

Memorandum

Date: January 30, 2012
To: District Administrators
From: Michael J. Thompson, Deputy State Superintendent
Subject: 2011 Wisconsin Act 84: Best Practices for Misconduct Referrals under § 115:31

Recently, Governor Walker signed into law 2011 Wisconsin Act 84, relating to revocation of a license issued by the Department of Public Instruction (DPI) due to immoral conduct. 2011 Wisconsin Act 84 provides that “immoral conduct” now specifically includes the intentional use of an educational agency’s equipment to download, view, solicit, seek, display, or distribute pornographic material. This does not mean that a revocation or denial for such conduct is automatic; rather, it means that the definition of “immoral conduct” in the law has been expanded such that the conduct specified in the act, on its face, constitutes immoral conduct, which could lead to the revocation or denial of a Wisconsin educator license or permit.

2011 Wisconsin Act 84 also requires an administrator, when reporting “immoral conduct” to DPI, to include with that referral a complete copy of the licensee’s personnel file and all investigative records.

2011 Wisconsin Act 84 also requires DPI to post the name of the licensee under investigation on the DPI website. It also requires DPI to maintain a record of all investigations it conducts.

Finally, 2011 Wisconsin Act 84 provides that the transfer of a record by an administrator to the DPI pursuant to Wis. Stat. § 115.31(3)(a) is not subject to certain requirements found in Wis. Stat. § 19.356(2)(a).

<https://docs.legis.wisconsin.gov/2011/related/acts/84.pdf>

Tips for Employment decisions:

- Regarding hiring, districts are encouraged to work with their legal counsel to develop hiring practices, policies and procedures that include a criminal background check and full reference checks with any and all former employers. Districts should not rely on DPI having issued the applicant a credential as a substitute for the district conducting its own new, updated criminal and employment background checks prior to making an employment offer.
- Districts are encouraged to use the DPI’s “License Look Up” feature <https://www2.dpi.wi.gov/lic-tll/home.do> to verify the validity of an applicant’s credential(s), to determine the applicant’s area(s) of licensure, and to determine if any adverse license action, such as a revocation or denial of a credential, has occurred, and/or whether the applicant is currently the subject of a DPI investigation. If a

- licensee is under investigation for alleged immoral conduct, the department is required to indicate this on its website. If you search using the “License Look Up,” it will indicate in red type at the top of the page if a person’s license is under investigation, is revoked, has been denied, is on hold or is under background review.
- Work with your district’s legal counsel and board to develop policies and procedures for a framework to assess when to make a referral to the DPI, how to make such a referral to the DPI, and what the referral will consist of. This should include a review and discussion of statutory obligations, as well as district policies in effect.
 - State law (see Wis. Stat. § 115.31(3) (<http://legis.wisconsin.gov/statutes/Stat0115.pdf>) requires an administrator to report the name of any person employed by the educational agency and licensed by the state superintendent, and to include with that referral a complete copy of the licensee’s personnel file and all records related to any investigation of the licensee conducted by or on behalf of the educational agency, if:
 1. *The person is charged with a crime under ch. 948, including a crime specified under Wis. Stat. § 948.015, a felony with a maximum term of imprisonment of at least 5 years or a crime in which the victim was a child.*
 2. *The person is convicted of a crime described under subd. 1. or of 4th degree sexual assault under Wis. Stat. § 940.225(3m).*
 3. *The person is dismissed, or his or her contract is not renewed, by the employer based in whole or in part on evidence that the person engaged in immoral conduct.*
 4. *The person resigns and the administrator has a reasonable suspicion that the resignation relates to the person having engaged in immoral conduct.*
 - Immoral conduct is defined as:
“conduct or behavior that is contrary to commonly accepted moral or ethical standards and that endangers the health, safety, welfare or education of any pupil.
“Immoral conduct” includes the intentional use of an educational agency’s equipment to download, view, solicit, seek, display, or distribute pornographic material.”
Wis. Stat. § 115.31(1)(c)

Making a Referral to DPI:

- Pursuant to 2011 Wisconsin Act 84, educational agencies are required to include a complete copy of the licensee’s personnel file and all records related to any investigation of the licensee conducted by or on behalf of the educational agency when a referral to DPI is made. The open records law specifically allows the administrator of an educational agency to the state superintendent of public instruction under Wis. Stat. § 115.31(3)(a).

- FERPA does not prohibit the release of investigatory materials to DPI, even if they contain student information.
- If DPI does not have full access to all relevant documents in the district's possession, it will likely impede and possibly damage DPI's ability to make a proper and fully informed decision in the matter. It will also likely have a negative impact on DPI's ability to successfully prosecute a license revocation and/or license denial. When a school district withholds or otherwise limits DPI's access to information about the matter under investigation, this severely hampers our ability to conduct a full investigation. Failing to provide contact information for a victim, district investigative records regarding the educator, etc. has resulted in DPI closing cases without action because we could not corroborate the allegations without speaking with witnesses, the victim, etc. This has allowed potentially dangerous persons to remain in the classroom.

Information about the DPI investigation process:

- In most cases, an employing school district will be aware that their employee is under investigation by DPI. However, if DPI does not know that the person is employed in a particular district, perhaps because they were only employed after the audit deadline, or the person is a sub, etc., then DPI has no way to notify the district that their employee is under investigation.
- When a referral to DPI is made as required under Wis. Stat. § 115.31(3) relating to a person licensed by the state superintendent, the department will post on DPI's internet site the name of the licensee who is under investigation. During the investigation, the state superintendent shall keep confidential all information pertaining to the investigation except the fact that an investigation is being conducted and the date of the revocation hearing.
- The standards for pursuing license revocation are statutorily defined. (Wis. Admin. Code sec. PI 34.35) The decision to revoke a license must be based on factual evidence that the credential holder has engaged in behavior that meets the standards for license revocation set forth in Wis. Admin. Code sec. PI 34.35.
- Each allegation of misconduct is investigated and considered individually to determine if there is sufficient factual evidence to conclude the alleged behavior occurred.
- Keep in mind that not all bad behavior/misconduct constitutes immoral conduct under the law, nor does all bad teaching and/or poor teaching technique constitute incompetency.
- Wis. Stats. § 115.31(6)(b) requires DPI to keep the details of any pending investigation confidential. During the investigation, DPI is only allowed to indicate whether there is an open investigation and to disclose the date of any schedule revocation hearing. Therefore, when citizens, law enforcement, the district attorney, district administrators, the media, etc., ask for information about a case that is under investigation by DPI, the department is limited by law on what information it may disclose. However, after a case is closed, the records pertaining to the investigation are available subject to the Open Records Law and its limitations. Pursuant to 2011 Wisconsin Act 84, beginning December 9, 2011, DPI will maintain a record of all

investigations conducted that indicate the name of the licensee, the date the investigation began, the reason for the investigation, and the result of the investigation.

- As long as the person's Wisconsin educator license has not expired, the license remains valid. Being under investigation by DPI does not invalidate a person's license.
- If there are pending criminal charges, DPI usually holds its investigation open until the criminal case is concluded. This is done for several reasons.
 1. *The district attorney and law enforcement agencies may not be able to release all the police reports and investigative files until the case is concluded.*
 2. *An independent investigation could jeopardize criminal prosecution by impeding or interfering with plea negotiations or witness preparation.*
 3. *The outcome of the criminal case could affect the disposition of the educator licensing case. For example, in some cases, a conviction would result in an automatic license revocation. In other cases, a criminal conviction may be useful evidence in a revocation action.*
 4. *Law enforcement has special investigative expertise and investigative tools and authority which could ultimately assist DPI with its case.*
- DPI usually holds its investigation open pending the outcome/conclusion of the school district's employment/discipline process. This is done for several reasons.
 1. *The district may not be able to release all of the personnel and investigative records until the employment action is concluded.*
 2. *The employment action could affect the disposition of the educator licensing case. For example, a school district may negotiate, in consultation with DPI, with the credential holder to surrender his or her license as part of a settlement agreement with the employment case. Or, the school district may determine that the behavior does not justify termination.*
 3. *Because the standard for job termination is different than the standard for license revocation, the district's employment decision can be very important to subsequent litigation. Because the district has sole hiring and firing authority over its employees, the district must complete its action first.*
 4. *Simultaneous investigations would be inefficient, and could cause evidentiary issues in either or both venues.*
 5. *The district has special knowledge of and easy access to the witnesses and the evidence, including pupil witnesses, making it more efficient and practical to develop the case at that level.*

If you have any questions please contact Courtney Spitz at courtney.spitz@dpi.wi.us or (608) 264-9339.