

Dealing with Allegations against Educators

Illinois State Bar Association

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Dealing with Allegations against Educators

Presented by the ISBA Education Law Section

Chicago

Thursday, October 24, 2019
ISBA Regional Office
20 S. Clark Street, Suite 900
8:45 a.m. – 12:00 p.m.

– or –

Live Webcast

Thursday, October 24, 2019
8:45 a.m. – 12:00 p.m.

3.0 hours MCLE credit, including 0.75* hour Professional Responsibility MCLE credit in the following category: *Professionalism, Civility, or Legal Ethics MCLE credit*

Do you represent school districts or public employees? Then join us for this half-day seminar that discusses key issues to consider when dealing with allegations against educators. Attorneys with all levels of practice experience who attend this seminar will better understand:

- How to protect client interests during an investigation;
- What to consider regarding Garrity warnings;
- How School Code protections and collective bargaining agreement rights may affect an investigation;
- What to consider when an educator is in danger of losing one's license; and
- Much more.

Program Coordinator/Moderator:

Robert P. Lyons, Illinois Education Association, Chicago

8:45 – 9:30 a.m. What You Need: Conducting a Fair and Effective Investigation*

This session addresses the issues an employer's attorney must consider in order to protect client interests, and to conduct a fair and effective investigation involving the accused employee.

Maureen A. Lemon, Ottosen Britz Kelly Cooper Gilbert & DiNolfo Ltd., Naperville

9:30 – 10:15 a.m. Allegations of Potential Criminal Conduct and Protecting an Educational Employee

Don't miss this opportunity to hear from a criminal defense attorney who is familiar with allegations against school district employees. Topics include: what to consider regarding Garrity warnings, child protection reports, and practical issues.

Daniel T. Hofmann, Donahue & Walsh, McHenry

10:15 – 10:30 a.m. Break (*refreshments provided*)

10:30 – 11:15 a.m. Representing the Educational Employee from the Employee Perspective

This presentation discusses what you need to consider when representing an accused employee, including School Code protections, collective bargaining agreement rights, and other elements of concern.

Margot A. Nikitas, Illinois Education Association, Chicago

11:15 a.m. – 12:00 p.m. Issues Concerning the Loss on Revocation of an Educator's License

The program closes with a look at the issues that can arise when an accused educational employee may be in danger of losing one's license. The investigation procedure, the right to a fair hearing, and practical considerations are all explored.

Angela M. Brancato, Illinois State Board of Education, Chicago

**Professional Responsibility MCLE credit subject to approval*

What You Need: Conducting a Fair and Effective Investigation

- Maureen A. Lemon
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This segment includes all materials received by the course book publication deadline.
Please contact the speaker for any other materials used at the program.

What You Need: Conducting a Fair and Effective Investigation

Maureen A. Lemon

Illinois State Bar Association

October 24, 2019

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Know
Relevant
Workplace
Provisions

Job descriptions

Union contracts

Employee handbooks

Board policies

3

FIRST STEPS

Notify *Central*
District Office
Administrator

Select a
Qualified
Investigator

4

Investigation Checklist



BE PROMPT



BE
CONFIDENTIAL



MAKE NO
ASSUMPTIONS

5

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Investigation Checklist

Conduct	interviews in discrete manner and location
Have	2 trusted individuals present during all interviews
Interview	each witness individually
Explain	purpose of investigation and that you'll take notes

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Investigation Checklist



Work from common outline



Use open ended questions



Disclose minimal information



Ask background and contact information

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Investigation Checklist

Make	copy of documents, records, photos, etc. that employees willingly share
EXCEPT	sexually explicit photos
Do not write on	original documents

8

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Interviewing the Complainant

Do not guarantee	CONFIDENTIALITY
Don't accept	CONCLUSORY STATEMENTS
Identify	WITNESSES TO INTERVIEW
Don't label	BEHAVIOR

9

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Interviewing the Complainant



Get
written
statement



Identify
requested
'remedy' –
consider
interim steps



Summarize
interview in
writing



Remind
complainant
that
retaliation is
prohibited



Explain
anticipated
timeline for
follow-up

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Interviewing Witnesses



Maintain confidentiality



Don't accept conclusory statements



Identify other witnesses



Ask if there are corroborating documents, photos, texts, recordings, etc.

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Interviewing Witnesses



Do not label the behavior



Get written statements



Direct witnesses to not discuss



Remind witnesses "no retaliation"

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Interviewing Accused

PRIOR TO INTERVIEW:

- Confer with HR
- Review interview notes and identify topics / incidents to address
- Provide pre-meeting written notice of meeting date, time, location and purpose
- Consider Union representation

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Interviewing Accused

“**WEINGARTEN**” Rights – The right to union representation in any discussion that could lead to discipline or affect one’s working conditions. The employee has the right to refuse to answer questions without union representation.

“**GARRITY**” Warning – Notifies the employee that he/she must answer your questions *or* be disciplined for insubordination. Answering the questions in the workplace cannot be used against the employee in a criminal proceeding.

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Interviewing Accused



Remain
as confidential as
possible



Explain
subject of
complaint and ask
for their version
of incidents



Don't accept
conclusory
statements



Identify
other witnesses



Don't label
behavior

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Interviewing Accused

Explain

- that no decision has been made yet

Get

- written statement

Request

- that employee not discuss interview with others

Remind

- them that retaliation is prohibited

Summarize

- interview in writing

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Student Sexual Abuse Claim

- 105 ILCS 5/22-85
- Effective August 23, 2019
- Limits the role of school personnel to interrogate student victim
- Limits the timing of when school personnel can interrogate student victim



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Request for Factual Information

In ALL interviews, obtain details regarding:

- Date / Time / Location
- Who was present
- What happened
- Antecedents / reactions
- Who knows about the incident – how?
- Any documents / records / recordings of the incident
- Motives

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Investigation Checklist #2

Assess

- Claims and Defenses
 - Security video / audiotapes; phone records; texts, etc.
 - Materials provided by complainant and others

Involve

H.R. and legal counsel

Consider

Whether additional (re)interviews are necessary

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Document Document Document

Prepare

- A thorough report with allegations; summary of witness statements; findings of facts; conclusions

Be

- Clear, consistent, accurate, and credible

Add

- Documents to the employee's personnel file

Incorporate

- Information in evaluation, if appropriate

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Document, Document, Document

- Identify examples of good or bad work

- Ex: Sue doesn't do her work well.

vs.

- Ex: On January 12, 2019, Sue should have emptied all of the wastepaper baskets and cleaned all toilet throughout the building. On the morning of January 13, 2019, the wastepaper baskets in the 4th and 5th grade wings were not emptied and dirt remained visible on the toilet seats in the 4th grade wing. ²¹

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Document, Document, Document

- Be factual describing the conduct, not the motive or assumed reason

- Ex: "Craig didn't hear the bell again and didn't care that students were unsupervised on the playground while he finished his coffee."

vs.

- Ex: "Craig is to be on the playground each morning at 8:05 a.m. to supervise students as they arrive at school. On December 15, 2018, Craig was in the building from 8:00 until 8:20 a.m. Students were not supervised during that time." ²²

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If a Medical Issue is Implicated

Focus on **BEHAVIOR**,
not assumptions about
why the behaviors are
occurring

Be aware of when the
employee might need a
reasonable
accommodation

NEVER, as the direct
supervisor, speak with
an employee's health
care provider

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DISCIPLINING AN EMPLOYEE

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Give Due Process



Give notice of disciplinary interview



State the allegations to the employee and allow the employee to give his/her side of the story



Ensure necessary Union representation



Don't have a disciplinary letter prepared and ready to hand out at the initial interview

Determine Appropriate Disciplinary Action

1

Confer with Human Resources

2

Consider severity of misconduct

3

Consider employee's prior disciplinary record

4

Consider how similarly situated employees have been disciplined

Do Not
Ignore
Unacceptable
Behavior

Notify

- Employees of the work expectations

Warn

- Employees about consequences

Give

- Time to improve

Give

- Honest evaluations

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Apply Rules Consistently

Follow

written procedures

Do not assume

the truth of
allegations prior to
the end of the
investigation

Give

due process
(Loudermill hearing)

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Treat Similarly Situated Employees Similarly



- Discipline should be similar if circumstances are similar
- Major differences in situations may justify different penalties
- Don't play favorites

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Don't Fall
into a
Legal Trap

Don't trample on

- First Amendment rights

Don't violate

- Fourth Amendment rights

Don't engage in

- an unfair labor practice

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Avoid Surprises



Address issues as soon as they arise; don't wait and 'pile' on



Be clear with employees



Document communications and performance issues regularly



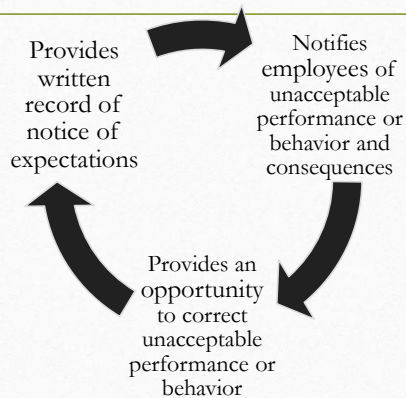
Don't allow the annual performance evaluation to be the red flag

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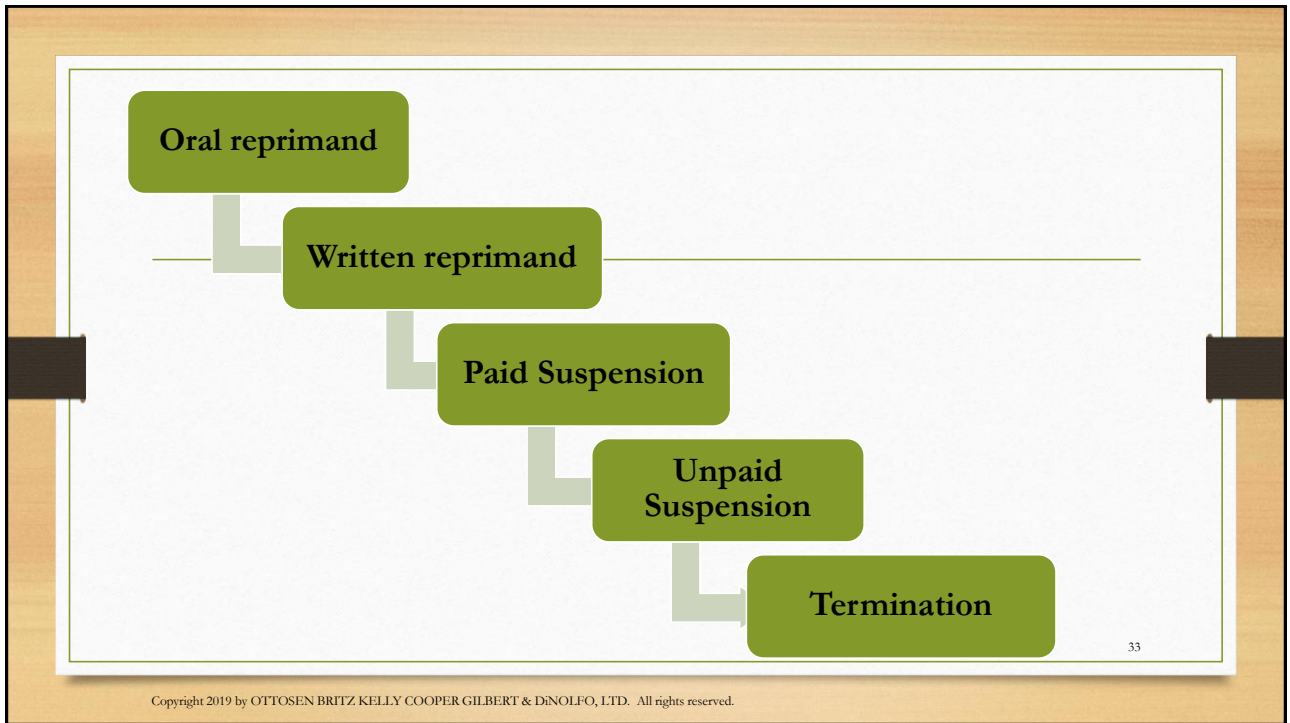
Use Progressive Discipline When Appropriate



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TAB 2

Allegations of Potential Criminal Conduct and Protecting an Educational Employee

- Daniel T. Hofmann

This segment includes all materials received by the course book publication deadline.
Please contact the speaker for any other materials used at the program.

DEALING WITH ALLEGATIONS AGAINST EDUCATORS

DANIEL T. HOFMANN
DONAHUE & WALSH, P.C.

1

DO NOT ALLOW THEM TO BE CHARGED WITH A CRIME

- Do most investigations end in criminal prosecutions?
- Should your client cooperate?
 - School officials?
 - Law enforcement?
- Cooperation allows for the quickest results

2

EDUCATORS ARE DREAM CLIENTS

- Licensed Professionals
- Respected/ Popular Community Members
- Do not have criminal backgrounds
- Not drug addicts
- **If you MUST go to trial, these are the best Defendants to have**

3

DO YOU WANT A TRIAL?

- You do not want to go to trial
 - You **MUST WIN**
- Educators do not want to go to trial
- By the time you go to Trial:
 - Your client has LOST their job
 - Standing in the community is likely shattered (i.e. media, social media)
 - Cannot return to the profession (personal and professional decision)

4

DON'T LET THEM GET ARRESTED

- Cooperate in the investigation
- Make yourself available as needed
- Attend meetings with the school district
- Speak to the police with your client

5

WHAT ARE WE OBLIGATED TO DO?

- Get the Investigation CLOSED
- Get the Client back to work
- Obtain assurance of no Criminal Charges
- NO DCFS indicated finding

6

MOST COMMON ALLEGATIONS

- Assaults/ Battery
- Sex Offenses
 - Grooming
- Thefts
- Disorderly Conduct

7

HOW DO CASES START & WHAT TO DO

- Phone call from client: “My superintendent just put me on administrative leave. I do not know why. A detective called me.”
- Your response: Do not talk to anybody. Come see me today.
 - Obtain Union Representatives contact information- Chapter President or Union Attorney
- We call the Union Representative who:
 - May have some information about the allegations
 - May have some information about school/law enforcement investigation

8

TYPES OF INVESTIGATIONS

- Allegations cause the following to be started:
 - School Administration investigations
 - Law Enforcement criminal investigations
 - Department of Children and Family Services Investigation

9

SCHOOL INVESTIGATION

- Independent of law enforcement investigations
- Conducted by administration
- Places the educator on administrative leave & informs them of the allegations
- Leave will continue until the Law enforcement/ DCFS investigation is completed

10

LAW ENFORCEMENT / DCFS INVESTIGATIONS

- Concurrent Investigations
- Police will require a meeting at the police station
- DCFS will likely be present
- Our compliant participation with this meeting will often move things along quicker
 - A decision to be made with your client, depending on what they have told you about the allegations

11

SCHOOL DISTRICT INVESTIGATIONS REQUIRE DUE DILIGENCE

- Districts have a responsibility to:
 - Protect Students
 - Protect the Educator

12

DISTRICT INVESTIGATIONS DIFFER

- District I: talk only to witnesses and wait until the conclusion of the investigation to meet with your client

Vs.

- District II: District may do a very cursory investigation and leave the serious investigation to law enforcement

13

SCHOOL DISTRICTS RIGHTS

- To investigate any possible wrongdoing, possibly occurring in their district
- To question educators and employees who may be involved
 - Employees then are effectively coerced into talking with Administration under penalty of termination for subordination

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GARRITY V. NEW JERSEY, 385 U.S. 493 (1967)

An educator facing discipline, up to and including termination, must have immunity from criminal prosecution for the statements they make in the school investigation process

15

WHAT IS A GARRITY WARNING?

Garrity warnings, standing alone, are sufficient to support the application of *Garrity* immunity.

People v. Smith, 926 N.E.2d 452 (App. 3d Dist., 2010)

Date: _____

Garrity /Atwell Warning

RE: Teacher/District Employee

Our investigation into your conduct as an employee of _____ School, District _____ is ongoing. Your cooperation in that investigation is required. Be advised that your failure to appear or to fully and truthfully answer questions presented to you by me or the other district representatives at today's meeting will be deemed gross insubordination and will lead to discipline up to and including discharge. Be further advised that federal and Illinois law requires you to respond to the School District's job-related inquiries, even if the answers to those questions may tend to incriminate. Be assured, however, that, although you may not refuse to answer the District's inquiries by asserting Fifth Amendment rights against self-incrimination, any statements you may make in response to the District's inquiries may not be used against you in any future criminal proceedings.

You have objected to the presence of counsel _____
Your objection is noted. However, you must answer questions presented to you.

Teacher/District Employee_____
School District Representative

16

EDUCATORS RIGHTS

- **MUST** get **WRITTEN** *Garrity* warning before answering questions posed by the school district administration or their attorneys
- Without a written *Garrity* warning:
 - Litigation will ensue when the government wants to use these statements in criminal prosecution
 - The Court will determine whether the government can access the statements in the absence of a written *Garrity* warning
- With a written *Garrity* warning:
 - You have important documents that may establish the statement will NOT be communicated to the prosecuting attorney
- Union representation is valuable
 - Union reps know the players, their roles, and how employment could be affected

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TWO LINES OF CASES ON GARRITY DISCLOSURES

- *United States v. Idorato*, 628 F2d 711, (1st Cir., 1980)
 - The **THREAT** of job loss must be **EXPRESS** and **OVERT**.
- *United States v. Frederick*, 842 F2d 382, (D.C. Cir. 1988)
 - An **IMPLIED** threat may be enough to prevent the disclosure if the employee subjectively believed he would be fired and that the belief was reasonable.

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LAW ENFORCEMENT INTERVIEWS

- Set the interview in advance
- Express complete willingness to answer all questions
- Miranda will be given 50% of time
- Encourage educators to relate all facts
- Discourage: theories for the allegations
 - When asked “why would a student say this about you?”
 - Can’t be answered

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WHEN NOT TO MEET WITH LAW ENFORCEMENT?

- We do not like our clients report
- We do not like the known evidence
 - Grooming/ complaints about improper communications with students are especially tricky

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WHO IS YOUR ENEMY?

- It is common for educators to be subject of anonymous reports of abuse

21

DEALING WITH DCFS

- Often, meetings with DCFS investigators feel like an inquisition, not an investigation
- Standard to indicate abuse is low
 - Some credible evidence of abuse
- Consequences are extreme
 - Place on state's central registry of child abusers
 - Educator is out of employment
 - Out of the profession

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DCFS: EXPEDITED ADMIN APPEALS FOR CHILD CARE WORKERS

- The Joint Committee on Administrative Rules Administrative Code Controls
 - Title 89: Social Services
 - Chapter III: DCFS
 - Subchapter b: Program and Technical Support
 - Part 336: Appeal of Child Abuse and Neglect Investigation Findings
 - Section 336.85: Expedited appeals for childcare workers
- Must expressly request, in writing, expedited appeal
- Must give pre-hearing within 7 days of the request, a hearing date will be set within 21 days after, a recommended decision will be given by the ALJ within 7 days of the hearing and then final decision 7 days after by the Director.
- Have subpoena power and ability to call witnesses

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COMMON DCFS ALLEGATIONS

- 10/60: Substantial risk of physical injury
- 11/61: Cuts, welts, abrasions, and oral injuries
- 14: Tying/close confinement
- 20: Sexual Exploitation
- 21: Sexual Molestation
- 22: Substantial risk of sexual injury

24

10/60: SUBSTANTIAL RISK OF INJURY (ABUSE)

- The caregiver has created a real and significant danger of physical injury by other accidental means that would likely cause death, disfigurement, impairment of physical health or loss or impairment of any body disfunction (325 ILCS 5/3)
 - Used when the type or extent of harm is undefined, but the total circumstances lead a reasonable person to believe the child is at substantial risk of physical injury
 - Includes incidents of violence, intimidation directed toward the child that hasn't yet resulted in injury
 - Types of Behavior: choking, smothering, pulling child's hair, violently pushing/shoving into fixed objects, throwing or shaking a child, subjecting the child or forcing the child to witness physical abuse of another.

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11/61: CUTS, BRUISES, WELTS ABRASIONS, ORAL INJURIES

- Cuts- break in the skin, incision
- Bruise- bleeding under the skin, skin discolored
- Welt- elevation on the skin from a lash, blow or allergic stimulus
- Abrasion- scraping of the skin
- Oral Injury- broken teeth, fat lip
- Considerations: child's age, child's developmental condition, single v. pattern of events, severity of the marks, location of the marks, instrument used

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14: TYING/ CLOSE CONFINEMENT

- Unreasonable restriction of a child's mobility, action or physical functioning by tying the child to a fixed object; tying limbs together or forcing the child to remain in a confined area
- Types of Behavior:
 - locking child in a closet
 - tying one or more limb to a chair or desk
 - Tying an arm behind his back
 - putting a child in a cage

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20: SEXUAL EXPLOITATION

- Use of the child for sexual arousal, gratification, advantage or profit
- Types of Behavior:
 - Indecent solicitation of a child
 - Child pornography
 - Intentionally exposing a child to sexually explicit material
 - Forcing the child to watch sex acts
 - Self masturbation in front of the child

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21:SEXUAL MOLESTATION

- Sexual conduct with a child when the contact, touching or interaction is used for arousal or gratification of sexual desires or needs (720 ILCS 5/12-2)
- Types of Behavior:
 - Fondling
 - Inappropriately touching or pinching parts of the child's body generally associated with sexual activity
 - Encouraging, forcing, or permitting the child to touch parts of the perpetrators body normally associate with sexual activity

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22: SUBSTANTIAL RISK OF SEXUAL INJURY

- Caregiver has created a real and significant danger of sexual abuse
- 4 types of behavior

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GROOMING-(720 ILCS 5/11-25)

- When a person knowingly uses a computer on-line service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child to commit any sex offense, to distribute photographs depicting the sex organs of the child, or to otherwise engage in any unlawful sexual conduct with a child or with another person believed by the person to be a child.
- Often use this to get to a Disorderly Conduct charge

Dealing with Allegations Against Educators

1. Do not allow an educator to be charged with a crime.
 - a. Most investigations do not end in criminal prosecutions.
 - b. Most require cooperation with school officials and law enforcement to achieve the desired result as quickly as possible.
2. Remember: Educators are dream clients
 - a. Licensed professionals
 - b. Respected/ popular community members
 - c. Don't have criminal backgrounds
 - d. Not drug addicts
3. If you have to go to trial, these are the best defendants you can have
4. You don't want to go to trial
 - a. No educator will say "Thank you for trying my case and helping me be found not guilty."
 - b. By then they've probably:
 - i. Lost their job
 - ii. Standing in the community is shattered
 - iii. Can't return to the profession
5. We do our best to make certain they don't get arrested
6. We are obligated to do it quickly
 - a. Get the investigation closed
 - b. Get them back to work
 - c. Obtain assurance of no criminal charges
 - d. Without a DCFS indicated finding
7. Most common allegations:
 - a. Assaults/battery
 - b. Sex offenses
 - c. Thefts
 - d. Disorderly conduct/grooming

8. Most cases start with a phone call:
 - a. “My superintendent just put me on administrative leave. I don’t know why. A detective wants to talk to me.”
9. Advice:
 - a. Don’t talk to anybody
 - b. Come and see me
10. We call the union rep
 - a. Chapter president or union attorney
 - b. Often know something about the allegations but not alot
11. An allegation will generally cause:
 - a. School administration investigation
 - b. Law enforcement criminal investigation
 - c. Department of Children and Family Services investigation
12. School districts conduct their investigations of educator misconduct independent of law enforcement. But--
 - a. Although they conduct their own investigation, they will notify the educator that they will be on administrative leave until the law enforcement/ DCFS investigation has been concluded.
13. Law enforcement/ DCFS often conduct concurrent investigations
 - a. Often we will come to a police station wanting to meet with a detective from the Sheriff’s Department and find that a DCFS investigator is also there.
14. If you have talked with your client and made the decision to speak with law enforcement, that the police/ DCFS are working together helps things move quicker.
15. Every district is different. Every situation/ allegation is different
 - a. Talk only to witness and wait until the conclusion of their investigation to speak with client. OR:
 - b. The district may do a very cursory investigation and leave the serious investigating to law enforcement/ DCFS
16. Most districts will do “due diligence”

- a. To protect students
- b. To protect the educator
 - i. They will do their investigation
 - ii. They will want to speak with educator

17. When the District wants to speak to the educator, *Garrity* comes into play--

- a. An educator, facing discipline up to and including termination, must have immunity from criminal prosecution for the statements they make in the investigation process

18. The school district has the right and obligation to investigate possible wrongdoing, possibly occurring in their district.

- a. They have the right and obligation to question those educators/employees who may be involved in wrongdoing.
- b. These employees are then effectively coerced into talking with Administration under penalty of termination for insubordination.
- c. Effectively, educators have to talk to administration if they were investigating potential criminal misconduct.

19. The employee must get a written *Garrity* warning before answering questions posed by the school district administration or their attorneys.

- a. Without a written warning, there will be litigation when the government prosecutors want to obtain those statements made by the employee.
- b. Without the written *Garrity* documents, litigation will ensue and the Court will determine whether the statements will be turned over to the prosecution.

Garrity v. New Jersey (1967), 385 U.S. 493

20. Two lines of cases:

- a. The threat of job loss must be express and overt. *United States v. Idorato* (1st cir. 1980) 628 F2d 711
- b. An implied threat may be enough to prevent the disclosure if the employee subjectively believed he would be fired and that belief was reasonable. *United States v. Frerick*, 842 F2d 382

21. With a written *Garrity* warning you have important documents that may establish the statements will not be communicated to the prosecuting attorneys. “*Garrity* warnings” standing alone are sufficient to support the application of *Garrity* immunity. *People v. Smith*, 926 NE2d 452, Ill. Appellate Court 3rd Dist., 2010.
22. At administrative investigative interview
 - a. Union representation is valuable
 - i. Representative knows the participants
 - ii. Knows their likely reaction to disclosures
 - iii. How employment will be affected
23. Meetings with law enforcement
 - a. Set interview in advance
 - b. Express complete willingness to answer all questions posed by law enforcement at the meeting
 - c. *Miranda* given to client about 50% of meetings
 - d. The other investigations are to inform the educator of the allegations and conclusion of the investigation
 - e. Encourage educators to relate all facts
 - f. Discourage: theories for allegations.
 - i. When asked “Why would student A say this about you?”
 1. Can’t be answered
24. We do not meet with law enforcement
 - a. When we don’t like the educator’s report
 - b. When we don’t like the known evidence
 - i. Grooming/ complaints about improper communications with students are especially tricky
25. Dealing with the Department of Children and Family Services
 - a. Often, meetings with DCFS investigator feel like an inquisition/ not investigation
 - b. Standard to indicate abuse is low
 - i. Some credible evidence of abuse

- c. Consequence is extreme
 - i. Place on state's central registry of child abusers
 - ii. Educator is out of employment
 - iii. Out of the profession

26. Not unusual for an educator to be subject of an anonymous report of abuse

- a. "Who is your enemy?"

27. Educators must often face DCFS investigations for allegation

- a. 10/60: Substantial risk of physical injury
- b. 11/61: Cuts, welts, abrasions, and oral injuries
- c. 14: Tying/ close confinement
- d. 20: Sexual exploitation
- e. 21: Sexual molestation
- f. 22: Substantial risk of sexual injury

Date: _____

Garrity /Atwell Warning

RE: Teacher/District Employee

Our investigation into your conduct as an employee of _____ School, District _____ is ongoing. Your cooperation in that investigation is required. Be advised that your failure to appear or to fully and truthfully answer questions presented to you by me or the other district representatives at today's meeting will be deemed gross insubordination and will lead to discipline up to and including discharge. Be further advised that federal and Illinois law requires you to respond to the School District's job-related inquiries, even if the answers to those questions may tend to incriminate. Be assured, however, that, although you may not refuse to answer the District's inquiries by asserting Fifth Amendment rights against self-incrimination, any statements you may make in response to the District's inquiries may not be used against you in any future criminal proceedings.

You have objected to the presence of counsel _____

Your objection is noted. However, you must answer questions presented to you.

Teacher/District Employee

School District Representative

Joint Committee on Administrative Rules

ADMINISTRATIVE CODE

TITLE 89: SOCIAL SERVICES

CHAPTER III: DEPARTMENT OF CHILDREN AND FAMILY SERVICES

SUBCHAPTER b: PROGRAM AND TECHNICAL SUPPORT

PART 336 APPEAL OF CHILD ABUSE AND NEGLECT INVESTIGATION FINDINGS

SECTION 336.85 EXPEDITED ADMINISTRATIVE APPEALS FOR CHILD CARE WORKERS

Section 336.85 Expedited Administrative Appeals for Child Care Workers

- a) Child care workers who are the subject of a Department finding that an allegation of child abuse and/or neglect is indicated may request from the Department's Administrative Hearings Unit an expedited appeal. The written request for an appeal must specifically state that an expedited appeal is being requested. The Department may request that an appellant requesting an expedited appeal provide documentation to confirm his or her status as a child care worker. Any time expended for the request, review and determination by the Chief ALJ as to the appellant's status as a child care worker shall not be attributed to the Department.
- b) Within seven calendar days after AHU's receipt of the request for an expedited appeal, the Department will set pre-hearing and hearing dates and send the appellant and his or her representative a notice by certified mail of the dates, along with a copy of the investigative file.
- c) The pre-hearing date will be set within 14 calendar days after receipt of the request for expedited appeal. The parties should be prepared to have the Department issue any subpoenas after the conclusion of the pre-hearing conference.
- d) The hearing date will be set within seven calendar days after the pre-hearing conference and within 21 calendar days after receipt of the request for expedited appeal. The Department will set aside two consecutive days for the administrative hearing.
- e) If the appellant in an expedited appeal requests any extension of time that is in excess of seven calendar days, the appeal shall automatically be converted from an expedited appeal to a regular appeal under Section 336.80.
- f) The ALJ will provide the Director with a recommended decision within 7 calendar days after completion of the expedited appeal hearing.
- g) The Director will issue a final administrative decision within seven calendar days after receipt of the ALJ's recommended decision and the Director's decision will be

sent to the appellant and his or her representative by certified mail within 35 calendar days after the date on which the expedited appeal request was received.

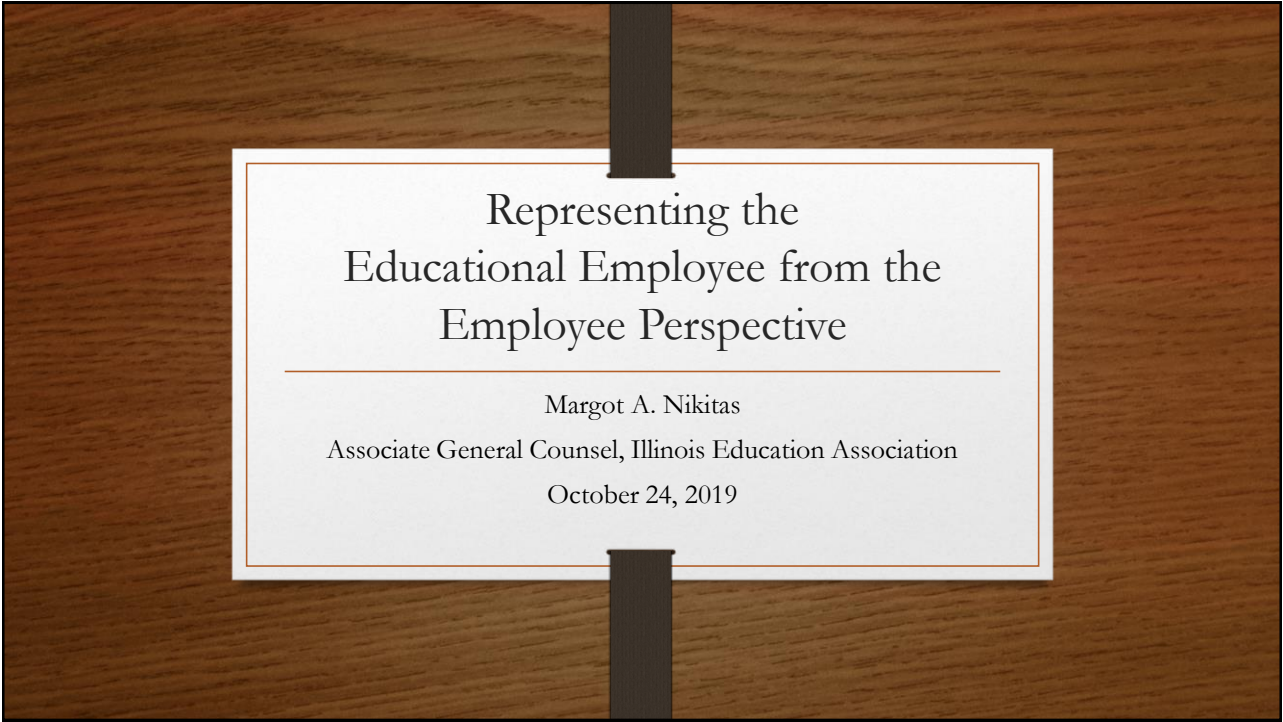
(Source: Amended at 41 Ill. Reg. 15260, effective December 6, 2017)

TAB 3

Representing the Educational Employee from the Employee Perspective

- Margot A. Nikitas
margot.nikitas@ieanea.org

This segment includes all materials received by the course book publication deadline.
Please contact the speaker for any other materials used at the program.



Representing the Educational Employee from the Employee Perspective

Margot A. Nikitas
Associate General Counsel, Illinois Education Association
October 24, 2019

1



Investigatory Interviews

2

Weingarten Rights

Unionized employee may refuse to submit to investigatory interview without union representation which employee reasonably fears may result in discipline. NLRB v. J. Weingarten, 420 U.S. 251 (1975).

3

Weingarten Rights

Employee must ask for representation:

“If this discussion could in any way lead to my being disciplined or terminated, I respectfully request my union representative, officer or steward to be present at this meeting. Without union representation, I choose not to participate in this discussion.”

4

Weingarten Rights

Once employee asks for representation, employer must:

1. Grant the representation request and delay questioning until the union representative arrives;
2. Deny the request and end the interview immediately; or
3. Only if the employee authorizes, proceed with the interview without representation.

5

Weingarten Rights

- Employee entitled to knowledgeable union representative.
- Employer can't require the union representative to remain silent.

6

Expanded Weingarten Rights Under CBA

- Collective bargaining agreement can expand meetings to which Weingarten right applies (e.g., post-evaluation conferences).
- Collective bargaining agreement can obligate employer to notify employee of his/her right to union representation.

7

Discipline, Suspension & Termination

8

K-12 Licensed Employees, Generally

- Can be suspended without pay if provided for in school board policy or collective bargaining agreement.
- Section 10-22.4 of the Illinois School Code empowers boards of education to dismiss a teacher for incompetency, cruelty, negligence, immorality or other sufficient cause.

9

Probationary Teachers

- May be dismissed for any lawful reason- have fewer protections than tenured teachers.
- Probationary teachers dismissed mid-year have minimal due process rights but may have breach of contract claim against employer.

10

Dismissal of Tenured Teachers

- Pursuant to Section 24-12 of the Illinois School Code, tenured teachers may not be dismissed for causes that are remediable without first receiving written notice and an opportunity to remediate—the “Notice to Remedy.”
- Tenured teachers have 17 days after issuance of notice of charges and bill of particulars to request a hearing before a neutral hearing officer at the Illinois State Board of Education.

11

Dismissal of Tenured Teachers

- Within 45 days after receipt of hearing officer’s findings of fact and recommendation, school board must issue written order as to whether the teacher must be retained or dismissed for cause.
- School board’s written order is final administrative order and standard on appeal must establish that board’s decision is against the manifest weight of the evidence. Beggs v. Bd. of Ed. Of Murphysboro Comm. Sch. Dist. 186, 2016 IL 120236, 72 N.E.3d 388 (Dec. 1, 2016).

12

Just Cause Protections in CBA

- Provides that employees may only be disciplined or discharged for just cause.
- Often accompanied by a progressive discipline policy.
- Many arbitrators will imply a just cause standard into a collective bargaining agreement.

13

The Seven Tests of Just Cause

1. Notice to employee of possible disciplinary consequences of particular conduct;
2. Rule reasonably related to employer's operations;
3. Investigation prior to discipline;
4. Fairness of investigation;
5. Sufficiency of Proof;
6. Non-discrimination in enforcement; and
7. Appropriateness of penalty.

14

Just Cause Protections in CBA

- CBA may provide that teachers may not be disciplined without just cause.
- A “Notice to Remedy” cannot be challenged pursuant to a just cause provision because of conflict with school board’s authority to dismiss tenured teachers under the Illinois School Code. Bd. of Ed. of Rockford Sch. Dist. No. 205 v. IELRB (Wehrle), 165 Ill.2d 80, 649 N.E.2d 369 (1995).

15

Loudermill Rights

- Public employees deemed to have a property interest in their employment have a right to a due process hearing before being suspended without pay or dismissed. Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532 (1985).
- Employee must have notice of charges, explanation of the evidence and opportunity to present his/her side of story.
- Due process rights can be expanded in CBA.

16

Resignation in Lieu of Termination: Considerations for Settlement

17

Factors to Consider

- Does the employee want to continue in the educational profession?
- Will the employer allow the employee to resign in lieu of termination?

18

Settlement Terms to Consider

- Monetary compensation
- Health insurance
- Retirement incentive benefits
- Neutral letter of reference
- Employer agreement not to contest unemployment benefits
- Non-disclosure clause

19

Questions?




20

TAB 4

Issues Concerning the Loss on Revocation of an Educator's License

- Angela M. Brancato
attybrancato@gmail.com

This segment includes all materials received by the course book publication deadline.
Please contact the speaker for any other materials used at the program.



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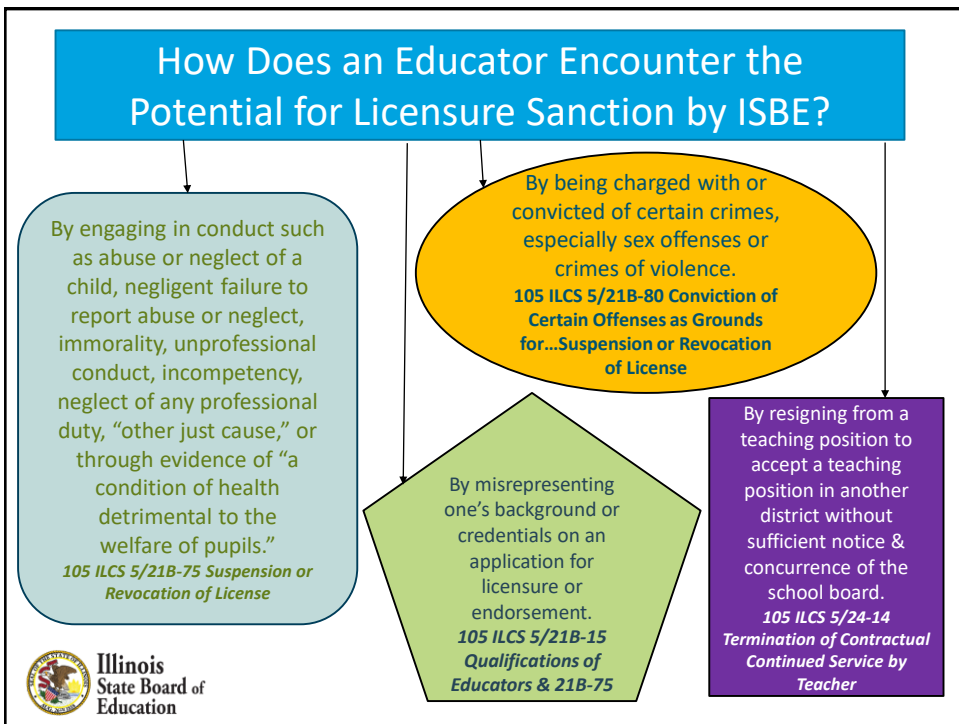
Dealing with Allegations Against Educators

Educator Misconduct and Licensure Implications

Angela M. Brancato
 Assistant General Counsel
 Illinois State Board of Education
 October 24, 2019

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1



2

Conduct Most Frequently Sanctioned

#1--INAPPROPRIATE COMMUNICATIONS, INTERACTIONS, and/or PHYSICAL CONTACT WITH STUDENTS

Can include any of the following:

- ✓ **Improper communications** = outside of school hours; non-school related; volume of contacts; use of personal or “secret” accounts; exchange of personal contact info; interactions via personal social media accounts; exchange of sexual images and/or video; romantic and/or sexual in nature; excessive compliments and/or singling out; excessive interest in students’ lives and/or relationships; treating a student or gender differently or more favorably; isolating a student by speaking against student’s parents/friends
- ✓ **Improper interactions** = “partying” with students; transporting students outside of school regulations; allowing student sleepovers
- ✓ **Improper physical contact** = physical abuse; unwanted/inappropriate touching (e.g., hair, back, shoulders; hugging, kissing, sexual contact)



3

Applicable Statutes

- **105 ILCS 5/21B-75**—Suspension or Revocation of License
- **105 ILCS 5/21B-80**—Conviction of Certain Offenses as Grounds for Disqualification for Licensure or Suspension or Revocation of a License
- **105 ILCS 5/21B-85**—Conviction of a Felony
- **105 ILCS 5/21B-45(b)**—Professional Educator License Renewal
- **105 ILCS 5/10-23.12**—Child Abuse & Neglect...Failure to Report
- **105 ILCS 5/24-14**—Termination of Contractual Continued Service by Teacher

NEW: PA 101-0531—effective 8/23/19 (“Betrayed Bill”)

Impacts several of the statutes listed above and adds new law; found at <http://www.ilga.gov/legislation/publicacts/101/PDF/101-0531.pdf>



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How Educator Misconduct Cases Reach ISBE for Licensure Review

- ❖ **24-12(d)(2) Dismissal Charges:** Copy of notice of dismissal charges must be forwarded to ISBE by the district. Reviewed by ISBE for possible 21B-75 educator misconduct
- ❖ **DCFS reports:** DCFS forwards indicated reports for licensees to ISBE
- ❖ **ReportMisconduct@isbe.net:** Dedicated email address for submission of complaints. Complaint form can be found at <https://www.isbe.net/Documents/20-01-educator-complaint-form.pdf>. Can be submitted by anyone.
- ❖ **General complaints** to State Superintendent or agency via phone, mail, email.
- ❖ **News media:** Reports of educator misconduct in the media
- ❖ **PA96-431 notices:** per 10-29.5(e-5) of School Code (re: background checks). School district superintendent must report to ROE and State Superintendent if an educator has left (e.g., quit, retired, dismissed) the district following an allegation of abuse or neglect of a child. Boilerplate letter only provides teacher's name; ISBE must subpoena records for more information.
- ❖ **State's Attorneys and School Districts:** Must report if an educator has been convicted of any felony. (SAO=55 ILCS 5/3-9005(a)(13); SDs=105 ILCS 5/21B-85)



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Educator Licensure Sanction Happens in One of Five Ways:

- **21B-75:** Educator receives notice of opportunity for hearing, statement of charges, option for hearing. Several grounds for licensure action, such as unprofessional conduct. In lieu of a hearing, an educator may be offered an agreement to accept a licensure suspension and/or remediation.
- **21B-75:** Pre-hearing licensure sanction agreement. Educator informed of charges and evidence; may be offered agreement for suspension of 5 years (max) or less and possible remediation, as appropriate.
- **21B-45(b):** Educator voluntarily surrenders teaching license; treated same as revocation.
- **21B-80:** Upon conviction of certain offenses, an educator's license can be revoked or suspended.
- **24-14:** Teacher resigns from district without sufficient notice or concurrence of the board to accept a teaching position in another district. Aggrieved district files a complaint with ISBE. Educator's license can be suspended for up to 1 year.*

*ISBE's non-regulatory guidance for 24-14 found at <https://www.isbe.net/Documents/section-24-14-guidance.pdf#search=24%2D14%20guidance>. NOTE: This guidance has been revised to comport with amendments following passage of PA101-0531; updated guidance is pending review.



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21B-80 Revocable Offenses /Pre-Conviction Suspensions under 21B-80(b-5)

Sections in Red added on 8/23/19 with passage of PA101-0531

Section of Illinois Criminal Code:

- 10-5.1 Child Luring
- 10-9(c) Involuntary Servitude of a Minor
- 11-6 Indecent Solicitation of a Child
- 11-6.6 Solicitation to Meet a Child
- 11-9 is now 11-30*
- 11-9.1 Sexual Exploitation of a Child
- 11-9.1A Permitting Sexual Abuse of a Child
- 11-9.1B Failure to Report Sexual Abuse of a Child
- 11-9.2 Custodial Sexual Misconduct
- 11-9.3 Presence in School Zone by Sex Offender...
- 11-9.4-1 Sexual Predator/Sex Offender..Near Parks
- 11-9.5 Sexual Misconduct with Disabled Person
- 11-11 Sexual Relations within Families
- 11-30 Public Indecency (if Class 4 Felony)
- 11-14.1 Solicitation of a Sexual Act
- 11-14.3 Promoting Prostitution
- 11-14.4 Promoting Juvenile Prostitution
- 11-18 Patronizing a Prostitute
- 11-18.1 Patronizing Minor Engaged in Prostitution
- 11-20 Obscenity
- 11-20.1 Child Pornography
- 11-20.2 Duty of Film Processors to Report Sexual Depiction of Children

- 11-21 Harmful Material
- 11-23 Posting of Identifying or Graphic Info on Pornographic Internet Site... (if Class 3 Felony)
- 11-24 Child Photography by Sex Offender
- 11-25 Grooming
- 11-26 Traveling to Meet a Minor
- 11-30 Public Indecency
- 11-1.20 Criminal Sexual Assault
- 11-1.30 Agg. Criminal Sexual Assault
- 11-1.40 Predatory Crim. Sex Assault of a Child
- 11-1.50 Criminal Sexual Abuse
- 11-1.60 Agg. Criminal Sexual Abuse
- 12-3.05 Aggravated Battery
- 12-3.3 Aggravated Domestic Battery
- 12-6.4 Gang Recruitment on School Grounds...
- 12-7.1 Hate Crime
- 12-32 Ritual Mutilation
- 12-33 Ritualized Abuse of a Child
- 12-34 Female Genital Mutilation
- 12-34.5 Inducement to Commit Suicide
- 12.35 Sexual Conduct or Contact with An Animal
- 12C-45 Drug Induced Infliction of Harm to Child Athlete
- 26-4 Unauthorized video recording & Live Studio Transmission (only if (d)(4) Class 3 Felony or (d)(5) Class 2 Felony)



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21B-80 Sanctions for Drug Offenses

21B-80(b): Whenever the holder of any license issued pursuant to this Article or applicant for a license to be issued pursuant to this Article has been convicted of any drug offense, other than as provided in subsection (c) of this Section, the State Superintendent of Education shall forthwith suspend the license or deny the application, whichever is applicable, until 7 years following the end of the sentence for the criminal offense. If the conviction is reversed and the holder is acquitted of the offense in a new trial or the charges against him or her are dismissed, the State Superintendent of Education shall forthwith terminate the suspension of the license.

Illinois Controlled Substances Act – any offense, except 410 Probation
Sec. 410 – no licensure sanction if sentenced to first offender 410 probation

Illinois Methamphetamine Control and Community Protection Act – any offense except 70 Probation
Sec. 70 – no licensure sanction if sentenced to first offender 70 probation

Cannabis Control Act – any offense except for those under (a), (b), & (c) of Sec. 4 and those under (a) & (b) of Sec. 5, and any offense for which licensee is placed on Sec. 10 probation (if successfully completed): 21B-80 sanctions under the Cannabis Control Act remain the same under the current statute, despite recent changes in Illinois cannabis law.



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How Does An Educator Know if He or She is Being Reviewed for Licensure Action?

If **charged** with a **21B-80(b-5)** offense:

- Educator receives **suspension order** (pre-conviction or pending appeal)

IMPORTANT:

- **IT IS THE EDUCATOR'S RESPONSIBILITY TO ADVISE ISBE** if the educator has been found **not guilty** or if the charges were **dismissed or reduced** to a non-21B-80 offense so that the license can be reinstated.
- The educator may **STILL face sanctions** pursuant to 21B-75.

If **convicted** of a **21B-80** offense:

- Educator receives a **revocation order** signed by State Superintendent.

If **alleged violation of 21B-75:**

- **Subpoena:** Educator receives copy of any subpoenas issued by State Superintendent.
 - Subpoenas typically request school district records (including investigations) and/or police reports.
- **Mitigation Letter:** The educator may also receive a letter requesting any mitigating evidence that the educator wishes to share. The educator does not have to respond.
- **Voluntary Surrender Letter:** If it appears that the allegations may warrant revocation of the educator's license, a letter offering the educator the opportunity to surrender his/her license may be issued, along with a voluntary surrender of license form.

21B-45 Broken Contract: Notification from ISBE by mail



9

How Long Do Misconduct Cases Take to Resolve?

- **21B-80 Cases:** Revocation order issued after final disposition of criminal conviction of a 21B-80 enumerated offense. Depends on the time it takes for the criminal case to conclude.
- **21B-75 Cases:** Varies. ISBE awaits the outcome of DCFS investigations and appeals, teacher dismissal proceedings, and criminal cases (non-21B-80) before proceeding with licensure action. Whenever possible, ISBE will attempt to reach an agreement with the educator to resolve the case before offering a hearing. If the educator receives notice of opportunity for hearing and statement of charges, s/he has 10 days to request a hearing. If a hearing is requested, a hearing officer is appointed and pre-hearing conferences and discovery take place before a hearing date is set. Sometimes, the parties reach agreement before hearing. Once the agreement is reached or the hearing officer has made a decision, the matter goes before the State Educator Preparation and Licensure Board for final approval.
- **21B-45 Voluntary Surrender:** Upon receipt of the signed, notarized surrender of license form, ISBE Legal prepares a revocation order. The order is sent to the State Superintendent for signature, then returned to Legal for mailing. If there are no delays, the process should take about a month.
- **24-14 Broken Contract Cases:** These cases are being adjudicated differently since passage of PA101-0531 on Aug. 23, 2019, so we have had no cases yet upon which to base an estimated time of resolution.



10

Due Process, Section 21B Educator Licensure

23 Ill Adm Code 475 & 105 ILCS 5/21B-90

- **Part 475 of the Illinois Administrative Code governs educator licensure hearings under 21B-75.**
- **105 ILCS 5/21B-90 applies to appeals of final administrative decisions by ISBE:**

Sec. 21B-90. Administrative Review Law. In this Section, "administrative decision" has the meaning ascribed to that term in Section 3-101 of the Code of Civil Procedure.

The provisions of the Administrative Review Law and the rules adopted pursuant to the Administrative Review Law shall apply to and govern all proceedings instituted for the judicial review of final administrative decisions of the State Board of Education, the State Educator Preparation and Licensure Board, and the regional superintendent of schools under this Article. The commencement of any action for review shall operate as a stay of enforcement, and no action based on any decision of the State Board of Education, the State Educator Preparation and Licensure Board, or the regional superintendent of schools shall be taken pending final disposition of the review. (Source: P.A. 97-607, eff. 8-26-11.)
- **24-14 "Broken Contract Cases"** provide either an informal hearing or waiver of hearing in lieu of hearing and agreement for licensure sanction and/or remediation.



11

Things to Know About Licensure Sanctions

1. All licensure sanctions are posted on the ISBE website at <https://www.isbe.net/educatorquality>. They are organized by Fiscal Year.
 - Sanctions can be either licensure suspensions (temporary) or revocations (permanent)

2. **All licensure suspensions and revocations (as well as denials of licensure applications or renewals) are reported to NASDTEC—the National Association of State Directors of Teacher Education and Certification and are posted in the NASDTEC Clearinghouse.**

The NASDTEC Clearinghouse "is a searchable database providing information regarding individuals who have had their licenses annulled, denied, suspended, revoked, or otherwise invalidated." Most states and some countries are members of the Clearinghouse. ISBE is a member. IL ROEs (but not school districts) can see ISBE alerts on the accounts of educators with negative licensure histories; they can obtain more information on the nature of the misconduct from ISBE.

https://www.nasdtect.net/page/ASSOC_CH_REG

3. All licensure sanction documents issued by the State Superintendent (e.g., agreements, orders, notices of opportunity for hearing/statement of charges) are subject to FOIA.



12

Impact of Licensure Sanction on Teacher Pensions

105 ILCS 5/218-85 (b): Whenever the State Superintendent of Education receives notice of a conviction under subsection (a) of this Section or otherwise learns that any person who is a teacher, as that term is defined in Section 16-106 of the Illinois Pension Code, has been convicted, either after a bench trial, trial by jury, or plea of guilty, of any offense for which a sentence to death or a term of imprisonment in a penitentiary for one year or more is provided, the State Superintendent of Education shall promptly notify, in writing, the board of trustees of the Teachers' Retirement System of the State of Illinois and the board of trustees of the Public School Teachers' Pension and Retirement Fund of the City of Chicago of the name of the license holder, the fact of the conviction, the name and location of the court in which the conviction occurred, and the number assigned in that court to the case in which the conviction occurred.

(from Illinois Pension Code, Article 16, Teachers' Retirement System of the State of Illinois)

40 ILCS 5/16-199. Felony conviction. None of the benefits provided for in this Article shall be paid to any person who is convicted of any felony relating to or arising out of or in connection with his or her service as a teacher. None of the benefits provided for in this Article shall be paid to any person who otherwise would receive a survivor benefit who is convicted of any felony relating to or arising out of or in connection with the service of the teacher from whom the benefit results... *(for CPS pensions, see 40 ILCS 5/17-149.1)*



13

Questions?

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14

Angela Brancato is Legal Counsel with the Illinois State Board of Education, where she investigates and adjudicates allegations of educator misconduct. Angela's work experiences include serving as superintendent of Illinois Youth Center, Chicago, a facility within the Illinois Department of Juvenile Justice, and as Assistant State's Attorney in Winnebago County, where she specialized in the prosecution juvenile abuse and neglect and juvenile delinquency cases. Before joining the legal profession, Angela worked as a reading specialist and elementary teacher in California and Illinois.

Daniel Hofmann graduated from Jerry Spence Trial Lawyers College. He now works at Donahue & Walsh. Donahue & Walsh is a 15-attorney firm concentrating in Criminal Law with offices in McHenry, Sycamore, Rockford, Palatine, and Elgin.

Maureen A. Lemon represents school districts and other educational entities in all aspects of school law including school board governance and policy development, special education law, boundary changes, Freedom of Information Act requests, Open Meetings Act obligations, student discipline, school board elections, and constitutional issues. She works closely with school boards and administrators on matters relating to the rights and responsibilities of school boards, students, and employees.

In the field of employment law, Ms. Lemon advises and represents clients in discipline, discharge, employment-at-will, disability matters and discrimination cases. Her labor experience includes negotiating collective bargaining agreements, handling grievance and interest arbitrations, and coordinating strike management.

Ms. Lemon defends clients on claims before the Illinois State Board of Education, the Illinois Educational Labor Relations Board, the Illinois Department of Human Rights, the U.S. Department of Education OCR, and the Equal Employment Opportunity Commission. She has defended school districts in federal and state courts including the Illinois Appellate Courts and the Illinois Supreme Court.

Ms. Lemon has been an adjunct professor of Education Law at the Northern Illinois University College of Law. She is a frequent speaker and author on labor, employment, sexual harassment, special education and student-related topics. Ms. Lemon is an Illinois Association of School Boards approved provider of professional development leadership training to new Illinois school board members.

Robert P. Lyons has been an attorney at the Illinois Education Association since 1991. He is a graduate of the John Marshall Law School and Loyola University Chicago. His practice focuses on labor and employment law.

Margot A. Nikitas is Associate General Counsel at the Illinois Education Association-NEA, a labor union representing over 130,000 teachers and educational support professionals in K-12 public schools and public and private higher education institutions throughout Illinois. As Associate General Counsel, Ms. Nikitas provides advice and counsel on a wide variety of collective bargaining, labor relations and employment matters. Prior to working with the IEA-NEA, Ms. Nikitas was Associate General Counsel at the United Electrical, Radio and Machine Workers of America (UE) in Pittsburgh. She is a graduate of the University of Illinois at Chicago and Chicago-Kent College of Law.

ISBA BENEFITS



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- ▶ **IllinoisBarDocs**
Automated legal forms
- ▶ **ISBA Central Communities**
Discussions and connect with other members

E-Clips

Daily legal news and case digests

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Award winning monthly magazine

Practice HQ

Practice management and technology resources

Section Membership

Access to substantive law information via newsletters & ISBA Central

ISBA Publications

ISBA books and periodicals

Illinois Lawyer Now

Legal news, practice news, photo galleries & more

ISBA Career Center

Post your resume for free and find or post a job

ISBA Member Mark

Use the Member Mark on your website and materials to denote ISBA membership

Ethics Infoline

Need ethics help? ISBA members can call the ISBA Ethics Infoline

Legislative Initiatives

Advocacy on issues important to the profession & public

UPL Investigation

Investigations and actions to terminate the unauthorized practice of law

QUESTIONS?

Contact Ann Boucher

aboucher@isba.org | 800-252-8908

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EsqSites.com
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ABA Retirement Funds
LawPay: Credit Card Processing for Attorneys
SoFi Student Loan Refinancing

Insurance Programs

GEICO Auto Insurance
ISBA Mutual
Mercer Health & Benefits

Travel & Entertainment

Go Next
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InterPark Garage (Chicago only)
Orlando Employee Discounts
TicketsAtWork

Personal Services

Brooks Brothers
Jos. A. Bank
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