MILLER, TRACY, BRAUN, FUNK & MILLER, LTD. presents

SCHOOL LAW UPDATE:

How to Conduct An Investigation

April 4, 2017

2017 Annual MTBF&M Firm Workshop

Pear Tree Estate

Champaign, IL

Presenters:

Brandon K. Wright
bwright@millertracy.com

Luke M. Feeney
lfeeney@millertracy.com

David J. Braun
dbraun@millertracy.com

Christine G. Christensen
cchristensen@millertracy.com

MBF&MT
EST. 1975

MILLER, TRACY, BRAUN, FUNK & MILLER, LTD.
316 S. Charter, PO Box 80
Monticello, IL 61856
(217) 762-9416

www.millertracy.com

HOW TO CONDUCT AN INVESTIGATION

I. GENERAL ADVICE REGARDING INVESTIGATIVE PROCESS

1. **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.

2. **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.

3. **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).

4. **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.

5. **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.

6. **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 that contains the following information:

     - Name of person completing written statement (printed).
     - Name of alleged offender.
     - Date/time report is being made.
     - Date/time/location of incident being reported.
     - Names of witnesses to alleged misconduct.
     - The individual's signature.
     - For each separate incident, the form should request that the individual answer the "who, what, where, when, why and how" questions. (i.e. Who was present, who was involved in incident, what occurred, where did the incident occur, when

did the incident occur, why did it occur (if known), how did each participant act/react).

7. **Written Statements Must Be Legible.** Ensure that written statements are type-written or legible if hand-written. DO NOT allow pencils to be used; a black or blue pen should be used whenever possible.

8. **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.

9. **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.

10. **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?).

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

Who Should Investigate? and Other Pre-Investigation Considerations

I. 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).

II. 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.

III. 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.
- 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.

- 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.

IV. 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.

V. 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.

Relevant Case Law
Beckwith v. District of Columbia, 68 IDELR 155 (D.D.C. 2016): The court found a denial of FAPE when the district repeatedly failed to follow its own established policies and procedures regarding the use of restraint. The district restrained a 9-year-old at least six times, failed to contact the parent within one hour of restraining the student, failed to give the parent a written report of restraint within one school day, and failed to convene an IEP meeting within five days of each incident. Also, the parent often learned about the incidents from the student after she returned home. The District did convene an IEP meeting after the sixth restraint, but failed to include the staff members who restrained the student

(another component of the district's policy). Ultimately, the court determined that the district's repeated failure to follow its own policies and procedures impeded the parent's participation in the IEP decision-making process and thereby resulted in a denial of FAPE.

- 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.

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.
- 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.

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.

HANDLING WITNESS STATEMENTS AND CONDUCTING INTERVIEWS

Witness Statements: General Guide

1. 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 content or wording.

2. Witness statements must be legible (allowing the witness to type their statement may be preferable in certain cases).

3. Statements should be signed and dated by the witness.

4. Ideally, witness statements should be given as close to the event in question as possible.

5. The time duration between the event in question and the witness statement should be noted in the investigation notes.

6. The investigator should note when and where the statement was given and who was present.

7. The investigator should note whether witnesses had an opportunity to discuss events among themselves before giving statements.

8. Witnesses should be allowed to supplement or change their statement upon request. Copies of both the "before" and "after" version of the statement should be maintained. Supplementation and/or changes may require additional investigation.

9. 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).

10. When a witness 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 additional information may be helpful).

11. When witness statements must be redacted, the investigator must take care to preserve an un-redacted original.

12. When multiple names must be redacted from the same statement, an individual specific "placeholder" or "code" should be inserted for clarity.

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

13. 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."

14. Gender specific pronouns may need to be redacted and replaced with "he/she".

15. If redaction makes witness statements illegible, consider typing the statement. Typing a witness statement may also be used if there is a concern regarding disclosing witness handwriting.

16. If witness statements are typed, they should be recreated verbatim (including profanity and any spelling and/or grammatical errors).

17. Witness statements are NOT a substitute for a thorough investigation, interview and/or detailed investigation notes

Conducting Interviews: General Guide

18. Have more than one administrator/investigator present during interviews, if possible.

19. Consider whether additional individuals must or should be included in the interview (parents or union representation).

20. Conduct interviews as soon as possible after the event in question.

21. If time permits, draft or outline questions in advance.

22. If available, and if time permits, review security footage before the interview.

23. Interview the complaining party first.

24. Interview each participant, victim and/or witness separately.

25. Separate investigation interviews from any meeting at which the student or employee is confronted with alleged misconduct (at which they must be provided with any opportunity to respond to the charge).

26. Approach each interview individually (i.e. – start from the beginning each time, do not assume facts disclosed in previous interviews).

27. Do not disclose information obtained in separate interviews.

28. Start with broad questions, then move to more specific questions.

29. Request documentation.

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

31. If the witness has secondhand information allow them to present it, but determine who they received it from (including Facebook).

32. Avoid making assumptions, ask follow-up questions.

33. Slow and deliberate questions generally produce better information than accusatory questioning (avoid anything that resembles an interview from a tv drama).

34. details. Details. DETAILS!

35. take notes. Take notes. Take Notes. TAKE NOTES!

36. Know and respect the difference between an interview and a search.

Other Evidence Issues and Issues of Proof

Dealing with Allegations of Abuse or Neglect of a Child

Reports of child abuse or neglect are outside the jurisdiction of the school. The school district is staffed with mandated reporters, who are obligated under threat of criminal penalty to report good faith suspicions of abuse or neglect to the Illinois Department of Children and Family Services. Such reports, made in good faith, are protected from liability for the employee:

> Any person, institution or agency, under this Act, participating in good faith in the making of a report or referral, or in the investigation of such a report or referral or in the taking of photographs and x-rays or in the retaining a child in temporary protective custody or in making a disclosure of information concerning reports of child abuse and neglect …, as it relates to disclosure by school personnel and except in cases of wilful or wanton misconduct, shall have immunity from any liability, civil, criminal or that otherwise might result by reason of such actions. For the purpose of any proceedings, civil or criminal, the good faith of any persons required to report or refer, or permitted to report, cases of suspected child abuse or neglect or permitted to refer individuals under this Act or required to disclose information concerning reports of child abuse and neglect …., shall be presumed. For purposes of this Section "child abuse and neglect" includes abuse or neglect of an adult resident as defined in this Act.

325 ILCS 5/9. Indeed, employers are prohibited from discriminating against employees who make good faith reports, even where the employer is forced to defend a resulting action by a person so reported against.

> No employer shall discharge, demote or suspend, or threaten to discharge, demote or suspend, or in any manner discriminate against any employee who makes any good faith oral or written report of suspected child abuse or neglect, **or who is or will be a witness or testify** in any investigation or proceeding concerning a

> report of suspected child abuse or neglect. For purposes of this Section "child abuse or neglect" includes abuse or neglect of an adult resident as defined in this Act.

325 ILCS 5/9.1. Even still, making a report does not prohibit the employer from conducting its own investigation unless such investigation will interfere with an ongoing criminal process or otherwise obstruct justice. Once a report is made, the employer may begin its own investigation where the accused may be an employee of the school, but should proceed cautiously. The risk of an allegation of interference with a criminal investigation is real and should be taken seriously. Before you begin investigating, be sure and protect those who will investigate by obtaining appropriate permissions and approval.

Once the Illinois Department of Children and Family Services ("DCFS") begins its investigation, the school district retains some rights.

> (c) In an investigation of a report of suspected abuse or neglect of a child by a school employee at a school or on school grounds, the Department shall make reasonable efforts to follow the following procedures:
>
> (1) Investigations involving teachers shall not, to the extent possible, be conducted when the teacher is scheduled to conduct classes. Investigations involving other school employees shall be conducted so as to minimize disruption of the school day. <u>The school employee accused of child abuse or neglect may have his superior, his association or union representative and his attorney present at any interview or meeting at which the teacher or administrator is present.</u> The accused school employee shall be informed by a representative of the Department, at any interview or meeting, of the accused school employee's due process rights and of the steps in the investigation process. The information shall include, but need not necessarily be limited to the right, subject to the approval of the Department, of the school employee to confront the accuser, if the accuser is 14 years of age or older, or the right to review the specific allegations

which gave rise to the investigation, and the right to review all materials and evidence that have been submitted to the Department in support of the allegation. These due process rights shall also include the right of the school employee to present countervailing evidence regarding the accusations.

(2) If a report of neglect or abuse of a child by a teacher or administrator does not involve allegations of sexual abuse or extreme physical abuse, the Child Protective Service Unit shall make reasonable efforts to conduct the initial investigation in coordination with the employee's supervisor.…

(3) If a report of neglect or abuse of a child by a teacher or administrator involves an allegation of sexual abuse or extreme physical abuse, the Child Protective Unit shall commence an investigation….

325 ILCS 5/7. The school district should be aware that when an investigator shows up, the district is obligated to comply with the investigation. Moreover, making nice with the first person to review the facts is advisable. Even still, both an affected employee and the school district retain certain rights. The school district has the right to counsel on its behalf, as does an employee. While honesty is both advised and required, no one must violate his or her rights against self-incrimination. Where a DCFS investigator seeks to assert his or her authority to investigate, the school district is well advised to be both cooperative and cautious – the complications created by the results of a DCFS investigation are best handled prospectively and with complete information for the protection of children.

Data investigations

With the speed and thoroughness of data transmission and retention, it is critically important that school districts understand the complication involved in technology-based investigations.

Before beginning any investigation rooted in a computer or other device, make sure that you understand the complication involved and be sure that you are prepared for the risks of finding evidence outside the initial scope of the investigation.

When you begin a data-based investigation, several issues will persist:

1. **Who: Who created the relevant information?** Account access data is not enough – you'll need to know who has what password, whose passwords are compromised, and how good those passwords are. Context counts, and you will have no certainty of facts until you have certainty about their inception.
2. **What: What is the purpose of relevant information?** When you see a post on Facebook, a tweet, or a piece of data in software, finding out where it came from is only half the battle. Once you have established a single person capable of creating data and liable for the creation of that data, you have to establish what the data means, and why it was created.
3. **How: Once you have a suspect and context, how do you prove the data created?** Data on computers and the internet is incredibly difficult to track – just because data appears does not mean that it is in the place or created in the way alleged. It is imperative during investigation that the investigator have a comprehensive understanding of where the information came from and how its genesis is proven.
4. **When: When was the data created?** How will you defeat arguments that the person you believe has created data could not have done so? How do you prove the person was in a place to create the data at a time, date, and place you have proven they created it?
5. **Where: How do you prove the evidence is both original and comprehensive?** Once the matter is completely understood, a good hearing will require the presentation of the data and its path in a thorough matter that respects chain of custody and objective truth. How do you prove that the data as originally created is the same as has been researched and recorded? Further, once accessed, data is,

by its nature, changed. Therefore, every access to data brings about the potential for alteration of its inception and identification.

Remember that any investigation, predicated upon probable cause (or reasonable suspicion if conducted by administrators seeking information about a student), must be reasonable in scope at its inception, and reasonably calculated to identify the target. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). Therefore, when investigations begin, they should be limited to the scope reasonably necessary to identify the target of the investigation, and as limited as possible so as to not be excessively intrusive to the privacy of the suspect involved.

Every school district beginning an investigation should be aware that proof in matters regarding data may be very complicated. In an environment where passwords are weak, devices are shared, and data can be faked and planted, a good, comprehensive and well-planned investigation is critical. Discovering the genesis of data is important, and understanding what it means (and its limitations) is equally important. Therefore, high standards of proof that a person is "behind the keyboard" or "at the phone" are part and parcel to the outcome of a good investigation.

Finally, administrators and teachers should never search the contents of a cell phone (particularly a student cell phone) without assistance. If the search turns up child sexual content, the risk of possession of child pornography is exceptional – and while the police have an investigative exception, no such protection is afforded employees of a school district conducting an investigation.

Media

Sometimes, the media will get wind of an investigation and seek comment from the school district about it. The school district should resist opportunities to discuss an ongoing investigation publicly – by making the process or findings public before the investigation has reached a conclusion, the school district will both undermine its ability to find truth and undermine its ability to protect fairness for those affected by the investigative findings.

When a statement to the media becomes a necessity, the school district should observe the following:

1. To the extent possible, be positive about those conducting and assisting the investigation, including law enforcement, investigative authorities, and school staff members.

2. Resist suggestion of investigative outcomes. Reassure stakeholders that school authorities are active and have control of the situation.

3. Protect due process. Don't suggest guilt or innocence of any individual or individuals before the board has had an opportunity to review the facts in an unbiased hearing.

4. Be practical. Anything you say can and will be used against you – be a calming influence, wherever possible – focus on the need for clear communication rather than the need for perfect transparency.

10 Best Practice Tips

Collecting evidence in an unbiased and comprehensive manner is important. It is critically important to good investigative outcomes to be able to prove the truth of the matter you will assert as the result of the investigation. Therefore, observe the following:

- **Be thorough**. Truth matters, and facts must guide your investigation. Truth is only obtained after thorough questioning and examination of the facts.

- **Be quiet**. To the extent it's possible, keep your investigation under the radar. When investigations become public, politics tend to guide outcomes, and witnesses become reluctant or unreliable.

- **Be emotionless.** It's very easy to identify wrongdoing and get mad about it or to make "right" and "wrong" judgments. Step back, take a deep breath and start again with a clean canvas. Your job is to determine what happened. Leave the judgments to higher powers.

- **Slow down.** Speed is critical only if the employee being investigated presents an immediate threat to the school community; "thorough" means interviewing every witness who may have additional information.

- **Prepare**. Know what you know and what you need to know before you walk into an interview. Consider whether or not the person you are interviewing might be accused. If so, do not conduct the interview until all others have been completed. Complainants should be the first interviewees. Any potential suspects should be the last interviews conducted.

- **Don't lead.** Ask open-ended questions, not ones that beg a conclusion. Begin with "Did you see anything I should know about yesterday afternoon?" rather than "Did you see Mary leave early yesterday afternoon?"

- **Collect and *preserve* documents.**
    - Get screen shots of documents stored on district computers.
    - Do not search phones or persons without first seeking help.

- **Document**. Keep track of everything you do by event (what occurred) and by time (when it occurred). Keep track of who witnessed what, and what was said.

- **Don't use written statements as a substitute for facts.** Witness statements are not a substitute for careful information gathering. Be aware that witness statements are gathered only after thorough questioning and then guided - to be sure the statement matches the interview response.

- **Be independent.** If you feel that your investigation is compromised either by politics or your personal relationships, seek additional unbiased help.

ISSUES RELATED TO STUDENT DISCIPLINE INVESTIGATIONS

Abused and Neglected Child Reporting Act: 325 ILCS 5/1 et seq.

Sec. 3. As used in this Act unless the context otherwise requires:

"Blatant disregard" means an incident where the real, significant, and imminent risk of harm would be so obvious to a reasonable parent or caretaker that it is unlikely that a reasonable parent or caretaker would have exposed the child to the danger without exercising precautionary measures to protect the child from harm. With respect to a person working at an agency in his or her professional capacity with a child or adult resident, "blatant disregard" includes a failure by the person to perform job responsibilities intended to protect the child's or adult resident's health, physical well-being, or welfare, and, when viewed in light of the surrounding circumstances, evidence exists that would cause a reasonable person to believe that the child was neglected. With respect to an agency, "blatant disregard" includes a failure to implement practices that ensure the health, physical well-being, or welfare of the children and adult residents residing in the facility. …

"Child" means any person under the age of 18 years, unless legally emancipated by reason of marriage or entry into a branch of the United States armed services. …

"Abused child" means a child whose parent or immediate family member, or any person responsible for the child's welfare, or any individual residing in the same home as the child, or a paramour of the child's parent:

(a) inflicts, causes to be inflicted, or allows to be inflicted upon such child physical injury, by other than accidental means, which causes death, disfigurement, impairment of physical or emotional health, or loss or impairment of any bodily function;

(b) creates a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death, disfigurement, impairment of physical or emotional health, or loss or impairment of any bodily function;

(c) commits or allows to be committed any sex offense against such child, as such sex offenses are defined in the Criminal Code of 2012 or in the Wrongs to Children Act, and extending those definitions of sex offenses to include children under 18 years of age;

(d) commits or allows to be committed an act or acts of torture upon such child;

(e) inflicts excessive corporal punishment or, in the case of a person working for an agency who is prohibited from using corporal punishment, inflicts corporal punishment upon a child or adult resident with whom the person is working in his or her professional capacity;

(f) commits or allows to be committed the offense of female genital mutilation, as defined in Section 12-34 of the Criminal Code of 2012, against the child;

(g) causes to be sold, transferred, distributed, or given to such child under 18 years of age, a controlled substance as defined in Section 102 of the Illinois Controlled Substances Act in violation of Article IV of the Illinois Controlled Substances Act or in violation of the Methamphetamine Control and Community Protection Act, except for controlled substances that are prescribed in accordance with Article III of the Illinois Controlled Substances Act and are dispensed to such child in a manner that substantially complies with the prescription; or

(h) commits or allows to be committed the offense of involuntary servitude, involuntary sexual servitude of a minor, or trafficking in

persons as defined in Section 10-9 of the Criminal Code of 2012 against the child.

A child shall not be considered abused for the sole reason that the child has been relinquished in accordance with the Abandoned Newborn Infant Protection Act.

…

"Neglected child" means any child who is not receiving the proper or necessary nourishment or medically indicated treatment including food or care not provided solely on the basis of the present or anticipated mental or physical impairment as determined by a physician acting alone or in consultation with other physicians or otherwise is not receiving the proper or necessary support or medical or other remedial care recognized under State law as necessary for a child's well-being, or other care necessary for his or her well-being, including adequate food, clothing and shelter; or who is subjected to an environment which is injurious insofar as (i) the child's environment creates a likelihood of harm to the child's health, physical well-being, or welfare and (ii) the likely harm to the child is the result of a blatant disregard of parent, caretaker, or agency responsibilities; or who is abandoned by his or her parents or other person responsible for the child's welfare without a proper plan of care; or who has been provided with interim crisis intervention services under Section 3-5 of the Juvenile Court Act of 1987 and whose parent, guardian, or custodian refuses to permit the child to return home and no other living arrangement agreeable to the parent, guardian, or custodian can be made, and the parent, guardian, or custodian has not made any other appropriate living arrangement for the child; or who is a newborn infant whose blood, urine, or meconium contains any amount of a controlled substance as defined in subsection (f) of Section 102 of the Illinois Controlled Substances Act or a metabolite thereof, with the exception of a controlled substance or metabolite thereof whose presence in the newborn infant is the result of medical treatment administered to the mother or the newborn infant. A child shall not be considered neglected for the sole reason that the child's parent or other person responsible for his or her welfare has left the child

in the care of an adult relative for any period of time. A child shall not be considered neglected for the sole reason that the child has been relinquished in accordance with the Abandoned Newborn Infant Protection Act. A child shall not be considered neglected or abused for the sole reason that such child's parent or other person responsible for his or her welfare depends upon spiritual means through prayer alone for the treatment or cure of disease or remedial care as provided under Section 4 of this Act. A child shall not be considered neglected or abused solely because the child is not attending school in accordance with the requirements of Article 26 of The School Code, as amended.

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

Sec. 2. As used in this Act,

(d) "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.

(e) "Student Permanent Record" means the minimum personal information necessary to a school in the education of the student and contained in a school student record. Such information may include the student's name, birth date, address, grades and grade level, parents' names and addresses, attendance records, and such other entries as the State Board may require or authorize.

(f) "Student Temporary Record" means all information contained in a school student record but not contained in the student permanent record. Such information may include family background information, intelligence test scores, aptitude test scores, psychological and personality test results, teacher evaluations, and other information of clear relevance to the education of the student, all subject to regulations of the State Board. The information shall include information provided under Section 8.6 of the Abused and Neglected Child Reporting Act. In addition, the student temporary record shall include information regarding serious disciplinary infractions that resulted in expulsion, suspension, or the imposition of punishment or sanction. For purposes of this provision, serious disciplinary infractions means: infractions involving drugs, weapons, or bodily harm to another.

…

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;

(2) to an employee or official of the school or school district or State Board with current demonstrable educational or administrative interest in the student, in furtherance of such interest;

(3) to the official records custodian of another school within Illinois or an official with similar responsibilities of a school outside Illinois, in which the student has enrolled, or intends to enroll, upon the request of such official or student;

(4) to any person for the purpose of research, statistical reporting, or planning, provided that such research, statistical reporting, or planning is

permissible under and undertaken in accordance with the federal Family Educational Rights and Privacy Act (20 U.S.C. 1232g);

(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;

(6) to any person as specifically required by State or federal law;

(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;

(7) subject to regulations of the State Board, in connection with an emergency, to appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons;

(8) to any person, with the prior specific dated written consent of the parent designating the person to whom the records may be released, provided that at the time any such consent is requested or obtained, the parent shall be advised in writing that he has the right to inspect and copy such records in accordance with Section 5, to challenge their contents in accordance with Section 7 and to limit any such consent to designated records or designated portions of the information contained therein;

(9) to a governmental agency, or social service agency contracted by a governmental agency, in furtherance of an investigation of a student's school attendance pursuant to the compulsory student attendance laws of this State, provided that the records are released to the employee or agent designated by the agency;

(b) No information may be released pursuant to subparagraph (3) or (6) of paragraph (a) of this Section 6 unless the parent receives prior written notice of the nature and substance of the information proposed to be released, and an opportunity to inspect and copy such records in accordance with Section 5 and to challenge their contents in accordance with Section 7. Provided, however, that such notice shall be sufficient if published in a local newspaper of general circulation or other publication directed generally to the parents involved where the proposed release of information is pursuant to subparagraph (6) of paragraph (a) of this Section 6 and relates to more than 25 students.

(c) A record of any release of information pursuant to this Section must be made and kept as a part of the school student record and subject to the access granted by Section 5. Such record of release shall be maintained for the life of the school student records and shall be available only to the parent and the official records custodian. Each record of release shall also include:

(1) the nature and substance of the information released;

(2) the name and signature of the official records custodian releasing such information;

(3) the name of the person requesting such information, the capacity in which such a request has been made, and the purpose of such request;

(4) the date of the release; and
(5) a copy of any consent to such release.

(d) Except for the student and his parents, no person to whom information is released pursuant to this Section and no person specifically designated as a representative by a parent may permit any other person to have access to such information without a prior consent of the parent obtained in accordance with the requirements of subparagraph (8) of paragraph (a) of this Section.

(e) Nothing contained in this Act shall prohibit the publication of student directories which list student names, addresses and other identifying information and similar publications which comply with regulations issued by the State Board.

Bullying and Harassment Investigations

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

The Illinois School Code defines "bullying" and "cyber bullying" as such:

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

b. **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.
    i. Includes:
        1. 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.

2. 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.

II. 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.

a. The Illinois School Code states that a student shall not be subjected to bullying, 105 ILCS 5/27-23.7(a) :
    i. During any school-sponsored education program or activity;
    ii. 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;
    iii. Through the transmission of information from a school computer, a school computer network, or other similar electronic school equipment; or
    iv. 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.
        1. *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.*

III. Bullying Investigation, 105 ILCS 5/27-23.7(b)

The Illinois School Code requires each school district, charter school, and non-public, non-sectarian elementary or secondary school to promptly investigate and address reports of bullying by:

a. Making all reasonable efforts to complete the investigation within ten (10) school days after the date the report of the incident of bullying was received and taking into consideration additional relevant information received during the course of the investigation about the reported incident of bullying;
b. Involving appropriate school support personnel and other staff persons with knowledge, experience, and training on bullying prevention in the investigation process;
c. Notifying the principal or school administrator or his/her designee of the report of the incident of bullying as soon as possible after the report is received;
d. Consistent with federal and state laws and rules governing student privacy rights, providing parents and guardians of the students who are parties to the investigation information about the investigation and an opportunity to meet with the principal or school administrator or his/her designee to discuss the investigation, the findings of the investigation, and the actions taken to address the reported incident of bullying.

Harassment Investigation:

I. What Conduct Amounts to Discriminatory Harassment?

"**Harassment**" is unwelcome conduct, whether verbal or physical, that is based on: race, color, national origin, sex, sexual orientation, religion, or disability that creates a hostile school environment.

a. Examples of harassment include:
    i. Display or circulation of written materials or pictures;
    ii. Verbal abuse or insults (slurs, inappropriate comments, stereotyping conduct); or
    iii. Actions or speech (threats, physical assault, etc).
b. A hostile environment is created when the harassing conduct is sufficiently:
    i. Severe,
    ii. Pervasive, or

iii. Persistent
iv. Such that it denies or limits the ability of an individual to participate in or benefit from the services, activities or privileges provided by the school.

c. *Generally, the more severe the conduct, the less necessary to show repeated incidents to in order for the conduct to be considered harassment.*

Hostile Environment: Factors to Consider	
• Context • Nature (physical or verbal) • Scope • Frequency • Duration • Location of incidents	• Identity, number, and relationships of persons involved • Particularized characteristics • Incidents outside of the complaint

II. Investigation of Alleged Harassment

A school is responsible for addressing harassment incidents about which it knows or reasonably should have known.

a. Once a school has notice of alleged harassment, it must take immediate and appropriate steps to investigate what occurred.
b. If an investigation reveals that discriminatory harassment has occurred, a school must take prompt and effective steps reasonably calculated to end any harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.
    i. Appropriate steps to end harassment may include separating the accused harasser and the target, providing counseling for the target and/or harasser, or taking disciplinary action against the harasser.
        - These steps should not penalize the student who was harassed.
    ii. A school should take steps to stop further harassment by: making sure the harassed students and their families know how to report any subsequent problems, conducting follow-up inquiries to see if there have been any new incidents or any instances of retaliation, and responding promptly and appropriately to address continuing or new problems.

c. 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.

OCR Discriminatory Harassment Hypothetical
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. The school administrators failed to recognize that anti-Semitic harassment can trigger responsibilities under Title VI. While Title VI does not cover discrimination based solely on religion, groups that face discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics may not be denied protection under Title VI on the ground that they also share a common faith. These principles apply not just to Jewish students, but also to students from any discrete religious group that shares, or is perceived to share, ancestry or ethnic characteristics (e.g., Muslims or Sikhs). Thus, harassment against students who are members of any religious group triggers a school's Title VI responsibilities when the harassment is based on the group's actual or perceived shared ancestry or ethnic characteristics, rather than solely on its members' religious practices. A school also has responsibilities under Title VI when its students are harassed based on their actual or perceived citizenship or residency in a country whose residents share a dominant religion or a distinct religious identity.

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.

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.

Dear Colleague Letter – October 26, 2010

III. 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.

Relevant OCR Finding
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."

Employee Discipline Investigations

Complying with policy

When beginning an investigation into employee misconduct, some of the most important issues that predominate will revolve around the board's policy and any relevant collective bargaining agreements. Often collective bargaining agreements have language regarding the rights of employees during an investigation. Somewhat common (though not advisable) language includes limitations on meeting with an employee, such as:

1. Notice – an employee must be given so many hours or days of notice before you can meet with them;
2. Agenda – the employee must be given notice of the "plan" for the meeting;
3. Cause – the employee must be given notice of the facts underlying the request;
4. Witness – the employee has the right to certain witnesses or recordings during the meeting.

It is important to good investigation that the employer observe the requirements of the contract and board policy on investigation. If the employer fails to observe the contractual requirements, the failure may undermine the ultimate disciplinary response – and nothing is worse than having a certain investigative result undermined by a failure of *de minimis* contract compliance.

Union involvement

Much more common in collective bargaining agreements is language requiring the presence of the union during such investigations. Regardless of whether or not such language exists, an employer should always invite the union to any and all investigative meetings during which the interviewee is a suspect whose employment may be jeopardized by discipline or dismissal. While the union is not present to answer questions (the interviewee is), failure to invite the union to protect the employee's rights may be a fatal procedural error undermining or terminating the ultimate disciplinary response of the employer. *National Labor*

Relations Board v. J. Weingarten, Inc., 420 US 251, 43 L Ed 2d 171, 95 S Ct 959 (1975) (holding that a union member has the right to representation by the union during any questioning which the employee reasonably believes may result in discipline). It is incumbent upon the employer to notify the employee that they have the right to such union representation when discipline may result. *Id*.

But what happens when there is criminal misconduct involved? Criminality and the jurisdiction of the policy does not estop a school district from investigating misconduct. However, employers are well-advised, when conducting investigations which may have criminal conduct involved, to carefully observe the distinction between criminal rights and employment rights.

While an employee probably does not have the right against self-incrimination in the context of a violation of employment rule, such right clearly exists when criminal charges are in play. While a school district has no authority to prevent criminal charges from being filed on a matter, if a school receives a confession or other evidence of criminality, such evidence will not be useful to criminal authorities where the employee was compelled to testify against himself or herself. *Garrity v. New Jersey*, 385 U.S. 493 (1967). Therefore, providing for union representation for the employee is imperative, and, where criminal misconduct is at issue, it is wise to consider a *Miranda* warning, explaining the employee need not respond to questions, and that any answers given can and will be used against him or her. *Id.*, *Miranda v. Arizona*, 384 U.S. 436 (1966).

Police involvement

Remember when criminality is involved, the standard of proof is different. While employers must generally prove a matter to a "preponderance of the evidence" standard, criminal authorities must meet a "beyond a reasonable doubt" standard to obtain a criminal conviction. The burden of proof is therefore more strict for the criminal authority than the employer. Due to distinct standards, employers should not rely upon criminal authorities to do the hard work for them unless no other option exists – criminal process may take months or years to complete. Deadlines are unreliable and are frequently moved. Moreover, pleas are routinely bargained which may make uncertain the employer's responsibilities and rights.

When criminal process necessarily runs concurrent to an employee disciplinary investigation, the employer should be prepared to reach independent conclusions and take action as appropriate on its own. Criminal process is no substitute for good employer disciplinary practice.

Due process

Generally, placing an accused employee on paid leave is not necessary except where such employee poses a threat to safety. If an employee constitutes a threat to safety, leave should generally be *with pay*. When the investigation is complete, the employer can and should appropriately analyze what due process is necessary. Before costing an employee wages or benefits, the employer should provide the employee at least some procedural check against error and an opportunity to be heard before either the employing board or a neutral arbiter at their behest. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, (1985), *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

The employer is well-advised to consider, before making a disciplinary decision, the reliability of the evidence against the employee. Does the case rely on hearsay? Is there an admission, and how likely is the admission to be recanted? Is there evidence to prove the case without the admission? Remember that the accused will have the right to cross examine witnesses against the accused, and therefore an employer conducting an investigation should prepare carefully for alternative theories.

Finally, in most situations it is not advisable to disclose the findings of an investigation before the employee has had the opportunity for due process. The employer should preserve the employee's opportunity for a fair hearing, which means allowing the employee the opportunity to confront his accusers and present alternate theories and evidence at a hearing. The employer should take care not to bias the board of education against the employee or against the facts before the employee has an opportunity for hearing.

THE WRITTEN INVESTIGATION REPORT

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.

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.

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.

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.

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.

CONFIDENTIALITY ISSUES

1. Never promise complete confidentiality to a witness or alleged victim, because it may not be possible to make good on that promise.

2. Only share information and the final report with those who truly have a legitimate "need to know."

3. Admonish participants not to discuss the investigation or underlying incident with others.

4. 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!

5. After the investigation is complete, the District may want to consult with legal counsel to determine what, if any, action should be taken.

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 outlined in a *Dear Colleague Letter* reported at 111 LRP 23852 (OCR 04/04/11). It concluded that a California district's proposed discrimination procedures, which obligated it to disclose certain information to parents regarding the outcome of its harassment investigations, did not violate FERPA's confidentiality provisions. 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.

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.