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MEMORANDUM

TO: KSB Policy Service Subscribers
FROM: KSB School Law
DATE: May 20, 2016
RE: Annual Policy Updates

Attached are the KSB School Law policy updates for the 2016-17 school year. This memorandum describes the new policies and the revisions to your existing policies that we recommend. It also highlights some legal considerations from the past year to discuss with your board.

To assist subscribers in implementing these policy changes and the other considerations laid out in this Memo, **KSB will hold a webinar on June 1, 2016 beginning at 10 AM**. In the webinar, we will give a brief overview and then answer questions from attendees regarding the policies and other considerations. We will send out the link to the ZOOM conference to subscribers prior to the webinar.

Please feel free to contact us if you have any additional questions or if you would like to have a policy customized or "tweaked" to meet your individual circumstances.

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REVISION TO POLICY 2005: Conflict of Interest

and

REVISION TO POLICY 4015: Prohibition Against Employment of Board Members

Boards of education are prohibited from employing board members to serve as teachers. Boards may decide on their own whether they will also prohibit the employment of board members in any capacity. We have always provided policy service subscribers with two versions of Policy 4015. One version prohibits board members from being employed by the district in any capacity, classified or certified. The other version permits board members to be employed as substitute teachers and as classified employees. The board may choose one of the two versions or may modify the policy as it sees fit – that is discretionary with the board.

Policy 2005 used to contain a section similar to Policy 4015 regarding employment of board members, which should have aligned with the board's preference as designated in Policy 4015. We have found that some districts have adopted incompatible versions of these policies. That is certainly understandable since you may have adopted these policies months or even years apart. In order to avoid this potential problem going forward we have revised Policy 2005 to have it cross reference Policy 4015. Now, regardless of the option you select for employment of board members in Policy 4015, Policy 2005 will not have to be amended.

Finally, when we were reviewing Policy 4015 for this update, we discovered that it also had a typographical error in the statutory citation. We have fixed that error in the attached policy. **So, even if you are not planning on changing your board's practice on the employment of board members, you should select the appropriate version of Policy 4015 and adopt it as revised.**

<u>These revisions are required.</u>

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REVISION TO POLICY 2015: Student Board Member

This policy used to specify that the board "shall decide whether to have a student member at its regular May board meeting." Some boards may determine whether to have a student member at other times, so we added "or at such other meeting determined by the board." This accounts for those with the common practice of using the May meeting and allows flexibility for boards who may not make those decisions in May.

We also removed the provision stating that the student board member must be a member of the senior class. Practices vary widely on whether boards have student board members and if so, who is eligible. Some boards appoint a student member, while others appoint the student body president. Because this may not always be a senior, we removed that requirement from the policy and suggest that you insert your standard practice.

This revision is recommended, unless the prior wording of the affected provisions reflects your actual practice.

REVISION TO POLICY 3014: Use of School Property

Over the last several years, schools and ESUs in Nebraska have seen an increase in the variety and frequency of groups wanting to utilize district facilities. Districts in Nebraska and throughout the country have been involved in significant litigation regarding facility use, and many others have been forced to resolve facility use questions with entities like the ACLU. In response, we decided to take a comprehensive look at our facility use policy and the related application(s). We will highlight the changes to this policy, below:

Accounting for "Regular Uses." Many districts permit patrons to use facilities such as the weight room and track on a regular basis. Some districts have designated hours, and others permit patrons to keep keys or fobs to access the facilities. Most districts use some sort of application and agreement for these uses separate from their general facility use application. The first section of the updated policy is an attempt to capture these regular, individual

uses and permit them with only one application. We have also included an updated Application, Release, Waiver, and Agreement document. Rather than requiring patrons to apply for a facility use permission every time, we hope this one-time application process protects the district to the maximum extent possible and eases the administrative burden when patrons use the facilities regularly.

Prohibiting Commercial Use. This is a very tricky area for many districts. Most districts do not want to turn the school and school activities into shopping malls. However, most schools do want to permit booster clubs and student groups to raise funds which support school students and activities. From a purely legal perspective, the district is almost always better off prohibiting others from profiting by using district facilities. One recent example is an athletic trainer who wanted to host a workout class in the school weight room and charge money for patrons to attend. The trainer sought to take advantage of the facility being open to community use and planned to use the district's equipment and facilities rent-free to host the class. As a result of requests like this, we have written the policy to prohibit commercial uses which result in personal financial gain. If your district has a practice of permitting commercial uses, such as fitness classes, for-profit craft fairs, and other such events, you should contact us directly to assist you in preparing a policy provision which best protects the district.

Redefined Groupings. The policy now breaks out groups using facilities into four separate categories: curriculum-related student groups, extracurricular student groups, non-curriculum related student groups, and non-student groups. This grouping system more closely tracks the Supreme Court cases and assists in drawing clearer lines for requirements of various groups depending upon their alignment with district curriculum and activity offerings. For example, the policy says that all student groups are given priority over other outside groups.

Charging Fees for Admission. The last section of the policy prohibits groups which use school facilities from charging admissions fees. This is a *major* change which may not be consistent with your district's practices and preferences for supporting your community groups. **Please read this section carefully and be sure to discuss it fully with your entire board.**

The Political Subdivision Tort Claims Act exempts schools from liability when their facilities are used for "recreational" purposes, *but only if the group using facilities does not charge a fee to participate in or spectate the event*. Likewise, if the district maintains control over the event/facilities, such as providing supervision or custodial services, the protection from liability may not apply.

These protections came about as a result of court cases where political subdivisions were sued because someone attending an event held in public facilities was injured. In one case, for example, a patron suffered an ankle injury stepping in an animal burrow on a courthouse lawn during a town celebration. The public policy behind these protections says that schools should be encouraged to permit others to use their facilities. As an incentive to permit the recreational use of district facilities, school districts should not be held liable for damages suffered when patrons are participating or spectating "recreational" activities on school grounds. The definitions in the statutes are quite broad, providing protection to schools in many cases.

However, in order to maintain the protections of this law, schools cannot permit outside groups to charge a fee to attend the facility and cannot maintain control over the facility. If someone has to pay a fee to attend an activity, and if the district maintains control over the facility, then the patron(s) has a greater expectation of protection from possible dangers. But if the school does not maintain control and the entity using the facility does not charge an admission fee, the district is only liable for its "gross negligence" rather than standard negligence.

These revisions are required.

REVISION TO POLICY 3018: Denial of Access to School Premises

This policy allows the superintendent or the superintendent's designee to restrict "any person" from accessing to school grounds for a variety of reasons. The last paragraph of the policy permits the excluded person to appeal the decision of the administrator to the board of education and requires the board to consider whether the administrative action is to be upheld. We believe this practice is permissible and would provide more than sufficient

"due process" to the affected person in the event that person sued the district to challenge the administrative decision. A handful of cases from outside of Nebraska have indicated that permitting an excluded person to appeal the decision is required to provide sufficient due process.

However, we do not believe a hearing is required by Nebraska and Eighth Circuit law. We also believe boards and administrators have enough to worry about without permitting sex offenders and others who disrupt the school environment to appear through an agenda item before the board to question administrative decisions. For that reason, unless your board feels strongly about permitting affected persons to appeal decisions to the board, we encourage you to delete the last paragraph of this policy.

This revision is recommended.

NEW POLICY 3038: Procurement, Suspension and Debarment Governed by Federal Procurement Regulations

Last year, the US Department of Education made major changes to 34 CFR, known as the Education Department General Administrative Regulations (EDGAR). The new EDGAR consists of multiple parts and regulations and in turn implements regulations promulgated by the Office of Management and Budget. The new EDGAR requires nonfederal entities to have written procurement procedures for federally-funded programs such as IDEA and Title I.

During IDEA audits, NDE representatives have been asking to review the district's debarment and suspension policy. This policy should meet all of the requirements of 2 CFR Part 200, which sets forth the Office of Management and Budget procurement requirements. We have numbered this policy in your 3000's and not in the special education procedures since the EDGAR requirements could apply to programs other than IDEA-funded services.

This revision is required.

REVISION TO POLICY 4012: Staff Internet and Computer Use

This session the Unicameral adopted LB 821 which is designed to address situations where employers require employees to provide the usernames and passwords to personal social media accounts. This change in state law has necessitated a revision to Policy 4012 as well as a new policy later on in the 4000s section. We have removed the social media references in policy 4012 and made it explicit that all staff use of the district's internet connection must be consistent with board policy and good professional judgment.

We have also tweaked the section on the use of school resources for political purposes. The new policy wording is more generic so that we can just rely on the other provisions of state law while still warning employees against using school resources for political purposes. Given the highly-charged impending 2016 elections, school districts should probably also remind everyone with a school e-mail address against using public resources to advocate for political change or to support or oppose any candidate.

This revision is required.

REVISION TO POLICY 4015: Prohibition Against Employment of Board Members

We updated this policy in 2013. However, it has come to our attention that not every subscriber received the updated version. Here is what we wrote about the update in 2013:

State statute prohibits school board members from entering into a contract to be a "regular" certificated teacher at the school district at which he or she serves as a board member. However, state law allows a board member to work as a substitute teacher or classified staff member at any school district, including their own. Some districts have expressed a desire to have the ability to hire board members in capacities other than as a "regular" certificated teacher. Other districts have expressed a desire to prohibit the

school district from employing school board members in any capacity. Therefore, there are two policy options. You must choose one.

Option 1 allows schools to employ board members in any position other than as a "regular" certificated teacher. Option 1 has been revised to correct an erroneous statutory reference and to make clear(er) that board members may be employed as substitute teachers.

Option 2 prohibits the employment of a school board member in any capacity. Option 2 has been revised to correct an erroneous statutory reference.

You should review this in conjunction with Policy 2005 or your current board conflict of interest policy.

This revision is required.

REVISION TO POLICY 4051: Staff and District Social Media Use

In LB 821 the Unicameral has make it unlawful for employers to require or even to request that employees provide their supervisors with the username and password to personal social media accounts. Complying with this prohibition is going to require schools to think carefully about staff members who use social media both in their personal and professional capacities. We want to create a policy that protects the district while not discouraging teachers from using social media.

This revision is required. You should review this policy with *all* staff members prior to the beginning of the 2016-17 school year.

NEW POLICY 4060: School Vehicle Use

We received a request during the 2015-16 school year to draft a policy for the use of school vehicles. The request was made mainly as the result of concerns over whether a school employee who did not transport students was "qualified" to drive a school vehicle given her questionable driving record. This policy is our response to the request. If you decide to adopt this policy, we

encourage you to pay particular attention to the "Driver Qualifications" section to ensure that it meets with your expectations and practice.

This revision is not required, but we strongly recommend that the board consider adopting a policy to address this issue.

REVISION TO POLICY 5004: Option Enrollment

The Department of Education's "technical cleanup" bill was adopted by the Unicameral in LB 1066. That bill made two significant changes to the option enrollment statutes.

First, school boards are now required to have "specific" standards for acceptance or rejection for release of a resident or option student. We have attempted to add more specific standards for acceptance and rejection, and have included some new factors for your consideration. These additional factors are highlighted in green in the updated policy. Although we believe the option enrollment statutes permit the board to adopt additional standards, these are new standards which have not been tested in a hearing before the State Board of Education. ***Before you deny an option application based on one of the factors highlighted in green, you should give one of us a call to visit about the specific facts of your situation***.

Second, LB 1066 states that school boards may no longer refuse to allow students to option **out of** the district when the application is submitted after March 15 based only on the fact that the application was submitted late. We have added standards for you to consider in determining whether to reject applications to opt out of the district that are submitted after March 15. Please note that the way LB 1066 is worded, districts may still deny applications to **opt into** the school district after March 15 based only on the fact that the application was submitted late. We know from conversations with staff members at the Nebraska Department of Education that they would prefer schools not use the "late is late" approach to option applications. **The attached policy requires you to choose between a factor-based approach or continuing with the "late is late" approach for students who want to option into your district** (that portion of the policy is highlighted in yellow).

For many years, the statute has stated that standards for acceptance or rejection "shall" be adopted "by resolution." Although hearing officers and the State Board of Education have never ruled against a school district who has adopted their standards by policy rather than "by resolution," we would rather defend your district if you had a carefully-considered resolution, supported by research-based reasons for your determinations. We have included a draft resolution for your board to consider which aligns with the changes made to this policy. We recommend passing a resolution containing your board's preferred standards, including capacity and any other standards you deem appropriate. We would be happy to assist you in drafting it, and you should discuss with one of us any additional standards your board would like to consider.

For those boards who have not passed a resolution or elect not to pass a resolution, there is legal risk. We are currently defending an option enrollment appeal by parents who wish to option their special needs child into one of our client districts. The parents are arguing that the option statute requires the board of education to adopt a specific, free-standing resolution each school year setting a numeric capacity for each program offered by the school district before a district can deem a program at capacity. We have argued strenuously against this interpretation of the statute, and we are hopeful that the hearing officer will agree with us. However, we do want to take this opportunity to remind you that the safest course of action is for a board to adopt a free-standing resolution setting program limits like the sample we have attached. We will keep all of our policy service subscribers updated on this issue as the option appeal unfolds.

This revision is required. You must select one of the two options highlighted in yellow dealing with on late applications to opt out of the district. You should also discuss whether your board wants to adopt the new standards that are highlighted in green.

REVISION TO POLICY 5016: Student Records

The Family Education Records Privacy Act (FERPA) defines student records as those records "maintained" by the school district. The increasing

digitization of student data has led to legal disputes between schools and parents in other states when parents claim that every e-mail, word processing file, and Google calendar entry about a student are student records because they are "maintained" on the school's computer systems. Even more concerning if a student is verified to receive special education services, the school district must provide notice to the special education parent before destroying records that are "maintained" by the school.

The cases have demonstrated that it is in school districts' interest to have a very clear definition of what records they "maintain." Therefore, we have revised Policy 5016 dealing with student records. This new draft has three choices:

1) A definition of "maintain" which states that only student records which are actually printed constitute FERPA protected records;
2) A definition of "maintain" which includes both printed records and the information about students which the school saves in PowerSchool or other student information system;
3) A definition of "maintain" which includes basically every physical and digital record of a student.

You should select the option that describes how your school district would like to define student records. Although we suspect that most schools will select the second option, the other two options are lawful so long as they reflect your actual practice. As with all of the policy revisions we have made here, service subscribers can have KSB customize a different policy for you if your school district has a unique approach to maintaining student records.

This revised policy also states that no "student record" or record required to be retained by the Nebraska Secretary of State's Record Retention Schedules will be destroyed unless it is first saved in a retrievable, digital format. The Public Records Act and the Secretary of State's implementing regulations state that many district records must be maintained in "microfilm" with a copy sent to the Secretary of State before the records can be destroyed. However, we are not aware of many schools who continue this practice, which was put in place long before digital storage systems were developed. Informally, the Secretary of State has taken the position that so long as records are saved in a digital, retrievable format, they can be destroyed,

rather than microfilming the records after the retention date passes. We have written this section of the policy in the most protective manner for schools that we could conceive; however you should be aware that the retention schedules do require schools to keep a large volume of records. This is one of the reasons why we believe that including the information in your student information system under the definition of "maintain" is a good practice.

This revision is required. You must select one of the three options available in this policy.

REVISION TO POLICY 5028: Initiations and Hazing

LB 710 changed the criminal definition of "hazing" so that it now applies to K-12 students. We have always prohibited hazing in this policy and in our student discipline policy and handbook provisions. However, LB 710 also changed the list of activities which constitutes "hazing" in Nebraska. To account for these changes, we have updated the definition of hazing in this policy and in Student Discipline policy 6024. Review that section for more information.

In this policy, we have also clarified the difference between initiations and hazing. We include "initiations" because hazing occurs only if the activity poses a threat to the physical or mental health of the student. We believe some rituals may not rise to that criminal level but might still constitute activity a school wants to or is required to prohibit. For that reason, we have changed this policy to outlaw hazing, as it is redefined in LB 710, but also make clear that initiations are also prohibited unless expressly authorized by the superintendent.

This revision is required.

REVISION TO POLICY 5033: Student Driving and Parking

Since 2003, we have taken the positon that school officials could search a student's vehicle even if it was parked off school property if the student had driven the vehicle to school. We based our opinion on a decision from the

Nebraska Court of Appeals. *In re Interest of Michael R.*, 11 Neb. App. 903, 662 N.W.2d 632 (2003). The Nebraska Supreme Court has now made it clear that school officials only have the authority to search student vehicles when they are located in the parking lot or otherwise on school grounds. *J.P. v. Millard Public Schools,* 285 Neb. 890, 830 N.W.2d 453 (2013). We have revised Policy 5033 to make it consistent with this more recent decision by the Nebraska Supreme Court. If you have reason to believe that a student has drugs or other illegal contraband in a vehicle which is parked off school grounds, you should contact law enforcement and have them determine whether they have probable cause to search the vehicle.

This revision is required.

REVISION TO POLICY 5053: Self-Management of Diabetes or Asthma/Anaphylaxis

In LB 1086 the Unicameral amended the statute that governs student self-management of asthma and severe allergies that could lead to anaphylaxis. The law now states that one of the criteria to require a school to allow a student with asthma/anaphylaxis to self-manage is the authorization of a physician "or other health care professional who prescribed the medication for treatment of the student's condition…."

We address student self-management of both diabetes and asthma/anaphylaxis in Policy 5053. However, you should notice that the Unicameral only amended the statute relating to asthma/anaphylaxis. Therefore you should continue to require the authorization of a medical doctor prior to allowing students to self-manage diabetes. The two statutes also treat the discipline of students with diabetes who misuse their medical supplies differently from students with asthma/anaphylaxis who do the same thing.

On a related note, we occasionally get questions from schools about why they must have **both** Policy 5053 Self-Management of Diabetes or Asthma/Anaphylaxis **and** Policy 5048 Emergency Response to Life Threatening Asthma or Systemic Allergic Reactions (ANAPHYLAXIS). Policy 5053 addresses the Unicameral's requirement that students be allowed to manage certain medical conditions themselves. Policy 5048 addresses a

separate and additional requirement that schools adopt a specific protocol from the Nebraska Department of Education on how to respond to student life-threatening asthma or anaphylaxis. We have included a copy of the protocol required by Rule 59 of the Nebraska Department of Education to be sure that your school has the most recent version. We recommend that Policy 5048 and the NDE Protocol be published in the staff handbook.

This revision is required.

REVISION TO POLICY 5057: Parental Involvement in Title I Program

Last year, NDE asked several schools to change their Title I Parental Involvement policy, so we worked with NDE to change our form policy so that it met the requirements NDE enforces in its compliance audits. We did so hoping that it would avoid required changes during future compliance audits.

However, some schools are being asked to add one additional provision relating to the coordination and integration of Title I parental involvement programs with other programs in the community. We believed we had accounted for this is in bullet point #2 in the policy. It appears now that NDE prefers that the Title I policy include a freestanding provision related to the coordination and integration of parental involvement programs with other community programs, so we have added it as bullet point #6 to our form policy.

This revision is required.

REVISION TO POLICY 5063: Audio and Video Recording Policy

We have seen an increase in requests for recording as an educational accommodation as well as an increase in students recording teachers and principals for illegitimate purposes. Based on these situations, we have revised this policy in several ways. First, we have moved the statement about parents assuming that students may be recorded to the beginning of the policy to make it more prominent. We have also added a requirement that students obtain written permission from an administrator before using class or activity

recordings for other purposes. We have also added a section on staff recording of classrooms. In that section we make it clear that staff-initiated recordings are not student records which are "maintained" under FERPA.

This revision is recommended.

DELETE POLICY 6022: Section 504 Grievance Procedure

In the 2015 updates, we combined multiple complaint and grievance procedures into a solitary complaint procedure policy, which can be found in policy 2006 of the KSB policy service. This is consistent with current Office for Civil Rights guidance and, in our opinion, is good practice. As part of that simplification process, we included the Section 504 grievance process into policy 2006. That can be found in the 2015 Policy Updates, and it makes policy 6022 unnecessary if you have updated your complaint procedure policy with our service last year.

If you are a long-time policy service or updates subscriber, you may delete policy 6022 and state "Intentionally Left Blank" or you may replace it with another policy of your choosing. If there are components of your Section 504 Grievance Procedure policy unique to your district, we would be happy to assist you in combining those into policy 2006.

If you are a new subscriber, let us know and we can work with you to update your complaint procedures if it is of interest to you and your board.

This revision is required.

REVISION TO POLICY 6024: Student Discipline

As noted in the discussion relating to policy 5028, LB 710 amended the criminal definition of hazing so that it applies to all Nebraskans, including K-12 students. Previously, only students attending postsecondary institutions were subject to criminal penalties for hazing. This change is significant for purposes of student discipline policies and handbook provisions. As a result, we have amended our student discipline policies in two important ways. You

should also ensure that these changes are reflected in your handbook sections governing student discipline.

First, we updated the definition of hazing within the policy to include two sections: one which tracks the changes made to the definition of hazing in the criminal statute, and one which expands upon that definition for school purposes. Consistent with the changes made to the Initiations and Hazing policy 5028, we have also included a definition of "Initiations" for activities which might not constitute criminal "hazing" but which schools may want to regulate.

The second change appears minor but is legally significant and requires a bit of explanation and background. Nebraska statute section 79-267, lists 11 reasons for which a school can impose a long-term suspension, expulsion, or mandatory reassignment as a result of a student's conduct occurring on school grounds, in a school vehicle, or at a school activity. Subsections (10) and (11) in that list are affected by LB 710 for purposes of student discipline.

Subsection (10) states that a student can be subject to one of those increased consequences for "any other activity forbidden by the laws of the State of Nebraska" when the activity constitutes a "danger to other students or interferes with school purposes." In other words, if a student violates a criminal law, which can be immediate grounds for increased consequences. Because not all activity schools wish to prevent is included in the Student Discipline Act and Nebraska statutes, section 79-262 authorizes boards to establish "school rules" in addition to the grounds for enhanced consequences listed in 79-267. Subsection (11) states that a student can be subjected to one of those increased consequences for "a repeated violation" of any of the school rules passed by the board if they constitute "a substantial interference with school purposes."

Prior to LB 710, criminal hazing did not apply to K-12 students, but obviously schools have always had a legal obligation under other state and federal requirements to prevent hazing from occurring. As a result, we have always listed a prohibition against "hazing" as one of the school rules established pursuant to 79-262. This allowed schools to impose enhanced consequences for hazing activity when it was a "repeated violation" of the rule. Now that criminal "hazing" applies to K-12 students, students can be expelled

for engaging in statutory "hazing" under subsection (10) of 79-267 *upon only one occurrence*. No longer must the student engage in "repeated" hazing, so long as the hazing activity falls under the broad definition in the criminal law.

When we were looking at this issue, we noticed that other "school rules" established pursuant to 79-262 may also constitute criminal behavior. One good example is a prohibition against "sexting." We have always listed it in the school rules section, because it is not otherwise specifically listed in the Student Discipline Act. However, sexting is also a crime in most cases, meaning it would not require a "repeated violation" of the school rule prior to imposing enhanced consequences. In other words, you only need a "repeated violation" of the school rule to satisfy subsection (11) of 79-267 when the activity does not otherwise violate Nebraska law which subjects the student to enhanced consequences upon only one occurrence.

Because of these unique circumstances, we have added a clarifying sentence to the paragraph preceding our list of "school rules" in this policy which states that a repeated violation of any rule warrants long-term suspension, expulsion, or mandatory reassignment, *unless* the action constitutes a violation of another Nebraska law, at which point the enhanced consequences are immediately available after only one occurrence.

This revision is required.

REVISION TO POLICY 6027: Field Trips

In LB 746, the Unicameral makes it clear that foster parents and other caregivers for children who are in out-of-home care have the capacity to give permission for a student to participate in extracurricular, enrichment, cultural and social activities. We are unaware of any school that has ever refused to let a foster child participate in an activity based on the consent of a foster parent. However, we have amended policy 6027 to make it clear that caregivers may give consent for field trips.

It is important for schools to be aware that, although LB 746 emphasizes the importance of these activities, it does not give children in out-of-home care *special* rights to participate based on their status as foster children.

Schools will need to use the same criteria to determine whether children in out-of-home care participate in field trips or extracurricular activities as they use for any other student.

This revision is required.

SPECIAL EDUCATION PROCEDURES

We have attached an updated version of these procedures for your review and adoption. Representatives of the Nebraska Department of Education's Office of Special Education have shared with us that the federal agencies they work with seem to be increasing the number and complexity of special education policies that the require of states, which in turn is passed on to local education agencies. We are working to strike a balance between including all of the topics that you are required to address in policy and procedure against not weighing down your staff with a lot of legal boilerplate. We will continue to work with our districts and with NDE in this area.

If you currently use policies rather than procedures to accomplish the requirements of the ILCD Checklist, we would be happy to assist you in updating them.

This change is strongly recommended.

LB 876: Electronic Voting Devices

LB 876 amended NEB. REB. STAT. § 84-1413, which is one of the statutes in the Nebraska Open Meetings Act. Previously, only certain public bodies were able to vote electronically. Thanks to LB 876, any public body may satisfy the requirements of a roll call vote by using "an electronic voting device which allows the yeas and nays of each member of such public body to be readily seen by the public." This change allows school boards to take electronic votes so long as the votes of each member of the board can be "readily seen by the public."

<u>This does not necessitate a change in policy, though it would be a permissible addition to a policy governing board voting at meetings if you maintain one in your district.</u>

Energy Financing Contracts – LB 881 and LB 959

LB 881 and LB 959 do not require any policy revisions. However, their enactment could have significant impact on your school of which you should be aware.

LB 881 expands current law to allow schools to use energy financing contracts for capital equipment acquisition to reduce wastewater or energy, utility, or water consumption, enhance revenue, or reduce operating or capital cost; replacement, installation, or modification of meters and meter reading systems; water conservation equipment; and "any other measure designed to reduce wastewater or energy, utility, or water consumption, enhance revenue, or reduce operating or capital costs."

LB 959, which went into effect on April 19, 2016, does the following:

- **Levy Limit Reduction.** The maximum levy for QCPUF has been reduced from $0.052 per hundred dollars of valuation to $0.03 per hundred dollars of valuation. This levy maximum applies to the combined levies made for projects approved before and after the effective date of LB 959. There are two exceptions to this levy limitation:
  - The taxable valuation of the district is lower than the taxable valuation in the year in which the district last issued bonds pursuant to section 11 of LB 959; and
  - The maximum levy is insufficient to meet the combined annual principal and interest obligations for all bonds issued pursuant to section 11 of LB 959 *<u>and</u>* section 79-10,110.
- **Levy Limitation Exclusion.** Amounts levied for the QCPUF are excluded from or in addition to the $1.05 school district levy limitation.
- **Eliminates ARRA and QCP.** Schools are no longer allowed to undertake any qualified capital purpose in any qualified zone academy or levy a tax to repay QZABs. It also prohibits schools from undertaking

any ARRA purpose. Nothing in LB 959 will affect levies made pursuant to the version of section 79-10,110 that existed prior to the effective date of LB 959.

- **Change in Health and Safety Modifications.** Schools may no longer use QCPUF funds for "indoor air quality" projects. However, schools may now use QCPUF funds for "life safety hazard" projects, although this term is not defined by LB 959 or any other provision of state law.
- **Project Limitations.** Schools will not be allowed to use the QCPUF for any projects related to the acquisition of new property, the construction of a new building, the expansion of an existing building, or the remodeling of an existing building *unless* they are for the abatement of environmental hazards, accessibility barriers, life safety code violations, life safety hazards, or mold.

What Does This Mean for Schools? All QCPUF levies for indoor air quality or QZAB or ARRA for any project must have been made and/or bonds issued prior to April 19, 2016. Some schools had used the QCPUF to fund HVAC projects in new construction and renovations. Schools may not be able to use QCPUF any longer to fund these projects because (1) "indoor air quality" has been removed from the list of qualified abatement projects, and (2) LB 959 specifically prohibits the remodeling of an existing building for purposes other than specifically listed abatement projects. Schools will still be able to use QCPUF to fund the abatement of an actual or potential environmental hazard, which is defined to mean "any contamination of the air, water, or land surface or subsurface caused by any substance adversely affecting human health or safety if such substance has been declared hazardous by a federal or state statute, rule, or regulation." With the elimination of the "indoor air quality" abatement criteria and the new project limitations described above, it will be much more difficult for schools to use the QCPUF to fund HVAC projects.

Finally, schools will not be able to approve new projects to be funded by the QCPUF if a school district already has a levy for its QCPUF fund that equals or exceeds $0.03 per hundred dollars of valuation.

This does not require a policy change.

TRANSGENDER STUDENT POLICY CONSIDERATIONS

For several years now, we have been advising KSB policy service subscribers and clients to proceed deliberately and slowly on issues related to transgender students and questions such as services, facility use, records, and activity participation. Our reasoning has been simple: there have been no changes to state and federal law, and there have been no clear answers to the difficult questions that surround the issues. The push for added rights for transgender students is not coming from Congress or the Unicameral; it's coming from federal agencies tasked with "interpreting" federal law and applying it to public schools. Because of the uncertainty, the Departments of Education and Justice (DOE/DOJ) released "significant guidance" on May 12, 2016. While their guidance and policy example documents made headlines in the news and probably stirred some reaction in your community, their positions *are not new*. For several years these agencies have taken the position that Title IX's prohibition against "sex" discrimination includes discrimination based on a person's "gender identity." Under their guidance, the answer is simple: access to facilities, activity participation, and any other related questions should be answered consistent with the student's gender identity and not their biological sex. This has been the federal government's official position in things like OCR investigations for many years.

After substantial news coverage of the May 12 "guidance," government officials like the Texas Assistant Governor, the West Virginia Attorney General, Governor Ricketts, and Nebraska Attorney General Doug Peterson have expressed their positions on these issues. These state officials believe that this guidance is in no way binding upon public schools and in some cases, they have said outright that schools should ignore it and not give into what they perceive to be federal bullying. *Regardless of any individual's personal beliefs*, there are consequences for ignoring federal "guidance" and passing policies with sweeping declarations against the DOE/DOJ's positions on these issues. There are also potential political consequences in your community for ignoring community mores and immediately adopting a policy that equates "sex" with "gender" in all circumstances as the DOE/DOJ want. In other words, taking a position on either extreme is a legal, political, and practical risk. For those

reasons and others explained below, we are not distributing sample policies relating to the issues associated with transgender students.

We believe a very viable option, both legally and practically, is to avoid major policy changes at this time. As discussed below, we believe you can maintain your current policies and practices but continue to be mindful of the changing landscape related to students' gender identity, tackling issues on a case-by-case basis as they arise. With that said, KSB provides a policy *service*. It is our goal to listen to board preferences and then help craft policies consistent with those preferences. Below, we will outline what we believe to be the various options on the major issues related to transgender students, with the promise that we will also assist your district and board in developing any policy they prefer.

Services. We receive many questions regarding policy application and services provided to transgender students and how, if at all, district responsibilities change with respect to those students. Our answer has been consistent: if a transgender student is eligible for or requesting services that the district provides to any other student, you should grant those requests. A transgender student does not forfeit any rights otherwise provided to all other students just because of the uncertain nature of what, if any, additional rights those students might be entitled to.

Common examples are dress codes and bullying/harassment directed at affected students. We believe Nebraska schools already enforce dress codes based on decency, not gender stereotypes or specific messages. Consistency and neutrality in enforcing dress codes has long been a First Amendment requirement. We also believe students who bully transgender students are given consequences not because of the basis of their bullying, but because they're bullying in the first place. Public schools do way more to accommodate and provide safe environments for students than elected officials realize. We know schools will continue to provide services and care for transgender students without the need for policies declaring that to be true. However, if your board would like a policy on services for transgender students, we would be happy to assist in drafting one.

Student Records and Preferred Names. While it has been a question at the national level and was a part of the recent guidance from the DOE/DOJ,

we have not heard of an overwhelming number of cases where transgender students have asked for modifications relating to their student records. We do anticipate that some students will ask for their records to reflect their gender identity prior to making a gender transition. Again, we believe your best bet is to follow existing policy and law. FERPA and state record laws govern student records. Although we will not outline those laws here, we suggest treating record requests on a case-by-case basis as is permitted under existing state and federal law. Your current record policies may also contain provisions relating to things like modification of records, and to the extent they do not, we believe you are best served following this state and federal law rather than creating a distinct policy for requests from transgender students.

We have heard of cases where students ask to be identified as something other than the name on their birth certificate. Again, we do not believe this is an area where schools need a new policy to address requests from transgender students, because most schools already have a practice established. If a student named "Robert" prefers to be called "Bobby" or a student named "Steven" prefers to be called "Steve," we think schools honor those requests. We suggest that schools stick to this practice or change their practice for all students, not adopt a separate practice for transgender students.

Facility Use. When it comes to facility use, the questions become more complicated, legally and politically. The DOE/DOJ are clear: allow students to use facilities consistent with their preferred gender identity. The opposite position is equally clear: require students to use facilities consistent with their biological sex. Both positions are risky. However, if your board is inclined to adopt a policy and take one of those positions in a formalized way, we will do all we can to assist the board in drafting one. In the middle of those two policy options is KSB's preferred approach: do not enact a new policy and enforce your existing policies as written by addressing individual situations and requests on a case-by-case basis. This is our preferred position on facility use (and most other transgender student issues) for several reasons.

The DOE/DOJ position is based on the argument that sex discrimination laws and policies apply in such a way as to protect transgender students. *You*

already have anti-sex discrimination policies. There is no legal requirement to amend policies to include specific protections for gender identity. The entire fighting issue is whether prohibitions against *sex* discrimination include *gender* identity. Even if you favor the position of the DOE/DOJ, you can obtain the same outcomes by enforcing your sex discrimination policies to protect against gender discrimination. We should mention here, though, that if you are investigated by the OCR, they will likely require you to adopt policies specific to transgender students. Since OCR almost always requires the schools it investigates to adopt amended policies of some sort anyway, we do not view this as a significant legal risk.

Additionally, making a sweeping policy declaration either way is much more likely to subject the district to potential lawsuits, OCR complaints, and other issues. If the law in this area was clear, you would not have the political divides surrounding it which have played out over the last several years. Waiting to see *what the law will be* on a more definitive basis seems manifestly reasonable to us.

The discussions outlined in this section underlie our reasons for advising boards on all of the legal issues and then allowing boards to make these decisions at the local level. We believe boards can elect to pass decisive policies on the issue of facility use, or they can elect to go slowly and wait to see how the law develops. For boards choosing the second route, we do not believe any developments in federal guidance, cases, or agency enforcement actions *require* you to change your policies. For districts who choose to enact a policy and take a formal stance on transgender facility use either way, we will do our best to assist you in drafting a policy to meet your preferences.

Activity Participation. Participation in extracurricular activities is related to the facility use considerations, but with a few different twists. The primary difference here is that the NSAA's policy on gender participation is now in effect and will be in effect indefinitely. The NSAA policy requires all students who wish to participate consistent with their gender identity and not their biological sex to apply for eligibility with their resident or option school district. The local school district then has the option to petition the NSAA, on the student's behalf, to determine if the student will be eligible under the other requirements of the NSAA policy.

Without going into all of the details on how the NSAA board's policy works and whether it will be impacted by the DOE/DOJ guidance, the primary question for school boards is relatively simple: will the board authorize the administration to petition the NSAA on the student's behalf? We believe boards have a binary choice here: first, they can deny all applications, which has the effect of banning transgender students from participating consistent with their gender identity. Or, they can permit the administration to petition the NSAA on behalf of all applicant students. The second option does not guarantee that the biologically male student will be able to play girls basketball consistent with the student's gender identity as female. It simply allows the student to try to convince the NSAA Gender Participation Committee that the student should be allowed to do so.

Legally, the safest option is to follow your current practices. For example, when a late-optioning student or foreign exchange student wants to ask the NSAA for eligibility, does your district assist the student in obtaining an eligibility determination from NSAA? We believe districts would probably answer that question in the affirmative. Legally, then, the safest choice when it comes to transgender student requests is to remain consistent with your practice for other students and pass the petition along to the NSAA. Denying all transgender student petitions while allowing all other students to pass on to the NSAA level makes it much more likely to face litigation based on allegedly discriminatory practices. However, the NSAA policy does give boards the choice at the outset to deny transgender students' applications.

Here again, we do not believe you are required to adopt a policy. We believe the board could simply inform the administration of its preferences or defer to the administration to make the decision. This could be by consensus at a board meeting or by passing a motion. Keep in mind that the more formalized the board's actions, the more likely it will be subject to challenge.

Conclusion. This is not an exhaustive list of issues related to transgender student considerations, but we believe these are the issues districts are most likely to face. Our guidance is intended to inform your discussions, but not make any decisions for you. If your board makes a decision and would like to formalize it in policy, we will assist you in creating a policy.

For districts who have transgender students in your population already, you have an added layer of considerations. Any action you take now could have the added risk of looking like a targeted response to existing students. However, we still believe your options remain the same, including the ability to continue with your current practices short of any major overhauls. If you would like to discuss your particular situation as it relates to policy implementation or best practices, please give one of us a call.

Finally, if you are in the process of constructing a new building or facilities, or if your board is considering such a project, we believe it is a good time to discuss these issues with legal counsel. For example, some schools in other states are electing to modify their building plans to incorporate individualized restroom and locker room facilities. While that may not be the best option for your school, it illustrates the things your district should consider if you are in the process of building or updating your facilities at this time.

A policy is not required, though boards are free to enact policies consistent with their decisions after careful consideration.

CONCLUSION

It is all too easy to adopt policies that look good, but that do not actually reflect how the school operates or assist the school in accomplishing its goals. Every year we stress that it is very important to us to give you a working, useful set of policies and a continuing ***policy service***. There is no additional charge for revisions to these policies or consultation about them. Please don't hesitate to contact any one of us with questions. Our group e-mail address is ksb@ksbschoollaw.com.

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