“Passing the Trash” in Illinois After Doe-3 v. McLean County Unit District No. 5: A Proposal for Legislation to Prevent School Districts From Handing Off Sexually Abusive Employees to Other School Districts

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I. INTRODUCTION

Safety is necessary for effective education.¹ Unfortunately, today’s
educational institutions are struggling to provide safe learning envi-
ronments, as sexual misconduct is alarmingly prevalent in schools across the
nation.² According to a congressional report from 2004, “more than 4.5
million students [out of approximately 50 million in American schools] are
subject to sexual misconduct by an employee of a school sometime between
kindergarten and 12th grade.”³ Even more disturbing, school personnel
often get away with it.⁴ In situations where school employees commit sexu-
al misconduct against students, school administrators often handle the mat-
ters internally due to fear of lawsuits, notoriety, and embarrassment.⁵ As a
result, school administrators allow the perpetrators to leave their employ-
ment without restrictions, and the public never learns of the sexual miscon-

¹ Studies show that there is a strong positive correlation between student safety
and student achievement. See, e.g., MATTHEW P. STEINBERG ET AL., STUDENT AND TEACHER
SAFETY IN CHICAGO PUBLIC SCHOOLS 28 (May 2011), available at
² See U.S. DEP’T OF EDUC., OFFICE OF THE UNDER SEC’Y, EDUCATOR SEXUAL
³ Id. at 18 (citing AM. ASS’N OF UNIV. WOMEN, HOSTILE HALLWAYS (2001)).
⁴ See id.
⁵ Martha Irvine & Robert Tanner, AP: Sexual Misconduct Plagues US Schools,
WASHINGTONPOST.COM (Oct. 21, 2007), http://www.washingtonpost.com/wp-
dyn/content/article/2007/10/21/AR2007102100144.html.
duct. Sexually abusive employees can simply leave quietly and continue their deplorable conduct at other school districts. This practice is known as “passing the trash.”

In the recent case of Doe-3 v. McLean County Unit District No. 5, Jon White, a grade school teacher employed by McLean County Unit District No. 5 (McLean), resigned from his teaching position after he was suspended for viewing pornography at school and making inappropriate sexual comments to a female student. White subsequently applied for another teaching position at Urbana School District No. 116 (Urbana). Urbana sent McLean an employment verification form, which McLean filled out by stating that White was an employee the previous year. McLean did not mention White’s two suspensions. Thereafter, Urbana hired White as a second-grade teacher. At Urbana, White committed eight counts of aggravated criminal sexual abuse involving nine female students.

After the facts surrounding Jon White’s actions became public, the Illinois General Assembly amended the Abused and Neglected Child Reporting Act (Reporting Act) in an attempt to prevent school districts from passing off sexually abusive personnel to other school districts in the future. While the changes to the Reporting Act benefit children, the effectiveness of the changes is somewhat limited, as the changes only work when individuals actually report suspected cases of abuse or neglect. The legislature has alternative methods available that would have greater utility for eliminating the practice of “passing the trash.”

The Illinois Supreme Court held that no legally recognized special relationship existed between McLean and the injured students, and therefore, McLean had no common law duty to protect the abused Urbana students.

6. See id.

7. Id. Sexually abusive teachers that pass from school to school are referred to as “mobile molester[s].” Id.


9. Id. at 885.

10. Id.

11. Id.

12. Id.


15. See id.

16. See infra Part V.A-D.
warn Urbana about White, or report White’s conduct to the authorities.\textsuperscript{17} However, the court declared that McLean did owe the Urbana victims a duty to make accurate statements on the employment verification form submitted by Urbana.\textsuperscript{18} The duty recognized by the court has a limited application as a result.\textsuperscript{19}

This Comment addresses the practical implications of the Illinois Supreme Court’s decision and the General Assembly’s subsequent remedial measures. In addition, this Comment proposes legislation that the General Assembly could enact in order to prevent school districts from handing off sexually abusive personnel to other school districts.

\section*{II. HISTORY AND BACKGROUND}

\subsection*{A. THE EXISTENCE OF A LEGAL DUTY}

The existence of a duty is a question of law left for the court.\textsuperscript{20} The Illinois Supreme Court described the concept of a legal duty in negligence cases as “very involved, complex and indeed nebulous.”\textsuperscript{21} When deciding whether a duty exists, courts take into account the reasonable foreseeability of injury, the likelihood of injury, the degree of the burden of preventing injury, and the consequences of placing that burden upon the defendant.\textsuperscript{22} In addition, public policy considerations factor into the determination of whether a duty exists.\textsuperscript{23}

It is axiomatic that every person owes to all others a duty to exercise ordinary care to guard against injury[,] which naturally flows as a reasonably probable and foreseeable consequence of his act, and that such duty does not depend upon contract, privity of interest or the proximity of relationship, but extends to remote and unknown persons.\textsuperscript{24}

Unless a special relationship exists, the law does not impose an affirmative duty to aid or protect another against an unreasonable risk of physical

\begin{thebibliography}{99}
\bibitem{17} Doe-3 v. McLean Cnty. Unit Sch. Dist. No. 5, 973 N.E.2d at 888-89. The court failed to acknowledge or address McLean’s statutory duty to report suspected incidents of abuse or neglect under the Abused and Neglected Child Reporting Act. \textit{See id.} at 889.
\bibitem{18} \textit{Id.} at 889-90 (stating that McLean’s omission of White’s suspensions for misconduct constituted a misrepresentation).
\bibitem{19} \textit{Id.}
\bibitem{23} Jones v. Chi. HMO Ltd. of Ill., 730 N.E.2d 1119, 1134 (Ill. 2000).
\bibitem{24} Nelson v. Union Wire Rope Corp., 199 N.E.2d 769, 779 (Ill. 1964).
\end{thebibliography}
harm. However, even when a special relationship does not exist, a duty of reasonable care may be imposed on one who voluntarily undertakes action to protect a third party. In the absence of a special relationship or a voluntary undertaking, Illinois law states that “[a] duty to warn exists where there is unequal knowledge, actual or constructive, and the defendant[,] possessed of such knowledge, knows or should know that harm might or could occur if no warning is given.”

B. THE TORT IMMUNITY ACT AND THE PUBLIC DUTY RULE

Sovereign immunity is a common law doctrine that shields state governmental entities from all tort liability. In 1959, the Illinois Supreme Court abolished sovereign immunity due to its “rotten foundation.” In response, the Illinois General Assembly enacted the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) in 1965 with the purpose of “protect[ing] local public entities and public employees from liability arising from the operation of government.” The Tort Immunity Act “prevent[s] the diversion of public funds from their intended purpose to the payment of damage claims.” The immunities provided under the Act are in the form of affirmative defenses. The Illinois Supreme Court held that “the Tort Immunity Act is in derogation of the common law,” and therefore it “must be strictly construed against the public entity involved.”

In 1970, the Illinois General Assembly ratified the Illinois Constitution of 1970, which states in part: “[e]xcept as the General Assembly may pro-

27. Rowe v. State Bank of Lombard, 531 N.E.2d 1358, 1365 (Ill. 1988) (citing Restatement (Second) of Torts § 324A (1965)).
29. Molitor v. Kaneland Cnty. Unit Dist. No. 302, 163 N.E.2d 89, 94 (Ill. 1959). “The original basis of the immunity rule has been called a ‘survival of the medieval idea that the sovereign can do no wrong,’ or that ‘the King can do no wrong.’” Id. (quoting 38 Am. Jur. Municipal Corporations § 573)).
33. Id.
vide by law, sovereign immunity in this State is abolished.”35 As a result, the Illinois legislature has the express power to control the tort liability of governmental entities.36

“[T]he existence of a duty and the existence of an immunity are separate issues.”37 In order for the immunities provided by the Tort Immunity Act to apply, a court must first find that a duty existed.38 At common law, the public duty rule limits the duty of care owed by governmental entities to the public at large instead of individual members of the public.39

There are three exceptions to the public duty rule recognized by case law.40 A governmental entity is not shielded from liability under the public duty rule when: (1) the government’s actions are “routine and mechanical, as opposed to discretionary or requiring the exercise of judgment”; (2) the government is engaged “in an enterprise that is not essentially a governmental function”; or (3) a special duty exists.41

For a special duty to exist,

(1) the municipality must be uniquely aware of the particular danger or risk to which plaintiff is exposed; (2) there must be specific acts or omissions on the part of the municipality; (3) the specific acts or omissions must be affirmative or willful in nature; and (4) the injury must occur while the plaintiff is under the direct and immediate control of municipal employees or agents.42

In situations where courts find that a special duty exists, the status of the individual is elevated “to something more than just being a member of the general public” due to the special relationship among the parties.43 “Because the special duty doctrine is a judicially created exception to the public duty rule, the special duty doctrine cannot, and was not intended to, contravene the immunities provided to governmental entities under the Tort Immunity Act.”44

Traditionally, courts have held that the public duty rule imposes no duty upon governmental entities and their employees that provide rescue services, such as police and fire departments, to protect individual members of

39. Id. at 702.
41. Id.
42. Leone v. City of Chi., 619 N.E.2d 119, 121 (Ill. 1993).
44. Zimmerman, 697 N.E.2d at 708.
the general public.45 “The rule embodies the conclusion that a police [or fire] department’s negligence[,] . . . oversights, blunders, [or] omissions [are] not the proximate or legal cause of harms committed by others.”46 Illinois courts have broadly applied the public duty rule and the special duty exception to other governmental entities, such as school districts.47

In Thames v. Board of Education of the City of Chicago, the appellate court applied the public duty rule to shield a school district from liability for the injuries of a student wounded in a school shooting.48 The injured student’s complaint alleged that the school district breached its duty of reasonable care, which existed due to a special relationship between the school district and the student under the special duty exception.49 The appellate court held that the special duty exception did not apply to the school district because the school district was not uniquely aware of the particular danger, nor did the school district have direct and immediate control over the situation at the time of the injury.50 As a result, the school district did not owe the shooting victim a special duty.51

Again, in Lawson v. City of Chicago, the appellate court applied the public duty rule to protect a school district from liability for the death of a student caused by a school shooting.52 Prior to the incident, the school district installed metal detectors, which the school district operated randomly.53 The metal detectors were not in operation on the day of the shooting.54 The mother of the victim alleged that the school district owed her son a duty based on the special duty exception and the school district’s actions of voluntarily undertaking the operation of metal detectors.55 The appellate court held that the plaintiff failed to establish that the special duty exception applied to the deceased student since the school district lacked a unique

45. Id. at 702.
46. Porter, 410 N.E.2d at 612.
48. Thames, 645 N.E.2d at 449. The school shooting occurred in a high school classroom. Id. at 447. The shooter, a student, concealed a handgun in his book bag. Id.
49. Id. at 452. The plaintiff alleged that the school district breached its duty to exercise reasonable care for the safety of the injured student by failing to warn parents about the danger of weapons on campus, “wilfully [sic] and wantonly maintaining inadequate policies and procedures which allowed the presence of weapons . . . to flourish,” and “failing to take remedial action . . . despite knowing that weapons were being brought” to school. Id. at 449.
50. Thames, 645 N.E.2d at 452.
51. Id.
52. Lawson, 662 N.E.2d 1377. In the two months prior to the shooting, authorities arrested the shooter for criminal trespass and gambling while on the high school campus. Id. at 1381. At the time of the shooting, the shooter was on suspension. Id.
53. Id.
54. Id.
55. Lawson, 662 N.E.2d at 1381.
awareness of the danger and direct or immediate control of the shooting.56
Furthermore, the Tort Immunity Act provided the school district immunity
for its voluntary undertaking of installing metal detectors because the ac-
tions involved the governmental function of providing police protection.57

C. THE ABUSED AND NEGLECTED CHILD REPORTING ACT
PRIOR TO 2005

In 1975, the Illinois General Assembly enacted the Abused and Ne-
eglected Child Reporting Act (Reporting Act).58 The Reporting Act established
classes of people required to report suspected cases of child abuse or ne-

glect to the Department of Children and Family Services (DCFS).59
Essentially, the Reporting Act allows DCFS to “protect the health, safety, and
best interests” of children in situations where they are “vulnerable to child
abuse or neglect.”60 As of 2004, the Reporting Act required any “school
personnel . . . having reasonable cause to believe a child known to them in
their professional or official capacity may be an abused child or neglected
child shall immediately report or cause a report to be made to [DCFS].”61

56. Id. at 1386.
57. Id. at 1383.
146.
Act’s inception, Illinois had a less-extensive act in place with the same purpose; however,
the 79th General Assembly replaced the former act with the Reporting Act in order to com-
ply with federal child abuse regulations promulgated by the Department of Health, Educa-
(May 13, 1975) (statement of Senator Rock), available at
http://www.ilga.gov/senate/transcripts/strans79/ST051375.pdf. States that did not conform
to the new regulations did not receive funds from the Child Abuse Grant. Id. As a result of
the Reporting Act’s enactment, Illinois received approximately $1,100,000 for the purpose
of child abuse prevention. Id.
60. 325 ILL. COMP. STAT. 5/2 (2004 State Bar Edition).
61. Id. 5/4. Other persons required to report under the Act include
[a]ny physician, resident, intern, hospital, hospital administra-
tor and personnel engaged in examination, care and treatment
of persons, surgeon, dentist, dentist hygienist, osteopath, chi-
ropractor, podiatrist, physician assistant, substance abuse

treatment personnel, funeral home director or employee, coro-
ner, medical examiner, emergency medical technician, acu-
puncturist, crisis line or hotline personnel, school personnel,
educational advocate assigned to a child pursuant to the
School Code, truant officers, social worker, social services
administrator, domestic violence program personnel, regis-
tered nurse, licensed practical nurse, genetic counselor, respir-
atory care practitioner, advanced practice nurse, home health
aide, director or staff assistant of a nursery school or a child
The standard of “reasonable cause to believe” is “equivalent to the term ‘suspect’ as used in the Code of Federal Regulations.” The issue of whether school personnel have reasonable cause to report suspected allegations of abuse is determined by the objective belief of a reasonable person, not the school personnel’s subjective belief. After a person reports suspected abuse or neglect of a child, DCFS becomes the sole agency responsible for investigating the report.

The mechanism for enforcement of the Reporting Act includes criminal penalties for those who fail to comply with the Act’s requirements. Any qualified person “who willfully fails to report” suspected child abuse and neglect “is guilty of a Class A misdemeanor for a first violation and a Class 4 felony for a second or subsequent violation.” Any person who makes a report in good faith “shall have immunity from any liability, civil, criminal or that otherwise might result by reason of such actions.” The Reporting Act presumes the good faith of any person required to report under the Act.

day care center, recreational program or facility personnel, law enforcement officer, licensed professional counselor, licensed clinical professional counselor, registered psychologist and assistants working under the direct supervision of a psychologist, psychiatrist, or field personnel of the Illinois Department of Public Aid, Public Health, Human Services (acting as successor to the Department of Mental Health and Developmental Disabilities, Rehabilitation Services, or Public Aid), Corrections, Human Rights, or Children and Family Services, supervisor and administrator of general assistance under the Illinois Public Aid Code, probation officer, or any other foster parent, homemaker or child care worker.

Id. 62. Id.
64. Dimovski, 783 N.E.2d at 198 (holding that the board of education had reasonable cause to report suspected allegations that a teacher sexually abused a student after the student and her mother informed two of the board’s agents of the teacher’s behavior).
65. 325 ILL. COMP. STAT. 5/7.3(a) (2004 State Bar Edition). In situations where extreme abuse is reported, DCFS may choose to delegate the investigation to the Department of State Police. Id. While the Act provides a specific procedure for the investigation of reports alleging suspected abuse or neglect of a child by a school employee, DCFS has broad discretion in its execution. Id. at 5/7.4(c).
66. Id. at 5/4.02.
67. Id. For a Class A misdemeanor, an offender may be sentenced to less than one year of imprisonment and fined up to $2,500. 730 ILL. COMP. STAT. 5/5-4.5-55 (2012 State Bar Edition). For a Class 4 felony, an offender may be sentenced to one to three years of imprisonment and fined up to $25,000. Id. at 5/5-4.5-45.
69. Id.
In addition, the Reporting Act protects the falsely accused by penalizing “[a]ny person who knowingly transmits a false report.” A person who knowingly transmits a false report to DCFS is guilty of the offense of disorderly conduct and a Class 3 felony for a second or subsequent violation. In addition to criminal penalties, any person that makes a false report may also be liable for compensatory and punitive damages in a civil action.

In the event of a violation, the Reporting Act does not afford an express statutory provision for a private cause of action. Still, a court may find that an act implies a private cause of action even when the act does not expressly provide for one. Unfortunately for victims of abuse and neglect, courts have held that a private cause of action is unnecessary to provide an adequate remedy for a violation of the Reporting Act, as there is no evidence that criminal penalties are insufficient. As a result, there is no tort duty for the established classes of people required to report suspected abuse and neglect of children to DCFS.

III. THE CAUTIONARY TALE OF JON WHITE: DOE-3 V. MCLEAN COUNTY UNIT DISTRICT NO. 5

A. FACTUAL ALLEGATIONS

McLean County Unit District No. 5 (McLean) employed Jon White as an elementary school teacher from 2002 to 2005. White taught first grade at Colene Hoose Elementary School during the 2004-05 school year. On

70. Id. at 5/4.
71. Id. Disorderly conduct under the Reporting Act equates to a Class 4 felony. 720 ILL. COMP. STAT. 5/26-1(b) (2012 State Bar Edition). For a Class 4 felony, an offender may be sentenced to one to three years of imprisonment and fined up to $25,000. 730 ILL. COMP. STAT. 5/5-4.5-45 (2012 State Bar Edition). For a Class 3 felony, an offender may be sentenced to two to five years of imprisonment and fined up to $25,000. Id. at 5/5-4.5-40.
72. Brown v. Farkas, 511 N.E.2d 1143 (Ill. App. Ct. 1986) (holding that a vendor who submitted a false report of child abuse to DCFS without good faith was liable for slander and both compensatory and punitive damages).
74. A court may infer that a statute implies a private cause of action if: “(1) plaintiff is a member of the class for whose benefit the Act was enacted; (2) it is consistent with the underlying purpose of the Act; (3) plaintiff's injury is one the Act was designed to prevent; and (4) it is necessary to provide an adequate remedy for violations of the Act.” Corgan v. Muehling, 574 N.E.2d 602, 609 (Ill. 1991).
76. See Cuyler v. United States, 362 F.3d 949 (7th Cir. 2004).
78. See id. at 885.
two separate occasions that year, the McLean administration disciplined White for his inappropriate conduct.\(^79\) In October 2004, the McLean administration suspended White for five days with pay after he admitted to visiting a pornographic website from school.\(^80\) In April 2004, the McLean Administration suspended White for the remainder of the school year after he gave inappropriate photographs of a young actress to a fifth-grade student and made suggestive remarks about the student’s resemblance to the actress.\(^81\) Thereafter, White resigned from his teaching position before the end of the school year.\(^82\) On behalf of McLean, Edward Heinemann, the principal of Colene Hoose Elementary School, wrote a positive letter of recommendation for White.\(^83\)

White subsequently pursued employment at Urbana School District No. 116 (Urbana).\(^84\) Urbana sent a Verification of Employment Form concerning White’s employment history to McLean.\(^85\) McLean responded to the form by “stating that White had worked during the entire [2004-05] school year” without mentioning White’s two suspensions and resignation or the circumstances surrounding them.\(^86\) Subsequently, Urbana hired White as an elementary teacher in August 2005.\(^87\)

At Urbana, White taught at Thomas Paine Elementary School from 2005 to 2007.\(^88\) Throughout White’s employment with Urbana, the Urbana administration received multiple complaints from parents about White’s sexual misconduct with their students.\(^89\) The Urbana administration assured


80. Id.


83. Letter from Edward F. Heinemann, Principal, Colene Hoose Elementary School (on file with author). Highlights from Mr. Heinemann’s statements about White memorialized in the letter of recommendation include: “he worked to build a strong connection with his students and parents”; “[p]arents have made positive comments to me regarding Mr. White”; and “Mr. White was willing to go beyond the school day with students.” Id.


85. Id.

86. Id.

87. Id.

88. Id.

parents that the matters would be investigated, but the administration did not remove White from the classroom or report the alleged conduct to DCFS.90

In late January 2007, the Urbana police received information about White’s sexual abuse from a police officer’s wife who learned of White’s conduct from a parent who complained to the Urbana administration.91 The Urbana police arrested White on January 31, 2007, as he arrived at school.92 Following White’s arrest, the Urbana police and Urbana parents identified more victims of White’s sexual abuse.93 On February 27, 2007, authorities arrested White again for predatory criminal sexual assault of a child that occurred in 2004 during his employment by McLean.94

On February 21, 2008, White pleaded guilty to eight counts of aggravated criminal sexual abuse involving nine students at Urbana and two counts of aggravated criminal sexual abuse involving two students at McLean.95 White received a forty-eight year sentence for his aggravated

cused White of victimizing students by playing a “tasting game” that involved students wearing a blindfold and identifying toppings placed on what they believed to be a banana.  

90. Id. The Urbana administration’s failure to report White’s actions to DCFS pursuant to the Reporting Act would later lead to the convictions of Urbana Schools Superintendent, Gene Amberg; Thomas Paine Elementary School Principal, Janice Bradley; and Urbana’s Human Resources Director, Carmelita Thomas. Mary Schenk & Amy F. Reiter, Third Urbana School Administrator Found Guilty in White Case, NEWS-GAZETTE.COM (Feb. 26, 2009), http://www.news-gazette.com/news/courts-police-and-fire/2009-02-26/third-urbana-school-administrator-found-guilty-white-case.htm. All three individuals received a sentence of eighteen months court supervision, a $2,000 fine, and an order to perform 100 hours of public service for violating the Reporting Act. Id.


92. Id.

93. Id. After White’s actions became public, John Pye, the Assistant Superintendent of Mclean, sent Julie Basting, the teacher’s union representative, an e-mail stating:

Please keep this information confidential, but I 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.


criminal sexual abuse at Urbana\textsuperscript{96} and twelve years for his aggravated criminal sexual abuse at McLean.\textsuperscript{97}

B. THE ILLINOIS GENERAL ASSEMBLY’S SUBSEQUENT REMEDIAL MEASURES

After the facts surrounding White’s scandal became public, the Illinois General Assembly took immediate action to prevent school districts, such as McLean, from passing off sexually abusive employees to other school districts.\textsuperscript{98} The legislature addressed the problem by identifying loopholes in the Reporting Act.\textsuperscript{99} The amendments, which made the Reporting Act more thorough, received unanimous support from the Illinois General Assembly.\textsuperscript{100}

The amended Reporting Act contains several improvements. First, under the amended Reporting Act, a school district must disclose the fact that a report was made about an employee when responding to another school district’s request for information about that employee.\textsuperscript{101}

When responding to a request for information about an employee, the general superintendent’s disclosure is limited to “[o]nly the fact that an employee of the school district has made a report involving the conduct of the applicant or caused a report to be made to [DCFS].”\textsuperscript{102} A disclosure by a former school district employer to a requesting school district does not catch the subject of the report by surprise because the Reporting Act requires the former school district to inform the subject of the potential for notification of the DCFS report to requesting districts.\textsuperscript{103} The Reporting Act


\textsuperscript{99} Id.

\textsuperscript{100} Id.


\textsuperscript{102} Id. If DCFS investigates and finds that the allegations are unfounded, the Reporting Act prohibits the general superintendent from any further disclosure. Id.

\textsuperscript{103} Id. An employee of a school district who is or has been the subject of a report made pursuant to this Act during his or her employment with the school district must be informed by that school district that if he or she applies for employment with another school
provides immunity for all school personnel from any liability: civil, criminal, or that otherwise might result from making a disclosure of information concerning reports of child abuse and neglect in compliance with the Act, except in cases of willful or wanton misconduct. 104

Second, the current Reporting Act outlines investigation procedures for school employees suspected of abuse or neglect of a child at school or on school grounds. 105 The investigation procedures are intended to protect children, limit the disruption of schools, and provide suspected teachers with certain procedural due process. 106 Whenever DCFS investigates a school employee for suspected abuse or neglect of a child, DCFS must send its final finding report to the general superintendent of the school district employing the individual. 107

Third, the amended Act penalizes any person who acts with the intent of preventing the “discovery of an abused or neglected child by lawful authorities for the purpose of protecting or insulating any person or entity from arrest or prosecution.” 108 A violator is guilty of a Class 4 felony for a first offense and a Class 3 felony for a second or subsequent offense. 109

In addition, the General Assembly clarified existing parts of the Act. For example, the legislature expanded the class of “school personnel” required to report any suspected abuse or neglect of a child known to them in their professional or official capacity to explicitly include “administrators and both certified and non-certified school employees.” 110

C. PROCEDURAL POSTURE AND HOLDINGS BELOW

While teaching at Thomas Paine in Urbana, White victimized Jane Doe 3, a student in White’s first-grade class during the 2005-06 school year, and Jane Doe 7, a student in White’s second-grade class during the 2006-07 school year. 111 Jane Doe 3 and Jane Doe 7, through their mothers, Julie Doe 3 and Julie Doe 7 respectively, filed separate complaints against White, Urbana’s Board of Directors, individual Urbana administrators, McLean’s Board of Directors, and individual McLean administrators. 112

district, the general superintendent of the former school district, upon the request of the school district to which the employee applies, shall notify that requesting school district that the employee is or was the subject of such a report. Id.
105. Id. at 5/7.4(c).
106. Id.
107. Id. at 5/7.4(c-5).
108. Id. at 5/4.
110. Id.
112. Id. at 884.
Both Jane Doe 3 and Jane Doe 7’s amended complaints alleged that: (1) the McLean administrators had actual knowledge of White’s sexual abuse of students at McLean;\(^{113}\) (2) the McLean administrators failed to report White’s misconduct in accordance with the Reporting Act;\(^{114}\) (3) the McLean administrators concealed White’s sexual abuse of students by entering into a severance agreement with White and drafting a “falsely positive letter of reference for White”;\(^{115}\) and (4) the McLean administration passed White to Urbana “willfully and wantonly by providing false information on [White’s] employment verification form.”\(^{116}\)

At trial, the court “dismissed with prejudice all counts against the McLean defendants, finding that defendants owed no legal duty to plaintiffs.”\(^{117}\) The court reasoned that “[e]ven if a duty existed under the law, . . . either the common law public duty rule or the Tort Immunity Act precluded any duty owed to plaintiffs.”\(^{118}\) The Tort Immunity Act states: “[e]xcept as otherwise provided by statute, a public employee, as such and acting within the scope of his employment, is not liable for an injury caused by the act or omission of another person.”\(^{119}\)

On appeal, the Fourth District Appellate Court reversed the circuit court’s judgment and remanded the case for further proceedings.\(^{120}\) The court stated, “[b]ecause the individual administrators knew that White had sexually abused students in McLean, it was reasonably foreseeable that White would do the same at Urbana.”\(^{121}\) The court held that the McLean administrators owed a duty of care to Urbana and its students, due to the McLean administration’s voluntary undertaking to write a falsely positive letter of recommendation on White’s behalf that failed to acknowledge the

\(^{113}\) Doe-3 v. McLean Cnty. Unit Sch. Dist. No. 5, 973 N.E.2d at 886. In the complaints, the plaintiffs defined “passing” as “a [s]chool [d]istrict’s conduct in passing a teacher who is known to have committed teacher-on-student sexual harassment and/or sexual grooming and/or sexual abuse to another [s]chool [d]istrict without reporting, and while concealing, known prior teacher-on-student sexual harassment and/or sexual grooming and/or sexual abuse.” Id. at 885 n. 3.

\(^{114}\) Id. at 886.

\(^{115}\) Doe-2, another one of Jon White’s victims at Urbana, sued McLean in federal court under Title XI and willful and wanton conduct theories. Doe-2 v. McLean Cnty. Unit Dist. No. 5 Bd. of Dirs., 593 F.3d 507, 511 (7th Cir. 2010). Doe-2’s Title XI claim failed because McLean did not have control over Doe-2’s injuries. Id. at 512-13. In addition, Doe-2’s willful and wanton conduct claim failed because no legal duty existed between the parties. Id. at 515.

\(^{116}\) Doe-3 v. McLean Cnty. Unit Sch. Dist. No. 5, 973 N.E.2d at 886.


\(^{119}\) Id. at 228.
potential danger he posed to students. In addition, McLean owed Urbana and its students a duty of care because McLean failed to report White’s actions to DCFS as required under the Reporting Act. The appellate court held that the public duty rule did not apply to the defendants because the plaintiffs did not allege damages based on the defendants’ failure to perform adequate government services. Furthermore, the court reasoned that the Tort Immunity Act did not provide immunity to the defendants because the plaintiffs alleged that the defendants’ conduct was willful and wanton. As a result, the decision allowed the injured Urbana students to continue their pursuit of damages against McLean.

D. THE ILLINOIS SUPREME COURT’S DECISION

The Illinois Supreme Court rejected all of the appellate court’s rationales for finding that McLean owed a duty to Urbana. The court held that none of the special relationships recognized by the common law applied to the plaintiffs and defendants. Without a special relationship, the court was unable to impose an affirmative duty of care upon McLean. Therefore, under the common law, McLean had no duty to: (1) protect the abused Urbana students, (2) warn Urbana about White, or (3) report White’s conduct to the authorities.

In addition, the court rejected the notion that McLean voluntarily undertook a duty by writing a letter of recommendation on White’s behalf because the plaintiffs’ complaints failed to allege that the letter of recommendation was actually sent to, or received by, Urbana. Thus, the creation of the letter alone was not enough to establish a duty.

Despite the Illinois Supreme Court’s rejection of the appellate court’s rationales for establishing a duty on the part of McLean, the court affirmed

122. Id.
123. Id. at 229.
124. Id. at 225.
125. Doe-3 v. White, 951 N.E.2d at 229. Under the Tort Immunity Act, “a public employee acting in the scope of his employment is not liable for an injury caused by his negligent misrepresentation.” 745 ILL. COMP. STAT. 10/2–202 (2012 State Bar Edition). Since the plaintiffs alleged that the defendants’ conduct was willful and wanton, not negligent, the Tort Immunity Act did not shield the defendants. See id.
127. Id.
128. See id. at 888-92.
129. Id. at 888-89. The court failed to acknowledge or address McLean’s statutory duty to report suspected incidents of abuse or neglect under the Abused and Neglected Child Reporting Act. See id. at 889.
131. Id.
the decision on different grounds.\textsuperscript{132} The court focused on McLean’s “act of misstating White’s employment history on the employment verification form sent to Urbana.”\textsuperscript{133} When deciding whether McLean had a duty, the court considered the relationship between the parties by analyzing “the reasonable foreseeability of the injury, the likelihood of injury, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendants.”\textsuperscript{134} The court held that the plaintiffs’ injuries were reasonably foreseeable since McLean was aware of White’s history of inappropriate conduct.\textsuperscript{135} Furthermore, McLean indicated that White’s termination was ordinary by falsely stating that White worked during the entire 2004-05 school year without mentioning White’s two suspensions.\textsuperscript{136}

If McLean would have truthfully disclosed White’s employment record, “it is certainly possible that [Urbana] would have investigated further and either not hired White or fired White before he abused the plaintiffs in this case.”\textsuperscript{137} The likelihood of injury for the Urbana students was present, as the McLean Administration knew of White’s inappropriate behavior while at McLean.\textsuperscript{138} Also, the magnitude of McLean’s burden in guarding against the injury was extremely low.\textsuperscript{139} McLean was not required to fill out the employment verification form, but when McLean accepted the task, McLean “had a duty to use reasonable care in ensuring that the information was accurate.”\textsuperscript{140} Finally, the court held that the consequences of placing the burden on McLean were “not so unreasonable and impractical as to negate the imposition of a legal duty.”\textsuperscript{141}

The defendants argued, “any claim by [the] plaintiffs based on a misrepresentation on the employment verification form is merely an attempt to ‘repackage’ a nonviable claim for the tort of fraudulent misrepresentation.”\textsuperscript{142} The court rejected that argument because other tort actions may be available for misrepresentation even if the tort of fraudulent misrepresentation is not viable.\textsuperscript{143}

\begin{flushleft}
132. \textit{Id.}
133. \textit{Id.}
134. \textit{Id.} at 890.
136. \textit{Id.} at 890.
137. \textit{Id.} at 891.
138. \textit{Id.}
139. \textit{Id.}
141. \textit{Id.} at 891.
142. \textit{Id.} at 889. Traditionally, fraudulent or negligent misrepresentation “has been treated as a purely economic tort[,] which is available only for commercial or financial losses and not for personal injuries.” \textit{Id.} at 889-90.
143. \textit{Id.} at 890.
\end{flushleft}
The Illinois Supreme Court affirmed the appellate court’s application of the public duty rule and the Tort Immunity Act. The court reasoned that the public duty rule did not apply to the case since the plaintiffs never alleged that McLean failed to protect them or that McLean owed a duty to protect them. The court further reasoned that the public duty rule only guards public entities from liability when there is an allegation that the government failed to fulfill its duty to protect. In addition, the court held that the Tort Immunity Act did not immunize the defendants because the Act “contains no exception for willful and wanton conduct” for misrepresentations made by a public employee. As a result, the court deferred to the legislature and refused to infer immunity from the statute.

In making its decision, the court relied on Illinois public policy concerns for the protection of children. Historically, courts have protected those who are unable to protect themselves. Illinois courts have recognized that Illinois has a “strong interest in protecting children when the potential for abuse or neglect exists.” The court held that the public policy concerns, when applied to the egregious facts of the case, weighed in favor of finding a duty.

The Illinois Supreme Court emphasized that the “holding in this case is limited to finding, under the particular circumstance presented here, that the allegations in [the injured students’] complaints are sufficient to establish that [McLean] owed [the injured students] a duty of care.” The court did not address factual issues, such as “whether [McLean] breached [its] duty of care, whether [McLean] acted willfully and wantonly, and whether [McLean’s] breach was a proximate cause of [the students’] injuries.”

IV. ANALYSIS

The actions taken by the Illinois General Assembly to prevent school districts from “passing the trash” and the Illinois Supreme Court’s decision

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145. Id.
146. Id.
150. See id.
151. Id. (quoting Am. Fed’n of State, Cnty. and Mun. Emps. v. Dep’t of Cent. Mgmt. Servs., 671 N.E.2d 668, 676 (Ill. 2004)).
152. Id.
153. Id. at 894.
154. Doe-3 v. McLean Cnty. Unit Sch. Dist. No. 5, 973 N.E.2d at 894. The court left the factual issues for the jury to decide. Id.
have strengths and weaknesses. This section analyzes the effectiveness of the legislature’s actions and the Illinois Supreme Court’s reasoning.

A. THE CURRENT ABUSED AND NEGLECTED CHILD REPORTING ACT

Once the public became aware of the Jon White story, the Illinois General Assembly addressed the practice of “passing the trash” by amending the Abused and Neglected Child Reporting Act.\(^\text{155}\) While the changes to the Reporting Act have distinct benefits for protecting children, the overall effectiveness of the amendments in preventing school districts from passing off sexually abusive school personnel is somewhat limited because the Reporting Act’s protocols only work when reports of suspected abuse or neglect are actually made.\(^\text{156}\) The following discussion will analyze the effect of each major part of the amended Reporting Act.

1. Mandatory Disclosure of the Existence of DCFS Reports

The legislature attempted to crack down on the practice of “passing the trash” by requiring school districts to disclose the fact that a report was made to DCFS involving the conduct of an applicant to a requesting school district.\(^\text{157}\) The amended Reporting Act now effectively eliminates “passing the trash” in cases where former school district employees cause a report to be made to DCFS and where hiring school districts inquire about applicants’ past job performance and qualifications to former school district employers.\(^\text{158}\)

Although this change to the Reporting Act provides hiring school districts with more information about applicants, the General Assembly presupposes that school districts will actually report suspected incidents of abuse and neglect to DCFS and that hiring school districts will actually inquire about applicants’ past job performance and qualifications.\(^\text{159}\) That is not a reality, as reports of abuse and neglect by school employees are not always made because school districts want to avoid lawsuits, embarrassment, and notoriety.\(^\text{160}\) Furthermore, hiring school districts do not always conduct their due diligence. For example, in Jon White’s case, McLean

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\(^\text{157}\) See id.

\(^\text{158}\) See id.

\(^\text{159}\) See id.

never made a report to DCFS, and Urbana did not seek more detailed information about White’s job performance or qualifications.\textsuperscript{161} The amended Reporting Act simply does not work when no one makes an initial report of suspected abuse or neglect to DCFS.\textsuperscript{162} Therefore, the amended Reporting Act was not a perfect solution to end the practice of “passing the trash.”

2. \textit{Investigation Procedures for School Employees Suspected of Abuse or Neglect}

By outlining investigation procedures for school employees suspected of abuse or neglect of children at schools or on school grounds, the Illinois General Assembly impliedly acknowledged the presence of predators in Illinois school districts.\textsuperscript{163} While the investigation procedures created by the legislature may be effective for analyzing suspected cases of abuse or neglect by school employees, the procedures do not engage until someone reports suspected abuse or neglect.\textsuperscript{164} Consequently, the new investigation procedures do not provide any benefits for injured students in cases where reports are never made. For example, in Jon White’s case, neither McLean nor Urbana ever made a report to DCFS.\textsuperscript{165} Therefore, the investigation procedures alone cannot solve the problem of “passing the trash” either.

3. \textit{Penalties for Protecting Persons Who Abuse or Neglect Children}

While amending the Reporting Act, the legislature took the opportunity to increase penalties for individuals who act with the intent of protecting persons who abuse and neglect children from prosecution or arrest.\textsuperscript{166} Since the initial reports of suspected abuse or neglect are integral for the Reporting Act to work,\textsuperscript{167} the General Assembly shrewdly provided further deterrence for inaction when it comes to reporting suspected abuse or neglect.\textsuperscript{168} With the increased penalties for failing to report coupled with the existing immunities provided for good faith reporting, the legislature afforded individuals required to report under the Act with both incentives to comply and

\textsuperscript{161} See Doe-3 v. McLean Cnty. Unit Sch. Dist. No. 5, 973 N.E.2d 880, 884-86 (Ill. 2012).
\textsuperscript{163} See id.
\textsuperscript{164} See id.
\textsuperscript{165} See Doe-3 v. McLean Cnty. Unit Sch. Dist. No. 5, 973 N.E.2d at 884-86.
\textsuperscript{167} See id.
\textsuperscript{168} See id.
deterrents for non-compliance.\textsuperscript{169} Although increasing the penalties for individuals who protect persons who abuse or neglect children does not directly apply to solving the problem of “passing the trash,” the increased penalties work as an additional deterrent. The threat of the penalties may even increase overall reporting and identification of school employees that abuse children, which will allow the other mechanisms of the Act to work properly in stopping school districts from “passing the trash.”

B. DOE-3 V. MCLEAN COUNTY UNIT DISTRICT NO. 5

The Illinois Supreme Court held that a public school district employer that passes off an employee to another school district by misstating the employee’s history owes a duty of care to students later injured by the employee.\textsuperscript{170} Despite the strong reasoning of the opinion, the holding has a limited application, which does not apply the duty of care to all school districts that “pass the trash.”\textsuperscript{171} The following discussion will analyze the effect of each major part of the court’s decision.

1. \textit{The Absence of a General Duty of Care}

Although the Supreme Court affirmed the outcome of the appellate court’s ruling, the court did not accept the appellate court’s holding that McLean had a common law duty of care to protect the Urbana students, warn Urbana about White, or report White to authorities.\textsuperscript{172} If the court had held that school districts owe an affirmative duty to warn hiring school districts about applicants who may pose a danger to students, the problem of “passing the trash” would be entirely resolved. Former school districts would then no longer be able to remain silent while formerly employed predators procure employment at other districts. The former school districts would be obliged to disclose the potential harms to the hiring school districts or risk civil liability.

Nevertheless, the court declined to follow the appellate court’s ruling because the relationship between McLean and the victims did not fall within the four limited categories of special relationships recognized by the common law.\textsuperscript{173} While the Illinois Supreme Court’s dedication to stare decisis is admirable, the court could have easily extended the definition of a special relationship by analogy to include the specific relationship between McLean and the Urbana students. While one could argue that the relation-

\begin{itemize}
\item \textsuperscript{169} See id.
\item \textsuperscript{170} Doe-3 v. McLean Cnty. Unit Sch. Dist. No. 5, 973 N.E.2d at 889.
\item \textsuperscript{171} See id. at 884-86.
\item \textsuperscript{172} Id.
\item \textsuperscript{173} Id. at 888.
\end{itemize}
ship between the parties is too tenuous, the strong public policy in Illinois for protecting children would have been a valid justification for creating such a special relationship.\textsuperscript{174}

2. \textit{The Existence of a Duty of Care to Provide Accurate Information}\\

Despite the court’s refusal to affirm that McLean owed the injured students an affirmative duty of care, the court held that McLean’s mis-statements on the employment verification form created a legal duty.\textsuperscript{175} After analyzing the reasonable foreseeability of the injury, the likelihood of injury, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on McLean, the court held that a duty of care existed based upon the existing relationship between the parties.\textsuperscript{176} Since McLean voluntarily completed the employment verification form, McLean had a duty to use reasonable care in ensuring the information provided was accurate.\textsuperscript{177} The court emphasized that the holding was limited to the particular circumstances of the case.\textsuperscript{178}

The conclusion reached by the Illinois Supreme Court is consistent with the conclusion reached by the Supreme Court of California in \textit{Randi W. v. Muroc Joint Unified School District.}\textsuperscript{179} In that case, three different school districts passed Robert Gadams, a school administrator, off to another school district after he engaged in inappropriate sexual conduct with female students at each school district.\textsuperscript{180} All three districts wrote Gadams a falsely positive letter of recommendation that omitted his known sexual misconduct.\textsuperscript{181} Gadams used the letters of recommendation to procure employment elsewhere.\textsuperscript{182} The Supreme Court of California held that former employers who write letters of recommendation “owe[] to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee.”\textsuperscript{183} Just as the former employers of Gadams had a duty to present accurate information in their letters of recommenda-

\begin{itemize}
  \item \textsuperscript{174} \textit{See} id. at 892 (referencing the strong public policy in Illinois for protecting children).
  \item \textsuperscript{175} \textit{Doe-3 v. McLean Cnty. Unit Sch. Dist. No. 5}, 973 N.E.2d at 890.
  \item \textsuperscript{176} \textit{Id.} at 890-92.
  \item \textsuperscript{177} \textit{Id.}
  \item \textsuperscript{178} \textit{Id.} at 894.
  \item \textsuperscript{179} \textit{See Randi W. v. Muroc Joint Unified Sch. Dist.}, 929 P.2d 582, 585-86 (Cal. 1997).
  \item \textsuperscript{180} \textit{Id.}
  \item \textsuperscript{181} \textit{Id.}
  \item \textsuperscript{182} \textit{Id.}
  \item \textsuperscript{183} \textit{Id.} at 591.
\end{itemize}
tion, McLean had a duty to present accurate information on Urbana’s employment verification form.\textsuperscript{184}

By finding that McLean owed a duty to the injured students, the Illinois Supreme Court provided an alternative avenue for the injured students to seek damages.\textsuperscript{185} While the court came to a just resolution of this case, the holding has a limited application for other students injured after school districts “pass the trash.”\textsuperscript{186}

In order for the Doe-3 opinion to be persuasive in future cases, plaintiffs must plead and prove that school districts responsible for passing off sexually abusive employees made misstatements that created reasonably foreseeable injuries.\textsuperscript{187} As a result, this opinion has little value when school districts “pass the trash” without making any statements to the hiring districts.\textsuperscript{188} For example, if McLean would have declined to respond to Urbana’s employment verification form and Urbana went on to hire White, by the Supreme Court’s reasoning, McLean would not have owed the injured students a duty. As an unintended consequence of the opinion, school districts now have an incentive not to respond to inquiring school districts since unintentional or intentional misstatements may create liabilities.

3. \textit{The Inapplicability of the Public Duty Rule and the Tort Immunity Act}

In addition to finding that McLean owed a duty of care, the Illinois Supreme Court did not allow McLean to use the public duty rule or the Tort Immunity Act to escape liability.\textsuperscript{189} School districts often rely upon the public duty rule and the Tort Immunity Act to shield their actions from claims.\textsuperscript{190} However, since the injured students’ complaints did not allege that McLean owed the victims a duty of protection, the public duty rule did not apply.\textsuperscript{191} Furthermore, the Tort Immunity Act did not apply because the complaints alleged that McLean’s actions were willful and wanton.\textsuperscript{192}

McLean’s public duty defense was in response to a non-issue.\textsuperscript{193} Since McLean was not in a position to protect the Urbana students, the plaintiffs

\textsuperscript{184} See Randi W., 929 P.2d at 585-86. See also Doe-3 v. McLean Cnty. Unit Sch. Dist. No. 5, 973 N.E.2d 880, 890-92 (Ill. 2012).
\textsuperscript{185} See Doe-3 v. McLean Cnty. Unit Sch. Dist. No. 5, 973 N.E.2d at 890-92.
\textsuperscript{186} See id. at 894.
\textsuperscript{187} See id.
\textsuperscript{188} See id.
\textsuperscript{189} See id. 892-93.
\textsuperscript{191} Doe-3 v. McLean Cnty. Unit Sch. Dist. No. 5, 973 N.E.2d at 892-93.
\textsuperscript{192} Id. at 893.
\textsuperscript{193} Id. at 892-93.
never alleged that McLean should have protected them. However, if the injured students alleged that McLean failed to protect them, the public duty defense would have been viable.

Although the court held that the Tort Immunity Act did not protect McLean since the plaintiffs alleged McLean’s conduct was willful and wanton, the Tort Immunity Act remained a defense for McLean. The court’s decision was limited to whether McLean owed a duty of care, not whether McLean acted willfully and wantonly. As a result, whether McLean’s actions were willful and wanton remains an issue of fact. If the injured students cannot prove that McLean’s misstatements on Urbana’s employment verification form were willful and wanton, McLean will be able to use the Tort Immunity Act to escape liability.

V. PROPOSED LEGISLATION: ALTERNATIVE METHODS OF PREVENTING SCHOOL DISTRICTS FROM “PASSING THE TRASH”

Although both the Illinois General Assembly and the Illinois Supreme Court have taken action to prevent school districts from “passing the trash,” the problem is not entirely resolved. The Illinois General Assembly should consider taking further action by: (1) amending the Reporting Act to provide a civil cause of action for victims against school districts whose employees violate the Act; (2) enacting a law that requires public school districts to conduct more extensive background checks when hiring school personnel; and (3) enacting a law that requires former school employees seeking employment at another school district to consent to the disclosure of an “in good standing form” from their previous school district employer. In addition, Congress should address the practice of “passing the trash” from the federal level by creating a cohesive national policy in order to eradicate the problem. The following discussion will address each of these recommendations in turn.

A. PROVIDE A CIVIL CAUSE OF ACTION WITHIN THE ABUSED AND NEGLECTED CHILD REPORTING ACT

The Illinois General Assembly provides stringent criminal penalties for violators of the Reporting Act. However, the legislature does not pro-

194. Id. at 893-94.
195. Id. at 894.
vide a civil remedy for victims. Illinois courts have refused to infer a private cause of action under the Reporting Act because there is no evidence that the criminal penalties are inadequate to provide a sufficient remedy. Although criminal penalties provide a remedy by punishing violators, they do not provide restitution for those injured as a result of violations under the Reporting Act. In order to ensure that victims of abuse by the hands of school employees are made whole, the General Assembly should provide a civil cause of action against school districts that “pass the trash” in addition to criminal penalties.

The Reporting Act’s criminal penalties did not incentivize the administrators at McLean and Urbana to report White’s actions to DCFS. However, if McLean and Urbana faced civil liability for their administrators’ inaction in addition to the criminal penalties for the administrators, there is a greater chance that someone would have reported White. Even if the civil cause of action would not increase the likelihood of reporting suspected abuse or neglect, it would provide victims with an additional method to receive compensation for their injuries. The legislature could balance the taxpayers’ interests with the interests of students injured as a result of school districts “passing the trash” by setting damage caps. As a matter of public policy, the General Assembly would be justified in providing a private cause of action because it is consistent with the purpose and design of the Reporting Act.

The Illinois General Assembly could implement a private cause of action for “passing the trash” by amending the Abused and Neglected Child Reporting Act with the following proposed statutory language:

**Passing the Trash.** Any violation of this Act by a certified or noncertified employee of a public school district that results in the further abuse or neglect of a student or students by a school employee at the school district or at another school district shall subject the public school district to a private cause of action for passing the trash. In any action for passing the trash, the court may allow

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200. Id.


damages not to exceed $50,000 plus attorney fees
and other costs.205

B. REQUIRE MORE COMPREHENSIVE BACKGROUND CHECKS

Before making final hiring decisions, Illinois school districts are
required under state law to run a variety of background checks on prospective
employees.206 As a condition of employment with a school district, certified
and noncertified applicants must authorize a fingerprint-based criminal history
records check.207 Thereafter, the Illinois State Police and the Federal
Bureau of Investigation provide records of convictions to the requesting
school district.208 In addition, the hiring school district itself must check
both the Illinois Sex Offender Database and the Illinois Murderer and Violen
t Offender Against Youth Database for information regarding each appli-
cant.209 All information discovered through the hiring process regarding
an applicant’s criminal record must remain confidential.210 School districts
may not “knowingly employ a person who has been convicted of any of-
fense that would subject him or her to license suspension or revocation . . . .”211
In addition, school districts may not “knowingly employ a person who
has been found to be the perpetrator of sexual or physical abuse of any mi-
nor . . . .”212

The use of fingerprint-based criminal history record checks is an effi-
cient method for preventing convicted felons from procuring employment
in schools by simply changing their identities.213 In addition, school dis-

205. $50,000 is an arbitrary amount. The legislature should set the damage cap by balancing the taxpayers’ interests and the interests of victims under the Reporting Act.


207. Id. at 5/10-21.9(a). In addition to certified and noncertified applicants, the employees of contractors that have direct, daily contact with students, such as food service workers and bus drivers, must consent to criminal history records information checks also. Id. at 5/10-21.9(f).


209. Id. The Illinois State Police maintain the Illinois Sex Offender Database, which contains registration information about sexual predators. 730 ILL. COMP. STAT. 150/12 (2012 State Bar Edition). The Illinois State Police also maintain the Illinois Murderer and Violent Offender Against Youth Database, which contains registration information about adults and minors convicted of committing certain violent, non-sexually-based offenses against individuals under the age of eighteen. Id. at 154/85(a). Violent offenses that require registration include varying forms of kidnapping, unlawful restraint, battery, child abduction, forcible detention, first-degree murder, and involuntary manslaughter. Id. at 154/5(b).


211. Id. at 5/10-21.9(c).

212. Id.

213. Each record check provided by the Federal Bureau of Investigation and the Illinois State Police costs the hiring school district approximately sixty dollars in fees. ILL. STATE BD. OF EDUC., CRIMINAL HISTORY RECORDS INFORMATION (CHRI) CHECKS FOR
districts may search the Illinois Sex Offender Database and the Illinois Murderer and Violent Offender Against Youth Database via the Internet at no cost. While Illinois’s current required background checks serve an important purpose, the Illinois General Assembly can increase their effectiveness by expanding their scope.

1. Utilize the National Sex Offender Public Website

Currently, Illinois’s statutory mandates that require school districts to check the Illinois Sex Offender Database and the Illinois Murderer and Violent Offender Against Youth Database satisfactorily identify convicted felons not suitable for school employment. Coupled with the statutorily required criminal history records information checks provided by the Illinois State Police and the Federal Bureau of Investigation, the process of identifying criminal applicants seems thorough. However, requiring school districts to use the National Sex Offender Public Website would reinforce the process further.

In 2005, the United States Department of Justice created the National Sex Offender Public Website (NSOPW), which provides a single search tool that allows users to examine the sex offender registries of all jurisdictions at no cost. While the NSOPW is comparable to the Illinois Sex Offender Database, the NSOPW provides comprehensive results from all fifty states. When a search yields a result, the NSOPW directs the user to the actual jurisdiction’s registry profile in order to provide the user with the most up-to-date information. As a result, the NSOPW provides users with a search that has greater breadth and instantaneous, exhaustive information, compared to the Illinois Sex Offender Database and the Illinois Murder and Violent Offender Against Youth Database.

Although a law requiring Illinois school districts to utilize the NSOPW would not have prevented the Jon White ordeal, as White was not yet a


\[214. \text{Id. at 3.}\]


\[216. \text{See id.}\]

\[217. \text{About NSOPW, U.S. DEP’T OF JUST., http://www.nsopw.gov/en-US/Home/About (last visited Jan. 3, 2013). Users may obtain information about sex offenders via searching by name nationally or within a given jurisdiction, address, zip code, county, or city/town. Id.}\]

\[218. \text{Id.}\]

\[219. \text{For example, even if an Illinois school district used the National Sex Offender Public Website in lieu of the Illinois Sex Offender Database and the search identified an Illinois sex offender, the National Sex Offender Public Website would automatically direct the school district to the Illinois Sex Offender Database’s profile for that sex offender.}\]
convicted sex offender, the use of the NSOPW could prevent school districts from “passing the trash” interstate. For example, a sex offender could not simply travel from another state to Illinois in order to escape his or her history because hiring school districts could check his or her background immediately. While the required Federal Bureau of Investigation’s background checks would inevitably identify a convicted sex offender applying for a position in another state, the NSOPW can provide the same information to school districts immediately without a fee.220

The Illinois General Assembly could implement a requirement for National Sex Offender Public Website checks with the following proposed statutory language in the form of an amendment to the school code:

National Sex Offender Public Website Check.
Prior to hiring a certified or noncertified employee, the hiring school district or regional superintendent shall perform a check of the National Sex Offender Public Website. No school board shall knowingly employ a person for whom a National Sex Offender Public Website check has not been initiated.221

2. Demand Professional and Personal References from Applicants

In general, the hiring process naturally contains information asymmetry. The applicant presents himself or herself in the best way possible by displaying the good and concealing the bad.222 Thus, employers are at an inherent disadvantage, as they are required to make a hiring decision based primarily upon information provided by the applicant. If applicants for school employment were required to produce professional and personal references, and if hiring school districts were required to inquire about applicants’ integrity and trustworthiness, school districts would have more objective information about applicants at their disposal before making employment decisions. Presumably, the additional information would allow school districts to identify and select better employees. Logic and common

221. The proposed amendment is modeled after and would fit well with the other required database checks in the school code. See 105 ILL. COMP. STAT. 5/10-21.9 (2012 State Bar Edition).
sense dictate that better employees would bolster both school safety and academic performance.

While school districts already screen applicants’ backgrounds with the statutorily required background checks, the background checks only identify applicants with criminal convictions. While identifying applicants with criminal convictions is an important step in the screening process, applicants may be unfit even if they do not have criminal convictions. For example, Jon White was extremely unfit to teach at Urbana, but since White did not have a criminal record and Urbana did very little to investigate White’s character and fitness, White was afforded an opportunity to continue his abuse of students. As a result, a law requiring school districts to check into applicants’ personal and professional references would make it harder for predators, such as Jon White, to obtain employment within school districts. Although checking references may impose an additional administrative burden upon school districts, the benefit of protecting students outweighs the costs.

The Illinois General Assembly could implement a requirement for applicants to provide professional and personal references with the following proposed statutory language in the form of an amendment to the school code.

**Professional and Personal Reference Check.**

Each applicant for a certified or noncertified employment position with a public school district shall submit the contact information for one (1) professional reference and three (3) personal references. As used in this section, a “professional reference” may be the applicant’s current or former employer or supervisor. A “personal reference” may be any person acquainted with the applicant who is not related by blood or marriage. Contact information should consist of a telephone number or a mailing address. Before selecting an applicant, the hiring school district must contact the applicant’s listed references and former employer and inquire about the applicant’s trustworthiness and integrity. No school board shall knowingly employ a person for whom a personal and professional reference check has not been initiated. Any person


acting as a personal or professional reference who replies in good faith shall have immunity from any liability, civil, criminal or that otherwise might result by reason of such actions.

C. REQUIRE SCHOOL DISTRICTS TO VERIFY THAT TRANSIENT SCHOOL PERSONNEL REMAIN IN “GOOD STANDING”

Under Illinois state law, a school district is required to fill out a one-page standard form for any student who transfers out of the school district.\(^{225}\) The form contains information about whether or not the student is “in good standing.”\(^{226}\) A student is “in good standing” if he or she is not being disciplined by a suspension or expulsion and is entitled to attend classes.\(^{227}\) No school district is required to admit a new student who is unable to produce the standard form.\(^{228}\) In addition, no school district is required to admit a student transferring from an out-of-state public school unless the student’s parent or guardian certifies that the student remains in good standing.\(^{229}\) Since students cannot transfer from one school district to another without proving that they left in good standing, it is logical that school personnel should be required to do the same.

Requiring an applicant to allow his or her former school district employer to disclose the ending status of his or her employment to a hiring school district furthers the Illinois State Board of Education’s stated goals.\(^{230}\) The Illinois State Board of Education’s second listed goal states that “[e]very student will be supported by highly prepared and effective teachers and school leaders.”\(^{231}\) If a hiring school district can determine which applicants are in good standing and which are not, the hiring school district will be better able to narrow the applicant pool and select a proper applicant. Better employees can further assist school districts in achieving the Illinois State Board of Education’s goal of supporting students.

In addition, the third recorded goal of the Illinois State Board of Education declares that “[e]very school will offer a safe and healthy learning environment for all students.”\(^{232}\) Once again, school districts that know which applicants left their previous employment not in good standing

\(^{225}\) 105 ILL. COMP. STAT. 5/2-3.13a(b) (2012 State Bar Edition).
\(^{226}\) Id.
\(^{227}\) Id.
\(^{228}\) Id.
\(^{229}\) Id.
\(^{231}\) Id.
\(^{232}\) Id.
would allow school districts to narrow applicant pools and make better hiring decisions. Better employees can assist the Illinois State Board of Education in fulfilling its goal by improving the safety and health of the learning environments of Illinois schools. A law requiring applicants to have their previous school district employers disclose whether they left in good standing could have prevented the tragedies caused by Jon White at Urbana. In Jon White’s case, he resigned from McLean amid his second suspension during the 2004-05 school year. Urbana hired White after McLean falsely stated that White worked the entire 2004-05 school year on Urbana’s employment verification form. Presumably, White did not disclose his two suspensions to Urbana during the hiring process either. Even if McLean would have accurately answered the question on the employment verification form with the specific number of days that White worked during the 2004-05 school year, the exact number of days White worked would not have directly informed Urbana that White was suspended twice for inappropriate sexual behavior. However, if the employment verification form used by Urbana was replaced by a standard form created by the Illinois State Board of Education with questions regarding White’s employment status at the time of his severance, it is much more likely that McLean would have acknowledged that White left the district not in good standing, and Urbana would have had a reason to conduct further investigation.

Although Illinois public school districts are separate entities, they share common stakeholders. One common stakeholder of public school districts is the Illinois State Board of Education, as it supervises all public schools in the state. Other common stakeholders are the Illinois taxpayers, as public school districts receive approximately one-third of their funding from the State of Illinois. Since Illinois school districts share interested parties, it is logical for the Illinois General Assembly to call for further cooperation among school districts. When Illinois school districts “pass the

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236. See id. at 884-86.
238. JAMES B. FRITTS, ESSENTIALS OF ILLINOIS SCHOOL FINANCE 1-3 (Illinois Association of School Boards 5th ed. 2010). While Illinois schools raise the majority of their revenue through local property taxes, the state of Illinois uses the general fund, which draws its money from state income taxes, sales taxes, other miscellaneous taxes, and fees, to finance public schools. Id. at 3. In 2007-08, local sources provided 60.9% of school revenue, state taxpayers provided 31.2%, and the federal government provided 7.9%. Id. at 1.
trash,” the citizens, and more importantly the students, of Illinois are the people that get hurt. By requiring school districts to share information about former employees, school districts can assist each other with screening applicants by providing more information about applicants’ backgrounds, which can lead to the benefit of all stakeholders.

The Illinois General Assembly could implement the recommendation mentioned above with the following proposed statutory language:

**Transient School Personnel Act.** The State Board of Education shall develop a one-page standard form that Illinois school districts are required to provide within fifteen (15) days upon the request of any school district that is in the process of hiring a former school employee (the “applicant”). The form shall contain information about the applicant’s employment history at the former school district. The form shall specifically address whether or not the applicant left his or her employment with the former school district “in good standing.” As used in this section, “in good standing” shall mean that the applicant’s employment was not terminated for disciplinary reasons. All applicants to any public school district job opening shall authorize the disclosure of the standard form by their previous school district employer as a condition of their employment. School districts shall not hire an applicant until the standard form has been received from the former school district.239

D. CREATE A COHESIVE NATIONAL POLICY

The Illinois General Assembly and the Illinois Supreme Court have been vigilant in addressing the practice of “passing the trash” in Illinois. However, the problem is not unique to Illinois alone.240 Despite Illinois’s best efforts to eradicate the practice of “passing the trash,” school districts in other states will continue the practice until their respective state government or Congress addresses the problem. Without a cohesive national poli-

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239. The proposed Transient School Employee Act is modeled after 105 ILL. COMP. STAT. 5/2-3.13(b) (2012 State Bar Edition).
cy, sexually abusive school personnel may seek refuge in states, unlike Illinois, where “passing the trash” is not restricted.241

In 2011, United States Representative Michael Fitzpatrick introduced a bill that would have established a national approach to “passing the trash.”242 H.R. 3766 had three primary functions. First, the bill prohibited employers from facilitating the interstate transfer of individuals engaging in child sex acts.243 Second, the bill required all school districts, both public and private, to carry out background checks of all employees.244 Third, the bill mandated that states adopt and enforce a policy that requires school district employees to report all suspected incidents of sexual conduct involving a minor and an individual employed at the school or any other school in the state.245 Unfortunately, the bill died in committee and was never reintroduced.246 However, H.R. 3766 is exactly what the United States needs from Congress in order to stop school districts from “passing the trash” once and for all.

VI. CONCLUSION

At an alarming rate, school districts allow former employees known to have committed employee-on-student sexual misconduct to obtain employment at other school districts without reporting and while concealing the sexual misconduct.247 This practice is known as “passing the trash.”248 Although the Illinois General Assembly’s amendments to the Abused and Neglected Child Reporting Act and the Illinois Supreme Court’s recent

241. If all states adopted Illinois’s current approaches to preventing the practice of “passing the trash,” school personnel accused of sexual abuse would face many obstacles in obtaining employment at another school district.
243. Id.
244. Id.
245. Id. States that do not comply with the mandate do not receive funds under the Elementary and Secondary Education Act of 1965. Id.

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decision in *Doe-3 v. McLean County Unit District No. 5* assist in preventing school districts from passing off sexually abusive personnel to other school districts, the problem remains.

In order to eradicate the practice of “passing the trash” in Illinois, the Illinois General Assembly should take further action by: (1) amending the Reporting Act to provide a civil cause of action for victims against school districts whose employees violate the Act; (2) enacting a law that requires public school districts to conduct more extensive background checks when hiring school personnel; and (3) enacting a law that requires former school employees seeking employment at another school district to consent to the disclosure of an “in good standing form” from their previous school district employer. In addition, in order to eradicate the problem across the nation, Congress should take action by creating a cohesive national policy.

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