



Florida Increases School Obligations Under the New Educator Conduct Act

Insights

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After unanimous approval by both Florida's Senate and House, Governor Ron DeSantis signed the Educator Conduct Act on June 21, amending several sections of the state's K-20 Education Code and imposing new statutory obligations on Florida schools. Beginning on July 1, 2021, public, charter, and certain private schools will now be required to comply with the Department of Education's newest record keeping policies regarding disqualified school employees, background checks, training requirements, and standards of ethical conduct.

While the amended statutes include nearly identical directives for public, charter, and private schools that accept students with state scholarships, this Insight focuses on the obligations of certain private schools.

A Quick Reminder on Which Schools Are Covered

The Educator Conduct Act's amendments impose additional state requirements only on those private schools that participate in state scholarship programs. The state scholarship programs include:

- the Opportunity Scholarship (which provides school-choice opportunity to students who attend or are assigned to failing public schools);
- the Gardiner Scholarship (which allows parents to personalize the education of their children with unique abilities);
- the McKay Scholarship (which allows students with special needs to attend a private school of their choice);
- the Family Empowerment Scholarship Program (which aids families with limited financial resources);
- the Florida Tax Credit Scholarship (which gives families a choice of financial assistance toward private school tuition and fees); and
- the Hope Scholarship (which contributes to the financial cost of private school for a student who has been the victim of certain violence or threats of violence at school).

Introduction to the Department of Education's New Disqualification List

Under the new law, Florida's Department of Education (DOE) will now be required to maintain a "disqualification list" of individuals who have been (1) permanently denied an educator certificate or whose educator certificate has been permanently revoked; (2) permanently disqualified by the commissioner from owning or operating a private school that participates in the state scholarship program; (3) terminated or resigned in lieu of termination from employment as a result of sexual misconduct with a student; or (4) disqualified from employment pursuant to Section 1012.315 of the Florida Statutes. The DOE must also provide access to electronic verification of information on this disqualification list to authorized staff of the specified private schools.

To keep an appropriate record of this list, the updated version of Florida's K-20 Education Code will now include a new duty to report. If, subsequent to employment, a private school employee working in direct contact with students engages in conduct that requires this person to be named on the disqualification list, the private school must report the person and the disqualifying circumstances to the DOE for inclusion on this list.

Implementation of New and Widened Obligations at All Stages of Employment

Additionally, the newly amended laws require private schools to modify and expand their policies and practices for pre-employment screening, during employment, and after separation.

Before Employment

The new law now makes clear that a covered private school generally may not employ any person whose educator certificate is revoked, who is barred from reapplying for an educator certificate, or who is on the disqualification list maintained by the DOE. Moreover, educational support employees, instructional personnel, and school administrators are prohibited from employment in any position that requires direct contact with students if the personnel or administrators are ineligible for such employment pursuant to Section 1012.315 of the Florida Statutes (which contains the listing of serious criminal offenses) or have been terminated or resigned in lieu of termination for "sexual misconduct with a student."

Private schools should note that all of the obligations that previously existed under the Ethics in Education Act for schools that receive scholarship funds still exist (such as the requirement for checking the state's databases, for checking an applicant's past references and keeping written records of same, and for checking the child abuse registry for complaints about the applicant).

During Employment

For covered private schools, the Educator Conduct Act also broadens the application of the state's requirements for training, policies, and postings regarding ethical conduct required of school personnel. Specifically, "educational support employees" are now also included as employees who must be governed by and trained on the school's adopted standards of ethical conduct. "Educational support employees" essentially encompasses all of the employees of the school that support the

educational process, such as doctors, nurses, attorneys, CPAs, technicians, clerical/secretarial workers, skilled craft workers, cleaners, grounds employees, service workers, and nearly any other employee of the school.

As previously required by the Ethics in Education Act, training must include training on child abuse reporting (and the liability for failure to report), boundary crossing behavior (behavior that affects the health, safety or welfare of a student, including sexual misconduct with a student), and the reference requirements for employees (including the immunity for providing a truthful reference). For schools that have imposed training and reporting requirements on *all employees* in the past, this addition of “educational support employees” will not add any obligations.

Schools are now also required to post their policies for reporting child abuse or boundary crossing behavior along with contact information to whom such reports are to be made, and penalties imposed for failure to do so. Policies must be in both English and Spanish. The DOE will provide model forms for this.

Finally, covered private schools must report to the DOE when a covered employee (which now means *any employee*) has been terminated or resigned in lieu of termination for engaging in behavior that affects the health, safety, or welfare of a child, including sexual misconduct with a student.

At the End and After Employment

Covered private schools may not enter into confidentiality agreements regarding *any employees* who have been terminated, dismissed, or who resign in lieu of termination, based in whole or in part on misconduct that affects the health, safety, or welfare a student. As before, any part of an agreement or contract that effectively conceals such misconduct continues to be void and unenforceable.

Finally, while schools were already limited as to their employment reference policies for instructional personnel and administrators after employment, the revisions to these statutory guidelines now broaden the scope of employees this applies to. Implicated schools (and their employees) are prohibited from providing employment references or discussing the performance of a former employee with prospective employers in another educational setting, without disclosing the former employee’s misconduct, for *all employees* separated from employment due to misconduct that affects the health, safety, or welfare of a student.

Still, Some Clarity May be Needed

Even with all these revisions and modifications that were made by the state legislature to provide clarification on school obligations surrounding educator conduct, one new phrase may require some judicial review: “sexual misconduct with a student.” Although the amended statutes frequently include this phrase in its updated language, the term “sexual misconduct with a student” is not defined by the K-20 Education Code. The only expanded reference is in Section 1001.42(6), which states. “misconduct that involves engaging in or soliciting sexual, romantic, or lewd conduct with a

student.” It is unclear whether the new statutory provisions would require a school to report such as behavior as a teacher telling a student a sexual joke, using innuendo, asking a student to meet for lunch, sending a text or making a social media post with sexual content, forwarding a nude photo, or touching of body parts over, among other things.

Until schools receive clarification, it may be advisable to be overly inclusive and report any type of boundary-crossing, romantic, or other forms of inappropriate sexual activity between a school employee and student, whether such behavior occurs in person or electronically.

Practical Application

While these amendments may seem to impose a substantial number of changes, a focused look at the practical application of these changes will help narrow the checklist of to-dos for a private school needing to update their policies and procedures on July 1 of this year. It is important to make these changes quickly, because a private school that knowingly fails to comply with these changes risks the state suspending payment of scholarship funds and prohibiting the school from enrolling new scholarship students for one fiscal year and until the school complies. Noncompliance will also risk the DOE from permanently denying or revoking the authority of an owner or operator to establish or operate a private school in the state and including such individuals on the disqualification list.

Thus, before employing any person, private schools that participate in state scholarship programs should first consult the DOE’s disqualification list to verify that the person is not ineligible for employment. Private schools can also look to former employers directly, who will now be obligated to put prospective employers on notice if their former employee’s departure was due to disqualifying misconduct.

Private schools should also modify their training policies concerning standards for ethical conduct to include all employees, not just instructional personnel and administrators. All school employees should participate in the same training programs that the school adopts regarding ethics and reporting to ensure compliance with the new versions of these statutes.

Finally, schools are now on notice that confidentiality provisions as part of separation agreements may no longer include any language that has the intent or effect of concealing misconduct that renders any person disqualified from employment at a school in Florida, regardless of their role at the school.

Conclusion

If you have any questions about how these changes effects your school, please contact your Fisher Phillips lawyer, the authors of this Insight, or any member of our Education Practice Group. Fisher Phillips will continue to monitor further developments and provide updates in the coming months,

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