



Date: January 30, 2006
To: All Superintendents and Boards of Education
From: MASB, MSBO & MASA

Advisory Re: Student Safety Initiative – Convictions Report & Talking Points

Based on reports in the media and from the state, some time in the next week or so you will receive a communication from the Michigan Department of Education that identifies school employees who reportedly have been convicted of a misdemeanor and/or felony. The list is reported to contain 2,500 active school employees who have been found guilty of some 4,600 crimes. We wish to offer some background and suggestions as to what to do and how to respond to your employees, community and the media.

As mentioned in the paragraph above, you will be receiving a listing of ALL convictions for both misdemeanors and felonies. For both internal and external purposes it is important to distinguish between “listed offenses” and other crimes.

For non-listed offenses we strongly advise that districts approach them on a case-by-case basis rather than “zero tolerance.” Many factors such as the type of offense, the time passed since the offense was committed, and the relationship of the offense to the employee’s job should be viewed before making a decision. We hope that districts are able to deal sensitively with individuals in what may be a very difficult situation for them.

Given the reports that the list contains the names of 2,500 school employees (out of a total of nearly 200,000 statewide) that amounts to an average of about four per district.

In talking with your community and the media about this situation it is important to communicate that safety of students is our first priority. In that respect, we will be dealing with employees listed as having serious convictions as quickly and forthrightly as possible, and will deal with other convictions in accordance with law, contract and board policy.

Explicit in our comments below is that before you take action affecting any employee, contact your district’s attorney. The information is for background and general guidance and does not substitute for an attorney’s advice based on the specific situations that may face your district.

Student Safety Initiative – Convictions Report

This advisory is being provided to assist our members in handling issues relating to the impending receipt of a report that identifies school district employees and their criminal convictions, including felonies and all misdemeanors. This report is being developed and sent by the Michigan Department of Education under the authority of Public Act 130 of 2006, which amended Section 1539b of the Revised School Code.

FREEDOM OF INFORMATION ACT (FOIA) ISSUES

Many school districts are likely to receive a FOIA request from local newspapers shortly after receiving the convictions report from the Department of Education. The following information provides guidance in responding to possible FOIA requests.

How much time does a school district have to respond to the requests?

A school district must respond to a FOIA request for a public record within 5 business days after the district “receives” the request. When computing the 5-business day period for responding, a request made by e-mail is not officially “received” until one business day after the electronic transmission was made. (MCL 15.235). For example, a request that is transmitted on Friday, February 3, will not be “received” until Monday, February 5.

How should a school district respond to the requests?

The law requires a response with a letter that does one of the following: (a) grants the request; (b) issues a written notice denying the request (stating the specific reason(s)); (c) grants the request in part and issues a written notice denying the request in part; or (d) issues notice of a ten-day extension to respond to the request by stating the reason(s) for the extension and the date by which the district will respond.

The following language may be used to request a ten-day extension:

Pursuant to MCL.15.235, we are giving you notice of our intent to extend the period in which we must provide a response to your records request. Additional time is necessary to consider the possible confidentiality of the requested record and to protect the privacy interests of our employees. We will issue our final response to your request in ten business days, no later than February ___, 2006

Is the report exempt from disclosure?

Criminal convictions are public information. School districts will primarily be receiving the same information from the Department of Education that the general public can request for a \$10 fee from the State Police’s Internet Criminal History Access Tool (ICHAT). The convictions report should not be confused with the results of individual criminal history and records checks that will

be performed on current and new school employees. The results of criminal history and records checks are protected and must not be disclosed (except felony and misdemeanor convictions involving sexual or physical abuse) to anyone not directly involved in evaluating the employee's employment qualifications. Unlawful disclosures constitute a misdemeanor punishable by not more than \$10,000.

Because the results of individual criminal history and records checks are protected from disclosure, an argument could be made that the convictions report should receive the same confidential treatment. While such reasoning is weakened by the absence of any language in Section 1539b that prohibits disclosure, school boards and administrators should consult with their retained legal counsel to ensure that the report can be lawfully disclosed to a third party under the FOIA.

ISSUES RELATING TO EMPLOYMENT DECISIONS

If the report includes an employee who has been convicted of an offense that requires registration as a sex offender ("**listed offense**"), the employee must be terminated.

A district may employ an individual who has been convicted of a **non-listed offense** felony only if the superintendent **and** board of education each specifically approve the employment or work assignment in writing.

The following information provides general guidance on steps and issues to consider if you have an employee who appears on the report for a listed offense or any other non-listed felony. Because the information cannot account for specific factual situations or other matters that may be dictated by a local collective bargaining agreement or contract, school boards and administrators should consult with their retained legal counsel before making any decisions regarding the employment status of a current employee.

A named tenured teacher has been convicted of a listed offense

- Notify the named teacher and his/her supervising principal. [**Note**- Personally notifying the teacher would not likely amount to an "investigatory interview" which would require the presence of a union representative under the *Weingarten* Doctrine.]
- Place the teacher on immediate *unpaid* leave [**Note** - If a teacher is convicted of a felony that is a "listed offense," a district must discontinue the teacher's salary effective on the date of conviction. MCL 38.103(2)].
- Provide the teacher with the opportunity to submit fingerprints to the state police to verify the conviction at the cost of the teacher.
- The Superintendent files and signs written tenure charges with the Board, specifying discharge as the proposed outcome. A copy of the charges must also be sent to the teacher.
- Within ten days of the filing, the Board reviews the charges brought by the Superintendent and makes its decision to proceed on the charges as stated.
- After the decision to proceed with the charges is made by the Board at an open meeting, it has five days to provide the teacher with the written decision, a written statement of the charges, and a statement of the teacher's right to appeal the decision to the Tenure Commission.

[**Note-** The teacher’s collective bargaining agreement may require additional termination procedures.]

A named employee has been convicted of a listed offense

- Notify the named employee and his/her immediate supervisor. [See Note above on *Weingarten* Doctrine].
- Place the employee on immediate leave under the terms of the employee’s collective bargaining agreement or contract.
- Provide the employee with the opportunity to submit fingerprints to the state police to verify the conviction at the cost of the employee.
- Follow the termination procedures under the employee’s contract or collective bargaining agreement and board of education policy.

A named teacher/employee has been convicted of a non-listed offense felony

- Notify the named teacher/employee. [**Note-** Under the *Weingarten* Doctrine, the teacher/employee has a right to insist on the presence of a union representative in an investigatory interview that the teacher/employee reasonably believes might result in discipline.]
- Consider placing the teacher/employee on immediate leave depending upon the crime/circumstances.
- Review the teacher/employee’s employment application to determine if the crime had been disclosed.
- The Superintendent and the Board of Education must then determine if the teacher/employee will be retained. As noted above, a school district may continue to employ an individual who has been convicted of a non-listed offense felony only if the superintendent **and** board of education each specifically approve the employment or work assignment in writing.
- If the employee is a tenured teacher, the Superintendent and Board of Education should consider the Tenure Commission’s conclusion that conviction of crime raises a nexus between teachers’ conduct outside of school and their fitness to teach, particularly in cases involving fraud, deceit or dishonesty on a particular person, or illegal activity for one’s personal gain. Further, the “just cause” standards of *Szopo v Richmond Community Schools* (TTC 93-60) should also be considered:
 - ✓ Was the behavior planned or deliberate?
 - ✓ Did it constitute a crime? [Yes]
 - ✓ Did it involve fraud, deceit, sexual misconduct, drugs or a weapon?
 - ✓ What was the teacher’s motive or purpose?
 - ✓ Did the conduct result in harm to a specific victim, and if so, what was the gravity of the harm?
 - ✓ How much did the conduct deviate from the norms of appropriate conduct for members of society and teaching?
 - ✓ Was there any prior discipline, especially for the same conduct?
 - ✓ What effect did any previous discipline have on the teacher’s record?
 - ✓ What is the teacher’s attitude – accepts responsibility and exhibits a willingness to change?
 - ✓ What is the likelihood the behavior will reoccur?

- For non-teaching employees, the standard for termination under a collective bargaining agreement is typically “just cause,” which has been defined under the following standards:
 - ✓ Did the employer give forewarning of consequences of the employee’s conduct?
 - ✓ Was the rule reasonably related to the operation of the employer’s business?
 - ✓ Did the employer make an effort to discover the employee violated the rule prior to disciplining?
 - ✓ Was the employer’s investigation conducted fairly and objectively?
 - ✓ Did the employer obtain substantial evidence of the employee’s guilt?
 - ✓ Has the employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
 - ✓ Was the degree of discipline administered by the employer reasonably related to (a) the seriousness of the employee’s proven offense and (b) the record of the employee in his/her service with the employer?

- Further, the following set of principles have been established by arbitrators to determine if “off-duty misconduct” amounts to “just cause”:
 - ✓ Did the conduct damage the employer’s business or reputation?
 - ✓ Did the conduct result in the refusal of other employees to work with the employee in question?
 - ✓ Did the conduct prevent the employee from reporting to work due to incarceration?
 - ✓ Is the employee unsuitable for work due to the specific nature of the misconduct?

If the employer can prove that one of these effects occurred to a significant extent, an arbitrator will likely uphold the employer’s discipline. If not, an arbitrator will rule that the employer’s discipline was overly intrusive into the employee’s privacy, and will sustain a grievance.

- The above standards are also similar to the standards set by the EEOC that prevent an employer from basing an employment decision on a criminal conviction unless the employer demonstrates a “business necessity,” which takes into account (1) the nature and gravity of the crime; (2) the elapsed time since the conviction; and (3) the nature of the job held.
- The Open Meetings Act permits closed sessions to discuss the dismissal or disciplining of an employee if a closed meeting is requested by the employee.
- If the Board of Education and/or Superintendent determine that discipline or termination is necessary based upon the conviction, the appropriate tenure and collective bargaining procedures and board of education policies must be followed as stated above.
- If the Board of Education **and** the Superintendent decide to retain the teacher/employee, the decision must be made by the Board at an open meeting and memorialized in writing, signed by the Board (or a representative) and the Superintendent.

As indicated by the foregoing information, many factors must be considered when terminating a professional or non-professional employee based upon a criminal conviction. Therefore, we do not advocate a “zero tolerance” approach when considering discipline for an employee who has been convicted of a non-listed offense felony or misdemeanor. We urge you to contact retained legal counsel prior to making any decisions regarding the employment status of the affected employee.

Student Safety Legislation Talking Points

The following talking points have been provided by MASA, MASB and MSBO to help their members as they implement this new legislation. These points are designed to specifically address the “list” being released by MDE in early February. The MDE will give school boards and superintendents the following information by employee:

1. Date of conviction,
2. Legal cite of the conviction (Penal Code reference),
3. Description of the conviction, and
4. Whether the conviction is a felony or misdemeanor.

Things to remember as you talk to the media and your community

- The intent of the law is to keep students safe, not to go after “bad” employees.
- We need to continually remind people that schools are balancing student safety with fair and consistent treatment of employees.
- Board members, superintendents, administrators, educators and all child advocates are in full support of creating the safest possible setting for our children.
- Current safeguards include professional conduct checks and reviewing potential employees job practices as well as fingerprinting certified staff.

How was the list developed?

The Department of Information Technology (DIT) is working with the Department of Education (MDE) and State Police to develop and implement an automated program that will compare the list of Registered Educational Personnel (REP) with the conviction information database. If a person on the REP has been convicted of a crime, the MDE is required to notify the district indicated on the REP as the employing district.

Why didn't you know this before?

- This legislation is expected to affect only one percent of more than 200,000 state school employees with most of committing misdemeanors.
- Even though schools ask potential employees to report their criminal history, not all report honestly. Until this legislation, only some employees were required to go through fingerprinting and criminal background checks.
- Crimes committed in other states often go unreported in Michigan. The new law will stop this practice.

What will you do now?

- If one of our employees appears on the list as a sex offender, they will be removed from the school immediately.
- Employees who have committed other felonies will come under review of the superintendent and board of education on a case-by-case basis.
- As we follow the law we guard student safety and respect people's privacy.
- We'll be using a specific set of guidelines and criteria to decide whether the person poses a threat to student safety.

When aren't you moving faster to safeguard our schools?

- The list being released to school districts is based on data the state police describe as "fairly reliable." Until the data is confirmed with the people involved, schools must move quickly but carefully.
- Students deserve a safe learning environment; at the same time, school employees are entitled to a fair process.

Why aren't you firing everyone? Criminals don't belong in schools.

- The majority of crimes on the list are misdemeanors, and some happened years ago. We're looking at each situation on a case-by-case basis.
- Communities must continue to talk about these kinds of issues. How long should a person pay for mistakes made in the past and what constitutes a safe learning environment?

Why aren't you releasing the names to the public?

- Administrators and school board members are prohibited from sharing information from a criminal background check on potential employees.
- Employees are entitled to some privacy until the facts of their history are confirmed.
- Student safety is schools first priority and no one who poses a threat to students will remain on the job while we move through our process.