

INVESTIGATING COMPLAINTS ABOUT SCHOOL PERSONNEL

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A Word of Caution

No two cases are exactly alike. This material is designed to provide administrators with a broad understanding of the law pertaining to the investigation of complaints against personnel. This material does not include every aspect of the law, nor does it discuss investigating complaints against students. 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 education administrators with a general understanding of the law in New Hampshire as it pertains to personnel investigations. 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 COMPLAINTS GIVING RISE TO AN INVESTIGATION

School administrators may be involved in investigating a variety of incidents involving personnel. Allegations that an employee violated a law, regulation, ethical rule, professional code of conduct or any rule or policy of the school could give rise to an investigation. The allegation may involve the employee’s conduct outside of the school, or within the school in relation to a member of the public, a student(s), or a co-employee. Today, it is common for the alleged improper conduct to take place electronically via email, social networking websites or text messaging. This wide array of possible complaints may originate from a member of the public, a co-employee, or from a student or parent.

Since the school district’s liability for employee misconduct may turn on what the district knew, when it knew it, and how it responded, it is imperative that administrators be trained in recognizing when a complaint is made and knowing to whom it should be reported for investigation. Once the complaint has been reported to the appropriate person(s) within the school district, an initial screening should be conducted to determine the degree of current risk, the nature of the complaint, any reporting obligations and the scope of investigation needed. The starting point should always be to determine what specific action, if any, is need to mitigate or prevent any ongoing threat of harm. Once an initial assessment on this has been made, one should look to what law and/ or school district policy(s) may apply, by assuming the “worst case scenario” with respect to the alleged behavior. That is, assuming that the allegations are true, what investigative response is required and appropriate given the governing law and any school district policy(s) which may apply? Finally, prior to beginning an active investigation, consideration should be given to any reporting obligation, any privacy rights, and how the district will handle public relations about the complaint.

A. Assessing Current Risks.

1. Is there an ongoing threat of harm?

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 other employees, students, or the public. If so, it may be necessary to take steps to protect these individuals from continuing or future harm.

2. Should immediate action be taken to reduce the threat of harm?

If an employee is the subject of a complaint which may involve ongoing or future harm, 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.

In addition to potential suspension of the subject of the complaint, are there additional measures which should be taken to reduce the threat of future harm? Is there a duty to warn individuals who may be harmed by the conduct of the subject of the complaint? Is any additional interim personnel action necessary? Is there a reporting duty, (see discussion below), to employees, students, the public, a governing agency or law enforcement? Is it necessary or prudent to notify a liability insurer or a pooled risk management entity?

3. Consider the public relations impact.

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 competing rights and interests of various parties. For example, the privacy rights of employees versus the rights of students to protection within the school. The public interest in free and open government versus an employee's right to protect his reputation. It is frequently a very difficult task to decide how to best balance these competing rights and obligations.

The employee or official receiving a complaint needs to ask a number of fundamental questions. Does the municipality or school district face a public relations risk? Is there a need for a public statement regarding the complaint? If so, who should issue the statement and what can legally be said about the complaint? Is it permissible to identify the subject of the complaint? What is

considered public information and what information must or can be kept confidential? Will the confidential status of information change once an investigation is commenced or completed? Typically, with any complaint which is likely to be investigated, the municipality or school district will need to consult with its general counsel in order to assure that it communicates to the public in a way that fulfills the obligation of open government and, at the same time, complies with the competing obligation to maintain confidentiality on certain matters and prevent a complaint from being tainted by public opinion on the matter prior to the completion of any investigation or hearing on the complaint.

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. In most cases, either counsel to the district, the district superintendent, the town manager, or the chairperson of the governing board or school board should be the conduit for communications from the district to the media and the public. It is particularly important that there be consistent communications from the public entity. While the entity's position or report may change over the course of an investigation, problems may arise when multiple parties who purport to "speak for the entity" are communicating with the media and the public.

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.

2. Sexual Harassment

A district may receive a complaint by an employee (or student) claiming that she (or he) is being sexually harassed by an 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.

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.

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 was 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. While the actual investigation process by the Commission may not be that time-consuming for the district, a municipality or school district faced with such a complaint should be prepared to deal with an open investigation lasting many months.

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 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, 555 U.S. 271 (2009). Thus, a municipality or school district conducting an investigation into an allegation of discrimination must be careful not to engage in any conduct which could be deemed retaliatory toward other employees who are being interviewed. Interviews requested by the employer need to be conducted in a manner which permits other employees to feel that they can speak freely and honestly without fear of reprisal from supervisors.

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. Section 504 of the Rehabilitation Act of 1973 requires that a school district respond to, and investigate, complaints of disability-based harassment. Moreover, the District has to provide a mechanism for the parent to grieve or appeal the findings of the school district.

Parents may elect to lodge their complaint with the New Hampshire Department of Education (IDEA-based complaints) or the federal Office for Civil Rights (complaints of disability-based discrimination). Under those circumstances, the agency will conduct its own investigation and a local investigation could be seen as a potential act of interference. However, the district has a duty to cooperate with the agency's investigation.

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.

7. “Bullying” or “Cyberbullying” by Adults

There is an increased frequency of parents raising complaints of bullying by educators, as well as complaints alleging that educators have retaliated against students who have reporting bullying or participated in an investigation. See e.g. RSA 193-F:4, I(b), (k). However, the law defines a “perpetrator” of bullying as a “pupil who engages in bullying or cyberbullying.” See RSA 193-F:3, IV (emphasis added). Thus, the best practice is to treat these complaints against employees as personnel complaints, rather than bullying complaints.

8. Student/Personnel Safety Issues

A school district may receive a complaint that the entity, or one of its employees or students, is threatened with harm. There may have been an actual incident involving a threat to the safety or the entity’s property, or to the employees or students of the entity. These issues can be as wide ranging as a disgruntled employee becoming violent to a student stalking another student.

An investigator may have to determine if the threat or the action is within the scope of the public entity’s domain; or, alternatively, if the safety threat is one that is a wholly private matter outside the scope of the municipal entity. This will often be a very difficult determination if the parties involved are students or employees of the school district or municipality. For example, if a student is harassing or threatening another student during evenings or weekends without using school email, it may be tempting to conclude that this is a private matter not involving the school. However, if there are contacts during the school day between the students, or if the perpetrator gains access to or information about the victim while at school or using school property, or if a school employee learns of the harassment, there may be a claim against the school for failure to warn and/or to protect the victim.

Similarly, in the municipal context, if a disgruntled employee harms co-employees, there may be a claim that the municipal employer failed to take reasonable steps to protect the employee victims. Absent special circumstances, an employer has no duty to protect employees from criminal conduct, (see Dupont v. Aavid Thermal Technologies, Inc., 147 N.H. 706 (2002)). However, an employer may be liable when it has unreasonably created a condition of employment that foreseeably enhances the risk of criminal attack, or when the employer or its managers know that an employee is in a position of imminent danger or serious harm and the employer fails to exercise reasonable care to avert the threatened harm. Id. at 713.

9. Financial Issues

School districts may face complaints that employees involved with fiscal management have committed malfeasance or outright embezzlement or fraud. School district employees who are entrusted with the entity's financial management may be bonded employees and within a school district may be credentialed employees such as a business administrator. In these cases, there is a responsibility to report a complaint to the appropriate governing agency, (D.R.A. or D.O.E.), as well as to the bonding company, unless the complaint is clearly unfounded. There may also be an obligation to report to a liability carrier or pooled risk management entity (see "Your Reporting Duties" below). In these cases, there may be a need to involve an outside individual with accounting expertise during the investigation phase. These types of complaints are typically very time-consuming to investigate as they may require detailed review of a substantial volume of financial records. It is also likely that the investigator will need assistance from the direct colleagues of the subject of the complaint, and this process may make it difficult for the employees to co-exist together during the investigation. On the other hand, the strict rules governing financial administration for public entities will often make it fairly easy to determine whether or not any misconduct occurred once the necessary records have been reviewed.

10. Regulatory Compliance (ADA/OSHA)

A school district may receive a complaint that an employee or facility is in violation of regulatory statutes such as the Occupational Safety and Health Act, 29 U.S.C. §651, et seq. (OSHA), or the Americans with Disabilities Act, 42 U.S.C. §12101, et seq. (ADA). Such a complaint will require the investigator to consider the obligations imposed by the governing federal statute, as well as any regulations promulgated by the federal and/or state agency overseeing enforcement of these laws.

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 should be reported to law enforcement. Public school administrators have a civic duty to report alleged crimes by their students and 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.” In addition, 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 for simple assaults.

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, regardless of the age of the perpetrator:

- 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; and,
- 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-D:9.

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:

- the 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 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. In addition, the failure to report suspected abuse or neglect may give rise to liability. See e.g. Wilson v. Columbus Board of Education, 589 F.Supp.2d 952 (S.D. Ohio 2008) (denying 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).

C. Reporting to the Individual who is the Subject of the Complaint.

At some point, due process may require that an individual be notified that they are the subject of a complaint. While the district may, in some circumstances, be warranted in withholding that information during a preliminary investigation, fundamental fairness usually will dictate that the individual be notified of the Complaint. The investigator should consult the district’s policies and procedures to determine whether there are additional notice requirements.

When the allegations involve a personnel matter, the investigator should consult the district’s policies, procedures, employee handbook, and the collective bargaining agreement to determine whether there are additional requirements pertaining to notifying an employee that he/she may be the subject of a complaint.

D. 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. This applies not only to complaints against employees, but also to claims of

employee injuries, whether they are physical or mental injuries. Note that with a physical injury to an employee, there is an obligation to report the injury to the New Hampshire Department of Labor, pursuant to R.S.A. 283-A, the Worker's Compensation Act, and the Department's Administrative Regulations.

A lack of timely notice to your liability carrier or pooled risk management entity can compromise coverage. You should assume that the liability carrier will request any documentation you create as to the complaint.

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.

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 a municipal employee or officer. A termination decision which was found to be unwarranted can result in an award of reinstatement, back pay and attorney's fees. On the other hand, a failure to diligently pursue an investigation can result in a subsequent allegation that the school district either knew or should have known that the subject of the investigation presented a risk and the district should have taken steps to remove or reduce the risk of harm.

E. 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. Administrative rule Ed 510.04 provides that a credential shall be suspended prior to a hearing by the Department if the State Board makes a determination that there is "imminent peril to the public health, safety, or welfare and commences its hearing within ten (10) days in accordance with R.S.A. 541-A:30, III."

Note that in cases of complaints against administrators involving alleged financial wrongdoing, to the extent that the accused employee is “credentialed” under state regulations, he or she is subject to a reporting requirement. This would include those employees who hold principal, superintendent or business administrator credentials from the state.

F. Reporting to the Bonding Company.

If the complaint involves a bonded employee, such as a school district Business Administrator, in addition to the appropriate governing state agency, (Department of Education and Department of Revenue Administration), there is an obligation to report malfeasance to the bonding company. The bonding company is entitled to notice as soon as practicable after the public entity becomes aware of a complaint which may trigger obligations of the bonding company.

In addition, when faced with a complaint against an employee alleging financial malfeasance, the investigator should consider whether there is a duty to report to the Department of Revenue Administration. While the allegations of the complaint may not trigger any DRA rule requiring such a report, consideration should be given to whether the allegations, if true, affect reports previously filed with the DRA. If the public entity is aware that previously filed reports contain misinformation, there is an obligation to correct these reports.

G. Duty to Warn: Reporting to Third Parties.

A school district has an obligation to protect students from harm given the nature of the school-student relationship, (Marquay v. Eno, 139 N.H. 708 (1995)), which imposes a duty to warn of foreseeable future harm. A municipal employer, on the other hand, does not normally have a duty to protect its employees from generally harmful conduct such as criminal attacks simply because of the employment relationship. Dupont v. Aavid Thermal Technologies, Inc., 147 N.H. 706 (2002). Rather, such a duty does not arise unless the employer has unreasonably created a condition of employment that foreseeably enhances the risk of criminal attack. Id. at 712. On the other hand, a municipality, like a private employer, has a duty to provide a safe workplace and to warn of reasonably foreseeable dangers which may be unknown to the employee. Id. at 716, (Duggan, J., *dissenting in part*).

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 individual about whom the complaint relates poses an immediate threat to the safety of other students or

staff and therefore whether steps should be taken to ensure safety 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.

Prior to imposing such discipline, the school official should ensure that the employee has received the appropriate level of due process. It will be important for the school official to consult district policies and procedures, employee handbooks, and the collective bargaining agreement to ensure that any discipline that is imposed is consistent with applicable laws and regulations and district procedures.

When the decision is made to impose preliminary discipline, it is important to label it as preliminary to ensure that it is not construed as the final decision of the district.

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 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.

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

The foundation for any investigation is 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;
- 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. In the case where a complainant simply refuses to provide a written complaint, the investigator cannot require that the complaint be in written form. In these cases, the investigator should then make a memorandum to the file summarizing in detail the complainant’s statement. The complainant, or the parents of a student complainant if they participated in the meeting, should be offered a copy of the memorandum.

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. 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.

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 importance of reducing the complaint to writing cannot be overstated. It is the key first step to performing the required response and investigation and is invaluable for establishing the school district's good faith performance of its duties. A properly documented and completed written summary of the complaint made as soon as practicable after the initial report is invaluable if the matter results in litigation. It demonstrates that the school district was cognizant of its ethical and legal obligations and that it took the complaint seriously. 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:

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

B. Do you Require any Additional Information?

Often, when faced with the decision of whether an investigation is warranted, further information is required in order to make an informed decision. This may require some preliminary inquiry into the allegations of the complaint. In this circumstance, the officer, employee or administrator should begin the process of documenting the complaint, but need not go further when it becomes clear that the complaint is frivolous or demonstrably false.

On some occasions, it will be clear that no further information is required. For example, if a school 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 R.S.A. 189:14-d and there really is no need for an extensive investigation.

C. Should I Consult with Legal Counsel?

A phone call to the municipal or district general counsel is a small investment to make in order to avoid the consequences of making the wrong decision on whether to investigate a complaint. A case may present a close call. It is always prudent to obtain a “second opinion” by reviewing the basics of the complaint with counsel when you are uncertain.

Practice Pointer: While it may be tempting to “close the book” on a matter when you personally doubt the veracity of the complaint, the test is not whether you subjectively believe the complainant, but whether an objective third-party reviewing your decision after the fact would believe your decision was reasonable. Thus, any time you have doubts as to whether or not you are making the correct decision, the prudent action is to seek the advice of counsel as to whether an investigation is warranted.

D. Do District policies require an investigation?

District policy may require an investigation, depending on the nature of the complaint. For example, if a complaint alleges sexual harassment or disability based discrimination, District policies require that an investigation be conducted, and the policies may set a specific timeframe for the completion of the investigation. Thus, it will be important to consult District policies in a timely fashion, to determine first whether they require an investigation, and second whether they set forth a specific timeline for completion of the investigation.

In addition, once you have determined that an investigation is necessary, you should review relevant policies and procedures of the school district to ensure that the investigation will be conducted in accord with any such requirements. Depending on the nature of the complaint, more than one policy may be implicated; thus, it will be imperative that the scope of the investigation,

the time period for completing the investigation, and any subsequent investigatory report are consistent with the requirements of all applicable policies.

For example, a teacher may be accused of engaging in harassing behavior toward both a fellow employee(s) and toward a student(s). This would trigger a duty to ensure that the investigation complies with the district's employee and student harassment policies, as well as providing the employee with whatever rights may be granted or protected by N.H. R.S.A. 189:31 and any applicable collective bargaining agreement.

VII. THE CONDUCT OF AN INVESTIGATION

Once the administrator has determined that an investigation is necessary, the administrator should review relevant policies and procedures of the District to ensure that the investigation will be conducted in accord with any policy requirements. Depending on the nature of the complaint, more than one policy may be implicated; thus, it will be imperative that the administrator ensure that the scope of the investigation, the time period for completing the investigation, and any subsequent investigatory report are consistent with the relevant policy requirements.

Certain personnel actions taken by a school district may be governed by a specific statute or administrative rule issued by a governing agency. For example, an employee may be entitled to a due process hearing prior to any suspension without pay or dismissal. See above discussion of "preliminary disciplinary decisions." While these statutes would not prevent a school district from investigating a complaint against such an employee, they do affect the range of permissible disciplinary responses of consequences which may be issued. The fact that an employee enjoys statutory protection also makes it significantly more likely that any adverse employment action will result in litigation. These types of employees are more likely to invoke the statutory right to a hearing and are more likely to pursue litigation against a former employer than at-will employees who do not enjoy statutory job protection. Any investigation conducted of an employee who has statutory job protection should be conducted with the expectation that future litigation will result if the employee is ultimately disciplined or dismissed.

A. Identifying the Investigator.

1. Do you Need an Outside Investigator?

The first step in any investigation is to determine who is going to conduct the investigation. Depending on the allegations, an assistant superintendent, human resources manager, or a building level administrator may serve as investigator. In some cases, however, it is appropriate to involve legal counsel or to hire outside investigators.

For example, certain allegations may give rise to a conflict of interest, or a perceived conflict of interest, for which it will be necessary to hire an outside investigator. 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. This can eliminate claims of potential bias which may be leveraged against a district employee investigator during any hearing in the matter. If the matter ultimately reaches litigation, an independent investigator can add significant credibility to the district's case, as he or she is usually free from any asserted interest in the outcome of the matter. If a matter is very likely to result in litigation, then it is wise to hire an independent investigator from the beginning, so as to avoid having to duplicate the initial efforts of an inside investigator and to avoid the appearance of bias at trial.

If a complaint involves the superintendent, or if there would be conflict of interest if the superintendent were to serve as the investigator, it may be necessary for the school board to oversee the investigation, and the investigation should be conducted by the district's attorney or an independent investigator retained by the attorney or the district. It is not advisable that a subordinate employee be assigned the role of investigating any complaint involving the superintendent.

2. Retention of the Outside Investigator

When retaining an outside investigator, it is wise to describe the matter with as much detail as possible, without prejudging any individual's conduct. It is helpful to provide the investigator with all of the information the district has obtained at the time of retention, so that the investigator has a sense of the scope of the inquiry. However, it is important not to lead the investigator astray or to push the investigator in any particular direction by providing preliminary judgments or characterizations as to the information, as this can result in wasted effort by the investigator if the administrator's preliminary judgments later turn out to be incorrect. It can also result in unintentional bias by the investigator as he or she may be led down the wrong path. Thus, while the general scope of what is required may be defined during the retention process, it is also possible that this may change somewhat during the course of the investigation as more information becomes available.

An important detail when hiring an outside investigator who is an attorney is to identify the parties to the attorney-client relationship. This is important because it will effect whether and under what circumstances communications between district employees and the attorney may be treated as confidential communications subject to the attorney-client privilege. Further, it can effect whether written documents produced by the attorney investigator may be entitled to protection against disclosure under the attorney work product doctrine. If the

school district hires the attorney investigator directly, there would be no question that an attorney-client relationship was created between the school district and the attorney investigator. If general counsel hires the attorney, the issue is murkier as the attorney client relationship may be between the investigator attorney and counsel to the school district, rather than the school district itself. Further, when the school district is the client, there are different tests applied to determine which employees are actually entitled to the protection of the attorney client privilege. It is often wiser to have general counsel retain the attorney investigator so that there is no confusion over the nature of the attorney-client relationship and when and in what manner the attorney-client privilege would apply.

It is also helpful to establish at the time of retention what the intended course of communication will be during the investigation. Typically, investigators hired by an entity's general counsel will direct questions or comments about the course of the investigation to the general counsel, and provide any interim reporting to the general counsel. The outside investigator will not typically have regular contact with a school district superintendent or board members during the course of the investigation. The parties should establish the expected protocol on these matters at the time of the initial retention.

B. Scope and Conduct 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. Nearly all investigations will involve document review, including district policies, witness statements given prior to the formal investigation and personnel files of any employees under investigation. The accused should also be given the opportunity to respond to the accusations, and if the accused is a minor student, the student's parents may wish to be present.

If the investigation is to involve taking statements from or conducting interviews of a significant number of district personnel, it may be wise to issue a confidential memorandum from the administrator or superintendent to the employees who will be interviewed in advance of conducting any interviews. This memorandum can serve to remind the employees of the confidential nature of the investigation and of their obligation to cooperate and provide a complete and honest disclosure of any relevant information that they may have. It is also wise in such a memorandum to state the municipality or school district's general obligation to complete a thorough obligation of the matter and to maintain confidentiality for all parties. This memorandum can also serve to reduce discussion of the investigation among employees, and therefore decrease the likelihood of careless or inadvertent disclosure of confidential information. Such a memorandum is particularly important when an outside investigator is conducting

the investigation, so that all employees who may be contacted by the investigator understand the nature of the relationship and their responsibilities as employees.

If an employee is being questioned about matters pertaining to his or her own alleged misconduct, the investigator should consider whether a Garrity warning is required prior to conducting the interview. A Garrity warning is provided to inform the employee that, in accordance with the United States Supreme Court's decision in Garrity v. New Jersey, 385 U.S. 493 (1967), any information or evidence which is gained while an employee is under threat of discharge from government employment is compelled, and therefore cannot be used against the employee in criminal proceedings. However, such information can be used against the employee in administrative proceedings relating to the employment. The Federal Court of Appeals for the First Circuit has interpreted Garrity as applying only in circumstances where the public employee faces automatic dismissal for refusing to cooperate with the investigation. See United States v. Indorato, 628 F.2d 711 (1st Cir. 1980, *cert. denied*, 449 U.S. 1016 (1980)). The New Hampshire Supreme Court has followed the Indorato decision and ruled that the Garrity protections are triggered only when failure to cooperate subjects the employee to automatic dismissal from public employment. State v. Litvin, 147 N.H. 606 (2002).

If a Garrity warning is required, the employee should be presented with a written document explaining the nature of the requested interview, the employee's right against self-incrimination in criminal proceedings, and the intended use of the interview by the employer. The document should also explain the requirement and importance of cooperating in the interview and answering questions related to the employment and warn of any potential discipline, including dismissal, if applicable, for failing to cooperate. Unless the municipality or school district has utilized a Garrity warning in the past which was drafted by its counsel, it is strongly recommended that an investigator seek the assistance of counsel in presenting a Garrity warning document to an employee under investigation.

Furthermore, when the investigation has the potential to result in disciplinary action for an employee, 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 or report of the investigation (who was interviewed, when, what was said, what documents were reviewed, etc.), and the conclusions reached by the investigator should also be prepared. A report by an independent investigator should be comprehensive, containing detailed discussion of the documents reviewed, witnesses interviewed, and conclusions reached based upon the investigation.

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 following an initial complaint, it will be essential for the municipality or school district to be able to demonstrate that it had insufficient evidence of wrongdoing to justify any disciplinary action. Further, the municipality or school district should be prepared to establish that the lack of sufficient evidence to justify further action was not due to the failure to seek out all potentially relevant information.

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 investigator has three options: 1) concluding that the complaint is founded; 2) concluding that the complaint is unfounded; or, 3) concluding that he/she has been unable either substantiate or rule out the complaint and therefore the complaint cannot be resolved.

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 resolution, of an investigation.

It is not necessarily the investigator's job to decide the appropriate response if a complaint is founded. In some cases, where the evidence is clear and convincing, the investigator may decide to make a recommendation as to disciplinary action or consequences. If, however, the investigator determines that any conclusion on a particular issue would be a judgment call, the decision maker may be required to consider the evidence gathered and make an independent determination as to whether to impose a consequence based on the evidence gathered.

In a school district, while the investigator will make findings, and may make recommendations based on those findings, in most cases it is ultimately up to the superintendent to issue a decision as to any discipline or consequence to be imposed as a result of the investigation. If a complaint against an employee results in something less than dismissal, generally the superintendent has authority to resolve the matter. New Hampshire R.S.A. 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. R.S.A. 194-C:4, II(b). In addition, New Hampshire Administrative rule Ed 302.01 clearly establishes the role of the Superintendent as the executive officer of the local school district. Administrative rule Ed 302.02 vests the superintendent with authority to direct and supervise the work of all employees of the district, as well as with responsibility for removing a teacher or other employee of the district from the classroom in accordance with R.S.A. 189:31 and recommending the dismissal of certified staff to the School Board. Alternatively, if the matter involves the superintendent or involves a matter not clearly delegated to the superintendent under state law, the board may be required to decide as to whether to impose a consequence and what specific action should be taken.

A. Documenting a "Nonfinding".

It is vital to document any investigation which is concluded by "nonfinding" or a finding that the complaint was unjustified. The subject of the complaint 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.

B. Media Relations.

When the public questions 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

district should make an effort to reassure the public that the matter does not involve the safety of 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 student. Similar considerations arise when the issue involves the question of general public safety.

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.

C. 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.

D. Liability Exposure.

Regrettably, certain actions by employees can create liability exposure on the part of a district. While it is prudent to make an initial assessment of liability exposure and an initial report to insurers or a municipal risk pool entity, this reporting obligation should be revisited upon the conclusion of an investigation. The decision to dismiss or discipline an employee may trigger liability claims even if the municipality or school district carefully complied with all applicable policies, statutes, regulations and the terms of any collective bargaining agreement. An improper termination decision can result in back pay, reinstatement and attorney's fees being owed to the educator. It may also result in a civil suit on a theory such as defamation. Thus, the administrator is wise to consult with district counsel throughout and at the termination of the investigative process to assure that every effort is made to comply with risk management reporting obligations.

While keeping this in mind, the general rule in New Hampshire is that “municipal corporations are immune from liability for torts arising out of negligence in the performance of governmental functions.” Opinion of the Justices, 101 N.H. 546, 548 (1957). Generally, courts in other jurisdictions have held that, absent egregious conduct, a negligent investigation does not subject a municipal entity to liability. For example in Bombace v. City of Newark, 125 N.J. 361 (1991), a court held that the New Jersey Tort Claims Act immunity barred a claim against a municipality and one of its housing inspectors for negligently mishandling a tenant's complaints relating to inoperative smoke detectors and a lack of heating. Similarly, in an educational context, one federal appellate court has held that an inadequate investigation will not amount to ratification of prohibited conduct – absent proof that there has been a pattern of intolerable

conduct. Thomas ex rel. Thomas v. Roberts, 261 F.3d 1160, 1174 (11th Cir. 2001) cert. granted, judgment vacated sub nom. Thomas v. Roberts, 536 U.S. 953, 122 S. Ct. 2653 (2002) and opinion reinstated, 323 F.3d 950 (11th Cir. 2003) (holding that “The students’ argument that the District should be held liable because its investigation following the [student] searches was tantamount to a ratification of the conduct is similarly without merit”).

IX. DISCLOSURE OR ACCESS TO THE INVESTIGATIVE REPORT

There are various parties who may seek access to the investigative materials: the subject, parents, members of the public, the media and other employees. The investigator and any employee involved in the investigation should treat all aspects of a personnel investigation as confidential. Witnesses are not, under most circumstances, entitled to the investigator’s notes or any material prepared as part of the investigation.

Special consideration should be given to whether to disclose a final report of an investigation to an employee who is the subject of the complaint. In nearly all cases, if any disciplinary action is to be taken against the employee, fairness and due process would require that the employee be provided a copy of the report. This fact makes it critical that the investigator writing the report make every attempt to produce a report that can be redacted, if necessary, to prevent disclosure of names or identifying characteristics that are not required to be disclosed.

New Hampshire R.S.A. 91-A:5 provides a number of exemptions to the right of access to governmental records. Included among these exemptions is “records pertaining to internal personnel practices” and “confidential . . . information” and “other files whose disclosure would constitute an invasion of privacy.” While the courts will generally engage in a three-step inquiry to determine whether a disclosure would constitute an unlawful invasion of privacy, records pertaining to “internal personnel practices” have been held categorically exempt from disclosure. See Hounsell v. North Conway Water Precinct, 154 N.H. 1 (2006) (investigative report as to whether an employee threatened and harassed a co-worker categorically exempt under R.S.A. 91-A:5, IV); Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993) (exempting documents compiled during an internal investigation of a department lieutenant accused of making harassing phone calls).

If an employee, officer, or board member is faced with a request for disclosure of material pertaining to a personnel investigation, he or she should consult with his or her supervisor or with the municipal or district general counsel as to the appropriate response. Bear in mind that municipalities and school districts are obligated to provide a response to a right-to-know request within five (5) business days, even if that response is that the documents requested are exempt from disclosure

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