

MEMORANDUM

TO: Randi Weingarten
President
American Federation of Teachers

FROM: Kenneth R. Feinberg

DATE: January 17, 2011

SUBJECT A Procedure for Teacher Discipline

You have asked me to propose a procedure for teacher discipline that could be utilized as a framework for processing fairly and expeditiously allegations of teacher wrongdoing. The following represents my recommendations for such a process. The recommendations are based upon my years of experience in designing and implementing programs and procedures to resolve myriad disputes. The proposal addresses objective allegations of teacher wrongdoing such as criminal offenses in the classroom, abusive practices toward students, and discrimination. It does not address allegations of teacher ineffectiveness. The latter raises an entirely different set of issues for another day.

SUMMARY OF PROPOSAL

This proposal sets forth a procedure for addressing issues of teacher discipline designed to be both fair and efficient. The process is tailored to provide specific notice of allegations that can be addressed and resolved in a manner consistent with fairness and due process within a period of no more than 100 days. In order to accomplish these goals, the proposal sets forth standards and rules as follows:

- Objective criteria, rather than vague and subjective allegations, trigger the process.
- Complaints are processed through the building principal and the superintendent with immediate notice to the teacher who has the right to seek greater specificity if necessary.
- A preliminary process provides for screening meritless complaints and informally resolving meritorious complaints quickly without the necessity of a full-blown hearing.

- Hearing Examiners selected and trained by the Program Administrator are given full authority to supervise discovery and the exchange of information and to conduct a hearing culminating in a written final decision recommending dismissal of the charges or specific sanctions--all within a strict time frame.

PROCEDURE FOR TEACHER DISCIPLINE

Part A discusses and sets forth specific substantive criteria that would trigger the process. Part B addresses the procedural due process procedures designed to make the process both fair and efficient.

- A. Substantive Criteria. It is essential to formulate objective criteria that trigger the process. These criteria must be specific to limit the potential for disciplinary procedures resulting from vague and subjective allegations. For example, criteria in state statutes include “moral turpitude and immorality,” “neglect of duty” and “general cause/conduct”. Such catch-all criteria are not included here. Instead, this process would only be triggered by the specific objective criteria set forth below that are designed to provide more specific notice to the teacher, thereby limiting arguments that the allegations are so vague that more time is needed for discovery or clarification.
1. Conviction of a felony or other crime involving moral turpitude.
 2. Allegation of a felony or other crime involving moral turpitude.
 3. Improper use of physical force against students including excessive student discipline.
 4. Inappropriate physical contact with students.
 5. Sexual abuse or harassment of any individual regardless of the form of communication utilized (e.g. texting, emailing, internet networking, and other forms of electronic communication).
 6. Excessive and repeated absenteeism and/or tardiness.
 7. Continued and repeated violation of or refusal to obey duly adopted state, local and school district rules and regulations.
 8. Racial, gender, religious and other forms of discrimination.
 9. Alcohol or drug abuse which makes the teacher unfit to instruct or associate with children.
 10. Health violations that make the teacher unfit to instruct or associate with children.

B. Procedural Due Process. The following procedures are designed to make the process both fair and efficient.

1. Filing a Complaint:

a. Authority to File a Formal Complaint. Teachers, students, parents, and other interested parties make an allegation that is brought to the attention of the building principal. The principal determines whether to file a Complaint with the superintendent.

b. Notice. On the date the Complaint is filed with the superintendent, the teacher will be sent notice of the filing of the Complaint by certified or registered mail, return receipt requested or by personal delivery to the teacher. Unless the teacher requests that the local union *not* be notified, the local union shall be notified of the filing of the Complaint by certified or registered mail within three days of the filing of the Complaint. If the teacher requests that the local union not receive notification of the Complaint, the local union will not implement representation.

c. Limitations Period. If allegations of teacher wrongdoing are raised for the first time more than one year after the teacher conduct in question, the allegations will be considered untimely and a Complaint will not be filed. However, a Complaint may be filed more than one year, but less than three years, after the conduct in question if the complainant can demonstrate good cause for the delay in making the allegations in question. A Complaint alleging a felony or other crimes involving moral turpitude may be filed at any time.

d. Specifics of the Complaint. A Complaint must include sufficient allegations and facts regarding the alleged wrongdoing to provide adequate notice to the teacher regarding both the allegations and the alleged facts supporting the allegations. The Complaint must include:

i. The specific criteria that trigger the process.

ii. The facts that establish the criteria, including the name of the complainant, the dates the conduct occurred, the dates the allegations were made, and sufficient information to establish the wrongful conduct.

iii. A summary of the evidence supporting the facts including names of witnesses or reference to documents establishing facts.

e. Request for Particularity. If the Complaint is not sufficiently particular, as required by B.1.d., the teacher may request that the Complaint be supplemented with additional facts. Particularity early in the process is critical to give the teacher (and the local union) sufficient

information to formulate (and advise in the formulation of) an early response and resolution of the Complaint. The teacher should request that the Complaint be supplemented with additional facts no later than five days after the filing of the Complaint and the superintendent should provide such additional facts no later than three days after receipt of the Request for Particularity. These deadlines are designed to ensure that the teacher and the local union have sufficient information to engage in a meaningful exchange during the preliminary process (see B.2. below). If additional facts sufficient to support the Claim are not provided in accordance with the above time requirements, the Claim should be dismissed.

- f. Confidentiality. No document or information relating to the process, including but not limited to the Complaint and supporting documentation, shall be disclosed to any person or entity (unless the person or entity has a need to know for purposes of administering the process) until five days after the information required to be disclosed has been exchanged pursuant to the discovery requirements of B.4. below.

2. Preliminary Process:

The preliminary process should include both an initial screening process to quickly resolve meritless complaints without the necessity of a full-blown hearing and an early review procedure to resolve meritorious Complaints informally, again, without the necessity of a full-blown hearing. The preliminary process is a critical stage where most Complaints will be resolved either through dismissal of the Complaint or informal resolution in cases of merit.

- a. The Screening Process. The screening process should be concluded within 14 days to ensure that the teacher is not subject to the stigma of a meritless claim that can and should be quickly dismissed.
- b. Resolution without Formal Hearing. The first 20 days after the filing of a Complaint should be used to resolve meritorious claims informally without the necessity of a full-blown hearing. It is essential that during this period the teacher and the local union are provided sufficient information to aid in the resolution of the Complaint. (See B.1.e. above regarding the specificity of the Complaint and the teacher's right to request and receive adequate particularity in a timely manner.)

3. Triggering a Hearing:

If the Complaint is not resolved informally within 30 days, a formal hearing should be scheduled leading to a series of important due-process issues:

- a. The Right to Representation. The teacher is entitled to be represented. When a union is the exclusive representative, the right to be represented,

including costs associated with such representation, shall be determined by the local union consistent with its procedures for providing such representation. If the allegations against the teacher are ultimately dismissed, the School District should reimburse the union/teacher for expenses and fees for representation.

b. The Presiding Officer.

i. Selection. For purposes of credibility and skill in presiding at the disciplinary hearing, it is important that a national training program be implemented by the Program Administrator who will select and train a national panel of regionally-based Hearing Examiners. These Hearing Examiners would then be made available to preside over local disciplinary hearings. The School District/Complainant and the teacher would agree to choose a Hearing Examiner from the regional list of panelists. If they were unable to agree to a Hearing Examiner, they could, by consent, choose an alternate. Finally, if they were unable to agree on a designated Hearing Examiner, the Hearing Examiner would be chosen by the Program Administrator. A Hearing Examiner must be selected within seven days after a formal hearing is scheduled.

ii. Payment. The Hearing Examiner would be compensated by the School District.

iii. Training. The Hearing Examiners must have instant credibility so that the perception of fairness is unquestioned. The Program Administrator would ensure that the Hearing Examiners are adequately trained in understanding issues of due-process and efficiency central to the Program.

4. Prehearing Discovery and Exchange of Information:

Before the hearing commences, a pre-hearing exchange of information is required. This exchange must occur within 60 days of the filing of the Complaint. This information should include all evidence, documents, or information relating to the Complaint, including but not limited to the personnel file, a list of witnesses, documents/evidence that will be presented at the hearing, and any exculpatory material. Neither the teacher nor other witnesses should be subject to examination prior to the hearing.

5. Questions of Proof:

The School District/Complainant must clearly establish proof of the allegations in the Complaint.

- a. Burden of proof. The School District/ Complainant would have the burden of proof.

- b. Standard of proof. The standard of proof would be a preponderance of the evidence.
- c. Shifting of burden. The burden of proof would remain with the School District/Complainant throughout the process.

6. Time:

The period of time allowed from the filing of a Complaint until completion of the hearing is critical in order to avoid excessive delay in resolving cases. The total time allotted from the filing of the Complaint until issuance of a written decision under the proposed schedule should be 100 days. The Hearing Examiner would not be able to extend the deadlines set forth below. The Hearing Examiner would have the authority to order monetary penalties if either the School District or the teacher fail to comply with the deadlines set forth below.

- a. Complaint filed and teacher receives Notice. Day 1.
- b. Local union receives Notice. Completed by day 3.
- c. Teacher Request for Particularity. Completed by day 5.
- d. Response to Request for Particularity due within three days after teacher's Request for Particularity. Completed by day 8.
- e. Screening Process. Completed by day 14.
- f. Period to attempt informal resolution. Completed by day 20.
- g. Scheduling of Formal Hearing. Completed by day 30.
- h. Period for appointment of a Hearing Officer. Completed by day 37.
- i. Prehearing discovery and exchange of information. Completed by day 60.
- j. Period of confidentiality ends five days after completion of discovery. Completed by day 65.
- k. Period to schedule and complete the formal hearing. Completed by day 90.
- l. Period for the Hearing Examiner to issue a written decision. Completed by day 100.

7. Teacher Status:

- a. Continuation of pay. It is important for purposes of ensuring a fair resolution process that the teacher continue to receive pay during resolution of the dispute either through informal resolution or a formal

hearing and decision, except in cases where formal charges of a felony or other crime involving moral turpitude are filed.

b. Suspension.

i. Immediate suspension without pay where formal charges of a felony or other crime involving moral turpitude are filed.

ii. As to all other charges, there would be no suspension. The teacher may be removed from the classroom at the discretion of the superintendent. If a teacher is removed from the classroom, the teacher will be provided with and expected to engage in meaningful work. Pay continues during resolution of the dispute either through informal resolution or a formal hearing and decision.

8. Hearing Procedures:

The role of the Hearing Examiner is vital to ensure a fair hearing, to promote efficiency, and to prevent the hearing from evolving into a full-blown trial with lawyers assuming control of the process.

- a. Place of Hearing. The place and time of the hearing should be at a venue in the School District.
- b. Transcript. A recording of the hearing would be made and not transcribed, unless a party requests the transcription. The party requesting a transcript would bear the costs of transcription.
- c. Rules of Evidence. The formal rules of evidence should not apply. However, hearsay would not be admissible unless the Hearing Examiner, in his or her discretion, specifically determined that the hearsay evidence is reliable and trustworthy. This rule is necessary to assure the credibility and fairness of the hearing, and in order to avoid serious damage to the teacher's reputation due to innuendo, gossip, or character assassination. The probative value of the hearsay evidence – or any other admissible evidence – must outweigh the danger of unfair prejudice.
- d. Witnesses.
 - i. The parties should have the right to call witnesses to testify under oath.
 - ii. The parties should have the right to cross-examine the witnesses.
- e. Documentary Evidence. The parties should have the right to offer documentary evidence. No documents may be offered unless disclosed in a timely manner pursuant to Section B.4.

9. Final Decision:

a. **Written Opinion.** The Hearing Examiner should prepare and render a final opinion in writing and specify the reasons for the decision. The opinion should have findings of fact as to each charge supporting the opinion of the Hearing Examiner. In the case of dismissal of the charges, the opinion should state whether or not the Complaint should be expunged from the teacher's personnel file.

b. **Sanctions.** The following sanctions should be available in appropriate cases. In addition, the Program Administrator, in consultation with national and regional representatives of school districts, teachers and unions should promulgate guidelines regarding appropriate sanctions for specific violations. These guidelines would be designed to avoid the imposition of inconsistent sanctions and would be advisory only.

i. Termination

ii. Suspension

iii. Imposition of fines

iv. Imposition of conditions on employment, including remedial action designed to address the problem.

v. Referral to the state Department of Education controlling licensing for denial of statewide certification.

vi. Letter of reprimand.

c. **Dismissed Charges.** In the event of dismissal of the charges, the teacher should be reimbursed for any back pay, as well as any other economic damages that the teacher can demonstrate he or she has incurred as a result of the charges, and returned to the classroom. In addition, it should be noted in the teacher's personnel file that the allegations were dismissed (with a copy of the Hearing Examiner's report). If the allegations were dismissed in the screening process, or the Hearing Examiner concluded that expungement was appropriate, all mention of the incident should be expunged from the teacher's file.

10. Appeal:

This procedure for teacher discipline does not provide for an appeal by either party from the decision of the Hearing Examiner. For purposes of the process, the Hearing Examiner's decision is final. Instead, the availability of an appeal is left to applicable state law. The vast majority of states provide for an appeal process.