

ARTICLE

Best Practices for Conducting Investigations

There are many situations in which school districts are tasked with investigating complaints. These complaints may involve employee misconduct, uniform complaint procedures (“UCP”) and sexual harassment, or student matters, to name a few. While different types of investigations will have their own nuances, there are many practices that are essential for all investigations. Since an effective investigation can prevent costly litigation and liability, following the best practices described below can help ensure your investigation protocol measures up.

1. Determine What Policies and Procedures Apply

The first step to a legally compliant investigation is to determine which policies and procedures apply. These policies and procedures serve as the roadmap for the entire investigation. Procedures and timelines will differ depending on the type of complaint or issue involved. Examples of possible applicable policies and procedures may include: Board policies and administrative regulations on complaints against employees, sexual harassment or student discipline, Williams Act complaint procedures, UCP; state and/or federal laws such as Title IX; and collective bargaining agreements. Once you have determined the correct policy or procedure, start by breaking it down into individual steps with deadlines. Then you’re ready to decide who will handle the investigation.

2. Choose The Right Investigator

Next, you need to decide whether the investigation can be appropriately conducted by an internal investigator or should be referred to an outside investigator or attorney. Many complaints can be appropriately handled by properly trained district staff or administrators. However, if there is any potential for bias of an internal investigation, for example if the case involves a high level employee of the district, outside investigators should be considered. Additionally, for complaints involving numerous or complex legal issues, an attorney may be advisable. A recent California Court of Appeals case confirmed that a factual investigation conducted by an attorney under certain circumstances is protected by attorney-client privilege. (*City of Petaluma v. Superior Court* (June 8, 2016, A145437) __ Cal.App.4th__ [2016 Cal.App. LEXIS 532].)

If a school district chooses to conduct an internal investigation, consider whether the internal investigator has specific training and experience in conducting investigations, knowledge of district policies, relationship to the accused and the complainant, and time and workload constraints.

3. Special Considerations

The investigator should also determine whether there are any special considerations that may affect the investigation. Examples of potential considerations may include whether minors are involved (consideration of age, notification to parents, allowing parents to be present during interviews), the sex of the interviewer if a sensitive matter is involved, potential claims of retaliation in the investigation process, whether or not witnesses are represented by union or other legal counsel, whether the investigation involves



Sarah Levitan Kaatz
Partner
Monterey Office
skaatz@lozanosmith.com



Jessi T. Gasbarro
Associate
Sacramento Office
jgasbarro@lozanosmith.com



As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this article does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

ARTICLE

allegations of criminal misconduct, and whether the investigation will run parallel to any law enforcement investigations.

4. Identify The Specific Allegations And Consider How To Document the Investigation

Before beginning the investigation, the investigator should clearly identify the specific allegations that he or she is investigating. Often, complaints are unfocused or rambling, so this step is crucial. It will serve as an outline for the interviews, help identify potential sources of information, and define the scope of the investigation. Additionally, the investigator should consider how to document the investigation, including whether or not to use audio or video recordings or to obtain signed declarations or affidavits from witnesses. School districts should consult legal counsel about what may or may not be subject to disclosure under the Public Records Act.

5. Timely Notices

As quickly as possible after the commencement of the investigation, notification letters should be sent to the complainant, the accused, and any potential witnesses. The complainant should be notified that his or her complaint is being investigated and given information regarding the procedures. The complainant should also be reassured regarding protections against retaliation if the allegations include discrimination or harassment based on being a member of a protected class. The accused should be notified that the complaint has been lodged against him or her, and reminded that he or she may not retaliate in any way against the complainant. The accused may also need to be appropriately notified of administrative leave pending the investigation. All recipients must be given appropriate admonishments about the need for confidentiality and protection from retaliation for participating in the investigation.

6. Collect and Review All Relevant Documents

All relevant documents and records should be collected and reviewed prior to beginning the interviews, if possible. Such documents may include: complaints, police reports, personnel files, collective bargaining agreements, board policies, written communications (including emails), statements from witnesses, site files, logs, handwritten notes, social media, and phone records, where available. Each witness should be asked if they have relevant documents such as emails or print-outs of text messages relevant to the complaint.

7. Prepare Necessary Admonitions

Before conducting the interviews, the investigator should prepare form admonitions to provide the witnesses, as needed. This may include may include, Lybarger/Spielbauer warnings (for the accused if s/he may exercise the right to remain silent), Banner admonition (for the accused to assure that they are able to communicate freely with their union), confidentiality admonishments, and statements regarding protection against retaliation

8. Conduct Thorough and Objective Interviews

When conducting the interviews, the investigator should generally begin with the complainant first, to ensure that all details about the allegations are known and the scope of the investigation is clear. The complainant will likely identify potential witnesses to interview. It is usually helpful to interview the accused last, so that the investigator can get his or her response to the statements of the complainant and other witnesses. The accused should also be asked for names of potential witnesses. The order of interviews may need to be changed depending on the nature of the investigation. Prior to concluding the interviews, the investigator should do any necessary follow up interviews to ensure that the investigation is complete. If, during the course of the investigation, additional issues or allegations come up, the investigator should consider whether the issues can appropriately be included within the same investigation, or whether the issues require separate investigation.

The investigator should ensure he or she is able to complete the investigation free from any biases. Interview questions should be neutral. The investigator should not express opinions on the outcome while the investigation is

ARTICLE

ongoing. If at any point the investigator feels he or she cannot continue the investigation objectively, a new investigator should be brought in or the matter should be referred to an outside investigator or legal counsel.

9. Complete A Thorough Report

The investigator should make every attempt to prioritize the completion of the final report promptly after concluding the interviews. Timelines required by Board Policy or other procedure should be adhered to, except in exceptional circumstances. All documents relied upon and any affidavits or witness statements should be included with the final report. While it may be difficult, the investigator should make a reasoned and informed effort to reach a conclusion regarding each disputed material fact. It is often helpful to have an Executive Summary of the report to highlight the key allegations and findings.

10. Send Completion Notices

Once the investigation is complete, the district will need to inform both the complainant and the accused regarding the outcome of the investigation. Typically, the complaint policy or procedure will spell out what information should be shared with which parties. It is recommended to consult with legal counsel regarding what documents and information to provide and whether names need to be redacted from documents. Additionally, both the complainant and the accused should be notified of any appeal rights and procedures.

Conclusion

No two investigations will ever be alike, but the above Best Practices will put you on the road to performing a thorough and complete investigation. As in any potentially litigious situation, school districts should work closely with their own legal counsel, even when conducting an internal investigation, to ensure that all legal requirements are met.