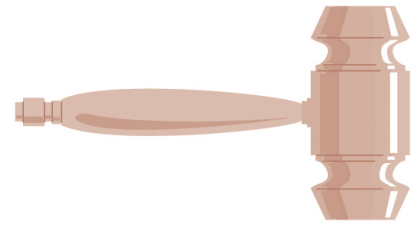


Legal Corner



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Investigating Student Misconduct



The purpose of this article is to provide a brief outline of best practices related to conducting a disciplinary investigation of a student. Before beginning, I note that although principals and assistant principals are often called upon to conduct investigations of alleged wrongdoing by students, in many instances, those administrators have not been trained as to the practical

and legal rules governing such investigations. Because it is critical that such investigations be conducted properly, adequately and in accordance with governing law, I urge all principals to obtain the necessary training.

That being said, an investigation is intended to collect factual information regarding an alleged incident of wrongdoing. It is axiomatic that the primary purpose of an investigation is to determine whether inappropriate conduct occurred, and if so, to identify the student(s) responsible for the conduct so that appropriate action can be taken. However, it must be recognized that all investigations can lead to legal proceedings. If the investigation is not conducted properly, or in accordance with law, the actions taken by the school districts can be undermined; discipline can be undone; and the principal can face legal liability, as can the school district. Perhaps the best example of an investigative technique that can undermine the legality of the investigation and lead to legal liability, including jeopardizing the employment status of the principal, is illegally audio recording a private conversation in violation of the Wiretapping and Surveillance Control Act, 18 Pa.C.S.A. § 5701 *et seq.* Against this backdrop, I will enumerate a number of simple concepts.

1. **Common Sense and Good Judgment.** As a general guideline, as with all investigations, the administrator should exercise common sense and good judgment.
2. **Confidentiality.** Confidentiality must be preserved to the maximum extent appropriate and legally required. However, there are a number of times when disclosure is legally or constitutionally required. For example, in order to provide due process to the alleged perpetrator, the perpetrator is entitled to know the allegations and to know the identity of

those necessary to be able to provide a defense. In addition, it is imperative that confidentiality be maintained and complete and accurate records be kept.

3. **The Complaint.** The first step in any investigation should be to review the complaint, if any. The nature of the complaint will often dictate the nature of the investigation. If a formal written complaint has not been made, I suggest that you document precisely the nature and scope of the complaint. The documentation should be acknowledged by the complaining party whenever possible. At a minimum, if at all possible, the complaining party should sign a document that contains a description of the complaint. Preferably, the complaining party should execute an affidavit describing the nature of the complaint, identifying possible witnesses and detailing the remedy that the complaining party may be seeking. You do not need a notary public to provide a seal on such an affidavit. Instead, the document should be titled an "Affidavit" and can conclude with the following statement: "I hereby certify that the foregoing facts are true and correct to the best of my knowledge and belief and are made subject to 18 Pa.C.S.A. § 4904 (relating to unsworn falsifications to authorities)." This statement must be followed with the signature of the affiant and the date of the signature.
4. **Requests for Anonymity.** It is not unusual for complainants or witnesses to request to remain anonymous. Never promise anonymity as the law may require that the identity of the complainant or the witness be divulged. For example, it is very possible that a complaining party may have to appear and testify at a later date.
5. **Requests Not To Do Anything.** There are times when a complainant may request that the school district not do anything. Depending upon the nature of the complaint, such a request cannot be honored. For example, a victim of sexual harassment, bullying or racial intimidation may say that he or she just wants the school to know what is happening, but does not want the school to do anything yet. Such a request cannot be honored because the law requires that known incidents of sexual harassment, bullying and racial intimidation be promptly investigated and that prompt and effective action reasonably calculated to end the wrongdoing be taken.

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6. *Governing Documents.* After securing the complaint, or affidavit, you should review the applicable student code of conduct¹ as well as board policies related to students' rights, complaints and investigations. If you are investigating an infraction, you should be familiar with the type of infraction(s) at issue; students' rights and responsibilities generally and as pertains to discipline; and any required procedures applicable to the specific type of investigation warranted by the circumstances.
7. *Security Video.* Practically speaking, the next step in any investigation should be to timely review all video footage from the applicable security cameras for the period of time in question to see if such events have been captured on screen. If so, the footage must be preserved and logged.
8. *Investigative Interview, Generally.* Next, you should promptly arrange interviews with the complainant (if you have not already done so) and then with witnesses to obtain their full account of the incident or events. You should also take their statements and collect any relevant documents. All witnesses should be admonished to maintain confidentiality as to the investigation and the matters discussed during the interview.
9. *Student Interviews.* Most investigations regarding student behavior will entail interviewing students. Numerous issues are associated with interviewing witnesses, especially students.
 - a. *Separate Interviews.* Witnesses should be interviewed separately and not in groups.
 - b. *Written Statements.* Given that witnesses are often fearful of the process and/or retaliation, it is recommended that you consider preparing a written statement in advance of the interview. This statement should succinctly state the reason for the interview, the fact that retaliation or retribution will not be tolerated and inviting the witness to contact you if he or she has any concerns of retaliation.
 - c. *Parental Notification.* With respect to student witnesses, depending upon the age of the child and the nature of the subject matter being investigated, it may be appropriate to notify the student's parents before the investigative interview.
10. *Documentation.* Of course, the first rule in terms of all interviews is to document, document and document. If you do not have contemporaneous prepared documentation, credibility can become an issue. Second, during an investigation interview, you should have a second administrative pair of ears in the room as witness to the proceedings to avoid "he-said" / "she-said" problems arising thereafter. Third, you should have in attendance a witness of the same gender as the student interviewee. (i.e., if a male principal is interviewing a female student, you should have a female assis-



- tant principal sit in on the conference. This may help to reassure the student and will avoid any potential problems arising from the interview.) In addition, for several years, our firm has used a court stenographer for investigative interviews where the nature of the investigation was such that legal liability was a real concern. We have found that they are more than worth the cost as it provides a verbatim and accurate record of what the witnesses said. Depending upon the nature and complexity of the investigation, you should consider using a court stenographer to prepare a verbatim transcript.
11. *Employee Witnesses.* With respect to employee witnesses, if the employee is in a collective bargaining unit, a determination should be made whether to allow a union representative to sit in on the interview. If the employee is simply a witness to wrongdoing by a student, unless there is a reasonable basis to believe that the questioning may lead to discipline of that employee, as well, the employee has no right to union representation. Also, an employee witness does not have the right to refuse to answer questions, unless the employee invokes the Fifth Amendment right against self-incrimination, which only arises in the criminal context. An employee's refusal to answer questions is insubordination and can form the basis of discipline.
 12. *Authentication.* As with the complainant, it is generally good practice to have witnesses authenticate the information that they provide. When possible, they should be asked to sign a statement or an affidavit.
 13. *Confronting the Alleged Perpetrator.* Once you have interviewed all known and available witnesses, you should interview the student who is the alleged perpetrator. There are a number of rules that govern the questioning of the alleged perpetrator.

- a. **Due Process.** Of course, public schools may not deprive a student of public education without providing “due process” to the student. Under due process principles, before any student is deprived of the right to a public education through a suspension or expulsion, the alleged perpetrator is ordinarily entitled to notice of the allegations against him or her and an opportunity to respond to the allegations. Where there is a possibility that the student perpetrator is going to be suspended, you may wish to combine the investigative interview and the due process “informal hearing.” Where the investigative interview and the “informal hearing” are combined, the rules set forth in the regulations of the State Board of Education must be fulfilled. Those rules essentially require that: (i) there be written notice of the allegations to both the parents (or guardians) and the student; (ii) there be reasonable notice of the informal hearing; (iii) the student be given the right to question any witnesses present at the hearing; and (iv) the student be given the right to speak and to produce witnesses on his own behalf. 22 Pa. Code §12.8(c).
 - b. **Student Searches.** To the extent that an investigation of a student perpetrator entails more than interviews, such as a search of a student or his possessions, as a general rule, no search may be conducted unless there is a “reasonable” suspicion that the search will turn up contraband or evidence of wrongdoing. Moreover, where there is reasonable suspicion to allow a search to be conducted, the “scope” of the search must be reasonable. For example, rarely, if ever, will a “strip search” of a student in school be considered to be reasonable. Before embarking upon student searches, you should consult your applicable school board policies.²
 - c. **Drug and Alcohol Testing.** Similarly, drug and alcohol testing of students based upon reasonable suspicion is permissible and is not precluded by either the Federal or State Constitution. However, such testing must comply with constitutional requirements. Therefore, it is important that whomever is determining whether there is “reasonable suspicion” that a student has taken drugs or alcohol or is under the influence of drugs or alcohol, is properly trained to make that determination. In addition, the collection and testing techniques and procedures used must meet strict standards. Again, you should consult your board policies before embarking on such measures.
14. **The Decision.** Once you have completed the interviews and any other investigative measures and have brought the investigation to a close, you will need to reach a conclusion based upon the results of the information you have obtained. When forming a conclusion, it is important to realize that “guilt” of

the perpetrator is not required to be proven “beyond a reasonable doubt” as in criminal cases. To the contrary, the correct standard is whether the “preponderance” of the evidence leads to a conclusion of guilt. A “preponderance” of the evidence is defined in the law as such proof as leads the investigator to find that the existence of the contested fact is more probable than not. Moreover, you can rely upon direct and circumstantial evidence to support your conclusion. In most instances, your conclusions should be documented as part of an investigative report stating your conclusion and outlining the facts and evidence that led to the conclusion.

- a. **“He Said, She Said.”** We have heard administrators mistakenly say that if there are no other witnesses and it comes down to one student saying that a second student did something wrong, and the second student denies it, the administrator cannot do anything. That is wrong. The evaluation of the credibility of witnesses is well recognized in the law and decision makers can consider credibility. If you believe that one witness is more credible than the other witness, you should form the appropriate conclusion and take the appropriate action.
- b. **Special Education.** One final note, in terms of special education students, (i.e., students with disabilities covered under the Individuals with Disabilities Education Act (“IDEA”) or under Section 504 of the Rehabilitation Act (“Section 504”)), many people, including administrators, have misconceptions regarding discipline of such students. In fact, the law provides such students with certain protections not afforded to non-disabled peers when discipline is necessary. That discussion is beyond the scope of this article. Therefore, it is suggested that if the student perpetrator at issue is covered under either the IDEA or Section 504, you seek guidance from your director of special education or your solicitor.

Conclusion

The importance of an adequate and proper investigation cannot be overstated. These tips for conducting such investigations are intended to be helpful but they are not a substitute for proper training. I urge all administrators to seek out such training before embarking upon investigations of students.

End Notes

¹Section 12.3(c) of the State Board Regulations provides that: “Each governing board shall adopt a code of student conduct that includes policies governing student discipline and a listing of students’ rights and responsibilities as outlined in this chapter. This conduct code shall be published and distributed to students and parents or guardians. Copies of the code shall also be available in each school library.” 22 Pa. Code §12.3(c).

²Under section 12.14(a) of the State Board of Education regulations, school boards are required to adopt reasonable policies and procedures regarding student searches. 22 Pa. Code § 12.14(a). The policies must be consistent with state and federal laws. The school district must notify students and their parents or guardians of these policies. *Id.*