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John H. Ashley, Executive Director

TO:	Members, Senate Committee on Labor, Public Safety and Urban Affairs
FROM:	Dan Rossmiller, Government Relations Director
DATE:	June 7, 2011
RE:	**Senate Bill 86**, Relating to Permitting an Educational Agency to Refuse to Employ Or Terminate an Unpardoned Felon

The Wisconsin Association of School Boards (WASB) **supports** Senate Bill 86.

Wisconsin law provides that an employer may not discriminate against an employee or prospective employee based on his or her criminal conviction record unless the conviction is substantially related to the circumstances of the particular job.

Senate Bill 86 creates a new statutory section that would permit an educational agency (including a school board) to refuse to employ or to terminate from employment an individual who has been convicted of a felony and who has not been pardoned for that felony, whether or not the circumstances of the felony substantially relate to the circumstances of the particular job.

Similar legislation has been introduced in past legislative sessions dating back at least a decade but has not been enacted. The original impetus for this legislation was a well-publicized 1999 discrimination case brought by a school employee who had been convicted of the felony offense.

In that 1999 case, an administrative law judge overturned the Milwaukee Public Schools' decision to terminate a Boiler Attendant Trainee who had been convicted of injury by conduct regardless of life. The individual had been involved in an argument with his then girlfriend and threw hot grease in a frying pan at her. The grease seriously burned the girlfriend's 20-month-old daughter who was standing between them.

The individual had been employed by Milwaukee Public Schools (MPS) as a building service helper for nearly 10 years without incident before the conviction occurred. Following the conviction, the individual applied to become a boiler attendant at MPS, but he failed to disclose his conviction record on the application.

Based on the violent nature of the conviction, the fact that the victim was a small child, and that the individual would be working in school buildings during the time that children were present, MPS terminated his employment. The employee successfully appealed that decision.

The administrative law judge determined that the position of boiler attendant was not substantially related to his conviction record and ordered that his employment, including back pay and benefits, be restored. The case proceeded through several levels of appeals. The Labor and Industry Review Commission affirmed the ruling of the administrative law judge. The circuit court and the court of appeals both ruled in favor of the employee.

The court of appeals set forth a test for determining whether the circumstances of the conviction are substantially related to the particular job. The employer must determine "whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context based on the traits revealed." The circumstances to be considered by the employer and the reviewing courts are those that foster criminal activity, "e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person." This includes, in part, an analysis of the risk of recidivism.

Given this precedent, a school district runs the risk of fighting a costly lawsuit if it makes a wrong decision in applying this test. Even when the district's decision is upheld, fighting an action challenging the decision can be costly. A case appealed to the Labor Industry Review Commission can easily run into the tens of thousands of dollars, and more if appealed further to circuit court. As in other types of discrimination cases, "fee shifting" is involved. If an employee prevails in the appeal, the school district must pay not only its own attorney fees but the attorney fees of the employee as well, adding to the cost.

In the 1999 case involving the MPS employee, the LIRC decision noted "The Legislature did not choose to exempt schools from the conviction record provisions of the Fair Employment Act." The Court of Appeals decision similarly noted that Legislature had not created a blanket exception to the prohibition against employment discrimination because of a conviction record for schools—although such blanket exceptions had been created in other instances (employment of private detectives and installers of burglar alarms, for example).

In response, lawmakers introduced legislation in 1999, 2001 and 2003 to allow educational agencies to refuse to employ or to terminate from employment an unpardoned felon. One of those bills, 2003 Assembly Bill 41, was approved by both houses of the legislature, but was vetoed by Governor Doyle. The Assembly's attempt to override the governor's veto fell three votes short of garnering the necessary two-thirds vote. Similar bills have been introduced since the 2003 session, but none has advanced as far.

If Senate Bill 86 is enacted, a convicted felon would no longer hold, in effect, a statutory right to employment in a school setting when the circumstances of the individual's conviction are not substantially related to the circumstances of the job.

Under this bill, school districts may still attempt to balance the interests of convicted criminals who apply for employment positions with society's competing interest in protecting its children in the public school setting. Whether a convicted felon should be employed in a particular district position would be left to the school district.