Book: Policies for MI Local Update
Section: Vol. 37, No. 1 - September 2022
Title: Vol. 37, No. 1 - September 2022 - OVERVIEW
Number: 01 - OVERVIEW

MI LOCAL UPDATE OVERVIEW AND COMMENTS

VOLUME 37 NUMBER 1

SEPTEMBER 2022

MASB Policy Services Provided by Neola

Effective policies are at the core of successful school district governance. Maintaining policies that reflect both local oversight and ever-changing state and federal laws is an enormous task. School board members can rely on the MASB-Neola Partnership to keep their policy manuals up-to-date. Under this partnership, Neola provides comprehensive policy services for MASB members on behalf of MASB. Working together, MASB and Neola produce uniform school policies and guidelines to better serve all Michigan school districts.

Policy Development and Updating

Neola, with assistance from MASB if and when needed, will work with the board, administrators, and committee(s) to develop a comprehensive policy manual that suits your district's needs. Each manual is based on templates that have been thoughtfully prepared, then vetted by Neola's outside counsel and MASB's legal counsel. These templates are customized to the district's unique circumstances through choices made by the board and administrative team. The bylaws, policies, and

administrative rules/regulations are a unique collection assembled by educators and attorneys. The end result will be a policy manual that's in line with law and court decisions containing legal citations, footnoted reference material, and will be searchable by keyword or phrase.

OVERVIEW AND COMMENTS

All production-related materials and questions should be directed to the Production Office at 632 Main Street, Coshocton, Ohio 43812 (phone: 800-407-5815 or 740-622-5341, e-mail: accounts@neola.com and/or production@neola.com). Billing questions should be directed to the Stow Office at 3914 Clock Pointe Trail, Suite 103, Stow, Ohio 44224 (phone 330-926-0514, e-mail: accounts@neola.com).

Please do not retype Neola materials before returning them for processing. We prefer to have the original materials returned after you have marked them indicating which changes and additions you choose to have/not have for your District. If a District chooses not to adopt a policy or an administrative guideline, the District is still obligated to follow applicable Federal and State laws relating to that section.

The proposed new, revised, and replacement policies, administrative guidelines, and forms included in this update have been thoughtfully prepared and reviewed by Neola's legal counsel for statutory compliance. If you make changes or substitute in its entirety policies or other materials of your own drafting, those materials should be reviewed by your legal counsel to verify compliance. Neola does not review District-specific edits to update materials or District-specific policies for statutory compliance.

If a policy or guideline is marked as a revision, the changes have been marked in bold/green font (to add material) and crossed out/red font (to delete material). As you review a revised policy or guideline, you may choose to accept one (1), many, or all of the changes provided. If a policy or guideline is marked as a replacement, that means there have been enough changes made that justify a complete, clean replacement copy. As you review a replacement policy or guideline, you should also check the materials you have in your current policy or guideline to see if there is some District/other specific wording you want to be included in the replacement policy. If so, any wording from the current policy should be added using “Track Changes” in the BoardDocs platform in the replacement policy or

guideline before returning it electronically to the Production Office for processing.

If the District alters language and adds it to a policy template or deletes content that is not marked as a choice in the policy template, then these actions will constitute District-specific edits.

Policies that are to be removed from the policy manual require Board action to rescind the policy.

As the Update “season” gets underway, Neola offers some suggestions for accessing the comprehensive policy services through your Neola Associate. While “in-person” consultation sessions are the preferred method for Neola Update “visits”, the means by which you and your Neola associate accomplish this review should be mutually determined based on availability and level of comfort with the consultation process. Overall, health and safety are the primary concerns. Your Neola associate will be in contact with you soon to discuss these options with you and to schedule an appointment to review this update and ensure you are current on this and previous updates. Please consider the following options:

schedule an appointment date/time to review the update materials during an in-person conference;

schedule/reschedule update or drafting visits for a later time;

schedule an appointment date/time to review the update materials via a virtual meeting such as Google Meet or other electronic options; or

schedule an appointment date/time to review the update materials in a telephone conference.

If you are not an administrative guidelines client, you did not receive those materials in this packet. Contact your Associate for more information about becoming an administrative guidelines client.

Processing Update Materials

If you will be making changes to these Update documents electronically, use the “Track Changes” editing tool in the BoardDocs platform to mark the Neola materials indicating which of the proposed

revisions and additions you choose to include or not include for your District, or to make additional edits, before returning them electronically for processing. Be sure to leave the “track changes” and marked up version as the one you submit to the Production office in Coshocton, Ohio.

District-Specific Material

If the District chooses during any step of the Update process to incorporate District-specific material into a new policy or guideline that has been proposed, or to insert District-specific material into a current policy or guideline for which revisions have been proposed in an update issued by Neola, then the District agrees to hold Neola harmless for those District-specific edits and acknowledges that Neola’s warranty for legal challenges to that District-specific language in that policy or guideline will not be in effect. In addition, Neola retains ownership of the text from the original policy template that remains in a policy to which District-specific material has been added. District-specific materials include the following:

materials from the District’s existing materials that the District requests be incorporated during the drafting process;

new materials that the District develops in their entirety and exclusive of Neola; and

revisions or deletions that substantively depart from Neola’s templates.

Further, Neola does not recommend the use or incorporation of District-specific materials. Neola will, at the request of the District, incorporate District-specific materials into the licensed materials, with the implicit understanding that the District bears all risks associated with the District’s decision to request that such District-specific materials be incorporated. Neola reserves the right, but is not obligated, to advise the District to seek its own legal review of District-specific materials.

Notice Regarding Legal Accuracy

Neola is vigilant in providing policy language to clients that has been vetted for legal accuracy by outside legal counsel. Should questions arise as to the legal compliance or accuracy of Neola's

materials, it is our expectation that Neola's counsel would have the opportunity to assist in the resolution of such a claim. Please notify the Neola corporate office if an issue arises in which such a review or assistance is necessary.

Policies in this update have been reviewed by Varnum, LLP (Grand Rapids, MI) for consistency with Federal and State law.

Textbooks, Instructional Materials, and Library Materials

During the past several months, public discussion at Board meetings has shifted away from COVID-19 issues and mask mandates to the matter of selection of appropriate learning materials such as textbooks, instructional materials, and library/media center materials, and challenges to those selections. Be sure to check current policies and administrative guidelines and their implementation at the start of the new school year. The following templates have been reviewed and have been determined to be accurate and compliant with State law:

Policy/AG 2510 - Adoption of Textbooks
Policy 2520/AG 2520A - Selection of Instructional Materials and Equipment
Policy 9130 - Public Complaints

IRS Mileage Reimbursement Rate

The Internal Revenue Service (IRS) issued Notice 2022-124 on June 9, 2022, which provides an increase in the standard mileage reimbursement rate for the final six (6) months of 2022.

For the final six (6) months of 2022, the standard mileage rate for business travel will be sixty-two and one-half (62.5) cents per mile, up four (4) cents from the rate effective at the start of the year of fifty-eight and one-half (58.5) cents. The new rate became effective July 1, 2022. The IRS provided legal guidance on the new rate in Announcement 2022-13PDF.

In recognition of recent gasoline price increases, the IRS made this special adjustment for the final months of 2022. The IRS normally updates the mileage rates once a year in the fall for the next calendar year.

LEGAL ALERTS

Included with this update are several legal alerts and other resource materials. These include:

03 - Legal Alert: U.S. Supreme Court Ruling on Employee Private Religious Expression

04 - Legal Alert: Update on Title IX - Notice of Proposed Rule Making and Two Recent Sixth Circuit Decisions

05 - Legal Alert: IRS Guidance for Payments to School Board Members

06 - Legal Alert: New Public Acts

07 - Legal Alert: Curriculum Changes Effective 2023-2024 School Year

08 - Legal Alert: Emotional Support/Comfort Animals and Therapy Dogs

09 - Legal Alert: Reminder about Employer Requirements for Nursing Mothers

BYLAWS AND POLICIES

Bylaw 0144.1 - Compensation (Revised)

This policy revision is offered to accommodate the IRS guidance regarding payments to School Board members. See Legal Alert #5.

This revision should be adopted to maintain accurate policies.

Policy 6108 - Authorization to Use Electronic Transfer of Funds and Automated Clearing House Arrangements (NEW)

This new policy is provided in response to client requests. In order to utilize electronic fund transfers and automated clearing house (ACH) arrangements and transactions, the District must have a written ACH policy in place. This policy includes the components required by Michigan statute.

This policy should be adopted in order to utilize electronic fund transfers and automated clearing house arrangements and transactions.

Policy 6460 – Vendor Relations (Revised)

This policy has been revised at client request to provide optional language that allows for preferred vendor access to students and their parent/guardian for non-district purchases.

This option is offered for consideration.

Policy 6700 - Fair Labor Standards Act (FLSA) (Revised)

More than a decade ago, Congress passed a law amending Section 7 of the Fair Labor Standards Act ("FLSA"), mandating that eligible employees be provided reasonable breaks and private facilities to express breast milk during the first year after the birth of their child. It is important to keep in mind that the FLSA overtime and lactation provisions only apply to certain employees in an organization, but not all of them. For public schools, typically nonteaching employees, such as bus drivers, custodians, and secretaries, are covered by the FLSA. However, professional employees like teachers, administrators, and IT staff are usually exempt from overtime and other FLSA provisions including those mandating breaks for lactation. However, school employers may elect to provide this type of benefit and support for exempt employees. Therefore, language has been added that summarizes a board of education's obligation to provide reasonable breaks and private facilities for FLSA-eligible employees to express breast milk. In the new AG 6700, optional language provides the same benefit to FLSA-exempt employees to the extent the employees may be accommodated without materially disrupting school operations or employee duties. Such an option is not required and in some cases may be difficult or nearly impossible to accommodate. Many employers attempt to provide similar accommodations/benefits for all employees, regardless of status or assignment.

A legal alert accompanies this change and summarizes a board of education’s duties with regard to this topic.

Policy 7440.03 - Small Unmanned Aircraft Systems (sUAS) (Revised/Technical Correction)

Policy and AG 7440.03 have been updated to incorporate changes in Federal regulations pertaining to the operation of drones at night or over people.

The proposed revision to the policy adds the new Federal regulation citation to the policy. If, in reviewing the policy template, a change to the current policy would be considered a revision or the addition of a new policy. Otherwise, the change would be considered a Technical Correction. The proposed revisions to the AG are consistent with the current state of the law and should be adopted.

Policy 8805 - Flags and Displays (NEW)

This new policy is offered at the request of clients. This is not a required policy and should only be considered after discussion with district leadership and legal counsel. Be sure to note that any prohibitions should not be "message-based" but rather restricting permission in a reasonable, school-oriented manner. In the case of districts that permit the display of "message-based" flags or displays, this policy should not be adopted.

Policy 9150 - School Visitors (Revised)

The proposed revision to this policy reflects the recent changes required by amendments, approved by the Governor, to the Sex Offender Registration Act (SORA). The change was made to Policy 8400 in a recent update

This revision should be considered in order to have consistent policies and to remain compliant with Michigan law.

ADMINISTRATIVE GUIDELINES

AG 6700 - Fair Labor Standards Act (FLSA) (NEW)

See note on Policy 6700.

AG 7440.03 - Small Unmanned Aircraft Systems (sUAS) (Revised)

See note on Policy 7440.03.

AG 8800A - Religious Activities/Ceremonies (Delete)

See Legal Alert #03.

COMMENTS

Reviewing Board Minutes

A feature of your subscription to the Update Service is the review of your District's Board minutes to identify actions that result in new policy or revision to existing policy. If such action has been taken and copies of the related materials have not been submitted to the Production Office, 632 Main Street, Coshocton, OH, 43812, the District will be contacted and additional information regarding the action will be requested. Please take advantage of this valuable service by sending copies of your Board minutes to the Production Office in Coshocton, OH for review.

Book: Policies for MI Local Update
Section: Vol. 37, No. 1 - September 2022
Title: Vol. 37, No. 1 - September 2022 Policy Disposition Sheet
Number: 02 - Policy Disposition Sheet

DISPOSITION OF NEW/REVISED/REPLACEMENT
POLICIES FOR BOARD ADOPTION

Vol. 37, No. 1 - September 2022

Coding for District-Specific Edits
***1** = drafted by District staff
***2** = if the material was a work for hire, that is, material the District paid someone else to develop but from whom the District purchased the rights to publish
***3** = if the material is copyrighted to someone else from whom the District has secured permission to publish the material
(No code is needed for accepting Neola's vetted material)

Policy Number	Date Adopted	District-Specific Edits (1, 2, or 3)	Date Tabled	Date Rejected
po0144.1				
po6108				
po6460				
po6700				
po7440.03				

po8805				
po9150				

Book: Policies for MI Local Update
Section: Vol. 37, No. 1 - September 2022
Title: Vol. 37, No. 1 - September 2022 U.S. SUPREME COURT RULING ON EMPLOYEE PRIVATE RELIGIOUS EXPRESSION
Number: 03 - Legal Alert

TO: Neola Clients in Michigan

FROM: Neola Legal Counsel

RE: U.S. Supreme Court Ruling on Employee Private Religious Expression

DATE: September 2022

LEGAL ALERT

Much like last year's "angry cheerleader" case involving First Amendment speech by students off campus, the recent pronouncement by the U.S. Supreme Court in Kennedy v. Bremerton School District, decided on June 27, 2022, did little to provide schools with practical guidance on employee rights where such expression occurs in the context of the free speech, free exercise and the establishment clauses of that Amendment.

In Kennedy, the majority opinion of Justice Gorsuch tackled the difficult issue faced by schools (and other government employers) of deciding when private religious observances by an employee (here, an assistant football coach "taking a knee" for a brief prayer after each game on the 50-yard line) takes on the appearance of behavior endorsed by the employer. This case truly represented the classic First Amendment "free exercise/free speech" versus "establishment" of religion conundrum faced by public employers.

In determining to what extent the decision will impact school district decision-making (if at all), it is important here – as it was in the cheerleader case – to look closely at the facts. While the dissent in this case took great pains to elaborate and "fill in" what they believed were some of the more

overlooked aspects of the case, the opinion arose out of these key factual determinations:

> The coach had long made it a practice to give "thanks through prayer on the playing field" at the conclusion of each game, taking a knee at the 50-yard line after the players had shaken hands, for approximately 30 seconds.

Initially, the coach prayed on his own but, over time, some of the players would ask if they could pray alongside him. His response was essentially, "This is a free country. You can do what you want."

Eventually, the coach started to add short motivational speeches with his prayer when others were present. In addition – predating the coach's tenure – it had long been the tradition of the team to engage in pregame and postgame prayers in the locker room, although he explained that he never told, pressured or encouraged any student to join in his midfield prayers.

After receiving a positive comment from an employee from another district about the "practices" at Bremerton, the superintendent reacted swiftly and sent the coach a letter concerning "two problematic practices" – the midfield prayer and inspirational talks that accompanied them and the pre and postgame prayers in the locker-room.

The letter instructed the coach to avoid the motivational talks that included "religious expression, including prayer" and to avoid suggesting, encouraging, discouraging, or supervising any prayers of students which the letter acknowledged that the students were free to "engage in."

The letter also explained that any religious activity on the coach's part must be "non-demonstrative" if students are also involved in religious conduct in order to "avoid the perception of endorsement," recognizing the tension between the employee's free exercise rights and the need to avoid the school's violation of the Establishment clause.

The coach stopped any and all locker-room prayers and of offering religious references or prayer in his motivational talks at midfield after the game.

The coach (through counsel) sent a letter to the district informing them that he intended to offer his personal, private prayer after the games at midfield, offering to wait until the players were walking to the locker-room or bus – and then catch up with the team.

The District responded by forbidding the coach from engaging in "any overt actions" that would appear to a reasonable observer to endorse prayer while he was on duty as a District-paid coach – believing that anything less would lead to a violation of the Establishment Clause.

When the coach gave his prayer after the next game while most players were singing the school fight song to the audience, the district sent him a letter saying that while they appreciated his efforts to comply with its directives, they concluded that a reasonable observer could think that when an employee on duty engages in overtly religious conduct, the school was endorsing religion.

In that letter, the district offered the coach the option of prayer in a private location, not observable to the students or the public.

The coach continued his practice at the next two games. After the second game, the school put the coach on paid administrative leave and prohibited him from participating in any capacity with the football program. In not renewing his coaching contract at the end of the season, the district cited his performance evaluation saying that he "failed to supervise student-athletes after games," even though the other members of the coaching staff were allowed to forgo supervision after games to visit with friends or take personal phone calls, etc.

One might well argue that the school district was thoughtful and accommodating in addressing the issues pertaining to religious practices in this instance. Indeed, in the initial decision supporting the school, the District court found that the sole reason for the coach's dismissal was the district's perceived risk of constitutional liability under the Establishment Clause – and found that a persuasive reason to do so. Had it done otherwise, the school would have invited "an Establishment Clause violation." The lower court concluded that a reasonable observer would have seen the coach as leading an "orchestrated session of faith," in contravention to the Supreme Court's 1971 decision in Lemon v. Kurtzman.

The Ninth Circuit affirmed on appeal, characterizing the coach's speech as government rather than private speech (it was on the field where he was employed to coach). They determined that the coach's on-field religious activity, coupled with "his pugilistic efforts to generate publicity in order to gain approval of those on-field religious activities," were enough to lead an "objective observer" to conclude that the District "endorsed Kennedy's religious activity by not stopping the practice" which would have amounted to a violation of the Establishment Clause.

The Supreme Court reversed in a 6-3 decision, determining that the Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from government reprisal and that the Constitution neither "mandates nor permits" the government to suppress such religious expression. In so doing, the majority found that the coach's speech was not government speech because it was not ordinarily within the scope of his duties as a coach. Beyond this, the district's policy was neither "neutral" nor "generally applicable" since the actions taken by the district were based upon religious conduct and despite the fact that other employees (coaches) were allowed to engage in personal secular conduct at the time of the private prayer.

The majority left little doubt as to the demise of Lemon and its progeny which had approached these cases with an eye toward whether the speech or behavior resulted in the potential for an "entanglement with religion" which had come to involve estimations as to whether a "reasonable observer" would consider the employer's action (or inaction) an endorsement of religion. Not surprising in light of other recent pronouncements, the Court decided that instead of that analysis, the Establishment Clause should be interpreted in reference to "historical practices and understandings." In short, Justice Gorsuch saw no reason for the ongoing and unnecessary conflict between the competing clauses in the First Amendment:

"It is true that this Court and others often refer to the "Establishment Clause," the "Free Exercise Clause," and the "Free Speech Clause" as separate units. But the three Clauses appear in the same

sentence of the same Amendment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech.” * * * A natural reading of that sentence would seem to suggest the Clauses have “complementary” purposes, not warring ones where one Clause is always sure to prevail over the others.”

In the Court’s view, the only meaningful justification the school offered for its reprisal against the coach rested on a mistaken belief that it had “a duty to ferret out and suppress religious observances even as it allows comparable secular speech.”

Fleshing out how the Kennedy case will actually impact school district decision-making may take some time. However, it is clear that the Supreme Court has now formally changed the fundamental framework for approaching private religious expression by employees and it is equally clear that schools will be tested. Like the angry cheerleader case, there is the potential that the decision will be misread as providing for unbridled freedom for employee religious expression. That is not what the decision says, nor has the Establishment Clause been eviscerated.

Instead, schools are well-advised to exercise an added level of care when addressing personal religious practices by employees. For example, under Kennedy, what the district here should have done was to stop after prohibiting the coach to include his inspirational talks after his prayer and at pre and post-game locker room addresses. Those were clearly moments when an employee was engaged in government speech and student-athletes were subject to legitimate coercion concerns. These were prudent steps to honor the separation of church and state and avoid Establishment Clause problems. However, when the district chose to remove the coach’s right to continue his private 50-yard line prayer, the media coverage and subsequent swelling of support seemingly forced the district into a no-win scenario, since the disruption now took on the appearance that the school was on board with these developments. As the majority opinion stated:

“Because a reasonable observer could (mistakenly) infer that by allowing the prayer the District endorsed Mr. Kennedy’s message, the District felt it had to act, even if that meant suppressing otherwise protected First Amendment activities. In this way, the District effectively created its own “vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other,” placed itself in the middle, and then chose its preferred way out of its self-imposed trap.”

Since the Court did little more to provide concrete guidance on how public employers might practically approach addressing this kind of expression and related issues, Kennedy nevertheless teaches us that the Establishment Clause should no longer be perceived as an "exception" to the Free Speech and Free Exercise clauses – instead, that each of these clauses should be read as being complementary with and equal to one another. In the majority view, it's often “2 against 1” (speech and exercise v. establishment) – and the dissent correctly assessed that the prior "backboard" of the Establishment Clause has been greatly weakened by this decision.

At the end of the day, avoiding these kinds of traps make navigating any First Amendment issue difficult. As always, we recommend consulting with Board counsel early if and when these questions arise.

This legal alert is intended as general information and not legal advice. No attorney-client relationship exists.

Book: Policies for MI Local Update
Section: Vol. 37, No. 1 - September 2022
Title: Vol. 37, No. 1 - September 2022 UPDATE ON TITLE IX - NOTICE OF PROPOSED RULE MAKING AND TWO RECENT SIXTH CIRCUIT DECISIONS
Number: 04 - Legal Alert

TO: Neola Clients in Michigan

FROM: Neola Legal Counsel

RE: Update on Title IX - Notice of Proposed Rule Making and Two Recent Sixth Circuit Decisions

DATE: September 2022

LEGAL ALERT

Notice of Proposed Rule Making

A year ago, the Biden Administration signaled that it intended to conduct a comprehensive review of the 2020 Title IX Regulations and promulgate revised regulations. On June 23, 2022 – the 50th Anniversary of Title IX being signed into law – the United States Department of Education ("USDOE") Office for Civil Rights issued a Notice of Proposed Rule Making (NPRM), which represents the first step in the process for issuing new regulations. The NPRM was subsequently officially published in the Federal Register on July 12, 2022, which commenced the sixty (60) day period for the public to submit comments to the USDOE regarding the proposed regulations. Once the comment period closes, the USDOE will review and respond to the comments and eventually issue final regulations. While it took the USDOE more than fifteen (15) months to respond to the comments it received concerning the NPRM that led to the 2020 Title IX Regulations, it is expected that the Department intends to complete the current process in less than twelve (12) months – i.e., school districts should expect to see revised Policy and Administrative Guideline 2266 by the start of the 2023-2024 school year. In the meantime, the 2020 Title IX Regulations remain in full force and effect.

Turning to the content of the 6/23/2022 NPRM, while the proposed regulations retain many of the provisions contained in the 2020 Regulations, there are also significant differences; below is a brief outline that identifies some of the more meaningful differences that we expect will be present in the final rules when they are released next year:

Whereas the 2020 Regulations are singularly focused on sexual harassment, the NPRM addresses all forms of sex discrimination, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. Sex stereotypes are defined to include “fixed or generalized expectations regarding a person’s aptitudes, behavior, self-presentation, or other attributes based on sex.”

The definition of “sexual harassment” that is tied to the creation of a “hostile environment” has been broadened to include “unwelcome sex-based conduct that is sufficiently severe or pervasive, based on the totality of the circumstances and evaluated subjectively and objectively, it denies or limits a person’s ability to participate in or benefit from the school’s education program or activity.” The 2020 Regulations, on the other hand, prohibit “unwelcome conduct only if it is ‘so severe, pervasive, and objectively offensive that it effectively denies a person equal access to” the school’s educational program or activity.

The proposed regulations would require educational institutions to address a sex-based hostile environment in its education program or activity, including when sex-based harassment contributing to the hostile environment occurred outside the school’s education program or activity or outside the United States. The NPRM focuses on whether the off-campus conduct involves a respondent who is a school representative or circumstances when the school exercises disciplinary authority. Recall, the current regulations do not require educational institutions to address a sex-based hostile environment in its education program or activity if the hostile environment results from sex-based harassment that happened outside the school’s program or activity, or outside the United States.

The proposed regulations would reinstate the concept of confidential employees (e.g., school counselors, school nurses, or school psychologists) who would not be required to automatically notify the Title IX Coordinator if the employee learns of conduct that may constitute sex discrimination under Title IX. Instead, the confidential employee would be responsible for providing the complainant with contact information for the Title IX Coordinator and information about Title IX protections and grievance process. The stated reason for this proposed change is to provide a safe space where a confidential employee can connect a student with resources and information so the individual can decide whether to move forward with a complaint.

Under the proposed regulations, a complainant would be permitted to pursue a complaint about sex discrimination the individual allegedly experienced while in the school’s program or activity even if the complainant subsequently chooses to leave the school’s education program or activity. The current regulations do not permit complaints under Title IX by former students or employees who are not participating or attempting to participate in the educational institution’s program or activity.

The proposed regulations would permit the school to offer an informal resolution process even if a

formal complaint has not been filed. Under existing regulations, a school may only offer informal resolution processes if a formal complaint is filed.

As mentioned above, the 2020 Regulations focus on complaints of sexual harassment. The proposed regulations adapt the current regulations to apply to all complaints of sex discrimination (not just sexual harassment) with specific changes incorporated to take into account the age, maturity, and level of independence of students in various educational settings. To this end, the proposed regulations define "student with a disability" and acknowledge that for "an elementary or secondary student complainant or respondent who is a student with a disability, the Title IX grievance procedures may intersect with the decisions, including those about FAPE, made by the IEP team or Section 504 team." As such, under the proposed regulations, the Title IX Coordinator would be charged with consulting with the IEP team or Section 504 team (i.e., persons knowledgeable about the student) throughout the resolution process.

The proposed regulations would permit a "single investigator" – i.e., the Title IX Coordinator or another individual could serve as both the investigator and decisionmaker – whereas the current regulations require the investigator and decisionmaker to be different persons.

Many of the proposed changes to the investigation/grievance process are aimed at streamlining the process (i.e., making it more efficient and speedy), including eliminating the two 10-day waiting periods associated with providing the parties with time to review the relevant evidence and investigation report; pursuant to the NPRM, the investigator would ordinarily only need to provide a description of the relevant evidence and not copies of the evidence and would not need to provide a written investigation report at least 10-days before the determination of responsibility is made.

While the proposed regulations continue to "permit" dismissals in certain circumstances, they do not require dismissal in specific situations as the current regulations do.

As briefly mentioned above, the NPRM specifically addresses pregnancy and related conditions such that schools – after learning a student is pregnant – would have a duty to provide the student with information about Title IX, including the school's obligation to provide reasonable accommodations/modifications, access to a separate and comparable program, a voluntary leave of absence, and time for and access to a clean, private space for lactation.

The USDOE states in the 6/23/2022 NPRM that it intends to engage in a separate rulemaking process to address Title IX's application to the context of athletics; in particular, what criteria educational institutions may use to establish students' eligibility to participate on a particular male or female athletic team. The USDOE provided no timeframe for when it might release a NPRM on this topic.

While it appears many of the proposed changes identified in the NPRM – if included in the final rules – will be beneficial to K-12 educational institutions, it is critical to remember school districts must continue to operate under the existing 2020 Regulations during the 2022-2023 school year.

Two (2) Recent Sixth Circuit Court Decisions Articulate Evolving Legal Standards for Title IX Claims in K-12 Educational Programs and Activities

On March 2, 2022, the U.S. Court of Appeals for the Sixth Circuit (the Federal circuit court that includes Michigan) ruled that the standards for deliberate indifference in student-on-student sexual harassment claims, as laid out in its 2019 decision in Kollaritsch v. Michigan State Univ. Bd. Of Trustees, are not applicable to claims of deliberate indifference in teacher-student sexual harassment cases. Specifically, the Court held in Wamer v. University of Toledo that "the more stringent standard for peer-harassment deliberate-indifference claims introduced in Kollaritsch should not apply in the context of teacher-student harassment claims."

To understand the Court's decision in Wamer, one needs a basic understanding of the Court's decision in Kollaritsch, in which it introduced a causation element requiring additional post-notice conduct by the institution; specifically, the Court held that plaintiffs must show "that the school had actual knowledge of some actionable sexual harassment, and that the school's deliberate indifference to it results in further actionable harassment of the student victim." Given that the students in Kollaritsch were only assaulted once, the Court ruled that their claims failed because they could not show the school's conduct or lack thereof caused them to suffer further harassment. The Court also held that the further harassment must be inflicted against the same victim.

In Wamer, the Court moved in a different direction, finding that there are important policy reasons for imposing a less stringent standard in cases alleging teacher-student harassment. Specifically, the Court stated: "When a student has been sexually harassed by a teacher…that student's ability to benefit from the educational experience provided by the school is often undermined unless the school steps in to remedy the situation because the student is put in the position of choosing to forego an educational opportunity in order to avoid contact with a harasser, or to continue attempting to receive the educational experience tainted with the fear of further harassment or abuse. For that reason, requiring an additional post-notice incidence of harassment in teacher-student deliberate indifference cases would undermine the purpose of Title. IX."

The Court, however, pointed out that a plaintiff still must allege 1) she was sexually harassed by a teacher, (2) a school employee had actual notice of the harassment, (3) the school's response was clearly unreasonable, and (4) the school's deliberate indifference caused the student to suffer discrimination. The Court further stated that to satisfy the causation requirement, the plaintiff must show that following the school's unreasonable response the plaintiff (1) experienced an additional instance of harassment or (2) an objectively reasonable fear of further harassment caused the plaintiff to take specific reasonable actions to avoid harassment, which deprived the plaintiff of the educational opportunities available to other students. Thus, while the court adopted a less stringent standard for teacher-student sexual harassment deliberate-indifference cases, the standard still remains significant for a plaintiff to recover against the educational institution.

Just over two months later, on May 19, 2022, the Court considered another case (actually, two combined cases) involving students' allegations that their school district was deliberately indifferent to them and violated their rights under Title IX by permitting student-on-student sexual harassment to occur against them. In Doe and Jane Doe #1, on behalf of Jane Doe #2, et al. v. Metropolitan Government of Nashville and Davidson County, Tenn., the Court revisited and distinguished its Kollaritsch decision, which involved post-secondary students, in a case involving two high school students.

In Doe, the plaintiffs offered two theories of liability under Title IX; first, they argued the district was liable for its actions before the students were harassed, and next they argued the district was liable for its actions after they were harassed. With respect to their "before" claims, the students argued that the district had a widespread problem of sexual harassment in its schools – sexual harassment that was similar in nature to that which the plaintiff students experienced – and because the district did not adequately address the numerous incidents of sexual misconduct that came before theirs, it made it more likely the plaintiffs would experience the unwelcome conduct they ultimately experienced – i.e., the sexual harassment that the plaintiffs experienced was the result of the district's indifference to the problem of pervasive sexual misconduct in its schools.

In allowing the "before" claims to proceed,[1] the Court adopted a test first articulated by the Ninth Circuit in 2020 in its decision, Karasek v. Regents of the University of California: "A student must show: 1) the school maintained a policy of deliberate indifference to reports of sexual misconduct, 2) which created a heightened risk of sexual harassment that was known or obvious, 3) in a context subject to the school's control and 4) as a result the plaintiff suffered harassment that was 'so severe, pervasive and objectively offensive that it can be said to have deprived the plaintiff of access to the educational opportunities or benefits provided by the school.'" The Court, therefore, ruled that when a student shows that the defendant school's deliberate indifference to a pattern of student-on-student sexual misconduct leads to sexual harassment against the plaintiff student, the Kollaritsch causation requirements are met.

Turning to the plaintiffs' "after" claims, the Court took two separate approaches with respect to the two plaintiff students. With respect to Sally Doe's claims, the Court voiced its concern with respect to the response the school official offered when meeting with Sally Doe's mother concerning what her daughter had experienced. In particular, the Court found the school official's response inadequate – he failed to inform the head of school or the Title IX Coordinator of the complaint and did not provide any guidance to the parent or student concerning what steps the school would take to address the situation. In fact, the only action the school official took – according to the Court – was to help Sally Doe's parents to arrange to homeschool Sally. Consequently, the Court concluded that a reasonable jury could find that the school failed to take appropriate steps to remedy the sexual harassment, and instead opted to avoid the situation, causing the plaintiff student to have to choose between homeschooling and potentially enduring further sexual misconduct.

With respect to Plaintiff Jane Doe #1, the Court ruled that Kollaritsch did not apply because the "same victim" requirement from Kollaritsch – which involved a post-secondary plaintiff – does not apply in the K-12 context because K-12 schools have more authority and control over students than universities do in post-secondary settings.

As we await the new final rules for Title IX, it will be interesting to see whether USDOE seeks to address the evolving Title IX case law as represented by the two preceding Sixth Circuit decisions.

Breaking News – USDOE and EEOC Guidance Documents Concerning Enforcement of Title IX and Title VII in light of Bostock Temporarily Halted by Federal Judge

On July 15, 2022, Judge Charles E. Atchley, Jr. of the United States District Court, Eastern District of

Tennessee, issued a preliminary injunction in The State of Tennessee, et al. v. United States Department of Education, et al., Case No. 3:21-cv-308, enjoining the U.S. Department of Education ("USDOE") and the Equal Employment Opportunity Commission ("EEOC") from enforcing guidance documents they published in June 2021 concerning (1) the USDOE's interpretation that, in light of the U.S. Supreme Court's Bostock v. Clayton County decision, Title IX prohibits sex discrimination, including discrimination based on sexual orientation and gender identity, and (2) the EEOC's established legal positions on LGBTQ+ related matters involving workers across the country.

The State of Tenn. v. U.S. Dep't of Ed. arose in late-August 2021, when State Attorneys General from twenty (20) states filed a lawsuit alleging the USDOE and EEOC had exceeded their authority and/or violated the Administrative Procedure Act ("APA") when they issued their respective guidance documents in June 2021.

Beginning with one of the first Executive Orders that President Biden signed on January 20, 2021, he has directed executive agencies to interpret all Federal laws pertaining to sex discrimination to include protections for persons based on their sexual orientation and gender identity. This directive is based on the Administration's application of the Bostock ruling concerning Title VII to other analogous Federal laws. In response to the January 20, 2021 Executive Order and a later one President Biden signed on March 8, 2021, which is particular to educational institutions, the U.S. Department of Justice's Civil Rights Division along with the Office for Civil Rights of the USDOE issued several documents in 2021 that set forth their legal reasoning why the Bostock ruling applies in the Title IX context such that it bars discrimination on the basis of a person's sexual orientation or gender identity. First and foremost among the reasons for their legal conclusion is that a number of courts of appeal had interpreted Bostock to apply to Title IX in cases involving transgender students. Among the documents setting forth this interpretation is the one issued by the USDOE in June 2021 that is the subject of this lawsuit.

In considering the Plaintiff States' motion for a preliminary injunction, Judge Atchley employed a very narrow reading of Bostock. Specifically, he read the decision to be limited to holding that sex discrimination is present only when an individual is terminated based on the person's sexual orientation or gender identity. He further stated that the U.S. Supreme Court expressly limited its decision to Title VII and did not intend the decision to cover other Federal laws that prohibit sex discrimination. He additionally stated that it is not at all clear in his opinion that the Bostock ruling prohibits other workplace conduct or rules that may be based on a person's sexual orientation or gender identity – e.g., rules that dictate employees' use of restrooms, locker rooms, etc. based upon their biological sex and/or requiring the use of pronouns tied to a person's biological sex as opposed to gender identity.

In reaching his conclusion that the Plaintiff States' had successfully justified the issuance of a preliminary injunction, Judge Atchley analyzed whether the USDOE and EEOC's "guidance" documents were "final rules." He concluded they were because they constituted "legislative" rules and not merely "interpretive" rules. The Sixth Circuit Court of Appeals has explained the difference between legislative rules and interpretative rules as follows:

[L]egislative rules have the force and effect of law and interpretative rules do not. Thus, a rule that intends to create new law, rights or duties, is legislative, while a rule that simply states what the

administrative agency thinks the statute means, and only reminds affected parties of existing duties is interpretative. Because interpretative rules cannot effect a substantive change in the regulations, a rule that adopts a new position inconsistent with any of the [agency's] existing regulations is necessarily legislative.

The significance between classifying a rule as legislative as opposed to interpretative is that legislative rules, pursuant to the APA, have to go through a notice-and-comment rulemaking process. Specifically, the agency that is promulgating the rule has to "publish a notice about the proposed rule, allow the public to comment on the rule, and, after considering the comments, make appropriate changes and include in the final rule a 'concise general statement' of its contents." Because neither of the June 2021 guidance documents that are being challenged by the Plaintiff States went through the APA's procedural requirements, the court ruled they were invalid and temporarily enjoined them, at least until such time as the APA notice-and-comment rulemaking procedures are completed, the court issues a final decision on the merits of the lawsuit, or a reviewing court decides otherwise.

At this point, Neola is confident that its earlier guidance remains an accurate summary of the law a relates to common issues that school districts confront with respect to transgender students. It is relevant to note that Judge Atchley recognizes in his Memorandum Opinion and Order that the court's injunction only bars the USDOE and EEOC from relying upon the guidance documents when investigating complaints pertaining to and engaging in enforcement actions related to Title IX and Title VII. As such, it does not impact how political subdivisions interpret Title IX and Title VII's prohibitions against sex-based discrimination – i.e., whether they interpret Bostock to apply to Title IX and to prohibit discrimination based upon a person's sexual orientation or gender identity – or whether a political subdivision might incur liability should a person file a lawsuit against the public entity based on claims of the person was subjected to sex discrimination based upon the person's sexual orientation or gender identity. Given the significant legal and political issues involved in this complex and evolving area of the law, Neola advises its clients that they should speak with competent legal counsel to address any specific circumstances that arise in their districts during the period when Judge Atchley's preliminary injunction is in effect.

Finally, as discussed earlier in this Legal Alert, the USDOE has commenced the notice-and-comment rulemaking process with respect to Title IX. As such, within a year the USDOE is expected to have completed the APA procedural requirements in order to issue a final rule that will have the effect of law. If the content of the NPRM remains unchanged with respect to the USDOE's proposed interpretation of the definition of sex discrimination, it is expected schools will be formally prohibited, pursuant to Title IX, from discriminating against a student or employee based upon the person's sexual orientation or gender identity. In the interim, it will be interesting to see whether the USDOE and/or EEOC appeal Judge Atchley's Order.

each jurisdiction are different and are constantly evolving.

[1]The appeal pertained to the district's motion for summary judgement that aimed to prevent the case from proceeding to trial before a jury.

This legal alert is intended as general information and not legal advice. No attorney-client relationship exists.

Book: Policies for MI Local Update
Section: Vol. 37, No. 1 - September 2022
Title: Vol. 37, No. 1 - September 2022 IRS GUIDANCE FOR PAYMENTS TO SCHOOL BOARD MEMBERS
Number: 05 - Legal Alert

TO: Neola Clients in Michigan

FROM: Neola Legal Counsel

RE: IRS Guidance for Payments to School Board Members

DATE: September 2022

LEGAL ALERT

Internal Revenue Service guidance states that individuals who serve as public officials are government employees and that the governmental entity is responsible for withholding and paying federal income tax, Social Security, and Medicare taxes. The IRS also requires a Form W-2 Wage and Tax Statement to each such official. This guidance document specifically identifies members of a Board of Education as a "public official."

Therefore, if your District's Board members receive compensation for their services, they must be included on the School District's payroll for tax purposes only and receive a W-2 as opposed to a 1099.

For more information use the following link: https://www.irs.gov/government-entities/federal-state-local-governments/federal-tax-obligations-for-school-district-employees

This legal alert is intended as general information and not legal advice. No attorney-client relationship

exists.

Book: Policies for MI Local Update
Section: Vol. 37, No. 1 - September 2022
Title: Vol. 37, No. 1 - September 2022 NEW PUBLIC ACTS
Number: 06 - Legal Alert

TO: Neola Clients in Michigan

FROM: Neola Legal Counsel

RE: New Public Acts

DATE: September 2022

LEGAL ALERT

The Governor signed two (2) bills into law that districts should be aware of even though they do not necessitate a policy change.

M.C.L. 722.118e went into effect on June 23, 2022 and imposes new requirements on districts that run a child care center within a multiple occupancy building. Within ninety (90) days of the effective date, a child care center that is currently licensed and located in a multiple occupancy building must provide certain information to the Department of Licensing and Regulatory Affairs. The full obligations are found in M.C.L. 722.118e.

The Governor also signed House Bill 4074 into law, encouraging school districts to ensure that the social studies curriculum for grades 9-12 includes a program of instruction in free enterprise and entrepreneurship beginning with the 2023-2024 school year. If a district chooses to offer such a program of instruction, it must be project-based and may include instruction in a variety of subjects identified in M.C.L. 380.1166b.

This legal alert is intended as general information and not legal advice. No attorney-client relationship exists.

Book: Policies for MI Local Update
Section: Vol. 37, No. 1 - September 2022
Title: Vol. 37, No. 1 - September 2022 - CURRICULUM CHANGES EFFECTIVE 2023/2024 SY
Number: 07 - Legal Alert

TO: Neola Clients in Michigan

FROM: Neola Legal Counsel

RE: Curriculum changes effective 2023/2024 SY

DATE: September 2022

LEGAL ALERT

Sections 1278a and 1278b of Revised School Code were amended recently by Public Act 105 of 2022. The changes, as outlined below, affect students beginning in 2023, therefore, Neola will make revisions to pertinent policies next summer. This legal alert is provided now, however, to give districts information about the changes to allow for mindful revisions to the curriculum starting with the 2023/2024 school year in compliance with the law.

Personal Finance

The statutory language states, in part, as follows:

Beginning with pupils entering grade 8 in 2023, the board of a school district or board of directors of a public school academy shall not award a high school diploma to a pupil unless the pupil completes a

one-half (1/2) credit course in personal finance that aligns with subject area content expectations developed by the department and approved by the state board under section 1278b. The one-half (1/2) credit course in personal finance must fulfill one-half (1/2) credit of mathematics required under subsection (1)(a)(i), one-half (1/2) credit of visual arts, performing arts, or applied arts required under subsection (1)(a)(iv), or one-half (1/2) credit of a language other than English required under subsection (2), as determined by the board of the school district or board of directors of the public school academy in which the pupil is enrolled. The one-half (1/2) credit course in personal finance required under this subsection may be fulfilled through a department-approved formal career and technical education program or curriculum that aligns with the subject area content expectations developed by the department and approved by the state board for the credit under section 1278b.

What does this mean? It means that for any student that enters the 8th grade in or after 2023, they must complete a one-half (1/2) credit course in personal finance to be allowed to graduate from high school. This credit may be utilized to fulfill a one-half (1/2) credit of the math, arts, or foreign language requirement. The personal finance credit may be fulfilled through a career and technical education program. As noted, the Michigan Department of Education is charged with developing content expectations for such classes.

Financial Literacy

The legislature also pulled back on two other sections of MCL 380.1278a, now allowing them only to be utilized by students who enter 8th grade before 2023. More specifically, the section allowing a class in financial literacy to be used to satisfy a portion of the math requirement and the section allowing a one-half (1/2) credit course in personal finance to satisfy the one-half (1/2)-credit economics requirement may now only be utilized by students who enter 8th grade before 2023.

Also of note, the changes prohibit using the one-half (1/2) credit in economics to be fulfilled by completion of the newly implemented one-half (1/2) credit course in personal finance.

Book: Policies for MI Local Update
Section: Vol. 37, No. 1 - September 2022
Title: Vol. 37, No. 1 - September 2022 - EMOTIONAL SUPPORT/COMFORT ANIMALS AND THERAPY DOGS
Number: 08 - Legal Alert

TO: Neola Clients in Michigan

FROM: Neola Legal Counsel

RE: Emotional Support/Comfort Animals and Therapy Dogs

DATE: September 2022

LEGAL ALERT

Board Policy 8390 addresses the presence of service animals and non-service animals in schools and on school property. Federal laws and regulations provide clear guidance for when individuals are entitled to have service animals. The law is less clear, however, when it comes to non-service animals, in particular, emotional support/comfort animals ("ESAs") and therapy animals.

Pursuant to the Americans with Disabilities Act ("ADA"), a service animal is ordinarily a dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability. The types of tasks that service animals perform include pulling a wheelchair, retrieving dropped items, alerting a person to sound, and reminding a person to take medication. The work or tasks that a service animal performs must be directly related to an individual's disability.

ESAs and therapy animals, on the other hand, are not service animals. Instead of performing specific tasks, ESAs and therapy animals may be used as part of a medical treatment plan to provide companionship, relieve loneliness, and help a person experiencing depression, anxiety, and certain phobias; they do not, however, have special training to perform tasks that assist individuals with disabilities.

ESAs and Students

To begin, students who do not meet the definition of an individual with a disability under either the Individuals with Disabilities Education Improvement Act ("IDEA") or Section 504 of the Rehabilitation Act of 1973 ("Section 504") have no right to have an ESA at school.

With respect to students with a disability under the IDEA or Section 504, they have the right to be accompanied by a service animal anywhere on school property where students are permitted to be. Because service animals are governed by the ADA, the service animal does not need to be listed as an accommodation in the student's IEP or Section 504 plan unless the service animal is needed in order the child to receive a free appropriate public education ("FAPE"). [1] A school district should always consult with its legal counsel before including a service animal in an IEP or Section 504 plan because doing so may obligate the district to provide and/or care for the service animal.

Likewise, students with disabilities only have a right to have an ESA on school property if the student's IEP team or Section 504 team determines it is necessary for the child to receive a FAPE. The decision whether an ESA is necessary for a child to receive a FAPE should be made on a case-by-case basis by the IEP team or Section 504 team. Teams will need to consider such requests when the student making the request is diagnosed with a psychiatric disorder and presents documentation that the ESA is therapeutically necessary. As part of the decision-making process, the team should request documentation from the student's health care provider (e.g., licensed mental health professional) concerning why having the ESA accompany the student is necessary for the student's mental health and ability to receive a FAPE.

Notwithstanding the preceding, given the increasing number of students who are presenting with mental health problems (e.g., anxiety, depression, panic attacks, school phobia) schools are facing

ever more requests for ESAs to accompany students.[2] In situations where an IEP or Section 504 team determines a student does not require an ESA in order to receive a FAPE, the Section 504 team or the building administration could still allow the student with a disability to have their ESA present at school - e.g., the Section 504 team could state in the Section 504 plan that the student is permitted to bring their ESA to school as "an accommodation that is not required for the provision of FAPE." In such situations, the Section 504 team or the administration will want to reach a written agreement with the family concerning the circumstances under which the ESA will be permitted at school - e.g., the district will want to expressly require the ESA to be under the control of the student at all times, address when and how the student will be able to care for the ESA's bodily needs, and whether the ESA is permitted to accompany the student on field trips.

Before a Section 504 or IEP team decides a student requires an ESA at school as an accommodation listed in the student's IEP or Section 504 Plan, the team should consider whether any alternative accommodations would be equally effective in addressing the student's needs. If a team is unsure whether having an ESA will be effective, it might consider authorizing the ESA on a trial basis and then collecting data for a period of time to compare the student's performance and ability to access the student's education with the ESA as compared to before the ESA was present. The team should encourage the student's health care provider who is "prescribing" the ESA to participate in the team meeting.

Other factors a Section 504 team or the administration should consider when determining whether an ESA is an appropriate accommodation is (1) whether the student can control and care for the animal, (2) whether the animal is properly trained and housebroken, and (3) whether the animal is disruptive to the school environment. It is important to note, however, that unlike service animals where the law specifically requires the student or a separate parent-provided handler to control and care for the service animal at school, if the IEP team or Section 504 team finds that the ESA is necessary for the child to receive a FAPE, it may become the school's responsibility to oversee the animal, including controlling and caring for the ESA while at school. In situations where an IEP or Section 504 team determines an ESA is not necessary for a FAPE, but the Section 504 team or the administration decides to nevertheless permit the ESA to accompany the student at school, the team/administration should expressly state to the family that the ESA is the student's animal and the family is responsible for all costs associated with it – i.e., the district is not providing the ESA; ordinarily, the district will want

to take the position that the costs, care, and supervision of the ESA would be unreasonable and an undue hardship to the district and/or a material change to its program and services. These topics should be expressly addressed at the outset and clearly delineated in the Section 504 Plan. Because a district could be responsible for the provision and/or care of an ESA that is listed as a necessary accommodation on an IEP, the IEP team should only list an ESA in an IEP if it is required for the student to receive a FAPE under the IDEA. If it is not so required, a Section 504 team or the administration can decide whether to otherwise allow the student to have the ESA at school.

The applicable IEP or Section 504 team or the building administration should consider and/or discuss whether other students might be affected if the ESA is permitted or determined to be required in order for the child to receive a FAPE (e.g., other students might have an allergy or phobia to the ESA). Again, if the IEP team or Section 504 team determines the ESA is an accommodation that is necessary for the student to receive a FAPE, the district will not be able to exclude the ESA based on other students' concerns; rather, the district will need to accommodate the other students to help them avoid the ESA or address any other issues the other students might have with respect to the ESA's presence. If the ESA is not necessary for the provision of FAPE, the Section 5-4 team or building administration can consider the potential impact of the ESA on other students when deciding whether to allow the student to have the ESA at school.

ESAs and Employees

Similar to the situation described above concerning ESAs and students, an employee who wants to be accompanied by a service animal or an ESA at work will need to present the request pursuant to the ADA – i.e., as a request for a reasonable accommodation in order to allow the employee to perform the essential functions of the employee's job. When an employer receives such a request, the employer will first need to determine whether the employee is an individual with a disability as defined by the ADA. In order to meet this requirement, the employee will need to submit documentation to demonstrate that the employee has a physical or mental impairment that substantially limits one or more major life activities. Assuming the individual does, the district will need to engage in the interactive process to consider the employee's request for accommodation. As part of the analysis, the district should educate itself about the employee's disability, including how it impacts/impedes the employee's ability to perform the essential functions of the employee's job.

If the employee is having difficulty getting their job duties completed due to their disability, the employer is responsible for providing a reasonable accommodation, but it does not have to be the preferred accommodation that the employee is proposing (e.g., permission to have an ESA accompany the employee at work); rather, it just needs to be an effective accommodation that addresses the situation. As noted above, the district's responsibility is to provide a reasonable accommodation that allows the employee to perform the essential functions of the employee's job. This duty to provide accommodation can be overcome if providing the accommodation would create an undue hardship (i.e., the proposed action requires significant expense or difficulty, or alter the nature of the job).

School-Owned Therapy Dogs

As noted above, there is an increasing number of students attending public schools who are experiencing depression, anxiety, excessive stress, and/or other mental health conditions that impact their ability to perform at an optimum level during the school day. Some school districts have begun to proactively address the situation by making therapy animals (primarily dogs) available on a regular basis in the school setting. The therapy dog's role is to react and respond to people and their environment under the guidance and direction of its owner. For example, students might be encouraged to gently pat or talk to a dog to teach sensitive touch and to help them keep calm. Therapy dogs can also be used as a part of an animal-assisted therapy program that teaches empathy and appropriate interpersonal skills to help individuals develop their social skills.

Therapy dogs normally are not viewed as a specific psychological intervention or limited to only students with disabilities. In fact, some schools are reporting improved school climate, including students being calmer and having improved attention and focus on task, and even improved reading scores when the dogs are used as a reading intervention (e.g., having a student read aloud to the dog helps improve reading fluency).

Districts that are entertaining the idea of introducing therapy dogs into their school buildings should consider the following issues: 1) make sure you are transparent with your students and parents as to the rationale for having the therapy dog and how various issues will be addressed (e.g., student or

staff allergies to the animal, and any phobias a person might have to the animal); 2) make sure the dog is properly trained; 3) train staff and students how to interact with the dog; 4) make sure the staff give appropriate thought and attention to how the dog will be used on a daily basis – i.e., the dog should have specific activities/assignments to perform and be provided adequate down-time to recover, as it can be physically and emotionally draining for the dog to constantly interact with students; 5) notify your insurance agent that you will be having the dog(s) in the school environment; and 6) give particular attention to selecting the staff member with whom the dog will be living and who will be primarily responsible for its care and supervision (if the district purchases the dog, it obviously should not place the dog with any staff member who has any performance issues that might result in the staff member being nonrenewed or otherwise terminated from employment).

If you have any questions concerning whether a student or employee should be permitted to have a service animal or an ESA at school, please contact your local legal counsel.

[1] Pursuant to the IDEA, a FAPE means special education and related services that (a) are provided at public expense, under public supervision and direction, and without charge; (b) provide access to the general education curriculum and meet State grade-level standards; and (c) are provided in conformity with an individualized education program (IEP) (i.e., the educational program is individualized to fit the specific needs of the child).

Pursuant to Section 504 regulations, a FAPE means education services designed to meet the individual education needs of students with disabilities as adequately as the needs of nondisabled students are met and the education of each student with a disability with nondisabled students, to the maximum extent appropriate to the needs of the student with a disability.

[2] While the majority of the requests are for dogs and cats, some students request permission to bring lizards, potbellied pigs, ferrets, guinea pigs, etc. to school.

Book: Policies for MI Local Update
Section: Vol. 37, No. 1 - September 2022
Title: Vol. 37, No. 1 - September 2022 - REMINDER ABOUT EMPLOYER REQUIREMENTS FOR NURSING MOTHERS
Number: 09 - Legal Alert

TO: Neola Clients in Michigan

FROM: Neola Legal Counsel

RE: Reminder about Employer Requirements for Nursing Mothers

DATE: September 2022

LEGAL ALERT

The Fair Labor Standards Act of 1938 (“FLSA”) requires employers to provide certain employees who are nursing mothers with a private place and reasonable break time to express breastmilk after the birth of a child.

The details are important when implementing this law. The duty to provide “reasonable” break time is limited to the first year after birth and is based on the unique needs of each nursing mother. Some mothers need to express milk more often than others, and the frequency may decrease over time. The employee is expected to notify a supervisor about their needs as they evolve. The FLSA does not require employers to pay employees for lactation breaks as long as they are completely relieved from work duties. However, if an employee takes time during a regularly scheduled compensated break, they must still be paid.

An employer is not required to have a dedicated lactation space available at all times. It must only be provided when there is a need, and only for the length of time that it is needed. However, the space may not be in a restroom, and must be shielded from view and free from intrusion by students, staff and visitors. It also must be functional enough to fulfill its intended purpose.

It is important to keep in mind that the FLSA only covers certain employees in an organization, but not all of them. For public schools, typically nonteaching employees such as bus drivers, custodians, and secretaries are covered by the FLSA. However, professional employees like teachers, administrators, and IT staff are usually exempt from overtime and other FLSA provisions. Since Michigan does not have a law that provides these benefits at the state level[1], school district employers are therefore only required under the federal law to provide break time and facilities for FLSA-covered employees, but not their exempt employees.

Of course, employers may always elect to do more than is required by federal law. Some school employers may consider providing this benefit to all employees for consistency, as a way to attract employees, and as a way to facilitate a new mother's return to work. The challenge comes with determining whether an employer can reasonably provide the benefit for some staff. It may be difficult for instance to provide breaks for teachers who are responsible for supervising students during this time of staff and substitute teacher shortages.

If your district is interested in providing this benefit to all employees, including those not covered by FLSA, Neola has created a template policy to help establish parameters. This language is optional for everyone except nonteaching employees covered by the FLSA. You should contact your legal counsel for further information and advice.

[1] Michigan law does require that a mother be permitted to breastfeed her child in any place of public accommodation. See, M.C.L. §37.231. A "place of public accommodation" means a business, an educational institution, or a refreshment, entertainment, recreation, health, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public.

This legal alert is intended as general information and not legal advice. No attorney-client relationship exists.

Book	Policy Manual
Section	For the Board 37-1
Title	Copy of COMPENSATION
Code	po0144.1
Status	
Adopted	September 12, 2001
Last Revised	January 13, 2021

0144.1 - **COMPENSATION**

Board members will not be compensated for serving on the Board. (Note: This is retroactive beginning July 1, 2020.) Board members will be reimbursed for actual and necessary expenses incurred in the discharge of their official duties, as well as for attending Board approved activities and functions.

The Board shall pay the expenses of Board members when they attend professional meetings approved in accordance with these policies. An original voucher, detailing the amount and nature of each expense, must be submitted to the Business Office prior to reimbursement.

REVISED BYLAW - VOL. 37, NO. 1

0144.1 - **COMPENSATION**

Board members shall receive not more than $_____ per meeting **[DRAFTING NOTE: ISDs are limited to $30 per meeting]**$30 per meeting up to a total of not more than fifty-two (52) meetings (including committee meetings) as compensation for their services. Expenses of a Board member shall be reimbursed when incurred in the performance of the Board member'shis/her duties or in the performance of functions authorized by the Board and duly vouchered.

The following guidelines have been established by the Board of Education to ensure appropriate and proper reimbursement of expenses for Board members:

A. **( )** Expenses will be reimbursed only for activities authorized by the Board.

B. **( )** Reimbursement for mileage will not exceed the current rate established by the Internal Revenue Service.

C. **( )** Attendance at Board-approved conferences should be at the location closest to the District.

D. **( )** Purchase of any printed or other materials relating to Boardmanship will be reimbursed if prepurchase approval is given by the Board. If such approval is not possible or feasible, a voucher must be submitted to the Board for approval. No postpurchase voucher will be approved if it exceeds $_____.

E. **( )** When the Board attends a community or school-related event as a Board function, or a Board member attends as the designated representative of the Board, any incurred expenses, including mileage, will be reimbursed by the Board. If a Board member attends such events as a private citizen, any incurred expenses are to be paid by the Board member.

F. **( )** No entertainment expenses or purchases of alcoholic beverages are reimbursable.

A voucher detailing the amount and nature of each expense must be submitted to the Board for approval at a Board meeting after the expenses have been incurred and prior to reimbursement.

Board members may use District credit or debit cards only in accordance with Board Policy 6423 and the accompanying administrative guidelines.

Legal M.C.L. 380.11a, 380.1254

Book	Policy Manual
Section	For the Board 37-1
Title	New AUTHORIZATION TO USE ELECTRONIC FUND TRANSFERS AND AUTOMATED CLEARING HOUSE ARRANGEMENTS
Code	po6108
Status	

Do not adopt

NEW POLICY - VOL. 37, NO. 1

6108- **AUTHORIZATION TO USE ELECTRONIC FUND TRANSFERS AND AUTOMATED CLEARING HOUSE ARRANGEMENTS**

In accordance with the provisions of law, the Board of Education authorizes the acceptance and distribution/transmission of electronic fund transfers (ETFs) and automatic clearing house arrangements (ACH). The Superintendent shall put in place measures to protect the integrity and security of such transactions to comply with mandates of State and Federal agencies or programs, including Medicaid.

Definitions

"ACH arrangement" means the agreement between the originator of the ACH transaction and the receiver of the ACH transaction.

"ACH transaction" means an electronic payment, debit, or credit transfer processed through an automated clearing house.

"Automated clearing house" or "ACH" means a national and governmental organization that has authority to process electronic payments including, but not limited to, the national automated clearing house association and the Federal reserve system.

"Electronic transactions officer" or "ETO" means the Superintendent or another person designated by the Board to have the responsibilities of the ETO as prescribed in the Michigan Electronic Transactions of Public Funds Act.

All District staff shall comply with all provisions of the Uniform Electronic Transaction Act when creating, generating, sending, communicating, receiving, storing, processing, using, and relying upon electronic records. Further, all District staff and other persons who use electronic signatures when completing transactions with the Board shall do so in compliance with State law.

ACH Transactions and Arrangements

The Superintendent or another employee designated by the ETO is authorized to engage in electronic transfer of funds and ACH arrangements in accordance with this policy. The Superintendent shall be responsible for overseeing the District's ACH transactions, including payment approval, accounting, reporting, and compliance with this ACH policy.

Internal Controls

The Superintendent is responsible for disbursement of funds and shall submit appropriate documentation to the Board. Such documentation shall include:

A. information regarding the goods or services purchased;

B. the cost of goods or services;

C. the date of the payment; and

D. departments serviced by the payment.

This documentation shall be contained in the District's electronic general ledger software system or in a separate report to the Board. ACH invoices must be reviewed and approved prior to payment.

The District's system of internal controls (see Policy 6111 - Internal Controls) shall be used to monitor the use of ACH transactions.

[ ] The Superintendent is authorized to develop administrative guidelines concerning the use of electronic fund transfers and ACH transactions.

M.C.L. 124.301 - 124.305

Legal M.C.L. 124.301 - 124.305

Book	Policy Manual
Section	For the Board 37-1
Title	Copy of VENDOR RELATIONS
Code	po6460
Status	
Adopted	September 12, 2001

6460 - **VENDOR RELATIONS**

The Board of Education shall not enter a contract knowingly with any supplier of goods or services to this District under which any Board member or officer, employee, or agent of this School District has any pecuniary or beneficial interest, direct or indirect, unless the person has not solicited the contract or participated in the negotiations leading up to the contract. This prohibition shall not prevent any person from receiving royalties upon the sale of any textbook of which the person s/he is the author and which has been properly approved for use in the schools of this District.

For the purpose of this policy "beneficial interest" shall be determined in accordance with M.C.L. 15.321 et. seq.

Board members and school personnel shall not accept any gifts or favors from vendors which might, in any way, influence their recommendations on the eventual purchase of equipment, supplies, or services.

All sales persons, regardless of product, shall clear with the Superintendent's Office before contacting any teachers, students, or other personnel of the School District. Purchasing personnel shall not show any favoritism to any vendor. Each order shall be placed in accordance with policies of the Board on the basis of quality, price, and delivery with past service a factor if all other considerations are equal.

[ ] Preferred Vendors for Non-District Purchases

The District may provide a vendor with exclusive access to market its products to parents/guardians and/or students at school events that the District considers to be limited public forums or nonpublic forums. Students and/or parents/guardians are not required to purchase goods or services from a preferred vendor; however, the District may choose to limit access to a preferred vendor to minimize distractions and maximize its ability to educate and/or communicate with parents and students.

To select a preferred vendor, the Superintendent or purchasing agent must solicit proposals for exclusive access from vendors and specifically identify the particular school event(s) at which the successful vendor will have exclusive access. The Superintendent or purchasing agent may interview potential vendors as part of the selection process.

[END OF OPTION]

Legal	M.C.L. 15.321 et seq.

Book	Policy Manual
Section	For the Board 37-1
Title	Copy of FAIR LABOR STANDARDS ACT (FLSA)
Code	po6700
Status	
Adopted	August 15, 2007

6700 - **FAIR LABOR STANDARDS ACT (FLSA)**

It is the Board of Education's policy to comply with the provisions of the Fair Labor Standards Act (FLSA) and its implementing regulations. The Board will pay at least the minimum wage required by the FLSA to all covered, non-exempt employees. Non-exempt employees are hourly employees, or salaried employees who do not qualify for a professional, administrative, computer or executive exemption under the FLSA. Teachers are generally exempt, even if they are paid on an hourly basis.

Non-exempt employees who work more than forty (40) hours in a given work week will receive overtime pay in accordance with the FLSA for all hours worked in excess of forty (40).

Non-exempt employees who work overtime without prior approval from the Superintendent or a supervisor may be subject to disciplinary action up to and including termination.

The work week is established as Saturday at 12:00 a.m. to Friday at 11:59 p.m.

To the extent that an employee's individual contract or collective bargaining agreement provides for greater benefits than mandated by the FLSA, the contract or bargaining agreement will be honored.

Notwithstanding the fact that exempt school employees continue to meet the salary basis requirements and are not disqualified from exemption even if the employee's pay is reduced or the employee is placed on a leave without pay for absences for personal reasons or because of illness or injury of less than one (1) work-day because accrued leave is not used for specific reasons, the Board reserves the right to make deductions from the pay of otherwise exempt employees under the following circumstances:

A. the employee is absent from work for one (1) or more full days for personal reasons other than sickness or disability

B. the employee is absent from work for one (1) or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness

C. to offset amounts employees receive as jury or witness fees, or for military pay

D. for unpaid disciplinary suspensions of one (1) or more full days imposed in good faith for workplace conduct rule infractions

E. for penalties imposed in good faith for infractions of safety rules of major significance

The Board shall also not be required to pay the full salary in the initial or terminal week of employment, or for weeks in which an exempt employee takes unpaid leave under the Family & Medical Leave Act.

The Board recognizes that with limited legally permissible exceptions, no deductions should be taken from the salaries of exempt employees. If an exempt employee believes that an improper deduction has been made to **their ~~his/her~~** salary, the employee should immediately report this information to the Superintendent, Business Manager, o**r their ~~his/her~~** immediate supervisor. Reports of improper deductions will be promptly investigated. If it is determined that an improper deduction has occurred, the employee will be promptly reimbursed for any improper deduction made, and the Board will make a good faith commitment to avoid any recurrence of the error.

Reasonable Break Time for Nursing Mothers

As required by Federal law, the District shall take steps necessary to support staff members who decide to breastfeed their infants by providing additional unpaid reasonable break time, as necessary, for a qualified employee to express breast milk for their nursing child, for one (1) year after the child's birth, on District premises.

Prior to returning to work from maternity leave, it shall be the employee's responsibility to notify their supervisor of their intent to continue breastfeeding their infant(s), and of their need to express milk during work hours. Further, it shall be the responsibility of the employee to keep their supervisor informed of their needs in this regard throughout the period of lactation.

The building administrator shall designate a private area, other than a restroom, where an employee can express breast milk. The designated area shall be a space where intrusion from coworkers, students, and the public shall be prevented, and one where an employee who is using this area can be shielded from view.

An employee shall be enabled to express milk during regularly scheduled break periods. The Principal or employee's supervisor shall make an accommodation if the time of regular breaks needs to be adjusted or if additional and/or longer breaks are needed. In the event that more breaks are needed or the break(s) need to be longer than legally required, the additional time required shall be unpaid, and the employee's work schedule or work day shall, therefore, be modified accordingly. The Principal or the employee's supervisor shall work with the employee to make these necessary modifications.

[DRAFTING NOTE: An employer that employs less than fifty (50) employees shall not be subject to the requirements of this subsection, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.]

Notice

Information regarding the Fair Labor Standards Act may be found on the U.S. Department of Labor's website .

This policy is intended to comply with and explain the employees' rights under the Fair Labor Standards Act. To the extent there is any conflict, or the policy exceeds the statutory requirements, the statute and its implementing regulations prevail.

Legal	29 U.S.C. 201 et seq.
	29 C.F.R. Part 541

Book	Policy Manual
Section	For the Board 37-1
Title	Copy of SMALL UNMANNED AIRCRAFT SYSTEMS
Code	po7440.03
Status	
Adopted	March 11, 2020

7440.03 - **SMALL UNMANNED AIRCRAFT SYSTEMS**

The Board prohibits the operation of small Unmanned Aircraft Systems (sUAS) at any time by any individual who is not employed by the District, as well as by any District staff member or administrator who is not expressly authorized to do so by the Superintendent or designee, on property owned or leased or contracted for by the Board.

The Board also prohibits the operation of a sUAS (drone) on property owned or leased or contracted for by the Board during District-sponsored contests (including scrimmages and previews), practices, tournaments, and activities under the auspices of the Michigan High School Athletic Association (MHSAA). District officials may deny admission or entry to anyone attempting to use a sUAS until the event has been completed. Any exceptions to this prohibition must be approved in advance by the Superintendent.

To be authorized to operate a drone on property owned or leased or contracted for by the Board, a staff member or administrator must have a Remote Pilot Certificate issued by the Federal Aviation Administration (FAA). Further, the drone must be registered with the FAA and properly marked in accordance with 14 C.F.R. Part 107.

A staff member or administrator authorized to operate a drone on property owned or leased or contracted for by the Board, must also comply with all rules set forth in 14 C.F.R. Part 107. (See AG 7440.03)

Failure to adhere by all rules set forth in 14 C.F.R. Part 107 and AG 7440.03 may result in loss of authorization to operate a drone on property owned or leased or contracted for by the Board, referral to local law enforcement, and/or further disciplinary action, up to and including termination.

86 FR 4314

Book	Policy Manual
Section	For the Board 37-1
Title	New FLAGS AND DISPLAYS
Code	po8805
Status	

Do not adopt

NEW POLICY - VOL. 37, NO. 1

8805 - **FLAGS AND DISPLAYS**

This policy is adopted by the Board of Education as a content-neutral policy with respect to the appropriate usage and display of items in District buildings and on/in District property, including flags, banners, posters, electronic insignia, and similar items (collectively "Displays"). In addition to the use of the American flag as addressed in Policy 8800, the only Displays that may be flown, posted, or affixed to the grounds, stadiums, fencing, walls, doors, ceilings, or any other furnishings or appurtenances of any public school system building, vehicle, or facility owned or operated by the Board or posted on any electronic messaging, including emails, on the District's network, are as follows:

A. The current Michigan flag.

B. **( )** The current school flag.

C. **( )** Displays used in the classroom as a part of a temporary unit of study within the approved curriculum.

D. **( )** Displays that denote a recognition of achievement and are approved by the Superintendent as to content and location of the Display including, but not limited to _____**[examples may include _____]**.

E. **( )** Michigan High School Athletic Association or other similar sport tournament Displays recognizing the participation of or accomplishment of a school team and/or athlete.

F. **( )** Displays from colleges or universities **( )** which may be placed in a District classroom or administrative office.

G. **( )** Flags of countries representing our Foreign Exchange Students **( )** which may be placed in _____.

H. **( )** Displays representing student organizations/clubs (see Policy 5840) **( )** which may be placed in/on _____.

Book	Policy Manual
Section	For the Board 37-1
Title	Copy of SCHOOL VISITORS
Code	po9150
Status	
Adopted	September 12, 2001
Last Revised	June 8, 2011

9150 - **SCHOOL VISITORS**

The Board of Education welcomes and encourages visits to school by parents, other adult residents of the community and interested educators. But in order for the educational program to continue undisturbed when visitors are present and to prevent the intrusion of disruptive persons into the schools, it is necessary to establish visitor guidelines.

The Superintendent or the principal has the authority to prohibit the entry of any person to a school of this District or to expel any person when there is reason to believe the presence of such person would be detrimental to the good order of the school. If such an individual refuses to leave the school grounds or creates a disturbance, the principal is authorized to request from the local law enforcement agency whatever assistance is required to remove the individual.

Individuals who are registered sex offenders and wish to participate in school activities may be allowed on campus. Conditions may be imposed by the Superintendent on the individual's campus visit(s) governing the terms and conditions of the visit. These conditions may include, but are not limited to, the need to receive prior permission before entering campus, required check-in, an approved escort in the building or at an event, and time or location limitations while on campus.

~~**Parents/Guardians, who are registered sex offenders and wish to participate in their child's school activities, may be allowed on campus at the discretion and under the direction of the principal. Conditions may be imposed, including but not limited to the following: must have prior permission, must check in, must have approved escort in building or at event, must leave premises immediately upon conclusion of business, and may not visit while school is in session.**~~

Nonstaff access to students and classes must be limited and only in accordance with a schedule which has been determined by the principal after consultation with the teacher whose classroom is being visited. Classroom visitations must be nonobtrusive to the educative process and learning environment and should not occur on an excessive basis.

Parent concerns about any aspect of **their** ~~**his/her**~~ child's educational program should be presented through the procedure set forth in Board Policy and AG 9130 - Public Complaints, a copy of which is available at the Board office and at each school.

The Superintendent shall promulgate such administrative guidelines as are necessary to protect students and employees from disruption to the educational program or the efficient conduct of their assigned tasks.

Rules regarding entry of persons other than students, staff, and faculty upon school grounds or premises shall be posted conspicuously at or near the entrance to such grounds or premises if there are no formal entrances, and at the main entrance to each school building.

Individual Board members who are interested in visiting schools or classrooms on an unofficial basis shall make the appropriate arrangements with the principal. In keeping with Board bylaws, such Board member visits shall not be considered to be official unless designated as such by the Board.

The Board member shall be visiting as an interested individual in a similar capacity of any parent or citizen of the community. These visits should not be considered to be inspections nor as supervisory in nature.

If, during a visit to a school or program, a Board member observes a situation or condition which causes concern, **the Board member** ~~**s/he**~~ should discuss the situation first with the Superintendent as soon as convenient or appropriate. Such a report or discussion shall not be considered an official one from the Board.

Revised 8/15/07