



## Education Update

# The Art Of Investigation

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One of the most challenging, but increasingly common, tasks a school will face is conducting an investigation into misconduct by a student, employee – or possibly even a parent. Nearly every instance of alleged wrongdoing a school learns about mandates some type of investigation. For example, schools should conduct investigations when a student complains of teacher misconduct, an employee complains of co-worker harassment, or the school suspects a student has cheated on a test.

### Why Should You Investigate At All?

Generally, investigations fall into two categories. In the first, the goal is to simply find out "who did it?" In the second type of investigation, the primary purpose is to satisfy a legal obligation (with the secondary purpose to find out "who did it?").

The second type of investigation should occur when the school has a legal obligation to take all reasonable steps to prevent and/or correct unlawful harassment in the workplace. In *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, the U.S. Supreme Court established an important defense for employers who act responsibly and reasonably to prevent harassment by supervisors in their workplaces.

Where the alleged harassment does not result in a tangible job detriment (such as termination or denial of a raise or promotion), an employer may avoid liability under federal law if it can show: 1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and 2) that the complaining employee unreasonably failed to take advantage of such preventive or corrective opportunities provided by the employer or to avoid harm otherwise. In addition, the laws of some states require a school to take affirmative steps to prevent harassment or discrimination of its employees.

Every investigation involves different facts, so no two investigations are alike. Nonetheless, you should have a consistent approach to misconduct investigations. The six steps below provide a solid framework for any investigation.

### Step 1: Define The Parameters

The first question should be: what is the nature of the misconduct? Is there a written policy prohibiting the misconduct? Does the policy provide for an investigation under this circumstance? Does the complaint involve student or employee harassment, which creates a legal obligation to investigate?

Be sure to review the school's handbooks and manuals. Often, schools have written policies as to when an investigation *must* occur, for example, if there is a complaint of employee or student harassment. Since the student-school relationship is contractual in nature, the school must follow its own policies if you are considering imposing a change in the contractual relationship, such as dismissal or suspension of a student.

## **Step 2: Plan The Investigation**

Once the parameters have been determined, consider how to approach the investigation. Who should investigate? This is an important question. If the investigator is not perceived to be neutral, the investigation may be undermined from its inception and will not fulfill its purpose of getting to the truth. Further, the investigation itself may generate further complaints and possible litigation.

Next, consider how the necessary information will be gathered. If the investigator does not have immediate access to documents or other possible evidence of the misconduct, how can such information be obtained? What if the complaint concerns inappropriate student pictures posted on a social networking site that have since disappeared? Or inappropriate "sexting" between students?

Identify possible witnesses, keeping in mind that the list may need to be adjusted as the investigation continues. Consider the order in which witnesses should be interviewed, remembering that the goals of the investigation are to: 1) get to the truth; 2) avoid witness tampering; and 3) keep the investigation as confidential as possible. In a case where there is an accused and an accuser, the accuser should be interviewed first so that the investigation can be tailored to the complaints raised.

With employee complaints, consider placing the accused and possibly the accuser on a leave of absence. This may help limit disruption in the school as well as help prevent potential retaliation or intimidation by the accused. When considering putting an accuser on a leave of absence, exercise caution as the accuser could later claim such action was retaliatory.

Consider the location of the interviews and whether a witness should be present. The witness interviews should be conducted in a private office or other location where interruptions are not likely to occur. In some cases, the witness may be a former employee (don't neglect to interview a witness merely because they are no longer employed). If that is the case, an in-person interview is preferred, but a phone interview is acceptable.

## **Step 3: Conduct Interviews And Document The Investigation**

The obvious objective of witness interviews is to find out the specifics of the wrongdoing. For the accuser, your goal is to find out what exactly was seen or heard? If the witness does not have personal knowledge of the events, who does? What evidence, if any, is there to support the allegation? Is there a document that shows the infraction? Can the witness give you access to the website that shows the infraction? Did the witness receive a text or email that evidences the communication? Where did the infraction occur? On campus? Off campus? On the Internet?

For the accused and other witnesses, start with broad open-ended questions and move to more specific ones. An interview of an accused harasser might begin with: did you interact with Mr. X on the date of the alleged misconduct? What was the nature of the interaction? What did you discuss? Did you discuss anything of a personal nature? Did you make any comments of a sexual nature to Mr. X? Did you tell Mr. X you wanted to have sex with him? Depending on the outcome of the interview with the accused, the accuser may need to be re-interviewed.

For student interviews, determine whether a parent will be present. There is no legal obligation to have a parent present for an interview about a school conduct violation or as a witness in the investigation. Nor is there any obligation to allow a parent's attorney to attend the interview.

Take thorough notes of the interviews and consider obtaining written statements from all of the witnesses. Keep an open mind regarding each step of the investigation. Be careful never to agree to "off-the-record" conversations. Never promise complete confidentiality, but make sure to advise witnesses that confidentiality will be maintained to the extent possible and that they are not to discuss the investigation with others. Advise witnesses accused of wrongdoing that retaliation against the accuser or others will not be tolerated.

The investigation may create an obligation to report the situation to child-abuse authorities or law enforcement. If that occurs, make such report immediately. Do not proceed further with the investigation, but instead work with the outside agency to facilitate their investigation.

#### **Step 4: Make Credibility Determinations And Reach a Conclusion**

Unless the accused admits the misconduct, after completing all interviews and reviewing all relevant documents, the investigator will need to decide whether it is more likely than not that the allegations in the accuser's complaint are true. The investigator must consider the accounts of the third-party witnesses and determine whether those witness accounts are impartial and unbiased.

Sometimes, there are no witnesses who corroborate the misconduct and the witness interviews result in a "he said/she said" conclusion. Then the investigator must attempt to determine whether the accused's denials were credible. The investigator should consider whether the accused clearly denied the misconduct or simply "doesn't remember" what happened. Also, were there inconsistencies in the stories of either the accused or accuser?

#### **Step 5: Take Appropriate Action**

Based on all of the information, conclude what disciplinary action (if any) is appropriate given the nature of the misconduct. Disciplinary action must be taken that is appropriate under the circumstances and effective in putting an end to the misconduct. In determining the appropriate action, consider whether there have been prior instances of misconduct. Consistency is key: ensure that disciplinary actions for similar infractions are consistent.

If the investigation results in a form of student discipline, take care to consider how to communicate this information to the parents. Be careful, direct, and patient. Be prepared to lay out the facts (avoiding reference to witness names) that led to the discipline, recognizing that the issue might be new and surprising for the parent.

If the investigation commenced with an employee complaint, communicate to the accuser that the investigation is complete and action was taken. Finally, the disciplinary action taken should be documented and the student and parent or employee disciplined should be asked to sign acknowledgment of any disciplinary notice.

Following these steps will help ensure a thorough, comprehensive, and legally correct investigation.

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