *any* past district employee who could harm a student. And moving beyond abusive employees to abusive students, some may argue that the Court's ruling logically leads to a duty to warn another school district if a dangerous student moves from one district into another one. While it is still unclear to what extent such an affirmative duty may exist, the *Doe-3* decision does stand for the principle that school officials cannot actively conceal information about abuse.

Another lesson to be learned from this case is to be careful about e-mail. The Urbana students produced an e-mail written by one of the McLean administrators to another that read, “Please keep this information confidential, but thought you would be interested in hearing that Jon White was arrested in Urbana today. I don’t know the specific charges, but it appears to be much worse than the issues he faced here. I’m glad we took the steps we did to get him out of the district. I believe it was you who said that he was on a path to further problems.” According to the Urbana students, this was their “smoking gun.”

For additional information about how school district should respond to sexual harassment and violence, see our Priority Briefing of April 8, 2011, and the U.S. Dept. of Education Dear Colleague Letter of April 4, 2011.