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Investigating and Responding to Employee Misconduct by Special Education Staff

by

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School personnel who work in special education (such as special education teachers, school psychologists, paraprofessionals, bus drivers) are not immune to employment performance concerns. Allegations of failure to properly and timely complete due process paperwork or a failure to implement an IEP could have significant and negative ramifications for a school district.

Although responding to employee performance issues is, generally speaking, a human resources/superintendent function, when special education employees are involved, the Director of Special Education may be expected to play a prominent role in advising other administrators on the technical complexities of due process compliance and other special education requirements that may bear upon on a review of employee performance concerns.

Accordingly, special education administrators must be prepared to proactively address employee malfeasance by assisting school administrators in the investigation of performance allegations and by providing input on whether discipline is warranted.

The need to conduct an employment investigation may be triggered by a number of events, including: (1) an audit of special education files; (2) parent complaints; (3) SEA complaints; (4) reports of wrongdoing or misconduct from other employees; (5) demand letters from lawyers; (6) safety issues and accidents; and (7) lawsuits and administrative claims.

Why is it a good practice to investigate complaints and other events or occurrences? Some federal laws related to harassment and discrimination require that investigations be conducted. Additionally, many school employees may only be disciplined or terminated from employment if there is “just cause.” Establishing “just cause” frequently requires an investigation.

Regardless of whether there is a specific law imposing a duty to investigate, it is a good practice to investigate when issues or facts arise that might be problematic. A properly conducted investigation, coupled with prompt and appropriate remedial action, can reduce or eliminate the school district’s liability exposure.

Below is a list of key items to consider when investigating and responding to allegations of employee misconduct:

I. CONSIDER WHETHER ANY IMMEDIATE ACTIONS NEED TO BE TAKEN

Upon receipt of a complaint or notice of an incident, prompt attention should be given to the following considerations:

- A. Has a crime been committed? Does law enforcement need to be notified?
- B. Does a maltreatment report need to be made?

II. CAPTURE ANY ELECTRONIC DATA OR PHYSICAL EVIDENCE BEFORE IT IS DESTROYED

Is there any surveillance video or other electronic media (i.e., a screenshot of a computer screen, voicemail or text messages) that must be preserved?

III. CONSIDER WHETHER TO PLACE THE ALLEGED WRONGDOER ON ADMINISTRATIVE LEAVE

Administrative leave is a general term for temporary removal from a job assignment. An employee on administrative leave typically continues to receive pay and benefits during the leave, which can be as short as a day or as long as several months, depending on the circumstances. It is most common for an employee placed on administrative leave to be directed to go home and remain there during the leave.

Most often, school districts place employees on administrative leave when students, parents or coworkers make allegations of misconduct against them. It is the policy of many districts to remove the employee from the situation while investigating the allegations. When the allegations are inflammatory or become public knowledge, administrative leave can also be beneficial for the employee. Gossip might die down more quickly when the employee is not there to remind people of the situation.

IV. INVESTIGATE COMPLAINTS OR INCIDENTS PROMPTLY AND THOROUGHLY

The investigation of the complaint or incident should be given high priority. Fast action sends a message to the complainant, the alleged wrongdoer, and the community at large that the school district is taking the matter seriously. Also, prompt action frequently results in a better investigation because recollections of events and physical evidence are better preserved.

V. CHOOSE THE MOST APPROPRIATE INVESTIGATOR FOR THE SITUATION

School officials must decide who will conduct the investigation. Generally speaking, districts have two choices: (1) Have an administrator conduct an internal investigation; or (2) hire a third-party (typically the district's legal counsel or other attorney) to conduct the investigation. There are advantages and disadvantages to both approaches.

Having a school official conduct the investigation is beneficial because the administrator presumably has greater personal knowledge of the employees, students, or parents involved and greater knowledge of the work environment and the physical plant of the schools. Also, an internal investigation is less expensive. However, there are drawbacks. School administrators may be seen as biased, not neutral, or "too close" to a situation. Also, an administrator frequently has conflicting responsibilities and may not be able to dedicate the time necessary to conduct a thorough investigation.

Involving an attorney conveys the impression that a "neutral" third party will take a fresh, serious look at the facts and be unbiased. Experienced attorneys will presumably have the requisite skill and knowledge to conduct a thorough investigation. However, using lawyers to conduct investigations can be expensive.

In determining who should conduct the investigation, careful consideration should be given to the following:

- A. The job titles/positions of the employees involved in the alleged conduct or wrongdoing;
- B. The type of conduct involved;
- C. The complexity of the issues;
- D. The potential liability to the school district;
- E. The existence or likelihood of litigation or adverse administrative action; and
- F. Whether the individual possesses the necessary skills and temperament to interview witnesses and assess credibility.

VI. COLLECT AND REVIEW RELEVANT DOCUMENTS BEFORE CONDUCTING INTERVIEWS AND PREPARE AN OUTLINE OF QUESTIONS OR POINTS OF DISCUSSION TO BE RAISED WITH EACH PERSON INTERVIEWED

It is generally necessary and helpful to become familiar with relevant documents and other information in advance so that the investigator is well versed on the pertinent background information and other data that may bear upon the investigation. Information that should be reviewed in advance includes:

- A. The personnel file of the alleged wrongdoer;
- B. Relevant school district policies and procedures;
- C. The collective bargaining agreement;
- D. Emails, including emails to and from the alleged wrongdoer; and
- E. Special education files of the students on the employee's caseload.

VII. SELECT AN APPROPRIATE LOCATION FOR THE INTERVIEWS; SELECT AN APPROPRIATE "WINGMAN" TO OBSERVE THE INTERVIEWS AND TAKE NOTES

If possible, the investigation should be conducted at the district office and not in the building where the alleged wrongdoer works. Such action minimizes disruptions and undue attention to the investigation process.

As a general matter, it is recommended that *two* school district representatives be present for the interviews. Having two representatives from management present may help to avoid confusion, misunderstandings, and claims of inappropriate conduct by the district during the interview process. Also, if the district's legal counsel is conducting the investigation, that person cannot be a witness in the case should litigation ensue. An administrator who is also present for the interviews could act as the witness instead of the lawyer.

VIII. DETERMINE THE ORDER OF THE PERSONS TO BE INTERVIEWED

It is generally recommended that individuals be interviewed in the following order:

- A. Complainant(s)
- B. Other witnesses
- C. The alleged wrongdoer

When conducting interviews, seek facts by asking open-ended questions. Do not ask questions that suggest a particular answer. Maintain a neutral and professional tone. Remain open-minded; do not argue or express an opinion. Ask witnesses for any supporting evidence such as photos, emails, notes, calendar entries. Have the witness draw diagrams, where appropriate. Follow up and clarify where the witness is not explaining matters clearly. Take careful notes AND DATE THEM. After completing the outline of questions, always ask: *“Is there anything we have not covered that you think is important for me [the investigator] to know?”*

When interviewing the complainant, use an appropriate tone and be respectful. THE COMPLAINANT MIGHT BE A FUTURE PLAINTIFF!

Prior to interviewing the alleged wrongdoer, give careful consideration to the employee’s Weingarten and Garrity rights (if any).

IX. COMPLY WITH THE MINNESOTA GOVERNMENT DATA PRACTICES ACT

At the outset of every interview, be it a school employee, student, or community member, always provide a Tennesen Notice and document that it has been given.

If the investigation involves student data, take appropriate measures to avoid disclosure of such private data to union representatives, unless such disclosure is authorized by law.

X. DEVELOP CONCLUSIONS BASED UPON THE DISCOVERED FACTS AND CREDIBILITY OF WITNESSES AND TAKE PROMPT REMEDIAL ACTION

It is common for the alleged perpetrator to deny any wrongdoing or responsibility. How do these denials square with other evidence obtained in the investigation?

Look for common threads of credibility. Are there any objective data that support a particular version of the facts? Is the story of the complainant or alleged perpetrator vague or inconsistent? Do the witnesses have any biases or motives? What were the demeanors and attitudes of the persons interviewed?

If the school district determines that the evidence supports a finding that an employee committed misconduct, remedial action (i.e., letter of directive, notice of deficiency, proposed discharge) should be considered. The precise action to be taken will depend upon the severity of the conduct, the employee’s prior employment record, and the strength of the evidence gathered during the investigation, in addition to other considerations.

In the case of a teacher, also consider the impact of statutory deadlines under Minn. Stat. § 122A.40 concerning nonrenewal of probationary teachers (written notice of nonrenewal before July 1) or a termination at the end of the school year (termination by vote of the full board before April 1). School districts are advised to consult legal counsel concerning what specific action should be taken.