



# CHARTER SCHOOL CONFERENCE

THURSDAY, MARCH 20, 2025

8:30 AM - 12:30 PM

HODGSON RUSS OFFICES | 140 PEARL STREET, BUFFALO NY 14202

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# Student Discipline: Investigation through Suspension

*Charter School Client  
Conference*



*March 20, 2025*



**Andrew J. Freedman, Esq.**  
**Lindsay A. Menasco, Esq.**

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# Student Discipline

- Relevant Statutes and Cases
  - New York Education Law § 3214
    - Short-Term vs. Long-Term Suspension
    - Investigations
    - Due Process Rights
      - Notice
      - Disciplinary Hearing
    - *Goss v. Lopez*, 419 U.S. 565 (1975)
      - Federal Due Process Standard

Reminder: \*\* Refer to your charter\*\*





## Common Mistakes

- Lack of Notice to Student;
- Lack of Notice to Parents;
- Failure to include the proper content in the notice;
- Failure to properly serve the notice (*i.e.*, U.S. Mail, email with return receipt, call to confirm receipt).



# Grounds for Suspension

- Insubordinate
- Disorderly
- Violent
- Disruptive
- Conduct that otherwise endangers the safety, morals, health or welfare of others
- NOT truancy!



# Notice to Student

- The “suspending authority” must provide the student with oral notice of charged misconduct, and if denied, must provide explanation of basis for suspension.

***NOTICE***

# Two Types of Suspensions



## Short-Term

- For a period of 5/10 days or less;
- Does not require a Disciplinary Hearing;
- May only be imposed by Principal or Acting Principal, the Board of Education, or the CEO.
- Assistant Principal cannot

## Long-Term

- For a period greater than 5/10 days;
- Requires a Disciplinary Hearing;
- May only be imposed by the CEO or Board of Education.

# Student Discipline Investigations

- Identify person in authority to conduct the investigation
- Learn specifics about the incident
- Gather evidence
- Interview witnesses
  - Witness Statements
- Evaluate evidence
- Conclude investigation
- Take appropriate action







# Learning about the Incident

- Determine time and date of incident
- Identify location of incident
- Note any special circumstances about incident
- Gather names of individuals present (students and staff)
- Identify all relevant evidence, including, social media posts and/or student writings
- Interview student witnesses separately to prevent communication between them prior to interviews

# Gather Evidence

- Obtain the following if available:
  - Contraband
  - Photographs
  - Social media posts
  - Digital recordings
  - Text messages
  - Emails
  - Student statements
  - Staff statements
  - Nurse's report
  - Police Report





# Evaluation of Evidence

- Does evidence obtained during the investigation prove that a violation of the Code of Conduct occurred?
  - If yes, identify the specific section of the Code of Conduct that was violated.
  - If no, did you conduct a complete investigation or do you need to revisit steps taken to ensure that you have gathered all the evidence available?
- If student is to be suspended, provide due process.



# Notice to Parents

- School officials must notify the parents in writing that the student is being suspended from school.
- Contents of Notice
  - Describe the incident;
  - Provide the length of the suspension;
  - Code of Conduct section violated.
- Charge(s) of Misconduct (Long-Term Suspension)

**Do:**

**On or about January 12, 2025, Jane Doe got into a physical altercation with another student in school.**

*Don't:*

*Jane Doe violated the Code of Conduct by engaging in violent behavior.*



# Long Term Suspension Process

- Suspension hearing brought pursuant to New York State Education Law Section 3214.
- Typically, Hearing Officer reviews evidence; makes a determination on guilt; recommends a penalty to the Principal.
- The School Leader makes the final determination of guilt and penalty.

# Pre-Hearing Preparation

- Arrange for the Disciplinary Hearing.
  - Out of school suspension may not continue beyond 5/10 days unless a disciplinary hearing is conducted.
- Draft Notice of Disciplinary Hearing and Charges.
  - Provide notice and charges to parents within reasonable time (at least 48 hours) before the date of the disciplinary hearing.



# The Hearing

- Presided over by the School Leader or designated Hearing Officer.
- Attendees:
  - For the School:
    - Individual to “present the case” (i.e., school attorney, building principal or assistant principal)
    - Witnesses (staff and/or students, to be called individually)
  - For the Student:
    - Student
    - Parents
    - Counsel or Advocate
    - Witnesses





# The Hearing

- A record must be made of the proceeding.
- The School has the Burden of Proof.
- Introduction and identification of those present.
- Reading of the Charges.
- Plea by the Accused Student (Guilty or Not Guilty).
- Presentation of the School's evidence.
- Opportunity for cross-examination.
- Student's presentation of evidence.
- Opportunity for cross-examination of the student's witnesses.
- Determination of guilty/innocence made.



# Translators

- The School must provide a translator for the hearing if the student or the student's parent(s)' primary language is a language other than English.
- Additionally, all notices must be provided in the primary language of the student and the student's parent(s).



# The Plea



## Guilty

- Student pleads Guilty to the charge(s).
- School provides background information about the conduct for the record.
- Consideration of prior disciplinary record, if any, for penalty purposes.

## Not Guilty

- Student pleads Not Guilty.
- School presents its case, consisting of evidence to support the charge(s) against the accused student.
- Cross-examination of witnesses.
- Student presents evidence.
- Cross-examination of witnesses.
- Hearing Officer determines guilt or innocence and moves to penalty phase, if necessary.



# The School's Burden

- The School needs competent and substantial evidence that the student engaged in the charged misconduct.
- This evidence consists of:
  - Witness testimony as to what was OBSERVED.
  - Physical evidence (knife, drugs, copies of e-mailed student threat, etc.).
  - Investigative results.
- The School cannot use written statements from students or staff who are not present and should not rely solely on hearsay testimony.
- Copies of all evidence used must be provided to the family.

# Rescheduling the Hearing

- If the parent requests that the hearing be rescheduled, the student remains suspended until the hearing is held.
- If the School adjourns the hearing, the student must be returned to school until the hearing is held.



- [illegible]



# Witnesses

- The best witnesses are those who personally observed the misconduct. Those witnesses should be prepared to testify by the person presenting the case.
- If these witnesses are students, the School should inform their parents and offer them the opportunity to be present.
- Witnesses should be made aware that they are subject to cross-examination by the accused.

# What to Bring to the Disciplinary Hearing



- The principal's short-term suspension notice.
- The notice of hearing and statement of charges.
- Any written statements.
- Documentary or physical evidence.
- Police statements, if applicable and available.
- The Code of Conduct.
- Student prior disciplinary record, if any.
- Bring 3 copies of all documents to the Disciplinary Hearing (parent, hearing officer, and school)

# The Penalty Phase

- Come to the Disciplinary Hearing prepared with a recommendation for period of further out of school suspension.
- If appropriate, a student's prior disciplinary record should be offered in support of the requested penalty.





## Penalty Phase - Early Return?

- Education Law § 3214 permits the School to condition a student's early return from suspension on the student's voluntary participation in counseling or specialized classes, including anger management or dispute resolution, where applicable.



# During Period of Suspension

- Students of compulsory attendance age must be provided with alternative instruction pursuant to Education Law § 3214.
- Alternative instruction must begin as soon as the out-of-school suspension begins.





# Discipline Appeals

- Parents may appeal a long-term suspension directly to the Board of Trustees.
- If the parents are dissatisfied with the result of the initial appeal, they may appeal to the Charter Authorizer.
  - Check your Code of Conduct and/or policies relative to the deadline by which appeals must be submitted.

# Questions?



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# Conducting Effective Workplace Investigations

Charter School Client  
Conference



*March 20, 2025*

**Elizabeth D. McPhail, Esq.**

**Lindsay A. Menasco, Esq.**

# Why Conduct Internal Workplace Investigations?



- Internal investigations are an important tool for responding to employee complaints or incidents because they assist employers in determining:
  - Whether allegations of misconduct have merit;
  - Who was involved in the misconduct;
  - If corrective or other measures should be taken to prevent recurrence and limit employer liability; and/or
  - Preventative steps to avoid similar future incidents.
- Investigations can also help:
  - Improve employee morale;
  - Increase productivity (when coupled with appropriate corrective action);
  - Reduce turnover rates; and
  - End inappropriate conduct.

# Benefits of Conducting Workplace Investigations



- Federal Law – under the longstanding *Faragher-Ellerth* defense, an employer could defeat a harassment claim if:
  - It attempted to prevent and correct the harassing conduct and had an internal complaint procedure; and
  - The employee unreasonably failed to take advantage of preventative and corrective opportunities provided by the employer.
- While the defense is no longer available under New York State Law, it likely will be factually persuasive for an employer to have commenced a timely investigation and taken remedial action, when warranted, in a subsequent litigation.





## A Reminder for Supervisors ...

- Under the NYSHRL, supervisors and managers can be held individually liable if they encourage, condone or participate in unlawful conduct. Therefore, supervisors should report:
  - A complaint or information they received about all forms of harassment;
  - Employee behavior that they have observed that may be or amount to harassment, including sexual harassment; or
  - Behavior that they suspect is occurring that is sexual harassment or other harassment.
- Examples:
  - Jim sends an email to Supervisor Sarah claiming that he did not receive a training manual provided to other female co-workers and he believes this is because he is a male.
    - Should Sarah report Jim's email?
  - Jim asks Sarah for advice because one of his co-workers referred to him using a racial slur. Jim does not want to make it in to a "big deal," but wants Sarah's advice about how to neutralize the behavior.
    - Should Sarah keep Jim's request for advice confidential?

# When is the Duty to Investigate Triggered?



- Employers must promptly investigate complaints of:
  - Discrimination;
  - Harassment (sexual and otherwise);
  - Retaliation;
  - Health and safety violations;
  - Workplace violence or threats;
  - Workplace drug and alcohol use;
  - Violations of employer rules;
  - Theft or fraud; and
  - Other criminal activity.
- Complaints of inappropriate workplace conduct should also be investigated in a timely manner.

# Planning an Investigation



- **Step 1:** Preserve the evidence.
- **Step 2:** Determine who should conduct the investigation.
- **Step 3:** Define the scope of the investigation.
- **Step 4:** Draft interview outlines.
- **Step 5:** Consult relevant school policies, state and federal law requirements, and collective bargaining agreements, if any.
- **Step 6:** Contact the complainant.

# Step 1: Evidence Preservation



- Memorialize the complaint into a written record.
  - Even if the complainant requests otherwise.
- Identify, preserve, and safeguard key potential evidence. This may include:
  - Emails;
  - Computer data;
  - Videotapes;
  - Memos;
  - Timecards;
  - Policies;
  - Personnel files;
  - Student files;
  - Notes; and
  - Anything else relevant to the alleged wrongdoing.
- Spoliation and the chain of custody.
- Litigation hold.
  - “Reasonable anticipation” of litigation.

## Step 2: The Investigator

- Attorneys or Non-Attorneys?
- School official?
- Depends on the nature of the claim.
  - What is the nature of the complaint?
  - What school policies are implicated?
  - What laws are implicated?
  - If bullying is alleged, should the school's DASA coordinator be alerted?
  - If harassment is alleged, should the school's Title IX coordinator be alerted?

## Step 3: Scope of the Investigation



- Who should be interviewed?
  - Complainant;
  - Accused;
  - Firsthand witnesses;
  - Former employees; and
  - Unidentified witnesses.
- In what order should individuals be interviewed?
- Where should the interviews take place?
- What evidence is available?
- What questions should be asked during the interviews?
  - Any relevant background or reoccurring incidents?
- What should each witness be told?
- What is the goal of the investigation?
- What interim steps should be taken to ensure a student or employee's safety or well-being?

## Step 4: Interview Outlines



- Outline the topics to be covered with each interviewee and to the extent possible, prepare a list of questions the investigator will ask each person.
  - It is important for the investigator to listen carefully to the information each witness provides and ask appropriate follow-up questions.
- Explore the basics in detail, using the following types of standard inquiries:
  - Who, What, When, Where, Why, How?

## Step 4: Interview Outlines Cont.



- The investigator should also use more specific inquiries:
  - Who was present?
  - What was said?
  - What documents relate to this situation?
  - Are the documents in your possession?
  - What other evidence do you have or know of?
  - What other witnesses may know?
  - Did the complainant report the issue? If so:
    - To whom;
    - When; and
    - What was said?
- Concluding questions.



## Step 5: Relevant Considerations



- Confidentiality:
  - Confidentiality is important to the success of an internal workplace investigation.
  - However, confidentiality should not be promised absolutely and should not be demanded.
- Treatment of the complainant and the accused.
  - Placing the accused on leave (*e.g.*, criminal activity, violence, ongoing harassment/discrimination, fraud, etc.)
- Collective Bargaining Agreements (if applicable):
  - Contractual rights may affect the way an investigative interview may be conducted.



## Step 5: Additional Considerations

- Retaliation
  - The NYSHRL and Title VII protect employees who engage in “protected activity” from retaliation. Protected activities include:
    - Making a complaint about discrimination or harassment or suspected discrimination or harassment;
    - Providing information during an investigation; and testifying in connection with complaint.
  - Retaliation is any action taken to alter an employee’s terms and conditions of employment because that employee engaged in protected activities.
    - Any adverse action that could have the effect of discouraging a worker from making a complaint about discrimination/harassment.

# Conducting the Investigation



- The investigator should:
  - Take accurate notes without conclusions/commentary/editorials.
  - Note credibility assessments (e.g., nervousness, insincerity, inconsistencies).
  - Get details on conclusory responses (e.g., "he harassed me," and "everyone knows.")
  - Ask non-leading, non-judgmental, and open-ended questions.
    - The goal is to get the interviewee to speak openly and candidly.
  - Consider having a second investigator/witness present.
- The investigator should not:
  - Promise confidentiality or require absolute confidentiality.
  - Be vague, ambiguous, or euphemistic about what they are asking.
    - Address the allegations head-on, even if it is uncomfortable.
  - Use conclusory language, e.g., "did you see Sean harass Susan at the party?"
    - Instead: "was Sean at the party?" "did you see him interact with Susan?" "describe the interaction – what was said, where, how often, how loud, any touching? Any emotional expressions?"



# Conducting the Investigation

- When interviewing the complainant, the investigator should explain that:
  - They are investigating a particular complaint about action(s) which may violate a school policy;
  - All witnesses will be questioned;
  - Confidentiality will be maintained to the greatest extent possible, but is not guaranteed;
  - At the conclusion, a decision will be made about what action, if any, is appropriate.
- The investigator should assure the complaining party and all witnesses that any retaliation will not be tolerated.



## Concluding the Investigation

- Draft investigation report.
- Communicate the outcome to the:
  - Complainant;
  - Accused; and
  - (When necessary) others involved in the investigation.



# Concluding the Investigation

- Attorney-Client Privilege:
  - The attorney-client privilege could protect investigation-related materials if the school initiated the investigation primarily to obtain legal advice, rather than primarily for a business reason.
  - If the investigation's primary purpose is to obtain legal advice, employees typically seek to protect investigation-related materials initially and reserve the decision of whether to waive any protection, if appropriate.
- Non-privileged Investigations:
  - A school's internal investigation may not qualify for the attorney-client privilege or work product protections, such as when:
    - A non-attorney is conducting the investigation;
    - The investigation's primary purpose is not to provide legal advice;
    - A law or internal district policy requires the district to conduct the investigation; or
    - The documents were prepared in the ordinary course of business or would have been created in essentially similar form regardless of any anticipated litigation.



## Investigation FAQs

- **FAQ 1:** Employee says she's retained a lawyer and won't participate in the investigation if her lawyer isn't present.
  - This request should be rejected, employees are not entitled to an attorney during an investigation.
- **FAQ 2:** Employee says he doesn't want his statement "on the record." What should the investigator do?
  - There is no such thing as off the record.
  - The employer has a duty to the employee to investigate any complaints.



## Investigation FAQs

- **FAQ 3:** Employee comes to HR to report a concern but doesn't want it to be "official" or later asks that it be withdrawn. What should HR do with the information?
  - The employer still has a duty to investigate.
- **FAQ 4:** Employee's mother calls to complain about how her son is being treated at work. Should the complaint be investigated?
  - The employer still has a duty to investigate; it does not matter the source of the complaint.
  - However, this type of complaint should be considered for credibility.





## Investigation FAQs

- **FAQ 5:** What do I do if a witness makes new allegations that are not part of the scope of the current investigation?
  - Be prepared to advise the employee that they should pursue their own complaint through the employer's internal reporting mechanisms.
  - Consider whether re-interviewing witnesses would be helpful in light of new information and should re-interview witnesses whenever necessary.

# Questions?



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# Hot Topics

*Charter School Client Conference*

*March 20, 2025*



*Presented by:*

**Andrew J. Freedman, Esq.**

**Elizabeth McPhail, Esq.**

**Lindsay A. Menasco, Esq.**

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# Agenda

- Trump Administration Executive Orders
- Immigration Enforcement Action in Schools
- Transgender Student Rights
- Record Requests Pursuant to Freedom of Information Law ("FOIL")
- Questions



## EO #11478 – January 20, 2025

- Coordinates the termination of illegal DEI in the Federal Government
  - Fails to define “illegal DEI discrimination”
  - Orders Director of the Office of Management and Budget, assisted with the USAG to terminate all discriminatory programs, including illegal DEI and “diversity, equity, including, and accessibility.”



# US Department of Education

- On January 23, 2025, US DOE eliminated “harmful Diversity, Equity, and Inclusion initiatives
- First step in reorienting the agency toward prioritizing meaningful learning ahead of divisive ideology in schools
- Dissolution of the Department’s Diversity & Inclusion Council
- Dissolution of the Employee Engagement Diversity Equity Inclusion Accessibility Council (EEDIAC) within the Office of Civil Rights
- Cancellation of ongoing DEI training and service contracts
- Placing staff involved with DEI on paid administrative leave
- Withdrawal of Department’s Equity Action Plan

# NY Attorney General Response



- US Department of Education is misconstruing Supreme Court precedent
- Nothing in Dear Colleague letter changes existing law and well-established legal principles that promote educational opportunity for students of all backgrounds
- Distinguishes Students for Fair Admissions v. Harvard
  - Sets forth a framework for evaluating the use of race under Title VI in higher education
- Dear Colleague Letter and February 28 FAQ incorrectly suggest that it would be unlawful for educational institutions to implement race-neutral policies
- Circuit Court of Appeals have held that it is not unlawful for a school to implement race-neutral admissions policies to increase student body diversity
- <https://ag.ny.gov/sites/default/files/publications/joint-guidance-re-school-programs-guidance-2025.pdf>





## Potential Risks

- US Department of Justice investigation
- US DOE Investigation
- Loss of Federal funds
- Litigation
- Link to Dear Colleague Letter dated February 14, 2025
  - <https://www.ed.gov/about/news/press-release/us-department-of-education-directs-schools-end-racial-preferences>

# Immigration Enforcement Action in Schools



- January 20, 2025 – Acting Department of Homeland Security Secretary Issues Directive
  - Rescinded a 2021 policy under the Biden administration restricting Immigration and Customs Enforcement (“ICE”) arrests near sensitive locations, including schools
  - ICE agents may arrive on-site without notice for an immigration audit, a raid, or to detain specific individuals
  - Policy (visit protocol, legal counsel contact)
  - Training (summary of protocol, get information, legal counsel contact, parent/guardian contact)
  - FERPA (no student PII without parental consent unless exception exists)
    - *Denver Public Schools v. Noem* – (D. Colo. 2025)  
Denver Public Schools failed to prove recent drop in student attendance was due to potential for ICE raids



# Transgender Student Rights

- January 20, 2025
  - Executive Order 14168 – Reinforces sex-based definitions recognizing only two sexes (male and female) as “immutable biological realities.”
  - “Gender identity” rejected as basis for legal recognition in policymaking and prohibits the use of federal funds to promote gender ideology.
  - Rescinds previous Executive Order 13988 which prevented and combated discrimination based on gender identity or sexual orientation.
- January 28, 2025
  - Executive Order 14187 – Ends gender-affirming medical treatments for children under age 19.
- January 31, 2025
  - U.S. Department of Education will officially enforce 2020 Title IX regulations
  - Any Title IX investigations initiated under 2024 Title IX regulations should be “immediately reoriented to comport fully with the requirements of the 2020 Title IX Rule.”
- February 6, 2025
  - NCAA announced changes to the Association’s participation policy for transgender students per Trump administration’s executive order which limits competition in women’s sports to student-athletes assigned female at birth only.
- \*\* Remember – We are in New York State = NYS Human Rights Law and DASA\*\*



# Freedom of Information Law

- What is subject to FOIL?
  - Any information kept, held, filed, produced, or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes. See N.Y. Pub. Off. Law §86(4).



# Freedom of Information Law Cont'd

- What records are exempted from FOIL?
  - Records exempt from disclosure by state or federal statute (e.g., FERPA)
  - If disclosure would constitute an unwarranted invasion of personal privacy
  - Disclosure of employment, medical or credit histories or personal references
  - Sale or release of lists of names and addresses of such lists would be used for commercial or fund-raising purposes
- If disclosure would impair present or imminent contract awards or collective bargaining negotiations.



# Freedom of Information Law Cont'd

- What records are exempted from FOIL?
  - If disclosure would endanger life or safety of any person
  - Records which are inter-agency or intra-agency materials which are not:
    - Statistical or factual tabulations or data,
    - Instructions to staff that affect the public,
    - Final agency policy or determinations, or
    - External audits



# Freedom of Information Law Cont'd

- What records are exempted from FOIL?
  - Trade secrets;
  - Records compiled for law enforcement purposes and would:
    - Interfere with investigation or judicial proceedings, deprive a person of a fair or impartial adjudication, identify a confidential source
- Examination questions or answers before the examination is administered
- Information which would jeopardize an agency's capacity to guarantee the security of its information technology assets

# Common Issues Under FOIL

- Emails can be subject to FOIL, even if not printed in paper form.
  - Often emails may be protected by the interagency exception
  - Be careful what you write!!
- Attorney fee invoices can be subject to FOIL- attorney client privilege does not protect invoices in their entirety
- Private companies and/or Nonprofits may seek district information







## Common Issues Under FOIL Cont'd

- A public agency cannot deny a FOIL request because it is voluminous.
  - However, there are strategies to address voluminous requests
    - Is there a “reasonable description” of the records requested
    - Do the records exist and/or can they be obtained with reasonable effort?
    - Fees
- Fees for FOIL
  - Paper copies - \$.25 per page
  - Electronic copies- only charge if requires more than 2 hours of time to “prepare” records. Charge hourly wage of lowest paid employee able to prepare records. May also charge for zip drive, CD, or other storage device
    - School can also charge for outside consultants to “prepare” records



## Common Issues Under FOIL Cont'd

- Redactions
  - To the degree possible, schools must take reasonable efforts to redact confidential data and provide the documents with this information omitted. Additionally, school may not charge requestor for the reactions
- Attorney Fees available for FOIL request litigation
  - State court is required to award reasonable attorneys fees to a person challenging a FOIL response when the person has “substantially prevailed” and the court finds that the agency had no “reasonable basis for denying access”

# Questions?



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