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# Due Process and Employee Performance

By Charles J. Russo, J.D., Ed.D.

Education leaders must provide some kind of due process when dealing with staff members with tenure or continuing contracts.

**A**s school boards face financial challenges due to a faltering nation economy and increasing calls for accountability, school business officials and other education leaders need to develop plans for effective documentation of staff performance to justify employment decisions and to avoid unnecessary litigation.

All states require education leaders to provide varying levels of due process when dealing with teachers and other staff members with tenure or continuing contracts who are subject to discipline or dismissal, but the laws often leave practical details unanswered.

## Fourteenth Amendment Due Process

In the school district context, procedural due process refers to the steps that school boards and other employers must take when disciplining staff members or terminating their working relationships. Teachers and staff members who have not achieved tenure lack significant rights to procedural due process.

In other words, school boards can choose not to renew the contracts of nontenured teachers or staff for any lawful reason as long as they provide notice of nonrenewal within statutory and contractual guidelines. Under these circumstances, employees are not entitled to procedural due process unless it is specifically conferred on them by state law or their employment contracts; the latter is unlikely since boards typically do not grant additional protections to individuals who lack tenure. Employees with tenure or with time remaining on their contracts (property interests) cannot be dismissed if disciplined without procedural due process.

The Supreme Court did not address the procedural due process rights of school employees who have property interests in

their jobs until *Cleveland Board of Education v. Loudermill* (1985). At issue in *Loudermill* was the dismissal of a school security guard for dishonesty after officials learned that he failed to disclose his conviction for grand larceny on his job application.

In *Loudermill*, the Supreme Court affirmed earlier judgments that absent unusual circumstances, wherein educators can be suspended with pay, the Fourteenth Amendment requires school boards to provide individuals with property interests in their jobs to procedural due process beginning with notice. However, insofar as the Court did not specify how much time had to pass from the time of notice, a federal trial court in Indiana found that one day's notice was adequate for a teacher who was accused of touching students inappropriately (*Tweedall v. Fritz* 1997).

## School business officials and other education leaders need to develop plans for effective documentation of staff performance.

The *Loudermill* Court reasoned that “tenured public employee[s] [are] entitled to oral or written notice of the charges against [them], an explanation of the employer’s evidence, and an opportunity to present [their] side of the story” (p. 546). Even so, depending on state law, tenured teachers are not necessarily entitled to full pretermination hearings as long as they are afforded opportunities to have hearings when they are dismissed (*Baird v. Board of Education for Warren Community Unit School District* 2004).

Stopping short of setting a precise formula in *Loudermill*, the Supreme Court ruled that at the heart of procedural due process are notices and hearings at which

teachers can address the charges they face in the presence of fair and impartial third-party decision makers who render determination based on the records they review.

In most jurisdictions, initial hearings are conducted by local school boards, hearing officers, or state administrative agencies. Although hearings need not conform to strict judicial processes (*Knox County Board of Education v. Willis* 1966), evidence that might not be admitted in court may be admissible as long as it does not violate the fundamentals of fair hearings (*Carangelo v. Ambach* 1987). Ultimately, whether hearing processes are adequate is up to the courts.

As illustrated by a case from the South Carolina Supreme Court, however, principals, as managerial employees, are not ordinarily entitled to predissmissal hearings (*Henry–Davenport v. School District of Fairfield County* 2011). The court observed that although the former principal would have preserved her rights to a hearing had she been a teacher, she had no such protection under state law as an administrator.

### Effective Documentation of Employee Performance

When contemplating dismissing or disciplining employees with property interests in their jobs, education leaders must recognize the importance of proper documentation, especially when dealing with teachers or other staff members who have property interests in their jobs and who may be subject to discipline or dismissal.

Whether boards prevail in disciplining or dismissing employees depends largely on the quality of documentation that boards rely on in supporting their proposed actions. To this end, education leaders should develop and implement policies that stress the importance of properly documenting staff behavior.

As a necessary corollary to proper documentation, if administrators are not properly prepared to evaluate

performance adequately, they may unwittingly err in reporting incidents. Accordingly, boards should provide regular (at least annual) professional development preparation for administrators to ensure the uniform application and standardization of their policies and applicable state laws. Boards can rely on an array of sources in this regard, such as their human resources departments, their attorneys, faculty members from local colleges or universities, and consulting companies. This kind of preparation should be a key component in orienting new administrators.

### Development and Documentation

When developing policies and documenting employee performance, education leaders may wish to keep the following points in mind.

**1. Focus on current issues.** Even when addressing ongoing difficulties with individuals, education leaders should let past documentation speak for itself. In other words, although employee work histories may be relevant, and it may be necessary to refer to past documentation, do not paraphrase old information in subsequent disputes unless they are part of ongoing patterns of (mis) behavior. The best way to deal with unrelated past incidents is to attach copies of earlier documentation to current records.

**2. Think before writing.** Some education leaders' belief that all violations, regardless of their significance, should be documented, can lead to mounds of superfluous documentation about specific staff members. Such an approach can give rise to the inference that officials are trying to retaliate against individuals.

To avoid such situations, education leaders should use common sense in considering whether to document incidents. Consequently, before placing letters in staff members' files, administrators should ask themselves whether the action was sufficiently

serious to warrant documentation—especially if it is a first offense and the parties have not had the opportunity to discuss the matter.

**3. Be specific.** Vague statements in reports can be confusing and easily misconstrued. Reports should use precise language, identifying individuals by name, along with the dates, times, places, and detailed descriptions of what occurred. The failure to be specific can cause difficulties for hearing officers, review panels, and judges about precisely what is at issue.

**4. Remember that not everything needs to be written.** Specificity is vital, but wordy documentation, however well-intentioned, can cause more difficulties than it solves and is certainly not a virtue in reporting employee behavior. Documentation reports should include only what *must* be included. Writing too much, like not writing enough, can create problems by leaving too many loose ends.

**5. Do not document when angry.** The worst reaction to a situation is to immediately draft letters of reprimand; they are more than likely reflections of anger rather than rational analyses. Administrators should collect their thoughts before documenting events. A good rule of thumb is to sleep on the matter, which can lead to slightly different perspectives the next day.

**6. Choose your words wisely.** Documentation should be rational, level-headed, and fair, avoiding judgmental words such as *foolish*, *stupid*, and *ridiculous*. Rather than describing an employee's actions as *foolish*, they might be better described as *perplexing*. The careful use of words can convey the message in an even-handed, nonconfrontational manner that can help lead to less acrimonious resolutions.

Spoken words may be easily forgotten, but written words and records can last a long time, especially in today's virtual world where postings on the Internet live

indefinitely. Administrators who act with good intent in documenting incidents must choose their words carefully in order to avoid being misinterpreted if the reports become public.

**7. Make a point.** In documenting incidents, education leaders should do more than state the facts. They should include statements about the possible consequences of the incident.

**8. Avoid the cc syndrome.** Administrators should limit the circulation of documentation to individuals who have a legitimate need to know. Restricting the flow of information can reduce the threat of liability for defamation or invasion of privacy to both those who draft documentation and those who circulate the materials.

**9. Follow the Golden Rule.** Education leaders should place themselves in the shoes of the staff members about whom they are writing. If scathing letters of reprimand are necessary, then administrators must act; if not, it might be wise to show some compassion. As important as the chain of command is in employment relationships, showing respect for staff members, especially through documentation, is equally important. Following the Golden Rule early on in employee documentation can foster a sense of trust that enhances good working relationships.

**10. Remember that documentation can be used positively.** Documentation is equally important to reward good work. Memos or letters of commendation can go a

long way toward raising morale and improving employee performance even if they are not accompanied by pay raises.

### Conclusion

By considering these suggestions for better documentation, education leaders can help safeguard the due process rights of their employees while accomplishing two related goals. First, by ensuring that employees receive the process they are due, leaders can foster good staff relations to help schools function more effectively. Second, by satisfying due process requirements, appropriate practices and policies can minimize possible conflicts leading to legal actions, thereby allowing boards to direct their financial resources to their primary focus of educating children.

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