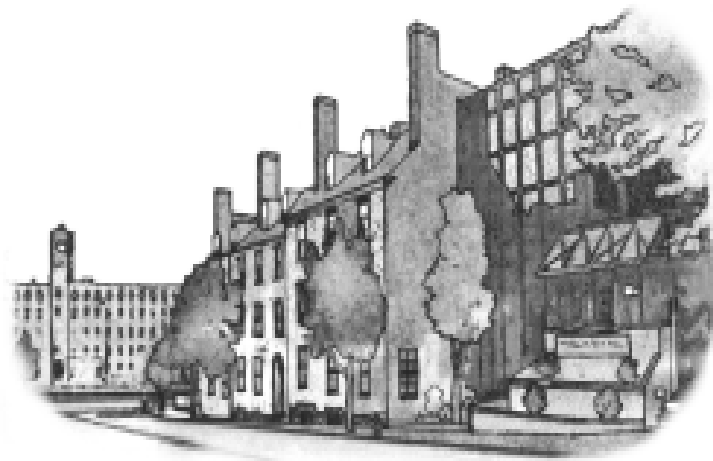


# INVESTIGATING COMPLAINTS ABOUT SCHOOL PERSONNEL

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*Wadleigh, Starr & Peters, P.L.L.C.  
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By: Dean B. Eggert, Esquire  
Kathleen C. Peahl, Esquire  
Alison M. Minutelli, Esquire

WADLEIGH, STARR & PETERS, P.L.L.C.

95 Market Street

Manchester, New Hampshire 03101

Telephone: 603/669-4140

Facsimile: 603/669-6018

E-Mail: [deggert@wadleighlaw.com](mailto:deggert@wadleighlaw.com)

[kpeahl@wadleighlaw.com](mailto:kpeahl@wadleighlaw.com)

[aminutelli@wadleighlaw.com](mailto:aminutelli@wadleighlaw.com)

Website: [www.wadleighlaw.com](http://www.wadleighlaw.com)

### About the Authors

**Dean B. Eggert, Esquire** (JD., UCLA; B.A., Wheaton College) is a partner in the firm of Wadleigh, Starr & Peters, P.L.L.C. Mr. Eggert is a jury trial attorney. Over the last 23 years he has had extensive experience representing school districts in its special education matters at the administrative and appellate levels. He has also provided in-service seminars to school districts on issues of risk management in the field of special education law.

**Alison M. Minutelli** (JD., Franklin Pierce Law Center; B.A. Brandeis University) is an associate in the firm of Wadleigh, Starr & Peters, P.L.L.C. Ms. Minutelli practices in the areas of school law and civil litigation.

### A Word of Caution

No two cases are exactly alike. This material is designed to provide the administrator with a broad understanding of the law pertaining to the investigation of complaints about school employees. This material does not include every aspect of the law. You are strongly encouraged to seek an opinion from your legal counsel regarding any specific case.

## **I. OVERVIEW**

The purpose of this material is to provide the education administrator with a general understanding of the law in New Hampshire as it pertains to the investigation of complaints about school district employees. The goal of this material is threefold:

- To assist the administrator in understanding the law;
- To educate the administrator in how to conduct a proper investigation; and,
- To assist the administrator in understanding the “best practices” in this area of their vocation.

## **II. RECEIPT OF A COMPLAINT ABOUT AN EMPLOYEE**

A school district may receive complaints relating to the conduct of its employees from a number of sources, including parents, students, other employees and even members of the public. Since the District’s liability for employee misconduct may turn on what the District knew and how it responded, it is imperative that building level administrators be trained in recognizing when a complaint is made and that they know to whom they should report the complaint so that it can be fully investigated. Once the complaint has been reported to the appropriate person(s) within the District, an initial screening should be conducted to determine the degree of current risk, the nature of the complaint, the District’s reporting obligations and the scope of investigation needed.

### **A. Assessing Current Risks**

Once a complaint is received, the first assessment to be made is a determination of whether the complaint relates to past or current conduct. If the complaint relates to current conduct, a determination must be made as to whether the employee poses a risk of harm to a student, coworker or member of the public. If so, a suspension (with pay if necessary) or an administrative leave with pay ought to be considered until a thorough investigation can be completed. If the complaint relates to an incident in the past and it is unlikely that it will be repeated, or the nature of the complaint is such that there is no risk of further harm, there may be no need to remove the employee from the workplace during the investigation.

It is also necessary to evaluate the timeliness of the complaint. If it relates to past conduct, it is possible that the complaining party has waited too long and will be barred from initiating any legal action based on the alleged conduct. Generally, the statute of limitations for bringing a civil suit is three (3) years. Some claims may have shorter statutes of limitation, which will be discussed later. Even if the statute of limitations has passed, if the complaint relates to a current employee, it should nonetheless be investigated and remedial action taken if appropriate. Once the District

has knowledge of the alleged misconduct, if the District does nothing, it could face liability if the conduct is repeated.

When you are considering the potential claim by a minor, the statute of limitations will rarely come into play. As a general premise, a minor has three (3) years after reaching the age of majority in which to assert their claim. Similarly, claims arising under the IDEA may arise during a student's twenty-first (21<sup>st</sup>) year of education and then may be potentially ripe for adjudication as long as three (3) years later.

## **B. Identifying the Nature of a Complaint**

Once you have dealt with minimizing the current risk, the next step is to determine the nature of the complaint. This is essential because the District's reporting obligations, the nature and scope of the investigation and the District's obligation to respond will turn on the type of complaint with which you are dealing.

### **1. Mistreatment of Student(s)**

One type of complaint a school district might receive is that a teacher, or other employee of the district, has physically or verbally mistreated a student. Such claims create the possibility of liability for both the employee and the district. It is also possible that a parent or former student will complain that the student was harmed by an employee of the District and complain that other teachers or administrators knew of the abuse and failed to intervene to protect the student. See Marquay v. Eno, 139 N.H. 708 (1995).

Although no claim has been recognized yet in New Hampshire, it is also possible that a parent could claim that their child was harmed by another student(s) and that a teacher or administrator knew of the offending student's behavior and did nothing to protect the victim. In fact, the Pupil Safety and Violence Prevention Act, R.S.A. 193-F, requires that school employees who either witness or are aware of "bullying" report such behavior to the Superintendent.

### **2. Sexual Harassment**

A district may receive a complaint by an employee claiming that she (or he) is being sexually harassed by another employee of the district. "Sexual harassment" is any kind of unwelcome contact, physical or verbal, which is directed at an individual because of his/her gender. In order to be unlawful, the conduct must be sufficiently severe and pervasive that it interferes with the individual's ability to do his/her job. Mere insults or embarrassing jokes are not actionable unless they are repeated.

Unless the harassment is by a supervisor and has resulted in a tangible employment action (such as a termination, demotion, etc.), an employer can avoid

liability if (1) it has taken appropriate steps to avoid harassment, such as adopting policies and training employees, and (2) the alleged victim failed to report the harassment and give the employer the opportunity to remedy the situation. Thus, it is imperative that employers respond to complaints of harassment by investigating and taking appropriate remedial action.

The complaint may also come in the form of a notice from the New Hampshire Commission for Human Rights advising the employer that a Charge of Discrimination has been filed. The statute of limitations for filing a charge of discrimination is 180 days (300 days if the charge is filed concurrently with the EEOC). The employer must file a response or answer (often referred to as a "Position Statement") to the Charge. The Notice will advise the employer of the deadline for filing the response. An investigator from the Commission will be assigned to the case and will investigate the claims to determine whether there is any merit to them.

### **3. Employment Discrimination**

School Districts may also receive complaints by employees alleging that they are being discriminated against on the basis of their age, gender, race, religion, national origin, marital status, sexual orientation or physical or mental disability. Discrimination on such grounds is prohibited under New Hampshire and/or federal law. The complaint may come from an employee claiming that he/she has been denied some benefit of employment on some prohibited grounds or, as with a sexual harassment claim, the notice may come from the New Hampshire Commission for Human Rights. Although such complaints may be filed against the employer, it is generally the conduct or decision of a supervisor or administrator which leads to the complaint. Thus, it is necessary not only to respond to the charge of discrimination, but to investigate to be sure that a supervisor or administrator is not harboring unlawful biases.

### **4. Retaliation**

Employees often complain that they are subjected to retaliation because they complained about possible misconduct by their supervisors. There are numerous statutes which prohibit such retaliation, including Title VII of the Civil Rights Act and New Hampshire's Whistle Blowers Protection Act, RSA 275-E. In the event of a complaint against a supervisor, it is advisable to warn the supervisor against taking any sort of action that can be viewed as retaliatory.

The United States Supreme Court recently held that the Title VII's prohibition against retaliation extends "to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation." Crawford v. Metropolitan Gov't of Nashville & Davidson County, \_\_\_ S.Ct. \_\_\_ (U.S. Jan. 26, 2009). In that case, the Metropolitan Government of Nashville and Davidson County began investigating rumors of sexual harassment by the

Metro School District's employee relations director. The human resources officer asked Vicky Crawford, a district employee, whether "she had witnessed 'inappropriate behavior' on the part of" the employee relations director, and Crawford reported several instances of sexually harassing behavior. Two other employees also reported being sexually harassed. At the close of the investigation, the district took no action against the employee relations director, but it fired Crawford and the two other accusers shortly thereafter. The stated reason for termination in Crawford's case was embezzlement. Crawford filed suit, alleging that the district retaliated against her for reporting the sexual harassing behavior.

The district court granted summary judgment in favor of the district, holding that Crawford had not "instigated or initiated any complaint," but instead had "answered questions by investigators in an already-pending investigation, initiated by someone else." This decision was affirmed by the Sixth Circuit Court of Appeals. The Supreme Court reversed, finding that Crawford's statements to the investigator constituted "opposition" to an unlawful action. The Court noted: "When an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication virtually always constitutes the employee's *opposition* to the activity." *Id.* (internal quotations and citations omitted; italics in original).

The statute of limitations for filing a claim of retaliation under Title VII is the same as for claims of discrimination. The Whistle Blowers' Protection Act does not contain a statute of limitations and, therefore, presumably the general three (3) year statute applies.

## **5. Educational Discrimination**

Parents may also complain that a teacher or other staff member has failed to comply with a student's Individualized Education Program ("IEP") or has otherwise failed to accommodate a student's disability.

## **6. Union Grievances**

For those school districts that are unionized, grievances may be filed by the union alleging some breach of the collective bargaining agreement. While grievances generally relate to decisions made by the administration, it is possible that a grievance could relate to the conduct of an individual supervisor or administrator. Although it is possible, such grievances generally do not involve conduct which would also expose the district to civil liability. Nonetheless, some level of investigation will be necessary in order to respond to the grievance. The grievance procedure provides a mechanism for resolving the grievance, either internally or through arbitration.

### III. YOUR REPORTING DUTIES

The receipt of a complaint by the district's administration may trigger a reporting duty on the part of the administration. Therefore, it is vital that the administrator know whether or not the law requires that they report the complaint, and to whom the complaint must be reported. By diligently adhering to these reporting obligations the administrator can reduce district liability and fulfill their statutory obligations to protect students.

#### A. Reporting to Law Enforcement

Common sense dictates that any complaint alleging a crime by an employee should be reported to law enforcement. Public school administrators have a civic duty to report alleged crimes by their employees.

In addition, administrators may have a statutory duty to report crimes which occur within the "Safe School Zone," in accord with the "Safe School Zones" Act (RSA 193-D:1 et seq.).

This Act prohibits any "act of theft, destruction, or violence" within a "safe school zone" and provides for stiffer criminal penalties for certain crimes committed within the safe school zone. In addition to providing for the punishment of perpetrators, the Act contains certain public employee reporting requirements.

##### 1. What is my Obligation?

School employees who **witness**, or who **have information from the victim** of, "an act of theft, destruction, or violence in a safe school zone" are required to file a **written report** with their supervisor detailing any such acts. The supervisor shall immediately forward the report to the principal, who must immediately report to the local law enforcement authority, by telephone or otherwise. Within 48 hours of making the initial report, the principal must forward a written report to the local law enforcement agency. See NH RSA 193-D:4, I(a).

If the alleged victim is a student, the principal should "immediately" notify the parent/guardian of the alleged victim that a report has been made to the police. The obligation to report a simple assault is deemed to be waived provided the District has a discipline policy requiring parental notification.

##### 2. Where is the "Safe School Zone?"

The "safe school zone" is an area inclusive of "any school property or school buses." RSA 193-D:1, II.

### **3. What is an “act of theft, destruction, or violence?”**

An “act of theft, destruction, or violence, includes the following criminal acts:

- Homicide;
- First or second degree assault;
- Simple assault;
- Felonious or aggravated felonious sexual assault;
- Criminal mischief;
- Unlawful possession or sale of a firearm or other dangerous weapon;
- Arson;
- Burglary;
- Robbery;
- Theft;
- Illegal sale or possession of a controlled drug; and
- Criminal threatening.

RSA 193-D:1, I (a)-(k).

### **4. What goes in my report?**

The report must include the following minimum items:

- Name and home address, if known, of the person suspected of committing an “act of theft, destruction or violence in a safe school zone”;
- The name and home address, if known, of any witness to the act;
- Identification of the act that was allegedly committed.

RSA 193-D:4, II.

The Department of Education has created a standard form, ED #317 that may be used for reporting under the Safe School Zones Act.

### **5. Any exceptions?**

Yes, a written report need not be made when law enforcement responds at the time of the incident and generates a written report. RSA 193-D:5. A written report need not be made for a simple assault if the District has adopted a discipline policy setting forth the circumstances under which parents shall be notified of simple assaults. RSA 193-D:4, I(b).

## 6. Penalties for Failure to report

Any person who knowingly fails to comply with the reporting requirements under this statute (unless the report has been waived) is guilty of a **violation**. RSA 193-D:6.

*Practice Pointer: If you have any doubt as to whether or not a crime has been committed you should report the matter to law enforcement. You are not tasked with making the legal judgment as to whether or not a crime has been committed, and therefore you should not assume that responsibility. Instead, let the law enforcement officials make the judgment as to whether or not there has been a crime.*

## 7. Liability for Reporting

Public or private school employees, or employees of a company under contract to a school or school district, who, in good faith, make a report of an act of theft, destruction, or violence in a safe school zone, shall not be subject to liability for making the report. RSA 193-F:5.

### B. Reporting Complaints of Abuse and Neglect

Administrators, as “school officials” are under a statutory obligation to report suspected abuse and neglect. RSA 169-C:29. The primary body to whom this reporting obligation runs is the New Hampshire Department of Health and Human Services, Division for Children, Youth and Families. When a complaint is made of potential abuse by an educator, the complaint, if credible, triggers a reason to suspect abuse and a concomitant reporting requirement.

#### 1. What is my Obligation?

The Child Protection Act (NH RSA 169:1 et seq.) provides, in NH RSA 169-C:29, that, [a]ny . . . teacher, **school official**, school counselor . . . or any other person having reason to suspect that a child has been abused or neglected shall report the same. . . “to the New Hampshire Department of Health and Human Services.

#### 2. What is “abuse or neglect?”

The terms “**abuse or neglect**” are defined in the context of an “abused child,” or a “neglected child.” An “abused child” means any child who has been . . .

- sexually abused;

- intentionally physically injured;
- psychologically injured so that the child exhibits symptoms of emotional problems generally recognized to result from consistent mistreatment or neglect; or
- physically injured by other than accidental means.

RSA 169-C:3, II.

A “neglected child” means any child

- who has been abandoned by his/her parents, guardian or custodian; or
- who is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for her physical, mental or emotional health, when it is established that her health has suffered or is very likely to suffer serious impairment, and the deprivation is not due primarily to the lack of financial means of the parent, guardian or custodian; or
- whose parents, guardians or custodian are unable to discharge their responsibilities to and for the child because of incarceration, hospitalization or other physical or mental incapacity.

RSA 169-C:3, XIX.

Note: Certain forms of religiously based treatment may not constitute “neglect.”

### **3. How and what do I report?**

An initial immediate report must be made immediately by “telephone or otherwise” and followed by a written report within 48 hours if requested by the Department. RSA 169-C:30. A report should contain the following:

- name and address of the child suspected of being neglected or abused;
- the name and address of the person responsible for the child's welfare;

- the specific information regarding the suspected neglect or the nature and extent of the child's injuries and any evidence of previous injuries;
- the identity of the person or persons suspected of being responsible for the abuse or neglect; and
- any other information that might be helpful in establishing abuse or neglect or that may be required by the Department.

Id.

In addition, it is a good practice to alert the school principal of your need to file a report. In those circumstances where you have a question regarding your duty to report, you should consult your supervisor/principal with regard to whether or not you may have a duty to make a report.

**4. Am I legally liable for making a report that turns out to be unfounded?**

NH RSA 169-C:31 provides that a "good faith" reporter is immune from civil and criminal liability. This liability does not extend to protect a reporter that has actually engaged in abuse and neglect from the consequences of his or her actions.

Failure to report suspected abuse or neglect may give rise to liability. In the case of Wilson v. Columbus Board of Education, 589 F.Supp.2d 952 (S.D. Ohio 2008), the court denied the school board's motion for summary judgment, finding that there were genuine issues of material fact with regard to whether the principal's failure to report suspected abuse or neglect was reasonable. In that case, a middle school female student met with the principal and another administrator, and "was upset, crying, and then non-responsive." The student did not specifically state that she was being abused, but after the meeting, the principal prepared an incident report, that stated in part:

[Jane Doe] made comments that strongly suggested some type of sexual abuse that was going on at home. [Jane Doe] repeatedly claimed that her mother would not believe her and that her mother was very happy now. While [Jane Doe] was talking, she continues to sob! Although, she continued to make comments about some type of problem that was going on at home, she would not come out and report an abusive situation.

During the conversation, [Jane Doe] indicated that she had talked about the situation with another female student and with Ms. Meyers (computer teacher). However, she felt she could not trust

Ms. Hooper [guidance counselor] or me. At this point, we informed [Jane Doe] that a conference with her mother would help us clear the situation. At this point, she got up and left the room.

. . . [Jane Doe] comments regarding some abuse situation at home were mentioned to a friend, a teacher and now in my office. These 'flags' seem to point to a problem that she is afraid to tell an adult or authority in school. Our report may not have strong evidence, but is sufficient to raise a concern at our school level.

The principal did not file the incident report with the State's reporting agency, nor did she take any action to report her suspicion that the student was being sexually abused at home. A week later, the District suspended the student for 10 days, for shoving another student, and verbally abusing and swearing at a substitute teacher. The principal was aware that by suspending the student, she would be required to remain in her home during the day. On the date of the suspension, the principal had not reported to anyone that she suspected that the student was being sexually abused. During the 10 day suspension, the student was alone in her home with her stepfather during the school hours, while her mother was at work. The student alleged that she was raped by her stepfather during school hours while she was suspended.

The student's mother filed suit against several school officials. The school moved for summary judgment; the motion was granted in part and denied in part. In particular, the court denied the motion for summary judgment on the parent's Section 1983 claim, in which the plaintiff alleged that the District violated the student's "constitutional rights by placing her on a 10 day out-of-school suspension, when, according to the incident report [the principal] created. . . , comments made by Jane Doe 'strongly suggested some type of sexual abuse in the home.'" In denying the motion for summary judgment, the court determined that "a reasonable jury could conclude that [the principal] acted with deliberate indifference in suspending Jane Doe and this suspension increased the risk of harm to Jane Doe at the hands of her stepfather."

### **C. Reporting to Parents of Student Victims**

Any complaint involving a crime or any form of injury by an educator on a student will trigger a duty on the part of the district to notify the parent of a student victim. In fact, the "Safe School Zones Act" now requires in RSA 193-D:4, I, a. that if the victim of a crime in the Safe School Zones is a student, that parents be notified that a report has been made to local law enforcement.

### **D. Reporting to the Employee who is the Subject of the Complaint**

At some point, due process may require that an employee be notified that they are the subject of a complaint. While the district may, in some circumstances, be warranted in withholding that information from the employee during a preliminary

investigation, fundamental fairness usually will dictate that the employee be notified of the Complaint.

#### **E. Reporting to the Risk Manager/Liability Insurer**

Certain employee acts may give rise to potential liability on the part of the District. In this litigious society, you must assume that any complaint alleging injury, malfeasance, mistreatment, discrimination, or the like on the part of the employee will give rise to potential claims of liability on the part of the district. A lack of timely notice to your liability carrier can compromise your coverage.

*Practice Pointer: Always notify your liability carrier and/or risk manager of any complaint alleging injury to body, injury to property, discrimination, harassment, mistreatment, defamation, retaliation, civil rights violation, malfeasance, sexual harassment, sexual abuse, or the like. You can assume that it will give rise to a claim of liability on the part of the district.*

#### **F. Reporting to the Bonding Company**

In rare cases, the complaint may involve embezzlement or malfeasance with regard to district funds. If the complaint involves an administrator, there may be a fiduciary bond in place. The bonds require timely notice, and most bonding companies reserve the right to participate in recoupment efforts. A lack of timely notice can compromise your coverage under the bond.

#### **G. Reporting under the Pupil Safety and Violence Prevention Act (RSA 193-F)**

The Pupil Safety and Violence Prevention Act is primarily designed to prevent “bullying” by students of other students. It protects students from “insults, taunts, or challenges, whether verbal or physical in nature, which are likely to intimidate or provoke a violent or disorderly response.” RSA 193-F:3, II(a).

Any school employee or employee of a company under contract with the school or school district who has witnessed or has reliable information that a pupil has been subjected to insults, taunts, or challenges, whether verbal or physical in nature which *are likely to intimidate or provoke a violent or disorderly response* that violates the school bullying policy shall report such incident to: the principal; or designee; who shall in turn report the incident to the superintendent and the School Board. Id. In addition, the principal shall by telephone or in writing by first-class mail report the occurrence of any incident of bullying or pupil harassment to the parent or legal guardian of all pupils involved within forty-eight hours of the occurrence of the incident. RSA 193-F:3, II(b). The notice must advise the individuals involved of their due process rights, including the right to appeal to the state board of education. The superintendent may, within forty-eight hours of the event, grant the principal a waiver from the notification requirement if

the superintendent deems such waiver to be in the best interest of the child. Any waiver granted shall be in writing. Id.

#### **H. Reporting to the School Board**

When it comes to reporting to the School Board, the administrator faces a natural tension. The tension is between preserving the right of the educator to a full and fair hearing in the event of termination, and ensuring that the Board has sufficient knowledge of the status of a matter so that they can quell the occasional hue and cry from the community.

As a general rule and as a matter of best practice, a Board is not entitled to know the details of a personnel matter unless, and until, it reaches the Board in the context of a full and fair hearing. The state regulations clearly delineate the dichotomy between a Superintendent's responsibility and a Board's responsibility. Whether or not that dichotomy is honored is usually dependent upon the ability of the Board to understand the scope and limits of its responsibility.

#### **I. Reporting to the State Department of Education**

Educators having reason to suspect that another educator has abused or neglected a student have a duty under NH Regulation Ed 510.01 to report that suspected educator to the:

- The Bureau of Credentialing, Department of Education; and
- The Department of Health and Human Services.

Ed 510.01 goes on to state, in subpart c., that a failure to report any charges of misconduct or incidence of suspected misconduct shall result in disciplinary action being taken against the non-reporting educator by the State Board of Education. Ed 510.01(a) also requires the Superintendent to report all charges of misconduct against a credential holder. Reports shall be investigated by the Department of Education, Bureau of Credentialing.

#### **J. Reporting under the Persistently Dangerous School Act (RSA 193-G)**

The Persistently Dangerous School Act contains a high threshold for a school to be identified as a persistently dangerous school. There must be three (3) significant

enumerated criminal acts<sup>1</sup> during the period of one school year for three (3) consecutive years in order for the school to be identified as “persistently dangerous.” RSA 193-G:1. Once being identified as “persistently dangerous,” there is a duty to notify parents and to afford them the option to transfer their child from the school to another school within the school district in a manner consistent with Board policy.

Tucked within NH RSA 193-G:4, II is a victim’s choice provision. Section II provides that if a pupil is a victim of first or second degree assault; aggravated felonious sexual assault, arson, robbery or unlawful possession or sale of a firearm or other dangerous weapon, the School District shall, within five (5) days of being notified of the incident, notify the parents or guardian of the pupil of the option to transfer their child to another school within the School District. The section is poorly written and includes within the stated reasons for a transfer “homicide.” Needless to say, an individual who is a victim of homicide is not restored by virtue of a right to transfer.

In addition, within 5 days of being notified that a school has been designated as a “persistently dangerous school,” the district must notify parents or guardians of all pupils attending the school that they have the option to transfer to another school within the same district, constituent with local district policy. RSA 193-G:4, I.

#### **IV. PRELIMINARY DISCIPLINE DECISIONS**

As mentioned above, one of the first decisions to be made after a complaint is received is the decision about whether the employee about whom the complaint relates ought to be removed from the workplace while the investigation proceeds. Such action is not necessary in every case, but should be considered where the complaint relates to conduct which is either ongoing or is likely to reoccur and poses a risk of harm to someone. Examples of such cases would be a complaint alleging mistreatment of students or a complaint of sexual harassment.

##### **A. Suspension with Pay/Administrative Leave**

Suspension with pay is one alternative when a district wants to remove an employee from the workplace while it completes its investigation. Until a conclusion is

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<sup>1</sup> The enumerated acts are:

- Homicide;
- First or second degree assault;
- Aggravated felonious sexual assault;
- Arson;
- Robbery, or
- Unlawful possession or sale of a firearm or other dangerous weapon.

RSA 193-G:1, I(a)-(f). The acts “must occur within the school or on school grounds, during regular school hours or during a school-sponsored event, or during transportation of pupils to or from school, if such transportation is provided by the school district.” RSA 193-G:1, II.

reached as to the truth of the allegations it is advisable to keep the employee on paid status. An “administrative leave with pay” is essentially the same as a suspension although it sounds less punitive. In some cases, some sort of administrative leave may be appropriate merely because the accused employee is so distraught over the allegations that he/she cannot effectively remain in their position. In those cases, the leave may actually be voluntarily accepted rather than punitive.

For teachers, the Superintendent has the authority, for cause, to remove them from the classroom, but the employee must remain on paid status until the Board votes to dismiss. See RSA 189:31. Both a suspension and an administrative leave would be considered a “removal” and, therefore, the allegations must be serious enough to justify the “for cause” standard. For both teachers and non-teachers, applicable collective bargaining agreements should always be consulted to be certain there are no restrictions on the superintendent’s authority.

## **B. Reassignment**

Alternatively, a temporary reassignment can achieve the objective of removing the employee from the situation in which the alleged misconduct is occurring without a suspension. This alternative should be considered only where the alleged misconduct is not likely to be repeated in the reassigned position. For a teacher, it would appear that a reassignment to a different classroom would not trigger RSA 189:31. However, if the reassignment was to a strictly administrative position, RSA 189:31 would apply and there must be “cause.” Once again, collective bargaining agreements should be consulted to be sure that transfer and reassignment provisions are not violated.

## **V. DOCUMENTING THE COMPLAINT**

Many complaints first arise as a spoken communication. They may reach the District in the form of a telephone call or a face-to-face complaint to an administrator. As a general rule, the complainant should be encouraged to reduce their complaint to writing. Reducing the complaint to writing produces the following benefits:

- It tests the credibility of the complainant;
- It ensures that you have a written first hand record of the complaint which has not been screened through your ears;
- It affords the subject of the complaint basic due process by ensuring that they will know the gravamen of the complaint;
- It reduces the likelihood that you will have to testify as to the complaint; and,

- It provides you with a written framework for defining the scope of your investigation.

There are always exceptions to the rule. For example, it may be difficult or unreasonable to require that a young student reduce their complaint to writing. In those circumstances, the ideal practice is for the investigator to meet with the student in the company of the parents. The investigator should then make a memorandum to the file summarizing in detail the student's statement. If the parents participated in the meeting, they should be offered a copy of the memorandum. The general rule is that any formal interview of a student should occur in the presence of the parents, or at a minimum, after parental permission.

At times, students will volunteer a complaint to a trusted teacher, guidance counselor, or principal in the school setting. The administrator should request that the recipient of the complaint reduce it to writing, and should remind the recipient that the subject matter is a personnel matter which should remain confidential. Under most circumstances, the parents/guardians should be notified that their child has made a complaint. This notification protects the student, protects the parents, and also provides a potential source for testing the credibility of the complaining student.

Finally, the administrator should remember that an eighteen year old student has the right to request the school district that it not inform his/her parents/guardians of the complaint. The district should encourage disclosure by the student to the parents, but cannot require disclosure. The eighteen year old student is an adult and must be treated accordingly.

The foundation for any investigation is the complaint. Therefore, no investigation file is complete without a written summary of the complaint.

## **VI. EVALUATION AND DETERMINATION OF THE NEED TO INVESTIGATE**

Once a complaint has been documented, the nature of the complaint has been identified, and the administrator has determined whether or not they have a reporting duty, they then can determine whether or not there is a need to investigate the complaint. In making that determination, the administrator should ask the following questions:

1. Is the complaint sufficiently credible to warrant investigation?

An administrator owes a duty to its district, the taxpayers, and the employee to make a preliminary determination as to whether or not the complaint has sufficient merit to warrant an investigation. From time to time, individuals will make complaints which are patently false or frivolous. If a complaint is immediately discernable as false, or frivolous on its face, the district has no duty to conduct an investigation.

2. Do you require any additional information?

On some occasions the district simply will not require any further information. For example, if the district receives a certified copy of a court conviction for felonious sexual assault regarding a certified teacher, the district is under a mandatory duty to terminate that employee in accord with RSA 189:14-d and there really is no need for an extensive investigation.

Unfortunately, it is the rare case which can be classified as false, frivolous or simply not requiring further investigation. The majority of complaints set forth a “prima facie” complaint; that is, on their face, they are sufficiently credible to warrant an investigation.

When an administrator encounters a close call, they should err on the side of investigation. Throughout the United States there has been an increasing trend in litigation alleging that a district should have investigated a complaint, but chose instead to disregard the matter. One need only look as far as the current issues pertaining to the Catholic Church to discern the consequences of an entity's failure to investigate and resolve a prima facie complaint.

## **VII. THE CONDUCT OF AN INVESTIGATION**

### **A. Identifying the Investigator**

The first step in any investigation is to determine who is going to conduct the investigation. Depending on the allegations, a building level administrator, a human resources manager or an assistant superintendent are potential investigators. In some cases, it may be appropriate to involve legal counsel or to hire outside investigators. One benefit of having legal counsel involved is that the investigation may fall within the protection of the attorney-client privilege. Outside investigators also bring an element of objectivity to an investigation.

### **B. Scope of the Investigation**

Obviously, the scope of the investigation will vary from case to case, depending on the nature of the complaint. In all cases, however, it will be necessary to interview and take statements from the complaining party and any witnesses. The accused employee should also be given the opportunity to respond to the accusations. In many cases, there may be documents or records to review. In particular, the accused employee's personnel file and disciplinary record are generally relevant.

If the investigation has the potential to result in disciplinary action, the accused employee should be permitted to have a representative of the union present with him/her during any interviews. In fact, union relations are often fostered if the union is involved early on in the investigation. Union representatives generally will appreciate

getting the “heads up” regarding a situation as opposed to learning about it after the fact. Also, especially if the allegations are particularly egregious and appear founded, the union representative may even be helpful in reaching a quick resolution.

### **C. “Papering the File”**

The investigator should keep a separate, confidential file on each complaint. Notes of all interviews and discussions should be kept. Where appropriate, written statements should be obtained from the complaining party, from the accused, and, if applicable, from witnesses. A summary of the investigation (who was interviewed, when, what was said, etc.), and the conclusions reached by the investigator should also be prepared. Depending on who the investigator is, a recommendation for further action may also be appropriate. It is just as important to document the basis for finding a complaint to be unfounded as it is to document the basis for finding it to be founded. If a second complaint is filed after no action was taken against an employee following an initial complaint, it will be essential for the District to be able to demonstrate that it had insufficient evidence of wrongdoing to justify any disciplinary action.

None of the investigation notes or reports should be placed in an employee’s personnel file. Only the actual disciplinary action, if any, should be placed in the personnel file.

### **D. Reaching a Finding(s)**

Once the investigator has interviewed everyone and reviewed any documents, he or she must reach a conclusion. The decision to be made is whether or not the complaint is founded. It is not necessarily the investigator’s job to decide the appropriate response if it is founded. In reaching his/her conclusion, the investigator ought to consider the following:

- The credibility of the witnesses;
- The consistencies/inconsistencies in testimony;
- The objectiveness (lack of bias) of the witnesses;
- Whether there is any motive for any person to falsify a story or lie; and,
- Whether there is any documentary or physical proof of the allegation.

## **VIII. THE RESOLUTION OF AN INVESTIGATION**

Once an investigation is complete, it is incumbent upon the administrator to resolve or, in some circumstances make a recommendation for resolution, of an investigation. If the resolution of the complaint is something less than dismissal, the

Superintendent of Schools generally has authority to resolve the matter. NH RSA 194-C:4 outlines the Superintendent services provided by an SAU or single school district and these services include supervision of staff and the processing of grievances. RSA 194-C:4, II(b). In addition, Ed 302.01 clearly establishes the role of the Superintendent as the executive officer of the local school district. Ed 302.02 vests the Superintendent with authority to direct and supervise the work of all employees of the district or districts as well as responsibility for removing a teacher or other employee of the district from the classroom in accordance with RSA 189:31 and recommending the dismissal of certified staff to the School Board.

### **A. Understanding Your Options**

It is important to understand that the resolution of a complaint is not confined to the black and white decision-making framework of termination versus retention. Instead, the administrator has a vast panoply of ways in which a complaint can be resolved. Some of the options are as follows:

1. A written determination that the complaint is unfounded.
2. A conclusion that the investigator has been unable to either substantiate or rule out the complaint and therefore the complaint cannot be resolved.
3. An oral word of caution from a supervisor.
4. A written word of caution from a supervisor.
5. An oral reprimand.
6. A written reprimand.
7. A written reprimand and suspension without pay.
8. A written reprimand and removal from the classroom with reassignment to a non-classroom position in accord with RSA 189:31. (Note: This is subject to a “for cause” standard.)
9. Written findings that the complaint is true and a recommendation for dismissal to the School Board with stated reasons for the dismissal. (Note: This is subject to the equivalent of a “just cause” standard.)

### **B. Mandatory Dismissal**

The following criminal acts require that the employee be terminated by the School Administrative Unit or school district after it receives notice of the conviction:

- Homicide
- Child pornography
- Aggravated felonious sexual assault
- Felonious sexual assault
- Kidnapping

RSA 189:14-d. This applies regardless of whether the conviction was in New Hampshire, or in another state, territory, or possession of the United States. Id.

### **C. The Role of Nonrenewal**

In some cases, where an educator is nontenured, the administrator is faced with a difficult decision of whether to recommend termination or nonrenewal. In those cases where the educator's conduct falls short of the "just cause" standard set forth in RSA 189:13 for dismissal, the administrator may still wish, in the case of a nontenured teacher, to consider nonrenewal under RSA 189:14-a.

As a general rule, a teacher may be nonrenewed provided he/she receives notice in writing of the district's decision to nonrenew by April 15, or within 15 days of the adoption of the district's budget, whichever is later. RSA 189:14-a, I(a). However, a teacher who has taught for three consecutive years in the district is entitled, upon request, to a written statement of the reasons for nonrenewal and a hearing before the School Board. The teacher must submit a written request within 10 days of receiving the notice of nonrenewal. RSA 189:14-a, I(b). The administrator should note that if a teacher has taught for three consecutive years in any school district and two consecutive years in the current district, then he or she is entitled to the statement of reasons and hearing. RSA 189:14-a, II.

The burden of proof in nonrenewal hearings falls on the administration. RSA 189:14-a, IV. The teacher also has the right to either appeal an adverse decision to the State Board of Education or request arbitration under the terms of a collective bargaining agreement. RSA 189:14-b, I. An appeal to the state board must be made in writing, and filed within 10 days after the issuance of the decision to be reviewed. Id. The state board must uphold the decision to nonrenew unless it is clearly erroneous. Id.

The statute provides that in cases of non-renewal because of unsatisfactory performance, the superintendent of the district shall demonstrate at the school hearing by a preponderance of the evidence:

- That the teacher received written notice that their unsatisfactory performance may lead to non-renomination;
- That the teacher had a reasonable opportunity to correct such unsatisfactory performance; and

- That the teacher failed to correct their unsatisfactory performance.

RSA 189:14-a, III.

#### **D. The Standard for Termination**

NH RSA 189:13 provides that a teacher may be terminated for the following reasons:

- Immorality;
- Incompetence; or
- Failure to conform to prescribed regulations

However, no teacher shall be dismissed before the expiration of the period for which they were engaged to teach without having been previously:

- Notified of the cause of their dismissal; and
- Granted a full and fair hearing

#### **E. Documenting a “Nonfinding”**

It is vital that any investigation which is concluded by “nonfinding” or a finding that the complaint was unjustified be documented. The employee is entitled to closure and closure is vital to ensure that a subsequent similar complaint does not result in district liability on a “knew or should have known” theory.

#### **F. Media Relations**

One of the most difficult tasks faced by an investigator is the management of media relations. Whenever a complaint has been lodged, the investigator is faced with the natural tension between the employee's privacy rights and the interests of both the complainant and the public in the resolution of the complaint.

When the taxpayers question the safety of their children, it is unsatisfactory for the administrator to simply make the usual “no comment” statement. In those cases where the matter does not involve the safety of a district's students, the administrator should, when questioned, assure the public that the matter does not involve the safety of the district students. In those cases where the safety of a student was compromised and the educator has been removed, the administrator can at least give assurances that there is no ongoing threat to the safety of the students.

Before speaking with the media, it is well advised to consult with counsel to determine the scope of the comments that you may make as well as any limitations on your commentary.

## **G. A Review of Your Reporting Duties**

Before you finally close the jacket on your investigation folder, it is important for you to review whether or not the scope of your investigation triggered a new reporting duty. If it did, then you need to comply with your ongoing duty to report.

## **H. Impact on the Personnel File**

The ultimate resolution of a complaint will determine whether or not the matter will land in the employee's personnel file. The district administrator should also be aware of the fact that some collective bargaining agreements require that a personnel file be purged of disciplinary actions after a defined period of time. While this means that future discipline of the employee may not consider the earlier event, it does not mean that all record of the complaint, investigation and its resolution should be destroyed. It is imperative that the investigation file be preserved as evidence, in the event of any future complaint, that the District responded appropriately.

## **I. Liability Exposure**

Regrettably, certain actions by employees can create liability exposure on the part of a district. In addition, a failure to make wise and prudent decisions with regard to the conduct of an investigation can result in liability exposure. This area is one of the most delicate fields of responsibility faced by an administrator. On the one hand, an improper termination decision can result in back pay, reinstatement and attorney's fees being owed to the educator. On the other hand, a failure to diligently pursue an investigation can result in a subsequent allegation that the district either knew or should have known that the educator presented a risk to students. In cases of this nature, the administrator is wise to consult with district counsel throughout the investigative process. The decision-making process in a grey area should always make student safety the priority.

