



Protecting Investigative Reports

Background

Often, when an incident or event occurs of an adverse nature involving a student or employee, district administration completes an incident investigation or follow up of some type. The resulting report and/or documentation is frequently requested by parents, employees, and/or plaintiff attorneys.

Providing documentation or reports that contain candid, sensitive, and potentially damaging information regarding an incident can increase a district's liability significantly. SISC II has experienced several claims that had exaggerated settlement value due to the adverse information given to the plaintiff by the district. In one instance, the claim form was submitted with an attached copy of the investigative report prepared by the district.

The response should not be to stop generating such investigative materials nor to produce the documents for whomever asks, but rather to ensure the documents are legally protected. The purpose of this correspondence is to outline the scope of targeted investigations as well as to outline the steps districts should take to ensure the generated information remains privileged and protected from disclosure.

Privileged Information

How and why investigative documents and reports are generated is important in order to maintain confidentiality of records involving incidents which may result in litigation.

It is not necessary for actual litigation to be commenced in order for the records to become privileged; therefore, it is important to identify the scope and procedure for generating such documentation so as to maintain the privileged nature of the material.

So long as the dominant purpose of the documents is intended to be communication with an attorney or liability claims personnel, the privilege is secure. Such communication is not limited solely to litigation.

There are many reasons why communication with counsel after an incident may be desired; therefore, the specific content of the report or material is not the driving issue in maintaining confidentiality; the driving issue is the dominant purpose. Asserting that the dominant purpose of generating investigative documents is to communicate information to counsel is not enough. The assertion must be borne out by the actual practices and procedures followed by the district.

Incident Investigations

Targeted Scope

Although district administrators should investigate all adverse incidents – there are incidents that warrant special attention. There are cases of a particular nature that SISC II classifies as “High Profile Claims” (HPC).

HPC are those that have the potential to have a profoundly negative impact on the school district and are of such a nature so as to be financially significant as well. Typically, HPC involves the following:

- Catastrophic injury
- Civil rights (employment discrimination, wrongful termination, etc.)
- Gang activity
- Health issues
- Physical abuse
- Sexual harassment
- Sexual molestation

If there is an incident involving any of the above, district administrators should act quickly to investigate the incident and gather as much information as possible for potential counsel review.

Although playground related injuries are rarely catastrophic, incidents involving playgrounds should be investigated as soon as possible, which means immediately after care is given to the student. Documenting the physical status of the surfacing material and condition of the playground is critical.

Investigate Early

When an incident is reported, the district should initiate an investigation as soon as possible. It is not necessary to hire outside investigators at this stage; however, a diligent effort should be made to identify any possible witnesses, document the incident scene, and preserve evidence.

Document the scene. Take photographs and/or videotape. Err on the side of too many and don't worry if you believe the information may be helpful or hurtful in litigation – that is for counsel to decide.

Witness statements. Identify witnesses (and possible witnesses) as soon as possible. Memories are best closer to the incident rather than weeks or months later. Don't worry about trying to obtain formal statements from witnesses. Document what you can; many districts have

witnesses write a statement as to what they saw or the nature of their involvement. Be sure to have the witness, or persons involved, date and sign the statement.

Impressions and opinions as to witness credibility, accident causation, or policy violations may be included in investigative reports. These reports will remain privileged if the documentation is intended for communication with counsel. In fact, this type of subjective information is often very valuable to assess the overall dynamic of the incident and/or the liability position of the district.

Whenever a question arises regarding an investigation, districts may contact the SISC II office for assistance. On many HPC, SISC II may want to assign an internal investigator to participate in the incident follow up. SISC Risk Management Services also has staff available to help follow up on incidents involving playground accidents, industrial arts incidents, or other facility related issues.

Although SISC has staff available to assist, and/or conduct investigations, not all incidents will be appropriate for SISC to become involved with as the primary investigator.

Protecting the Information

It is one thing to say the information is intended for communication with an attorney, but in order to preserve the privilege certain procedures must be followed.

In Scripps Health V. Superior Court, the court held that communications between a self-insured entity risk manager and its employees can be protected by the attorney/client privilege. In order to maintain the privilege, the following should be done:

1. Require that the reports/statements and/or other documentation prepared by the district as a regular course of its risk management procedures. The requirement to prepare such documentation must be done at the direction of its legal advisor.

In coordinating with our coverage counsel, SISC II has determined that HPC are the targeted group of incidents for which we want to generate detailed and comprehensive information.

Therefore, whenever any such incident occurs, district administrators should proceed to generate the information to be communicated to counsel. SISC II claim staff will communicate with districts as needed as to the timing and coordination of transmittal.

2. Print on the reports/statements themselves, and any other documents generated, that the reports are “confidential” and they are “attorney/client privilege.” This point is very important. Even statements written by witnesses, and e-mail, should have a header or footer with this notation.
3. After any reports are generated they should be transmitted to the district risk manager, or to a designated risk manager in administration. The reports are not to be circulated nor kept in the initiating department or school site.

If there is a need for some of the content generated in an investigative report for a purpose other than communication to counsel, the district’s risk manager who is in charge of the documents or the district’s legal advisor should extract the needed information and forward it for use in a separate document.

One legal firm has opined that if having counsel extract needed information is too cumbersome, districts could use two forms whereby one contains the non-privileged information that can be used as needed for other purposes. Such uses include: tracking overall incidents, dissemination to site staff, review by risk management committee, and even dissemination to parents.

Requests for Information

District personnel should be advised to never disclose documents that have been generated regarding any of the types of incidents mentioned in this correspondence. Refer to your legal counsel or SISC II regarding such requests if you have questions or are concerned about whether you are legally bound to disclose the information.

Counsel can handle the legal steps necessary to maintain the confidentiality of the material.

With student incidents, it is understood that some sort of report should be given to the parent. However, this does not mean giving a copy of the school’s investigation. District’s should have a generic “accident/incident report” that can be given to the parent that contains basic information only. Judgments as to cause, opinions, or other subjective information should not be included in reports to parents. This information is only suitable for the district’s confidential incident file.

For More Information

For more information regarding the content of this bulletin, or to request assistance in an incident follow up, please contact one of the following:

Catherine Jones, Director, Risk Management Services, 661-636-4608

Bob Kretzmer, Director, SISC II, 661-636-4709

The attached form can be used as the confidential report form to investigate incidents. Please note that it should never be given to parents or disseminated to staff, but rather kept by one designated “risk manager”. SISC also has a generic report that can be given to parents.

The attached form was modified from the original created by San Luis Obispo SIPE.

CONFIDENTIAL SCHOOL INCIDENT INVESTIGATION**FOR INTERNAL USE ONLY:****DO NOT COPY OR DISTRIBUTE****SEND COMPLETED REPORT TO DISTRICT OFFICE**

ALL QUESTIONS CONTAINED IN THIS QUESTIONNAIRE ARE STRICTLY CONFIDENTIAL
ATTORNEY/CLIENT PRIVILEGE

District Name		School/Site			
Name (Last, First, M.I.):		<input type="checkbox"/> Student <input type="checkbox"/> Non-Student <input type="checkbox"/> Employee			
Homes Address Street, City, ST, Zip				<input type="checkbox"/> Male <input type="checkbox"/> Female	Date of Birth
Home Phone No.:		Date of Incident:			Time:
Report to Whom?		Date Reported:			Time:

DETAILS OF INCIDENT

Exact Location of Incident	
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Did incident involve other student(s) or non-student(s)? Yes No If "Yes," Give Name(s):

DESCRIBE HOW THE INCIDENT OCCURRED IN DETAIL (ATTACH ADDITIONAL SHEET OR REPORT IF NECESSARY)					

WAS EQUIPMENT OR MACHINERY INVOLVED? (PLAYGROUND, INDUSTRIAL ARTS, ETC.) Yes No IF "YES," NOTE ANY DEFICIENCIES

WAS A RULE OR PROCEDURE VIOLATED? EXPLAIN (Include horseplay)

Full Name of Teacher, Teacher's Aide, etc., for injured student	Title of Person (Teacher, Aide, etc.)	Present at time of incident? <input type="checkbox"/> Yes <input type="checkbox"/> No
Name of Witness	Address	Phone
Name of Witness	Address	Phone
Name of Witness	Address	Phone

NATURE OF INJURY**INJURED PART OF BODY**

<input type="checkbox"/> Abrasion <input type="checkbox"/> Fracture <input type="checkbox"/> Sprain <input type="checkbox"/> Concussion <input type="checkbox"/> Contusion <input type="checkbox"/> Cut <input type="checkbox"/> Dislocation <input type="checkbox"/> Internal <input type="checkbox"/> Other - Explain below:	<input type="checkbox"/> Left Side <input type="checkbox"/> Right Side <input type="checkbox"/> Abdomen <input type="checkbox"/> Arm <input type="checkbox"/> Back <input type="checkbox"/> Chest <input type="checkbox"/> Eye <input type="checkbox"/> Face <input type="checkbox"/> Finger <input type="checkbox"/> Foot <input type="checkbox"/> Hand <input type="checkbox"/> Head <input type="checkbox"/> Leg <input type="checkbox"/> Neck <input type="checkbox"/> Other pain/discomfort – Explain below:
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First Aid Treatment Given:

Name of person who administered First Aid:

Parent/Guardian Name (if applicable) Date/time Contacted Disposition Return to Class/Work Home Doctor 911/Hospital

Other Transported By:

Parent Comments:

REPORT PREPARED BY	PHONE NUMBER	DATE PREPARED

SITE ADMINISTRATOR SIGNATURE

CONFIDENTIAL ATTORNEY/CLIENT PRIVILEGE