

Investigating employee misconduct

By the New York State
Association of School Attorneys



In every school district, officials strive to create a positive and professional environment conducive to both working and learning. When allegations arise that an employee has engaged in harassment, sexual misconduct, insubordination, corporal punishment or some other form of serious wrongdoing, administrators are obligated to investigate such allegations in accordance with board policies and various laws and regulations. Even when there is no legal obligation to conduct an investigation, a well-handled inquiry can help administrators decide whether action is appropriate.

How a district handles allegations of misconduct can affect the district's reputation, environment, operations and ability to defend against claims by third parties, and there are many pitfalls to avoid. For instance, neither the substance of the allegations nor the existence of an investigation should be disclosed to anyone without a need to know. Improper disclosure of information could lead to claims for defamation or infliction of emotional distress, exposing the district to liability.

This article will provide information and practical advice on how to handle an investigation effectively. We recommend 10 steps in responding to such situations:

1. Act promptly. Timeliness is crucial in any investigation of alleged employee misconduct. Prompt action increases the effectiveness of the investigation and maximizes the opportunity to gather reliable evidence. Criminal and civil statutes may have deadlines, so be aware that a statute of limitations may apply.

2. Contact your school attorney. In some cases, the first phone call must go to law enforcement or Child Protective Services. In any case, your school attorney should be informed whenever there is an allegation of serious misconduct by a school employee. Legal counsel can provide guidance in next steps, including conducting an investigation, filing mandated reports with the State Education Department, notifying insurers and pursuing discipline and/or implementing remedial plans.

3. Create an investigatory plan. State laws, school board policies and collective bargaining agreements may dictate how an investigation should be handled. The first decision involves who will conduct the investigation. It should be an impartial person able to promptly and objectively gather and consider relevant facts and evidence. Options include an administrator, a third party (such as a private consultant or investigator) or a law firm. Notably, certain practical and ethical issues accompany using your school attorney as your investigator. District officials should speak to counsel when making such a decision.

4. Decide if interim action should be taken. While the investigation is pending, consider reassigning the accused or making scheduling changes to reduce contact between the accused and complainant. Such action generally can be involuntary (check your collective bargaining agreements) but should be characterized as non-disciplinary.

5. Interview the complainant. If the allegations were raised in a formal or informal complaint, the complainant(s) should be interviewed early in the process. Often, the complainant will raise a concern about confidentiality. District officials should explain that investigating the complaint may involve questioning potential witnesses and seeking other forms of evidence on the specifics of the complaint. While it is impossible to guarantee confidentiality, it is appropriate to reassure the complainant that their concerns about confidentiality are valued. Promise that all information gathered will remain confidential to the extent possible, consistent with a thorough investigation.

6. Gather documentary evidence. The investigator must gather documents and other forms of evidence to create a record of all relevant material, regardless of

whether it corroborates or refutes the allegation in the complaint. Evidence might include letters, memos, emails, voicemail or text messages, phone records, footage from security cameras, etc. When applicable, computers, hard drives, flash drives, tablets and phones should be examined, and in some cases, impounded to protect the integrity of the information. It is a good idea to have sensitive documents prepared under the direction of the district's counsel to increase the likelihood of invoking attorney-client privilege protection. Good recordkeeping is invaluable; it can ensure a fair outcome, assist in future investigations and help the district mount a defense against potential claims by an employee if they are disciplined after the investigation.

7. Interview witnesses. Witnesses may either corroborate or refute allegations made by the complainant. At the start of the interview, briefly explain that an investigation is taking place and what will be expected of the witness, e.g., "I will be asking you questions about an incident that was reported to have occurred in a classroom where you were assigned to work on or about Nov. 1." If counsel is present on behalf of the district, the witness should be given an "Upjohn warning" in accordance with a 1981 U.S. Supreme Court case called *Upjohn Co. v. United States*. Sometimes called the corporate *Miranda* warning, this informs the witness that (1) counsel represents the district and not the witness and (2) the conversation with counsel is covered by the attorney-client privilege. In addition, the witness should be advised that the district has sole discretion to waive the privilege and disclose the conversation between counsel and the witness to a third party.

To the extent possible, the investigator should avoid revealing to the witness the source of the report and should ask open-ended questions. Strive to develop a rapport with the witness through empathy. Explain the advantages of cooperation, appealing to the witness' desire to "do the right thing" to maintain a safe workplace. Under certain circumstances, it may be appropriate to inform a witness that they are obligated to answer questions and that failure to provide truthful answers could result in disciplinary action. However, this could affect the quality and usefulness of the information. The investigator and other district officials should never promise confidentiality to witnesses. Nor should they pledge to disclose of the findings of the investigation or details of particular results. Remind all witnesses that the district does not permit retaliation and that if they later feel that they have been retaliated against for participating in the investigation, they should report it immediately.

When interviewing students, consider informing parents and/or obtaining parental consent although this usually is not required by law.

8. Question the accused, consistent with their rights. The accused is entitled to certain due process rights during the investigation and should be given an opportunity to present his/her side of the story. Bear in mind that a tenured teacher cannot be compelled to provide self-incriminating information and may refuse to answer questions in any pre-hearing investigation that the teacher believes could lead to disciplinary action. Also, the teacher cannot be considered insubordinate when refusing to answer such questions. (These are called "Cadet Rights," named for a case involving Andre Cadet, a New York City teacher who refused to answer questions about his relationship with an 18-year-old student.) While Civil Service employees

lack Cadet Rights and generally may be directed to answer questions, information obtained under a threat of disciplinary action may be less useful and lack context compared to testimony from a cooperative witness.

Consider how much information to disclose during the interview. Ask for a general response to the complaint and ask for specific responses to each action or comment. Discuss the importance of confidentiality and its limits. Warn against any contact with the complainant or other witnesses beyond what is required for school business.

It is usually helpful to save uncomfortable or embarrassing questions until the end of the interview. Beginning with the "tough" questions may cause the witness to become defensive.

9. Evaluate the evidence. Investigations often result in conflicting information and sometimes boil down to one person's word against the word of another – the proverbial "he said/she said." Determining and noting the credibility of the complaint and witnesses is particularly important in such situations. Consider whether the complainant's story or a witness' statements make sense when considered alone, whether the evidence tends to support one interviewee's account over another's and whether any facts have been corroborated or refuted by credible evidence. Assessing the demeanor of witnesses is also appropriate in making credibility decisions. Conduct follow up interviews about new or conflicting information, if appropriate.

10. Create final report and take corrective actions. The investigator should create a final report that states whether the complaint was substantiated, unsubstantiated, or that the findings were inconclusive. If the complaint is substantiated, the final report should cite the laws and policies violated and the harm that the district or an individual suffered as a result. A specific and factual written report will support the district's findings and actions, assist in future investigations, serve as useful evidence in related proceedings, and help the district defend itself against employee claims after any reinstatement.

After receiving the final report, the superintendent may decide to pursue discipline in accordance with the relevant statute or collective bargaining agreement. For a tenured teacher or administrator, the procedure must comply with Education Law section 3020-a, while discipline for an eligible Civil Service employee must follow the requirements of Civil Service Law section 75. This can result in a disciplinary penalty imposed by an arbitrator or hearing officer.

Even if the allegations are not substantiated, the investigator may recommend a non-disciplinary form of corrective action, such as a counseling memorandum (a "Holt letter"). Other non-disciplinary options include keeping the parties separate in the workplace, requiring relevant training, reassignment, transfer or other actions that can be taken in the discretion of the employer in accordance with law and collective bargaining agreements.

Follow-up is also important. It is a good practice (and in some cases it is required) to inform the complainant of whether the allegations were substantiated or unsubstantiated and what actions the district intends to take. While a brief letter can suffice, it may be appropriate to schedule a meeting with the complainant. Witnesses generally should not be told the details of the outcome of the investigation. Follow-up also should include documentation of efforts to ensure that there has been no retaliation after the investigation.

Handling allegations in a prompt, fair and impartial manner will contribute to an effective environment for all concerned.



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