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## WELCOME TO THE 2017 MTBF&M FIRM WORKSHOP

### SCHOOL LAW UPDATE: HOW TO CONDUCT AN INVESTIGATION

2017

April 14, 2017 at the Pear Tree Estate, Champaign, IL

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## How to Conduct An Investigation

- *Why do we investigate?*
- *Who should investigate?*
- *Handling Witness Statements and Interviews*
- *Evidence Issues and Issues of Proof*
- *Student Discipline Investigations*
- *Employee Investigations*
- *Bullying/Harassment Investigations*
- *Writing the Investigation Report*

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## WHY DO WE INVESTIGATE?

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## Why Do We Investigate?

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■ **Educate Staff and Students.** Provide education each year to supervisors, employees and students to help them recognize, document and report inappropriate conduct, such as: sexual harassment, sexual abuse, physical abuse, bullying, etc.



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## Why Do We Investigate?

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**Adhere To The District's Protocol Regarding Investigations.** When a situation is brought to the attention of a school administrator that is serious enough to warrant an investigation, the school administrator should immediately report the matter to the Principal if it is not the Principal who initially learns of the situation. The Principal should then immediately report the matter to the appropriate District level administrator to seek guidance and direction for future action.



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## Why Do We Investigate?

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**Select Qualified Investigators.** Determine at the District level who is authorized and appropriate to conduct investigations. The selected investigator should have adequate training to conduct the investigation and should not be personally involved in the matter. There may be times when the District determines it is in its best interest to retain an outside investigator (an attorney or other professional).



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Why Do We Investigate?

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**Fairness and Impartiality Are Critical.** Staff and students have constitutional due process rights that must be protected. In addition, those involved in an investigation will be much more likely to accept the results of the investigation if they feel they were treated fairly and respectfully during the process. To that end, it is critical that the investigator and District/School officials:

- ❖ Do not assume the truth of the allegations or the guilt of an individual prior to the completion of the investigation.
- ❖ Conduct the investigation in a manner that is (and appears) fair and impartial.
- ❖ Follow applicable District Policies and Administrative Procedures.
- ❖ Treat those involved in the investigation with respect and dignity.



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Why Do We Investigate?

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**Conduct Prompt and Thorough Investigations.** Act immediately or very promptly when a complaint is made or inappropriate conduct is recognized. Documentation should reflect that the investigation was prompt, factual and reflects that appropriate remedial or other follow up action was taken.



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Why Do We Investigate?

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**Use Standard Reporting Forms That Facilitate Adequate Disclosure Of Relevant Information.**

The complaint and the alleged offender's response should be in writing and signed. The investigator may need to assist complainant, particularly when the complaint is verbal.

If the investigator is going to have the parties or witnesses complete a written witness statement on their own, make certain the statement contains facts, not just conclusory statements. To help accomplish this, use a standard reporting form



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## Why Do We Investigate?

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**No Retaliation Permitted.** Advise the alleged offender that retaliation or unauthorized contact with the alleged victim by the alleged offender or his/her friends will not be tolerated and will subject him/her to discipline.



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## Why Do We Investigate?

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**Keep Complainants/Parents Informed About Investigation Process.** If allegations involve misconduct by employee against a student or another staff member, keep the alleged victims informed as to the procedural status of the investigation.



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## Why Do We Investigate?

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**Your Policy Must Be Your Guide.** Re-read your policy (or policies) on the issues at the heart of the complaint prior to beginning your investigation and again prior to finalizing your report. Also, be sure that your timelines are consistent between various policies which may apply (Are there different timelines under your bullying policy, harassment policy, and uniform grievance procedure?).



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# Why Do We Investigate?

## Goals for Your Investigation:

- ❖ Determine whether undesirable conduct took place
- ❖ Determine what occurred, and how
- ❖ Identify the person(s) responsible for the undesirable conduct
- ❖ Change that conduct
- ❖ Support the imposition of consequences (discipline), when appropriate, for undesirable conduct
- ❖ Solve this problem before being tackled by the next problem



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# WHO SHOULD INVESTIGATE? AND OTHER PRE-INVESTIGATION CONSIDERATIONS

2017

Christine G. Christensen

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# Who Should Investigate and Other Pre-Investigation Considerations

## Who Should Investigate?

The selected investigator should have adequate training to conduct the investigation and should not be personally involved in the matter.

In general, the Principal is expected to be the investigator. However, there may be times when the district determines it is in the best interest to retain an outside investigator (an attorney or other professional).



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Who Should Investigate and Other Pre-Investigation Considerations

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■ What Should Be Investigated?

The label used to describe an incident (e.g. bullying, hazing, teasing) does not determine how a school is obligated to respond. Rather, the nature of the conduct itself must be assessed to determine the appropriate response.

For example, if the abusive behavior is on the basis of race, color, national origin, sex, or disability, and creates a hostile environment, a school is obligated to respond in accordance with the applicable federal civil rights statutes and regulations enforced by OCR


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Who Should Investigate and Other Pre-Investigation Considerations

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■ When Must The District Respond?

- A district must respond when it receives notice.
- A school may learn of harassment or discrimination when it receives:
  - Reports/complaints from students;
  - Reports/complaints from parents;
  - Observations from staff; or
  - Through more indirect notice from community sources, such as: newspapers or outside organizations.


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Who Should Investigate and Other Pre-Investigation Considerations

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■ When Must the District Respond?

- A district must respond when it receives notice.
  - Constructive notice: When the district, through the exercise of due care, should have known of the harassing or discriminatory conduct.
    - Example: The district conducted an investigation, but investigator failed to ask whether there were prior incidents.


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Who Should Investigate and Other Pre-Investigation Considerations

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- When Must the District Respond?
  - A district must respond when it receives notice.
    - OCR imputes knowledge to the district when the alleged harasser is an employer.
    - Notice to the district is established when members of school staff have witnessed or become aware of the conduct. This includes, but is not limited to:
      - Teachers, administrators, school nurses, cafeteria workers.
      - Custodians, bus drivers, athletic coaches, advisors to school sponsored extra-curricular activities.
      - Such staff members must immediately report the conduct to the principal or the appropriate designee.

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Who Should Investigate and Other Pre-Investigation Considerations

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- Where Should the Investigation Take Place?
  - While the investigation may take place in various venues, each of the venues should preserve the confidentiality of the process.

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Who Should Investigate and Other Pre-Investigation Considerations

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- How Can the District Prepare for the Investigation?
  - Collect and review all relevant documents as early in the process as possible.
    - First, review the relevant Board policy. This policy may dictate 1) who must be involved in the investigation; 2) the applicable procedures and timelines; and 3) other material considerations.

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Who Should Investigate and Other Pre-Investigation Considerations

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■ How Can the District Prepare for the Investigation?

- Collect and review all relevant documents as early in the process as possible.
  - Second, collect other relevant documentation, such as: employment contracts, job descriptions, evaluations, prior disciplinary records and attendance records, school calendar, the Student Code of Conduct, daily schedules, written information given to teachers/students, class rosters, and a map of the school.


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Who Should Investigate and Other Pre-Investigation Considerations

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■ How Can the District Prepare for the Investigation?

- Prepare Interview Outlines In Advance.
  - Prepare an interview outline for each party/witness in advance. To avoid claims of bias: 1) Ask the same questions to similar types of witnesses; and 2) Avoid leading questions!
  - Each testimony outline should include questions designed to elicit basic background information about the individual and contact information, as well as all information related to the incident(s) giving rise to the investigation.


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Who Should Investigate and Other Pre-Investigation Considerations

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■ How Can the District Prepare for the Investigation?

- Include in each outline a statement to remind the investigator to:
  - Ask each person interviewed if there are any written documents the person has or is aware of that the investigator should review.
  - Ask each person interviewed if he/she knows of other individuals who should be interviewed.
  - Remind the person interviewed of the requirements relating to confidentiality and non-retaliation.
  - Remind the person interviewed to contact the interviewer at a later date if they subsequently recall additional relevant information.


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## Who Should Investigate and Other Pre-Investigation Considerations

- What Can the District Do to Prepare for the Investigation?
  - ▣ Prepare a Chronology of Events
    - As early in the process as possible – and throughout the investigation – create and refine a chronology of events and an exhibit book. The chronology will be of assistance as you interview the witnesses


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# HANDLING WITNESS STATEMENTS AND CONDUCTING INTERVIEWS

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Luke M. Feeney

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## Witness Statements

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- General Guidelines:
  - Witnesses should be instructed to be as specific as possible with regard to dates, times, locations and events, but should never be given prompts or suggestions regarding wording.


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# Witness Statements

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- Witness statements must be legible.
- Allowing the witness to type their statement may be preferable in certain cases.
- Statements should be signed and dated by the witness.



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# Witness Statements

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- Ideally, witness statements should be given as close to the event in question as possible.
- The time duration between the event in question and the witness statement should be noted in the investigation notes.



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# Witness Statements

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- The investigator should note when and where the statement was given and who was present.
- The investigator should note whether witnesses had an opportunity to discuss events among themselves before giving statements.



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Witness Statements

- Witnesses should be allowed to supplement or change their statement upon request.
- Copies of both the “before” and “after” versions of the statement should be maintained.
- Supplementation and/or changes to a witness statement may require additional investigation.



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Witness Statements

- When witnesses use only first names, last names, or nicknames, the investigator should question the witness and document in writing the full names of each individual.
- Using a copy of the witness statement to document additional information may be helpful.



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Witness Statements

- When a witnesses uses slang or describes events in a manner in which the meaning is not readily apparent, the investigator should question the witness and document any explanation.
- Using a copy of the witness statement to document any additional information may be helpful.



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# Witness Statements

- When witness statements must be redacted, the investigator must take care to preserve an un-redacted original.
- When multiple names must be redacted from the same statement, an individual specific "placeholder" or "code" should be inserted for clarity.

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# Witness Statements

- Example (Statement of Student A):
  - "I was walking to class with XXXX when XXXX and XXXX started yelling at us. XXXX then punched XXXX."
  - "I was walking to class with B when C and D started yelling at us. C then punched B."

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# Witness Statements

- When multiple witness statements reference the same event, the redaction codes should be standardized across all statements.
- Example (Statement of Student B):
  - "I was walking with A when C and D approached us. They yelled at us, and then C punched me."

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Witness Statements

- Gender specific pronouns may need to be redacted and replaced with "he/she".
- If redaction makes witness statements illegible, consider typing the statement.
- Typing witness statements may also be necessary if there are concerns regarding disclosing witness handwriting.

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Witness Statements

- If witness statements are typed, they should be reproduced verbatim.
  - Include profanity.
  - Include misspelling.
  - Include poor grammar.

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Witness Statements

- Witness statements are NOT a substitute for a thorough investigation, interview and/or detailed investigation notes.
- Witness statements may not be admissible in every setting and/or may require specific information to be included in the record (such as a legitimate concern of retaliation) before they can be used.

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## Conducting Interviews

- General Guidelines:
  - Have more than one administrator / investigator present during interviews if possible.
  - Consider whether additional individuals must or should be included in the interview (parents or union representation).


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## Conducting Interviews

- Conduct interviews as soon as possible after the event in question.
- If time permits, draft or outline questions in advance.
- If available, and if time permits, review security footage before the interview.


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## Conducting Interviews

- Interview the complaining party first.
- Interview each participant, victim and/or witness separately.
- Approach each interview individually.
  - Start from the beginning each time.
  - Do not assume facts disclosed in previous interviews.


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## Conducting Interviews

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- Interviews are part of the fact finding portion of an investigation, and should be separate from any meeting at which the student or employee is confronted with alleged misconduct and (at which they must be provided with any opportunity to respond to the charge).


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## Conducting Interviews

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- Do not disclose information obtained in separate interviews.
- If disclosure is necessary, disclose as little as possible.
- Start with broad questions and move to specific questions.


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## Conducting Interviews

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- Avoid hearsay.
- What does the witness "know" v. what do they have firsthand knowledge of?
- Focus on firsthand information.
- What did the witness see or hear?


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## Conducting Interviews

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- If the witness has secondhand information, allow them to present it, but determine who they received it from.
  - Including Facebook or social media.
- Avoid making assumptions.
- Ask follow-up questions.


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## Conducting Interviews

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- Slow and deliberate questions produce better information.
- Avoid being accusatory.
- Avoid anything that resembles an interview or interrogation from a TV drama.


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## Conducting Interviews

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- Know and respect the difference between an interview and a search.
- Students are subject to 4<sup>th</sup> Amendment protection from unreasonable searches.


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## Conducting Interviews

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- Take notes.
- Take Notes.
- TAKE NOTES.
- TAKE NOTES!



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## OTHER EVIDENTIARY ISSUES - PROOF

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## Hearsay

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- Out of court statement introduced to prove the truth of the matter asserted
  - Common Exceptions:
    - Records ordinarily kept in the course of business (regularly recorded activity)
    - Recorded recollection (made when fresh)
    - Excited utterance
    - Admission/statement against interest



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## Hearsay

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- Defeating hearsay
  - Make sure the witness is available to testify (to be cross examined)
    - Anonymous statements are not helpful, but are also not an excuse not to investigate.
  - Don't rely on a written statement.
  - Don't "coach" a witness statement –
    - Intervention must be exclusively to match what the witness said during initial questioning.



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## Hearsay

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- Defeating hearsay
  - Question all available witnesses – but introduce only those who can testify to *what happened* rather than what *they heard*
  - Don't "settle" for the first story you hear
    - Consistency counts



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## Data

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- Any investigation involving evidence collection from a data source will be complicated!
  - Sources of data
    - Phones
    - Computers
      - Home and work
      - Remote desktop or local?
    - Tablets/iPads
    - Game consoles



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## Data

2017

- Any investigation involving evidence collection from a data source will be complicated!
  - Sources of data
    - Passwords
      - How secure are they?
      - How do we know who was using the machine?
      - How do we prove possession, access, and intent?



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## Data

2017

- Any investigation involving evidence collection from a data source will be complicated!
  - Threats
    - ISP STIC
      - Illinois State Police State-Wide Terrorism Intelligence Center
    - Direct links to social media networks
      - Request must come through local police



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## Child Abuse/Neglect

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- DCFS Investigations
  - Mandatory report
    - Investigation is not a substitute for district action
    - Investigation does not necessarily dictate district action
    - Those questioned are entitled to representation – interviewee may request representation and must insist if they so-desire



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## Child Abuse/Neglect

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## Child Abuse/Neglect

- DCFS Investigations (325 ILCS 5/7)
  - Such investigations are required to take into account class schedules, and should be scheduled “in coordination” with the employee’s supervisor.
    - Schools may not retaliate based upon investigation
    - But should be aware that school standards are distinct – we need to be cooperative but not captive.


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## Examples

- A threat is made against a student on Facebook. The threat is specific, naming the student victim, and referencing the school. But the Facebook account is a fake, and does not lend sufficient evidence to identify who made the threat. Parents are upset and threatening to call their children off school.
  - What do you do?


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## Examples

2017

- A student fight occurs on school grounds. No teachers witness the fight, but two students are badly bruised, and one requires minor medical attention for two cuts on his face. There was a substantial scrum which was broken up by a police officer called to the scene by one of the students.
  - What do you do?



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## Examples

2017

- A DCFS investigator appears on school grounds and demands to speak to your teacher. You call the teacher down to the office. The teacher agrees to speak with the investigator – what do you do?



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## Examples

2017

- A parent complains that a child other than his own is harassing his son. Upon inquiry, the alleged victim child produces an alleged Instagram post, which reveals a manipulated picture of him. The Instagram post is under the name of another student in the school, and the time stamp reveals the post occurred during class.



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2017

STUDENT DISCIPLINE INVESTIGATIONS

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2017

Student Discipline – Due Process

- What is “Due Process?”

The conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, *including notice and the right to a fair hearing* before a tribunal with the power to decide the case.

- Black’s Law Dictionary



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Student Discipline – Due Process

- Sources of Due Process:
  - The “Due Process Clause” of the 5<sup>th</sup> and 14<sup>th</sup> Amendments
    - Applies when a deprivation of a significant life, liberty or *property* interest may occur.
  - The right to a public education has been consistently held to be a property interest.
- Due Process requirements are also found in 105 ILCS 5/10-22.6 of the Illinois School Code (Suspension or expulsion of pupils; school searches).



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## Student Discipline – Statutory Authority

2017

- The statutory authority to suspend or expel is found in Section 10-22.6 of the School Code, 105 ILCS 5/10-22.6.
- School boards have the power to:
  - Expel pupils guilty of gross disobedience or misconduct for up to 2 calendar years.
  - Suspend students for gross disobedience or misconduct for up to 10 school days
  - Suspend students from riding a school bus for more than 10 school days for safety reasons (where the event leading to the suspension took place on the school bus).
- \*\* With regard to suspension, school boards may authorize the Supt, Principal, Asst. Principal or Dean of Students to issue suspensions.
- \*\* **THE PROCEDURE AND REQUIREMENTS NECESSARY FOR SUSPENSIONS AND EXPULSION HAS CHANGED SIGNIFICANTLY WITH THE ADOPTION OF SB 100.**

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## Substantive v. Procedural Due Process

2017

- **Substantive due process = a fair result**
- **Procedural due process = a fair hearing**
- Historically, Illinois Courts have been reluctant to overturn school discipline decisions on substantive grounds.

School discipline is an area which courts enter with great hesitation and reluctance and rightly so. School officials are trained and paid to determine what form of punishment best addresses a particular student's transgressions. ***They are in a far better position than is a black-robed judge to decide what to do with a disobedient child at school.*** They can best determine, for instance, whether a suspension or an after-school detention will be more effective in correcting a student's behavior. Because of their expertise and their closeness to the situation and because we do not want them to fear court challenges to their every act school officials are given wide discretion in their disciplinary actions. *Wilson v. Hinsdale Elementary School District 181*, 349 Ill.App.3d at 248, citing *Donaldson*, 98 Ill.App.3d at 439; See also, *Lusk*, 149 Ill.App.3d at 426, citing *Donaldson* (citation omitted).

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## Student Discipline – Procedural Issues

2017

- Evidentiary Issues:
- Right to cross examination?
- Federal standard:
  - Coronado v. Valleyview Public School District* (7<sup>th</sup> Cir. 2008)
  - Due process does not require a "judicial or quasi-judicial trial with all of the features and safeguards thereof."
  - A student is entitled to notice and "a meaningful opportunity to be heard"

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## Student Discipline – Procedural Issues


2017

- Evidentiary Issues:
  - Right to cross examination?
    - Coronado argued that he was denied due process when he was denied the opportunity to cross examine witnesses. The 7<sup>th</sup> Circuit stated:
 

“Coronado provides no federal authority to support his proposition and the only circuit court to decided the question in the high-school context (that we have found) reached the opposite conclusion.”

The 7<sup>th</sup> Circuit further stated that the Illinois case on which Coronado relied (*Colquitt v. Rich Township High School*) was not binding upon the Federal Court.

*Colquitt* (an Illinois case) held that procedural due process required cross examination.



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## Student Discipline – Procedural Issues


2017

- Cross examination:
  - The *Coronado* case essentially trumps *Rich*'s holding that a student has a due process right to cross examination – in Federal Court.

HOWEVER

- A 2014 Illinois Appellate Court case, *Kimble v. Ill State Board of Ed.*, may have breathed new life into *Rich*.

“We must emphasize that, in the case at bar, a tenured teacher is being terminated from her employment of over 20 years based almost entirely on the hearsay statements of one student, who was not present at the hearing. There were no eyewitnesses to the alleged incidents, and the only other evidence of the incidents considered by the Board was two witnesses who observed the student entering a room quickly and wearing a wrinkled shirt, respectively; the teacher denies the conduct and testified to only taking the student's hand to remove him from the class line. While we have no way of knowing what actually occurred on October 28 and 30, 2008, it is simply unjust to terminate a tenured teacher's employment without giving her the opportunity to cross-examine her accuser, and we cannot find that such a procedure comports with due process.”



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## Student Discipline - Procedure

2017

- Cross examination:
  - The *Kimble* case involved cross examination in the context of a tenured teacher dismissal hearing, but the Court relied on, and cited to *Rich* (a student discipline case) for the proposition that the teacher was entitled to confront the witness.
  - Student discipline cases post *Kimble*?
  - School Districts must take care in student discipline cases that involve, or may involve, student witnesses.
    - Is the witness necessary?
    - Can the District prove its case with other evidence?
    - Is retaliation against the student witness a legitimate concern?



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Student Records

2017

- Illinois School Student Records Act. 105 ILCS 10/1 et seq.

"School Student Record" means any writing or other recorded information concerning a student and by which a student may be individually identified, maintained by a school or at its direction or by an employee of a school, regardless of how or where the information is stored. The following shall not be deemed school student records under this Act: writings or other recorded information maintained by an employee of a school or other person at the direction of a school for his or her exclusive use; provided that all such writings and other recorded information are destroyed not later than the student's graduation or permanent withdrawal from the school; and provided further that no such records or recorded information may be released or disclosed to any person except a person designated by the school as a substitute unless they are first incorporated in a school student record and made subject to all of the provisions of this Act. School student records shall not include information maintained by law enforcement professionals working in the school.



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Student Records

2017


- Illinois School Student Records Act. 105 ILCS 10/1 et seq.

Sec. 6. (a) No school student records or information contained therein may be released, transferred, disclosed or otherwise disseminated, except as follows:

(1) to a parent or student or person specifically designated as a representative by a parent, as provided in paragraph (a) of Section 5;

...

(5) pursuant to a court order, provided that the parent shall be given prompt written notice upon receipt of such order of the terms of the order, the nature and substance of the information proposed to be released in compliance with such order and an opportunity to inspect and copy the school student records and to challenge their contents pursuant to Section 7;



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Student Records

2017

- Illinois School Student Records Act. 105 ILCS 10/1 et seq.

(6.5) to juvenile authorities when necessary for the discharge of their official duties who request information prior to adjudication of the student and who certify in writing that the information will not be disclosed to any other party except as provided under law or order of court. For purposes of this Section "juvenile authorities" means: (i) a judge of the circuit court and members of the staff of the court designated by the judge; (ii) parties to the proceedings under the Juvenile Court Act of 1987 and their attorneys; (iii) probation officers and court appointed advocates for the juvenile authorized by the judge hearing the case; (iv) any individual, public or private agency having custody of the child pursuant to court order; (v) any individual, public or private agency providing education, medical or mental health service to the child when the requested information is needed to determine the appropriate service or treatment for the minor; (vi) any potential placement provider when such release is authorized by the court for the limited purpose of determining the appropriateness of the potential placement; (vii) law enforcement officers and prosecutors; (viii) adult and juvenile prisoner review boards; (ix) authorized military personnel; (x) individuals authorized by court;



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2017

BULLYING/  
HARASSMENT  
INVESTIGATIONS

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2017

Bullying/Harassment  
Investigations

■ A parent complains that a child other than his own is harassing his son. Upon inquiry, the alleged victim child produces an alleged Instagram post, which reveals a manipulated picture of him. The Instagram post is under the name of another student in the school, and the time stamp reveals the post occurred during class.

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Bullying/Harassment  
Investigations

**School Code Definitions of "Bullying," 105 ILCS 5/27-23.7(a)**

□ **Bullying** (includes cyber-bullying): any severe or pervasive physical or verbal act or conduct, including communications made in writing or electronically, directed toward a student or students that has or can be reasonably predicted to have the effect of one or more of the following:

- Placing the student or students in reasonable fear of harm to the student's or students' person or property;
- Causing a substantially detrimental effect on the student's or students' physical or mental health;
- Substantially interfering with the student's or students' academic performance; or
- Substantially interfering with the student's or students' ability to participate in or benefit from the services, activities, or privileges provided by a school.

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## Bullying/Harassment Investigations


2017

**School Code Definitions of "Cyber Bullying", 105 ILCS 5/27-23.7(a)**

■ **Cyber-Bullying:** bullying through the use of technology or any electronic communication, including – without limitation – any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic system, photoelectronic system, or photooptical system, including without limitation electronic mail, internet communications, instant messages, or facsimile communications.

■ Includes:

- The creation of a webpage or weblog in which the creator assumes the identity of another person or the knowing impersonation of another person as the author of posted content or messages if the creation or impersonation creates any of the effects enumerated in the definition of bullying.
- The distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more persons if the distribution or posting creates any of the effects enumerated in the definition on bullying.



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## Bullying/Harassment Investigations

2017

□ **Scope of the District's/School's Jurisdiction, 105 ILCS 5/27-23.7(d)**

■ The district's policy must include a process to investigate whether a reported act of bullying is within the scope of the district's or school's jurisdiction.



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## Bullying/Harassment Investigations

2017

■ The Illinois School Code states that a student shall not be subjected to bullying, 105 ILCS 5/27-23.7(a) :

- During any school-sponsored education program or activity;
- While in school, on school property, on school buses or other school vehicles, at designated school bus stops waiting for the school bus, or at school-sponsored or school-sanctioned events or activities;
- Through the transmission of information from a school computer, a school computer network, or other similar electronic school equipment; or
- Through the transmission of information from a computer that is accessed at a non-school-related location, activity, function, or program or from the use of technology or an electronic device that is not owned, leased, or used by a school district or school if the bullying causes a substantial disruption to the educational process or orderly operation of a school.

■ This only applies in cases in which a school administrator or teacher receives a report that bullying through this means has occurred. It does NOT require a district or school to staff or monitor any non-school-related activity, function or program.



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## Bullying/Harassment Investigations

2017

▣ According to OCR in a 2010 Dear Colleague Letter, these duties are a school's responsibility even if the misconduct also is covered by an anti-bullying policy, and regardless of whether a student has complained, asked the school to take action, or identified the harassment as a form of discrimination.



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## Bullying/Harassment Investigations

2017

*Over the course of a school year, school employees at a junior high school received reports of several incidents of anti-Semitic conduct at the school. Anti-Semitic graffiti, including swastikas, was scrawled on the stalls of the school bathroom. When custodians discovered the graffiti and reported it to school administrators, the administrators ordered the graffiti removed but took no further action. At the same school, a teacher caught two ninth-graders trying to force two seventh-graders to give them money. The ninth-graders told the seventh-graders, "You Jews have all of the money, give us some." When school administrators investigated the incident, they determined that the seventh-graders were not actually Jewish. The school suspended the perpetrators for a week because of the serious nature of their misconduct. After that incident, younger Jewish students started avoiding the school library and computer lab because they were located in the corridor housing the lockers of the ninth-graders. At the same school, a group of eighth-grade students repeatedly called a Jewish student "Drew the dirty Jew." The responsible eighth-graders were reprimanded for teasing the Jewish student.*



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## Bullying/Harassment Investigations

2017

In this example, school administrators should have recognized that the harassment was based on the students' actual or perceived shared ancestry or ethnic identity as Jews (rather than on the students' religious practices). The school was not relieved of its responsibilities under Title VI because the targets of one of the incidents were not actually Jewish. The harassment was still based on the perceived ancestry or ethnic characteristics of the targeted students. Furthermore, the harassment negatively affected the ability and willingness of Jewish students to participate fully in the school's education programs and activities (e.g., by causing some Jewish students to avoid the library and computer lab). Therefore, although the discipline that the school imposed on the perpetrators was an important part of the school's response, discipline alone was likely insufficient to remedy a hostile environment. Similarly, removing the graffiti, while a necessary and important step, did not fully satisfy the school's responsibilities. As discussed above, misconduct that is not directed at a particular student, like the graffiti in the bathroom, can still constitute discriminatory harassment and foster a hostile environment. Finally, the fact that school officials considered one of the incidents "teasing" is irrelevant for determining whether it contributed to a hostile environment.



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Bullying/Harassment Investigations

2017

Because the school failed to recognize that the incidents created a hostile environment, it addressed each only in isolation, and therefore failed to take prompt and effective steps reasonably calculated to end the harassment and prevent its recurrence. In addition to disciplining the perpetrators, remedial steps could have included counseling the perpetrators about the hurtful effect of their conduct, publicly labeling the incidents as anti-Semitic, reaffirming the school's policy against discrimination, and publicizing the means by which students may report harassment. Providing teachers with training to recognize and address anti-Semitic incidents also would have increased the effectiveness of the school's response. The school could also have created an age- appropriate program to educate its students about the history and dangers of anti- Semitism, and could have conducted outreach to involve parents and community groups in preventing future anti-Semitic harassment.

□ 2010 Dear Colleague Letter



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Bullying/Harassment Investigations

2017

□ **Investigating Bullying and Discriminatory Harassment:**

- When a district is investigating bullying and discriminatory harassment, it should:
  - Determine the facts
  - Apply the legal standard to the established facts
- During the pending investigation, consider implementing interim measures, if appropriate (separate classes, modified school day; counseling offer).
  - These measures should not be punitive to the victim.
  - If the district determines that interim measures are not appropriate, document which measures were considered and why they were not offered.



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Bullying/Harassment Investigations

2017

*Shelby County (TN) Schools*, 116 LRP 35864 (OCR 05/04/16): A teacher was alleged to have been abusing preschoolers with disabilities. Despite the TAs reporting this in early March 2013, the District did not investigate the allegations until April 4, 2013 after a staffer contacted family services.

OCR found that the District had failed to take adequate interim measures. OCR noted, "Despite the initial reports of physical abuse, the ... administrators allowed the accused Teacher and her alleged victims to remain in the same classroom for a month."



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## EMPLOYEE MISCONDUCT INVESTIGATION

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### Issues

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- Board policy
- Collective bargaining agreement
- Employee contract



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### Issues

2017

- Common (though perhaps ill-advised) contractual language:
  - Notice before investigative meeting
  - Agenda before investigative meeting
  - Representation at investigative meeting
  - Cause of investigative meeting
  - Witnesses or explanation at meeting
  - Deadline for report
    - JUST CAUSE underlying discipline or dismissal
  - Security camera footage use



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## Issues

2017

- **Miranda v. Arizona**, 384 U.S. 436 (1966).
  - During criminal investigation, the investigated party has the right to:
    - Counsel;
    - Not to incriminate himself; and
    - Be made aware that anything he says can (and will) be used against him
  - But, these rights do not necessarily apply to an employment investigation



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## Issues

2017

- **Garrity v. New Jersey**, 385 U.S. 493 (1967).
  - During employment investigation which may result in criminal prosecution, an employee has a right to representation, as well as a right against self-incrimination.
  - An employee has a right to be so-informed if the testimony is to be useful



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## Issues

2017

- **Garrity v. New Jersey**, 385 U.S. 493 (1967).
  - **FACTS**
    - (1) that anything he said might be used against him in any state criminal proceeding;
    - (2) that he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but
    - (3) that, if he refused to answer, he would be subject to removal from office.



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## Issues

2017

- **Garrity v. New Jersey**, 385 U.S. 493 (1967).
  - Further, the employee does not “waive” the right to union representation by not asking for it – it is the employer’s duty to provide
  - Choice between self-incrimination and dismissal is no-choice at all.
    - Where the choice is “between the rock and the whirlpool” (*Frost Trucking Co. v. Railroad Comm’r*, 271 U. S. 583, 271 U. S. 593), the decision to “waive” one or the other is made under duress. 385 U.S. at 498.


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## Issues

2017

- *National Labor Relations Board v. J. Weingarten, Inc.*, 420 US 251, 43 L Ed 2d 171, 95 S Ct 959 (1975)
  - If the employee reasonably believes he or she may be subject to discipline by the employer, the employee has right to representation by the union


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## Therefore...

2017

- Always afford an employee subject to investigation for misconduct the right to **union representation**.
- Always assure the union is present.
- Always distinguish between criminal investigations and those that are merely employment-related.
  - And be careful when questioning that you do not place an employee under duress with threats you cannot sustain with facts.


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## Criminal Process

2017

- Criminal procedure is slow and utilizes a different standard (beyond a reasonable doubt) than employment process
- Criminal authorities do not share their evidence
  - And a charge is **NOT a conviction**, and bears no relation to a conviction



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## Therefore...

2017

- Do not await criminal conviction as a substitute for employment process unless you have no other choice.
  - Independent evidence?
- If you must conduct an investigation which is contemporaneous with criminal investigation, be sure you do not **obstruct criminal process** – such obstruction may itself be criminal.



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## Therefore...

2017

- Upon report of potentially criminal misconduct, investigate what you can independently of the police, and remember your own standard.



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## Due process

2017

- What is at-will employment?
  - An employee is at-will if he has no reasonable expectation of continued employment
    - He is not at-will if, in light of the circumstances of his employment, he reasonably believes his employment will continue
  - At whose will?
    - If an employee has been employed for a long period of time, he is very unlikely to be "at will"
      - An employee with a reasonable expectation of employment is entitled to some level of due process



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## Due process

2017

- What is at-will employment?
  - The use of the arbitration procedure as a means of settling employment-related disputes **"necessarily alters the employment relationship from at-will to something else"**—some standard of discernable cause is inherently required in this context where an arbitration panel is called on to interpret the employment relationship"; *Shearson Hayden Stone, Inc. v. Liang*, 653 F.2d 310, 312–13 (7th Cir.1981)



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## Due process

2017

- What is at-will employment?
  - Harrisburg* (227 Ill.App.3d 208 (1992)) does not state, however, that an arbitrator is precluded from finding any standard for dismissal at all. Nor does *Harrisburg* state that an arbitrator must recognize that an employee is employed at-will even if doing so would render a portion of the collective-bargaining agreement meaningless. The arbitrator here declined to read a just-cause requirement into the parties' agreement in light of the relevant bargaining history but, instead, concluded that the District's decision to discharge [the employee] **was subject to a standard of arbitrariness**. This was entirely consistent with *Harrisburg*.



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## Due process

2017

- Standard
  - Proven to a preponderance of the evidence
    - Arbitrary and capricious?
      - "When a member of the bargaining unit is required to appear before the Board of Education concerning any disciplinary matter, **the staff member shall be given reasonable prior written notice of the reasons for such meeting** and shall be entitled to have a personal representative at said meeting, if so requested by employee." *Griggsville-Perry CUSD No. 4 v. IELRB*, 2013 IL 113721
    - Just cause?


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## Due process

2017

- Due process must be protected
  - Charges are not convictions, and investigations do not *suggest* misconduct
  - Any public statement must respect an employee's right to be heard
  - The level of due process necessary for discipline is related to the degree of action to be taken


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## Due process

2017

- Before an employee can be dismissed, he must:
  - notice of charges
  - opportunity to *be heard*
  - Cross *examine* witnesses
  - Right to attorney/*representation*


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## Examples

2017

- A student alleges the his medication, Adderall, has gone missing from his backpack. Review of security camera footage reveals a person too tall to be a student opening the backpack during the gap in time when the Adderall appears to have gone missing. Believing the suspect to be the aide, you question the teacher to confirm whether the aide was in the room. You ask only whether the aide was present and in the room last Wednesday during lunch, and the teacher responds "I don't know anything about any Adderall."
- The union complains you didn't have the union rep present, and that contract says you cannot use the camera for evaluative purpose.



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## Examples

2017

- Police officer arrives and declares he is seizing your computer. He tells you he cannot explain what is happening, but that there has been an allegation of felonious activity by an employee of yours.
- What do you do?



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## Examples

2017

- During an investigation into sick leave abuse, you seek a doctor's note on the first day an employee is gone. She responds she doesn't have to give you one, because this is the first day she's utilized sick leave this year, and it was one day. You point to the contract, which requires a sick leave note before an employee returns to work.



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2017

THE WRITTEN INVESTIGATION REPORT

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Writing the Investigation Report

2017

1. Documentation of an investigation is very important because it is often the only contemporaneous evidence of the allegations, the knowledge and credibility of witnesses, and the employer's efforts to remedy the problem. Memories fade and/or recollections become very self-serving. Protect yourself and the District.



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Writing the Investigation Report

2017

2. Include information about what prompted the investigation and how the complaint/conduct become known.

3. Include information about who was interviewed.

4. Outline each allegation investigated, relevant facts, your analysis of the facts and the conclusion(s) reached.



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Writing the Investigation Report

2017

5. Consider how best to include the recommendations in the report, consistent with policy.

6. The school administrator may incorporate the investigation conclusions and/or information obtained during the investigation into the employee's performance evaluation, if appropriate.


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Writing the Investigation Report

2017

**REVIEWING THE INVESTIGATION RESULTS**

The investigator can, and usually should, share the final results of the investigation with the parties (administration, accused and complainant).

The investigator should make certain that the parties understand everything that was done, why it was done and how the investigator reached his/her conclusions. Because it is a "personnel matter," does not mean that you cannot keep the parents appropriately informed.


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Writing the Investigation Report

2017

**REVIEWING THE INVESTIGATION RESULTS**

Pay close attention to the timelines in your Uniform Grievance Procedure (2:260) and related administrative procedures.

Also, be sure to make a finding in the report as to whether sufficient evidence exists for a violation of policy. OCR suggest a "preponderance of the evidence" standard.


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Writing the Investigation Report

2017

**CONFIDENTIALITY ISSUES**

- Never promise complete confidentiality to a witness or alleged victim, because it may not be possible to make good on that promise.
- Only share information and the final report with those who truly have a legitimate "need to know."
- Admonish participants not to discuss the investigation or underlying incident with others.
- If your conclusion is that the complaint was unsubstantiated or that you cannot make a conclusive determination, place the investigation report in sealed envelope in employee's file. Thereafter, watch for patterns of behavior!
- After the investigation is complete, the District may want to consult with legal counsel to determine what, if any, action should be taken.


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Writing the Investigation Report

2017

**CONFIDENTIALITY ISSUES**

*Letter to Soukup, 115 LRP 18668 (FPCO 02/09/15).* According to the Family Policy Compliance Office, FERPA does not conflict with Title IX's "notice of outcome" requirements. While FERPA generally prohibits a district from disclosing students' personally identifiable information to third parties without parental consent, there's an exception to this rule in cases involving unlawful discriminatory harassment. According to FPCO, a district may inform the parents of a harassment victim of the disciplinary sanction imposed on the perpetrators of the harassment when that sanction directly relates to the victim. An example of this would be "an order that the harasser stay away from the harassed student." However, districts should note that the disclosure of sanctions that do not relate to the harassment victim may constitute a FERPA violation.


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Writing the Investigation Report

2017

**CONFIDENTIALITY ISSUES**

*Letter to Anonymous, 20 FAB 7 (FPCO 2016).* FPCO advised a district to consider informing all appropriate district officials of FERPA's consent requirements as they pertain to information about bullying incidents at school. Generally, they should avoid answering a parent's question about another student at school when the information sought could be part of that student's education records. Here, a principal allegedly disclosed protected information about a student's involvement in a bullying incident when talking to the parent of another student on the phone. The principal could have avoided the alleged violation by declining to respond to questions about other students' education records.


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## Why Do We Investigate?

**Goals for Your Investigation:**

- ❖ Determine whether undesirable conduct took place
- ❖ Determine what occurred, and how
- ❖ Identify the person(s) responsible for the undesirable conduct
- ❖ Change that conduct
- ❖ Support the imposition of consequences (discipline), when appropriate, for undesirable conduct
- ❖ Solve this problem before being tackled by the next problem

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**THANK YOU!**

**QUESTION & ANSWER  
PANEL DISCUSSION  
TO FOLLOW LUNCH**

2017 Brandon K. Wright, Luke M. Feeney, David J. Braun, and  
Christine G. Christensen

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Thank You for Joining Us! It is our pleasure  
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316 S. Charter St.  
P.O. Box 80  
Monticello, IL 61856  
(217)-762-9416  
www.millertracy.com

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