


# Five Essential Steps for Conducting an Investigation

National Association of Independent Schools (NAIS) Annual Conference  
February 27, 2020

Presented by: Michael Blacher & Kimberly Cole

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## Learning Objectives

**Today you will learn:**

- The purpose and significance of an investigation.
- The essentials of conducting an investigation.
- Common complaints about how investigations are conducted and communicated.

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## Why Conduct an Investigation?

- Have a factual basis to make and support decisions.
- Meet contractual obligations and those of fundamental fairness.
- Use as a defense in litigation.
- Retain trust and credibility within school community.
- Model the process by which individuals are held accountable for their conduct.
- Prevent future improper conduct.

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**The Five Essential Steps for Conducting an Investigation:**

1. Assess the Complaint.
2. Check the School's Contracts and Policies.
3. Gather Information from the Complainant, Witnesses, and the Accused.
4. Ensure Fundamental Fairness Before Reaching a Conclusion.
5. Communicate the Decision to the Complainant, the Accused, and Potentially Others.

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**Step 1:  
Assess the Complaint**

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**When to Investigate**

- **Complaint is made**
  - Can be verbal or written
- **What triggers a duty to investigate?**
  - Legal requirement?
  - Standard set out in policy?

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**How to Communicate About Ongoing Investigations**

- Acknowledge receipt of complaint to Complainant and notify of intent to investigate
  - Notify Complainant that he or she may not be retaliated against and provide contact person if there is a concern about retaliation
- Let the person who is the subject of investigation know about the investigation
- Determine if interim steps are necessary

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**Selecting an Investigator**

**Evaluate the most appropriate option:**

- Internal investigator (school employee):
  - Head of School
  - Dean or Department Head
  - Human Resources Director
- External investigator:
  - Attorney acting in his or her capacity as an attorney
  - Licensed private investigator

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**Case Study**

A teacher receives an anonymous complaint about bullying by students.

**Is the school obligated to investigate the claim?**

A department chair is accused of discrimination by a poor performing teacher.

**Who should conduct the investigation?**

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**Step 2:  
Check the School's  
Contracts and Policies**

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**Review School Rules, Policies, and Procedures**

- **Read the applicable rules, policies and procedures**
  - Handbook
  - Separate policies
  - Past practices
- **Follow the applicable rules, policies and procedures**
  - Not following the rules, policies, and procedures will lead to a questionable investigation

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**True, False, or Maybe**

The School's employee handbook says that all complaints are taken seriously and will be investigated. There needs to be a full-blown investigation for of any complaint of misconduct.

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**Step 3:  
Gather Information from the  
Complainant, Witnesses, and  
the Accused**

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**First: Understand the Scope of the Investigation**

- Scope refers to the allegations to be investigated
- School (through person directing/coordinating investigation) determines the scope based on the allegations in written and/or verbal complaint
- Scope *should not* be whether a legal or policy violation occurred:
  - Was Employee sexually harassed?
  - Was sexual harassment policy violated?
- Scope *should* be whether asserted conduct occurred, e.g.:
  - Whether or not Employee touched co-worker's breast?
  - Whether or not Employee told co-worker she is "sexy"?

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**Next: Gather, Review, & Research**

- **Gather and review**
  - All written complaints
  - All relevant documents
    - E-mails, text messages
    - Physical evidence
    - Potentially: Personnel file or student records
  - All witness statements
- **Research**
  - Verifiable relevant information
  - Verifiable factual assertions

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**Gather, Review, & Research**

- **Searches of school property:**
  - Reasonable expectation of privacy?
    - Handbook
    - Computer use/electronic media policy
  - Can we search school email?
  - Can we search school computers/laptops?
  - Can we review social media pages?
- **Can we search personal property?**

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**Then: Interview**

- **Order of Witness Interviews:**
  - The Complainant
    - Get a complete complaint
  - Witnesses
    - Talk to anyone else with knowledge
  - The Alleged Wrongdoer
    - Give her/him the last word
- However, be flexible

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**Interview**

**The Interview:**

- Set welcoming, respectful, and professional tone
- Use outline as question guide only
- Focus, connect, and listen carefully
- Ask follow-up questions based on witness responses
- Take detailed notes, have a note taker, or tape record interviews
- Ask wrap up questions
  - “Have you told me everything?”
  - “Is there anything else you wish to add?”
  - “Is there a question you thought I’d ask but I haven’t asked?”

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**True, False, or Maybe**

Parents must be alerted before a student can be interviewed.

Anyone being interviewed has a right to have his or her attorney present.

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**Step 4:  
Ensure Fundamental Fairness  
Before Reaching a Conclusion**

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**The Legally Compliant Investigation**

**What standard does an investigation have to meet?**

"Investigative fairness contemplates listening to both sides and providing employees a fair opportunity to present their position and to correct or contradict relevant statements prejudicial to their case without the procedural formalities of trial."

*Cotran v. Rolling Hudig Hall Intern, Inc. (1998) 17 Cal. 4th 93.*

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**Assessing Witness Credibility**

Investigators are expected to make credibility determinations when necessary in order to reach a conclusion

- **Credibility Factors**
  - Inherent plausibility
  - Motive to lie
  - Corroboration
  - Extent to which a witness was able to perceive, recollect, or communicate about the matter
  - History of honesty/dishonesty
  - Habit/consistency
  - Inconsistent statements
  - Manner of testimony
  - Demeanor - but be careful

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**Evaluate the Evidence**

- **Burden of proof:**
  - Preponderance of the evidence
  - Is it more likely than not that the alleged misconduct occurred or did not occur?
- **Evaluate:**
  - Did the alleged wrongdoer commit the alleged acts?
  - Consider each allegation separately
  - Did the conduct violate school policy and/or rules of conduct? (If asked to determine)

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**Case Study**

During an investigation an employee credibly denies wrongdoing. There are ambiguous emails that are not determinative. Several employees contradict the employee who denied wrongdoing.

**What is the result of the investigation?**

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**Step 5:  
Communicate the Decision to the  
Complainant, the Accused, and  
Potentially Others**

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**Evaluating Discipline and/or  
Corrective Action**

- Impose appropriate discipline in accordance with school policies, enrollment contracts, etc.
- There must be a policy, contract, rule, etc. violated in order to discipline a student.
- Follow-up to make sure that the situation has been resolved.
- Consider non-disciplinary remedial measures (if appropriate).

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**Communicating with the  
Complainant**

- If allegation(s) ARE sustained: Provide general notification to Complainant that appropriate corrective action(s) will be taken
- If allegation(s) ARE NOT sustained:
- Balance: Accused's rights to privacy vs. School's interest in disclosure
- Generally: No disclosure of investigative report

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**Communicating with the Accused Wrongdoer**

- If allegation(s) ARE NOT sustained: Simply advise Accused of the findings
- If allegation(s) ARE sustained: Communicate to Accused at least the general basis for sustaining the allegations and determining that school policies were violated
- Generally: No disclosure of investigative report

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**Communicating with the Community**

- Typically no statements to community
- If there are communications, they must be:
  - Factual
  - Legitimate/Reasonable Need
- May want to hire PR firm (through attorney)

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**Communicating with the Board**

- Duty of Board to exercise proper oversight
- Provide information on a “Need to know” basis
- Have attorney present to keep discussion privileged

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**Checklist for a Fair Investigation**

- Investigation is thorough and investigator is unbiased
- Both complainant and accused have full opportunity to present their side of events, preferably in person
- Investigator follows up on evidence that supports either side's version of events
- Investigator interviews relevant witnesses and reviews relevant documents
- Investigation is consistent with the school's rules & policies and its normal investigative practices
- Investigator assesses witnesses' credibility
- Investigator reaches a reasonable and fair conclusion based on information collected, reviewed & analyzed during investigation

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**Case Study**

You finish an investigation and terminate an employee. She makes false statements about her misconduct and the investigation. Families demand to know what really happened.

**What can you say?**

**Would your answer be different if the situation involved a student who was expelled?**

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**Thank You!**

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