

Ethics and the Superintendent



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Issues We Will Cover

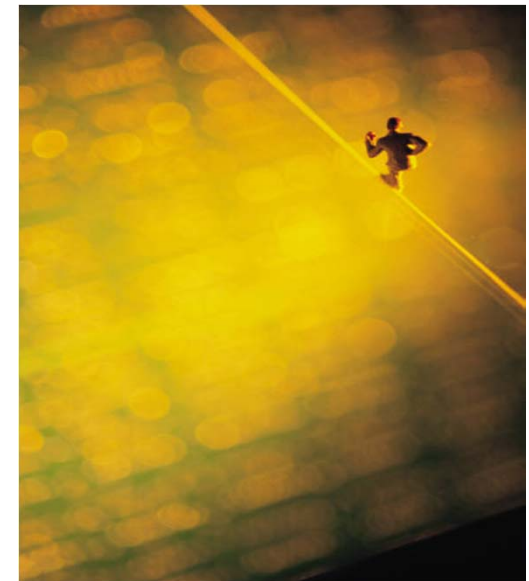
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- What are the sources of Ethical Standards?
- What is an unconstitutional gift of public funds?
- What are prohibited conflicts?
- What is an appearance of impropriety?
- When must I disclose and recuse myself from involvement in a matter?
- When is it permissible to accept a gift?
- Is nepotism illegal?
- What information must be kept confidential?
- What are my responsibilities regarding my District's Code of Conduct?
- When might my position as Superintendent be inherently incompatible with another position I hold?
- What are my reporting responsibilities under Part 83?
- A Cautionary Tale: Atlanta's Cheating Scandal
- Your questions/real life "hypotheticals".

The Challenge

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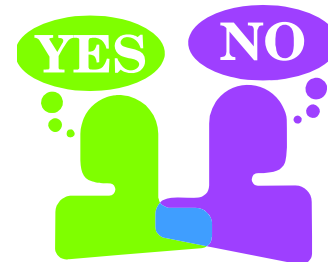
- **Not an exact science.**
- **Every situation is unique; every question must be carefully analyzed based on the specific, detailed set of facts presented.**
- **When in doubt:**
 - **Consult with counsel.**
 - **Err on the side of caution.**



Sources of Ethical Standards

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- State Constitution (Article VIII, Section 1).
- Common Law
- Statute (General Municipal Law, Public Officers Law, Education Law).
- Regulations of the Commissioner of Education (Part 83).
- Decisions of the Commissioner of Education.
- Decisions of the Courts.
- Opinions of the State Attorney General.
- Opinions of the State Comptroller.
- District's Code of Ethics.
- SCSSA Code of Ethics.



Gift of Public Funds

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- Article VIII, Section 1 of the NYS Constitution prohibits a school district from giving or loaning “any money or property to or in aid of any individual or private corporation or association or private undertaking...”
- Bottom line: neither public funds or public property can be used for a private purpose or benefit; must be used only for a public purpose that is within the authority of a school district.

Gift of Public Funds

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- Ask two questions: (1) Is the expenditure or use of district resources within the District's authority under Education Law, and, if so (2) does the expenditure or use of district resources benefit a private entity or the public?
- If the answer to either question is NO, then the use of district funds or resources would be improper.

Gift of Public Funds

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- If the benefit is mixed, *i.e.*, both a public benefit and a private benefit is realized, there is no improper gift of public funds *if the private benefit is merely incidental to the public benefit, and the public benefit is primary.*
- *“Incidental benefit to a private interest does not invalidate town’s proposed expenditure, otherwise public in nature.” NY Tele. Co. v. Second Bros., Inc., 62 Misc.2d 866, aff’d 35 A.D.2d 779 (1970).*



Common Law Fiduciary Duties

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- Duty of undivided loyalty—acting in the best interests of district, and without self-interest.
- Duty of care-acting with due care as a reasonably prudent person would under similar circumstances.
- Duty of obedience-acting to fulfill the mission of the organization.
- Illustrative cases: *Roslyn Union Free School District v. Barkan*, 16 N.Y.3d 643 (2011); *Board of Regents v. Diamadopoulos, et. al* (1997).

General Municipal Law – §800 *et seq.*

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- Statutory source of ethical requirements for “municipal officers or employees”.
- “Municipality” includes school districts.
- “Officers and employees” means school officers (board members, superintendent, school district clerk, treasurer, tax collector, claims auditor) AND all other employees.

Purposes of General Municipal Law (GML)

§§800-807

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- To protect the public from contracts influenced by biased or dishonest officers/employees.
- To safeguard the integrity of public funds.
- To insure that decisions made by public officials are devoid of self-interest and made in the best interest of the public entity they serve.
- To protect public officials from unwarranted assaults on their integrity by establishing rules and standards by which conduct is measured.



General Municipal Law

§806: Code of Ethics

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- Requires school boards to adopt a Code of Ethics for school officers and employees containing guidance on the standards of conduct “reasonably expected of them.”
- The Code must include standards for:
 - disclosure of interests in matters before the board;
 - holding of investments in conflict with official duties;
 - holding of employment in conflict with duties;
 - future employment that may be in conflict with official duties.

Can A Code of Ethics Be Stricter Than The GML?

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- The GML sets the baseline.
- Most codes are co-extensive with the GML provisions.
- Code can regulate conduct that is not expressly prohibited by law...
- ...But may not authorize conduct that is prohibited.

Can A District Code Be Stricter Than The GML?

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- Code may not be “contradictory, incompatible or inharmonious with” GML.
- If the GML does not expressly address the conduct at issue, a Board can adopt a Code provision that is more strict than the GML.
- If the law expressly addresses an issue, Board cannot adopt a provision that contradicts the law.



Examples

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- *Appeal of Grinnell v Middle Country CSD*, Dec. No. 13,914 (1998) – Code provision was illegal where it prohibited a board member from voting on any collective bargaining agreement when a family member was covered by that agreement.
- *Appeal of BOE of Guilderland CSD*, Dec. No. 11,211 (1984) – Code provision was illegal where it prohibited a superintendent from having a spouse employed in the district in a full-time contractual position.

Superintendent's Duties

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- The Superintendent, as CEO of the District, must distribute a copy of the code to every district officer and employee.
- Those employees and officers must enforce and comply with the code, even if they do not actually receive a copy. GML §806(2).

GML §801: Prohibited Conflicts of Interest

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- Some conflicts of interest are absolutely prohibited.
- Disclosure, fairness of contract terms, recusal-- will not transform a prohibited conflict into a permissible contract.
- Instead, they must be avoided completely, or administrative, civil or criminal penalties may apply.



GML §801: Prohibited Conflicts of Interest

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- In general, a school board member, school officer or employee is prohibited from having an “interest” in any contract with the school district from which he/she benefits financially and over which he/she has control as a result of his/her position with the district.



Analyzing the Conflict

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- Ask three questions:

1. Is there or will there be a contract or agreement in place? If not, there is no conflict of interest. If yes...
2. Does the board member, officer or employee receive a direct or indirect pecuniary benefit from the contract? If not, there is no conflict of interest. If yes...
3. Is the board member, officer or employee authorized to exercise any of his powers or duties with respect to the contract, or does he or she have authority over someone who is so authorized? If not, there is no conflict of interest. If yes...

There is a prohibited conflict of interest, which CANNOT be cured by disclosure or recusal or a fair and impartial selection process.

DON'T ENTER INTO THE AGREEMENT !!

Breaking It Down: “Pecuniary Benefit”

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- If the contract results in a “direct” or “indirect” “pecuniary benefit” to you as superintendent/employee, you have an “interest” in it.
- Opinion State Comptroller 87-23 (member of city board of education has a prohibited interest in a real property contract between the district and a family member **only if** he stands to receive a direct or indirect pecuniary benefit as a result of the contract).
- Opinion State Comptroller 81-66 (school district clerk does not have a prohibited interest in the district’s contract with his brother-in-law for accounting services where the district clerk derives no direct or indirect pecuniary benefit from the contract).

Breaking It Down: Do You Have “Authority”?

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- Do **you** have the power, **or** you can **appoint someone who has the power**, to either: negotiate, authorize, approve, prepare, make payment or audit bills/claims under the contract?



Exceptions to the Conflict Rule: Conflicts That Are Not Prohibited

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- An employment contract between the District and your spouse, minor children or dependents.
- A contract between the District and your adult children *from which you derive no pecuniary benefit*.
- A contract between the District and a corporation of which you are not a director and you own less than 5% of the outstanding stock. *See Appeal of Golden, 32 Ed Dep Rep 202* (if you are a director or own more than 5% of the stock, you have a prohibited interest).
- A contract between the district and an entity that employs you, but where your compensation is not directly affected by the contract, and you have no duties of procurement or performance under the contract.

More Exceptions

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- A collective bargaining agreement between the District and a union in which any relative is a member.
- A contract between the District and a membership corporation/ association or other non-profit corporation or association.
- A contract to purchase real property, provided purchase is approved by order of the supreme court upon petition of the board or through condemnation proceedings.
- A contract where the total consideration paid does not exceed \$750 during the fiscal year when added to the aggregate amount of consideration payable under all contracts in which that employee has an interest.

... And More Exceptions

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- Designation of a bank or trust company as a depository, **as long as** the District's CFO, treasurer or deputy treasurer **specifically** does not have an interest in the bank or trust company (*i.e.*, other employees **can** have an interest without violating rule).
- Designation of a newspaper for publication of notice.
- A contract entered into prior to the time that an officer member or employee was appointed BUT not the renewal of that contract. Opinion State Comptroller 86-58 (no conflict found where the contract in question was entered into prior to election to the board; however, contract cannot be renewed).

Practical Effect of Exceptions

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- If you have an interest in a contract with the District that you receive a pecuniary benefit from and you exercise some control over that contract, you have a prohibited interest, unless one of the above exceptions applies.
- If an exception applies, the District is permitted to enter into the contract.
- **However**, the Superintendent who has the conflict should publicly disclose the conflict in writing to the board as soon as the conflict is known, but at least prior to the board's action on the contract.
- The Superintendent should also recuse himself or herself from involvement with the contract award (for example, put the Assistant Superintendent in charge), to avoid the appearance of impropriety.

Familial Conflicts: Nepotism

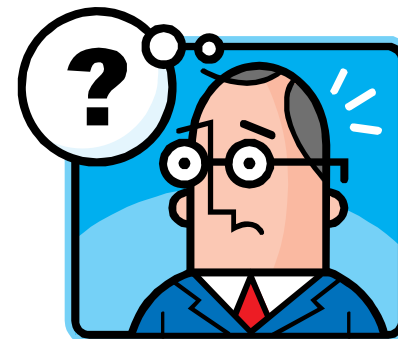
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- Nepotism, in and of itself, is not necessarily a violation of the GML.
- Remember: employment contracts between the school board and the spouse, minor children or dependents of an officer or employee are not prohibited.
- Other contracts with the relatives of school board members, officers or employees must be analyzed against the same 3 questions/criteria as contracts with non-relatives.
- But nepotism can give the “appearance of impropriety” which should be guarded against.
- And many districts have rules about direct supervision of family members.
- Education Law §2103(3) prohibits family members who reside in the same house from serving simultaneously on the same school board.

Hypothetical

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- The board awards a contract to a company owned by the Superintendent's daughter-in-law. The Superintendent recommended the company to the board. The Superintendent is not personally benefitting financially from the contract.
- Prohibited conflict under GML? What actions are appropriate? What if the company is owned by the Superintendent's wife?



Hypothetical

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- The Superintendent's husband is a teacher in the District. The collective bargaining agreement between the District (*i.e.*, the Superintendent) and the Teachers' Association is up for approval. The Superintendent was on the District's negotiating team.
- GML violation?



GML §805: Look A Gift Horse In the Mouth

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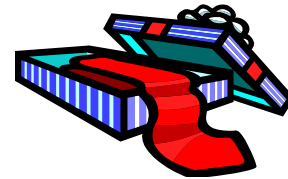
- §805 prohibits *soliciting or accepting* any gift worth more than \$75, where it could *reasonably be inferred* that the gift was intended to influence or reward official action.



\$75 Gift Threshold

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- Think broadly: gift includes money, tangible gifts, services, loans, travel, entertainment or hospitality.
- Measured by fair market value.
- Unit of measurement is a single gift or cumulative gifts over a 12-month period.
- A District's Code of Ethics can set a lower threshold (*i.e.*, less than \$75 value – because a lower threshold does not contradict the GML) (Atty. Gen. Opinion 99-16 [Inf. 1999]).



Standard: Actual Intent or Reasonable Inference of Intent

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- Prohibits gifts *actually* intended to influence or reward, *OR*
- Even if there is no *actual* intent, prohibits gifts if it could be *reasonably inferred under the circumstances* that it was intended to influence or reward (*i.e.*, “appearance of impropriety”).

Appeal of Dashefsky, 46 Ed Dep Rep 219 (2006)

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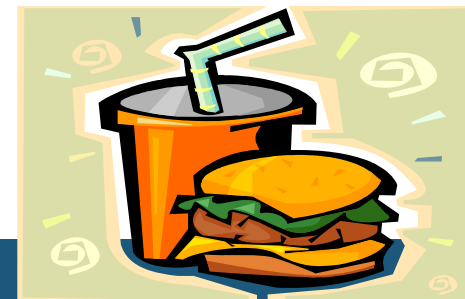
- Law firm invited current school board member clients to annual dinner celebration where value of food and drink was between \$200-\$300 per board member.
- Commissioner held that, even though there was no evidence of *actual* intent to reward, it could *reasonably be inferred* that dinner was held to reward school board clients for their past business.



State Ethics Commission Opinion 94-16: Examples of Acceptable Gifts

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- Where a pre-existing personal relationship exists.
- Unsolicited promotional materials of little intrinsic value (pads, pens, etc.).
- Gifts customarily given on occasions like retirement, marriage, etc.
- Meals, when a board member/employee is a participant in a job-related educational program, and meals are available to all participants.
- A free seminar that is job related, as long as the board member/employee did not solicit the invitation and it is open to a broad audience.



GML §805-a(1)(b): Disclosure of Confidential Information

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- An officer or employee may not disclose confidential information acquired by him/her during the course of his official duties **or** use such info to further his/her own interests.



Application of Nett & Raby, 45 Ed Dept Rep 259 (2005)

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- Board member secretly recorded an executive session where the board was discussing the possible discipline of an employee.
- Board member secretly gave recording to employee who was being discussed.
- When employee sued the Board for wrongful termination, it was revealed in discovery that the recording existed.
- An appeal was brought asking the Commissioner to remove the board member who made the recording for willful violation of law and/or willful neglect of duty.

Application of Nett



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- Commissioner held that a board member could not disclose confidential information learned in a properly convened executive session of the board.
- Disclosure violates GML and Common Law duty of loyalty.
- Disclosure interferes with the board's proper functioning by chilling free discussion in executive session.
- Since decision to go into executive session must be made by the board as a corporate body, only the board as a corporate body can waive executive session privileges – an individual board member cannot do so.

Application of Nett

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- Commissioner did not remove board member.
- She had relied on the advice of her private counsel that she could legally record the discussion.
- Her good faith reliance vitiated the element of “willfulness” that must be proven for Commissioner to remove a board member.
- Since this decision, all board members are on notice, and good faith reliance argument will not prevail.

GML §805-a(1)(c): Limits on Receipt of Compensation

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- An officer, board member or employee of the district cannot represent clients for compensation before the board or school.
- *Exs:* The attorney for a town planning board may not represent clients before the board. (Op. Atty. Gen. Inf. 92-54). Where a village prepares its own assessment roll, the village comptroller may maintain a private tax certiorari practice **if** it is limited to representing owners of properties located *outside* the village. (Op. State Comp. 92-22).



GML §805-a(1)(d): Limits on Receipt of Contingent Compensation

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- An officer, board member or employee of the district cannot enter into contingency arrangements with clients for compensation in any matter before the school board or school.



GML §803: Required Disclosure

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- If a board member, officer or employee has, will have, or later acquires, an interest in any actual or proposed contract with the district, he must disclose the interest in writing.
- **Caveat - Remember!:** disclosure does not cure a prohibited interest.
- Good practice to disclose any appearance of a conflict, even if Code of Ethics does not appear to require it.
- Recuse yourself from involvement with the contract or transaction to avoid even the **appearance** of impropriety. (*Ex.:* A member of a board of assessment who owns property before the board for review should recuse himself from participating in the board proceedings with respect to the property to preserve the validity of the action and maintain public confidence. (Op. Atty. Gen. (Inf.) 99-42.)

GML §§804 and 805: Consequences For GML Violations

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- **Contract willfully entered into that creates a prohibited interest is null and void.**
- **A “knowing” violation of law is a misdemeanor.**
- **Other penalties may include fine, suspension, removal from office or removal from employment.**

Superintendent's Duties

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- **GML §807 – requires the Superintendent to cause a copy of §§800-809 of the GML to be posted in each public building of the District.**
- **Posting must occur in a place that is conspicuous to officers and employees of the district.**



Inherent Conflicts: Incompatibility of Office

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- There is no ***general*** prohibition against holding a school district office and another public office at the same time. (Op. Atty. Gen. I 82-1 (1982)).
- However, two questions must be asked: (1) is there an express prohibition against a Superintendent holding or running for the office in question; and (2) whether the duties of the two offices may be legally incompatible.

Express Prohibitions

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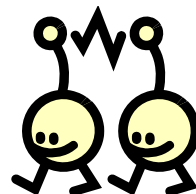
- Education Law §2103(4) – prohibits a Superintendent, as an employee of the District, from simultaneously serving on the board of education.
- Education Law §1950(9) – prohibits a Superintendent, as an employee of the district, from serving on the BOCES board of which his/her district is a component district.



Incompatibility Test

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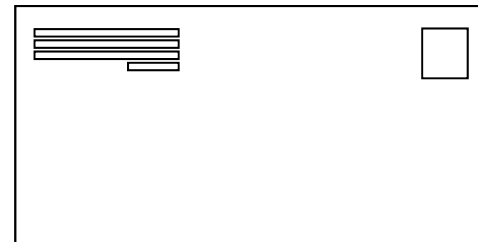
- One person cannot simultaneously hold two public offices or positions of employment if one office is subordinate to the other, such that the person would essentially be their own boss, or if the functions of the two positions are inherently inconsistent with each other, such as an individual serving simultaneously as the district's finance officer and as the internal auditor responsible for the integrity of the district's finances.



Part 83 Responsibilities

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- Part 83 of the Commissioner’s regulations requires school superintendents to report to the professional conduct officer of the State Education Department “any information indicating that a person holding a teacher certificate has been convicted of a crime, or has committed and act that raises a reasonable question as to the individual’s moral character.” 8 NYCRR §83.1(a).



Part 83 Responsibilities

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- A superintendent's failure to do so may result in a Part 83 investigation into the superintendent's own moral character. *See Skiptunis v. Mills, 2000 U.S. Dist. LEXIS 65 (N.D.N.Y. 2000).*
- “Silent resignations” in settlement or in lieu of charges under Education Law §3020-a *no longer permitted.*
- *Get a copy of confirmation letter from SED saying you as Superintendent have discharged your responsibility to report.*

SCSSA Code of Ethics

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- Contains a “Statement of Standards” for the professional behavior of its members, which reflect a set of values.
- Includes obeying laws and BOE policies (which include the GML requirements and the district’s Code of Ethics, as discussed above).
- Is intended to “supplement”, not supplant, the GML and district codes.

Solicitation Under the SCSSA Code

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- Allows solicitation of donations of funds or benefits, under certain conditions that are consistent with GML.
- “No member shall solicit...on behalf of the Association from any person, firm...” etc. “which does or has done business or does or has a professional relationship with a district by whom such member is employed.”

Solicitation Under the SCSSA Code

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- If the receipt of funds or direct or indirect pecuniary benefits by a member would be ethically precluded, it shall also be ethically precluded for that member's spouse, minor children, dependents or firm in which any of those individuals have an interest, to receive those funds or benefits.



Atlanta Cheating Scandal: A Cautionary Tale



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- Atlanta uses a Criterion-Reference Competency Test (CRCT).
- CRCT is a multiple choice exam given annually in grades 3-8; results in reading, ELA, math and social studies help determine if a school makes AYP.
- An erasure analysis performed in 2009 by McGraw Hill raised questions about possible testing irregularities.
- Analysis showed a significant number of erasures from “incorrect” answers to “correct” answers when compared to other districts statewide.

Investigation

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- Governor appoints special investigator in 2010.
- Investigator team conducts 2,100 interviews and reviews 800,000 documents.
- Investigator finds cheating in 44 of 56 schools (78.6%) examined.
- Uncovers organized and systemic misconduct on the CRCT going back to 2001.

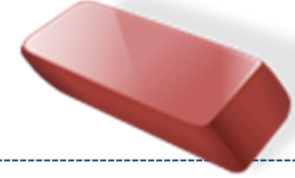
Investigation

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- In 30 schools, educators confessed to cheating.
- 178 educators were identified as involved in cheating; of those, 82 confessed.
- 38 of the 178 were principals.
- Investigation concluded that the Superintendent and her senior staff knew, or should have known, that cheating was occurring.



Anecdotal Findings





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- Teachers and administrators erased students' wrong answers after the test was given and filled in correct answers.
- In some cases, these changes were so sophisticated that plastic transparency answer sheets were created to make changing the answer sheets easier.
- Changing of answers was done at weekend gatherings, and in one case at a teacher's home.
- A principal forced a teacher with low CRCT scores to crawl under a table at a faculty meeting.
- Teachers arranged classroom test seating so that the lower performing children could cheat off higher performing children.
- Children were denied special education assistance because their CRCT scores were too high.
- Students asked to be assigned to certain teachers because the teacher(s) were rumored to cheat.
- Teachers pointed to the correct answer while standing at a students' desk.
- In one class, a student sat under his desk and refused to take the test; he passed.

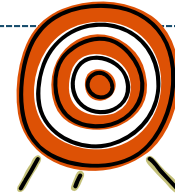
Lack of Integrity/Ethics

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- Teachers and principals denied receiving any ethics training.
- The Superintendent failed to balance the data-driven environment she created with an equal focus on the importance of integrity in achieving those goals.
- Teachers who conducted themselves ethically but failed to achieve results were sanctioned.
- Those who reported unethical conduct often were targeted for retaliation, intimidation and harassment.  
- The message the Superintendent gave was those without targeted improvement over 3 years were to be fired: “No exceptions and no excuses”; threat was not tempered by ethical guidelines.

Conditions That Lead to Cheating

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- **Targets set by the District were often unrealistic and the administration, particularly the Superintendent, put unreasonable pressure on teachers and principals to reach those targets.**
- **A culture of fear, intimidation and retaliation spread through the District; and**
- **The Superintendent and her administration emphasized results and public praise to the exclusion of integrity and ethics.**

Lessons Learned

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- School leaders should surround themselves with people who will speak honestly and the leaders must be willing to listen to what they have to say.
- School leaders need to be involved at the building level - not insular.
- Administrators must be vigilant about following test protocols.
- Districts should foster a culture that encourages reporting of inappropriate behavior.
- Thoroughly review all reports of testing misconduct.
- Seek advice of school attorney when receiving allegations of cheating.
- Superintendent sets the tone from the top.

Closing Thoughts

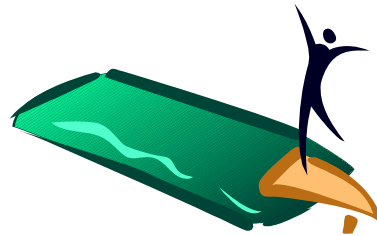
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- **Your reputation is priceless - once damaged, difficult to repair.**
- **Questions raised about the propriety of behavior by board members, officers or district employees put the district and its mission at risk.**
- **Be conservative. Err on the side of caution. Avoid the headlines.**
- **When in doubt, ask Counsel's advice.**
- **Set a tone of integrity and ethical behavior at the top of the organization, by rules, modeling ethical behavior and acting to address unethical behavior.**

Thank you for attending and listening!

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THE END



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