



**REPORT TO THE CONCORD SCHOOL DISTRICT**

TO: Stephen Bennett, Esq.  
FROM: Djuna Perkins, Esq.  
DATE: October 30, 2019  
RE: Recommendations following investigation of sexual misconduct of Howie Leung

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Few events are as devastating to a community as the revelation that a sexual predator may have lived among them and preyed upon their children undetected for years, all the while receiving accolades for his dedication to his students and the community. The betrayal felt by the City of Concord as a result of teacher Howie Leung's alleged sexual misconduct, as expressed by citizen participation at School Board meetings and in statements given to news media, is palpable and deep. The community has understandably asked how such a terrible thing could happen in a supportive, caring community like Concord.

In the wake of the investigation, the Board asked me to make recommendations to its policies and infrastructure that will help prevent similar violations from recurring in its schools. The recommendations below were based on interviews of dozens of witnesses including teachers, administrators, staff, parents and students; and a review of hundreds of pages of documents including the District's current policies, Employee and Student Handbooks, emails, personnel files, training records, correspondence, text messages, internal school records, yearbooks, and Facebook pages.

I. **Accept that Sexual Abuse Can and Does Occur in Public Schools; and that Non-Sexual Boundary Violations Are Often Precursors to Sexual Abuse.**

For the sexual predator, schools are a hunting ground. Based on my investigation, my overriding recommendation to the Board, District staff and administrators, and the Concord community, is to accept that sexual misconduct can and does occur everywhere, including in public schools, regardless of how supportive, caring or wholesome a community may be; regardless of whether a staff member has no prior criminal history, has been credentialed by the Department of Education, or is a popular or charismatic teacher; and regardless of whether a District has policies prohibiting misconduct and mandating reporting of suspected sexual abuse. Wherever there is a vulnerable person (or population) subject to the authority of another person (or population), sexual misconduct can occur, and a sexual predator will use any tools at his or her disposal, including ambiguity of rules, a lack of enforcement of rules, or a charismatic personality, to accomplish it.

## II. The District Should Conduct a Climate Survey of Staff, Students and Families.

Creating a school environment that is safe for students begins with establishing a culture in which all community members feel comfortable reporting concerns and are confident that the concerns will be addressed. In the wake of significant incidents of sexual predation, many communities conduct climate surveys to better assess current perceptions about school culture, and identify strengths and weaknesses in the school environment with respect to sexual misconduct.

I recommend that Concord conduct a climate survey of staff, parents and students to gain insight into the current understanding of each constituency about sexual misconduct and their perceptions of how the District has responded to complaints of sexual misconduct. Since strengths and weaknesses in responding to any type of complaint may also impact the District's responses to sexual misconduct, the District should also consider including general questions related to the District's management and leadership of the schools, in addition to those specific to all types of sexual misconduct and other types of discrimination. A climate survey will help the District to design a comprehensive program of trainings, initiatives, policy and response protocols customized to meet the specific needs of the community that will help establish a new culture in which all community members feel safe and respected. It can also allow participants who have not already been heard in some other forum a mechanism to air any complaints or concerns so that the District maximizes the information it has and can respond appropriately.

## III. Establish a Comprehensive Protocol for Responding to Concerns Related to Sexual Misconduct

In general, District policies meet statutory requirements, but establishing a comprehensive, coordinated protocol for responding to all concerns about sexual misconduct will ensure consistency and accountability. For clarity, many institutions use a unified complaint process that applies to both staff and students. The complete protocol (including definitions of prohibited conduct, how to report concerns, and a detailed description of the complaint process) should be published in all student and staff handbooks and on public bulletin boards visible to students and staff.

### A. All Allegations of Boundary Violations and Sexual Misconduct Should be Reported to the Title IX Coordinator.

The Concord School District must abide by numerous state laws governing sexual misconduct, and it must also comply with Title IX of the Educational Rights Act of 1972, the federal law that prohibits gender discrimination in educational opportunities, because sexual misconduct is a form of gender discrimination. As discussed below, although the OCR has since withdrawn the 2014 guidance, schools in New England continue to rely on it.

In 2014, the United States Department of Education's Office for Civil Rights ("OCR") promulgated "Questions and Answers on Title IX and Sexual Violence," which provided comprehensive guidance applicable to all schools receiving federal funding.<sup>1</sup> The 2014 Q&A provides:

A Title IX coordinator's core responsibilities include overseeing the school's response to Title IX reports and complaints and identifying and addressing any patterns or systemic problems revealed by such reports and complaints. This means that the Title IX coordinator must have knowledge of the requirements of Title IX, of the school's own policies and procedures on sex discrimination, and of all complaints raising Title IX issues throughout the school. To accomplish this ... the Title IX coordinator must be informed of all reports and complaints raising Title IX issues.... The school should ensure that the Title IX coordinator is given the training, authority, and visibility necessary to fulfill these responsibilities.

Current District protocol requires anyone with a concern of sexual misconduct to report it to a designated administrator. In practice, these administrators are the principals of each school. The principals then report to the superintendent, who is the ultimate decision-maker. I recommend the District change the current protocol to require that any community member (including staff, students and families) report potential Title IX violations—including any concerns about non-sexual boundary violations—directly to the District's Title IX Coordinator, who would coordinate the District's response and any investigation. Authority to make disciplinary decisions would remain with the principals and Superintendent. Reporting all complaints to the Title IX Coordinator will:

- Ensure consistent responses that comply with District policies
- Enhance impartiality by removing oversight of investigations from the person ultimately responsible for discipline
- Instill confidence in the community that complaints will be heard and thoroughly investigated; and
- Promote the reporting of sexual misconduct.

Reporting all concerns to the Title IX Coordinator would also serve another critical function: ensuring institutional knowledge of concerns about sexual misconduct related to any particular staff member, student or trend. Since the Title IX Coordinator does not have disciplinary authority, peers could report concerns about non-sexual boundary violations to the Title IX Coordinator without fear of unfairly jeopardizing a colleague's career, but confident that someone with the necessary expertise and authority is aware of the issue and can respond appropriately. With a complete clearinghouse of information, the Title IX Coordinator would be in the best position to evaluate when to simply keep a watchful eye, when to take preventive measures before behavior escalates, when to ensure that behavior of concern is monitored, and

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<sup>1</sup> Although the 2014 Q&A, promulgated during the Obama administration, was withdrawn in September 2018, most schools continue to rely on its guidance.

when to initiate a formal investigation. The Title IX Coordinator could also receive anonymous reports or those in which the complainant requests confidentiality and act on those complaints to the extent possible.<sup>2</sup> Tracking trends and patterns will also allow the Title IX Coordinator to determine whether and when training is needed for staff, students or even families in a particular area.

B. Administrators Tasked with Investigating and Responding to Sexual Misconduct Must Be Impartial and Have Specialized Training or Experience.

As any professional in the field will attest, sexual misconduct investigations are complex and require specialized skills in evidence-gathering and analysis compared to other types of misconduct.<sup>3</sup> They also can take considerable time and effort. For this reason, the 2014 Q&A advised that sexual misconduct investigations should be “adequate, reliable, impartial and prompt,” and conducted by investigators with “training or experience handling complaints of sexual violence.” Professionals in the field also widely recognize that investigators should be “trauma-informed,” i.e., they should be aware of the impacts of trauma as well as the signs and symptoms of trauma, integrate that knowledge into the investigation, and avoid re-traumatization of victims of sexual misconduct. Trauma-informed investigations also attempt to ensure victim safety and autonomy to the extent possible.

Some schools have trained investigators on staff who investigate complaints, sometimes in addition to other responsibilities. Others utilize outside investigators. Still others use a combination of internal and external investigators, referring investigations to outside investigators when internal investigators are overburdened or as an extra precaution to avoid the appearance of bias in a particular case. Whatever model the District chooses can be successful, as long as the investigator has adequate training and time to conduct a thorough and impartial investigation. In school settings, because of the compressed calendar and academic requirements, there is often tension between completing an investigation quickly and being thorough. The District must be careful to use child safety as its overriding guide in balancing these sometimes, competing concerns.

In addition, I strongly recommend that the District conduct all sexual misconduct investigations—even those between students and those between staff—at the District, rather than the school level to avoid the appearance of bias, reduce the risk of retaliation, and minimize re-traumatization and embarrassment among individuals who will have ongoing contact unrelated to the investigation.

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<sup>2</sup> In some instances, based on the egregiousness of a particular act or a pattern of behaviors that jeopardizes the safety of all students, the Title IX Coordinator may determine that an investigation should proceed even if the alleged victim does not want to initiate a disciplinary process. In these instances, the District should continue to engage with, and support, the alleged victim as appropriate.

<sup>3</sup> While the resources available to law enforcement can be helpful, alternative sources of information often provide equally convincing evidence; and a referral to law enforcement does not relieve a school of its obligation to conduct an internal investigation.

C. The District Should Impose Interim Measures to Ensure Student Safety.

In matters involving student safety, it is standard practice in schools (and workplaces) to place an employee on paid leave upon receipt of a credible allegation of sexual misconduct, and to take any other reasonable measures necessary to ensure the safety of all students, such as issuing a “No Contact” or “No Trespass” order. See OCR Q&A at 32-33. Such measures prevent retaliation against the reporting student, and they protect all students who might be at risk of harm, without depriving the staff member of a livelihood without due process. It is also standard practice to provide support to an alleged victim to the extent possible, such as by providing referrals to counseling services and offering academic accommodations. OCR Q&A at 32-22.

Since all school employees are mandated reporters, the District should also refer students who are--or are suspected to be--alleged victims of sexual misconduct to a survivors’ advocacy organization in the community, and they can help empower students to come forward and to pursue other rights available to them. The District should also inform alleged victims of sexual misconduct of the other legal rights available to them, including to pursue criminal prosecution, to obtain restraining orders against perpetrators in court if appropriate, to file complaints at other agencies such as the New Hampshire Department of Education and the Office for Civil Rights, and to file a civil lawsuit.

To encourage reporting and accountability for sexual misconduct, the District should also adopt an “amnesty” policy, i.e., a policy to refrain from disciplining students who report sexual misconduct for minor violations of school rules occurring during the sexual misconduct.

D. The District Should Inform Involved Parties of the Outcome of the Investigation.

The District should inform victims of sexual misconduct (and/or their families, if the student is a minor, or with the student’s permission if the student is 18 years of age or older) of the general conclusion of the investigation (e.g., that the investigation concluded that the alleged misconduct did or did not occur) as well as any sanctions that impact the victim directly, such as the issuance of a No Contact order or removal from school—even if the victim is not the party bringing the complaint.

E. Sanctions Should Be Proportionate to the Conduct and Consistent with Other Discipline

In all instances in which a sexual misconduct investigation concludes that misconduct occurred, the sanction should be proportionate to the conduct, consider all mitigating and aggravating factors, and be consistent with discipline meted out in similar situations.

F. The District Should Provide an Appeals Process

Similar to the right of appeal provided in suspension and termination matters (for both staff and students), the School should provide an appeal process on the grounds of procedural error, previously unavailable evidence, or where a sanction is substantially disproportionate to the findings.

IV. Train Staff and Administrators to Recognize “Red Flags” of Sexual Misconduct and to Report and Respond Appropriately.

Sexual misconduct against children can be especially challenging to detect. Many adults have difficulty recognizing and articulating abuse when it happens to them, and delayed reporting of sexual misconduct is a well-known phenomenon among all age groups and populations. Identifying sexual abuse in children is even more difficult because of children’s varying developmental abilities to recognize abuse and advocate for themselves against the adults they are taught to trust and obey.

A child of twelve or thirteen who does complain of inappropriate behavior will not necessarily express themselves in language that would clearly suggest a violation of a school’s sexual misconduct or discrimination policy. A child who is directly asked about sexually inappropriate behavior may deny it because of fear of repercussion to themselves, to their family or even to their abuser, or because they do not understand that what is happening is sexual misconduct. Even students who do recognize that what is happening is abuse may be unable to disclose it until they feel safe to do so. Adolescents, even if they have reached the age of sexual consent or the age of legal majority, are not developmentally adults and may still have difficulty distinguishing between a healthy sexual relationship and one that exploits them. Even parents may not have adequate training in recognizing the signs that their child may be the subject of sexual misconduct.

Because sexual acts generally take place outside of public view and without video recording, the greatest chance of detection of sexual abuse results from careful observation of any behaviors that violate policies, social norms or physical boundaries, whether the behavior is overtly sexual or not. It is also critical to be alert to behaviors of a student that may be indicators of sexual abuse, including depression and its symptoms, anxiety, declining academic performance, substance abuse, aggression and other discipline problems, risky sexual behavior, eating disorders, and self-harm.

For these reasons, the burden is on educators, who are trained in child development, experienced in working with children, and collectively spend more time with children than any

family member, to be alert to potential signs of sexual misconduct, even subtle or vague ones, regardless of the age or gender of the student, and to report all signs of it when it arises.

Both students and staff should receive annual training in identifying and reporting sexual misconduct that goes beyond mere recitation of policies. The training should specifically address concerns about reporting peers; and should also address “grooming,” i.e., the non-sexual boundary violations that often precede sexual abuse. Administrators should receive separate training in creating a culture in which students, staff, faculty and community members feel comfortable reporting concerns without fear of repercussion; and in identifying and reporting sexual misconduct and grooming behaviors.

V. The District Should Enhance Supervision of Staff and Students

A school’s greatest value is in the critical relationships that develop between educators and students, the best of which instill a lifelong love of learning and can result in significant mentoring. Yet the line between guiding students and exploiting them is fine. Maintaining such a delicate balance requires adherence to clear boundaries between teacher and student.

A. Staff

1. General

Administrators should document any concern that results in verbal counseling of a staff member for conduct issues and use progressive discipline for any behavior warranting discipline. Administrators should also walk the halls regularly to be aware of the general comings and goings and activities of students and staff so that they will be able to identify unusual activity that may warrant further inspection.

2. Social Media, Internet Use, Personal Communications, Professional Appearance

The District has standard policies for staff about social media, internet use, personal communications at school, and maintaining professional appearance. The social media policy specifically discourages teachers from communicating with students on Instagram, Snapchat and Facebook, and forbids teachers from using personal social networking sites during school. Failure to enforce such policies can enable boundary violations and sexual misconduct. Because sexual predators use ambiguity to perpetrate their crimes, even minor rule infractions can be indicators of potential boundary violations.

3. The District should not permit students to spend significant time in the classrooms of a teacher to whom they are not assigned; nor to request information about a student who is not assigned to them.

Staff should not be permitted to work with their students in the presence of unassigned students because it violates FERPA and makes supervision of the unassigned students challenging. Moreover, the District should not permit teachers to disclose information about students to teachers who are not assigned to them without express permission of the student's parents and consultation with the student's guidance counselor. Teachers should report receiving any such requests to the Title IX Coordinator.

#### 4. Schedule changes

Changes to a student's schedule should not be permitted without express written permission from the student's parent.

#### 5. Transportation

The District should adopt a policy clearly outlining situations in which a staff member may provide transportation to students and vice versa. The policy should include the requirement that the school administration and students' parents receive prior notice of the transportation arrangements and give consent.

#### 6. Communication with students

The District should adopt a policy clearly outlining when and how teachers may communicate with students both inside and outside of school above and beyond the current policy discouraging communication via social media and in compliance with the New Hampshire Department of Education's Code of Ethics.

#### 7. Gifts

In accordance with the Code of Ethics adopted by the Department of Education in 2019, and in addition to the prohibition against students giving teachers gifts, the District should adopt a policy forbidding staff from giving anything of value to students (except rewards/awards authorized by the administration) in compliance with the New Hampshire Department of Education's Code of Ethics.

#### 8. Fraternization with students

The District should consider adopting a policy discouraging staff from socializing with students outside of school and requiring staff to disclose any relationships with students that require in-person contact outside of school or school sanctioned events, such as employment or family relationships.

#### 9. Physical contact with students



The District should consider adopting a policy forbidding staff from hugging students or engaging in any physical contact with a student other than as a momentary hand on a shoulder or arm, or a handshake/fist bump. But see RSA 126-U: 1 which defines child restraints, but permits “brief touching or holding to calm, comfort, encourage, or guide a child.”

B. Students

1. Lockdown Panels

Most doors in the high school and middle school have small windows that staff are instructed to cover with “lockdown panels” during active shooter drills to discourage shooters from entering a classroom. These panels should be removed at the end of the drill so that any activity in the classroom may be observed from the hallway.

2. Lunch Time

Students at the middle school and high school should be required to eat lunch in the cafeteria or other specific areas designated by the administration. Any area in which a student is permitted to have lunch or spend free time should be supervised. This ensures that administrators know the location of students in case of emergencies and that all students are appropriately supervised.

3. Cell Phone Policy

In 2014, RMS forbid students from using their cell phones during the school day, even during lunch or free periods. Administrators should question any teacher’s failure to enforce reasonable restrictions on student behavior.

4. Nomenclature

The District requires students to address teachers by their last names, with the appropriate title. This formality reminds both staff and students that their relationship is that of teacher and pupil and not one based upon friendship. As discussed above, administrators should question any teacher’s failure to enforce District standards of behavior because it could be an indication of other boundary violations.

**VI. The District Should Err on the Side of Notification to Authorities and Parents/Guardians of Minor Children**

New Hampshire law provides immunity to those who make good faith reports of *suspected* abuse to DCYF and law enforcement. For this reason, most schools take the conservative approach of notifying DCYF, local police and parents/guardians of:

- any allegation involving a possible sexual relationship between a teacher and student (because of the New Hampshire law forbidding sexual penetration of a person between the ages of 13 and 18 by a person with authority over that person who uses that authority to coerce the victim to submit);<sup>4</sup>
- any allegation of sexual misconduct by one student on another student who is under the age of 18<sup>5</sup>; and
- consensual sexual conduct between students when one or both parties is under the age of sexual consent.

If the allegation is unfounded or outside the agency’s jurisdiction, the authorities so determine and close the case with no negative consequence to the District. The District should also notify parents/guardians of minor children—whether current or former students--of any evidence suggestive of a relationship between a teacher and student that exceeds appropriate boundaries.

**VII. The District Should Conduct Regular Evaluations of Administrators**

Because administrators set the culture of a school with respect to reporting and responding to sexual misconduct, the District should conduct regular evaluations of administrators using a “360-degree” analysis that includes the perspectives of supervisors, subordinates, peers and families.

**VIII. The District Should Ensure Enhanced Supervision of Staff Without Requisite Certification**

Administrators should ensure enhanced supervision of individuals without the certification for their assigned roles.

**Conclusion**

Recovery from these recent events will require considerable time, resources and reflection, but this process also presents the Concord School District with the opportunity to heal and move forward as a stronger community by creating robust response mechanisms, and more importantly, a culture that recognizes and understands the realities of sexual misconduct and the harm it causes, encourages reporting, and holds offenders accountable.

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<sup>4</sup> If a student is age 18 or older at the time of the report, schools report to DCYF if they have reason to believe reportable conduct may have occurred prior to the student’s 18<sup>th</sup> birthday.

<sup>5</sup> Schools typically inform alleged victims of sexual misconduct who are 18 years of age or older of their right to inform law enforcement, provide the student with referrals to support services, and request the student’s permission to notify parents/guardians.